

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

**In Re: Hingham Public Schools**

**BSEA # 10-0592**

**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 August 27 and 31, 2009 in Braintree, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student's Mother

Richard Rein

Marsha Stevens

Maria Tebeau

Deirdre Dowd-Pizzuto

Diane Fischer

Jean Curtis Loud

Mary Joann Reedy

Student's Therapist

Parent's Educational Consultant and Advocate

Program Director, Chauncy Hall Academy

Program Director, READS Academy

Out-Of-District Coordinator, Hingham Public Schools

Director of Special Education, Hingham Public Schools

Attorney for Hingham Public Schools

The official record of the hearing consists of documents submitted by Student's mother (hereinafter referred to as "Mother" or "Parent") and marked as exhibits P-1 through P-51; documents submitted by the Hingham Public Schools (hereinafter, "Hingham") and marked as exhibits S-1 through S-13; and approximately two days of recorded oral testimony and argument on August 27 and 31, 2009. Closing arguments were made at the end of the hearing day on August 31, 2009, and the record closed on that date.

In order to apprise the parties in a timely manner of my conclusions regarding Student's need for residential services, an Order was issued on September 2, 2009, in advance of the full text of this Decision. See Appendix A.

**INTRODUCTION**

On August 4, 2009), Student was discharged from Chauncy Hall Academy, a Massachusetts Department of Mental Health (DMH)-funded intensive residential treatment program (IRTP) where he had been placed by court order for purposes of evaluation. The next day (August 5, 2009), Parent filed a Hearing Request with the Bureau of Special Education Appeals,

seeking, in part, an expedited hearing on the question of whether her son (Student) required a therapeutic residential placement. The BSEA granted expedited status.

Parent takes the position that her son requires continued residential placement and that such placement is for educational reasons, therefore making it the responsibility of Hingham. Hingham takes the position that Student's educational needs can be met appropriately through a therapeutic day program—specifically, the READS Academy—where Student had been placed prior to his court-ordered placement at Chauncy Hall Academy. Hingham argues that any residential services are not necessary and are actually contraindicated for Student.

For the reasons explained below, I have determined that Student requires a therapeutic residential placement so as to make effective, meaningful educational progress within the least restrictive environment.

### **ISSUES**

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

1. Is the IEP most recently proposed by Hingham 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 seventeen-year-old who resides at home with his Mother and who attended the READS Academy as a 10<sup>th</sup> grader during the second half of the 2008-2009 school year. Mother has full physical custody of Student. Mother and Father share legal custody. Parents have been divorced for nine years. Testimony of Parent, Dowd-Pizzuto; exhibits P-13, P-14.

Hingham's most recently-proposed IEP for Student (for the period 5/4/09 to 5/3/10) calls for Student's placement to continue at the READS Academy, which is a therapeutic day school specifically designed to educate children with Student's profile. Exhibits P-46, S-5.

Student is a kind, intuitive, appreciative young man who enjoys school, particularly because it is his only social place (Student has no friends), and who very much wants to please adults and peers. Testimony of Parent, Rein.

Student has been diagnosed with Bipolar Disorder, Anxiety Disorder NOS (Not Otherwise Specified), Attention Deficit Hyperactivity Disorder, and Oppositional Defiant Behavior. Student may also have a chronic post-traumatic stress disorder. Student has also been

diagnosed with a learning disability, including a non-verbal learning disability. Testimony of Parent, Rein, Dowd-Pizzuto; exhibits P-1, P-3, P-4, P-5, P-6, P-43.

Student has a history of volatile, impulsive, oppositional, and unsafe behaviors within school and in the community. Student's extremely poor judgment and extremely poor decision-making, combined with his impulsive and oppositional behaviors and poor social skills, render him at high risk for endangering himself and engaging in unlawful behavior. These behaviors are attributable in whole or in large part to Student's constellation of disabilities (described above) and, in general, are not considered to be intentional. Student is not diagnosed with a conduct disorder. Testimony of Rein, Dowd-Pizzuto, Parent; exhibits P-1, P-2, P-12, P-15, P-18, P-19.

Student has a long history of social, behavioral, and emotional difficulties. Beginning in 3<sup>rd</sup> grade (the 2001-2002 school year) in the Hingham Public Schools, Student was demonstrating non-compliant, disruptive behavior in the classroom. Student also struggled academically. Parent privately arranged for her son to see a psychiatrist for the purpose of prescribing and monitoring medications to help address his disabilities. Parent has continued to have her son see a psychiatrist for this purpose from this time through the present. Student has been tried on a number of medications during that time period. Testimony of Parent.

During 3<sup>rd</sup> grade, Hingham did a comprehensive evaluation of Student, including an educational evaluation, psychological evaluation, and speech-language evaluation. This, in turn, led to Hingham arranging for a neuropsychological evaluation at the end of the school year. These reports found that Student had multiple learning disabilities, as well as emotional and social deficits and an emerging diagnosis of a Bipolar Disorder. Testimony of Parent; exhibits P-6, P-7, P-9, P-10, P-11.

Each succeeding school year, Student continued to struggle academically and continued to demonstrate behavioral and emotional deficits in the classroom. For example, Student would be disruptive in class, yelling at the teachers and being non-compliant with requests to do his school work. At school, he would tell others (including adults) fictitious stories about himself and his family, apparently not being able to separate fact from fantasy at times. Parent found it difficult to get her son to complete homework. Student did not develop social skills, with the result that he was not able to maintain any friendships. Testimony of Parent.

Parent sought to address her son's social deficits by privately enrolling him in a social skills class and having her son participate in Boy Scouts and sports activities. Testimony of Parent.

By the end of 5<sup>th</sup> grade (the 2003-2005 school year) with Student about to enter middle school, Parent was concerned that her son would not be able to transition from class to class in a regular middle school and that socially, he would be "eaten alive." She also thought that her son would benefit from smaller classes. For these reasons, Parent placed her son at the South Shore Charter School for 6<sup>th</sup> grade. Testimony of Parent.

Sixth grade (the 2004-2005 school year) did not go well for Student. The same pattern of disruptive behavior continued but now at a higher level. At times, his behavior would spiral out of control. The Charter School could neither control nor contain Student. During this placement, Student made a bomb threat at school and was expelled. Testimony of Parent.

Pursuant to an IEP Team meeting, it was decided that Student should attend the Massapoig Collaborative program in Hingham, MA, for 7<sup>th</sup> grade (the 2005-2006 school year). This, too, was an unsuccessful placement. Student adopted some of the deviant and anti-social behaviors of his peers, and he was sexually abused by one of his peers, although the sexual abuse was not revealed until 2008. During this placement, Student was admitted to the Westwood Lodge, a psychiatric hospital, for a period of time in November 2005. Also in November 2005, Parent arranged for her son to begin receiving therapy from Richard Rein, PhD. Dr. Rein continued to provide therapy to Student twice each week for the first one and one-half years and then once per week for the next two years. Subsequently, Dr. Rein saw Student once every two weeks. Dr. Rein has continued, through the present, to provide therapy to Student although Dr. Rein has not seen Student during the times that Student has been hospitalized or in a residential placement. Testimony of Parent, Rein; exhibit P-48.

For 8<sup>th</sup> grade (the 2006-2007 school year), as well as during the summer immediately prior to 8<sup>th</sup> grade, Student attended the Quest program that is part of the South Shore Collaborative. The same behavior pattern continued. Student was disruptive, sometimes yelling and swearing at teachers, he did not get along with his peers, he refused to do his schoolwork and homework, he was occasionally suspended and placed in the time-out room as result of his behaviors. During this time, there were also safety issues during his bus transportation to and from school when he would occasionally jump out of the bus when the bus stopped, and refuse to return to the bus. In August 2007, Student was admitted for a period of time to Bournewood Hospital, a psychiatric hospital. Testimony of Parent; exhibits P-19(e), P-19(f), P-19(g), P-19(h), P-19(i), P-46(d) and (e).

For 9<sup>th</sup> grade (the 2007-2008 school year), Student was transferred from the Quest program to the Careers Program at the South Shore Collaborative. The Careers Program had a vocational focus, and Student took courses in the area of culinary arts, which was an interest of his. Student's behavioral and academic difficulties continued. Student's behavioral difficulties continued. Testimony of Parent; exhibits P-17, P-19(a), P-19(b), P-19(c), P-19(d), P-46(c) and (d).

While in 9<sup>th</sup> grade, as Student had done since a young child, he occasionally wandered from home, particularly at night. However, in January 2008 of his 9<sup>th</sup> grade year, Student's night wandering increased. At first, he would wander part of the night, and then he began staying out all night. He would walk the streets of Hingham and spend the night (sometimes three or four nights in a row) sleeping in the woods or by the side of the road. Nevertheless, he would end up at the South Shore Collaborative for school the following day. Testimony of Parent.

Notwithstanding all of his difficulties at school, Student loved school, in part because it was his only social life since he did not have any friends. Whenever he wandered at night, Parent would go out to look for him, she would call others who might possibly have seen him, and she would go to the police station to file a missing person statement, but usually none of this was successful in finding Student during the night. Testimony of Parent.

In February 2008 while Student was attending the South Shore Collaborative Careers Program, Student had been wandering all night for two or three nights in a row, and when he arrived at school the next day, the school building was locked because of the early hour at which Student had arrived at school. Student proceeded to break into the school building, entered a closet, and fell asleep, not waking up until 1:00 pm that afternoon. The Collaborative called the police because of Student's having broken into the school building. Student appeared to be lethargic, dehydrated, and medically unstable. He was taken to the South Shore Hospital emergency room pursuant to section 12 of MGL chapter 123 (the mental health commitment law). Testimony of Parent; exhibit P-18.

As a result of this incident, Student was asked to leave South Shore Collaborative. At an IEP Team meeting, Parent sought, as she had in the past, a residential educational placement, which Hingham refused. Pursuant to this meeting, Student was placed at Granite Academy. This placement lasted three days. Student was so upset about having to leave South Shore Collaborative that he was not sleeping, he was wandering the streets of Hingham at night, and he was de-compensating emotionally. Student refused to go to school. At this time, Student began spending time with a Neo-Nazi group that, Parent feared, would be extremely dangerous for Student. Testimony of Parent.

On May 24, 2008, Parent unilaterally placed Student at the SUWS Wilderness Program in North Carolina. Parent made this placement because she literally feared for her son's life if he were to continue to live at home and associate with the Neo-Nazi group. Parent testified that her son seemed to make progress at the residential program at SUWS, learning how to relate to his peers and enjoying the wilderness experience. The program provided therapy to Student, and Student's therapist spoke weekly with Parent by telephone. Nevertheless, Student began to de-compensate emotionally while attending the program. Testimony of Parent; exhibits P-30, P-32.

On August 19, 2008, Student was discharged from SUWS, without successfully completing the program. By then, Parent believed that SUWS had gone as far as it could to help her son. The SUWS discharge report indicated that Student had a low ability to deal with frustration. Parent noted that her son's behavior, as described in the discharge report, was similar to what she has observed at home. The discharge report recommended that Student receive a complete psychological evaluation and that he be placed in a residential program. Testimony of Parent; exhibit P-30.

During his stay at SUWS, Student received a psychological evaluation from Sheneen Daniels, PhD, who recommended that student receive therapeutic residential services. Exhibit P-3.

On August 21, 2008, Parent unilaterally placed Student at the Meridell Achievement Center, which is part of the University of Texas. At this Center, Student was placed on a neuro-behavioral, residential unit. During his stay, Student participated in individual, group, family (including phone conversations with Parent), recreational, and milieu therapies. Student made progress, with insight and judgment improving. For a period of time, he had aggressive behavior towards staff and peers, but Student then began demonstrating better impulse control and more pro-social behaviors. After approximately four months, Parent could not continue to afford sending her son to Meridell, with the result that he was discharged on December 23, 2008. Testimony of Parent; exhibits P-38, P-39, P-40, P-41, P-42, P-43.

After returning home from Meridell, Student resumed his private therapy with Dr. Rein. Dr. Rein found that Student was better than Dr. Rein had ever observed in the past. Because Student appeared to be relatively well at this point in time, Dr. Rein continued to provide therapy to Student but at the reduced frequency of once every other week. Testimony of Rein.

Following the school Christmas break, Student was placed at the READS Academy on January 9, 2009. READS is located in Marlboro, MA. Student attended READS as a 10<sup>th</sup> grader until May 28, 2009. At READS, Student did not make more than minimal progress regarding his four IEP goals of social/emotional, behavior, organizational skills, and academics, and there were many behavioral incidents. While attending READS, Student's previous aberrant behavior in the community (for example, lying, stealing, and wandering) began to return. Testimony of Rein, Dowd-Pizzuto, Parent; exhibits P-14, P-15, P-46(c).

In late May 2009, Student left home from Wednesday to Saturday and was found, by the police, in his Father's house on Cape Cod. Student was with people whom he had apparently only recently met, including a mother and her baby. It appears that he invited these virtual strangers to stay with him in his Father's house, believing that he should take care of them. Apparently, Student had driven his Father's car to this house on Cape Cod, taking his recent acquaintances with him, even though Student did not have a driver's license. His father was not living at this house at the time, and Student was discovered in the house by the police. Testimony of Parent.

The police arrested Student and he was taken to Cape Cod Hospital. Soon thereafter, Student was discharged from READS on May 28, 2009 when it became clear that Student would not likely be able to return to READS in the near future. Pursuant to a court order, Student was committed to Chauncy Hall Academy, which is an intensive residential treatment program funded by the Massachusetts Department of Mental Health. The initial period of commitment of 20 days, beginning on June 15, 2009, was for the purpose of Student's being evaluated for competency to stand trial. This 20-day commitment was then extended by the court for an additional 20 or so days. Student did well within the therapeutic environment at Chauncy Hall, with only one substantial behavioral incident, which occurred near the end of his placement. Testimony of Tebeau, Parent; exhibits P-1, S-2, S-12.

On July 22, 2009, Student was evaluated by Robert Fleming, PhD, for purposes of a determination of whether Student was competent to stand trial. Dr. Fleming reported that Student had stabilized while attending Chauncy Hall, but warned that “[Student] is likely to once again decompensate if he is not placed in a therapeutic residential environment.”

Testimony of Tebeau; exhibits P-1, S-2.

On August 4, 2009, Student was discharged from Chauncy Hall to home, with a recommendation that he receive intensive home-based services, outpatient counseling, and medication monitoring, together with placement at a therapeutic day school. The discharge recommendation was written by Chauncy Hall staff who were unaware of Dr. Fleming’s recommendation and who did not consider any of Student’s educational history or any of his educational record. Testimony of Tebeau; exhibits P-12, S-1.

Since August 4, 2009, Student was in Maryland for a week of family vacation, and he spent a week with his grandparents in New Jersey. Since then, his grandparents have been helping to supervise him within Parent’s home. Testimony of Parent.

By letter of August 18, 2009, Student was determined eligible, for the first time, for DMH community continuing care services. A DMH representative advised Ms. Tebeau that it would be unlikely that DMH would have residential services available for Student.

Testimony of Tebeau; exhibit P-51.

## DISCUSSION

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”)<sup>1</sup> and the Massachusetts special education statute.<sup>2</sup> 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.”<sup>3</sup> In addition, FAPE is defined by the IDEA to include state educational standards,<sup>4</sup> and Massachusetts special education law includes a state FAPE requirement.<sup>5</sup>

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

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<sup>1</sup> 20 USC 1400 *et seq.*

<sup>2</sup> MGL c. 71B.

<sup>3</sup> 20 USC 1400(d)(1)(A). *See also* 20 USC 1412(a)(1)(A).

<sup>4</sup> 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 (1<sup>st</sup> 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”).

<sup>5</sup> MGL c. 71B, ss. 1, 2, 3.

disabled student,<sup>6</sup> allowing the student to access public education.<sup>7</sup> Access must be meaningful,<sup>8</sup> but need not maximize a student’s educational potential.<sup>9</sup>

Massachusetts and federal educational standards require that the individualized education program (hereinafter, “IEP”) be designed to enable the student to make effective progress.<sup>10</sup> Massachusetts standards also provide that the special education services be designed to develop the student’s educational potential.<sup>11</sup> Hingham’s proposed IEP must be custom-

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

<sup>7</sup> *Rowley*, 458 U.S. at 192 (“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”).

<sup>8</sup> *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 (3<sup>rd</sup> 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 (9<sup>th</sup> 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 (2<sup>nd</sup> 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 (4<sup>th</sup> 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 (7<sup>th</sup> 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 (6<sup>th</sup> Cir. 2004); *Shore Regional High School Bd. of Educ. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004); *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 395 (3d Cir. 2006), citing *T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d 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 (5<sup>th</sup> Cir. 2000); *Adams v. Oregon*, 195 F.3d 1141, 1145 (9<sup>th</sup> 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); *Hunt v. Bureau of Special Education Appeals*, 109 LRP 55771, CA No. 08-10790-RGS (D.Mass. 2009) (“School districts provide a FAPE by designing and implementing an IEP ‘reasonably calculated’ to insure that the child receives meaningful ‘educational benefits’ consistent with the child’s learning potential” citing *Rowley*).

<sup>9</sup> *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.”).

<sup>10</sup> 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 (1<sup>st</sup> Cir. 1993); *Roland v. Concord School Committee*, 910 F.2d 983, 991 (1<sup>st</sup> 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”).

<sup>11</sup> 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”*

tailored to meet Student's "unique" needs so that he will receive sufficient educational benefit.<sup>12</sup> Parent has the burden of persuasion that residential educational services are required in order for Student to receive FAPE.<sup>13</sup>

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.<sup>14</sup>

At the same time, special education and related services need not address "problems truly 'distinct' from learning problems."<sup>15</sup> Thus, the need to address Student's social, emotional,

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("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>12</sup> 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(1<sup>st</sup> Cir. 2008) (noting the school district's "obligation to devise a custom-tailored IEP").

<sup>13</sup> *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").

<sup>14</sup> *Lenn v. Portland School Committee*, 998 F.2d 1083, 1089-1090 (1st Cir. 1993). See also *Mr. I. v. Maine School Administrative District No. 55*, 480 F.3d 1, 12 (1<sup>st</sup> 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 (1<sup>st</sup> Cir. 2005) (student may have the right, under the IDEA, to "receive an education that is tailored to her social, psychological, and educational needs"); *Alex R. ex rel. Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. No. 221*, 375 F.3d 603, 613 (7th Cir.2004) (holding that "[t]o meet the second, substantive criterion of *Rowley*, an IEP must respond to all significant facets of the student's disability, both academic and behavioral."); 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 . . .").

<sup>15</sup> *Gonzalez v. P.R. Dep't of Educ.*, 254 F.3d 350, 352 (1<sup>st</sup> Cir. 2001).

and behavior deficits depends on whether these deficits can appropriately be considered separable from the learning process.<sup>16</sup>

In the instant dispute, it is not possible to separate out Student's social, emotional, and behavioral deficits from his learning. It is not disputed that Student has serious social, emotional, and behavioral deficits and that these deficits impact negatively upon his learning. Hingham's most recent IEP references the need to address each of these deficits as part of Student's special education. In order to address these concerns, Hingham has recommended placement within a substantially-separate, therapeutic day school (the READS Academy). Testimony of Loud; exhibits S-5, P-46.

Within the learning environment itself (for example, at READS Academy), Student's behavioral difficulties frequently resulted in his leaving the classroom or being unable to stay awake in the classroom after wandering at night. In addition, Student's emotional and behavioral difficulties have often resulted in his not completing schoolwork and homework. Student's poor decision-making and impulsive behavior have resulted in his doing such things as breaking into the South Shore Collaborative school building and illegally driving strangers to his father's house at Cape Cod after wandering at night for several nights, and this behavior has led to significant disruptions in his education. Most recently, his behavior led to a 40-day stay at a DMH-funded intensive residential treatment program where he received no educational services during the summer; otherwise he would have been able to receive summer educational services at READS. He has also had several psychiatric hospitalizations which have similarly disrupted his education. Testimony of Parent; exhibits P-12, P-15(a) through (y), P-16, P-18, P-19(a) through (i); P-20, S-11.

It is not disputed that Student's aberrant behavior is not intentional—in fact, he very much wants to please adults. Rather, this behavior is primarily or entirely attributable to his various disabilities. Testimony of Rein.

For these reasons, I find that Student's social, emotional, and behavioral deficits are not separate and distinct from, but rather are inextricably intertwined with, his learning needs. In addition, it is not disputed and I so find that Student's social, emotional, and behavioral

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<sup>16</sup> 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 (1<sup>st</sup> 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 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").

deficits are his most substantial educational difficulties. These needs present themselves throughout the school day, as well as in the home and community. Addressing these deficits appropriately is essential to Student's making any meaningful or effective educational progress.

Under both federal and Massachusetts law, FAPE must be provided in the least restrictive environment—that is, Hingham has a responsibility to appropriately address Student's social, emotional, and behavioral deficits in the environment that is least restrictive. The phrase "least restrictive environment" means that, to the maximum extent appropriate for Student, he must be educated with other students who do not have a disability.<sup>17</sup> A residential placement is properly considered more restrictive than a day program, even when the day program (for example, at READS Academy) places Student in a substantially separate special education program.<sup>18</sup>

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 Hingham 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.<sup>19</sup>

The initial inquiry, as reflected within the Issues statement above, is whether Hingham's proposed IEP is appropriate. Through this IEP, Hingham has proposed that Student continue to be placed at READS Academy where Student was previously educated for approximately five months from early January to late May 2009. READS Academy is a therapeutic day school that has been established specifically to work with children with Student's profile. Testimony of Dowd-Pizzuto; exhibits P-46, S-5, S-10.

It is not disputed by the parties that Student made only minimal progress at READS regarding his four areas of educational need as identified by his IEP goals—that is, behavioral, social/emotional, organizational, and academic. Student's final grades, which are determined 40% by his academic work, 40% by his behavior, and 20% by his attendance, were no higher than a grade of 66, except for a grade of 88 in group counseling. Over the course of the five-month period, there were 25 written incident reports reflecting unacceptable behavior and the written progress reports (regarding his four IEP goals of behavior, social/emotional, organization, and academics) reflected no substantial progress. When asked about any progress that may not have been reflected within his grades and written progress reports, the program director testified only that he had made "some" progress regarding peer relationships in that he was finding appropriate ways to be noticed

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<sup>17</sup> 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).

<sup>18</sup> *Walczak v. Florida Union Free School Dist.*, 142 F.3d 119 (2nd Cir. 1998).

<sup>19</sup> *Gonzalez v. Puerto Rico Department of Education*, 254 F.3d 350 (1<sup>st</sup> Cir. 2001); *Abrahamson v. Hershman*, 701 F.2d 223, 228 (1<sup>st</sup> Cir. 1983).

by his peers, as compared to acting out in order to get their attention. She noted that over the course of five months, Student showed “glimmers” of progress but would then regress. Testimony of Dowd-Pizzuto; exhibits P-13, P-14, P-15(a) through (i), P-20(a), S-10.

In addition, Student’s therapist (Dr. Rein) testified that while attending READS, Student’s previous aberrant behavior in the community (for example, lying, stealing, and wandering) began to return. Dr. Rein explained that these behavior difficulties culminated in a series of events in late May 2009 that led to Student’s being discharged from READS.

Hingham took the position that Student would do better at READS during the 2009-2010 academic year than he did during his five months there from January through May 2009. Over time, it became apparent to READS staff that Student did not do well on the level behavioral system that is generally used for students enrolled at READS. During the 3<sup>rd</sup> quarter of the 2008-2009 school year, Student was given his own, individualized behavior plan, which provided more frequent positive rewards for Student’s appropriate behaviors. This change appeared to result in better behavior and an improvement in grades. But even then, during the 3<sup>rd</sup> quarter, only four out of his ten grades were above 68, and he continued to have behavioral incidents during this quarter and into the 4<sup>th</sup> quarter. Even with these improvements, it is not disputed that Student made no more than minimal progress during his five months at READS Academy. For these reasons, I find it unlikely that Student’s participation in READS Academy during the 2009-2010 school year would result in meaningful or effective educational progress in school, nor would there likely be any meaningful or effective progress regarding his behavioral difficulties within the home and community that have consistently impeded and, for periods of time, interrupted his learning. Testimony of Dowd-Pizzuto, Rein; exhibits P-13, P-14, P-15(a) through (i); S-11.

For these reasons, I find that Hingham’s proposed IEP is not reasonably calculated to allow Student to make effective or meaningful progress.

It is unlikely that placement at another therapeutic day program would be any more successful than what Student experienced at READS Academy. As described within the Factual Background section of this Decision, above, Student has had a history of failure in all of the day school placements provided by Hingham, including approximately one and one-half years in a therapeutic school at the South Shore Collaborative, as well as his placement at READS Academy. Dr. Rein testified, and there was no evidence to dispute it, that during the time period that he has been providing therapy to Student since 2005, he had not observed Student having made any substantial progress regarding his social, emotional, and behavioral deficits while attending a day school.

Although Hingham has conceded that Student has made no more than minimal progress at READS Academy, Hingham takes the position that the READS placement is appropriate for the 2009-2010 school year and that Student therefore need not be placed within a residential school. Hingham’s principal argument in support of this position appears to be that the READS placement will become appropriate if intensive, home-based services are added to complement the other services described within the IEP. Essentially, Hingham requests that

in the event that I find its proposed IEP, as written, to be inappropriate, I should order Hingham to amend its IEP for the purpose of adding intensive, home-based services.

Hingham suggested these home-based services, for the first time, at the evidentiary hearing. Hingham has not previously recommended or proposed these services for Student. The suggested addition of home-based services was supported by the testimony of Hingham's Director of Special Education (Dr. Loud), the testimony of the READS Program Director (Ms. Dowd-Pizzuto) and the August 4, 2009 discharge report from Chauncy Hall Academy. Testimony of Loud, Dowd-Pizzuto; exhibits P-12, S-1.

The only written reference to Student's need for or recommendation to receive home-based services is found within the August 4, 2009 Chauncy Hall discharge summary, which simply mentioned it as one component of recommended services for Student. The testimony supporting home-based services did not describe, in any detail, what those services would consist of. Perhaps because Hingham has not proposed home-based services through the IEP Team process during which this issue might have been explored and developed, there is virtually no substantive description or explanation of what Hingham is now proposing for home-based services. Exhibits P-12, S-1.

The only evidence at hearing regarding what, specifically, may be proposed for home-based services was included in Ms. Dowd-Pizzuto's testimony. She explained that READS has clinical staff who could assess Student's need for home-based services and that, based upon that assessment, services could be provided within the home by READS staff as needed, which for most students is once per month. Neither Hingham nor READS has ever proposed or conducted such a home-based services assessment. Testimony of Dowd-Pizzuto.

In their testimony, both Dr. Loud and Ms. Dowd-Pizzuto indicated that Student would likely benefit from intensive, home-based services. Each of these witnesses has clinical experience and expertise, but they have been working as full-time administrators for the past sixteen years and six years, respectively. Further neither Dr. Loud nor Ms. Dowd-Pizzuto has ever worked directly with Student, and Dr. Loud has never met Student. Rather, these witnesses are familiar with Student through the observations and reports of others. I find that these two witnesses have sufficient expertise and experience to persuasively recommend intensive, home-based services *generally* as something that should be considered for and may benefit Student, but I find that neither has demonstrated sufficient understanding of Student to render an expert opinion regarding the likelihood that such services would *actually* benefit Student. Testimony of Loud, Dowd-Pizzuto; exhibits S-13 (resumes).

Turning to the reference to home-based services within the August 4, 2009 discharge report from Chauncy Hall, I find that it has little, if any, probative value. This is because, as the Chauncy Hall Program Director explained in her testimony, this discharge report was written solely from Chauncy Hall staff's experience with Student over the course of his 40-day residential stay at Chauncy Hall and did not consider any of Student's educational history prior to attending Chancy Hall and considered none of Student's records, including evaluations and previous therapy from Dr. Rein. Testimony of Tebeau; exhibits P-12, S-1.

In contrast, Dr. Rein was well-equipped to provide expert opinion regarding the likely usefulness of intensive, home-based services. Dr. Rein has been working for the past 24 years as a therapist with families and children, including adolescents. Except for time periods during which Student was hospitalized or in a residential program, Dr. Rein has been seeing Student in therapy at least once every two weeks since November 2005. As part of these therapy sessions, Dr. Rein also frequently met privately with Parent and also, at times, with both Parent and Student together. Dr. Rein evidenced a thorough clinical understanding of Student regarding his social, emotional, and behavioral deficits, and he also demonstrated an understanding of Student's relationship with Parent, as well as a high level of expertise regarding the best ways for Parent to work with Student. I also note that Dr. Rein testified in a candid, objective, careful, and clear manner. Testimony of Rein; exhibit P-50 (resume).

Dr. Rein's testimony was persuasive (and I so find) that providing intensive, home-based services to Student and his Parent would be unlikely to address appropriately Student's social, emotional, and behavioral deficits within the home and community. Dr. Rein reached this conclusion based upon the fact that, since 2005, he has essentially been providing the equivalent of home-based services to Student and Parent—that is, he has been working with them to find ways for Parent to relate to Student and for her to respond to him in ways that would ameliorate his tendency to act in ways that are unsafe, oppositional, and disruptive. In short, Dr. Rein has provided to Parent a continuing source of consultation for purposes of working on precisely the issues that would be addressed within home-based services. As Dr. Rein made clear and as is also apparent from an abundance of testimony and reports, Dr. Rein's assistance, although invaluable to Parent and Student, has been unsuccessful in ameliorating the many behavioral difficulties and self-destructive decisions that have undermined Student's education over the past four years. Dr. Rein was persuasive that there now is no reason to believe that intensive, home-based services would be any more successful than Dr. Rein's efforts to date. Testimony of Rein.

It might be argued that it would be possible to give these intensive, home-based services a try nevertheless, that they would be provided in a new way, and perhaps that they could make a difference if provided in addition to Dr. Rein's continuing therapy. This might, arguably, be a way of avoiding the most restrictive placement of a residential school.

I do not find this line of reasoning to be persuasive. Although it is important to exhaust all less restrictive, appropriate options prior to placing Student residentially, it makes little sense (and there is too high a risk in taking valuable time) to provide services that have little or no likelihood of being helpful. Hingham has had many years to evaluate and understand Student's complex educational difficulties, and then to propose and provide effective educational services. As is described in detail within the Factual Background section of this Decision, above, there have been too many failed attempts over too long a period of time, with highly negative consequences to Student's education. It is very late in the day for Hingham to propose, for the first time during the evidentiary hearing, that Student should receive intensive, home-based services for the purpose of forestalling the need for a

residential placement where there is no credible evidence in support of their likely success and Hingham has provided no description of what those services would entail.

For these reasons, I find that the addition of intensive, home-based services to Hingham's IEP would not likely meet Hingham's obligations to provide Student with FAPE. Hingham has not argued that any other additional services (or changes to the IEP) be considered, nor am I am aware of any that merit consideration.

I now turn to the question of whether residential educational services are appropriate for Student.

As explained above, Dr. Rein understands the history of Student's failure to make educational progress, particularly with respect to his social, emotional, and behavioral deficits. Dr. Rein has seen many approaches tried, both by Hingham and Parent for purposes of addressing these deficits. More than any other witness (perhaps except for Parent), Dr. Rein understands Student's most important educational deficits and how they can be ameliorated. In sum, his testimony was credible and persuasive.

In his testimony, Dr. Rein noted the substantial benefits that Student obtained from his combined placements of three months at SUWS (even though Student was not able to graduate from this program) and the four months at Meridell. When Dr. Rein saw Student soon after his return from these residential programs, he was struck by how well Student was doing. Student was the healthiest that Dr. Rein had ever seen him. His thinking process was working well, he was committed to doing his school work, and he made clear the importance of showing up on time for his obligations. For several months, Student did extremely well. Dr. Rein reduced the amount of time in therapy to once every two weeks. Then, unfortunately, Dr. Rein observed Student's old behaviors returning in a "mild" form—for example, wandering, lying, and oppositional behavior with Parent. Eventually, this culminated in Student's illegally driving his father's car to his father's unoccupied house on Cape Cod and living there with virtual strangers, as discussed in greater detail above.

Dr. Rein testified that except for this period of residential services at SUWS and Meridell, Student has not made any substantial educational progress regarding his most important deficits. Dr. Rein opined that the constellation of therapeutic day program, outpatient therapy, community activities (Student held a job bussing tables for a period of time), and supportive Parent have not been and are not likely to be sufficient to allow Student to make educational progress. Dr. Rein testified persuasively that without substantially more intensive and comprehensive therapeutic services, Student is likely to become more involved with the juvenile (and then adult) justice systems, with potentially disastrous consequences.

Based upon Student's success at SUWS and Meridell, together with Student's consistent lack of educational success in other educational environments and his propensity to engage in dysfunctional and potentially criminal conduct without sufficiently intensive and comprehensive educational services, Dr. Rein recommended that Student be placed in a therapeutic residential educational program as Student's only opportunity for making

effective and meaningful progress regarding his social, emotional, and behavioral deficits. More specifically, such placement would provide an opportunity for Student to change his ways of thinking, to develop internal behavioral controls, which simply have not developed to date, and to internalize and generalize more appropriate decision-making skills. Dr. Rein also recognized the importance of working with Student to be able to transition back into the community (and providing sufficient supports within the community) when residential services are no longer necessary. In sum, Dr. Rein was persuasive that Hingham has simply run out of viable, less restrictive options for giving Student a realistic opportunity to make meaningful educational progress, and that Student now requires a residential educational placement in order to receive FAPE.

Parent's other expert, Ms. Stevens, has extensive experience in the area of special education services and placements, including evaluating students for many years. Her testimony supported Student's need for residential services. Ms. Stevens made clear her opinion that Student cannot make effective educational progress outside of a residential, therapeutic placement. She supported this view through her review of the record and telephone conversations with many persons who have evaluated or provided services to Student—including, for example, Dr. Daniels, Mr. McKeown, Mr. Reed, Dr. Fleming, Dr. Rein, and Dr. Clark. Testimony of Stevens.

I consider Ms. Stevens' testimony to have limited probative value, and I do not rely upon it. Ms. Stevens has not, for many years, evaluated students or provided direct services, nor does she have current professional qualifications, for example, as a psychologist. Over the years, Ms. Stevens has become an educational consultant and, at the same time, an advocate for parents and students with special education needs. As is made clear within the present dispute, her role as advocate includes vigorously representing the interests of Parent and Student before the BSEA. Ms. Stevens appeared to be testifying less as an objective expert and more as an advocate with substantial educational expertise. This diminished the reliability and usefulness of her expert testimony. Testimony of Stevens; exhibit P-49 (resume).

Next, I consider the evaluations of Student. Hingham conducted a three-year evaluation of Student in 2001. Subsequently, in 2002, Hingham referred Student for a neuropsychological evaluation. This neuropsychological evaluation is Hingham's most recent evaluation of Student. In 2005, Parent privately obtained a subsequent neurological evaluation of Student; in 2006, Student was evaluated psychiatrically as part of his placement at the South Shore Collaborative; in 2008, Parent privately obtained a psychological evaluation of Student during the time that she had placed her son residentially in SUWS in North Carolina; later in 2008, Student received an admission evaluation from a Meridell psychiatrist; and finally in 2009, Student was evaluated by court-order to determine his competency to stand trial. Exhibits P-1, P-3, P-4, P-5, P-6, P-7, P-8, P-9, P-10, P-11, P-12, S-1, S-2.

Parent has never denied any request by Hingham to have her son evaluated. Essentially, Hingham has declined to do its own recent evaluations (including any subsequent three-year evaluation after its initial evaluations in 2001), apparently relying instead on the above-

referenced evaluations that were conducted at Parent's initiative or that occurred as part of a placement or pursuant to a court order. Reviewing these evaluations in general, to the extent that any of them makes recommendations regarding Student's current need for services, they recommend a residential placement. Hingham has no recent evaluations or written report that rebut these recommendations for residential placement.

There are two evaluations and one discharge report that recommend residential placement. First, Sheenan Daniels, PhD, the Director of the Clinical Division of the Center for Research, Assessment, and Treatment Efficacy in North Carolina, conducted a psychological evaluation of Student in June 2008 while Student was attending the SUWS program in North Carolina. The evaluation recommended that following the SUWS placement,

[Student should] continue in a clinically-oriented therapeutic boarding school or residential treatment center. Given the significant deterioration in his functioning over the past year combined with poor judgment, deficient impulse control, naïveté, and an association with a negative, older peer group, [Student] appears to be at substantial risk of becoming involved in situations that are potentially dangerous and risky for his well-being. ... [Student's] difficulties appear to stem from mental health or psychiatric problems rather than merely behavioral problems.

Exhibit P-3.

Second, on August 19, 2008, when Student was discharged from SUWS, the discharge report prepared by Student's primary clinician (Jason McKeown) stated that "Student could benefit from placement at a therapeutic residential boarding school that will allow him to work on his impulsive/reactive behaviors, learning coping skills, and address the areas of his psychological testing." Exhibit P-30.

Third, Robert Fleming, PhD, conducted a court-ordered competency evaluation of Student on July 22, 2009 while Student was at Chauncy Hall. In addition to making a determination of competency, he opined, in relevant part, as follows:

[Student] is likely to once again decompensate if he is not placed in a therapeutic residential environment. ... [Student] would definitely benefit from placement in a therapeutic, long-term residential program that has an integrated special education and vocational program. It is quite clear, in my opinion that he only does well in structured settings due in part to his "external locus of control." [Student] has little ability to engage in constructive goal directed behavior over the long-term due to several handicapping problems—his mental health issues (mood disorder), learning problems, past history of abuse, conduct problems.

In addition, Dr. Fleming's report indicated that Dr. Amidon, a forensic psychologist who also evaluated Student during his 40-day stay at Chauncy Hall, proposed a specific residential placement as appropriate for Student, indicating agreement with Dr. Fleming's conclusion that Student should be placed residentially. Dr. Fleming is a court clinic evaluator who is not

associated with Chauncy Hall, and Dr. Amidon is an independent forensic psychologist employed by DMH who was on Student's treatment team at Chauncy Hall. Testimony of Tebeau; exhibit P-1.

I found helpful and have relied upon these professional evaluations and discharge report. However, a written evaluation or report is given less weight than expert testimony unless there is testimonial explanation and clarification from either the author or another professional competent to comment upon the relevance of the evaluation or report. This did not occur in the present dispute. Testimony allows for cross-examination as well as clarifying questions from the Hearing Officer, whereas the document does not. In addition, the qualifications and expertise of the evaluators were not revealed regarding the above-referenced two evaluations. On the other hand, it is noteworthy that the only relatively recent evaluations in evidence that consider the question of placement, recommended that Student be placed residentially, and they did so for essentially the same reasons. Accordingly, I find that these evaluations and report have probative value in support of Dr. Rein's testimony and Ms. Tebeau's testimony (described below) although, by themselves, they might not be sufficient to establish that Student requires residential services.

Another discharge report made a recommendation for Student's educational placement, but I find, for the following reasons, that this report has no substantial probative value. This is the August 4, 2009 discharge summary from Chauncy Hall Academy, written by the Program Director (Ms. Tebeau). In her role as Program Director, Ms. Tebeau was also on Student's treatment team, and she attended the meetings of the treatment team. Testimony of Tebeau; exhibit P-12.

Although there are two, slightly different versions of this document, both recommend that Student be placed in a therapeutic day school, and one version specifically references the READS Academy for this purpose. However, as Ms. Tebeau explained in her testimony, this discharge report was written solely from Chauncy Hall staff's experience with Student over the course of his 40-day residential stay at Chauncy Hall, did not consider any of Student's educational history prior to attending Chancy Hall, considered none of Student's records and evaluations, and did not even consider the above-discussed evaluations by Dr. Fleming and Dr. Amidon that occurred while Student resided at Chauncy Hall. Testimony of Tebeau; exhibit P-12.

Ms. Tebeau testified as to how Student did at Chauncy Hall, which is a secure, intensive residential treatment center funded by the Massachusetts Department of Mental Health. She explained that Student did quite well, with minimal behavioral difficulties until near the end of his stay where there was one behavioral incident. Parent testified that her son was afraid of leaving the contained and protected environment of Chauncy Hall, and may have acted out as a manifestation of his anxiety when he began to approach his discharge date. Testimony of Tebeau, Parent; exhibit P-12.

In light of how well Student did at Chauncy Hall, in contrast with his history of failure within every recent day placement, I find that without considering earlier reports, including

evaluations, and without considering Student's earlier history, it was not possible for Chauncy Hall staff to provide a credible recommendation as to Student's next appropriate placement. Testimony of Tebeau; exhibit P-12.

Ms. Tebeau testified that although Chancy Hall staff were not allowed to consider any outside information or reports regarding Student when the discharge report was prepared, she was nevertheless aware of Student's educational history (including social/behavioral difficulties at school and in the community) prior to Student's admission to Chauncy Hall. When Ms. Tebeau was asked whether she had an opinion regarding Student's prospective placement needs in light of what she knew of Student's previous history, she opined that Student would likely benefit from residential placement. She made clear that Student would likely benefit from residential services primarily for safety and supervision reasons. Also, the evidence, discussed above regarding how well Student did at Chauncy Hall, further supports the proposition that Student would likely do well in and benefit from a residential therapeutic setting. Testimony of Tebeau.

The only evidence that supports the position that Student does not require and would not benefit from a residential placement was the testimony of Dr. Loud and Ms. Dowd-Pizzuto. For the reasons explained above, I do not find either of these witnesses to have the depth of understanding of Student that were demonstrated by Dr. Rein. I therefore do not find them to be persuasive as a rebuttal to Dr. Rein's opinions regarding Student's social, emotional, and behavioral needs and how they may be addressed effectively.

In sum, I rely upon the following evidence: (1) demonstrated lack of effective educational progress in the day therapeutic placement (READS Academy) that Student attended for five months during the 2008-2009 school year and that Hingham has proposed for the 2009-2010 school year, (2) Student's consistent failures in all educational day placements since sixth grade (2004-2005 school year), (3) over many years, the lack of effective progress regarding Student's emotional and behavioral difficulties within the community and the negative impact of these difficulties on Student's educational opportunities, (4) the unlikelihood of effectiveness of any additional home or community support services, (5) Student's educational successes within recent residential placements, and (6) the clear weight of the expert testimony and all recent evaluations and reports, supporting the educational need for therapeutic residential services.

For these reasons, I find that a therapeutic residential placement is essential in order for Student to receive an effective, meaningful educational benefit and to address appropriately his social, emotional, and behavioral needs set forth within the most recent IEP. I further find that such therapeutic residential placement is primarily oriented toward enabling Student to obtain an appropriate education and is therefore the responsibility of the Hingham School District.<sup>20</sup>

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<sup>20</sup> Within this context, I remind Hingham of the critical importance for planning for Student's transition back into the community, so that from the very beginning of the residential placement, it can be viewed from the perspective of Student's gaining sufficient abilities to return, successfully, to the community and when he is able to do so, to have

## **ORDER**

Hingham'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) to the current IEP, including but not limited to intensive, home-based services, are not sufficient to satisfy this standard.

In order to receive the special education and related services to which Student is entitled, Hingham shall place Student into a therapeutic residential placement. Hingham shall amend its most recent IEP to reflect such a placement.

By the Hearing Officer,

William Crane

Dated: September 9, 2009

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sufficient supports available there to ensure a successful transition. In light of the fact that Hingham has not evaluated Student since 2002, Hingham should also consider obtaining additional evaluations for purpose of understanding Student's current and future needs and how to address them, including but not limited to a comprehensive vocational evaluation.

COMMONWEALTH OF MASSACHUSETTS  
BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Hingham Public Schools

BSEA # 10-0592

ORDER

In order to apprise the parties in a timely manner of my findings in this case, this Order is issued in advance of a full Decision. The only issue addressed by this Order is the appropriateness of Hingham Public Schools' (Hingham) most recently-proposed IEP and whether Student requires residential services to receive a free appropriate public education. The full Decision regarding this issue will be issued no later than ten days after the close of the record, which occurred on August 31, 2009.

This Order 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 regarding this matter was held on August 27 and 31, 2009 in Braintree, MA before William Crane, Hearing Officer. The official record of the hearing consists of documents submitted by the Parent and marked as exhibits P-1 through P-51; documents submitted by the Hingham and marked as exhibits S-1 through S-13; and two days of recorded oral testimony and argument. As agreed by the parties, oral closing arguments were made on August 31, 2009, and the record closed on that date.

I have now had an opportunity to review and consider the entire evidentiary record, as well as the arguments of both parties.

On the basis of this review, I find that Hingham'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) to the current IEP, including but not limited to intensive home-based services, are not sufficient to satisfy this standard.

I therefore find that in order to receive the special education and related services to which Student is entitled, Hingham shall place Student into a therapeutic residential placement. Hingham shall amend its most recent IEP to reflect such a placement.

By the Hearing Officer,

William Crane  
Dated: September 2, 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.