

COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS

In re: Adam¹

BSEA# 09-5460

DECISION

This decision is rendered pursuant to M.G.L. Chapters 30A and 71B; 20 U.S.C. § 1400 et seq.; 29 U.S.C. §794; and the regulations promulgated under these statutes.

A hearing in the above-entitled matter was held on June 9, 16, and 17, 2009 at the Bureau of Special Education Appeals in Malden, MA. The record remained open for receipt of written closing arguments until July 20, 2009.

Those in attendance were:

Ellen Chagnon	Guidance Counselor, Dover-Sherborn Middle School
Kristin Peterson	Special Education Liaison, Dover-Sherborn Middle School
Audrey Moran	Out-Of-District Coordinator, Dover-Sherborn Regional School District
Pamela Travers	Administer of Special Education, Dover-Sherborn Regional School District
Laura Rice	Director, Dearborn School (via speaker-phone)
Andrea Bell	Attorney for Dover-Sherborn Regional School District
Mother	
Lou Eckart	Clinical Psychologist
Marlies Spanjaard	Attorney for Parent
Tami L. Fay	Legal Intern, Bureau of Special Education Appeals
Raymond Oliver	Hearing Officer, Bureau of Special Education Appeals

The evidence consisted of Dover-Sherborn Schools' Exhibits labeled S-1 through S-17; Parent's Exhibits labeled P-A through P-L; and approximately 11 hours of oral testimony.

HISTORY/STATEMENT OF THE CASE

Adam is a 13 year old young man who resides with his mother and younger siblings in Dorchester, MA. Currently, Adam is diagnosed with ADHD and a Nonverbal Learning Disability, which results in difficulties with social pragmatics.

In 2003, Adam (then beginning 3rd grade) was accepted into the METCO program and placed in Sherborn Public Schools (SPS) at Pine Hills Elementary School. Adam suffered lead poisoning as a child. In 2005 he was placed on a 504 plan due to a diagnosis of ADHD. On

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

January 2, 2007 (5th grade) Adam received a cognitive evaluation using the Wechsler Intelligence Scale for Children, 4th edition (WISC-IV), and the evaluation report of January 19, 2007 indicated concern over the disparity between his high verbal comprehension and low perceptual reasoning scores. His full scale IQ score was a 95, which is in the average range. The evaluator noted that Adam was not being medicated for ADHD at the time of this evaluation, and that his difficulty in focusing may have affected his scores. The evaluator also recommended additional testing to rule out possible learning disorders (S- 9). In September 2007, Adam transitioned to Dover-Sherborn Regional Middle School (DSRMS) of the Dover-Sherborn Regional School District (DSRSD).

While Adam succeeded academically with support, the DSRMS staff became concerned with his behavior and social skills during 6th grade (2007-2008). Adam's behavioral issues included inconsistency getting his homework done, being tardy to class, violating the personal space of others, and failing to stay in his seat (P-I). Adam was briefly suspended in October of 2007 and again in January of 2008 for violations of the DSRMS student handbook. He also received several lunchtime detentions at the end of his 6th grade year (S-12). A psychological evaluation was done at DSRMS in December of 2007 (S-10). On January 25, 2008 a Team meeting was held and an Individualized Education Program (IEP) was developed and accepted by Parent (S-10). Adam's 1/25/08 – 1/23/09 IEP provided for a special education aide in all his general education academic classes; a daily academic support class; occupational therapy (6 x 20); and a once-per-week special education consult (S-10). The IEP was amended on April 3, 2008 to allow extra time for assessment due to Adam's relatively slower processing speed (S-11).

Entering 7th grade, staff remained concerned about Adam's choices relating to socializing (testimony, Peterson). On September 25, 2008 Adam was involved in a behavioral incident with another student in the hallway just before school started for the day (S-13). The other student was seated near a friend's locker when Adam approached, took her by the ankle, and pulled her down the hallway. The student got up and returned to the locker, and Adam pulled her away again, this time by the wrist (S-13). No adults witnessed the incident; the school first became aware of the event at the end of the day because the other student wrote her father an email and then the father called the headmaster (S-13). Parent was not notified until 3:30 pm (testimony, Parent). The other student's father insisted on Adam's removal after this incident (P-B). DSRMS responded by suspending Adam for eight days out-of-school. When Adam briefly returned to DSRMS on October 6, 2008, his special education aide met him at the bus, accompanied him in the hallways between classes, and generally supervised him at lunch and during all unstructured times (S-12; testimony, Mother). DSRMS held a Manifestation Determination (MFD) meeting on October 8, 2008. The MFD meeting determined that Adam's actions on September 25th were a manifestation of his disability, specifically his misinterpretation of social cues. The school recommended placing Adam in an Interim Alternative Educational Setting (IAES) for a 45 school day evaluation at Dearborn Short Term Educational Placement program (STEP). Parent agreed to this evaluation (S-6; testimony, Parent).

Adam began attending STEP on October 21, 2008. The STEP program performed a Clinical Assessment and an Educational Assessment of Adam, and diagnosed him with a Nonverbal Learning Disability for the first time (S-3). The STEP program found Adam to be

cooperative and highly motivated to return to DSRMS (S-3; S-4; testimony, Rice). STEP recommended a small, structured classroom for Adam, as well as a speech and language evaluation, regular check-ins with a support person, and a social pragmatics group (S-3; S-4; testimony, Rice).

On December 18, 2008, the Team reconvened at DSRMS to consider the results and recommendations of the STEP evaluations. In response to the STEP evaluations and recommendations, the Team developed a new IEP for Adam that provided for a substantially-separate special education placement (S-1; testimony, Travers; Moran). At this same meeting, Parent announced her intention of conducting a private neuropsychological evaluation with Dr. Lou Eckart. The Team agreed to await the results of that evaluation and requested that Adam remain at STEP, which was agreed to by the Parent (S-7; testimony, Parent). Since DSRSD has no substantially-separate classrooms, the district decided that it could not provide the support specified in the proposed IEP. Therefore, Boston Public Schools (BPS), Adam's district of residence, was invited to participate in further Team meetings because of Adam's METCO status (testimony, Travers; Moran). On February 24, 2009, the Team reconvened (with a BPS representative) to discuss the results of Dr. Eckart's evaluation and future placement for Adam. The Team decided that Dr. Eckart's findings did not vary significantly from the findings of the STEP program, and therefore did not alter the proposed IEP. The Team discussed program options for Adam within BPS, and Parent expressed interest in observing some of those programs before making a decision (P-C; S-8). Parent later declined to sign the new IEP, and DSRSD filed the unsigned IEP with the BSEA on March 13, 2009.

DSRMS held a meeting on March 23, 2009 to discuss Adam's re-entry to the school under the old IEP (1/25/08-1/23/09). At that re-entry meeting, the Team discussed continuing the increased aide supervision of Adam during unstructured times. DSRMS Headmaster, Mr. Randall, directed that Adam be under the supervision of an aide at all times (testimony, Chagnon; Travers). Parent recalls discussing the aide at the re-entry meeting, but was under the impression that the aide's increased presence was a temporary measure for perhaps the first week Adam was back (testimony, Parent).

Adam returned to DSRMS from STEP on March 23, 2009. Guidance Counselor Chagnon and Special Education Liaison Peterson discussed strategies with Adam for dealing with his classmates questions about his long absence. However, Adam later had difficulty putting these strategies into practice (testimony, Chagnon; Peterson). At DSRMS, Adam continued to have the one-to-one aide with him during all general education classes, and she also accompanied him during unstructured times, such as hallway transitions, lunch, and getting on and off the school bus. Initially, Adam was barred from eating lunch in the cafeteria because the DSRMS staff were concerned about his transition back into that environment. Later, Adam was permitted to eat in the cafeteria (under the supervision of his special education aide), but often chose to eat in Ms. Peterson's room or not to eat lunch at all (P-F; testimony, Peterson).

On June 1, 2009, Dr. Eckart performed a classroom observation and group interview with Adam's teachers at DSRMS. Dr. Eckart found that "the staff reports that [Adam's] behavior and academic work have improved since the beginning of the school year. Currently, he is able to access the curriculum and demonstrate appropriate classroom behavior with minimal adult

support” (P-G). Adam continued to have some problems following directions in class, but he had no more major behavioral incidents after his re-entry (P-A; testimony, Travers; Peterson). Although academically successful and staying out of trouble, several sources noted that since his re-entry Adam seemed sad, depressed, and declined social interaction with his peers (P-G, P-I; testimony, Chagnon; Peterson; Eckart). Adam has repeatedly complained about the special education assistant who accompanies him during unstructured time, explaining that it makes him feel “like a person who got released [sic] from jail” (P-L; testimony, Chagnon).

ISSUES IN DISPUTE

- 1) Does DSRMS’ proposed 12/18/08 – 6/26/09 IEP, requiring a substantially-separate special education placement, appropriately address Adam’s special education needs in the least restrictive educational environment?
- 2) Should Adam return to DSRMS for the 2009-2010 school year?

STATEMENT OF POSITIONS

DSRSD’s position is that the proposed 12/18/08-6/26/09 IEP appropriately addresses the totality of Adam’s special education needs. DSRSD contends that it is inappropriate for Adam to continue at DSRMS when they do not have and cannot create the program Adam requires and which was recommended by STEP. DSRSD contends that Adam should return to his residential school district (BPS) for implementation of the IEP created by DSRSD.

Parent’s position is that Adam has made meaningful educational progress at DSRMS with the academic support of his previous 1/25/08-1/23/09 IEP (see P-A) and that the school relocation mandated under the proposed IEP is unwarranted. Parent contends that while Adam needs services to address his social and emotional needs, those services can be provided at DSRMS and/or by afterschool programming.

PROFILE OF STUDENT

Both sides agree that Adam is an intelligent boy who does well academically at school. With academic support, he consistently gets As and Bs in his academic classes (testimony, Peterson). According to Adam’s last progress report from May 2009, he was getting a 96 in Social Studies (A), an 88 in Science (B+), and a 91 in English (A) (P-A).²

On January 2, 2007, DSRSD performed a cognitive evaluation of Adam using the WISC-IV test (S-9). Adam was then 11 years old and near the end of 5th grade. Adam achieved the following scores and was within the following ranges:

² Adam’s Math grades were not tabulated in a term average, but his most recent Math quizzes received an 80, 90, and 92.

Verbal Comprehension: 126, Superior; Perceptual Reasoning: 79, Borderline; Working Memory: 88, Low Average; Processing Speed: 85, Low Average; Full Scale: (FSIQ): 95, Average

The STEP program performed a Clinical Assessment and an Educational Assessment of Adam (S-3, S-4, respectively) during his placement between October 21, 2008 and January 6, 2009. The Clinical evaluation found that “like many young people with nonverbal learning disabilities, [Adam] struggles to grasp the unwritten rules of social interactions and negotiation skills.” The report also concluded:

[Adam] is aware that he has some social deficits, but his understanding of these deficits is limited by his poor social pragmatics. When he misinterprets an interaction or becomes over stimulated, [Adam] can act impulsively... There appears to be a disconnect on how [Adam] thinks he presents himself verses [sic] how he actually interacts in social situations. It is the belief of the treatment Team that [Adam’s] struggle to make gains in increasing his insight is due to his learning style and very strong defensive structure, which protects him from uncomfortable, overwhelming affect.

[Adam] would benefit from a classroom that could provide structure and predictability to assist him with managing his anxiety and rigidity... [Adam] could also benefit from a social/pragmatic skills group in the community or school that would continue to reinforce appropriate social norms. [Adam] is extremely motivated to do well and it is our belief that with the proper supports, he can be successful in school.

The STEP Educational Assessment notes that “[Adam] has benefited from working in a small environment, working at his own pace, and having a teacher easily accessible to help him stay on task and prevent him from becoming frustrated when the work is challenging.” As part of the Educational Assessment, Adam took the Kaufman Test of Educational Achievement (KTEA). Adam’s overall Comprehensive Achievement Composite score fell within the average range on that test, earning a standard score of 98 (S-4). His composite scores in the various subject areas were as follows:

<u>Subtest</u>	<u>Score</u>	<u>Range</u>
Math	96	Average
Reading	108	Average
Reading Fluency	100	Average
Oral Fluency	83	Below Average

The Educational Assessment also recommended, among many other accommodations, a social skills group and a full speech and language evaluation.

On January 29, 2009, Dr. Lou Eckart, a clinical psychologist sought out by Parent, performed a neuropsychological evaluation of Adam at STEP. This evaluation included administering the Differential Ability Scales (DAS-II) test for the school age level, on which Adam obtained the following scores and ranges:

<u>Section</u>	<u>Score</u>	<u>Range</u>
Verbal	118	Above Average
Nonverbal Reasoning	99	Average

Spatial	80	Below Average
Working Memory	77	Low
General Cognitive Ability (GCA)	99	Average

After her January evaluation, Dr. Eckhart recommended a small, structured classroom setting for Adam and emotional supports built into his routine. Dr. Eckhart also recommended a speech and language pathology evaluation in order to assess Adam’s potential benefit from a social and language pragmatics skills group and school.

On June 1, 2009 Dr. Eckart saw Adam again for a classroom observation in DSRMS. Dr. Eckart indicated that although she would not have originally envisioned Adam in general education classrooms, she thought he “looked good” at DSRMS (testimony, Eckart). Dr. Eckart observed that the special education aide assigned to Adam interacted with him no more often than with other students in class (P-G; testimony, Eckart). Dr. Eckart’s group interview with Adam’s DSRMS teachers indicated that Adam is performing well academically and adequately behaviorally, but that he seemed depressed and withdrawn since his re-entry in March (P-G; testimony, Eckart). Therefore, while Dr. Eckart still recommends some daily small group interaction, social pragmatics, and guidance counselor support for Adam, she feels that Adam’s needs can be met within DSRSD (testimony, Eckart).

SCHOOL’S PROPOSED PROGRAM

DSRSD supports the IEP developed for Adam from 12/18/08-6/26/09, which the Parent has not accepted. This IEP calls for all of Adam’s academics to be taught in a substantially-separate classroom by special education staff. It also calls for occupational therapy (3x30), counseling (1x60), and a weekly social pragmatics group (1x 45).

DSRSD contends that it cannot implement this IEP because the district does not have any substantially-separate classrooms. It therefore asserts that Adam should be reintegrated into the BPS district. Potential placements previously discussed (at the March 23, 2009 meeting) include the Edison School in Brighton, MA (S-8).

PARENT’S PROPOSED PROGRAM

Parent proposes that Adam remain as DSRMS with the special education supports that he received under his last accepted IEP (1/25/08-1/23/09) until a new IEP can be written and agreed upon. Adam should remain in the general education classes, but also receive some small-group academic support, regular access to the guidance counselor, and opportunities to work on social pragmatics, either within school or at an after-school program (testimony, Parent; Eckart).

FINDINGS AND CONCLUSIONS

It is undisputed by the parties and confirmed by the evidence presented that Adam is a student with special education needs as defined under state and federal statutes and regulations. The fundamental issues in dispute are listed under **ISSUES IN DISPUTE**, above.

Based upon the oral testimony and written documentation introduced into evidence and a review of the applicable law, I conclude that:

- 1) DSRSD' proposed 12/18/08 – 6/26/09 IEP, requiring a substantially-separate special education placement, is inappropriate to address Adam's special education needs in the least restrictive environment;
- 2) Adam should return to a DSRMS general education classroom for the 2009-2010 school year with appropriate accommodations and services.

My analysis follows.

Pursuant to Schaffer v. Weast, 126 S. Ct. 528 (2005), the United States Supreme Court has placed the burden of proof in special education administrative hearings upon the party seeking relief. Therefore, in the instant case, DSRSD bears the burden of proof in demonstrating that the proposed 12/18/08 – 6/26/09 IEP is appropriate to address Adam's special education needs so as to provide him with FAPE in the least restrictive environment. The major disputed feature of the 12/18/08-6/26/09 IEP is that it calls for a substantially-separate classroom placement. IDEA allows

removal of children with disabilities from the regular educational environment... only when the nature or severity is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.³

Therefore, DSRSD must prove that Adam cannot make educational progress in a regular education classroom in order to prevail. DSRSD has failed to meet that burden.

Adam's 1/25/08 – 1/23/09 IEP, the last IEP accepted by Parent, provided him with the following services: a special education aide in all his general education academic classes; a daily academic support class; occupational therapy; and a once-per-week special education consult (S-10). Adam was academically successful with these services in place (see **STUDENT PROFILE**), and up until September 25, 2008, DSRMS was satisfied that the specified services adequately addressed any behavioral and social needs as well. It is true that Adam had a documented history of disciplinary infractions, and even some suspensions, since October 2007 (S-12). However, none of these incidents provoked MFD meetings, IAES placements, continuous adult supervision during all unstructured time, or any kind of re-evaluation of Adam's needs. There was an amendment to the 1/25/08 – 1/23/09 IEP on April 3, 2008, but the amendment only called for extra time on assessments (S-11). By April 3, Adam had had four behavioral incidents that school year, including three days of suspension (S-12). If DSRSD believed that they "didn't have a good handle" on Adam's needs (see testimony, Travers), the April 3 amendment meeting would have been an excellent opportunity for the Team to add behavioral supports or discuss the need for further evaluation.⁴

³ 20 U.S.C. §1412(a)(5)(A).

⁴ The cognitive evaluation report of January 19, 2007 could also have incited further evaluation, for it recommended "additional examination ... to focus on ruling out a possible learning disability" (S-9). However, it

The only behavioral accommodation written for Adam was tangential and inconsistently applied. Adam's 1/25/08 – 1/23/09 IEP calls for an alternative discipline plan to help Adam make effective progress:

Prior to issuing a consequence for poor behavior, the administration should meet with members of the special education department in order to discuss the violation and come up with appropriate discipline for Adam (S-10).

There is no evidence, however, that such a meeting occurred on September 25, 2008 before Adam was suspended for 8 days (S-13). This decision does not mean to trivialize the seriousness of the incident on September 25, 2008. Adam's actions were extremely inappropriate and merited an immediate disciplinary response. However, the relevancy of the incident to the present dispute stems from the fact that only *after* September 25, 2008 did DSRSD decide that Adam's special education needs merited removal from the general education classroom. That single and unrepeated incident was the catalyst for all of the evaluations, observations, and program changes that have been discussed and disputed during this hearing. DSRSD's failure to adhere to the IEP discipline plan on September 25, 2008 is not germane to this hearing, except that by overlooking the only behavior-related accommodation, the school failed to utilize a process that might have led to a less restrictive result.

Since September 25, 2008, Adam has evinced no noteworthy behavioral problems. Dearborn STEP was aware that Adam had been referred as a result of the September 25th incident (testimony, Rice), but the program's reports show that it did not find Adam to have any behavioral issues. Adam was cooperative and highly motivated by the idea of returning to DSRMS while attending Dearborn STEP (S-3; testimony, Rice). One Dearborn clinician noted that "[Adam's] behavior has been exceptional at STEP...[he] has earned incentive rewards on numerous occasions for doing so well behaviorally" (S-3). The Dearborn program director testified that Adam was a "not a behavior problem...he was lovely and polite, no problems whatsoever" (testimony, Rice). Furthermore, since Adam returned to DSRMS on March 23, 2009, his behavior has been irreproachable. His teachers told Dr. Eckart during her observation that Adam's behavior, as well as his academic work, have improved since the beginning of the year (P-G; testimony, Eckart). Ellen Chagnon testified that Adam "definitely" benefitted from the Dearborn STEP program, in that since his return he has made better eye contact and been more "open" in conversation (testimony, Chagnon). Adam's most recent progress reports also indicate that he is working hard to the satisfaction of his teachers (P-A; P-G).

Special education liaison Kristin Peterson testified that Adam still occasionally acts inappropriately in class, such as refusing to follow directions, putting his head down on his desk, and keeping his hood up during class (testimony, Peterson). Ms. Peterson also wrote an email to Parent describing a class in April when Adam resisted doing his work and crumpled up a worksheet (P-I). However, these minor behavioral concerns should be taken in the context both of Adam's prior history at DSRMS and his special education diagnoses. On ten separate occasions between October 2007 and October 2008, Adam received detentions or suspensions

was nearly two years later, only after the September 25 incident, that DSRSD followed up on this recommendation for additional evaluation, and Dearborn STEP diagnosed Adam with a Nonverbal Learning Disability.

(S-12). He has received no detentions or suspensions since his return to DSRMS on March 23, 2009 through the end of the school year (testimony, Peterson). Furthermore, behaviors such as refusing to follow directions or putting his head down would not usually justify removal from the inclusion classroom. On Adam's May 1, 2009 Progress Report, Ms. Peterson describes him as making "some progress" towards his IEP goals, but she does not specify any areas in which he is failing to progress (P-F, emphasis added).

Both Ms. Peterson and Guidance Counselor Ellen Chagnon expressed concern over Adam's apparent withdrawal and that he does not take advantage of the transition times at school to socialize (testimony, Chagnon; testimony, Peterson). Adam's withdrawal and disinclination to socialize should not be considered negative behavior given his undisputed social pragmatics deficits and the additional social stigma allotted him as a result of his six-month absence from school and constant adult supervision since his return. I find that there has been a marked improvement in Adam's behavior since September, and yet his restrictive and continuous adult supervision has continued unabated, although he has made clear his dislike and desperation to be rid of his "spy" (testimony, Chagnon; P-L).

As a result of Adam's six month period of evaluation outside DSRMS, several proposals for additional accommodations have emerged. Dearborn STEP's evaluations and Dr. Eckart's original evaluation recommend a small, structured classroom for Adam. It is DSRSD's position that Adam needs an out-of-district substantially-separate classroom in order to obtain this small, structured environment. DSRMS points out that there are approximately 18 students in Adam's current general education classes (testimony, Chagnon). However, when explaining the "small, structured classroom" recommendation, Dearborn director Laura Rice did not insist on a particular maximum number of students for Adam's classroom. She rather emphasized teacher-student ratios, preferred seating strategies, schedules written on the board, and other accommodations that could be provided in a general education classroom (testimony, Rice). There are four special education aides who work with the 21 students in Adam's 7th grade class (testimony, Peterson). Ms. Rice also testified that she was surprised by Adam's academic success upon his return to the general classroom at DSRMS, but that it was a testament to Adam's "commitment to stay mainstream" and she was "very excited for him" (testimony, Rice). After her January 29, 2009 evaluation, Dr. Lou Eckart also reported that Adam needed a small, highly structured classroom (S-5). However, during her testimony, Dr. Eckart explained how her more recent observation of Adam in DSRMS caused her to reconsider her original recommendations. Like Ms. Rice, Dr. Eckart did not initially expect him to do well in a general education classroom; however, when she observed him at DSRMS, she was pleased to see how well Adam was doing. Dr. Eckart now believes that her recommendations for Adam can be addressed in the general education setting, and that placing him in a more restrictive setting would be an unwarranted blow to his self-esteem (testimony, Eckart).

Despite the fact that Adam has been participating in classrooms since March 2009 (since, indeed, coming to DSRSD) that are not explicitly designed to be "small and structured," he is succeeding academically. (See **STUDENT PROFILE**) DSRSD does not offer substantially-separate classrooms; it would appear that its regular education classrooms have therefore adapted a more structured and supported environment than is typical. Dr. Eckart particularly commended the small-group English class that she observed. As DSRSD has pointed

out, those small-group classrooms are a general education program, and therefore outside the scope of this Decision. However, the fact that DSRSD provides such prized small-group instruction in its general education setting is relevant to the case at bar. Perhaps largely due to the quality of DSRSD's general education program, Adam has proved that he can progress in a less restrictive environment than originally anticipated. Therefore, in accordance with the least restrictive environment (LRE) mandate of state and federal special education law⁵, I find that Adam should remain in the inclusion classrooms at DSRMS.

Several sources recommended Adam have regular contact with some type of counselor. The proposed IEP includes once-a-week 60 minute session with an adjustment counselor. Dearborn STEP's educational assessment recommended that Adam have "opportunities... to check in with a support person (Guidance Counselor or School Social Worker)" (S-4). Dearborn STEP's director, Laura Rice, also testified that check-ins with a counselor would be beneficial (testimony, Rice). Dr. Lou Eckart's original report called for "emotional supports, such as... individual counseling, built into [Adam's] program," and her classroom observation report recommended "regular support from a school adjustment counselor or psychologist to address his behavioral and emotional needs" (S-5; P-G). Dr. Eckhart also testified at hearing that time with a counselor could fulfill her recommendation of "daily small group" (testimony, Eckart). Given that Adam already sees a psychiatrist/therapist regularly outside of school (testimony, Parent), and sees a trained social worker at school (testimony, Chagnon), the counseling component recommended for Adam could be easily incorporated into an inclusion program. In fact, Adam has already established a trusting relationship with Guidance Counselor Chagnon, whom he willingly goes to see when at DSRMS (testimony, Chagnon).

Several reports also recommended a full speech and language evaluation for Adam (S-5; S-4; testimony, Moran). DSRSD resisted conducting this evaluation, although it is included in the proposed IEP. Pamela Travers testified that it could not be conducted while DSRMS was implementing the 1/25/08 – 1/23/09 IEP, and Audrey Moran testified that it would be more useful for Adam's next placement to conduct the evaluation, since he would presumably not be at DSRMS very long (testimony, Travers; Moran). Since Adam used to receive speech therapy when he was young (testimony, Parent), and an evaluation has not been done recently, this recommendation seems a reasonable component of Adam's future program.

Both parties agree that Adam has social skills/social pragmatic⁶ deficits which need to be addressed (see S-3; S-4; S-5; P-G; testimony, Eckart; testimony, Rice; testimony, Moran; testimony, Chagnon; testimony, Peterson). The question frequently addressed in this hearing has been the nature of Adam's prospective social pragmatics remediation. DSRSD's proposed IEP justifies Adam's removal from the general education classroom entirely on the basis of "[his] difficulties in focusing in class and understanding the unwritten rules of social interactions, [which necessitate] special education support in a small classroom environment" (S-1). Audrey

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

⁶ There was some confusion during the hearing about the terms "social skills group" versus "social pragmatics group" and some sources seem to use the two interchangeably (i.e., "a social skills group that focuses on social pragmatics" (S-3) or "a social and language pragmatics skills group" (S-5)). For simplicity, this decision will use the term social pragmatics, but it should be understood to reflect the same services recommended by the experts.

Moran further explained that Adam could not be serviced in the inclusion classroom because his social pragmatics work needed to be “spiraled throughout the day” (testimony, Moran). DSRSD steadfastly pursued this kind of the social pragmatics program, but it does not appear in the language of Dearborn STEP’s reports. Dearborn STEP’s recommendations called for “a social skills group that focuses on social pragmatics and increasing [Adam’s] self-esteem *either in school or in the community*” (S-3, emphasis added). Similarly, although Laura Rice described Dearborn’s program as integrating social pragmatics and practicing social skills in the moment, she also testified that Adam’s social pragmatics group could be done outside of school, particularly if there was ongoing communication between the school and the outside group, as through a guidance counselor (testimony, Rice). DSRSD’s desire to fully emulate the Dearborn program’s method of teaching social pragmatics is commendable, but not required to benefit Adam. Dearborn STEP’s experts have never claimed social pragmatics *must* be so integrated in order to be effective. Removing Adam to a more restrictive setting is not justified by the aim of integrating social pragmatics training throughout the school day.

DSRSD also argues that it cannot provide Adam with the social pragmatics practice that he needs because there is no similar cohort of peers in the school district. Without a cohort, there would be no group of peers to practice with, and therefore Adam would derive no benefit (testimony, Travers). Dr. Eckart testified that the social pragmatics group does not need to be composed of students with Adam’s diagnosis, and that in fact, the group could be composed of regular education students (testimony, Eckart). DSRSD insists that participation by other students would have to be voluntary, and as such, cannot be guaranteed. The guidance office at DSRMS does offer “friendship groups,” however, where shy or nervous students (presumably volunteers) come to eat lunch together and talk about the day (testimony, Chagnon). DSRSD also rejected the proposal of a “lunch bunch” because it would not offer direct instruction (see DSRSD’s closing arguments). However, Dearborn STEP’s evaluation reports do not recommend direct instruction of social pragmatics, but rather a group that would “reinforce appropriate social norms” (S-3). During her testimony, Laura Rice was specifically asked what type of social pragmatic instruction was recommended. Her answer referred to regular practice, positive reinforcement, and in general, the fact that the more opportunity Adam had to practice his social skills the better – she never mentioned a need for direct instruction (testimony, Rice). There is no valid reason why DSRSD could not attempt to create a “lunch bunch” type program within DSRMS, which Ms. Rice testified would be beneficial (testimony, Rice). Should DSRMS be unable to find volunteer peers, or should that program fail to provide Adam regular social pragmatics practice for any other reasons, DSRSD could contract out for a social pragmatics group that Adam could regularly participate in outside of school.

Related to the question of addressing Adam’s social pragmatics deficits is the one-to-one special education aide (Aide) who has been meeting him at the bus, accompanying him in the hallways between classes, and supervising him during lunchtime since the September 25th incident.⁷ Dearborn STEP’s clinical assessment stated that “[Adam] would benefit from having

⁷ Adam’s last accepted IEP calls for the one-to-one Aide to assist him in the general education academic classrooms. Both parties seem to agree that this is a helpful accommodation for Adam, although Dr. Eckart’s observation noted that the Aide is not always engaged exclusively with Adam (see P-G; testimony, Eckart). It should be understood that when this Decision discusses the necessity of the Aide’s presence, it is referring to her supervision *outside* of the classroom during “unstructured times”.

someone available to him during transitions and unstructured times” (S-3). However, this recommendation was not the stimulus for Adam’s constant adult supervision; the Aide began accompanying Adam during all unstructured times when he briefly returned to DSRMS in October of 2008 (before he entered the STEP program). Furthermore, Ellen Chagnon testified that DSRMS headmaster Mr. Randall, and not the Team, decided that Adam would have an aide with him at all times after his March 23, 2009 re-entry (testimony, Chagnon). There were no educational evaluations responsible for the initial expansion of the Aide’s role, nor are there any evaluation recommendations which justify it now.⁸ Adam and his mother have both provided credible and persuasive evidence to the fact that Adam feels socially inhibited by the Aide’s presence (testimony, Parent; P-L). The Aide herself noted on April 29, 2009 that “[Adam] seems to be backing off socially/ [sic] I suppose perhaps he fears because I am with him what my reactions will be” (P-I). Furthermore, it is simply not reasonable to believe that Adam’s 7th grade peers are unaware that he has a special adult assigned to supervise him, regardless of how many feet she stays behind him in the hallway. Given the fact that all parties agree Adam has difficulties socializing, and that he is already at a disadvantage trying to reconnect with his peers after an unexplained six-month absence, additional impediments to Adam’s peer interactions should be avoided. Regardless of whether the Aide actually prevents Adam from socializing, or whether Adam merely perceives her to be doing so, the result is the same: Adam does not socialize. Importantly, Adam needs opportunities to *practice* his social pragmatics and positive reinforcement of social skills (testimony, Rice). He cannot practice, and therefore progress socially, if he is inhibited from socializing casually with his peers. I therefore conclude that the Aide’s constant supervision during all unstructured times constitutes an overly restrictive environment for Adam.

I also find that any potential benefits of relocating Adam to a substantially-separate classroom in a new school would be largely counteracted by the negative impact on his self-esteem (testimony, Rice; Eckart). When asked about how she felt Adam would react to being moved to a substantially-separate classroom away from DSRMS, the director of Dearborn STEP, herself a clinical social worker, testified,

“I think he would have a hard time understanding the move [because] he’s been so successful... he would feel terrible that he did all this work and proved to people that he could do well by getting good grades and no one listened to him” (testimony, Rice).

DSRSD has placed much weight on Adam’s continuing social difficulty at DSRMS, including his skipping lunch and social isolation, as proof that he needs a different placement. Dr. Eckart, Kristin Peterson, Ellen Chagnon, and Parent also testified to Adam’s reclusion and generally depressed affect since his return to DSRMS. However, Adam has not been silent on the source of his unhappiness. He has repeatedly spoken to his guidance counselor about how sad he is about the “spy” who follows him throughout the day⁹ (testimony, Chagnon). He also reports that the constant presence of the Aide makes

⁸ When questioned about the above-referenced recommendation, Laura Rice said Adam did not need to “necessarily be followed, but to have someone aware” of his actions during unstructured times (testimony, Rice).

⁹ Adam’s comments shared by Ms. Chagnon in her testimony are very clear: “every time I speak with him, that is what he shares as the problem, that he just feels that he’s being followed – that he did make a mistake, but, you know, he feels like he’s being good and he’s doing well in school and he doesn’t understand why he still needs to be

him feel “like a person who got released [sic] from jail” (P-L). Given that Dr. Eckart, Laura Rice, and the Dearborn STEP evaluators all evince concern over Adam’s struggle with his self-esteem (testimony, Eckart; Rice; S-3), I conclude that Adam should have the opportunity to address his social deficits at DSRMS without the restrictive presence of the Aide before risking the emotional impact of transitioning to a new school. I cannot find that Adam’s social deficits constitute a disability “the nature or severity [of which] is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”¹⁰ Therefore, removal to a substantially-separate classroom is neither warranted on the grounds of Adam’s need for a “small, structured” classroom, nor on the grounds of his social pragmatics deficits.

While there may be benefits to DSRSD’s proposed substantially-separate placement, providing FAPE to Adam does not require such a restrictive environment. Therefore, DSRSD’s proposed IEP placement is in violation of the least restrictive environment (LRE) principle of state and federal special education law.¹¹ Additionally, BSEA Hearing Officers are directed to order an educational placement and services that assure FAPE, with “a presumption . . . to direct such placement to the regular educational environment.”¹² Federal courts have made clear that if a proposed placement does not allow for education with mainstream peers to the maximum extent appropriate, the placement may not be offered or provided by the school district.¹³

Lastly, DSRSD argues that state regulations referencing the METCO program imply that the district of residence, and not the program district, is responsible for any special education services needed by the student that are not available in the program district. This argument fails. The regulations regarding METCO state:

When the Team determines that the student may need an out-of-district placement, the Team shall conclude the meeting pursuant to 603 CMR 28.06(2)(e) without identifying a specific placement type, and shall notify the school district where the student resides.¹⁴ (emphasis added)

followed by his assistant, given that he’s been doing well... every time I see him, weekly, he asks me [sic] if that could be gone, if the Aide could be gone” (testimony, Chagnon).

¹⁰ 20 U.S.C. §1412(a)(5)(A).

¹¹ See 20 USC 1400(d)(1)(A); 20 USC 1412(a)(1)(A); 20 USC 1412(a)(5)(A); 34 CFR 300.114(a)(2)(i); MGL c. 71B, ss. 2, 3; 603 CMR 28.06(2)(c).

¹² MGL c. 71B, s.3.

¹³ E.g., *Burlington v. Mass. Department of Education*, 471 US 359, 369 (1985) (federal statute “contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children”); *Rome Sch. Comm. v. Mrs. B.*, 247 F.3d 29, 33 (1st Cir. 2001) (“mainstreaming may not be ignored, even to fulfill substantive educational criteria”), quoting *Roland v. Concord School Committee*, 910 F.2d 983, 992-993 (1st Cir. 1990); *Board of Education of LaGrange School District No. 105 v. Illinois State Board of Education*, 184 F.3d 912, 916 (7th Cir. 1999) (placement proposal, which did not enable the student to share a classroom with typically developing children, did not satisfy mainstreaming requirement because student’s disability and IEP did not prevent him from benefiting educationally in a more inclusive setting).

¹⁴ 603 CMR 28.10(6)(a)

In accordance with this regulation, DSRSD properly invited BPS to the February 2009 Team meeting when they were considering a substantially-separate placement.¹⁵ However, given that a substantially-separate placement has been found unnecessary and overly restrictive, Adam requires additional *services* in his current placement. The above regulation, and all of its subsections, relates to the relationship between program school and resident school only when there is no *placement* for the student within the program school district.¹⁶ METCO does not release DSRSD from programmatic responsibility for providing Adam with accommodation services within his general education inclusion placement.

ORDER

- 1) The substantially-separate classroom placement proposed in DSRSD's 12/18/08 – 6/26/09 IEP is not appropriate for Adam, in that it fails to provide FAPE in the least restrictive environment possible.
- 2) The last accepted IEP is appropriate with the following modifications: a full speech and language evaluation; a social pragmatics 'lunch-bunch' group within school and/or a social pragmatics practice group outside of school; a weekly meeting or check-in with the school guidance counselor; and a special education aide to assist Adam in academic classes only.

By the Hearing Officer

Dated:

Raymond Oliver¹⁷

¹⁵ I note, however, that DSRSD did not invite BPS to the meeting in October 2008 when it was considering an out-of-district IAES placement at Dearborn STEP.

¹⁶ This Decision does not reach to the financial implications should DSRSD choose to contract out-of-district for a social pragmatics group (as opposed to developing an in-district social pragmatics lunch group) because the evidence and arguments at hearing did not address that issue. DSRSD does cite to one SJC decision, *City of Boston v. Mass Bd. Of Educ.*, 392 Mass 788 (1984), which pertains entirely to financial rather than programmatic responsibility, but that case is not on point because it involves a unique situation where the student's services were being erratically paid for by the Commonwealth via METCO itself. It is worth noting, however, that DSRSD has already voluntarily funded out-of-district programming for Adam, i.e. the IAES placement at Dearborn STEP.

¹⁷ The Hearing Officer gratefully acknowledges the invaluable assistance of BSEA legal intern Tami Fay in the preparation of this Decision.