

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: MILLBURY PUBLIC SCHOOLS

&

BSEA #1801409

WALTER¹

DECISION

This Decision is issued pursuant to M.G.L. c. 71B, 20 U.S.C. § 1400 *et seq.*, 29 U.S.C. § 794, and the regulations promulgated under those statutes. Millbury Public Schools (“The School”) requested a Hearing on August 14, 2017. The Hearing was scheduled for August 31, 2017. A conference call was held among the Hearing Officer, the School’s attorney and both parents on August 21, 2017. The Parents abruptly terminated their participation in the discussion before the conclusion of the call and could not be reconnected. The School’s request to postpone the Hearing to September 11, 2017 was Granted. An Order reflecting the new Hearing date, time and location as well as setting out the schedule for submission of exhibits and motions was sent to the parties on August 22, 2017. No BSEA correspondence to the Parents’ listed address was returned as undeliverable. The School obtained signed, overnight delivery receipts and successful in-hand service of its prehearing correspondence and proposed exhibits at the address listed in the BSEA record and used for BSEA contact for the Parents. The Parents did not communicate with the BSEA or send documents to the BSEA or to the School in advance of the Hearing. The Parents did not attend the Hearing. On the day of the Hearing the Parents did not answer either of the two phone numbers listed in the BSEA file on which they had been successfully contacted for the August 22, 2017 conference call. The Hearing proceeded without the Parents.

¹“Walter” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

Those present for all or parts of the Hearing were:

Christine Warren	Team Chair, Millbury Public Schools
Thomas Bresnahan	Assistant Principal, Bridgewater-Raynham High School; Former Assistant Principal, Millbury High School
Lauren Wilson	School Psychologist, Millbury Public Schools
Richard Denault	School Adjustment Counselor, Millbury Public Schools
Gregory Przygoda	Special Education Teacher, Millbury Public Schools
Anthony Cacace	Principal, Grow School
Scott Swenson	Teacher, Grow School
Kate Ryan	Director Pupil Services, Millbury Public Schools
Felicia Vasudevan	Attorney for Millbury Public Schools
Alexander Loos	Court Reporter
Lindsay Byrne	Hearing Officer

The School's Motion for a Default Judgment was DENIED. The School completed presentation of its case-in-chief on September 11, 2017. The court reporter's transcript of the Hearing and copies of 4 additional documents admitted into evidence during the Hearing, were forwarded to the Parents on September 26, 2017. The Parents were permitted to respond in writing to the School's exhibits and the transcript until October 12, 2017. The BSEA did not receive a Response or Argument from the Parents.

The official record of the Hearing consists of Exhibits submitted by the School marked S-1 through S-32 and approximately 5 hours of recorded proceedings. The School submitted a written closing argument on October 23, 2017 and the record closed on that date. At all times the School was represented by Attorney Felicia Vasudevan. There is no indication in the BSEA file of legal representation for the Parents.

ISSUES:

1. Whether the January 2017 - January 2018 Individualized Education Program developed by Millbury, which calls for Walter to receive full day special education services in a public day school setting, is reasonably calculated to provide him with a free appropriate public education?

2. Whether the BSEA should authorize the School to conduct a home assessment where the Parents have failed to consent to the School's request?

SUMMARY OF THE EVIDENCE

1. Walter is a 16 year old resident of Millbury. He has been determined to be eligible for special education due to ADHD and an emotional impairment. He entered the Millbury Public Schools as a 9th grade student during the 2015-2016 school year having previously attended an in-district therapeutic program in Worcester. He repeated the 9th grade during the 2016-2017

school year. He was not promoted and is retained in the 9th grade for the 2017-2018 school year.

2. Walter's first year at Millbury High School, 2015-2016, was characterized by chronic and escalating incidents of disruptive behavior, lewd and offensive comments to students and staff, physical aggression toward students and staff and property damage. These incidents resulted in progressive discipline, including out of school suspensions, manifestation determination meetings, functional behavioral assessments, and responsive student support plans. None of these actions altered the type or intensity of his behavioral infractions or improved his chronic truancy. (Bresnahan; Ryan-Vokes; Warren; Wilson; S-15; S-16; S-18.)

His teachers uniformly reported that Walter was capable of academic performance at grade level but that his poor concentration, poor self-regulation, poor social skills, poor conduct, poor attendance, task avoidance and hyperactivity impeded learning. (Wilson; Warren; S-11; S-18; S-20; S-22; S-23.) Mr. Przygoda was Walter's special education math teacher during the 2015-2016 school year. He testified that Walter's poor conduct in class was resistant to every teacher intervention and behavioral support plan technique that was attempted throughout the school year. (S-27; S-31) He noted that Walter required "extensive" support to maintain himself in the classroom. Mr. Przygoda testified that Walter regularly stayed after school for 15-20 minutes in the math classroom with him. During this time, when Walter was alone with a teacher, Walter was quiet, engaging and capable of concentrated academic work. (Przygoda)

3. Millbury accelerated Walter's three- year re-evaluation due to the intensity of Walter's behavioral needs and the School's commitment to providing more appropriate, targeted interventions to assist him. (Warren) The results of teacher assessments, educational testing, a functional behavioral analysis and a psychoeducational evaluation were discussed with the Parents at a Team meeting held on June 1, 2016. The Team proposed an IEP providing for: separate special education instruction in math and social studies; inclusion support in science, social studies and English; daily counseling and/or access to an LICSW, and testing accommodations. The Parents accepted the proposed 2016-2017 IEP on September 6, 2016. (Wilson; Warren; S-26; S-7; S-8) This is the last accepted IEP for Walter.

4. Walter attended a general education program at Millbury High School during the summer 2016. On a weekend evening in June 2016 Walter allegedly caused significant property damage to the school building. This incident resulted in felony charges. (Bresnahan; S-24; S-25)

5. A manifestation determination meeting was held on September 6, 2016. The Team concluded that the vandalism incident was planned and purposeful and thus not a manifestation of Walter's documented disability: ADHD. (S-6; Warren; Wildon; Przygoda) The Team determined that Walter's special education needs could be appropriately addressed in a small, therapeutic school which offered immediate feedback, tight supervision and structure, small classes, and intense teacher-student relationships. The Team offered Walter a 45 day assessment at the GROW School, a component of the Southern Worcester County Educational Collaborative.

6. The GROW School is a small, self-contained high school designed to address the academic, behavioral, and social-emotional needs of students whose significant behavioral and emotional challenges have prevented success in mainstream schools even with intensive supports. It offers a responsive individualized, therapeutic approach to each student which reduces anxiety and improves school engagement. There are thirty students in the school. The day is divided into seven academic periods. Core academic classes in English, social studies, math and science have five to eight students, grouped by academic level, and two teachers. An academic support room is always available to students who need a quieter space or more individualized academic instruction. All students receive formal individual counseling and weekly group counseling. A therapist and/or behavioral support specialists are immediately available to students who need additional attention. Teachers also play a significant role in administering formal behavior support plans and token economy goals as well as less formally supporting, redirecting, motivating, clarifying, focusing and assessing students to improve both their academic and their behavioral/emotional functioning. All student behaviors are charted on a behavioral tracking system which assists in evaluating and implementing appropriate interventions. (Swenson; Deneault; Cacace) The School provides breakfast and lunch as well as a “soft landing” for school avoidant students.

7. Walter entered the GROW School on October 12, 2016. At the conclusion of the 45 day evaluation period Walter had attended just 14 days of school. Nevertheless, the GROW team had charted his in-school behavior and determined that, aside from non-attendance, the most frequent “disruptive” behavior exhibited by Walter was sleeping in class to avoid work. This behavior was substantially less disruptive than those seen at Millbury High School. (S-9; S-17; S-19) GROW and Millbury recommended that Walter remain at GROW for the remainder of the 2016-2017 school year. The Parents agreed, but did not sign the IEP proposing the post-45 day placement. (S-4; S-5; Cacace; Warren)

8. Walter remained at the GROW School during the spring 2017. His attendance, behavior and academic performance improved. He developed positive relationships with several behavioral support specialists and a therapeutic alliance with the school adjustment counselor. (Deneault) Walter began initiating participation in group recess activities and asked for and completed independent, grade level academic work in government class. (Swenson)

9. The Team met again on April 27, 2017. The Team continued to propose placement at the GROW School. The Parent requested placement at Millbury High School for the 2017-2018 school year. (S-3; Cacace; Deneault; Warren)

10. The Team met on August 8, 2017. The Parents did not attend. The School notified the Parents of the meeting by first class mail, in-hand sheriff service, email and voicemail. The Team reviewed Walter’s participation in the GROW School during the 2016-2017 school year and concluded that the program was addressing all of Walter’s identified special education needs and that Walter was making meaningful academic and behavioral progress in that program. The Team also determine that placement in a less restrictive setting, Millbury High School, would not address Walter’s current learning needs or permit him to progress commensurate with his abilities. The Team noted that Millbury High is too large a setting, and its educational supports are too diffuse and insufficiently intense, to appropriately address

Walter's need for a small, actively therapeutic, adult intensive educational program. (Warren; Deneault; S-19; S-21)

11. On August 8, 2017, Millbury proposed a 2017-2018 IEP calling for Walter's placement at the GROW School. (S-1; S-2; S-26) The IEP also proposed increasing direct individual counseling services to twice weekly and group counseling to once weekly while acknowledging that, as a therapeutic school, Walter's social/emotional/behavioral goals are addressed by all staff across all settings. The proposed 2017 - 2018 IEP also added a Transition goal to ensure that Walter works to acquire skills necessary to transition to a less restrictive educational setting as well as to post-high school opportunities.

12. The proposed 2017-2018 IEP also requested parental consent to a home assessment to gather information relevant to improving Walter's school attendance. (S-1)

13. The Parents have not responded to the proposed IEP. It is considered rejected. Walter did not return to GROW School when the 2017-2018 academic year began.

14. Walter's "stay put" placement is Millbury High School pursuant to the last accepted IEP for the 2015-2016 school year. Walter did not attend Millbury High School when the 2017-2018 school year started. At the time of the Hearing, September 11, 2017, Walter had returned to Millbury High School pursuant to his last accepted 2016-2017 IEP for "9 consecutive days" not including September 11, 2017. (Ryan-Vokes)

LEGAL FRAMEWORK

Once determined to be eligible for special education a school age child with a disability is entitled to an educational program and related services that are tailored to her/his unique needs and potential. The program must be designed to produce "meaningful educational benefit" and "demonstrable improvement" in the educational, behavioral and personal skills identified as the student's special needs. 34 CFR 300.300; *Lenn v. Portland School Committee*, 998 F.2d 1083 (1st Cir. 1993.) Whether an educational benefit is "meaningful" is determined in the context of the individual student's "circumstances" and potential to learn. *Andrew F. v. Douglas County*, 173 S. Ct. 988 (2017); *Lessard v. Wilton-Lyndeborough Cooperative School District*, 518 F.3d 26 (1st Cir. 2008). A student's goals should be appropriately ambitious and likely to measurably advance the student toward increased learning and independence. *D.B. v. Esposito*, 675 F.3d 26 (1st Cir. 2012).

IDEA eligible students are entitled to an education in the "least restrictive environment": one which offers the greatest integration in and exposure to the mainstream of school life that is feasible while maintaining appropriate special education services. Students should be placed in segregated educational settings, such as private day schools, only when the nature or severity of the disability is such that the student cannot receive a free appropriate public education in a less restrictive setting. *School Committee of the Town of Burlington v. Dept. of Education of Mass.*, 471 U.S. 359 (1985).

In a typical special education administrative hearing to determine whether a school district has offered or provided a free, appropriate public education to an IDEA eligible student the burden of proof is placed on the party seeking to change the *status quo*. *Schaffer v. Weast*, 546 U.S. 49 (2005). In this matter the School seeks to change the *status quo* placement – an inclusion program at Millbury High School outlined in the student’s last accepted 2016-2017 IEP – to a more restrictive, separate, public day school placement for the 2017-2018 school year. Therefore the School must prove, by a preponderance of the credible evidence, that the proffered 2017-2018 IEP is reasonably calculated to provide a free appropriate public education to Walter in the least restrictive setting consistent with that goal.

CONCLUSIONS OF LAW

There is no dispute that Walter is a student with special learning needs and is thus entitled to receive a free appropriate public education in accordance with 20 U.S.C. § 1400 *et seq.*; M.G.L. c. 71 B and 29 U.S.C. § 794. The issue presented for Decision here is whether Millbury’s proposed placement at the GROW School offers Walter the least restrictive setting in which his identified learning needs can be addressed and which will permit him to make meaningful progress commensurate with his abilities. After careful consideration of all the evidence presented in the Hearing, viewing both the documents and the testimony critically on behalf of the absent Parents, it is my determination that it does. My reasoning follows:

1. 2017-2018 IEP

Walter is currently repeating 9th grade for the third time. During the 2015-2016 school year in a partial inclusion program Walter made virtually no academic progress. While his teachers reported, and educational testing confirmed, that Walter had the intellectual capacity and academic skills to access grade level content, Walter’s school performance was impeded by chronic misbehavior, inattention, and irregular attendance. (Summary of the Evidence at 2). Notably, the one setting in which Walter consistently demonstrated concentrated engagement in academic work and appropriate conduct was in a quiet, distraction-free after school tutoring session with one teacher. (Przygoda) When he entered the GROW School the next year, 2016-2017, Walter’s progress was derailed by chronic absenteeism during the first semester. As Walter began to forge age appropriate relationships with adults at the GROW School, and to take advantage of the therapeutic feedback and structure that was consistently available to him there, his attendance improved. As his attendance improved Walter’s appropriate social relations with peers emerged. As Walter began to experience a positive educational environment he began attending to academic instruction, and to set and to meet academic goals for himself. At Team meetings held in January, April and August 2017 all school based participants remarked on Walter’s behavioral and academic progress. They attributed his fragile progress to the small structured setting, the universal therapeutic approach, the immediately available counseling and the strong teacher-student bonds available to Walter at the GROW School. At each Team meeting all participants, with the singular exception of a Parent, recommended that Walter continue to attend the GROW School. There are no professional recommendations to the contrary.

The Parent did not present any information either to the Teams, or to the BSEA, to indicate that GROW was not an appropriate special education placement for Walter or that he failed to make educational progress while attending GROW. Furthermore, there is no evidence in this record to support a proposition that the inclusion “stay put” placement at Millbury High School would be appropriate for Walter for the 2017-2018 school year, nor to counter the substantial weight of credible evidence that Walter had not made progress commensurate with his abilities in that setting.

I find that the clear preponderance of the evidence garnered at the Hearing leads inexorably to the conclusion that placement at the GROW School during the 2016-2017 school year was an appropriate response to Walter’s escalating negative behaviors and deteriorating academic performance. I further find that the uncontroverted evidence establishes that while attending the GROW School Walter’s previously disruptive behaviors diminished, his engagement with teachers, students and academic work improved and he began, slowly, to make academic progress. I conclude, therefore, that continued placement at the GROW School, in accordance with the recommendations of both Millbury and GROW School staff, is reasonably likely to offer Walter the special educational services and setting he requires in order to make meaningful educational progress commensurate with his potential. Similarly the preponderance of the evidence compels the conclusion that a less restrictive placement at Millbury High School would not offer Walter a reasonable opportunity to learn the social, emotional, behavioral and academic skills needed to complete high school and to transition to functional independent adulthood.

Therefore, I find that the 2017-2018 IEP proposed by Millbury calling for Walter to attend a therapeutic public day school such as the GROW School is reasonably calculated to ensure that he receives a free, appropriate public education in the least restrictive setting consistent with that goal and with the School’s obligations pursuant to MGL ch71B and 20 U.S.C.§1401 *et seq.*

2. HOME ASSESSMENT

Millbury requests substitute consent for a home assessment. Millbury requested the Parents’ consent to an assessment of their family/home circumstances during the Team meeting in April 2017 and through the proposed 2017-2018 IEP in August 2017. The Parents have not responded to Millbury’s request and, it is likely that consent is not forthcoming.

Millbury contends that, through a home assessment, it seeks information to assist improvement in Walter’s school attendance. While the goal of improving attendance is laudable it is not clear that, given this Student’s age and functioning level, there is any pertinent information capable of translation to a concrete in home service that would be both reasonable and acceptable to the family. Where a proposed evaluation, such as this one, is both intrusive and unwelcome, the School bears a significant burden of demonstrating either that there is no less burdensome means available to elicit information that is necessary to craft an appropriate IEP for a student, or that the assessment is likely to result in a substantial home service related benefit to the student. Here, the School has not met that burden.

Having found that the 2017-2018 IEP Millbury developed for Walter would provide him with a free appropriate public education, I am not now persuaded that proposed home assessment is necessary for the appropriate development or implementation of that IEP. Therefore the School's request for substitute consent to an assessment of Walter's home is DENIED.

ORDER

The 2017-2018 IEP proposed by Millbury Public Schools is reasonably calculated to ensure the delivery of a free, appropriate public education to the Student.

By the Hearing Officer,

Lindsay Byrne
Dated: November 10, 2017