

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

In Re: Fall River Public Schools and Mass. Dept. of Mental Health BSEA # 09-6962

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 July 10, 2009 in Fall River, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student's Mother

John Byrnes	Activities Director at Chauncy Hall Academy
Katherine Lucier-Grattan	Teacher at Chauncy Hall Academy
Jean Smith	Teacher at Chauncy Hall Academy
Margaret Moore	Clinical Director of Chauncy Hall Academy
Krishna Rajadhyaksha	Psychiatrist, Chauncy Hall Academy
Timothy Hurley	School Director, Southeast Alternative School, Berkley
Debra Corcoran	Education Coordinator, Hampshire Education Collaborative
Lorna Ketin	Supervisor, Mass. Dept. of Mental Health
Christine Gibney	Supervisor of Out-of-District Placements, Fall River PS
John Connors	Attorney for Student and Parent
Diane Parent	Attorney for Fall River Public Schools
Kathleen Kugelmann	Attorney for the Mass. Dept. of Mental Health

The official record of the hearing consists of documents submitted by Student's Parent (sometimes also referred to as "Mother") and marked as exhibits P-1 through P-15; documents submitted by the Fall River Public Schools (hereinafter, "Fall River") and marked as exhibits S-1 through S-9; documents submitted by the Massachusetts Department of Mental Health (hereinafter, "DMH") and marked as exhibits DMH-1 through DMH-31 and DMH-A through DMH-S; and approximately one and one-quarter days of recorded oral testimony and argument.

INTRODUCTION

Student is currently placed at a DMH-funded intensive residential treatment program. Parent and DMH take the position that Student is now (and has been since March 2009) ready to be discharged, provided that he can be placed in an appropriate, residential program. Parent and DMH argue that this residential placement is for educational reasons and therefore the responsibility of Fall River.

Fall River takes the position that Student has made sufficient educational progress within his current and most recent placements so that his educational needs can now be met appropriately through a therapeutic day program—specifically, the Bradley Day School in Rhode Island. Fall River does not argue that any continued residential services are necessary at this time.

For the reasons explained below, I have determined that to receive a free appropriate public education, Student requires a residential educational placement so as to make effective educational progress within the least restrictive environment.

PROCEDURAL HISTORY

On May 12, 2009, Parent filed a hearing request with the Bureau of Special Education Appeals (BSEA). On May 27, 2009, Fall River filed a motion to join DMH. On June 23, 2009, this matter was re-assigned to the present Hearing Officer.

On June 23, 2009, a telephonic hearing was held on the joinder motion. Also on that day, a hearing on the merits of the dispute was scheduled for July 9 and 10, 2009 (which was later changed to a single hearing day of July 10th because of conflicts on July 9th and because of the difficulty of scheduling an additional hearing day to replace July 9th). On June 24, 2009, the motion to join DMH was allowed .

A one-day evidentiary hearing on the merits took place on July 10, 2009. By agreement of the parties, oral closing arguments were made telephonically on July 14, 2009, and the record closed on that date. DMH also filed a supplementary written argument on that date.

ISSUES

The issues to be decided in this case are the following:

1. Is the IEP most recently proposed by Fall River reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment?
2. If not, can additions or other modifications be made to the IEP in order to satisfy this standard?
3. If not, would a residential educational placement satisfy this standard?

FACTUAL BACKGROUND

Student is a fifteen-year-old 8th grader who currently resides at Chauncy Hall Academy (hereinafter, Chauncy Hall). Chauncy Hall is a private, DMH-funded Intensive Residential Treatment Program (hereinafter, “IRTP”) located in Westboro, MA. When able to go home on weekends, Student stays with his Mother in Fall River, MA. Student has had no contact with his Father for many years. Student is the only child of his Parents. Mother is extremely invested in Student. Testimony of Parent; exhibits DMH-P.

Fall River's most recently-proposed IEP for Student (for the period 5/4/09 to 5/3/10) calls for Student to be placed at Bradley Day School, which is a separate, day school located in Rhode Island. Services on the IEP are as follows: academic support from a special education teacher each day for 300 minutes; social emotional services from a counselor each day for 60 minutes, three times per week; and transition training from a special education teacher for 60 minutes, twice per week. Exhibit S-1.

Student is artistic, has a sense of humor, likes science, loves animals, and would like to be a chef when he is older. Student enjoys reading, music, playing games, and videos. Testimony of Parent; exhibits S-1, DMH-6, DMH-P.

Student has been diagnosed with Mood Disorder, NOS (Not Otherwise Specified), Anxiety Disorder, Attention Deficit Hyperactivity Disorder, and Oppositional Defiant Behavior. Student also has been given a diagnosis of Bipolar Disorder, but Mother does not believe this diagnosis is appropriate. Student has periods of delusional thinking and extreme paranoia, and may be properly diagnosed as having childhood schizophrenia. Student has a history of witnessing domestic violence and may possibly have experienced significant trauma himself. Student has also been diagnosed with a learning disability that consists of poor processing speed and poor expressive language skills. This learning disability may impede his ability to process events and may result in his reacting impulsively. Student has average cognitive abilities. Testimony of Rajadhyaksha, Moore, Parent; exhibits S-1, DMH-19, DMH-P, DMH-Q, DMH-R.

Since 2001, Student has been receiving services from DMH. These services have included a behavior specialist who has worked with him several times a week in the community, weekend respite at the Walker School, individualized support that has allowed Student to participate in social activities within the community, individualized summer and school vacation supports that have allowed him to go to camp, and a child/adolescent case manager to coordinate services and work with his family. Testimony of Parent; exhibit P-7.

Student has a history of volatile, impulsive, aggressive, and dangerous behaviors both within and outside of school. Student's poor judgment, combined with his impulsive behavior and aggression, render him at high risk for hurting himself and others. Student has often required physical restraints at home and school. He has been both physically and verbally abusive towards his Mother. Due to his age and size (15 years old, 120 pounds, and 5' 1" or 5' 2" tall), Student has become increasingly dangerous at home. Student has difficulty with his activities of daily living, frequently refusing to shower despite prompting. He requires frequent re-direction. Testimony of Rajadhyaksha, Moore, Parent; exhibits DMH-11, DMH-Q, DMH-P.

From an early age, Student has had a history of behavioral and emotional difficulties. Throughout elementary school, Student displayed mood swings, severe tantrumming, obsessional thought patterns, compulsive and ritualistic behaviors, and very poor social skills. There are reports of Student's being terminated from several day care programs. One dismissal occurred because of "uncontrollable behaviors" including physical and emotional aggressiveness towards staff and peers, and exposing himself to children and inappropriate

sexual talk and behaviors. Testimony of Parent; exhibits DMH-3, DMH-4, DMH-5, DMH-9, DMH-Q, DMH-R.

In September 2006, Student was hospitalized at the Franciscan Hospital for Children for one month as a result of his violent and aggressive behavior. On the hospital unit, he continued to have difficulty, including swearing, threatening and being physically defiant, and often needing redirection and individual staff attention. Testimony of Parent; exhibits DMH-5, P-6.

In November 2006, Fall River's school psychologist conducted a psychological evaluation of Student. The evaluation included Wechsler Intelligence and Achievement Tests, Human Figure Drawing, Rorschach Test, Thematic Apperception Test, Clinical Interview, Beck Behavior Rating Scale, and review of records. The evaluator found Student to be a "fragile and complicated pre-adolescent struggling with mental illness." The evaluation report made the following educational recommendation:

Concerning school placement, [Student] requires a highly structured, consistent, predictable learning environment which does not over-stimulate him and provides him with a sense of safety and trust that adults can control him and keep him safe. Only then can [Student's] learning, academic, social, and emotional needs be addressed.

Exhibit DMH-7.

On October 3, 2007, Student's psychiatrist (Alfred Darby, MD) wrote that he has been working with Student for six years and "firmly believe[s]" that his aggressive behavior is "directly related to his mental illness." Dr. Darby is employed at the Corrigan Mental Health Facility, which is a DMH facility located in Fall River, MA. Exhibit DMH-11.

Midway through the fall of 2007, Fall River placed Student at the Southeast Alternative School (SAS) in Berkley, MA, as a day student. The placement was intended to address Student's social, emotional and behavioral needs, as well as his academic needs. Although initially Student did well, as the school year progressed, Student's behavior worsened. Approximately 27 incident reports detail Student's difficulties beginning on November 16, 2007 and continuing into May 2008. Student was suspended from the program seven times. Testimony of Parent, Hurley; exhibits P-2, DMH-S.

While Student was attending SAS, there were a number of serious behavior incidents that resulted in Student's being taken to Corrigan Mental Health Center. For example, on February 26, 2008, Student was brought to the Corrigan Mental Health Center emergency services due to an outburst in school in which he assaulted a teacher. Charges were pressed by the teacher who had a black eye and broken eye glasses. Testimony of Parent, Hurley; exhibit DMH-16.

On May 12, 2008, Student was brought by the police to Corrigan Mental Health Center emergency services due to out-of-control behaviors and assaultiveness towards Mother. While at emergency services, Student continued to assault Mother and destroyed property.

On May 13, 2008, Student was hospitalized at the Westwood Lodge, with a discharge home on May 19, 2008. Again, on June 5, 2008, Student was brought to the Corrigan Mental Health Center emergency services following an aggressive outburst at school. Student was hitting Mother's car with a ping pong paddle and was running in the street. Student required a police intervention and ambulance transfer. Testimony of Parent; exhibits DMH-16, DMH-Q.

On June 19, 2008, Mother wrote to Fall River Public Schools, seeking a residential placement due to her son's "violent and destructive behavior" that was occurring in the home, resulting in police intervention. Testimony of Parent; exhibit DMH-20.

Student was scheduled to attend the SAS summer program, with the addition of 1:1 staffing from Fall River, for the summer of 2008. However, on June 30, 2008 after the end of the academic year at SAS, Student was hospitalized at the Lowell Treatment Center due to severe behavioral problems at home and school, including episodes of aggression towards staff and physically assaulting his Mother, causing her extensive bruising. Student was then discharged from SAS because it seemed unlikely that he would soon be able to return to SAS. In August 2008 Student was transferred from the Lowell Treatment Center to the Boston University Medical Center (hereinafter, "BU") IRTP. Student was determined appropriate for an IRTP placement due to his level of aggression in the community and his lack of readiness for less restrictive residential placement. In December 2008, Student was admitted to the Chauncy Hall IRTP from the BU IRTP when the BU IRTP closed. Testimony of Parent, Hurley, Gibney; exhibits DMH-16, DMH-Q, DMH-P.

From December 2008 through the date of the evidentiary hearing in the instant dispute, Student has continued to reside at Chauncy Hall. Testimony of Parent, Rajadhyaksha, Moore.

LEGAL FRAMEWORK

It is not disputed that Student is an individual with a disability, falling within the purview of the federal Individuals with Disabilities Education Act (hereinafter, "IDEA")¹ and the Massachusetts special education statute.² The 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."³ In addition, FAPE is defined by the IDEA to include state educational standards,⁴ and Massachusetts special education law includes a state FAPE requirement.⁵

¹ 20 USC 1400 *et seq.*

² MGL c. 71B.

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

⁴ 20 USC 1401(9)(b); *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 127 S.Ct. 1994, 2000-2001 (2007) ("education must ... meet the standards of the State educational agency); *Mr. I. v. Maine School Administrative District No. 55*, 480 F.3d 1, 11 (1st Cir. 2007) (state may "calibrate its own educational standards, provided it does not set them below the minimum level prescribed by the [IDEA]"). *See also* MGL s. 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").

⁵ MGL c. 71B, ss. 1, 2, 3.

The United States Supreme Court has explained that under the federal statute, FAPE is intended to require special education services that provide a "basic floor of opportunity" to a disabled student,⁶ allowing the student to access public education.⁷ Access must be meaningful,⁸ but need not maximize a student's educational potential.⁹

Massachusetts and federal educational standards require that the individualized education program (hereinafter, "IEP") be designed to enable the student to make effective progress.¹⁰ Massachusetts standards also provide that the special education services be designed to develop the student's educational potential.¹¹ Fall River's proposed IEP must be custom-

⁶ *Rowley*, 458 U.S. at 201 & n.23 (1982).

⁷ *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").

⁸ *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"); *Lauren P. v. Wissahickon School Dist.*, 2009 WL 382529 (3rd Cir. 2009) (IEP must confer "significant learning" and "meaningful benefit" on student); *N.B. v. Hellgate Elementary School Dist.*, 541 F.3d 1202, 1212-13 (9th Cir. 2008) (under 1997 amendments to the IDEA, a school must provide a student with a "meaningful benefit" which is more than "some educational benefit"); *Frank G. v. Board of Educ. of Hyde Park*, 459 F.3d 356, 364 (2nd Cir. 2006) (IDEA requires a student to be provided with "meaningful access" to education); *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 (3^d Cir. 2004); *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 395 (3^d Cir. 2006), citing *T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3^d Cir. 2000) (phrase "some educational benefit", as utilized by Supreme Court in *Rowley*, requires provision of a "meaningful educational benefit"); *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).

⁹ *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.").

¹⁰ 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); *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 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").

¹¹ 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)

tailored to meet Student's "unique" needs so that he will receive sufficient educational benefit.¹²

The First Circuit has made clear that, as a general rule, the IEP must address all of a student's special education needs, whether they be academic, physical, behavioral, emotional, or social. As the First Circuit has explained:

[An IEP] must target "all of a child's special needs," Burlington, 736 F.2d at 788 (emphasis supplied), whether they be academic, physical, emotional, or social. See Roland M., 910 F.2d at 992 (explaining that "purely academic progress . . . is not the only indic[um] of educational benefit"); Timothy W. v. Rochester, N. H. Sch. Dist., 875 F.2d 954, 970 (1st Cir.) (observing that "education" under the Act is broadly defined), cert. denied, 493 U.S. 983, 110 S.Ct. 519, 107 L.Ed.2d 520 (1989); U.S. Dep't of Educ., Notice of Policy Guidance, 57 Fed. Reg. 49,274 at 49,275 (1992) (stating that an IEP must address "the full range of the child's needs"). . . . In the last analysis, what matters is not whether the district judge makes a series of segregable findings, but whether the judge is cognizant of all the child's special needs and considers the IEP's offerings as a unitary whole, taking those special needs into proper account.¹³

At the same time, special education and related services need not address "problems truly 'distinct' from learning problems."¹⁴ Thus, the need to address Student's social, emotional, and behavior deficits depends on whether these deficits can appropriately be considered separable from the learning process.¹⁵

(Massachusetts Education Reform Act "underscores the Commonwealth's commitment to assist all students to reach their full educational potential").

¹² 20 USC 1400(d)(1)(A) (IDEA enacted "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living"); 20 USC 1401(9), (29) ("free appropriate public education" encompasses "special education and related services," including "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability"); *Honig v. DOE*, 484 U.S. 305, 311 (1988) (FAPE must be tailored "to each child's unique needs"); *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 518 F.3d 18, 23(1st Cir. 2008) (noting the school district's "obligation to devise a custom-tailored IEP").

¹³ *Lenn v. Portland School Committee*, 998 F.2d 1083, 1089-1090 (1st Cir. 1993). See also *See also Mr. I. v. Maine School Administrative District No. 55*, 480 F.3d 1, 12 (1st Cir. 2007) (IDEA entitles eligible students to services that target all of their special needs, whether they be academic, physical, emotional, or social); *Zayas v. Commonwealth of Puerto Rico*, 163 Fed.Appx. 4, 5 (1st Cir. 2005) (student may have the right, under the IDEA, to "receive an education that is tailored to her social, psychological, and educational needs"); 603 CMR 28.02(18) ("Progress effectively in the general education program shall mean to make documented growth in the acquisition of knowledge and skills, including social/emotional development . . .").

¹⁴ *Gonzalez v. P.R. Dep't of Educ.*, 254 F.3d 350, 352 (1st Cir. 2001).

¹⁵ 20 U.S.C. 1414(d)(3)(B)(i) ("The IEP Team shall . . . in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior"); *Indep. Sch. Dist. No. 284, Wayzata Area School v. AC*, 258 F.3d 769 (8th Cir. 2001) (student's behavior problems are not separable from the student's learning process, and behavioral and emotional problems must be addressed through residential services if the student is to succeed academically); *Rome Sch. Comm. v. Mrs. B.*, 247 F.3d 29, 33 n.3 (1st Cir.2001) (noting that, in determining adequacy of IEP for emotionally disturbed boy, "[t]he question is whether [his] behavioral disturbances interfered with the child's ability to learn"); *Board of Education of Montgomery County v. Brett Y.*, 155 F.3d 557 (4th Cir. 1998) ("residential placement that is necessary for 'medical, social, or emotional problems that are segregable from the learning process' need not be

Under both federal and Massachusetts law, FAPE must be provided in the least restrictive environment. 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.¹⁶ A residential placement is properly considered more restrictive than a day program, even when the day program (for example, at the Bradley School) places Student in a substantially separate special education program.¹⁷

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 Fall River is required to provide Student with a more restrictive, residential placement, is whether the educational benefits to which Student is entitled can only be provided through around-the-clock special education and related services, thus necessitating placement in an educational residential facility.¹⁸

Parent has the burden of persuasion that residential educational services are required in order for Student to receive FAPE.¹⁹

DISCUSSION

It is not disputed that Student has serious social, emotional, and behavioral deficits and that these deficits impact negatively upon his learning. Fall River’s most recent IEP references the need to address these deficits as part of Student’s special education. In order to address these concerns, Fall River has recommended placement within a substantially-separate, therapeutic day school (the Bradley School). Fall River has chosen this day placement, as compared to the day placement which Student most recently attended (SAS), because of the Bradley School’s greater emphasis on clinical and therapeutic aspects of programming, which are deemed important to address Student’s social, emotional, and behavioral deficits. Testimony of Gibney; exhibit S-1.

As discussed in the Factual Background section of this Decision, Student’s social, emotional, and behavioral deficits have resulted in multiple hospitalizations, causing him to miss educational opportunities. Even while in a DMH-funded intensive residential treatment program, these emotional and behavioral deficits have resulted in his being removed to the

funded by the local education agency.”); *Mrs. B. v. Milford Board of Education*, 103 F.3d 1114, 1122 (2nd Cir. 1997) (“fact that a residential placement may be required to alter a child's regressive behavior at home as well as within the classroom, or is required due primarily to emotional problems, does not relieve the state of its obligation to pay for the program under federal law so long as it is necessary to insure that the child can be properly educated”).

¹⁶ 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).

¹⁷ *Walczak v. Florida Union Free School Dist.*, 142 F.3d 119 (2nd Cir. 1998).

¹⁸ *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).

¹⁹ *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”).

residential portion of the program, again resulting in missed educational opportunities. Testimony of Parent, Moore.

For these reasons, I find that Student's social, emotional, and behavioral deficits are not separate and distinct from his learning needs, and in fact are his most substantial educational needs. Addressing these deficits appropriately is essential to Student's making educational progress.

As discussed above within the Factual Background section of this Decision, since August 2008 Student has been residing and attending school at a DMH-funded IRTP due to his level of aggression in the community and his lack of readiness for a less restrictive residential placement. Initially, Student was placed at the BU IRTP, and in December 2008, Student was transferred to the Chauncy Hall IRTP when the BU IRTP lost its funding and closed. Since then, Student has remained at Chauncy Hall. Testimony of Parent, Moore, Rajadhyaksha; exhibit DMH-P.

Student has made progress while at Chauncy Hall as reported by Chauncy Hall staff during a May 4, 2009 IEP Team meeting, and as reflected in (1) testimony from Chauncy Hall staff during the hearing in the instant dispute, (2) written progress reports prepared by Chauncy Hall staff, and (3) daily notes of Chauncy Hall staff. This progress is evidenced by Student's not requiring physical intervention from staff since March 2009, a significant reduction in tantrumming during this time period, and not being late for school since January 29, 2009. Student's progress generally includes improvement in his coping skills, becoming better at taking cues from staff, becoming more aware of his emotional triggers, becoming more adept at verbalizing his concerns, interacting with others in a more positive manner, and academic progress in the classroom. In sum, it is not disputed that, overall, Student has demonstrated improvement in his ability to manage his anger and anxiety safely and appropriately within the IRTP. Testimony of Smith, Lucier-Grattan, Rajadhyaksha, Moore, Parent; exhibits S-2, DHH-27, DMH-28, DMH-K.

Mother also testified as to her son's progress. She explained that she has observed that her son has improved while at Chauncy Hall—for example, he is not so quick to become angry, has greater tolerance in general, and has learned to verbalize to a greater extent how he is feeling or why he is doing something. Testimony of Parent.

Mother has also noted progress during home visits. Over the course of his stay at Chauncy Hall, Student has begun coming home on weekends, starting for the first time on Christmas 2008. Student started coming home for one night and this has now increased to two-night weekends at home. Over the July 4th weekend, Student spent four days at home. Testimony of Parent; exhibits S-2, DMH-27, DMH-28.

These visits have also posed significant challenges for Mother. While at home, Student requires continual attention from Mother, and he benefits from a substantial amount of structure. Student also has difficulty following Mother's directions and instructions. When her son refuses to do something, Parent is not able to force her son to do it—for example, to go to school—because her son now weighs 120 pounds and is 5' 1" or 5' 2" tall. On the weekend of March 13, 2009 during a home visit, Student threatened to destroy property, he

threw items, and he became physically aggressive towards Mother. However, Mother was able to contain him during this March incident, and this incident was the last time that he has been physically aggressive with Mother. Testimony of Parent; exhibits S-2, DMH-27, DMH-28.

Fall River takes the position that Student's improvements at Chauncy Hall and on home visits, as summarized above, indicate that his educational needs can now be appropriately met through a therapeutic day school placement alone, rather than through a residential educational placement.²⁰ Also, Fall River appropriately points out the significant, general disadvantages for any student of a residential placement and the significant, general advantages for any student of living at home and going to school during the day—for example, the presence of typical students after school and in the community who can serve as role models and the many educational advantages of living at home, and the disadvantages of being cut off from all of this while living in a residential school. On the basis of this evidence and argument, Fall River takes the position that Student can now be educated appropriately in its proposed placement at the Bradley School. Testimony of Gibney; exhibit S-1.

As noted, Student's gains and achievements while at Chauncy Hall were reported by Chauncy Hall staff and Parent through oral and written reports and testimony in the instant hearing. Yet, it is the unanimous opinion of the Chauncy Hall treatment team (as well as Parent) that these gains, although demonstrable and important, do not now support placement in a day program alone. Rather, it is the unanimous opinion of the Chauncy Hall treatment team and Parent that Student not be discharged from Chauncy Hall until he can be placed in a residential educational placement where the school and residential components are integrated into a single program. They strongly believe that Student cannot be appropriately, safely, or effectively educated in a therapeutic day school alone. Testimony of Rajadhyaksha, Moore.

There is substantial and compelling evidence of Student's current inability to make effective progress outside of a residential environment. The Chauncy Hall written reports of progress relied upon by Fall River not only reflect progress, as discussed above. These reports also include many references to Student's continuing emotional and behavioral difficulties, even within the structure of a locked, intensive treatment program. The most recent of these reports (March 19, 2009 and April 19, 2009) noted that Student has continued to struggle at Chauncy Hall. For example, as of the March 19, 2009 progress report, he "still struggles with recognizing his anger building and with expressing it appropriately" and continues to have episodes of throwing things. The variability of his progress was also noted. For example, he has been able to "manage his emotions and work collaboratively with some of his staff on some occasions." Also, the reports noted that learning appropriate boundaries with others (which is considered by Chauncy Hall staff to be an "essential skill" for Student) has not occurred as Student has continued to have frequent boundary violations—for example, purposely bumping into people. The most recent report (April 19, 2009) explained

²⁰ Other than the above-referenced oral and written reports from Chauncy Hall staff, the testimony of Chauncy Hall staff in the instant dispute, and Parent's testimony, Fall River has no other source of information regarding Student's current needs. Fall River's most recent evaluation or observation of Student was in 2006.

a continuing concern that Student's "negative emotions such as anxiety and anger have the potential to intensify and prompt [Student] to act out in an unsafe way." This report stated that although Student has improved his ability to express his emotions safely, he "still struggles with recognizing his anger building and with expressing it appropriately." Exhibits S-2, DMH-27, DMH-28.

The most comprehensive and persuasive evidence regarding Student's current strengths and needs came from the expert testimony of Student's treating psychiatrist at Chauncy Hall (Krishna Rajadhyaksha, MD) and the Chauncy Hall clinical director (Margaret Moore, LICSW). Together, they have a thorough and current knowledge of Student and his emotional and behavioral needs; they are both highly experienced clinicians; and they each provided credible, expert testimony. Their testimony explained, in detail, the reasons that, in order to continue to make effective educational progress, Student requires a residential educational placement. In a letter dated June 18, 2009 and addressed "To whom it may concern," Ms. Moore provided further explanation regarding her opinions and recommendations for Student. Exhibit DMH-29. All of this evidence provided compelling expert opinion that a residential educational placement is needed for Student in order for him to receive FAPE. Because Fall River did not effectively oppose or contradict the expert testimony of Dr. Rajadhyaksha and Ms. Moore, their testimony was essentially un rebutted (see further discussion of this point near the end of this part of the Decision).

I make the following findings, based upon the expert testimony of Dr. Rajadhyaksha and Ms. Moore, and the letter from Ms. Moore.

Student continues to be an extremely anxious person who has substantial difficulty trusting others. Because of his emotional and behavioral deficits, he also has substantial difficulty with transitions within the day (for example, at the end of the school day) as well as with larger, life transitions, and he requires consistency (including staff consistency) throughout the day and evening in order to make progress. As a result of his extreme anxiety, his difficulties with trust, and his need for consistency, Student has required while at Chauncy Hall (and he continues to require) a sense of safety, trust, stability, structure, and dependability at all times of the day. This is available only in a residential program. Testimony of Rajadhyaksha, Moore; exhibit DMH-29.

At times, Student demonstrates high levels of shame and guilt. Shame and guilt can occur, for example, if Student does not complete his homework correctly in the evening or if he does not respond correctly in class. Student has a very difficult time letting go of guilt and shame once it occurs, with the result that he often carries the guilt and shame with him for a significant period of time. The guilt and shame typically lead to high levels of anxiety and physical restlessness. Implications of this anxiety and restlessness are that he may not sleep well at night, he may miss class time because he has missed sleep, and either he may refuse to attend class because he is upset or he may become so upset that he must be removed from the classroom. Chauncy Hall staff have found that when guilt or shame, followed by anxiety and physical restlessness, occur during the classroom, it is insufficient simply to remove Student to a time-out room at school since this continues to fuel Student's sense of shame. Rather, he requires that the residential milieu staff come to the school and bring him back to the residence where he is then able to calm down without continued the anxiety from being

seen by his peers at school. This is one example of the continuing importance of having the resources of a residential program available to Student on an around-the-clock basis, including during the evening hours to help with academics and during the day to remove Student from class when necessary. Testimony of Rajadhyaksha, Moore; exhibit DMH-29.

It is only because of the consistent, 24-hour therapeutic staffing at Chauncy Hall (where the school and residential components are integrated with each other) that Student has made progress to date. Student requires more time within an integrated residential setting in order to internalize the coping skills that he is learning; otherwise, he is likely to “fall back on ineffective ways of dealing with his frustration and become physically aggressive.” Without continuing the level of consistency, structure, and support of an integrated residential program, it is likely that Student would almost immediately decompensate. This decompensation would likely continue for a period of months and would likely substantially and negatively impact his ability to make further progress in his behavior, and this would likely impact negatively on any his progress. In sum, notwithstanding Student’s progress at Chauncy Hall to date, he continues to require a residential educational program in order to make further emotional, behavioral, and academic progress. Testimony of Rajadhyaksha, Moore, Smith, Lucier-Grattan; exhibit DMH-29.

What Student no longer needs is the level of care of an IRTP, and this has been true since March 2009. The BU and Chauncy Hall IRTPs are locked units. The admission criteria include meeting the Massachusetts statutory standards for civil commitment—essentially, that one is dangerous to self or others as a result of mental illness. Throughout Student’s admission to the IRTPs, the principal objective of the treatment program was to reduce Student’s aggressiveness so that he could be appropriately maintained within a less treatment-intensive setting. This objective was attained as of March 2009, making Chauncy Hall an inappropriate program for Student as of that date. However, Student’s progress has not been sufficient to allow Student to be discharged now to home and a therapeutic day program. Testimony of Moore, Rajadhyaksha; exhibit DMH-29.

Fall River’s Supervisor of Out-of-District Placements (Christine Gibney) was the only witness who opined that Student does not require residential services. Ms. Gibney testified credibly, and she has significant experience working, in an administrative capacity, to address the needs of Fall River special education students who may require an out-of-district placement. She also has previous experience as a special education classroom teacher within the Fall River Public Schools. Ms. Gibney, herself, does not have the expertise to rebut the credible and persuasive expert opinions of Dr. Rajadhyaksha and Ms. Moore, and she has had no significant contact with Student. Accordingly, Ms. Gibney sought out and relied on the advice of Fall River school psychologist Jamie Sunderland who had previously evaluated Student. However, Ms. Sunderland has not evaluated or observed Student since 2006, and Ms. Sunderland did not testify. Testimony of Gibney; exhibit DMH-7.²¹ I also note that there is no written report or evaluation that concludes that currently Student may be appropriately placed in a day, rather than residential, educational program. For these

²¹ Compare, e.g., *In Re: Worcester Public Schools*, BSEA # 09-3109, 15 MSER 40 (SEA MA 2009) (credible testimony from the school district’s expert witness, a clinical psychologist, was persuasive that the student could be safely and appropriately educated within the community with sufficient support in the home).

reasons, I find that Fall River did not provide any expert testimony or report to effectively rebut the credible, expert opinions of Dr. Rajadhyaksha and Ms. Moore, as summarized above.

In sum, Student is currently in a locked, DMH-funded intensive residential treatment program that focuses extensively on his emotional and behavioral needs. It is within this highly structured treatment facility that Student has made progress. For Student, a less restrictive and less treatment-intensive placement would be a residential school. The Chauncy Hall clinical team, who have been working with Student since his admission in December 2008, were unanimous that in order that Student continue to make emotional, behavioral, and academic progress, in order to continue building on the successes to date, and in order to avoid a substantial emotional crisis that would preclude further progress for months, it is necessary that Student be placed in an integrated residential educational program, rather than a day school, at this juncture. The Chauncy Hall and DMH staff have felt sufficiently strongly about this recommendation that they have continued to serve Student in an IRTP and have declined to discharge Student to date because Fall River has not made a residential educational placement available to Student. Testimony of Rajadhyaksha, Moore, Parent.

For these reasons, I conclude that in order to appropriately address his social, emotional, and behavioral needs, Student requires around-the-clock educational services. Accordingly, Fall River must place Student, as quickly as possible, into a residential educational placement.

ORDER

Fall River's most recently-proposed IEP is not reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment. Any additions (or other modifications) of services to the current IEP are not sufficient to satisfy this standard.

In order to receive the special education and related services to which Student is entitled, Fall River shall place Student, as quickly as possible, into a residential educational placement. Fall River's IEP shall be amended to reflect such a placement.

By the Hearing Officer,

William Crane
Dated: July 17, 2009

**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.