COMMONWEALTH OF MASSACHUSETTS
SPECIAL EDUCATION APPEALS

In Re: Taunton Public Schools BSEA #03-4093

DECISION

This decision is issued pursuant to 20 USC Sec. 1400 et seq. (Individuals with Disabilities Education Act), 29 USC Sec. 794 (Section 504 of the Rehabilitation Act); MGL c. 71B (the Massachusetts special education statute; “Chapter 766”); MGL c. 30A (the Massachusetts Administrative Procedures Act), and the regulations promulgated under these statutes.

On June 19, 2003, the Taunton Public Schools (“Taunton” or “School”) filed a hearing request with the Bureau of Special Education Appeals (BSEA). Taunton sought a decision that its proposed IEP for the 2003-04 school year, which Parents had rejected, was appropriate. In April 2004, while the hearing was in progress, Taunton offered a subsequent IEP for April – June 2004, which the Parents also rejected. Both of these IEPs are the subjects of this appeal.

The procedural history of the case prior to the hearing on the merits is complicated and will not be fully recounted here. In sum, between the time the hearing was requested and approximately September 22, 2003, several attempts were made to conduct telephone conferences between the parties in an effort to clarify the issues in the case. Parents were not reachable for these calls and did not participate. On August 18, 2003, counsel for Parents entered an appearance and requested such a telephone conference call, which was held on August 29, 2003 with counsel for both parties. As a result of this conference call, the Hearing Officer recommended, and Taunton agreed, to conduct a functional behavioral assessment of Student to evaluate Student’s behavior in school and at home as well as to conduct other updated evaluations. As will be discussed in the Findings of Fact, below, no such assessment took place because Parents did not consent. A further telephone conference call with counsel for the parties was held on September 23, 2003.

A pre-hearing conference was held on October 17, 2003. Taunton’s counsel, the Director of Special Education, and the principal of Student’s preschool attended on behalf of the School. Parents’ counsel attended on behalf of Parents, but due to an undisclosed emergency, neither Parent appeared at the pre-hearing conference. On October 23, 2003 Parents’ counsel withdrew her appearance. Parents proceeded pro se from that time forward.

A hearing was scheduled for December 3, 4, and 5, 2003. All parties were duly notified of the hearing dates. On October 23, 2003, Parents had requested a postponement of the hearing. This request was denied on November 24, 2003.
The first day of hearing was held on December 3, 2003, via speaker telephone. Parents did not appear at the hearing. The Hearing Officer called the Parents by telephone to offer them an opportunity to participate, but Parents were not reachable. Therefore, the School was the only party to present evidence, and rested after presenting its documents and two witnesses.

On December 10, 2003, the Hearing Officer sent both parties copies of the tape recorded testimony from the first day of hearing as well as an order granting Parents the right to present rebuttal testimony and documents and setting forth detailed procedures and deadlines for the parties to submit and respond to additional evidence. On or about December 16, 2003, Parents filed proposed documentary exhibits and witness lists pursuant to this Order. Taunton filed its responses on December 30, 2003. After several telephone conferences to discuss procedural matters, an in-person conference with the parties and the Hearing Officer took place on February 13, 2004. Pursuant to that conference, the Hearing Officer issued an order that (1) reported that there was no dispute that Student’s “stay put” placement was four half-days per week in a substantially separate kindergarten, and one day in an integrated kindergarten at the Chamberlain Elementary School in Taunton, (2) ordered Taunton to consider Student’s most recent evaluation at Children’s Hospital, and (3) scheduled further hearing dates of March 30 and April 1, 2004.

After a brief postponement the hearing resumed on April 13, 15, and 20, 2004. For the convenience of the parties, the hearing on April 13 and 15 was held in the offices of Wynn & Wynn, P.C. in Taunton. Both parties were present for the hearing on April 13 and 15. The hearing on April 20, 2004 consisted of the testimony of one witness and took place by telephone. Parents were unavailable by telephone and did not participate. A subsequent letter from the Parents explained that they had been unavailable because of a medical issue.

Each party presented documentary evidence and examined and cross-examined witnesses at the hearing.

Those present for all or part of the proceeding were:

Student’s mother
Student’s father
Robert Murray   Special Education Director, Taunton Public Schools
Edith Cannon   Principal, Barnum Elementary School, Taunton
Rebecca Antunes  Preschool Teacher, Barnum Elementary School
Jennifer Ellis   Asst. Group Leader, Project Images Extended Day Program
Ann Whelan   Occupational therapist, Taunton Public Schools
Alyssa Runk   Speech/language therapist, Taunton Public Schools
Joseph Ward   Principal, Hopewell Elementary School, Taunton
Julia Terzakis   First Grade Teacher, Hopewell Elementary School

1 This law firm was not involved in this case.
The official record of the hearing consists of School’s Exhibits S-1 through S-28, Parents’ Exhibits P-1 through P-56, and P-58 through P-60, and approximately 14 hours of tape-recorded oral testimony and argument. The record was held open for consideration of whether additional evaluation documents expected during the summer of 2004 should be admitted; however, the School’s motion to exclude these reports was GRANTED on August 27, 2004 and the record closed on that day.\(^2\)

**ISSUES PRESENTED**

1. Whether Taunton’s proposed IEP for September 2003 through June 2004, based on information available to the TEAM at relevant times, was reasonably calculated to provide Student with a free, appropriate public education (FAPE) pursuant to applicable state and federal law;

2. Whether Taunton’s proposed IEP for April-June 2004 was reasonably calculated to provide Student with FAPE.

3. Whether Student’s “stay put” placement was unsafe for Student or others.

**POSITION OF SCHOOL**

The IEP proposed for Student for September 2003-June 2004, and the subsequent IEP, proposed after additional evaluations, for April – June 2004, were both reasonably calculated to provide Student with FAPE. Student’s academic and behavioral needs can be addressed primarily within the mainstream, with supports, accommodations and related services as specified in the IEPs. Student’s academic and behavioral needs are not severe enough to warrant a more restrictive placement.

**POSITION OF PARENTS**

Student has serious psychological, behavioral and learning needs. In particular, Student has severe behavioral issues related to ADHD, neurological problems and language deficits. Student’s behavioral needs preclude his being educated safely in a mainstreamed setting. Rather, Student needs a small, substantially separate language based classroom for children with similar issues along with one-on-one assistance at all times and a comprehensive behavior intervention plan. Taunton has denied the existence and/or minimized the severity of Student’s behavioral issues. Moreover, the substantially separate Kindergarten classroom that Taunton provided pending resolution of this dispute was inappropriate for Student because there were insufficient behavioral supports and the setting was unsafe for Student. Therefore, Taunton is required to provide a substantially separate kindergarten “stay put” classroom in a different school building within Taunton.

\(^2\) Both parties filed numerous procedural and evidentiary motions that were ruled on during the hearing or on August 27, 2004. School filed a motion in April 2004 regarding Parents’ allegations of procedural violations. I have not ruled specifically on that Motion as this decision resolves any outstanding issues raised therein.
Parents are entitled to reimbursement for past and future evaluations from Children’s Hospital, various doctors employed there, and Morton Hospital and Medical Center, as well as “public funds for private use,” because of Taunton’s failure to provide FAPE.  

**FINDINGS OF FACT**

1. Student is a six-year-old boy (born in January 1998) who lives with Parents and an older sibling in Taunton. Student is a friendly, pleasant child who is eager to interact with adults and children and who loves to learn. (Antunes, Runk, Whelan S-12, S-17)

2. Student’s most recent diagnoses are developmental delay, expressive and receptive language delays, ADHD and disruptive behavior disorder. Student was born one month prematurely. He had delays in motor and language skills as an infant and toddler as well as frequent ear infections that led to a temporary partial hearing loss. Student was in Early Intervention for a short time, but Parents terminated services because they felt that they were not appropriate. The record contains no information on the time frame, the services provided or Student’s response. Parent enrolled Student in private play therapy when he was a toddler or preschooler in an effort to help improve his behavior, and Student was still participating in this therapy during the course of the hearing. There are no reports or other information on the record about Student’s progress in this therapy. (S-12, S-17)

3. In approximately February 2002, when Student was four years old, Parents referred him for evaluation by the Taunton Public Schools on the advice of medical professionals and Student’s private therapist. (S-17) Parents’ concerns included speech and language delays, (including problems with speech intelligibility), possible sensory integration issues, distractibility, and significant behavioral concerns including Student’s hitting himself, unprovoked aggression to family members and pets, and severe tantrums. (S-17) In January 2002, before Parents made the referral, Taunton had conducted developmental screening in the areas of eye-hand coordination, language, and large muscle control. (P-11) At the time of Taunton’s screening, Parents reported that Student had frequent temper tantrums, was abnormally aggressive, and had could not be left alone with other children because he would hurt them. The screening reports recommended academic, psychological, OT (sensory integration) and speech/language assessments. (P-11)

4. Taunton conducted these assessments during February and March 2002. The psychological evaluation, conducted by school psychologist Gail Provost, consisted of classroom observations and play sessions, “Learner Profile of Cognitive Strategies,” review of records, interviews with Parents, and sections from the McCarthy Scales of Children’s Development. Most of the information was gathered

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3 Parents sought the relief stated in this paragraph in a request filed on March 22, 2004. (Exhibit P-42) In that same letter, Parents stated that it would not be in Student’s best interests for Taunton to retaliate against him or Parents, but did not appear to seek a specific order to that effect.
informally, as formal assessments could not be completed because Student could not sit still and focus for the required amount of time. (S-17)

5. Ms. Provost, the psychologist, observed that Student became very agitated and overstimulated when asked to process too much information, e.g., he could complete a three piece puzzle, but became rigid and growled when presented with a six-piece puzzle. Student was able to repeat some numerals and words from the memory sections of the McCarthy scales, and could also do three examples from the analogy section of the test, after which he began to ignore the examiner. The examiner did “not believe that the etiology of the ignoring is a behavioral response but rather an “overload to the system response.” (S-17) Student somewhat resisted interaction and assistance from the examiner. The psychologist concluded that Student had “difficulties with his level of arousal,” which influenced his behavior and ability to tolerate adult intervention, but that his ability to complete several analogies was encouraging as to his cognitive potential. (S-17)

6. The speech/language assessment also consisted of informal observation because it was not possible to formally assess Student.4 Student engaged in solitary play with toy trucks, but rebuffed attempts of the examiner to play with him. He used little language, many of his utterances were unintelligible, he made some requests and made eye contact, and he could not sustain interest in picture naming. “There was evidence that his labeling ability is not developed to the level of the typical 4 year old.” The evaluator concluded that Student had “significant delays with language acquisition, learning potential and social awareness/behavior,” and recommended a daily preschool placement with supplemental services. (S-12)

7. The educational assessment, which consisted of informal classroom assessment as well as the Beery Test of Visual-Motor Integration and Brigance developmental inventory, revealed weaknesses in fine motor, speech, and pre-readiness skills. Strengths included ability to follow the daily routine, enjoyment of play with other children, willingness to share, and the desire to please adults. (S-10)

8. After a TEAM meeting held on March 14, 2002, Taunton concluded that Student had developmental delays in fine motor, expressive language, pre-readiness and social-emotional skills, and strengths in gross motor and visual memory skills. Taunton issued an IEP for April 2002 through April 2003 that called for placement in a substantially separate preschool program located the Barnum Elementary School, as well as pull-out speech/language and occupational therapy. Student attended this program from April through June 2002, and for the entire 2002-03 school year. (S-6) He also attended a twice-weekly summer program during the summer of 2002 that consisted primarily of speech and occupational therapy. Although Student’s name appeared on the roster for the 2003 summer program, Student did not attend. There are no reasons on the record. (Ellis, Antunes)

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4 The speech-language evaluation report does not state why Student could not be formally assessed.
9. The substantially separate Barnum School preschool met four days per week for about 2.5 hours per day, and was taught by a certified special education teacher, Ms. Rebecca Antunes, and an aide. The class served 5 to 7 three- and four-year-olds with various disabilities, including ADHD, PDD and autism spectrum disorder. During the period in question, the functional level of Student’s classmates ranged from approximately 15 to 20 months. Some of the other students had behavioral problems, including tantrums, hitting, biting, and oppositionality. Most had limited verbal skills. (Antunes)

10. When Student first entered the Barnum School program, his academic functioning was low, and he had significant receptive and expressive language delays. However, his language, academic, social and behavioral skills quickly surpassed that of his classmates. (Antunes)

11. Before Student entered, Parents informed school staff that Student had problems with aggression and with using objects aggressively; therefore the teacher removed objects that might be used in this way. (Antunes)

12. Student did not behave in an aggressive or seriously inappropriate manner in school at any time during his tenure at the Barnum School program. As stated above, Student’s general functioning was significantly higher than that of his classmates, and he was often a leader and a role model for appropriate behavior in school. Student was friendly and appropriate with staff. In fact, Student rarely had behavioral problems of any kind at the Barnum School. (Antunes, Cannon) Student’s occasional misbehavior in school was typical for a child his age-- for example, Student got too rowdy a few times when playing with another little boy—and were handled successfully by redirection or verbal cues. On one occasion, an aide put Student in time out when he got too rambunctious with another child (who also was placed in time-out) and Student used inappropriate language while in time-out. After Ms. Antunes spoke firmly to Student about the incident, Student showed remorse and did not repeat the behavior. (Antunes, S-26, P-23) In October 2002, Student threw a book across the room when Father was visiting the classroom. In this instance, also, Student was able to understand his mistake when it was explained to him, and did not repeat the behavior. (Antunes, S-26)

13. On several occasions, Parents told Student’s teacher and the school psychologist that Student was having behavior problems at home, however, including physical aggression to his older sister. (Antunes, S-18)

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5 Parents presented the testimony of two witnesses, Jennifer Ellis, from the Project Images after school program, and Joseph Wade, Principal of the Hopewell Elementary School, as to aggressive behavior in the school setting. Ms. Ellis observed Student hit another child, without having been provoked. Student seemed angry at the time (Ellis). Mr. Wade observed Student raise his fist to him during a meeting between Parents and Mr. Wade. Student put his hand down when told to do so. Mr. Wade did not observe similar behavior on other occasions when Student was in the Hopewell building. (Wade) Both of these incidents occurred before Student had enrolled in preschool. Student was present at the after school program and the Hopewell School because he was accompanying his parents when they dropped off or picked up his older sister. (Ellis, Wade)
14. Student made significant progress between April 2002 and April 2003. (Antunes) Progress reports reviewed at a TEAM meeting held on January 23, 2003 showed that Student had achieved his annual OT goals in the areas of attention, sensory, and fine motor skills, although he still needed to work on pre-writing skills. Student had made "tremendous progress" in speech and language development. At the beginning of his tenure in the Barnum School, Student spoke in one and two-word utterances. He rapidly progressed to using long sentences. (Runk) Student was a "pleasant, cooperative student" who was "a pleasure to work with in speech class." (S-7) He had no problems with inappropriate behavior. When frustrated, he would sometimes put his head down, but could easily be redirected. (Runk)

15. Student did have some difficulty relating to other children in the preschool program, primarily because these other children were less verbal than Student was, and Student could not understand why the other children did not respond to his attempts to speak with them. When frustrated, Student would generally whine to the teacher, but did not become aggressive. (Antunes) At some point near the beginning of the 2002-03 school year, Taunton began to bring a typical child into the special education preschool room for a short time each week to play with Student and provide him with a more verbal and age-appropriate peer. Student handled the situation well and enjoyed playing with the other child. In October and November, 2002 Taunton also attempted to have Student gradually begin spending time in an integrated preschool classroom serving typical children and children with mild disabilities. Student enjoyed his time in this classroom and did well, but in or about December 2002, Parents refused to allow the arrangement to continue except on an ad hoc basis. (Antunes)

16. On April 9, 2002, Student underwent an evaluation consisting of medical, psychological, and speech/language assessments at the Developmental Medicine Center at Boston Children’s Hospital to address Parents’ concerns regarding language delays, attentional problems, and aggressive and unsafe behavior. (S-20, P-20)

17. The psychological assessment indicated that Student had low-average nonverbal cognitive skills. Based on parental report, Student showed significant "temperamental, self-regulatory and behavioral issues" which the psychologist attributed, in part, to poorly developed language skills. Student’s behavior during the evaluation was cooperative and appropriate, however. The psychologist found Student’s profile to be consistent with a diagnosis of Disruptive Behavior Disorder, Not otherwise Specified.” (S-20, P-20).

18. The speech/language assessment showed Student’s receptive language as well as verbal reasoning skills were “severely” impaired. On the Peabody Picture Vocabulary Test (PPVT), Student scored in the 1st percentile, with an age equivalent

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6 The medical report provides information about Student’s early medical history and the result of a head MRI that showed “non-specific findings of cerebral underdevelopment:” however, there is no evidence on the record that explains how this diagnosis might affect Student’s functioning and educational needs.
(at age 4 years 4 months) of less than one year, nine months. On the Clinical Evaluation of Language Fundamentals-Preschool (CELF-P) test Student scored in the ninth and second percentiles, respectively, in the Basic Concepts and Sentence Structure subtests. (S-20, P-20). On another test of receptive language, the Reynell Developmental Language Scales, Student scored below the first percentile with an age equivalent of two years, four months. (S-20, P-20) Expressive language was moderately to severely impaired. Student’s scores on the Expressive one Word Picture Vocabulary Test (EOWPVT), and Reynell Developmental Language Scales, placed him, respectively, at the second (age equivalent of 2.5 years) and first percentiles (age equivalent of 3 years). Student’s intelligibility was fair. Student had intermittent difficulty with attention during speech/language testing. (S-20, P-20)

19. The Children’s Hospital team diagnosed Student with “Mixed Expressive-Receptive Language Disorder,” in addition to the Disruptive Behavior Disorder-N.O.S. referred to above. Based on the results of testing and observation, the team concluded that Student presented as a “sweet, socially engageable young boy with caring and concerned parents,” receptive and expressive language delays, low frustration tolerance, some task avoidance, fine motor difficulties, and deficits in social, motor, communication and daily living skills. The hospital team noted that although they did not see any aggressive behavior during testing, parental reports of cruelty to animals and physical violence was “quite concerning.” (Id.)

20. The Children’s team made numerous recommendations, including “an intense behavioral program through a behavioral therapist [that is] consistent between school and home…,” weekly occupational therapy, and placement in a “small, highly structured, integrated, language-based preschool with a low teacher to student ratio and consistent behavioral support…,” speech/language therapy, and summer programming. (Id.)

21. Additionally, Children’s Hospital recommended a functional behavioral assessment, prioritization of safety needs, close adult monitoring to keep Student safe, and assistance of a behavioral therapist in the home. (Id.)

22. The record is unclear as to when Children’s Hospital actually issued its reports and when Taunton received them. Based on a date for an electronic signature on one of the reports, as well as Parents’ and Ms. Antunes’notes in the home-school notebook, it is most likely that the reports were issued some time after September 2002 and that upon receiving the reports, Parents sent a copy to Ms. Antunes in Student’s lunch box. (P-23) Ms. Antunes received and read the reports and passed them to the occupational therapist, speech therapist, and school psychologist. (Antunes, Whelan) The special education office did not receive the reports. (Murray)

23. The record also is unclear as to when and whether Taunton convened a TEAM to specifically to consider the Children’s Hospital reports, although service providers who received the reports (presumably from Ms. Antunes; see Para. 22, above) did conduct some review of the recommendations during the 2002-03 school year/
Thus, in October 2002, pursuant to the Children’s Hospital recommendations, Taunton’s school psychologist conducted a functional behavioral assessment (FBA) consisting of 2 classroom observations as well as review of the daily home-school communication book (“blue book”). The evaluation report consisted of one page that indicated that Student “adhered to classroom routine, changed activities when verbally cued by any adult…and related socially with peers…These observations were described as being typical of [Student’s] school presentation…” (S-18) In short, the psychologist could identify no problematic behaviors.

24. The psychologist did not observe Student at home, and there was no indication that she gathered data about Student’s behavior in the home through interviews with the parents, parent questionnaires or checklists or other methods. There also is no evidence on the record that Ms. Provost communicated with the Children’s Hospital team. The psychologist and Ms. Antunes did invite Parents participate in an eight-session parent training group that taught how to manage children’s behavior at home. (This group was open to all Barnum School parents and was not focused on children with disabilities) Parents attended one of the eight sessions. (S-18)

25. On November 24, 2002, Taunton conducted an updated speech/language assessment consisting of observation and formal testing. This testing showed Student to have receptive language skills in the “normal and functional age-range.” Student had made “tremendous progress” in expressive language skills. He could use three to five-word sentences, define age-appropriate words, repeat sentences, and use prepositions and past tense verbs. He still had problems with categorization of objects, answering “why” questions, describe a sequential procedure, understanding of some concepts, and intelligibility. In speech class Student was “truly a joy to work with,” followed directions, and maintained attention to tasks. His communication skills were better when he could follow peer models. (P-34, Runk, Antunes)

26. In a letter to Principal Edith Cannon dated December 2, 2002, Parents “revok[ed] Barnum School and any employee’s rights from contacting, discussing or from receiving information about our son, [Student]…We are revoking any past parental forms [we] have previously signed. The letter refers to statements that Student allegedly had made, and to which school staff had responded. (S-24, P-26)

27. In approximately January 2003, the TEAM convened to discuss progress reports. Parents partially rejected a proposed amendment to Student’s IEP on March 4, 2003. The rejection notice mentioned the titles of various pages of the IEP (e.g., “Student concerns;” “service delivery”) but did not specify the reasons for the rejection. (S-5)

28. Overall, Student made considerable progress in school during the 2002-03 school year, but Parents continued to report to Ms. Antunes that Student had serious behavioral problems at home, and in particular was assaultive to his older sibling. However, neither Ms. Antunes nor other school personnel noticed any behavior in school that was out of the ordinary for a child Student’s age or that could not be dealt
with by speaking with Student or imposing mild consequences such as a brief time out. (Antunes, Terzakis) Moreover, while the older sister felt somewhat harassed and annoyed by Student at home, reported that Student had scratched her a couple of times and pushed her off the bed once, and sometimes found it difficult to cope with his special needs, she showed no evidence of serious physical injuries or emotional upset as a result of Student’s behavior. (Terzakis) The sister’s teacher saw no evidence that Student’s behavior had a negative impact on his sister’s educational progress. (Terzakis)

29. Taunton conducted updated speech/language, OT and educational assessments in May 2003 in preparation for drafting an IEP for 2003-04. All assessments revealed that Student had made significant progress during his time in preschool. The speech/language evaluation report, completed by speech therapists Ann Colby and Alyssa Runk, described Student as “a pleasant and cooperative student who appears to enjoy speech class [and] to enjoy interacting and engaging in conversations with both peers and adults.” Student had made progress in his ability to attend to tasks and benefited from learning with peers. (S-11, Runk) Student now had age-appropriate skills in turn taking, waiting, raising his hand, following directions and maintaining attention to tasks. Student had more appropriate social language than previously. He was able to follow classroom routines and two to three step directions. Formal testing revealed functional age level skills in receptive language except for mild delays in the areas of linguistic concepts. Student also had functional expressive language skills, with some mild delays in word finding and intelligibility, with mild to moderate expressive language delays seen with formal testing. The speech therapist recommended placement in regular kindergarten with two hours per week of direct speech and language services. (S-11)

30. The occupational therapist, Ellen Whelan, recommended discontinuing OT services because Student had age appropriate and functional fine motor skills. Student was again described as “cooperative.” (S-14, Whelan)

31. Educational testing conducted by the special education teacher, Ms. Antunes, showed that Student had improved since January 2003 in many skill areas. Specifically, on the Brigance Inventory of Early Development, Student, now aged 5.4 years, scored at the 5.0 to 6.6 year levels in his ability to express personal data, name body parts and pictures, answer basic “why” questions, and identify colors and shapes. He functioned at the 7.0 age level in classification skills. On the Brigance Kindergarten and Grade 1 Screening, Student earned a passing score of 84 and probably would have scored higher had he been in a classroom with peer models and appropriate (i.e., more challenging) curriculum. Student had achieved all pertinent IEP goals. Ms. Antunes recommended placement in a classroom where appropriate language is modeled and an appropriate level of curriculum taught. (S-8, P-31, Antunes)

32. In general, Student had made excellent progress and was functioning well above the level of most of the other children in his sub-separate preschool class. His language
had developed noticeably, and all functional skills appeared age-appropriate. (Cannon, Antunes, Whelan, Runk)

33. On May 30, 2003, after a TEAM meeting, Taunton issued an IEP for the 2003-2004 school year calling for Student’s placement in a regular kindergarten class with classroom accommodations (for his remaining language weaknesses) as well as speech/language therapy in the general classroom 2x30 minutes per cycle. Parent rejected this IEP on May 31, 2003. Upon receiving notice of this rejection, Taunton requested the instant hearing. (Murray)

34. Because Student had “aged out” of preschool, Taunton proposed a stay put placement in a substantially separate Kindergarten classroom at the Chamberlain School. (Murray)

35. Parent did not send Student to the stay put program. (S-27)

36. As stated above, pursuant to a telephone conference in the instant Appeal, Taunton offered to conduct a Functional Behavioral Assessment (FBA) to assess Student’s behavior at home and at school. Parent declined to consent and this assessment never took place. (Murray)

37. Parents did not send Student to school during the 2003-2004 school year. (Murray, S-27)

38. In September 2003, Student began treating with Dr. Bradley K. Deal at the Children’s Hospital Outpatient Psychiatry Clinic. Student was diagnosed with ADHD, combined type and began treatment with medication for what the psychiatry clinic team deemed as “severe problems with attention, focus, hyperactivity.” As of December 22, 2003, Student was not yet fully stabilized on his most recent medication. (P-22)

39. In a letter “to whom it may concern,” dated December 22, 2003, Dr. Deal said the following with respect to Student’s behavior:

Although [Student] does not currently meet hospital level of care, his impulsivity and behavioral dysregulation warrant concern and need specific attention by his school providers. Although generally a sweet, kind, cooperative boy, [Student] has reportedly had periods of extreme outbursts of anger directed toward family members, sister and others. By report he is currently at home because of continued behavioral problems at school and the impasse in creating a mutually acceptable IEP plan…There is no indication at this time that it would not be safe for [Student] to return to school, as he is not deemed an immediate or imminent threat to himself or others; however, given his previous behavioral issues, special considerations and provisions are indicated in the school setting…”
Dr. Deal recommended placement in a small class of 4-6 students, psychological testing, individual behavioral therapy, an emergency Core evaluation and IEP, an after school program, longer academic school day as tolerated, and social skills and groups to facilitate reintegration into the school setting. (P- 22) It is not clear when this report was made available to the school.

40. In January and February 2004, Student underwent additional evaluations at Children’s Hospital, this time at the Coordinated Care Service of the Developmental Medicine department. (P-24) These evaluations consisted of medical and speech/language assessments as well as extensive interviews with the Parents. The medical report, written by Ronald E. Becker, M.D., stated that Student had documented difficulties with language skills, ADHD, and mild brain anomalies noted on MRI, as well as significant behavioral, including bolting. Dr. Becker attributed these difficulties to ADHD, language problems, the stress of struggles getting into a school placement, and absence of behavioral structure from a school placement. Dr. Becker’s report states:

The foremost priority is getting [Student] back into a school setting which will preserve his safety and provide him with appropriate special educational support. I anticipate that [Student] will require a full day program provided full-year (including summers)...direct, one to one adult support during transportation...and throughout the school day...a small classroom setting, ideally in a language based classroom...speech therapy...3 times per week. He will also require appropriate behavioral support for his ADHD. Social skills training with a focus on social use of language is also recommended.

41. According to the evidence on the record, the information that Children’s Hospital had about Student’s behavioral problems appears to come from interviews with Parents, who reported that Student would come home from school complaining of headaches and full of rage. Parents also reported that Student’s behavior sometimes was “so out of control that it was borderline hospitalization.” (P-28) There is no evidence on the record of Children’s Hospital evaluators having observed problematic behavior from Student. Rather, Student’s behavior was appropriate and manageable during evaluation sessions. (P-28) There is no evidence that any the Children’s Hospital evaluators conveyed the Parent’s reports of behavioral problems or their own conclusions about those issues to any representative from Taunton.

42. The speech/language assessment was performed by Hope Dickinson, MS, CCC-SLP. Father reported to Ms. Dickenson that he was concerned with language processing, articulation, and stuttering. Parent also reported that Student becomes upset and aggressive if he “is not understood or encounters a communication breakdown.” (P-28)
43. Ms. Dickenson reported that Student behaved appropriately during the evaluation, was somewhat motorically restless, had reduced frustration tolerance and gave up easily when frustrated by difficult tasks. Id.

44. Tests of receptive language showed a “mixed profile.” Student’s scores on single word comprehension as measured by the Peabody Picture Vocabulary Test (PPVT-III) were in the average range, which “indicated excellent gains” since he was assessed in April 2002, when he had scored in the “severely impaired” range. On the other hand, another test instrument, the Verbal Comprehension Scale A of the Reynell Developmental Language Scales, which measures comprehension of more complex verbal information, measured skills in the “severely impaired” range, corresponding to the mid-three year age level. On this test, Student had the same standard score as in 2002, and had gained approximately 17 months in the age score in the 22 months since he had been tested.

45. Tests of expressive language showed Student’s skills to be moderately impaired. Student’s responses were delayed. He was frustrated and said that “my brain hurts.” (P-45) Student also had moderately reduced intelligibility and mild to moderate dysfluency. (Id.)

46. Ms. Dickenson recommended three sessions of speech therapy per week to work on language processing, word retrieval, oral formulation, and fluency. Ms. Dickenson also recommended placement in a small language-based special education classroom taught by a special education teacher familiar with children with severe language impairment and behavioral concerns, individualized teaching, and various classroom modifications such as breaks between language and visual tasks. Ms. Dickenson also recommended some strategies for Parents to use at home to support Student’s language development and reduce his frustration. (P-45)

47. Parents provided the School with the reports of the Children’s Hospital evaluation on or about March 22, 2004. (Murray)

48. On April 1, 2004, shortly before the resumed hearing in this matter, Taunton convened the TEAM to consider the Children’s Hospital evaluations. Taunton issued a proposed IEP for the remainder of the 2003-04 school year, April 2004 through June 2004. This IEP called for placement in a regular education kindergarten at the Hopewell School with various classroom modifications and accommodations to support Student’s language development; three weekly 30-minute sessions of individual or small-group pull-out speech/language therapy; three weekly 40-minute sessions of academic support with a special education teacher (one within the classroom and two on a pullout basis); and a one-on-one assistant for educational and support services. (S-28)

49. The IEP noted that while Parent had expressed concerns about Student’s behavior, no problematic behavior had been observed in school or during formal testing by school
or Children’s Hospital evaluators. The IEP stipulated that a FBA would be conducted upon receipt of parental consent. (Id)

50. Parent rejected the proposed IEP by letter dated April 25, 2004. (P-59) The reasons stated for the rejection were (1) inadequate safety provisions during transportation; (2) absence of behavioral plan to accommodate ADHD and assure safety of Student and other children; (3) absence of summer program; (4) need for smaller class size than provided in general classroom; (5) need for special education teacher in classroom at all times; (6) need for services to be provided weekly; 7 (7) overly short duration of IEP; (8) absence of a specific statement that a 1:1 aide would be provided; (9) absence of services to “help [Student] decompress after his school day, as he becomes violent and agitated from the stress of learning;” (10) absence of OT services; and (11) designation of “level of need” as “low,” and (12) designation of service time as “under 25% of the time.” (P-59)

51. Parent did not send Student to any school program for the remainder of the 2003-2004 school year—either the “stay put” substantially separate program or the program proposed in the IEP of April 1, 2004, and did not consent to a functional behavioral assessment.

FINDINGS AND CONCLUSIONS

Based on the evidence presented at the hearing, as well as the applicable law, I conclude that the IEP presented for the 2003-2004 school year was reasonably calculated to provide Student with FAPE, as was the IEP amendment for the last quarter of that year. While the evidence suggests that Student may have had significant behavioral problems outside of school that warranted more formal evaluation and, possibly, additional interventions, Parent has precluded such interventions and/or services by refusing to consent to an expanded functional behavioral assessment after one had been recommended by Parents’ own evaluators at Children’s Hospital and ordered in the context of this proceeding.

Thus, Parents have prevented Taunton from evaluating the area of disability that Parents themselves have asserted. Taunton cannot be required to provide behavioral services for a problem that has been neither corroborated nor evaluated, especially when Student had no serious behavioral problems when he attended the Barnum School.

Further, there is no evidence that Student would be unsafe in the “stay put” placement at the Chamberlain School, either with or without the one-to-one paraprofessional offered by Taunton. Therefore, Taunton was not required to offer a stay-put placement in any other location.

Finally, Parents request for reimbursement for evaluations and for funding as set forth in their letter of March 22, 2004 is denied, without prejudice as to the usual course

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7 This concern was based on the school operating on a six day, rather than 5 day cycle.
of payment for independent evaluations or any separate agreements on this issue entered
into by the parties.

My reasoning follows.

Legal Framework

The FAPE Standard

The parties agree that Student is a school-aged child with a disability who is eligible
for special education and related services pursuant to the IDEA, 20 USC Section 1400, et seq., and the Massachusetts special education statute, G.L. c. 71B (“Chapter 766”).
Therefore, Student is entitled to a free appropriate public education (FAPE) as defined in federal and state law. 8

In general, FAPE encompasses substantive appropriateness, least restrictive
environment (LRE) considerations, and conformity with the IDEA’s procedural
requirements. Substantively, Federal courts have interpreted FAPE to mean an IEP and
services that provide “significant learning” and confer “meaningful benefit” on the
student via “personalized instruction with sufficient support services to permit the child
to benefit educationally.” Hendrick Hudson Bd. of Education v. Rowley, 458 U.S. 176,
(1st Cir. 1984).

The IEP must be tailored to the unique needs of the disabled child, and must be
“reasonably calculated to provide ‘effective results’ and ‘demonstrable improvement’ in
the educational and personal skills identified as special needs.” 34 C.F.R. 300.300(3)(ii);
Lenn v. Portland School Committee, 998 F.2d 1083 (1st Cir. 1993), citing Roland M. v.
Concord School Committee, 910 F.2d 983 (1st Cir. 1990), cert. denied, 499 U.S. 912
(1991) and Burlington, 736 F.2d at 788. Courts have measured educational benefit by
whether the child makes progress towards the goals stated in the IEP. Hamilton-Wenham
Public Schools, BSEA Nos. 04-1791, 03-3932 (Figueroa, 11/3/03), citing County of San

Under both federal and state law, FAPE requires schools to educate eligible students
in the least restrictive environment, i.e., to the extent appropriate, with children who do
not have disabilities. 20 U.S.C. 1412(5)(A).

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8 The IDEA defines FAPE as special education and related services that (A) are provided at public
expense and under public control; (B) meet the standards of the state educational agency; (C) include an
appropriate preschool, elementary, or secondary school education; and (D) are provided in conformity with
a properly developed IEP. 20 USC Sec. 1401; 34 CFR Sec. 300.13. The state statute, G.L. c. 71B,
(“Chapter 766”) defines FAPE as special education and related services that conform with the IDEA and its
regulations and also “meet the education standards established by statute or…by regulations promulgated
by the Board of Education.” G.L. c. 71B, Sec.1.
Finally, FAPE also entails complying with the procedural requirements of the IDEA. These requirements, among other things, are designed to ensure that students are evaluated in all areas of need, that IEPs are written by duly constituted TEAMs, with meaningful parental participation, and that services are delivered in a timely manner. 20 USC Sec. 1414; 34 CFR 300.536; 603 CMR 29.04(2)-(3).

The IDEA explicitly requires IEP teams to consider behavioral factors if appropriate:

In the case of a child whose behavior impedes his or her learning or that of others, [the Team shall] consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior…

20 USC Sec. 1414(d)(3)(B)(I). It is well settled that in so doing, schools need not restrict their behavioral assessment to the four corners of the classroom when the student’s behavior elsewhere affects progress on goals and objectives or where generalization of behavioral skills is an appropriate goal for the child. See David D. v. Dartmouth School Committee, 775 F.2d 411, 415-416 (1985)

A school district that violates a student’s procedural rights under federal or state law may be liable for compensatory services where "procedural inadequacies [have] compromised the pupil's right to an appropriate education … or caused a deprivation of educational benefits." Roland M., 910 F.2d at 994 (citations omitted), Murphy v. Timberlane Regional Sch. Dist., 22 F.3d 1186, 1196 (1st Cir. 1994). On the other hand, technical or de minimis violations that do not deprive the child of FAPE do not entitle parents to compensatory relief. Id. Moreover, compensatory education is in the nature of an equitable remedy. An award of compensatory service may be denied or reduced if undue delays or other actions on the parents’ part have contributed to the loss or denial of services. (Id).

**The IEPs for 2003-2004**

Here, the record shows that Student is a sweet, cooperative, likeable child who consistently follows the school routine, is eager to learn, and enjoys forming relationships with adults and other children. The record also shows that Student and made meaningful progress when he attended school. Specifically, Taunton’s initial evaluation, as well as the Children’s Hospital evaluation of April-May 2002, both conducted before Student had spent significant time in any school placement,9 revealed that Student had significant receptive and expressive language delays and some problems with attention, sensory integration, and fine motor skills. The record shows that the Barnum School preschool program met those needs so that Student made meaningful progress in all areas of need identified by the TEAM. Student entered the program in April 2002 with severe deficits in language and life skills, and completed the program at the end of the 2002-03 school

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9 Taunton evaluated Student in February and March 2002. Children’s Hospital evaluated him in April 2002. Student began the Barnum preschool in April 2002. This was his first school placement.
year with skills that were age appropriate or nearly so according to the school’s measurements.

The testimony of Rebecca Antunes is persuasive that even before Student completed the sub-separate preschool program in the spring of 2003, his skills surpassed those of his peers, and he was frustrated because those peers could not respond to Student’s attempts to talk and play with them. During his limited exposure to settings with typical peers, Student did well. Student was ready for a less restrictive setting with more exposure to typical peers.

The main dispute between the parties is whether at the time in question Student had behavioral issues that warranted a more restrictive setting—i.e., a small, language-based substantially separate classroom with a strong behavioral component as recommended by Children’s Hospital. I conclude that based on the information available to Taunton at the time (spring 2003), Student did not require such a restrictive program in school. By all reports, Student’s behavior in school was very good, and Student actually was a positive role model for his classmates. The few incidents of in-school misbehavior were typical for a child of Student’s age and easily handled by staff with low-level interventions such as verbal cues, redirection, a brief time-out, or firm discussions. Additionally, when given the opportunity to interact with typical students, Student did very well. (Antunes)

On the other hand, Parents reported that Student had serious behavior problems at home that resulted in injury to others and risk to Student. Parents repeatedly asked Ms. Antunes and the school psychologist for help and/or suggestions. Further, Student’s behavior at home was one of the major concerns that Parents raised with Children’s Hospital when they had Student evaluated there. Parents’ continual reports of behavioral problems should have prompted Taunton to further evaluate Student to determine if behavioral issues existed that did implicate his educational progress (to determine, for example, if Student could not generalize his classroom behavioral skills to the less structured setting of home, and needed educational services to enable him to do so, or was frustrated by his language limitations and needed additional accommodations, services, or home-based strategies for the Parents.) It is troubling that a functional behavioral assessment was only conducted upon the recommendation of Children’s Hospital. It also is troubling that this FBA stopped when no problematic behavior was identified at school, when all concerned knew that the reported problems arose not at school but at home. Not every behavioral problem that arises in the home is an educational issue. Without assessment, however, it may be difficult to determine if a student’s educational progress is affected by outside behavioral problems, or if home-based behavioral problems indicate frustration with an area already being addressed by the IEP, for example, language. This is especially true with a young child with documented delays in language and other areas of development, who reportedly becomes frustrated and angry when he can’t express himself. Without more investigation, it is difficult to determine if such problems (assuming they are verified) indicate that additional goals should be added to the IEP and/or the child should receive additional services.
Even though it might have been preferable for Taunton to address Parents’ concerns more systematically, however, Taunton did not commit actionable procedural violations by not doing so, for a number of reasons. First, Taunton did not ignore Parents’ concerns. Taunton offered a parent training group to address disciplinary issues. This group may or may not have been appropriate for Student’s needs, but since Parents only attended one session, they denied themselves the opportunity to find out.

Additionally, as early as September 2003, Taunton attempted to secure Parents’ consent for an expanded FBA. Subsequently, as this litigation progressed, Taunton renewed its offer several times, including in the proposed IEP issued in April 2004. Children’s Hospital also recommended an FBA in both the 2002 and 2004 evaluations. Parents neither consented to this evaluation, nor obtained their own, however. Taunton cannot be held liable for failure to address behavioral issues asserted by the Parents when Parents (a) did not participate in services that were offered (i.e., the parent group); and, more importantly, (b) refused to participate in an expanded FBA that might have shed light on or even resolved the situation, especially where the school had no first-hand knowledge of Student’s alleged behavioral problems because they did not manifest in school.

Parents are not entitled to behavioral services for Student when they have refused to allow Taunton to evaluate the basis for their claim. See Murphy v. Timberlane Regional Sch. Dist., supra, at 22 F.3d at 1196 (1st Cir. 1994). Moreover, Taunton cannot impose potentially intrusive behavioral interventions when Student has not displayed problematic behavior in school and there is no data as to behavioral issues in other settings. Taunton was not required to provide such interventions based on the 2002 or 2004 Children’s Hospital evaluations, as these reports (1) noted no inappropriate behavior during the evaluations themselves; (2) relied solely on Parents’ reports for their recommendation for a behavioral intervention plan. (3) recommended an FBA to which Parents refused to consent. Moreover, there is no evidence on the record that any evaluator from Children’s Hospital attended TEAM meetings, observed Student in school or at home, or took other steps to assess Student’s behavior. Rather, Children’s Hospital recommended a FBA for this purpose.

In light of the foregoing, Taunton’s initial proposed IEP for 2003-2004, which called for a regular kindergarten placement with two 30-minute sessions per week of speech/language therapy was appropriate in light of the information available to the TEAM at the time the IEP was written. This IEP and placement were reasonably calculated to provide Student with the services he needed for his areas of weakness while also providing Student with access to typical peers and a regular education environment.

The proposed IEP for April through June 2004 was also appropriate, in that it offered increased services recommended by Children’s Hospital while enabling Student to remain in the mainstream. This IEP incorporated numerous recommendations from the 2004 Children’s Hospital evaluation, including a renewed offer of a functional behavioral assessment, strategies and accommodations to support Student’s language development,
90 minutes per week of speech/language therapy, 120 minutes per week of academic support and a one-on-one assistant.

**The “stay-put” placement**

The substantially separate Kindergarten at the Chamberlain School, with or without the one-on-one assistant offered by Taunton, met applicable “stay put” standards in that it essentially replicated Student’s preschool setting only on a Kindergarten level. Despite numerous opportunities, Parents presented no facts to warrant a conclusion that this setting was unsafe for Student.

**Other claims for relief**

I decline to specifically order reimbursement for all past and future evaluations as requested by the Parents because (1) Parents have stated no legal basis for reimbursement for “all past and future evaluations” and (2) there is no evidence that Taunton has refused any request to pay for independent evaluations that it is required by law to fund. This denial shall not be construed to relieve Taunton of the responsibility to fund independent evaluations when required to do so by pertinent regulations or to preclude the parties from entering voluntary agreements on this issue. I also deny Parents’ request for “public funding for private use” based on denial of FAPE because I have found that Student received or was offered FAPE during the period covered by this Decision.

**CONCLUSION**

Taunton’s IEPs for the 2003-2004 school years were reasonably calculated to provide student with FAPE. The initial IEP incorporated all available and verified information as to Student’s needs. When the Children’s Hospital evaluations of February 2004 suggested that Student needed additional services, Taunton issued a new IEP that incorporated many or most of the hospital recommendations, including a 1:1 aide and increased speech/language therapy and academic support. Moreover, Taunton repeatedly offered to assess Student’s behavior in order to determine if additional behavioral services were necessary. Finally, Parents did not demonstrate that the “stay put” placement at the Chamberlain School was unsafe for Student.

By the Hearing Officer

_________________________ Date: ________________________