

**COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS**

In Re: Sharon Public Schools

BSEA # 09-2797

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 December 4, 2008 in Malden, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student's Mother	
Student's Father	
Joseph Schembri	Private Therapist
Kristine Barker	Principal, Longview Farm
Elizabeth Liao	Staff Psychiatrist, Longview Farm
Naami Turk	Clinical Psychologist, Sharon Public Schools
Steven Kaplan	Director of Student Services, Sharon Public Schools
Ray Wallace	Attorney for Parents
Thomas Nuttall	Attorney for Sharon Public Schools
Maureen Pires	Court Reporter

The official record of the hearing consists of documents submitted by the Parents and marked as joint exhibits J-1 through J-36, except that exhibits J-24, J-25, and J-26 are excluded and the dollar amount listed on exhibit J-27 is redacted because the three exhibits and the dollar amount on exhibit J-27 are irrelevant to my consideration of the issues in dispute; and approximately one day of recorded oral testimony and argument. As agreed by the parties, oral closing arguments were made on December 8, 2008, and the record closed on that date.

ISSUE

The issue to be decided is whether Sharon Public Schools (Sharon) must reimburse Parents for their payment of the residential component of the residential placement at Longview Farm from August 22, 2008 to October 6, 2008.

FACTS

Student is a fourteen-year old boy who lives with his Parents in Sharon, MA. Student has attended Sharon Public Schools since kindergarten. Student attends Longview Farm, a private school located near Parents' home, as an 8th grade day student. Student's Longview Farm placement is pursuant to an accepted IEP. Testimony of Father; exhibit J-3.

Student is intelligent, engaging, and polite. Student has been diagnosed as having a depressive disorder not otherwise specified, learning disabilities, and attention deficit hyperactivity disorder. When Student comes under stress—for example, when unwanted limits are placed on his behavior by his Parents—he can become impulsive and angry. His deficits (as described by a therapist who attempted unsuccessfully to engage him in therapy) include lack of insight, poor judgment, and difficulty establishing relationships with others. Testimony of Schembri, Father; exhibits J-3, J-9, J-12, J-15.

In the fall of 2007 during Student's 7th grade, his behavior became increasingly inappropriate and unsafe—for example, cutting himself and running away. Over the next several months, Parents became increasingly concerned about their son's ability to manage his emotions and behavior. Student also reported to his Parents that he had been repeatedly bullied at school. Testimony of Father.

During January 2008 and the next several months, Student's inappropriate and unsafe behaviors increased. One incident of particular concern was Student's bringing a knife to a teen center, which is run by the YMCA and is not associated with the Sharon Public Schools, and showing the knife to the other children there. By early March 2008, Student was cutting himself, he had carved the word "hate" on his forearm with a pencil, and he seemed fascinated with matches. Testimony of Father.

At the suggestion of Student's pediatrician, Parents arranged for a private therapist (Joseph Schembri, EdD) to see their son. Dr. Schembri held five therapy sessions with Student beginning in January and ending in March 2008. Dr. Schembri terminated the sessions in March because he had not been able to establish a therapeutic relationship with Student and therefore, did not believe that Student would benefit from out-patient therapy. Dr. Schembri advised Parents that Student should be placed in a residential therapeutic program. Testimony of Schembri.

On March 9, 2008, Student made a threat on the telephone to kill another child. Parents were now concerned about their son's safety and the safety of others. At an IEP Team meeting on March 11, 2008, Parents were informed that their son was dangerous and that he should not attend the Sharon Middle School. On March 12, 2008, Student was hospitalized as a day (rather than residential) patient at Westwood Lodge, a private psychiatric hospital. Student's hospitalization continued until approximately March 20, 2008 when he was discharged to his home. Testimony of Father.

From March 20, 2008 until April 9, 2008, Student remained at home. He received home tutoring from Sharon for part of this time. Testimony of Father.

At an IEP Team meeting on March 27, 2008, Sharon and Parents discussed placing Student for 45 days in a setting where he could be evaluated. On April 9, 2008, Parents accepted Sharon's proposal for a 45-day extended evaluation for purposes of determining his educational needs. Parents understood that near the end of the 45 day time period, the IEP Team would re-convene to determine Student's educational placement as well as the special education and related services to be provided at the placement. Testimony of Father; exhibits J-30, J-31.

On April 10, 2008, Sharon placed Student at Longview Farm as a day student for purposes of the 45-day extended evaluation. Longview Farm is a private school located near Parents' home. Parents had proposed this location for the evaluation, and Sharon agreed. Testimony of Father.

On May 13, 2008, Student was again hospitalized at Westwood Lodge, this time as a residential patient, due to increasing suicidal thoughts. Student was also cutting himself at this time. The hospitalization cut short Student's 45-day extended evaluation at Longview Farm. Student remained at Westwood Lodge for five weeks until he was discharged on June 16, 2008 after he was determined to be safe to go to a residential educational placement. Over the course of the hospitalization, Westwood Lodge staff began utilizing medications to help Student with his mood swings. Testimony of Father.

By agreement of the parties, Student returned to Longview Farm on June 16, 2008, this time as a residential (rather than day) student. The placement began anew the 45-day time period for the extended evaluation. Sharon placed Student at Longview Farm pursuant to an IEP for the time period of March 11, 2008 to March 11, 2009. The IEP specifically designated Longview School as Student's placement for the 45-day evaluation from June 16, 2008 to July 30, 2008. This IEP was developed at a June 11, 2008 Team meeting and was signed by Parents on June 13, 2008. Parents again understood that near the end of the 45 day time period, the IEP Team would re-convene to determine Student's educational placement as well as the special education and related services to be provided at the placement. Testimony of Father; exhibit J-6.

Over the course of the 45-day residential evaluation, Longview Farm scheduled weekly family therapy meetings to discuss Student's progress. Parents learned and were particularly concerned that their son, with another Longview Farm student, had broken into a school building. Parents' impressions from these meetings was that their son would not be ready to leave Longview Farm and return home at the end of the 45-day evaluation on July 30, 2008. Testimony of Father.

Longview Farm's clinician, Alison Lawrence, LICSW, prepared a Diagnostic Report dated July 21, 2008 for purposes of providing a therapy update, educational update, diagnostic impressions, and recommendations regarding further services. The Diagnostic Report

concluded that it would not be “beneficial” to transition Student home at the end of the 45-day assessment period, as he would be at risk of regressing to his prior ways of coping with stress. The Diagnostic Report recommended that Student remain in residence at Longview Farm through the end of the summer in order to continue to work on his on-going mental health needs (specifically, his emotional and relationship difficulties) within the safe and contained environment of the residential placement at Longview. The Diagnostic Report anticipated that Student’s continued residential stay at Longview would allow additional time for Longview Farm to work with Student and Parents, Student would continue to practice coping skills within the residential milieu and during weekend passes at home, and this process would provide for an appropriate transition to living at home. Exhibit J-12 (pages 4, 5).

The 45-day evaluation was scheduled to end on July 30, 2008. At an IEP Team meeting on July 21, 2008 to discuss what would occur at the end of the 45-day evaluation period at Longview Farm, the above-referenced Diagnostic Report was presented, as well as a report by Student’s Longview Farm psychiatrist (Elizabeth Liao, MD). There was also a written residential report given to Parents during the meeting, but the residential report was not presented at the Team meeting. At the Team meeting, Parents expressed their concern that their son was not ready to return home, and others at the meeting agreed. The above-described proposal from the Diagnostic Report was accepted by Parents, Sharon, and Longview Farm—that is, Sharon would continue to fund Student’s residential placement at Longview Farm until August 22, 2008, which was the end of the summer session. Parents understood that the purpose of the extended stay at Longview Farm was to continue the therapeutic interventions and consolidate Student’s gains prior to his returning home on August 22, 2008. Sharon and Parents also agreed that upon termination of Student’s residential placement at Longview Farm, Sharon would fund Student’s continued placement at Longview Farm but this placement would be as a day student. There was discussion at the meeting as to what transition steps were to occur for purposes of Student’s returning home on that date. Testimony of Father, Kaplan, Turk; exhibits J-12, J-15.

Student’s continued stay at Longview Farm was reflected in Sharon’s proposed N-1 form, which included the August 22, 2008 end date. Parents agreed to this proposal. Testimony of Father; exhibit J-4.

Subsequent to the July 21, 2008 IEP Team meeting, Parents read the residential report that had been distributed at but not discussed during the Team meeting. Parents believed that the residential report raised troublesome issues regarding Student’s behavior that were not discussed during the Team meeting. This report, in Parents’ opinion, raised a concern as to whether their son would be prepared to return home on August 22, 2008. Parents then contacted Sharon and requested a meeting to discuss this issue. Testimony of Father.

By memo of August 15, 2008, Parents wrote to the Sharon out-of-district coordinator (Linda Salon), taking the position that the residential program at Longview Farm remains their son’s placement until they agree otherwise. The memo enclosed their signed placement consent

form, indicating that consented to the Longview Farm placement except that they disagreed with the end date of August 22, 2008. Exhibit J-27.

In response to Parents' concerns, Sharon scheduled an IEP Team meeting that occurred on August 19, 2008. The following persons attended this meeting: Parents, Dr. Schembri, Parents' educational advocate, the Longview Farm staff psychiatrist (Elizabeth Liao), the Longview Farm principal (Christine Barker), Sharon's Director of Student Services (Steven Kaplan), Sharon's clinical psychologist (Naami Turk), and Sharon's out-of-district coordinator (Linda Salon). At the meeting, Parents expressed their belief that their son was not safe to return home. The Longview Farm staff disagreed, stating their opinion that Student was ready to come home. Sharon declined to fund Student's residential placement at Longview Farm past August 22, 2008 but offered to continue Student as a day student at Longview Farm. Parents offered to privately pay the residential component of Student's continued stay at Longview Farm. Parents and Sharon agreed that Sharon would pay for the day portion of Student's continued placement at Longview Farm. September 8, 2008 was selected as the date for the next IEP Team meeting, at which time the Team would develop an IEP for a day placement at Longview Farm. Testimony of Father, Kaplan; exhibit J-5.

Parents and Longview Farm entered into an agreement dated August 21, 2008 and entitled "Therapeutic Transition Agreement". The stated purpose of the agreement was to provide Student, his family, and Longview Farm clinical and school teams with a framework for Student and his family to develop a successful transition from living at the residential school to living at home and attending Longview Farm as a day student. Exhibit J-11.

Longview Farm observed a one-week summer vacation during the last week of August 2008. As a result, Student came home on August 22 or August 23, 2008 (the evidence on this point was inconsistent), he lived at home for the following ten days, and then he returned to Longview Farm as a residential student on September 2, 2008. Sharon paid for the day component, and Parents paid for the residential component, with Parents reserving their right to seek reimbursement from Sharon. Testimony of Father, Kaplan.

The next IEP Team meeting occurred on September 8, 2008. This resulted in a proposed IEP for Student to continue at Longview Farm as a day student. Parents accepted this IEP. Testimony of Parent, Kaplan; exhibit J-3.

This arrangement continued until October 6, 2008 when, for financial reasons, Parents ended their son's residential stay at Longview Farm and Student returned home. Student continued to attend Longview Farm as a day student pursuant to the accepted IEP. Testimony of Father; exhibit J-3.

As of the date of the hearing in the instant dispute, Student had been hospitalized again at Westwood Lodge. Parents anticipated attending a discharge meeting on December 5, 2008, with their son returning home on December 8, 2008. The evidence was not sufficient to know the reasons for this hospitalization although it may have been precipitated, in part, by Student's not taking his medications. Testimony of Father.

DISCUSSION

Legal Standard. The federal Individuals with Disabilities Education Act (IDEA) was enacted "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."¹ The Massachusetts special education statute also includes a FAPE requirement.²

The Supreme Court has explained that FAPE is intended to require special education services that allow a student to access public education.³ Access must be meaningful,⁴ and sufficient to confer educational benefit,⁵ but need not maximize a student's educational potential.⁶ In addition, FAPE is defined by the IDEA to include state educational standards.⁷ Massachusetts and federal educational standards require that the IEP be designed to enable the student to make effective progress.⁸ Massachusetts standards also mandate that the special education services be designed to develop the student's educational potential.⁹

¹ 20 USC 1400(d)(1)(A). *See also* 20 USC 1412(a)(1)(A).

² MGL c. 71B, ss. 1, 2, 3.

³ *Rowley*, 458 U.S. at 192 (1982) ("intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside").

⁴ *Rowley*, 458 U.S. at 192 ("in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful"); *Frank G. v. Board of Educ. of Hyde Park*, --- F.3d ----, 2006 WL 2077009 (2nd Cir. 2006); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004) ("state must provide children with 'meaningful access' to public education"); *Alex R. v. Forrestville Valley Community Unit School Dist. # 221*, 375 F.3d 603, 612 (7th Cir. 2004) (question presented is whether the school district appropriately addressed the student's needs and provided him with a meaningful educational benefit), *cert. denied*, 543 U.S. 1009 (2004); *Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004); *Shore Regional High School Bd. of Educ. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004); *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000); *Adams v. Oregon*, 195 F.3d 1141, 1145 (9th Cir. 1999); *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773, 789 (1st Cir. 1984) ("federal basic floor of meaningful, beneficial educational opportunity"), *aff'd* 471 U.S. 359 (1985).

⁵ *Rowley*, 458 U.S. at 200 ("Implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.").

⁶ *Rowley*, 458 U.S. at 197, n.21 (1982) ("Whatever Congress meant by an 'appropriate' education, it is clear that it did not mean a potential-maximizing education."); *Lt. T.B. ex rel. N.B. v. Warwick Sch. Com.*, 361 F.3d 80, 83 (1st Cir. 2004) ("IDEA does not require a public school to provide what is best for a special needs child, only that it provide an IEP that is 'reasonably calculated' to provide an 'appropriate' education as defined in federal and state law.").

⁷ 20 USC 1401(9)(b); *Winkelman v. Parma City School Dist.*, 127 S.Ct. 1994, 2000-2001 (2007) ("education must ... meet the standards of the State educational agency"). *See also* MGL c. 71B, s.1 (definition of FAPE, describing Massachusetts educational standards as those "established by statute or established by regulations promulgated by the board of education").

⁸ Massachusetts standards: 603 CMR 28.05(4)(b) (IEP must be "designed to enable the student to progress effectively in the content areas of the general curriculum"); 603 CMR 28.02(18) (defining *Progress effectively in the general education program*). Federal standards: 20 USC 1400(d)(4) ("purposes of this title are . . . to assess, and ensure the effectiveness of, efforts to educate children with disabilities" (emphasis added); *Lenn v. Portland School Committee*, 998 F.2d 1083, 1090 (1st Cir. 1993) (program must be "reasonably calculated to provide 'effective results' and 'demonstrable improvement' in the various 'educational and personal skills identified as special needs'"); *Roland v. Concord School Committee*, 910 F.2d 983, 991 (1st Cir. 1990) ("Congress indubitably desired 'effective results' and 'demonstrable improvement' for the Act's beneficiaries"); *North*

Student's right to FAPE is assured through the development and implementation of his IEP.¹⁰

It is not disputed that Student is an individual with a disability, falling within the purview of the IDEA¹¹ and the Massachusetts special education statute.¹² In the instant dispute, Parents are the party seeking relief and therefore have the burden of persuasion.¹³

Free Appropriate Public Education. I first consider whether, on August 22, 2008 when Sharon terminated funding for residential services but continued funding Student in Longview Farm's day school program, Student required residential educational services in order to receive FAPE.

FAPE must be provided in the least restrictive environment.¹⁴ A residential placement is properly considered more restrictive than a day program, even when the day program would place Student in a substantially separate special education program.¹⁵

The appropriate standard, as reflected within several First Circuit Court of Appeals decisions, for determining whether a day placement would satisfactorily address Student's educational needs, or, conversely, whether Sharon was required to provide Student with a residential placement is whether the educational benefits to which Student is entitled can be obtained in a day program alone, or conversely whether these educational benefits can only be provided

Reading School Committee v. Bureau of Special Education Appeals, 480 F.Supp.2d 479, 489 (D.Mass. 2007) (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 MGL c. 71B, s. 1 (defining the term "special education" to mean "educational programs and assignments including, special classes and programs or services designed to develop the educational potential of children with disabilities"). See also MGL c. 69, s. 1 ("paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential"); 603 CMR 28.01(3) (identifying the purpose of the state special education regulations as "to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential"); *Mass. Department of Education's Administrative Advisory SPED 2002-1: Guidance on the change in special education standard of service from "maximum possible development" to "free appropriate public education" ("FAPE")*, Effective January 1, 2002, 7 MSER Quarterly Reports 1 (2001) (appearing at www.doe.mass.edu/sped) (Massachusetts Education Reform Act "underscores the Commonwealth's commitment to assist all students to reach their full educational potential").

¹⁰ 20 USC 1414(d)(1)(A)(i)(I)-(III); *Honig v. Doe*, 484 U.S. 305, 311-12 (1988); *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 182 (1982).

¹¹ 20 USC 1400 *et seq.*

¹² MGL c. 71B.

¹³ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief; a party who has the burden of persuasion "loses if the evidence is closely balanced").

¹⁴ The phrase "least restrictive environment" means that, to the maximum extent appropriate for the particular student, the student is to be educated with other students who do not have a disability. 20 USC 1400(d)(1)(A); 20 USC 1412(a)(1)(A); 20 USC 1412(a)(5)(A); MGL c. 71B, ss. 2, 3; 34 CFR 300.114(a)(2)(i); 603 CMR 28.06(2)(c).

¹⁵ *Walczak v. Florida Union Free School Dist.*, 142 F.3d 119 (2nd Cir. 1998).

through round-the-clock special education and related services, thus necessitating placement in an educational residential facility.¹⁶

As was made clear to Parents during an August 19, 2008 IEP Team meeting, the Longview Farm staff, including the clinicians working directly with Student over the course of the extended evaluation, recommended that Student be transitioned home on August 22, 2008 because they believed that he was no longer appropriate for residential placement. At the evidentiary hearing in the instant dispute, the Longview Farm staff psychiatrist (Dr. Liao) testified persuasively that by August 19, 2008, Student no longer had academic, behavioral, or emotional needs that required a residential level of services and placement. Testimony of Liao; exhibits J-9, J-15.

Dr. Liao did not seek to minimize the importance of continuing to address Student's mental health (and related behavioral) deficits, including the importance of psychotherapy regarding Student's following rules at home. She recommended that Parents take advantage of family stabilization services offered by the Massachusetts Department of Mental Health (DMH). In addition, she noted that, as a day student at Longview Farm, Student would continue to see the Longview Farm clinician during weekly therapy sessions and could continue to utilize her for medication monitoring. Dr. Liao testified persuasively that this combination of services would be sufficient to address Student's mental health deficits while living at home. Testimony of Liao; exhibit J-15.

The Longview Farm principal (Ms. Barker) further supported Dr. Liao's opinion with respect to behavioral issues. Ms. Barker testified that Student had been consistently at the highest level of privileges for purposes of leaving the school for trips and outings, and that he did not have the level of emotional and behavioral needs of the other children placed residentially at Longview Farm. The principal further testified that although the July 17, 2008 residential report noted a particular incident (ear piercing) and other behavior that raised concerns for Parents, the more recent residential report for August 2008 indicated no significant behavioral concerns. In addition, Longview Farm reported no critical incidents regarding Student since his admission to Longview Farm. Testimony of Barker; exhibits J-15 (last page), J-28, J-35, J-36.

Parents provided only the testimony of Father and Dr. Schembri, and written statements of Dr. Schembri as evidence in support of their position that Student continued to require residential educational services. There is no doubt that Parents are devoted to their son and have worked tirelessly to address his behavioral and emotional difficulties in a safe and appropriate manner. I do not question the sincerity of Parents' concern regarding their son's proposed return home on August 22, 2008. Based in particular on the residential report of July 17, 2008, Parents believed that it might not be safe to have their son return home on August 22, 2008. Testimony of Father.

¹⁶ *Gonzalez v. Puerto Rico Department of Education*, 254 F.3d 350 (1st Cir. 2001); *Abrahamson v. Hershman*, 701 F.2d 223, 228 (1st Cir. 1983).

Nevertheless, the weight of the evidence does not support Parents' position. As discussed above, the Longview Farm staff working directly with Student were persuasive that by August 19, 2008, Student did not have significant behavior difficulties and was safe to return home. Similarly as discussed above, the written reports (including the July 17, 2008 report relied upon by Parents) did not indicate behavior problems that would implicate the safety of Student or others. Testimony of Liao, Barker; exhibits J-15 (last page), J-28, J-36.

Parents' only expert, Dr. Schembri, wrote a statement dated August 12, 2008, noting that Student was being considered for return back home with his family and day placement at Longview Farm. Dr. Schembri opined that this would be "contraindicated". He explained, in part, as follows:

[Student] needs to continue in a residential treatment facility. In my opinion, if [Student] is allowed to return home he will quickly decompensate and return to his previous dangerous behavior. He cannot be controlled by his parents and he has not internalized his own ability to control himself, not in two months of treatment.

Exhibit P-13.

Dr. Schembri further testified that having had five sessions with Student from January to March 2008 and having read the relevant reports of Student, he was convinced that Student's mental health needs could only be addressed appropriately within a residential setting. He further opined that unless Student were stabilized emotionally, Student would not benefit from his education. Dr. Schembri is an experienced therapist who testified candidly, although his memory was, at times, deficient—for example, he could not respond with certainty to a number of questions regarding what documents he had reviewed or with whom he had spoken regarding Student.

I do not find Dr. Schembri's testimony and written statement to be persuasive. Dr. Schembri's conclusion (that Student's mental health needs necessitated a residential placement) was premised on the belief that Student would not be able to establish a therapeutic relationship with a clinician for purposes of receiving mental health therapy and therefore his emotional needs could not be addressed on an outpatient basis. Dr. Schembri appeared to reach this conclusion because after five sessions with Student, Dr. Schembri was unable to establish a therapeutic relationship with Student. Dr. Schembri also premised his recommendation of residential placement on the basis of his opinion that Student continued to be dangerous. Testimony of Schembri.

However, the undisputed evidence was that the Longview Farm clinician (Alison Lawrence) had established a therapeutic relationship with Student, was working successfully with him in therapy, and would continue to provide therapy to Student after he transitioned to being a day student at Longview Farm. Testimony of Barker; exhibit J-12.

In addition, I note that Dr. Schembri had not worked with or met with Student since March 2008, and Dr. Schembri's contact with Student has only been within the context of

attempting to establish a therapeutic relationship. Subsequent to seeing Student in March 2008, Dr. Schembri's information regarding Student was principally from Parents and written reports. In contrast, the Longview Farm staff were working directly with Student in a variety of capacities (residential staff, therapist, psychiatrist, school principal) throughout the evaluation period which continued to August 22, 2008. The Longview Farm staff's understanding of Student was significantly greater than that of Dr. Schembri, particularly with respect to Student's mental health needs as well as his then-current behavior and potential dangerousness. As discussed above, the persuasive testimony and reports from Longview Farm staff were that by July 30, 2008, Student continued to occasionally demonstrate "odd" behavior (such as walking on his toes), but he showed no signs of physical aggression and was not violent, and his mental health needs could be appropriately addressed through outpatient therapy.

In sum, the overwhelming testimony and reports from those who knew Student best from a clinical and behavioral perspective, were that Student had established a therapeutic relationship with his Longview Farm therapist and had made progress therapeutically, Student's behavior had stabilized to the point where there were no significant incidents, and he was ready to return home. Testimony of Barker, Liao, Turk;¹⁷ exhibits J-28, J-36.

For these reasons, I conclude that by August 22, 2008, which was the end of the evaluation period at Longview Farm, Student did not require a residential educational placement in order to receive FAPE.

Transition Services. In his closing argument, Parents' attorney did not take the position that Student had emotional, behavioral, or academic deficits so severe as to justify a residential placement subsequent to August 22, 2008.¹⁸ Instead, Parents' attorney focused on the argument that Student required transition services that had not been provided by August 22, 2008, with the result that it was unsafe and inappropriate for Student to return home at that time. For these reasons, Parents believed that they were justified in asking Sharon to pay for the residential portion of Student's placement subsequent to August 22, 2008 in order that the transition process could be completed prior to Student's returning home to live with his Parents.

The parties have not disputed the importance of providing a transition between Student's residential services at Longview Farm and his living at home. Longview Farm staff recommended, and Sharon agreed, to an extension of the original 45-day residential evaluation until August 22, 2008, in part, so that Student and Parents would be more prepared for Student's return to his living at home. It is also not disputed that by August 22,

¹⁷ Naami Turk, PsyD, is Sharon's consulting clinical psychologist. Her familiarity with Student is based on review of records and evaluations, participation at IEP Team meetings for Student, and listening to the testimony at hearing. She has significant clinical expertise regarding children with Student's profile. Her testimony was candid, careful, and credible. Testimony of Turk; exhibit J-32 (resume).

¹⁸ In his oral closing argument, Parents' attorney also conceded that if Parents had the burden of persuasion on the issue of whether residential placement was required in order that Student receive FAPE, Parents had not met their burden.

2008, the transition process had not been satisfactorily completed. Testimony of Liao, Father.

Nevertheless, I am not persuaded that the need for a further transition process would justify requiring Sharon to pay for residential services past August 22, 2008. My reasoning follows.

First, Student and his Parents do not have a right under state and federal special education law to receive transition services *per se*.¹⁹ Rather, the only relevant question is whether Student required completion of the transition process in order to receive FAPE.²⁰ In other words, transition planning (as well as many services and interventions) may be useful to a student and may be desired by parents, but a school district is not required to provide it unless failure to do so would deny the student FAPE.²¹

Parents took the position that it would be unsafe for Student to live at home starting August 22, 2008, and clearly they were concerned about the difficulty of addressing his behavior at home. However, there was no evidence of probative value that supports the contention that completion of the transition process was sufficiently important that a return home without completion of the transition process would be unsafe or would otherwise deny Student FAPE.

Parents did not present any expert testimony or report relevant to this issue. Their only expert, Dr. Schembri, did not address it. The evidence clearly supports a conclusion that all concerned (including Longview Farm staff and Sharon) viewed the transition process as important, but there was no evidence to explain the implications to Student if he were to return to living at home prior to completion of the transition process.

As discussed above, the overwhelming weight of the evidence was that notwithstanding the incomplete transition process, Student did not have any significant behavior issues by August 22, 2008, his mental health deficits could be appropriately addressed while living at home with continuing therapy with the Longview Farm therapist on an outpatient basis, and it was safe for Student to return home.²² His academic needs would continue to be met appropriately through the day school at Longview Farm. For these reasons, I find that Parents did not present sufficient evidence to meet their burden of persuasion on this issue.

¹⁹ State and federal special education law explicitly require that transition planning and services be provided in anticipation of a student's leaving special education services through graduation or attaining the age of 22 years (20 USC 1401(34) and 1414(d)(1)(A)(i)(VIII); MGL c. 71B, s. 2), but transition planning and services are not explicitly required with respect to transitioning from an evaluation setting to a more permanent placement.

²⁰ 20 USC 1415(f)(1)(E)(i) ("Subject to clause (ii) [pertaining to procedural violations], a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education").

²¹ See, e.g., *Lt. T.B. ex rel. N.B. v. Warwick Sch. Com.*, 361 F.3d 80, 83 (1st Cir. 2004) ("IDEA does not require a public school to provide what is best for a special needs child, only that it provide an IEP that is 'reasonably calculated' to provide an 'appropriate' education as defined in federal and state law.").

²² In fact, Student came home for approximately ten days, beginning on August 22 or August 23, 2008 (the evidence was inconsistent as to which date he returned home). Testimony of Father. Parents provided no evidence of any behavioral, safety, or other difficulties during this time period.

Second, Parents were provided the opportunity to receive home-based stabilization services from DMH. These were intensive services that included family therapy, peer therapy, and 24-hour/7-days-per-week emergency back-up support. Although Parents sought to cast doubt on whether DMH would have actually provided these services, the unrebutted testimony was that DMH offered these services to begin immediately. These services would likely have substantially assisted Parents and Student with any difficulties that might have arisen at home. Dr. Liao testified persuasively that with these home-based services, Student was ready to go home. However, Parents declined these services. Testimony of Barker, Liao, Father.

Third, the Longview Farm principal (Ms. Barker) testified that Parents declined to participate in transition planning prior to August 21, 2008 when Parents met with Longview Farm staff and developed (and entered into) an agreement, dated August 21, 2008, for the purpose of establishing transition expectations. The August 21st meeting appeared to be the first time Parents were willing to engage in concrete discussions regarding the specifics of a transition plan for their son. Ms. Barker had previously advised the Sharon director of student services (Mr. Kaplan) that for a period of time after the July 21, 2008 Team meeting, Parents did not want to participate in any transitioning. The testimony of the Longview Farm staff psychiatrist (Dr. Liao) also indicated that Parents failed to cooperate with transition efforts by Longview Farm. Exhibit J-11.

Father testified on rebuttal that Parents participated in transition planning during family therapy sessions, except that Father explained that they did not want to acknowledge to their son that he would be coming home on August 22, 2008. Father did not otherwise seek to rebut the more general assertion that Parents were partly or fully responsible for the failure of the transition process to be completed by August 22, 2008.

I find that the weight of the testimony was that Parents did not fully cooperate with Longview Farm's attempts to address transition issues until the August 21, 2008 meeting at which time it had become clear that Sharon would no longer fund the residential component of Student's services past August 22, 2008. I conclude that Parents were, in part, responsible for the transition process not being completed by August 22, 2008. Testimony of Barker, Kaplan, Liao, Father.²³

Stay Put. Parents argue that they had stay put rights to continued residential services at Longview Farm past August 22, 2008. The IDEA's stay put provision provides, *inter alia*, that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child."²⁴

²³ Reimbursement is an equitable remedy, requiring consideration of the reasonableness of Parents' actions. See, e.g., *School Union No. 37 v. Ms. C*, 518 F.3d 31, 34 (1st Cir. 2008) ("Reimbursement is an equitable remedy").

²⁴ 20 USC § 1415(j); 34 CFR §300.518.

The Massachusetts special education regulations state that an extended evaluation is not to be considered a “placement”.²⁵ Therefore, the normal procedural requirements relevant to a student’s educational placement (including stay put) do not apply to an extended evaluation.²⁶

As discussed in greater detail in the Facts section of this Decision, Student was initially placed at Longview Farm as a day student for a 45-day extended evaluation. This evaluation was interrupted by a psychiatric hospitalization at Westwood Lodge. When Student was discharged from Westwood Lodge and returned to Longview Farm, he began again the 45-day extended evaluation, and this time the evaluation was conducted on a residential basis. On July 21, 2008, which was near the conclusion of the 45-day residential evaluation period, Longview Farm staff recommended, and Sharon agreed during an IEP Team meeting, to continue Student on a residential basis at Longview Farm until August 22, 2008.

I find that Student’s stay at Longview Farm, including the residential period of time from July 30, 2008 through August 22, 2008, was an extended evaluation. Accordingly, pursuant to Massachusetts special education regulations referenced above, stay put does not apply to Sharon’s funding of Student’s residential placement at Longview Farm.

Parents point out correctly that the extended evaluation exceeded eight weeks, and the state special education regulations limit the duration of such an evaluation to eight weeks.²⁷ Parents also argue that the additional time (past July 30, 2008) was not actually for evaluation purposes, but rather for the purpose of providing continued therapeutic services and transitioning home. Arguably, this additional time and purpose took the evaluation out of the parameters of the state regulatory standards regarding extended evaluations, including the regulatory language that such an evaluation is not a placement.

Even in the event that I were to conclude that the last part of Student’s residential stay at Longview Farm through August 22, 2008 was not an extended evaluation, my conclusion regarding the applicability of stay put would be the same.

Federal courts have concluded that a temporary or interim placement is not a student’s stay put placement. The temporary or interim placement typically is scheduled to end on a specific date or after a specific period of time and is usually contemplated by the parties as a one-time occurrence.²⁸ I am aware of no judicial decisions to the contrary.

²⁵ 603 CMR 28.05(2)(b)5 (“The extended evaluation shall not be considered a placement.”).

²⁶ See *In Re: Melrose Public Schools & C. M.*, BSEA # 07-4987, 13 MSER 70 (2007) (“diagnostic program ... cannot, by regulation, be a Student’s ‘Stay Put’ placement”); *In Re: Melrose Public Schools*, BSEA # 07-2782 (2006) (at the completion of student’s extended evaluation, his stay put placement was a return to his regular education placement).

²⁷ 603 CMR 28.05(2)(b)4.

²⁸ *Verhoeven v. Brunswick School Committee*, 207 F.3d 1, 10 (1st Cir. 1999) (temporary placement not considered stay put) (dicta); *Leonard v. McKenzie*, 869 F.2d 1558, 1564 (DC Cir. 1989) (time-limited placement not considered stay put); *Casey K. v. St. Anne Community High School Dist. No. 302*, 400 F.3d 508, 517 (7th Cir. 2005) (“district’s temporary and conditional acquiescence in the parents’ unilateral action cannot constitute an ‘educational placement’ for purposes of the stay-put requirement”); *Stanley C. v. M.S.D. of Southwest Allen County Schools*, 2008 WL

The Longview Farm residential placement, even as it was extended by Sharon to August 22, 2008, was intended to be a temporary, one-time placement. The residential placement had a specific end date (initially, July 30, 2008 and then August 22, 2008) and there was no mutual understanding that the placement may continue past this date. In other words, it was a temporary placement to which stay put rights do not attach.

Further support for this conclusion is found within the purpose of stay put. Its essential purpose is to preserve the status quo pending resolution of a dispute between the parties, thereby preventing unilateral action by a school district in contravention of a student's or parent's objection, until the completion of due process proceedings.²⁹ In the instant dispute, a residential placement at Longview Farm was never considered the status quo. Instead, it was a time-limited, 45-day extended evaluation, which Sharon agreed to extend for a specific and limited period of time.³⁰

For these reasons, I conclude that the Longview Farm residential placement cannot be considered Student's stay put placement under the IDEA.³¹

2228648 (ND Ind. 2008) (court denied parents' request for stay put order where agreements between the parties included funding only for a definite time period); *Gabel v. Board of Education*, 368 F. Supp. 2d 313, 325 (SDNY 2005) ("agreement in which a Board of Education agrees to pay tuition to a private school makes that school the child's pendency placement unless the stipulation is explicitly limited to a specific school year or definite time period"). See also *In Re: Dracut Public Schools*, BSEA # 08-6414 (ruling December 3, 2008) (temporary placement not stay put).

²⁹ *CP v. Leon County School Bd. Florida*, 483 F.3d 1151, 1156 (11th Cir. 2007) ("provision amounts to, in effect, an automatic preliminary injunction, maintaining the status quo and ensuring that schools cannot exclude a disabled student or change his placement without complying with due process requirements"); *Verhoeven v. Brunswick School Committee*, 207 F.3d 1, 3, 10 (1st Cir. 1999) (preservation of the status quo ensures that the student remains in the last placement that the parents and the educational authority agreed to be appropriate).

³⁰ The First Circuit's discussion in its *Verhoeven* decision is instructive.

The policy behind section 1415(j) supports an interpretation of "current educational placement" that excludes temporary placements like P.J.'s SMLC placement. Section 1415(j) is designed to preserve the status quo pending resolution of administrative and judicial proceedings under the Act. The preservation of the status quo ensures that the student remains in the last placement that the parents and the educational authority agreed to be appropriate. However, in the case of P.J.'s temporary placement at SMLC, Brunswick and the Verhoevens never agreed that P.J. would be placed at SMLC beyond June 1, 1998. To the contrary, the parties expressly agreed that P.J. would only be placed at SMLC during the 1997-98 school year. Therefore, to maintain P.J. at SMLC during the pendency of the Verhoevens' challenge would actually change the agreed-upon status quo, not preserve it. Thus, because a reading of "current educational placement" that includes the temporary SMLC placement at issue here would thwart the purpose of section 1415(j), we decline to adopt such a reading.

Verhoeven v. Brunswick School Committee, 207 F.3d 1, 10 (1st Cir. 1999) (internal quotation marks and citation omitted) (dicta).

³¹ Parents argue to the contrary by asking the following question: if Longview Farm was not Student's stay put placement, then where was his stay put placement? Parents correctly point out that at any given time, a student has a stay put placement. Most likely, until the IEP Team meeting on July 21, 2008, Student's stay put placement was the last agreed-upon IEP providing for Student's placement in the Sharon Middle School. (There was not sufficient evidence to make a finding on this point, and therefore the question cannot be answered definitively.) At the Team meeting on July 21, 2008, the parties agreed that as of August 22, 2008 when the temporary residential placement at Longview Farm would end, Student would be placed at Longview Farm as a day student. This agreement re-set Student's stay put placement. Parents argue that this agreement should not be considered valid because at the July

IEP Amendment. Parents make an additional argument that an IEP amendment proposed by Sharon and agreed to by Parents called for a residential placement. The time period of the IEP amendment, which was developed at a June 11, 2008 Team meeting, was from March 11, 2008 to March 11, 2009. Parents take the position that this IEP amendment required Sharon to provide Student with a residential placement for the life of the IEP amendment and, more specifically, to place Student residentially at Longview Farm since there is no dispute that Longview Farm was an appropriate placement for Student. From this perspective, the IEP amendment created a twelve-month IEP calling for residential placement, within which there was identified a 45-day evaluation placement. Exhibit S-6.

Sharon responded by correctly pointing out that at several places in the IEP amendment (for example, pages 2 and 4 of exhibit J-6), it is clear that the IEP amendment was prepared for the sole purpose of describing a 45-day extended evaluation. No other amendment is proposed. The original IEP (that was being amended) called for a day, rather than residential, placement. Exhibit J-7.

I find that the IEP amendment, on its face, is subject to differing interpretations, each of which is plausible, with the result that the IEP is ambiguous and internally inconsistent.³²

Although courts have not generally found that an IEP is to be considered a contract, an IEP is sufficiently close to being a contractual agreement between a school district and parents that it may be useful to utilize rules relevant to interpretation of contracts. Where IEP language is, on its face, ambiguous or internally inconsistent, it may therefore be appropriate to consider the entire document within the context of the circumstances in which it was prepared, as well as any other evidence relevant to the intent of the parties.³³

The numerous discussions regarding Student's placement at Longview Farm (outlined in the Facts section of this Decision), as well as the specific discussions during the IEP Team meeting utilized to develop the IEP amendment on June 11, 2008, make clear that the purpose of developing the IEP amendment was to place Student at Longview Farm for a residential evaluation for a limited period of time, and that residential services were being offered only for this purpose. I am aware of not a single conversation or document that would support the view that Sharon agreed or that either party understood the IEP

21, 2008 IEP Team meeting, the July residential report was not discussed; and on the basis of this report, Parents later changed their position regarding the end of the residential placement. I am not persuaded by this argument. The one-page July residential report was given to Parents at the July 21, 2008 Team meeting, and Parents could have reviewed it at that time. In addition, as discussed above in the text of this Decision, the July residential report (either by itself or in combination with other reports and evidence) is not persuasive that Student required a residential placement. At most, the July residential report raised questions regarding Student's behavior that needed to be discussed between the parties, so that Parents would have a better understanding of Student's behavioral issues and how they should be addressed at home, and these concerns were discussed at the August 19, 2008 Team meeting.

³² Cf. *Allen v. Adage, Inc.*, 967 F.2d 695, 700 (1st Cir. 1992) (contract language which is susceptible to differing, but nonetheless plausible, constructions is ambiguous).

³³ Cf. *Id.* at 701 (where contract is ambiguous, court may consider the circumstances in which the contract was prepared as well as any other evidence relevant to the intention of the parties when the entered into the contract).

amendment to provide for a more long-term, continuing residential placement for Student. In fact, Father testified that each time the IEP Team discussed Student's placement at Longview Farm, it was within the context of an extended evaluation, and Father understood that at the end of the evaluation period, the IEP Team would need to make a new decision regarding Student's special education and related services and where those educational services would be provided. It is apparent that Father's understanding was the same as Sharon's—that is, residential services were offered by Sharon only for the life of the evaluation at Longview Farm. Testimony of Parent, Kaplan; exhibit J-6.

I further note that at the July 21, 2008 IEP Team meeting, the parties agreed that Student's temporary residential placement at Longview Farm would end on August 22, 2008; and as of that date, the parties agreed that Student would continue as a day student at Longview Farm. Therefore, even had there been a prior IEP amendment (from the June 11, 2008 Team meeting) calling for continued residential services, the parties agreed that the residential component of those services would end on August 22nd. This further undermines any argument that, as of August 22, 2008, Parents believed that there was a current IEP requiring Sharon to continue providing residential services to their son. Testimony of Parent, Kaplan.

I find that the overwhelming weight of the evidence is that there was no IEP or IEP amendment requiring that Sharon provide Student with residential services past August 22, 2008.

Procedural Error. Finally, Parents raise a separate procedural issue. They point out correctly that Sharon did not develop an IEP for purposes of the day placement at Longview Farm until the IEP Team meeting on September 8, 2008. In effect, Student was without a current IEP from August 22, 2008 until September 8, 2008. Exhibit J-3.

This procedural error was harmless. As of the IEP Team meeting on August 19, 2008, the parties knew exactly what Sharon was proposing for Student, which was a continuation of his placement at Longview Farm as a day student. During that Team meeting, the parties also agreed to the date of the next Team meeting—that is, September 8, 2008.

It is not sufficient that Parents demonstrate a procedural error. In order to obtain relief as a result of a procedural error, Parents have the burden of persuasion to demonstrate harm—that is, that the violation impeded Student's right to FAPE, significantly impeded Parents' opportunity to participate in the decision-making process regarding FAPE, or caused a deprivation of educational benefits.³⁴ No such harm has been alleged, and I find that no such harm occurred.

Conclusion. For these reasons, I conclude that Sharon had no obligation to fund the residential component of the Longview Farm placement subsequent to August 22, 2008.

³⁴ 20 USCS § 1415(f)(3)(E)(2)(ii).

ORDER

Sharon is not obligated to reimburse Parents for their payment of the residential component of the residential placement at Longview Farm from August 22, 2008 to October 6, 2008.

By the Hearing Officer,

William Crane

Dated: December 17, 2008

**COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS**

THE BUREAU'S DECISION, INCLUDING RIGHTS OF APPEAL

Effect of the Decision

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Accordingly, the Bureau cannot permit motions to reconsider or to re-open a Bureau decision once it is issued. Bureau decisions are final decisions subject only to judicial review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. Rather, a party seeking to stay the decision of the Bureau must obtain such stay from the court having jurisdiction over the party's appeal.

Under the provisions of 20 U.S.C. s. 1415(j), "unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement," during the pendency of any judicial appeal of the Bureau decision, unless the child is seeking initial admission to a public school, in which case "with the consent of the parents, the child shall be placed in the public school program". Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington, v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child's placement during the pendency of judicial proceedings must seek a preliminary injunction ordering such a change in placement from the court having jurisdiction over the appeal. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1st Cir. 1983).

Compliance

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the facts on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

Rights of Appeal

Any party aggrieved by a decision of the Bureau of Special Education Appeals may file a complaint in the state court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review of the Bureau decision. 20 U.S.C. s. 1415(i)(2).

An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

Confidentiality

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove School District v. Pulitzer Publishing Company*, 898 F.2d 1371 (8th Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

Record of the Hearing

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to federal law, upon receipt of a written request from any party, the Bureau of Special Education Appeals will arrange for and provide a certified written transcription of the entire proceedings by a certified court reporter, free of charge.