

COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS

In re: Rob¹

BSEA# 09-7579

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 July 9, 2009 at the Bureau of Special Education Appeals in Malden, MA. The record closed on July 9, 2009, after oral closing argument.

Those in attendance were:

Maureen McCarthy	Administrator of Special Education, Revere Public Schools
Jane Lewis (via speakerphone)	Director of Education, The Italian Home for Children
Mary Ellen Sowyrda	Attorney for Revere Public Schools
Tami Fay	Legal Intern, Bureau of Special Education Appeals
Raymond Oliver	Hearing Officer, Bureau of Special Education Appeals

The evidence consisted of Revere Public Schools' Exhibits labeled S-1 through S-9, and approximately 1.5 hours of oral testimony.

PROCEDURAL BACKGROUND

Revere Public Schools (RPS) filed a hearing request with the BSEA on June 3, 2009. Parent did not file a response. The pre-hearing conference call (PHCC) between parties and the Hearing Officer was scheduled for June 17, 2009, and notice was sent out. When the Hearing Officer initiated the PHCC on June 17, Parent said she was in a supermarket and it was an inappropriate time to speak. The conference call was therefore rescheduled for the next day. When the Hearing Officer called on June 18, 2009, Parent did not answer. The Hearing Officer then rescheduled the conference call for June 23, 2009, and again sent notice to both parties. On June 23, the Parent was again not present for the conference call, and the Hearing Officer decided to proceed to hearing on July 9, 2009 at the behest of RPS.² Notice of the hearing date was again issued. On July 9, 2009, Parent did not appear at the Bureau of Special Education Appeals in Malden. The

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

² RPS' attorney participated in all conference calls.

Hearing Officer called Parent³, and Parent answered the phone but said again that the time was inappropriate and she hung up the phone. The Hearing Officer called back immediately; Parent did not answer; the Hearing Officer therefore left a message informing Parent that the hearing would proceed without her.

Accordingly, Parent was not present during this hearing and RPS presented its evidence unopposed.

HISTORY/STATEMENT OF THE CASE

Rob is a twelve year old boy who lives with his mother in Revere, MA. Rob has been diagnosed with ADHD and his cognitive abilities are generally in the low-average range (See S-1, S-4). A clinical report of April 1, 2009 also diagnosed Rob with Mood Disorder NOS, Attention Deficit Disorder, and parent-child relational problems (S-3).

Rob began his 5th grade year (2008-2009) at the Garfield School in RPS. During October of 2008, he underwent a Cognitive and Educational Evaluation, Special Education Eligibility Reevaluation, a Speech and Language Evaluation, and an Occupational Therapy Evaluation from RPS. Rob was found to continue to be eligible for special education, specifically resource room services, speech, and occupational therapy consult (S-5). Transportation was a problem for Rob, and so he transferred in the middle of the academic year to the Paul Revere School, which was in his neighborhood.

Rob entered the Paul Revere School on January 26, 2009. Teachers quickly became concerned that Rob would need additional academic support, and so a Team meeting was called to amend his IEP on February 6, 2009. Despite additional academic accommodations, Rob became frustrated easily and would lash out, both verbally and physically, at staff and fellow students (S-8). There were also several incidents on the school bus during February 2009 (S-8).

On February 13, 2009, Rob had a series of behavioral problems throughout the day, including walking out of class, pushing through students at lunch, drawing violent pictures of weapons, and threatening to hurt fellow students (S-8). An immediate school psychological assessment determined that Rob needed to go to acute psychiatric services at Massachusetts General Hospital, and a non-parental family member was contacted to assist (S-8). Soon after this hospitalization, Paul Revere School went on February vacation, and RPS was not directly informed where Rob would be placed pending hospital discharge. (testimony, McCarthy). On February 24, 2009, an administrative assistant at the Paul Revere School got in touch with Rob's aunt for a routine absentee check, and the aunt told her that Rob was at the Boston Center Community Based Acute Treatment program at the Italian Home for Children (IHC-CBAT) (S-8; testimony, McCarthy). This was the first RPS knew of Rob's re-admittance to IHC⁴ (testimony, McCarthy).

³ Calls to Parent on the day of the Hearing were made via speaker-phone with RPS counsel present.

⁴ This was not Rob's first admittance to IHC. He had been to the program multiple times prior to initially entering Paul Revere School (See S-2; S-3; testimony, Parent).

IHC-CBAT issued a clinical update on April 1, 2009, the date of Rob's discharge (See S-3). RPS held a re-entry meeting on April 2, 2009 to draft a new IEP for Rob and discuss the possibility of placement at a therapeutic day school (S-8; testimony, McCarthy). The new 4/2/09 – 10/28/09 IEP provided for Rob to receive all of his academic instruction in a substantially separate classroom. The new IEP also provided for one 30 minute session of occupational therapy per month and two 30 minutes sessions of speech/language therapy per week (S-1). RPS expected that the 4/2/09- 10/28/09 IEP for Paul Revere School was only an interim placement (testimony, McCarthy). Parent accepted the substantially separate placement decision, but she rejected the portion of the IEP calling for regular transportation services (S-1).

Rob returned to the Paul Revere School on April 6, 2009. He worked in the substantially separate classroom with relatively little incident for approximately one week (S-8). On April 13, 2009, Rob's behavior broke down; he refused to transition between classes; he called other children derogatory names; he knocked over furniture. Eventually, Rob began kicking walls and punching doors, swearing at staff, and trying to force his way into a classroom. This escalated to what the school considered an emergency situation: several school staff, including school nurse and the school police officer, were called in to attempt to calm Rob down. Rob was taken from school to MGH in an ambulance (S-8). Rob did not return to Paul Revere School. In the short-term, he was discharged back to the IHC-CBAT program (S-8; S-2).

On April 17, 2009 the RPS Team convened to discuss future placement. RPS gave Parent information on various daytime, therapeutic placement options and provided her with the school form for an out-of-district referral (testimony, McCarthy). Parent wished to have more time to review the information before making a decision, and RPS agreed to provide tutoring at home in the meantime. RPS has not heard back from Parent since the April 17 meeting, nor has Parent sent or given permission to send out packets to the placement programs (testimony, McCarthy). RPS sent sanitized records to the therapeutic day program at IHC on approximately June 22, 2009 (testimony, Lewis). Jane Lewis, Director of Education at IHC, testified that Rob's profile is a good match for this program and that he would "definitely" be compatible with the other students (testimony, Lewis). If Rob's 4/2/09 – 10/28/09 IEP were amended to incorporate the extended day and summer program aspects of IHC, he could be placed immediately. The Italian Home, RPS, and Parent would then create a new IEP around mid-October (testimony, Lewis). Rob has also been accepted at the SEEM Collaborative and the Lighthouse School, which could also provide therapeutic day programming (testimony, McCarthy).

ISSUES IN DISPUTE

- 1) Does the placement offered by RPS in the 4/2/09- 10/28/09 IEP for Rob, accepted by Parent on 4/2/09, adequately provide Rob with a free and appropriate education in the least restrictive environment?

- 2) If not, would a therapeutic day placement, such as the one at IHC, be an appropriate placement for Rob?

STATEMENT OF POSITIONS

RPS' position is that the school district cannot provide an appropriate placement for Rob, and that his needs would be best served by a therapeutic, private day placement. The 4/2/09- 10/28/09 IEP was only meant to be temporary, and as Rob required hospitalization after little more than a week in the substantially separate classroom, that placement is clearly not appropriate. Rob requires clinical care, focusing on resolving his emotional and behavioral issues, in order to be safe enough to make meaningful educational progress.

Parent's position is unknown. Parent did not file a response to RPS' hearing request; Parent did not submit any documents; Parent did not appear at hearing.

PROFILE OF STUDENT

Rob has degenerative eye disease; he is blind in his left eye, and he is legally blind without the corrective lenses he wears for his right eye (S-1, S-3). Rob has also lately reported headaches and burning sensations in his eyes (S-1). The clinical report of April 1, 2009 from the Italian Home diagnosed Rob with Mood Disorder NOS, Attention Deficit Disorder, and parent-child relational problems.

On October 10 and 16, 2008 Karen English conducted a cognitive and educational evaluation of Rob on behalf of RPS.⁵ This and all following testing took place while Rob was at RPS' Garfield School. Rob's scores on the Woodcock-Johnson III Test of Cognitive Abilities (WJ III) indicate that his intellectual abilities are in the very low range (S-4). Ms. English further found that:

When compared to others at his age level, [Rob]'s performance is low average in visual-spatial thinking and auditory processing; low in fluid reasoning, processing speed, and short-term memory; and very low in comprehension-knowledge and long-term retrieval.

Ms. English also found no discrepancies between Rob's overall intellectual ability and his measured reading, mathematics, and written language achievement. She concluded that Rob was eligible for special education services. Ms. English also conducted Rob's special education eligibility/initial and reevaluation determination on October 28, 2008 (S-5). This determination form also supports the cognitive findings of the WJ III, as it lists Rob's scores on the Weschler Intelligence Scale for Children (WISC-IV) as follows:

⁵ Ms. English is also the contact person on Rob's special education eligibility/initial and reevaluation determination (S-5).

Subject Area	Standard Score
Verbal Comprehension Index	77
Perceptual Reasoning Index	84
Working Memory Index	65
Processing Speed Index	70
Full Scale IQ	70

Rob was administered an occupational therapy evaluation by Kimberly Hudd on October 1, 15, and 22, 2008. The evaluator found that Rob’s fine motor skills were below average; his visual motor integration was average; his visual perception was low; and his motor coordination was low, but this does not seem to compromise his writing and visual motor activities too much if he is given extra time (S-7).

Rob was also evaluated by RPS speech-language pathologist Shammi Gohel on October 1 and 7, 2008. The examiner found that Rob “demonstrates overall expressive and receptive language skills that fall in the below average range” (S-6). She recommended direct speech and language therapy (S-6).

IHC-CBAT performed a clinical update of Rob on April 1, 2009 (See S-3), prior to his discharge from the program and reentry into the Paul Revere School. IHC-CBAT noted that Rob had trouble misinterpreting his environment and that he became particularly defiant and defensive when talking about his family relationships. While at IHC-CBAT, Rob worked on coping strategies and participated in an anger management group, but the clinician noted that Rob “struggled with ignoring situations and or environments that might trigger him” (S-3). The report also notes that Rob had to be physically restrained seven times while at the IHC-CBAT. When he left IHC-CBAT, Rob’s medications consisted of Risperdal, Concerta, and Clonidine. In addition to recommending mentoring, psychopharmacology follow-ups, outpatient therapy, and family therapy, the IHC-CBAT clinician concluded as follows:

The Italian Home treatment team recommends a therapeutic school placement for [Rob] where his mental health, behavioral, and educational needs can be met. A small, structured school setting that has onsite counseling services [sic]. The school placement should keep [Rob] safe and offer various outlets for [Rob] to cope with his struggles (S-3).

SCHOOL’S PROPOSED PROGRAM

RPS would like to place Rob in a therapeutic day school. Based on the district’s previous experience with IHC and students matching Rob’s profile, as well as Rob’s previous treatments in IHC-CBAT, RPS believes that IHC’s therapeutic day school program would be an appropriate placement (testimony, McCarthy; testimony, Lewis).

IHC is a licensed and accredited special education facility focusing on children with emotional disturbances between the ages of 4 and 13. It offers a full range of educational and clinical services (S-9). IHC enrolls approximately 100 day students on its

Jamaica Plains campus and approximately 20 residential students at its location in East Freetown, MA (S-9). The IHC-CBAT program where Rob was treated previously is, by contrast, a step-down program from Massachusetts General Hospital, which Ms. Lewis describes as much more of a “hospital setting” (testimony, Lewis).

The director of education at IHC, a clinician, and a curriculum coordinator have reviewed and discussed Rob’s sanitized records, and they feel that Rob’s diagnosis and behaviors align with IHC’s services and population (testimony, Lewis). Rob’s classes at IHC would be in classrooms with ten students or less, a certified special education teacher, a child care worker, and a teaching assistant. Speech and language, occupational therapy, and resource room services are all available. Clinical services are available on site, as well as weekly therapy and family outreach therapy (testimony, Lewis). Ms. Lewis testified that Rob’s aggressive behavior would not be a safety concern because the entire staff is trained in crisis intervention. IHC also has a “safe room” and individual behavior plans for each student (testimony, Lewis). Rob would have the opportunity to work on social skills in IHC’s afterschool club program, as well as community groups within the classroom (testimony, Lewis).

PARENT’S PROPOSED PROGRAM

Parent’s proposed program is currently unknown. Parent has said that Rob is in Santo Domingo, but she has not formally withdrawn him from RPS, and it is uncertain what placement she prefers for the 2009-2010 school year.

FINDINGS AND CONCLUSIONS

It is undisputed by the parties and confirmed by the evidence presented that Rob is a student with special education needs as defined under state and federal statutes and regulations. The evidence is also clear regarding the nature, extent, and manifestations of Rob’s special education needs. 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) The substantially separate classroom proposed and accepted in RPS’ 4/2/09-10/28/09 IEP is inappropriate to address Rob’s special education needs so as to provide him with FAPE in the least restrictive education environment;
- 2) RPS’ proposed program at a therapeutic day school, such as the program at IHC, is an appropriate placement to address Rob’s needs and provide him with FAPE in the least restrictive education environment.

My brief 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, RPS bears the burden of proof in demonstrating that the 4/2/09-10/28/09 IEP is inadequate to address Rob's special education needs so as to provide him with FAPE in the least restrictive environment. RPS has met that burden.

First, based upon the evidence presented, Rob has a very complex special education profile. He has physical impairments (severe vision problems), emotional/behavioral problems (Mood Disorder NOS), and below average cognitive ability. (See **STUDENT PROFILE**). Progress for Rob must therefore be considered in a variety of contexts. Rob needs an educational placement which not only supports him academically but helps him to succeed in controlling his frustration and emotional issues.

Second, the evidence demonstrates that Rob has not made progress with the support available to him at the Paul Revere School. Rob attended the Paul Revere School for less than a month before his first behavioral meltdown on February 13, 2009. He did not return to RPS again until April 6, 2009. Even with the increased support of a new IEP with a substantially separate classroom placement, Rob went to school for only a week before he once again broke down and required an emergency hospitalization (S-8). Since that time, Rob has received home tutoring (S-2).

In so much as Rob has not been able to remain physically at Paul Revere School for extended periods of time, the substantially separate classroom has demonstrably failed to provide FAPE. His extended absences from school have undoubtedly impeded Rob's ability to progress academically and socially. As a student with recognized low cognitive abilities, compounded by emotional and behavioral disabilities, Rob is in need of a continuous and consistent special educational setting. It is unlikely that Rob will be able to progress so long as his emotional-behavioral issues prevent him from being able to function in the school environment. Therefore, Rob is in immediate need of a program which focuses on resolving and controlling those issues, even though such a program constitutes a more restrictive environment. RPS is not able to provide such a program, nor is the school district confident that it can ensure the safety of its staff, students, and Rob himself during Rob's outbursts (testimony, McCarthy).

IHC can provide the emotionally and behaviorally-focused classroom that Rob needs. (See **SCHOOL'S PROPOSED PROGRAM**.) At IHC, Rob can safely work through the emotional and behavioral issues that have impeded his learning thus far. The IHC therapeutic day program also matches the program recommendations from Rob's most recent clinical update:

The Italian Home treatment team recommends a therapeutic school placement for [Rob] where his mental health, behavioral, and educational needs can be met. A small, structured school setting that has onsite counseling services [sic]. The school placement should keep [Rob] safe and offer various outlets for [Rob] to cope with his struggles. (S-3).

The IHC therapeutic day school offers just such a small, structured setting with accessible and integrated therapy. (See **SCHOOL'S PROPOSED PROGRAM.**) Experts from the IHC day therapeutic program have already reviewed Rob's sanitized records and believe him to be an appropriate candidate for the school. IHC is also willing to start Rob in the program immediately with only minimal changes to his accepted 4/2/09- 10/28/09 IEP, and then to create a new IEP for him in the early fall of the coming school year (testimony, Lewis). IHC therefore enables Rob to re-enter a structured, special education setting immediately.

Based upon all of the above factors, I conclude that Rob requires a more restrictive environment than the RPS substantially separate classroom in order to receive FAPE. Rob's appropriate education placement is a therapeutic day program, such as that offered at IHC. It is RPS' responsibility to provide such a placement under state and federal special education law.

ORDER

- 1) The substantially separate classroom placement proposed and accepted by Parent in the 4/2/09- 10/28/09 IEP is not appropriate for Rob.
- 2) IHC's therapeutic day school program, or a comparable therapeutic day placement, constitutes an appropriate educational program for Rob in the least restrictive environment possible.

By the Hearing Officer,

Raymond Oliver

Dated: