

**COMMONWEALTH OF MASSACHUSETTS  
SPECIAL EDUCATION APPEALS**

**In Re:** Bridgewater-Raynham Regional School District v.  
Student

**BSEA # 09-8323**

**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 ch. 71B), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under these statutes.

On June 24, 2009, Bridgewater-Raynham Regional School District (BR) filed a Request for Hearing in the above-referenced matter. The procedural history of this matter was already discussed in an Order issued on July 15, 2009, and a Ruling issued on July 29, 2009, and incorporated herein by reference. The hearing on BR's Request for Hearing was held on July 14, 2009 at the BSEA, 75 Pleasant St., Malden, Massachusetts, before Hearing Officer Rosa I. Figueroa. Those present for the proceedings<sup>1</sup> were:

Gay W. Yelle	Director of Pupil Personnel Services, BR
Mary Ann Mozzone	Guidance Counselor, Department Head, BR
Kimberly A. Stelz	School Adjustment Counselor, BR
Mary Ellen Sowyrda	Attorney for BR
Tami L. Fay	Legal Intern, Bureau of Special Education Appeals

The official record of the hearing consists of documents submitted by BR and marked as exhibits SE-1 through SE-23, and Parent's exhibits PE-A through PE-D, recorded oral testimony, BR's oral closing argument and Parent's written closing argument. The record closed on July 29, 2009 upon issuance of a Ruling denying Parent's/Student's Motion for Re-Assignment of the Hearing Officer/ Recusal and Bridgewater-Raynham Public Schools' Request for Issuance of Subpoena to Dr. Steven Auster and Motion to Leave Open the Record for the Testimony of Dr. Auster.

**HEARING ISSUES:**

1. Whether the Physician' Statement dated May 20, 2009 provides sufficient basis for temporary or permanent home tutoring?
2. Whether home tutoring will provide Student a Free Appropriate Public Education (FAPE)?

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<sup>1</sup> Although Parent/Student were represented by Attorney Michael Turner neither he, Parent, Student or anyone acting on their behalf attended the Hearing. Parent/Student's Motion to postpone was denied via a separate order and the Hearing was scheduled to begin at 1:00 p.m. to accommodate Attorney Turner's other work commitments.

3. Whether the Therapeutic Program proposed by BR will provide Student with a Free Appropriate Public Education (FAPE) in the least restrictive environment?

## **POSITION OF THE PARTIES:**

### **BR's Position:**

BR argues that over the past four years, Student has been without formal educational services due to her failure to attend school regularly and consistently. According to BR, there is insufficient medical basis to continue to support home tutoring.

It argues that home tutoring will not provide her with a FAPE and constitutes a highly restrictive environment. In light of the above, BR seeks a determination from the BSEA that its proposed program will offer Student a FAPE.

### **Parent's Position:**

Parent challenges the jurisdiction of the Bureau of Special Education Appeals (BSEA) to hear this matter, asserting that Student, who has a long history of emotional disabilities and attempts at a variety of placements, requires home tutoring pursuant to a physician's home hospital form dated May 20, 2009. According to Parent/Student, the Parties had a settlement agreement which BR refused to follow. Parent/Student has filed a Writ of Mandamus in Superior Court to get BR to meet with Parent/Student to discuss Student's need for tutoring.

Parent/Student assert that Student has suffered significant trauma and emotional issues because of BR, as a result of which her counselor and treating psychiatrist opined that tutoring constitutes the appropriate educational method for Student. According to them, BR has ignored the requests for tutoring made by Student's treating psychiatrist to the detriment of Student. They assert that the Physician's Statement and letter of July 10, 2009 are sufficient to warrant provision of tutoring to Student. They further claim that BR has not yet convened the Team and therefore, its request for hearing is premature.

Parent/Student further assert that BR has not bothered to evaluate Student during the past three years and therefore the only evaluation available, that of Dr. Schumer, persuasively delineates the need for tutorial services. Parent/Student state that Dr. Schumer, who conducts evaluations on behalf of school systems and parents, is familiar with Student and has evaluated Student in the past.

Parent/Student argue that the BSEA lacks jurisdiction over medical issues and since the needs of Student are purely medical, her educational needs cannot be disputed through the BSEA. According to Parent/Student, BR should instead complain to the Massachusetts Board of Medicine.

## **FINDINGS OF FACT:**

1. Student is a 17-year-old, eleventh grader, who resides in the BR school district. She has been found eligible to receive special education services due to social/emotional needs resulting from an anxiety disorder (related to school) which has prevented her from consistently attending school over the past few years. She has been described as having a turbulent psychiatric and educational history including a long history of school phobia (SE-2). Student has displayed dramatic changes in mood and behavior with angry outbursts at home and in school, impulsivity, sleep disturbance, severe depression, suicidal ideation and social withdrawal. Some of the more dramatic episodes were associated with medication changes and medication regulation (SE-12; SE-13). In 2002 she was psychiatrically hospitalized at Westwood Lodge (SE-12).
2. Student reportedly decompensated in 2005 after learning that she could not attend the "Bristol-Aggie" High School, within a few days of starting high school at BR. Student's attendance in school was sporadic or non-existent reportedly because of significant anxiety (SE-12). Her school counselor worked on a behavior plan which required Student to attend school in order to participate in social activities. This plan met with some success. While in school Student spent most of the day in the school counselor's office where she completed her academic work. Student was able to complete academic work independently (SE-12). She however, received warnings in the eighth grade mathematics and science and technology/engineering MCAS administered in the spring 2005 (SE-15). She was able to attend lunch with friends and go to the mall with them, and also participated in social activities (SE-12).
3. A neuropsychological evaluation conducted by Eileen Savage-Creedon, Psy.D., on November 15, 2005 was consistent with previous testing demonstrating that Student possesses average intelligence as measured by the WISC-IV, with indices ranging from average to high average (SE-2; SE-12). She possesses well-developed expressive and receptive language skills, and her neuropsychological reasoning abilities as well as attention and memory were normal. She displayed strong auditory and visual memory skills. Student scored solidly in the average range of cognitive ability with relative weakness in verbal social comprehension and social judgment areas as well as with visually stimulating tasks involving visual attention. Dr. Savage-Creedon noted that Student's performance during the evaluation was stronger in structured situations, doing well in tasks that presented cognitive demands which were of interest to her. She had a difficult time when presented with unstructured projective tasks, becoming easily overwhelmed by her emotions. According to the evaluator, Student demonstrated a lack of mental stamina and anxiety which impacted her performance, requiring a great deal

of support and cajoling to complete the evaluation (SE-2; SE-12). Projective testing revealed low self-esteem, vulnerabilities, lack of emotional and cognitive flexibility, and internal conflict. Dr. Savage-Creedon noted that Student presented a “profile of emotional intensity and lability without effective skills to cope with her perceived problems” which she concluded was a dangerous combination (SE-12). She presented with a combination of avoidant and hypervigilant personality style. Dr. Savage-Creedon recommended that Student

be taught to take time to process and make meaning out of social situations when she feels she is being treated unfairly or being victimized. A therapeutic intervention which would help [Student] to focus on the clarity of her thinking and check for accuracy in her responses, will likely benefit her considerably in the management of her daily life and interpersonal interactions (SE-12).

4. Student was taking Trileptal, Wellbutrin XL and melatonin (to assist with sleep) at the time of this evaluation. She was diagnosed with Bipolar Disorder, NOS; Generalized Anxiety Disorder with features of OCD and specific phobia (school phobia); Rule out: Anorexia Nervosa; and Emerging traits of personality disorder. Dr. Savage-Creedon recommended continuing in psychotherapy, possibly Dialectical Behavior Therapy, monitoring by a psychiatrist, further evaluation of a possible trauma history, monitoring for a possible eating disorder, and a “highly structured behavioral plan that is unified between home and school” (SE-12).
5. Student’s psychiatric care is provided by Dr. Steven Auster and she has been seen by Linda D’Ambly, a specialist in anxiety disorder, over the past several years (SE-12).
6. Following a Team meeting on May 16, 2006, an IEP was proposed offering Student participation in a full inclusion program at BR high school for the ninth grade. The IEP provided direct one hour per week counseling with the school psychologist to address Student’s social emotional and behavioral needs. This IEP was accepted by Parent on June 5, 2006 (SE-11).
7. Student has met with success regarding school attendance when motivational strategies have been combined with working with a diligent and consistent team, able to build connections with Student and strengthening her feelings of safety and comfort through her areas of interest (SE-13). She has required the establishment of a transition plan when moving from one school to another and from year to year. Ninth grade was an example of a successful transition (SE-13). According to Mary Ann Mozzone, head of the Guidance

Department at BR, Student completed 23 credits during her freshman year at BR (testimony of Ms. Mozzone).

8. For tenth grade 2006-2007, Student continued to attend BR's inclusion program (SE-16). The first semester, consistent with previous experience, was a difficult period for Student, with significant deterioration in her attendance by October 2006. She displayed symptoms of hopelessness, depression and social withdrawal; homework was not completed as she was absent most of the time and she ultimately stopped attending school (SE-13; SE-14; testimony of Yelle).
9. On August 24, 2006, Dr. Steven J. Auster, M.D., Student's psychiatrist/neurologist from Comprehensive Psychiatric Associates, recommended that Student's school day be scaled down to a partial day, and that she be allowed to start her day in Ms. Damon's office and gradually work towards moving into the classroom, a strategy that according to him had proven to be effective the previous year (PE-A). Dr. Auster wrote again on October 6, 2006 requesting that Student's absences be excused because of a condition for which she was being treated. On November 1, 2006, Dr. Auster wrote a letter releasing Student to return to school in a gradual fashion (PE-A).
10. Student's Team convened on December 6, 2006 (with Parent's and BR's attorneys present), and she was offered participation in a substantially separate classroom in BR's high school (including counseling) for the period covering December 6, 2006 through December 6, 2007 (SE-10). Parent accepted placement of Student in the substantially-separate program on December 6, 2006<sup>2</sup> (SE-10). From this point, Student began receiving all of her academic instruction from Mr. Mark Mosher at which point Student's behavior, class work and homework completion improved, even when her attendance continued to be erratic. Student however, expressed a desire to return to her regular classes and after much consideration, it was determined that she could leave Mr. Mosher's room to attend history class with Ms. Spear so long as Student was able to: maintain a C average; have no more than five excused or unexcused absences per quarter; complete all class work and homework,; and display appropriate behavior in class (SE-18). On January 31, 2007, Student, Parent, the school psychologist, guidance counselor and Director of Special Education signed a contract reflecting this agreement (SE-18).
11. By March 19, 2007, Student had been absent seventy four (74) times and tardy twenty one (21) in spite of BR's constant communication with Parent and efforts to get Student to attend school (SE-9; SE-16). Student was

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<sup>2</sup> Parent signed the placement page consenting to the proposed placement in the substantially separate classroom, but did not sign the Response section of the IEP accepting or rejecting the IEP (SE-10).

- failing tenth grade due to her severe absenteeism and ultimately stopped attending school altogether (SE-17).
12. Following another Team meeting on March 19, 2007, BR offered Student participation in a residential placement to address her issues with class-work completion, school attendance and appropriate socialization. Parent did not accept the proposed IEP although she initially consented to allow BR to send referral packets to potentially appropriate special education schools (SE-9; SE-19). Parent subsequently withdrew her consent as she did not want Student to attend a residential program (SE-19).
  13. On March 21, 2007, Dr. Stephen Auster filled out a Physician's Statement for Temporary Home or Hospital Education, which stated that Student required home tutoring for more than fourteen days due to a diagnosis of "ADAD" and generalized anxiety disorder (PE-A). Throughout this period Student remained home receiving tutoring (SE-19).
  14. On April 10, 2007, BR filed a Hearing Request with the BSEA alleging that Student was being denied a FAPE and seeking a finding that Student required residential placement (SE-19). Administrative notice of this case shows that following numerous telephone conference calls by the first Hearing Officer, a sixty day show cause was issued on August 7, 2007 in BSEA #07-5828 and the case was later dismissed without prejudice on November 9, 2007.
  15. Linda L. D'Ambly, LICSW, BCD has been Student's psychotherapist since September 26, 2001, when Student was in second grade. During the 2006-2007 school year Ms. D'Ambly supported Parent's/Student's position that Student be allowed to receive her education through home tutoring. In a letter dated June 4, 2007, Ms. D'Ambly further requested that Student be allowed to receive tutorial services from Mrs. Kathy Voller specifically as she had a good connection with this tutor. In the past, Student's connection and experience with other tutors had not been good.
  16. In a letter dated April 25, 2007, Stephen Auster, M.D., Student's psychiatrist/neurologist, supported Ms. D'Ambly's recommendations of November 2006 and April 2007 (PE-A). Dr. Auster wrote again on June 20, 2007 stating that Student had been unable to attend school as a result of her anxiety condition (PE-A).
  17. By June 2007, BR was considering residential placement for Student as a way to address her issues. Ms. D'Ambly supported continued tutoring services as opposed to placement of Student in a residential program. According to Ms. D'Ambly, as reflected in a letter dated June 26, 2007, Student's achievements would be compromised by participating in a

residential program<sup>3</sup> as she had made gains regarding her social relationships. By June 26, 2007, Student was interested in getting credit for the work completed in tutoring and wished to return to school; she wanted to feel “normal”, and Ms. D’Ambly was supportive of Student’s new plan (PE-B).

18. Student’s Team met in mid September 2007, as a result of which Student began to receive her education in a substantially separate classroom (in the Adjustment room) in BR high school, for the 2007-2008 school year. The IEP Amendment dated September 21, 2007 further proposed that since Student did not present a learning disability in either science or math, she would be placed in inclusion classes for these two subjects while attending BR high school (SE-8).
19. Again Student’s attendance became an issue, and on October 17, 2007, BR filed a Request for Expedited Hearing with the BSEA seeking a determination as to what constituted FAPE for Student (SE-21). Student had missed one hundred twenty days of school during the 2006-2007 school year and fourteen days between September and October 17, 2007. BR was again seeking Parent’s consent for proceeding with an out of district placement (SE-22). This matter, BSEA # 08-2356, was assigned to a second Hearing Officer.
20. On October 23, 2007, Parent’s attorney filed a Motion to Dismiss BSEA #08-2356 on the basis that Student had been receiving home tutoring between October 3 through October 21, 2007 pursuant to a home hospital form (made available to BR on October 10, 2007), and alleging that any hearing would be premature until a team meeting was convened to discuss re-entry of Student into BR. Parent further cited numerous procedural reasons why the case should not proceed, including challenging the authority of the BSEA to resolve the dispute and grant the remedy sought by BR. BR opposed Parent’s Motion on October 30, 2007, and again sought residential placement for Student. Administrative notice of BSEA #08-2356 shows that the Hearing Officer denied Parent’s Motion to Dismiss orally on November 7, 2007 (SE-20; docket sheet in BSEA #08-2356).
21. The Parties in BSEA #08-2356 participated in a mediation on October 29, 2007 whereby the parties agreed to provide Student with tutoring. Joyce Onischewski, BR’s Administrator of Special Education wrote to Parent on January 22, 2008 apprising Parent of the fact that Student was not accessing any of the tutoring offered to her and requesting that Parent contact BR to

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<sup>3</sup> In March 2004, Ms. D’Ambly had been supportive of placing Student in a therapeutic residential program given the high degree of Student’s social isolation and anxiety at the time, and in order to prevent regression. According to Ms. D’Ambly, Student had not been responsive to treatment (PE-B).

arrange for Mrs. Haguis, one of the high school teachers, to offer Student tutoring (SE-22).

22. Since October 29, 2007, Student has remained eligible to receive home tutoring although she has not accessed these services consistently (SE-7; SE-22).
23. On December 3, 2007, Dr. Stephen J. Auster, of Comprehensive Psychiatric Associates, wrote a letter stating that Student had been unable to attend school since September 21, 2007 because of a condition for which he was treating her. Dr. Auster had been treating Student since June 2004 (PE-A).
24. Dr. Auster wrote another letter on February 11, 2008, recommending that Student maintain her academic development through regular tutoring for the foreseeable future in light of her Anxiety Disorder diagnosis and because Student had a good relationship with her tutor (PE-A).
25. On March 6, 2008, Ms. Onischewski wrote again to Parent to pursue the Parties' plan to enroll Student in a therapeutic day program that could meet her academic and emotional needs. BR agreed to continue Student's IEP covering the period from March 19, 2007 through March 19, 2008 until the day program was established. BR also requested that Parent complete the application for New England Academy, one of five programs being explored so that BR could follow-up with the referral (SE-22).
26. Ms. Onischewski wrote again to Parent on May 29, 2008 explaining that BR would establish a new therapeutic academic day program with a strong vocational and therapeutic component at the old high school location (now the middle school). The program was located in Student's home town in the building where she started high school. Ms. Onischewski suggested that the Team be reconvened in August 2008 so that Parent and Student could meet the teacher, visit the program and to elicit Student's input regarding her vocational interests and transitional plan (SE-22).
27. On August 4, 2008, BR invited Parents to attend a Team meeting on August 14, 2008, to plan for Student's eleventh grade. In addition to Parent and Student, the following individuals were expected to attend the meeting: Joyce Onischewski, Special Education Administrator; Elizabeth Albon, Special Education teacher; Kimberly Stetz, Adjustment Counselor; and Parent's and BR's attorneys (SE-5).
28. Student's Team met on August 14, 2008 to discuss her IEP for the 2008-2009 school year (SE-2). The team recommended Student's participation at BR's Therapeutic Day Program (BRTDP).

29. Student's IEP for the 2008-2009 school year offered Student educational services at the BRTDP. Pursuant to the IEP of August 2008, Student would receive all of her educational services in a substantially separate setting as follows: English language arts, five times per week, fifty five minutes each session by the special education (sped) staff; directed study three times per week, fifty minutes each session with the sped personnel; pre-vocational skills, once per week for fifty minutes with the sped teacher; math five times per week for fifty five minutes each session with the sped staff; academic instruction ten times per week for fifty minutes with the sped teacher; counseling with the school adjustment counselor once per week for half an hour; and, group counseling three times per week with the school adjustment counselor (SE-2).
30. BRTDP is staffed by a full-time program director, assistant director, special education teachers, a part-time physical education teacher, a licensed adjustment counselor, a nurse and a school psychologist (SE-4; testimony of Stetz). Its mission is to provide students who are at risk with a safe and supportive environment with individualized instruction so as to enable them to "generalize their skills, independently, cooperatively and collaboratively in their chosen social and educational setting." Academically, students are offered a full academic agenda based on their individual needs and are expected to complete the same graduation requirements as other BR high school students consistent with the Massachusetts Curriculum Frameworks. A strong vocational component allows students to take part in school/work opportunities that are interest based. The program offers therapeutic support by a qualified and experienced team that carefully selects appropriate challenges for students while employing effective strategies to provide opportunities for success. The program integrates choice theory, and students follow a behavioral management system entitled Relationship-Based Behavior Management Program (RBBMP). RBBMP follows a "point sheet, level system" within a therapeutic environment specially crafted to provide opportunities for "positive practice" through support and guidance. Group and individual counseling are a major component of the program which also holds daily school meetings where students can address issues that they may have confronted throughout the day, with each other and the staff (SE-4).
31. BRTDP has approximately nine (9) to twelve (12) students who present with social emotional difficulties, some have bipolar disorder and present with anxiety and depression. Academically, most of them access grade level curriculum. Students in this program have little if any interaction with other students in the high school until they are ready. Ms. Kimberly Stetz, licensed school psychologist in BR, runs daily groups to address issues such as dating, anger management, and dating violence. Once a week they have a yoga class to teach students relaxation techniques. Students also get help with developing coping skills. The vocational piece includes interviewing

skills and maintaining eye contact, and students are provided assistance in finding jobs outside school. Ms. Stetz's office is adjacent to the two classrooms at BRTDP, making it easy for her to conduct periodic checks with students throughout the day, and making the office accessible for Student should she feel anxious and need to leave the classroom (testimony of Stetz).

32. Since Student has been out of school since 2007, BR recognized that it would take her some time before she was able to attend school with regularity. BR offered to transition Student back slowly by initially having her attend school for two to three hours per day and slowly increasing the time she spent in school through the course of the school year until she was able to attend the regular school hours (SE-2; testimony of Stetz).
33. Parent consented to Student's placement in said program on August 14, 2008 (SE-3).
34. In spite of BR's numerous efforts to encourage Student's attendance at the BRTDP, by mid October 2008 Student continued to stay home, receiving home tutorial (SE-6).
35. On or about December 4, 2008, Dr. Stephen Auster, Student's psychiatrist/neurologist, completed a Physician's Statement for Temporary Home or Hospital Education stating that Student required home education for more than fourteen (14) days because of Student's diagnosis of generalized anxiety disorder. The form does not provide an end date for the home services; instead it states "to be determined". The form is designed to expire in thirty calendar days (PE-A).
36. BR later amended its request for hearing on December 9, 2008<sup>4</sup>, seeking a determination that Student would receive a FAPE in the LRE by providing her with a placement in BR's therapeutic day school program pursuant to the IEP of August 14, 2008 (SE-1). By agreement of the Parties, a hearing in that matter was scheduled for January 22, 2009 and later continued to February 2009 (SE-1).
37. Ms. Onischewski wrote to Parent on December 23, 2008 responding to a request for tutoring made by Parent to Ms. Rossi of BR. Ms. Onischewski stated in the letter that she had instructed Ms. Rossi to contact tutors in the high school to deliver instruction in English, science, math and history who would in turn contact Parent to establish a tutoring schedule. Ms. Onischewski further reminded Parent that Ms. Stetz, the adjustment

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<sup>4</sup> Said request for hearing, BSEA # 08-2356, was assigned to a different Hearing Officer.

counselor at BRTDP, was also available to offer Student counseling pursuant to the IEP (SE-22).

38. Ms. Rossi emailed Ms. Onischewski on January 5, 2009, to inform her that she had heard from Parent who wanted to “hold off” on the tutoring until after the BSEA hearing scheduled for January 22, 2009 in BSEA #08-2356. Ms. Rossi further stated that Parent had stated to her that she knew that Student would not meet with any tutor and therefore did not want Ms. Rossi to be troubled (SE-22).
39. Over the years, Ms. D’Ambly has been consulted regarding educational planning for Student. Her letter of January 23, 2009 recommends that Student continue to receive her education through home tutorial due to her psychological fragility. According to Ms. D’Ambly, Student was able to complete all of her academic work outside the school environment. Ms. D’Ambly had previously written letters on behalf of Student on February 5, 2008, June 26, 2007, June 4, 2007, April 19, 2007, March 16, 2007, November 19, 2006, and March 24, 2004. In them, she narrated the progress made by Student over the past several years and stated that Student was able to attend driver’s education and had obtained her driver’s license; had a job as a dog-walker once per week; had developed a network of friends, maintained those friendships since ninth grade, and was able to go into the community with them; and, had developed a good relationship with Ms. Voller, her tutor in 2008. In 2007 Student was able to hold a summer job. (PE-B).
40. On January 25 and February 5, 2009, Jeffrey Schumer, Psy.D., performed a psychological evaluation of Student to gain information regarding Student’s intellectual and social/emotional functioning. She was referred by Ms. D’Ambly, Parent and Student’s/Parent’s attorney. A previous evaluation by this evaluator in 2001 “evidenced significant anxiety and depression, the use of avoidance and guardedness as coping mechanisms and a cluster of symptoms suggesting a diagnoses of Anxiety Disorder NOS with features of Social Phobia and Depressive Disorder NOS” (PE-C). Dr. Schumer administered the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III)-attempted; Incomplete Sentences Blank-High School Form (ISB); Piers-Harris Children’s Self-Concept Scale (PHCSCS); OCD Checklist; SCL-90-R; Youth Self-Report for Ages 11-18; Behavior Observations; and, a Clinical Interview. Dr. Schumer found that the CIF indicated that compared to same-aged peers, Student presented with the following symptoms more frequently:

Often loses temper, touchy/easily annoyed, unrealistic and persistent worries, somatic complaints, refuses to go to school, unrealistic concerns about competence, marked self-consciousness, worry of future events, depressed/irritable, fatigue,

feeling of worthlessness, loss of energy, guilt, panic attacks, clinging attachment, and unusual fears... significant difficulties with: crying, being fearful of attending school, feeling overtired with no good reason, having sudden mood changes, and worrying often (PE-C).

41. According to Dr. Schumer, Student was unable to complete the testing because she reported becoming overwhelmed with anxiety, started to cry and left the room seeking comfort in Mother during both testing sessions. She however put good effort into the WAIS-III evincing intellectual ability between the average and above-average range. Similarly, her visual attention/memory and graphomotor speed and ability to analyze and integrate abstract visual designs fell solidly in the average range, while she excelled in tasks involving identifying missing visual details, something that Dr. Schumer found to be consistent with Student's hypervigilant personality. He found that Student continued to feel overwhelmed by anxiety around judgment-based activities, such as school, her self-esteem was low, and she continued to feel isolated and depressed resulting in debilitating and incapacitating anxiety and rumination over self-recrimination (PE-C).
42. Dr. Schumer diagnosed Student with Axis I: 300.00 Anxiety Disorder NOS with features of School Phobia and Obsessive-Compulsive Disorder; 296.90 Mood Disorder NOS; 309.81 Post Traumatic Stress Disorder, Severe; and Axis II, features of Avoidant Personality Disorder. He recommended continued therapy and regular monitoring/adjustment/re-evaluation of psychotropic medication. In his opinion, Student should be allowed to complete her education in a setting comfortable for her, where she could focus on her school demands without being compromised by her emotional issues. In his opinion, home tutoring met Student's needs (PE-C).
43. BSEA #08-2356 remained open until March 17, 2009 when BR withdrew its request for hearing pursuant to a settlement agreement between the Parties. According to Gail Yelle, Director of Pupil personnel in BR, the agreement contained language that if Student were not successful in her transition into an educational program because her anxiety became too great, Student would be hospitalized (testimony of Yelle).
44. Following the settlement agreement, Kimberly A Stetz tried to meet with Student. She visited the home on three occasions starting on March 18, and then on March 19 and 20, 2009, but every time she was told that Student was not home. She also attempted to reach her over the phone and left her messages which went un-responded. During this time, Student was meeting with the tutor in the home. Ms. Stetz was attempting to meet with Student, get to know her and discuss a plan for Student's re-entry into school. Ms. Stetz opined that Student would be able to address her socialization issues in

the school program. She testified that a conversation would need to take place between Student, the tutor and the lead teacher to ascertain what material Student had covered in tutoring and where would she fall in terms of her academics (testimony of Stetz).

45. On May 20, 2009, Dr. Auster completed an open ended Physician's Statement for Temporary Home or Hospital Education for Student stating that she would require educational services in the home for more than fourteen days (PE-D).
46. On June 24, 2009, BR filed the Request for Hearing now before me, BSEA # 09-8323.
47. On July 10, 2009, Dr. Auster wrote a letter which he intended to serve as an addendum to his Physician's Statement for Temporary Home or Hospital Education of May 2009. In it, he provided a diagnosis of: Anxiety Disorder with specific phobias, Major Depression, Mood Disorder NOS, Post Traumatic Stress Disorder, Severe. He stated that Student required home tutoring for medical reasons and that she did not qualify for a day hospital program. According to him, Student felt unsafe in school settings due to severe anxiety, and due to the public school's continual failure to follow medically recommended orders (PE-D). Dr. Auster attributed Student's inability to attend school to the following detrimental events:
  - a) school staff reportedly belittling [Student] in the classroom and in IEP meetings causing trauma;
  - b) being physically restrained by school personnel and locked inside a room causing trauma;
  - c) school personnel having police officers interrogate [Student] at the age of 10 without a parent being present to protect her, causing trauma;
  - d) being searched physically at READS Academy for no reason, just policy;
  - e) meeting the personnel at North River Collaborative, on her own and witnessing a physical altercation and restraint which caused her to have recollections of past traumatic experiences, exacerbating her symptoms;
  - f) fearful of large school buildings;
  - g) unnecessarily subjected to trauma in the way of reported threats made to her by school staff and administrators;
  - h) each time [Student] was being successful, school personnel would remove the services that were working, therefore leaving her with a feeling of insignificance and rejection (PE-D).

48. At present Student has 23 credits from her freshman year, and 22.5 credits from her sophomore year. She will require 115 credits to graduate. This means that she will require approximately two more years before graduation. Student is also not prepared to take the MCAS, a requirement she must fulfill before graduation (testimony of Mozzone).

## CONCLUSIONS OF LAW:

The Parties do not dispute that Student is an individual with a disability falling within the purview of the Individuals with Disabilities Education Act<sup>5</sup> (IDEA) and the state special education statute.<sup>6</sup> As such, Student is entitled to a FAPE.<sup>7</sup>

Here, BR raises concerns that home tutoring denies Student a FAPE, and that it violates the “least restrictive environment” (LRE) requirements of the IDEA. BR challenges the sufficiency of the Physician’s Statement dated May 20, 2009 and subsequent letter of July 10, 2009 by Dr. Auster. In rendering my decision, I rely on and incorporate by reference the facts recited in the Facts section of this decision. I have also taken administrative notice of BSEA # 07-5828 and BSEA # 08-2356.

As the party challenging the Physician’s Statement and seeking a determination that its proposed program is appropriate to assure Student a FAPE in the LRE, BR carries the burden of persuasion pursuant to *Schaffer v. Weast*, 126 S.Ct. 528 (2005)<sup>8</sup>. For the reasons stated below, I find that the evidence supports BR’s position and as such, BR has met its burden of persuasion.

The IDEA and the Massachusetts special education law, as well as the regulations promulgated under those acts, mandate that school districts offer eligible students a FAPE. A FAPE requires that a student’s individualized education program (IEP) be tailored to address the student’s unique needs<sup>9</sup> in a way reasonably calculated to enable the student to make meaningful<sup>10</sup> and effective<sup>11</sup> educational progress. Additionally,

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<sup>5</sup> 20 USC 1400 *et seq.*

<sup>6</sup> MGL c. 71B.

<sup>7</sup> MGL c. 71B, ss. 1 (definition of FAPE), 2, 3.

<sup>8</sup> *Schaffer v. Weast*, 126 S.Ct. 528 (2005) places the burden of proof in an administrative hearing on the party seeking relief.

<sup>9</sup> E.g., 20 USC 1400(d)(1)(A) (purpose of the federal law is to ensure that children with disabilities have FAPE that “emphasizes special education and related services designed to meet their unique needs . . . .”); 20 USC 1401(29) (“special education” defined to mean “specially designed instruction . . . 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”).

<sup>10</sup> *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 192 (1982) (goal of Congress in passing IDEA was to make access to education “meaningful”); *Deal v. Hamilton County Board of Education*, 104 LRP 59544 (6<sup>th</sup> Cir. 2004); (“IDEA requires an IEP to confer a ‘meaningful educational benefit’ gauged in relation to the potential of the child at issue”); *G. by R.G. and A.G. v. Fort Bragg Dependent Schs*, 40 IDELR 4 (4<sup>th</sup> Cir. 2003) (issue is whether the IEP was reasonably calculated to provide student meaningful educational benefit); *Weixel v. Board of Education of the City of New York*, 287 F.3d 138 (2<sup>nd</sup> Cir. 2002) (placement must be “‘reasonably calculated’ to ensure that [student] received a

said program and services must be delivered in the least restrictive environment appropriate to meet the student's needs.<sup>12</sup> Under the aforementioned standards, public schools must offer eligible students a special education program and services specifically designed for each student so as to develop that particular individual's educational potential.<sup>13</sup> Educational progress is then measured in relation to the potential of the particular student.<sup>14</sup> School districts are responsible to offer students

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meaningful educational benefit"); *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000) (educational benefit must be "meaningful"); *Ridgewood Board of Education v. NE for ME*, 172 F.3d 238 (3<sup>rd</sup> Cir. 1999) (IDEA requires IEP to provide "significant learning" and confer "meaningful benefit").

<sup>11</sup> *Lenn v. Portland School Committee*, 998 F.2d 1083 (1<sup>st</sup> Cir. 1993) (program must be "reasonably calculated to provide 'effective results' and 'demonstrable improvement' in the various 'educational and personal skills identified as special needs'"); *Roland v. Concord School Committee*, 910 F.2d 983 (1<sup>st</sup> Cir. 1990) ("Congress indubitably desired 'effective results' and 'demonstrable improvement' for the Act's beneficiaries"); *Burlington v. Department of Education*, 736 F.2d 773, 788 (1<sup>st</sup> Cir. 1984) ("objective of the federal floor, then, is the achievement of effective results--demonstrable improvement in the educational and personal skills identified as special needs--as a consequence of implementing the proposed IEP"); 603 CMR 28.05(4)(b) (Student's IEP must be "designed to enable the student to progress effectively in the content areas of the general curriculum"); 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, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the child, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district.").

<sup>12</sup> See generally *In re: Arlington*, 37 IDELR 119, 8 MSER 187, 193-195 (SEA MA 2002) (collecting cases and other authorities).

<sup>13</sup> 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..."); MGL c. 71B, s. 1 ("special education" defined to mean "...educational programs and assignments . . . designed to develop the educational potential of children with disabilities . . ."); 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..."). See also 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](http://www.doe.mass.edu/sped)) (Massachusetts Education Reform Act "underscores the Commonwealth's commitment to assist all students to reach their full educational potential").

<sup>14</sup> *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 199, 202 (court declined to set out a bright-line rule for what satisfies a FAPE, noting that children have different abilities and are therefore capable of different achievements; court adopted an approach that takes into account the potential of the disabled student); *Deal v. Hamilton County Board of Education*, 104 LRP 59544 (6<sup>th</sup> Cir. 2004); ("IDEA requires an IEP to confer a 'meaningful educational benefit' gauged in relation to the potential of the child at issue"); *HW and JW v. Highland Park Board of Education*, 104 LRP 40799 (3<sup>rd</sup> Cir. 2004) ("benefit must be gauged in relation to the child's potential"); *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000) (progress should be measured with respect to the individual student, not with respect to others); *T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 578 (3<sup>d</sup> Cir. 2000) (appropriate education assessed in light of "individual needs and potential"); *Ridgewood Board of Education v. NE*, 172 F.3d 238 (3<sup>rd</sup> Cir. 1999) ("quantum of educational benefit necessary to satisfy IDEA . . . requires a court to consider the potential of the particular disabled student"); *Mrs. B. v. Milford Board of Ed.*, 103 F.3d 1114, 1122 (2<sup>d</sup> Cir. 1997) ("child's academic progress must be viewed in light of the limitations imposed by the child's disability"); *MC v. Central Regional School District*, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996), *cert. denied* 519 US 866 (1996) (child's untapped potential was appropriate basis for residential placement); *Roland v. Concord School Committee*, 910 F.2d 983 (1<sup>st</sup> Cir. 1990) ("academic potential is one factor to be considered"); *Kevin T. v. Elmhurst*, 36 IDELR 153 (N.D. Ill. 2002) ("Court must assess [student's] intellectual potential, given his disability, and

programs and services that will allow them to make meaningful, effective progress.<sup>15</sup> Upon consideration of the facts in the case at bar, it is clear that the tutoring services offered Student over the past few years, are insufficient to afford Student a FAPE. In order to make effective progress Student must have access to a therapeutic program such as the one proposed by BR.

I. **Physician's Statement:**

BR seeks a determination that there is insufficient medical basis to support home tutoring. It argues that the Physician's Statement dated May 20, 2009 provides insufficient basis for continued temporary or permanent home tutoring. It seeks that the Physician's Statement be set aside arguing that it fails on its face as it does not provide sufficient information or medical reasons why Student must be educated in the home. Parent tried to correct this mistake by submitting a letter from Dr. Auster on Friday, July 10, 2009. This letter was produced the day after Parent's request to postpone the Hearing of Tuesday, July 14, 2009 which was denied.

Regulation 603 CMR28.03(3)(c) addressing educational services in home or hospital specifically provides that

Upon receipt of a physician's written order verifying that any student enrolled in a public school or placed by the public school in a private setting must remain at home or in a hospital on a day or overnight basis, or any combination of both, for medical reasons and for a period of not less than fourteen school days in any school year, the principal shall arrange for provision of educational services in the home or hospital. Such services shall be provided with sufficient frequency to allow the student to continue his or her educational program, as long as such services do not interfere with the medical needs of the student. The principal shall coordinate such services with the Administrator of Special Education for eligible students. Such educational services shall not be considered special education unless the student has been determined eligible for such services and the services include services on the student's IEP.

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then determine the academic progress [student] made under the IEPs designed and implemented by the District").

<sup>15</sup> E.g. *Lt. T.B. ex re. I.N.B. v. Warwick Sch. Com.*, 361 F. 3d 80, 83 (1<sup>st</sup> 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.")

This section of the regulations applies to both regular and special education students who because of medical reasons require provision of educational services in the home or hospital for a defined period of time<sup>16</sup>.

Parent is correct that typically, hearing officers do not look beyond a properly completed Physician's Statement for Temporary Home or Hospital Education in order for the provisions of the aforementioned regulation to take effect, and so has the BSEA found in previous cases. See *In Re: Medford Public Schools*, 8 MSER 329 (11/01/2002); *In Re: Lowell Public Schools*, 7 MSER 246 (10/24/2001).

The Physician's Statement and facts of this case, however, warrant a different approach. Tutoring under a Physician's Statement for Temporary Home or Hospital Education is not intended as a substitute for appropriate education especially in cases involving children in need of special education. The operative word in the title of this document is "*temporary*." To further support the temporary nature of this form, the Physician's Statement for Temporary Home or Hospital Education establishes an automatic expiration of thirty days and requires that the Physician provide an expected return to school date at the bottom of the form. If additional time is required, then a new form must be completed. The form presumes that the Physician will have an opportunity to re-evaluate the student prior to completing the form, ascertain what his/her condition is and estimate how long it will be before Student is able to return to school. The form may also be used for situations in which a student is out for recurrent periods of less than fourteen days that will accumulate to fourteen days in the school year. This applies to cases where a student may attend school for a while and periodically need to remain at home or in the hospital as a result of a medical condition. Regardless of whether the situation involves more than fourteen consecutive days or recurrent periods that accumulate to more than fourteen days, on its face the form is designed to reflect its intention that such provision of services is *temporary*.

Turning to the instant case, there is nothing temporary about a situation that has lasted over two years, especially when Student has not availed herself of the tutoring consistently, and BR continues to be unable to address Student's social/emotional issues through an appropriate school program. Where as here, the student remains out of school for such an extended period of time, in essence the tutoring becomes the IDEA-eligible student's permanent placement. Such change in placement is impermissible under a Physician's Statement for Temporary Home or Hospital Education form. As BR points out, Parent and Student have concentrated their efforts on securing tutoring on a permanent basis and have been successful in securing it until now (testimony of Yelle).

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<sup>16</sup> See Department of Elementary and Secondary Education (ESE) *Question and Answer Guide on the Implementation of Educational Services in the Home or Hospital*, 603 CMR 28.03(3)(c) and 28.04(4), issued on February 1999, revised 2005 (ESE Question and Answer Guide).

BR also argues that an improperly completed Physician's Statement for Temporary Home or Hospital Education can be set aside. Parent argues that the forms provide little or no direction to physicians who are unable to complete them in a way that prevents hearings. Parent ignores the guidelines drafted by ESE, which are accessible through its website, regarding this specific form. Parent further argues that the physician was simply updating his previous forms, pursuant to which BR offered tutoring services, and therefore it was reasonable for Dr. Auster to conclude that nothing else was required. Finally, she argues that any mistake was corrected by Dr. Auster's letter of July 10, 2009.

BR is correct that the form submitted by Parent on May 20, 2009, does not provide a diagnosis or an expected date of return to school. In this regard, it is insufficient. Furthermore, the form states that Student's health "will not affect the provision of full educational services" (PE-C). It was only after BR filed its request for hearing and challenged the Physician's Statement that Parent attempted to cure the defects by submitting Dr. Auster's letter of July 10, 2009.

BR also argued that Dr. Auster's letter simply narrates a series of allegations regarding past events but offers no evidence that the physician actually evaluated Student. There is no way of knowing whether Dr. Auster relied on his own examination/evaluation of Student, or on information provided by Ms. D'Ambly, and/or Parent. It also makes no mention of the date of Student's most recent visit to Dr. Auster for medical evaluation and his findings at the time of said evaluation. Parent states in her Motion that Dr. Auster sees Student on a monthly basis and that he confers with the treating therapist, Ms. D'Ambly. However, there is nothing in the record to support this allegation. Dr. Auster concludes that Student's tutoring is medically necessary due to severe anxiety, depression and trauma. Parent had an opportunity to defend this position at hearing but nobody appeared on her behalf. Rather, she simply chose to rely on PE-D, a document that expired on July 20, 2009 and her attorney's "Motion to Dismiss or in the Alternative Postpone" the Hearing, received on July 13, 2009.

The evidence is persuasive that Dr. Auster's Physician's Statement for Temporary Home or Hospital Education and subsequent letter failed to meet the requirements as, taken together, they were not properly completed and were intended to secure tutoring on a long term basis. Therefore, I turn to the question of whether Dr. Auster's Physician's Statement and subsequent letter triggered BR's responsibilities under 603 CMR 28.04(4), and whether BR has met its responsibility under said regulation.

Regulation 603 CMR 28.04(4), addressing unscheduled evaluations for medical reasons, provides that

If, in the opinion of the student's physician, an eligible student is likely to remain at home, in a hospital, or in a pediatric nursing home for medical reasons and for more than 60 school days in any school year, the Administrator of Special Education shall, without undue delay, convene a Team to consider

evaluation needs and, if appropriate, to amend the existing IEP or develop a new IEP suited to the student's unique circumstances.

Even if Parent were persuasive in her arguments, and she is not, Dr. Auster's Physician's Statement of May 20, 2009, which does not provide an expected date for Student's return to school, expired on June 20, 2009. His letter of July 10, 2009 does not anticipate that Student will require tutoring into the new school year, 2009-2010; therefore, it can only be interpreted as calling for provision of tutoring services through what amounts to the end of the 2008-2009 school year. I note that Student does not qualify for summer services. Dr. Auster's letter further states that Student is not a candidate for a day hospital program. Therefore, PE-D, the Physician's Statement of May 2009 and subsequent letter of July 2009, is insufficient to trigger the mandates of 603 CMR 28.04(4)<sup>17</sup>.

Lastly, over the past few years, Parent, who has been represented on several occasions, requested programs for Student and even consented to placement by acceptance of IEPs, but Student has yet to show a real intention of availing herself of anything other than home tutoring. This matter has been on the verge of hearing on multiple occasions, only to have the Parties report that they have entered into agreements which have not been followed through since Student remains at home. Parent's/Student's attempt to use yet another Physician's Statement as well as allegations of procedural misconduct on BR's part, as a means to continue to procrastinate and avoid school attendance is disturbing. If she avails herself of a real program, Student has a couple of years left before her entitlement expires. She needs a program that provides her the tools to be successful and help her cope with her disability; this will not occur at home, in what constitutes the most restrictive setting.

## II. **Home Tutoring:**

BR further asserts that permanent home tutoring should be rejected as a matter of law because it constitutes the most restrictive environment. It further argues that if Student can leave the home to attend performances such as Dirty Dancing in Boston, go to the mall with friends, and maintain a job with her grandmother, she should be able to attend school. BR seeks a determination from the BSEA that there is insufficient medical evidence to support home tutoring and that the BSEA find that its proposed program will offer Student a FAPE. Since the issue regarding the medical statement has been addressed, I turn to the question of home tutoring *vis á vis* the least restrictive environment requirement of the law.

State and federal special education law unequivocally mandate that to the maximum extent possible eligible students be educated with typically developing students. This

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<sup>17</sup> The evidence shows that BR has held multiple Team meetings to explore a myriad of possible placements over the past two and a half years, some of which have been accepted by Parent, but Student has attended none of them (testimony of Yelle).

mandate is known as the “least restrictive environment” requirement.<sup>18</sup> Under said mandate, “removal . . . from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services, cannot be achieved satisfactorily.”<sup>19</sup> Consistent with this mandate, courts have emphasized and stressed Congress’ strong preference to provide eligible students the opportunity to participate to the extent possible in the same activities and programs as non-disabled students.<sup>20</sup> In this sense, home tutoring, constitutes an extremely restrictive setting as it has the effect of isolating students from both their typically-developing peers and other disabled students. This type of placement may therefore be offered only when a student may not be educated in any other less restrictive setting.

The evidence here shows that BR has contemplated multiple options for Student. The Team convened in March 2007 recommended residential placement for Student which Parent ultimately rejected. A second Team convened on September 21, 2007 proposed participation in a substantially-separate classroom within BR. Parent accepted this program but Student failed to attend it consistently at which point BR sought a determination from the BSEA of what constituted FAPE for Student (SE-21). In March 2008, the Parties agreed to pursue a therapeutic day program for Student (SE-22). On May 29, 2008, Parent was informed of the new therapeutic program which BR was in the process of developing, the BRTDP (SE-22).

Student’s Team met again on August 14, 2008 resulting in a recommendation for Student’s participation in BRTDP, a substantially-separate program consistent with what Parent had previously sought for Student but in the public school setting (SE-2;

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<sup>18</sup> 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).

<sup>19</sup> 20 USC 1412(a)(5)(A) (“To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”); MGL c. 71B, ss. 2, 3; 34 CFR 300.114(a)(2)(i); 603 CMR 28.06(2)(c). See *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 non-handicapped 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 (1<sup>st</sup> Cir. 1990); *Board of Education of LaGrange School District No. 105 v. Illinois State Board of Education*, 184 F.3d 912, 916 (7<sup>th</sup> 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).

<sup>20</sup> See *Burlington v. Mass. Department of Education*, 471 US 359, 369 (1985); *Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993); *DeVries v. Fairfax County School Board*, 882 F.2d 876, 878 (4<sup>th</sup> Cir. 1989); *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1044 (5<sup>th</sup> Cir. 1989); *Rome Sch. Comm. v. Mrs. B.*, 247 F.3d 29, 33 (1st Cir. 2001), quoting *Roland v. Concord School Committee*, 910 F.2d 983, 992-993 (1<sup>st</sup> Cir. 1990); *Board of Education of LaGrange School District No. 105 v. Illinois State Board of Education*, 184 F.3d 912, 916 (7<sup>th</sup> Cir. 1999).

SE-22). Between August 14 and October 16, 2008, BR made several attempts to transition Student from home to the BRTDP. The district convened meetings, offered the services of a counselor, attempted to meet with Student off campus, and telephoned Student, all to no avail. Student continued to request provision of tutorial services and began working with her grandmother twenty hours per week (SE-6; testimony of Stetz; Yelle). The evidence is clear that prior to Parent's accepting placement of Student at BRTDP, over the past four years, BR offered a myriad of options including exploration of private day schools, and residential placements, but Student did not attend any of these programs (SE-6; testimony of Yelle). By January 22, 2008, Student was also not accessing the tutorials offered as part of a mediated agreement dating back to October 29, 2007 (SE-7). Since 2007, BR has attempted to work with Parent and Student regarding provision of a FAPE in a less restrictive placement to no avail.

When BR withdrew its previous request for hearing on March 17, 2009, pursuant to a settlement agreement, the parties agreed that if Student was not successful in her transition into an educational program (because her anxiety became too much for her to handle), Student would be hospitalized (testimony of Yelle). In the letter prepared by Dr. Auster after the request for hearing herein was filed, he specifically stated that Student is not a candidate for a day hospital program. This would indicate that Student's anxiety does not rise to a medical level requiring hospitalization, or a hospital type setting, and therefore, it is not so overwhelming that it could not be appropriately addressed in other fashions, including participation in a therapeutic program. The evidence shows that Student has the ability to successfully participate in supported, modified, school-based programs as she was able to receive 23 credits during her freshman year at BR (testimony of Mozzone). At this time, continuation of home tutoring without offering Student the opportunity to attempt a less restrictive program constitutes a violation of the least restrictive environment requirement of the law.

### **III. Therapeutic Program proposed by BR:**

The disabilities presented by Student are precisely those that call for a program where socialization and emotional needs can be addressed in context, so that she can learn to cope with and control her anxiety and live a happier, productive life. Within the structure and support of BRTP, she will gain the knowledge that will better prepare her for future employment and independent living. The evidence is persuasive that BR's proposed program can meet her needs and constitutes a less restrictive setting than home tutoring, consistent with the IDEA mandates.

Previous, supported transition back to school in the eighth and ninth grades met with some degree of success, suggesting that if done correctly, and with the support of all of the adults in Student's life, she is capable of transitioning back to school. It is evident that Student's relationship with Sheri Damon, a former part-time employee of the guidance office in BR, was a key to Student's transition (testimony of Yelle). Ms. Damon's leaving her position in BR coincided with Student's decline in school attendance. In the past, Student has responded well to interventions and in the eighth

and ninth grades was able to attend school more regularly. According to Ms. D'Ambly, Student showed great strides in dealing with anxiety and being able to attend school when placed in the alternative classroom (PE-B). Drawing from that experience, Ms. Stetz has attempted to establish a relationship with Student, as BR correctly understands that this is a key ingredient to a successful transition into BR (testimony of Stetz). Student however, offered no explanation but has clearly avoided Ms. Stetz.

Ms. Stetz persuasively explained that Student will not learn coping mechanisms or the skills that she requires in the isolation of the one-to-one tutorials. Student needs to learn the strategies she requires in order to be successful in social situations. The program in BR can also teach her many techniques that can be helpful to Student later in life, for instance, if she gets frustrated in the work place, she can use the breathing techniques to address her anxiety (testimony of Stetz). BR is willing to modify its program as needed to meet Student's needs and is willing to look at creative ways of helping Student pursue her interests and achieve her post secondary goals. For instance, in light of Student's interest in animals, BR would explore ways in which to give her credit for time spent pursuing this interest (testimony of Yelle). As part of the vocational portion of the BRTDP, Student may be provided with a job-coach who can help her address her anxiety in the work place. To date, the types of jobs Student has held do not offer her opportunities to interact with people, an unavoidable part of life. At the BRTDP, Student will learn skills that she can generalize into other settings while beginning to work on an overdue, realistic transitional plan towards independent living (Id.).

Regarding the transitional plan, Ms. Yelle testified that BR offers an extended school year component with a strong vocational piece.

Over the past few years, Parent and Student have made overtures that led BR to believe that Student would attempt different programs, however, the result is that Student has avoided any type of formal education. Moreover, given her inconsistency with accessing tutoring over the years, one can only conclude that this option is not working to further her academic development and is not addressing her social/emotional issues. Tutoring is not education under the IDEA, and BR is correct that it denies Student a FAPE.

The record contains insufficient evidence to ascertain whether, as BR suggests, Ms. D'Ambly, even if well-meaning, may have somehow sabotaged Student's return to school. Ms. D'Ambly has been working with Student since September 2001. At least during a portion of that time, in 2006, Student also worked with Ms. Damon, with whom Student was able to establish a trusting supportive relationship, and the catalyst for Student's return to school in the eighth and ninth grades. When Student returned to school (albeit inconsistently) during the eighth and ninth grades, she formed friendships that have lasted to date. Student has been seen at the mall, has been able to hold two jobs over the past few years (as a dog walker and assisting her grandmother in the latter's business), has attended after-school activities, and at least once, went to a

theatre in Boston to see a musical. During her junior year, Student wanted to be part of the cheerleading squad (testimony of Yelle). The aforementioned could be interpreted as an indication that Student has made some progress. Looking at this evidence in the light most favorable to Student/Parent, it would be reasonable to conclude that she is ready for a less restrictive placement by participating in a school-based program. The BRTD is the appropriate program for her at this time and will afford her a FAPE.

Assuming *arguendo*, that as BR suggests, Ms. D'Ambly has not been supportive of Student's return to school and that the result of years of inconsistent tutoring and home therapy is that Student has not progressed, then the current situation is not working, and hence Student would require a different program. Ms. D'Ambly's continued suggestion that Student complete her high school experience through home tutoring is not supported by the evidence, and deprives Student of a FAPE. BR is persuasive that Student is legally entitled to much more than she has received during the past years.

It is worth stressing that the success of any program will depend on the ability of all the adults working or interacting with Student to provide a consistent message. Ms. D'Ambly opined that what has worked best for Student is a combination of positive reassurance and gentle encouragement (PE-B). As described by Ms. Stetz, BR is to immediately begin to implement a slow transition back to school and build on it over a period of time until Student is able to attend a full day. The evidence is persuasive that the Therapeutic Program proposed by BR will provide Student with a FAPE in the least restrictive environment

## **ORDER**

1. The Physician's Statement dated May 20, 2009 is (a) insufficient to secure temporary or permanent home tutoring; and (b) has expired. Therefore, BR is not responsible to continue to offer home tutoring to Student.
2. Home tutoring does not offer Student a FAPE.
3. BR is responsible to offer Student a program and placement at the BRTP as this program will offer Student a FAPE and constitutes the least restrictive environment appropriate to meet her needs.

So Ordered by the Hearing Officer,

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Rosa I. Figueroa

Dated: August 27, 2009

August 27, 2009

COMMONWEALTH OF MASSACHUSETTS  
BUREAU OF SPECIAL EDUCATION APPEALS

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**BRIDGEWATER - RAYNHAM REGIONAL  
SCHOOL DISTRICT**

**BSEA # 09-8323**

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BEFORE

ROSA I. FIGUEROA  
HEARING OFFICER

MARY ELLEN SOWYRDA, ATTORNEY FOR BRIDGEWATER-  
RAYNHAM REGIONAL SCHOOL DISTRICT  
MICHAEL TURNER, ATTORNEY FOR PARENT/STUDENT