

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

**IN RE: CHELMSFORD PUBLIC SCHOOLS V.
SWANSEA WOOD SCHOOL**

BSEA # 2203132

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 November 17 and 29, 2021 before Hearing Officer Alina Kantor Nir. Those present for all or part of the proceedings agreed to participate via a remote videoconferencing platform. The following were in attendance for some or all of the proceeding:

Parent

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| Michael Joyce | Attorney, Chelmsford Public Schools |
| Anthony J. Cichello | Attorney, Swansea Wood School |
| Allison Lennon | Attorney, Swansea Wood School |
| Amy Reese | Director of Student Support Services, Chelmsford Public Schools |
| Amy Matson | Assistant Director of Student Support Services, Chelmsford Public Schools |
| Robert Gilman, M.D. | Psychiatrist, St. Elizabeth's Medical Center |
| John Medeiros | Program Director, Swansea Wood School |
| Joy Williamson | Director of Operations for Residential Services, Swansea Wood School |
| Christopher Poulin | Clinician, Swansea Wood School |
| Randall Medina | Residential Supervisor, Swansea Wood School |
| Victoria Pavao | Co-Residential Director, Swansea Wood School |
| Ken DiFraia | Registered Professional Reporter |
| Carol Kusinitz | Registered Professional Reporter |
| Jane Werner | Registered Professional Reporter |
| Alina Kantor Nir | Hearing Officer |

The official record of the hearing consists of documents submitted by the Chelmsford Public Schools (the District or Chelmsford) and marked as Exhibits D-1 to D-22 ; documents submitted by the Justice Resource Institute (JRI) Swansea Wood School (Swansea Wood or the School) and marked as Exhibits S-1 to S-6; approximately 17 hours of recorded oral testimony and

argument; and a 2-volume transcript produced by a court reporter. The parties made their oral closing arguments on November 30, 2021, and the record closed on that date.¹

FACTUAL FINDINGS:

1. Student is a nineteen-year-old resident of Chelmsford, Massachusetts. (D-1) He is a “moderately large” adult male who loves ambulances and flashing lights. (Gilman, Matson, Medeiros, Medina, Williamson) He has expressed that he wants to be an Emergency Medical Technician (EMT). (S-2) Parent is Student’s legal guardian pursuant to G.L. 190B and has been since June 16, 2020. (D-2) Student has a strong relationship with Parent, who adopted him when he was one year old. (D-13)
2. Since November 2020 and until his hospitalization at St. Elizabeth’s Medical Center (St. Elizabeth’s) on September 10, 2021, Student attended Swansea Wood as a residential student pursuant to an IEP under the disability categories of intellectual, emotional and autism. (D-19, D-21, Matson, Gilman, Poulin). Student struggles with social emotional deficits intensified by his autism features: impulsivity, self-regulation deficits, defiant, destructive/aggressive responses to frustration and limit setting, and weak ADL skills. (S-2, S-5, D-12, D-13, D-14, D-15, D-16, D-17, D-18, Matson, Gilbert, Poulin, Williamson, Pavao)
3. For approximately seven years prior to Student’s placement at Swansea Wood, he attended both Devereaux’s Therapeutic Day School and Devereaux’s 1:3 Residential Program in Rutland, Massachusetts (Devereaux). (D-12, D-13, S-1, Matson, Poulin) In the fall of 2018, Student had a “major sexual incident” at Devereaux that led to his transfer to another residence hall. (D-12, Matson) As Student approached his eighteenth birthday, he became increasingly anxious, irritable, and challenging. He presented with ongoing risk for running away from staff, getting triggered by noise or other peers’ problems, and pushing physical or verbal boundaries with less assertive adults. (D-12, D-13, D-16, D-17, Matson) In addition, Student required coaching for interactions with female peers. (D-12, D-13) In the fall of 2019, he became enraged at his counselor and was transferred to a new clinician. (D-12, Matson) At that time, the Devereaux Team felt that “[g]iven the intensity of his behavioral concerns ... and the length of his stay at Devereaux,” Student might benefit from a transfer to another program. (D-12)
4. Student was last evaluated by the District in 2020. Testing included a psychological assessment in February 2020, performed by Dr. Richard Hummel, Ph.D. (D-12, D-13, D-14, D-15, D-16, D-17, D-18) In part, testing demonstrated significantly delayed academic achievement and communication skills and extremely delayed daily functional skills. (D-12, D-13, D-14, D-16, D-17) Student’s scores on the Vineland Adaptive Behavior Scales showed significant issues with maladaptive behaviors, including anxiety, impulsivity, defiance, boundaries, engagement, and attention problems, and, sexualized, aggressive, and destructive episodes, all of “severe intensity.” (D-12) Dr. Hummel noted that Student’s “level of maladaptive or unsafe behavior [was] quite high, even for youth in residential programming.” His daily functioning skills were noted to be far below the applied skill range that might be expected from an individual with an intellectual IQ in the mid 60s, like Student’s. (D-12, D-15, Matson) Even at his best, Student required a

¹ With the consent of the Hearing Officer, the parties agreed that this would not extend the date of the issuance of the Decision, which the Hearing officer indicated, on the record, would be issued by December 6, 2021.

great deal of external structure and support. (D-13) “Due to the nature and enduring degree of problems in [Student’s] functioning, results [of the psychiatric evaluation] highlight[ed] the seriousness of [Student’s] overall safety risk and need for continued environmental containment...” (D-12) The evaluating psychologist stressed that Student’s “most important safety intervention ... continue[d] to be the overall intensity of his supervision level.” (D-12, D-13) He endorsed one-to-one support and supervision for Student. (D-12, D-13, Matson)

5. Amy Matson is the Assistant Director for Student Services at the Chelmsford Public Schools. She has held this position since January 2018, although she has worked in the District since 2015. She holds a professional license in special education administration from the Department of Elementary and Secondary Education (DESE). Her duties include overseeing the programming of 65 students placed in out-of-district programs. In that role, she attends IEP meetings and progress meetings, coordinates with outside agencies, and works closely with families. (Matson)
6. Ms. Matson testified that by March 2018, she was receiving “a lot” of incident reports from Devereaux regarding Student’s behaviors, which Devereaux reported as “typical” for Student. (Matson)
7. On July 6, 2020, the District proposed, and Parent accepted, an IEP for the period 6/29/2020 to 6/28/2021 with residential placement at Devereaux. When discussing Student’s eventual transition to adult services, Student’s team recognized “the time it takes for [Student] to adjust to any changes in his schedule or routines. These changes can often result in behavior escalation.” Parent also noted concerns regarding the impact of transitions on Student’s “stability.” (D-18) The IEP included goals and services focused on social/emotional skills, functional ELA, functional math, and transition skills. Counseling was offered once per week for 60 minutes, and Student was assigned a one-to-one paraprofessional. (D-18, S-1)
8. Approximately one month later, on August 13, 2020, Student’s Team proposed a new IEP² for the period 8/11/2020 to 6/28/2021. One-to-one support was added in the residence due to numerous incidents and safety concerns. (D-19, S-1, Matson) Student was hospitalized at the time of the meeting on August 13. (D-19) The social/emotional goal was also amended to include an objective for Student’s development of self-regulation skills as follows: “[Student] will increase and maintain his ability to maintain safety at least 90% of the time by refraining from aggression, and elopement behavior...” (D-19, S-1) Parent accepted the IEP on August 14, 2020. (D-19)
9. The IEP for the period 8/11/2020 to 6/28/2021 describes a student struggl[ing] to maintain appropriate physical boundaries with staff members. He often [was] intrusive in the physical space of staff members and other clients often through physical aggression or difficult social interaction. [Student] exhibit[ed] difficulties seeking staff members[’] help or support within the classroom resulting in barrier behaviors, such as classwork refusal, running around the classroom, and aggressive behaviors. These behaviors [] resulted in interventions including refocus time, in vivo coaching, alternative programming, and physical management. These behaviors and in turn interventions require high levels of support, with 1:1 staff...” (D-19, Matson)

² Ms. Matson testified that in lieu of amending the June 2020 IEP, the Team decided to issue a new IEP. (Matson)

10. On or about August 2020, Deveraux raised concerns that Student was struggling to keep himself safe despite numerous supports. (D-19, Matson) Student was not making progress. (Matson) With Parent's consent, the District began to explore other placements for Student. (D-6, D-7, D-9, D-20, Matson)
11. Ms. Matson testified that she sent nine (9) referral packets, one of which was sent to Swansea Wood, which included Student's IEP for the period 8/11/2020 to 6/28/2021 and the 2020 evaluation reports. (Matson)
12. Swansea Wood was the only school that accepted Student at that time. Ms. Matson testified that Student was "one of the hardest students to place in a residential program" because of his diagnosis of intellectual disability and autism; mental health issues; significant behaviors; need for one-to-one support; and his advanced age. (Matson)
13. John Medeiros is the Program Director at Swansea Wood. He has been in that position for approximately one year, prior to which he served as the Educational Director of Swansea Wood for seven and a half years. Prior to his tenure at Swansea Wood, Mr. Medeiros worked at the Steven Treatment Program. He holds several DESE licenses including special education (moderate) teaching K-12 and special education administrator. Mr. Medeiros was part of Student's interview process prior to his admission at Swansea Wood and testified that he was "aware of Student's previous behaviors". Mr. Medeiros testified that Swansea Wood is "more structured" than Deveraux. (Medeiros)
14. Joy Williamson is the Director of Operations for Residential Services at Swansea Wood. She has held this position for the past year and has served as the Residential Director of Swansea Wood for the previous five years. She has worked at Swansea Wood since 2001 in multiple capacities. According to Ms. Williamson, a transfer from Deveraux to Swansea Wood is a "lateral move" as both schools offer the same level of care. She opined that, sometimes, a transfer may be necessary when a student is "stuck," and a change in location may help. (Williamson)
15. Ms. Matson testified that she was "very candid" during her "multiple conversations" with Swansea Wood regarding Student's presentation and his need for one-to-one support. (Matson) According to Ms. Matson, Swansea Wood indicated that due to its small size and small geographic configuration, Student could be "successful without one-to-one support." Parent was "happy" with the prospect of increased independence for Student. (Matson, Medeiros) However, one-to-one support in both school and the residence remained on the IEP.
16. Swansea Wood is a DESE-approved special education school serving students ages 12 to 22 who are diagnosed with intellectual disabilities and mental health issues. (Medeiros, Poulin) Many of the students are also on the autism spectrum. (Poulin) Students at Swansea Wood may engage in elopement and self-harm behaviors such as cutting, ingesting objects, hair pulling, and tying objects around their necks. Some are assaultive and have caused injury to staff. (Pavao) Swansea Wood currently serves 27 students who are grouped in a one-to-three staff-to-student ratio. Additional staff may be added per students' needs. (Medeiros, Williamson, Medina, Pavao)
17. Swansea Wood utilizes Dialectical Behavior Therapy (DBT) and the Attachment, Regulation and Competency Framework (ARC) for their behavior management approach. (Medeiros, Williamson)

18. Ms. Williamson explained that Swansea Wood manages students' behaviors through consistency and routine. (Williamson) Staff utilize a token economy system, positive reinforcement, and incentive contracts. (Medeiros, Williamson) Students are placed on "levels" which correlate to allowed privileges. As part of this system, students are also placed on "restrictions" based on their engagement in certain behaviors (24 or 48 hours, depending on the severity of the behavior). More dangerous behaviors result in a longer restriction. Restrictions may necessitate an increase in staff supervision. Depending on specific behaviors, students can be placed on "watches" (i.e., AWOL watch, safety watch, constant monitoring watch) which further increase staff support and supervision. (Medeiros, Williamson, Poulin, Medina, Pavao) At any time, one to five Swansea Wood students are "on watch." (Pavao) In addition, when responding to student behaviors, staff use redirection, "cautions" of an impending restriction, and time outs. (Williamson)
19. Swansea Wood has a psychiatrist on staff who is responsible for medication changes. Mr. Medeiros testified that, with a guardian's consent, at times, the psychiatrist makes medication changes. The on-staff psychiatrist also sees students monthly and consults with clinicians. (Medeiros, Poulin)
20. Swansea Wood is located on a busy road, where multiple accidents have occurred. (Medeiros, Poulin, Williamson, Medina, Pavao). The program is located on the first floor of the building, and the residence is on the second floor. The residence is divided by a swinging door that separates the sexes. There are five exits from the second floor to the first floor, and an exit from the gym leads directly to the outside. (Medeiros) None of the doors are locked. (Medeiros, Williamson, Poulin, Medina, Pavao)
21. Student transitioned to Swansea Wood in November 2020. (D-21, Medeiros, Matson) Ms. Matson testified that based on Student's "very complex profile" and the behaviors he exhibited at Devereaux, she was not "under any false hope that a change in placement would somehow eradicate his behaviors." (Matson)
22. Student was anxious at Swansea Wood and suffered from mood lability. He often "sabotaged moving up" on Swansea Wood's "levels" system. (Poulin) Student's capacity to engage or respond to interventions vacillated widely and depended on many factors, including, but not limited to "perseverating" on his old program at Devereaux, engaging in nonpreferred activities, having contact with his father, being physically uncomfortable, and interacting with other students. Student rarely sought out peer interaction, and the other students tended to avoid him. (Williamson, Poulin) Mr. Poulin testified that Student's perseverance on his old program, Devereaux, played a large role in "holding Student back" at Swansea Wood. (Poulin)
23. Randall Medina is the Residential Supervisor at Swansea Wood. Victoria Pavao is the Co-Residential Director. Neither has a formal special education background, but each has worked with children extensively. In their respective roles, they assist with the staffing ratio, as needed, and conduct trainings for staff whom they supervise. (Medina, Pavao) Ms. Pavao testified that in order to assess whether interventions are working, she meets with her staff on a weekly basis. In order to adjust interventions, she consults with other administrators or the clinician. (Pavao) Both Mr. Medina and Ms. Pavao have worked directly with Student and have supervised other staff who worked with him. (Medina, Pavao)
24. Swansea Wood documented Student's "serious behaviors" in incident reports. (S-2, Medeiros, Williamson, Medina, Pavao) While at Swansea Wood, Student's behaviors

included the following: eloping (and threatening to elope); grabbing/touching faces; getting too close to staff; hugging; poking; tying (and trying to tie) masks and clothing around his neck; spitting; hiding from staff; refusing to move or to follow directions; being nonresponsive when spoken to; refusing to complete ADLs; chewing non-edibles; destroying flipflops and masks; using suicidal words and statements, including reporting that “voices” were telling him to hurt himself; light head banging; pushing; kicking; making verbal threats; and using inappropriate language. (S-2, S-5, Medeiros, Williamson, Poulin, Medina, Pavao)

25. Student was “incredibly creative” and “crafty” when seeking to engage in self-harm. (Poulin, Williamson, Pavao) Ms. Pavao testified that Student is impulsive yet “opportunistic” and “very calculating,” as he “seeks out good times to be impulsive.” (Pavao)
26. Swansea Wood documented two incidents of Student refusing offered medication at Swansea Wood.³ (S-2, Medeiros)
27. Student was also impulsive with sexual behavior, and it was very difficult to redirect Student once he had made up his mind to act. (Poulin, Pavao) Multiple incident reports reference “over-” or “hyper-sexualized behavior”. (S-2, Medeiros, Williamson, Poulin) In one incident, Student approached a female staff member as if to grab her breast, but no contact resulted after Student was “redirected.” He also “attempted to gain physical sanctions from staff” while naked in the shower. (Poulin)
28. Student often attempted to touch staff members’ faces or to hug them. (Poulin) Student could not “modulate” the force of his actions, so even his “high-fives” were often too hard. (Poulin) He often created “awkward” situations and made staff feel uncomfortable. (S-2, Williamson, Poulin) In states of dysregulation, Student “smiled” but maintained a “flat affect.” Because he was both “nonresponsive and impulsive,” he was difficult “to read.” (Williamson)
29. Swansea Wood documented one incident of Student masturbating in his room with his door open.⁴ (S-2, Williamson) It also documented one report of Student “humping” a yoga ball,” and one incident of his staring at a woman’s breasts. (S-2, Poulin)
30. At Swansea Wood, no physical sexual contact was actualized by Student with any peer or staff member. However, during a hospitalization, Student inappropriately touched a minor’s backside while hospitalized (resulting in court involvement), and on another occasion tried to kiss or grope a nurse. (Medeiros, Williamson, Poulin, Medina, Pavao)
31. Although Swansea Wood staff testified that the incidents identified in the incident reports were “serious,” no incident reports were provided to the District from May 2021 to September 2021. (Medeiros, Williamson, Pavao, Matson) In addition, no reports were made to DESE during this time. (Medeiros) Ms. Matson testified that Swansea Wood’s communication with her was “very limited.” (Matson)
32. Although no incident reports were provided to the District or DESE, Mr. Medeiros testified that the severity of Student’s behaviors increased after March/April 2021 with more incidents occurring in the residence. (Medeiros) Student was consistently on the lowest “levels” with very few privileges. (Williamson, Poulin, Medina) Student was

³ Mr. Medeiros opined that additional incidents occurred which may not have been documented by staff. (Medeiros)

⁴ During this incident, peers were either in their bedrooms or transitioning in the hallway. The incident required a female staff member to leave her post in the girls’ wing to assist two male staff who blocked Student’s doorway. (Williamson)

placed on AWOL watch, safety watch, constant monitoring watch, or any combination of the three, throughout the majority of his tenure at Swansea Wood. (Medeiros, Williamson, Medina, Pavao)

33. To his knowledge, the on-staff psychiatrist did not seek Parent's consent to change Student's medications during his time at Swansea Wood. (Medeiros)
34. Even though Student did not have a "dedicated" staff member assigned to him, he was receiving additional staff supervision (two-to-one or sometimes higher) at all times because of his "watch" status. (Medeiros, Williamson, Medina, Pavao) Even so, Student could not be prevented from eloping the premises. (Williamson, Poulin, Medina, Pavao)
35. Student's incentive plans were changed frequently. (Medeiros, Poulin) His response to interventions was "minimal," and he could not utilize learned skills when dysregulated.⁵ (Williamson, Poulin, Pavao)
36. Student did not suffer any injury during his tenure at Swansea Wood. No student or staff member was ever injured as a result of any of Student's behaviors at Swansea Wood. (Medeiros, Williamson, Poulin, Medina, Pavao) However, during one visit to the emergency room in August 2021, Student sprained the wrist of an accompanying Swansea Wood staff member. (Medeiros, Williamson, Poulin, Medina, Pavao) Also, during one incident at Swansea Wood during the summer of 2021, a staff member's glasses were broken during Student's physical escalation when Student pushed the staff member while attempting to elope. (S-2, S-5, Medina, Medeiros)
37. In order to respond to Student's elopement (including his attempts to elope), additional staff were pulled from other areas of the program, resulting in inappropriate staffing of other students. (S-2, S-5, Medeiros, Williamson, Medina, Pavao)
38. At times, Student required physical management which necessitated at least 3 staff members. (S-2, S-5, Medeiros, Williamson, Medina) When physically managed, Student became "very aggressive" but would eventually "calm down." (Medeiros, Williamson) In the community, including during incidents of elopement, staff refrained from physically managing Student. (Medeiros) No injuries resulted to Student or staff during physical management of Student. (Williamson) Restraint debriefing forms following Student's physical escalation indicated that there was "no" need to modify Student's treatment plan. (S-2, Medina)
39. Swansea Wood staff testified that although Student's behaviors did not result in injury at Swansea Wood, there was a "threat" to the safety of Student and staff. (S-2, S-5, Medeiros, Williamson, Poulin, Medina, Pavao) According to staff, Student's dysregulation resulted in the dysregulation of the other students at Swansea Wood as many were dealing with trauma histories. (Medeiros, Williamson, Medina)
40. Swansea Wood staff also testified they were not aware that Student's IEP required one-to-one support in the residence. (Medeiros, Williamson, Medina, Pavao) Ms. Williamson testified that Student's need for a one-to-one at Devereaux did "not necessarily" translate into his needing one at Swansea Wood. (Williamson) Mr. Medeiros testified that Swansea Wood does not provide "dedicated" one-to-one support. (Medeiros, Medina) Mr. Medina testified that all staff members felt that Student "needed" a dedicated one-to-one but did not know how to request it or get it "funded." (Medina)

⁵ Ms. Williamson testified that Student has not had "enough of a break in psychiatric hospitalizations to be stable enough to have effective engagement or treatment" at Swansea Wood. (Williamson)

41. Swansea Wood staff were also unable to identify which residential staff member was responsible for attending Student's IEP meeting. (Williamson, Medina, Pavao)
42. Christopher Poulin is a clinician at Swansea Wood. He served as Student's clinician since beginning his employment at Swansea Wood in February 2021. Mr. Poulin is a licensed clinical social worker. He met with Student weekly for one hour. He was often called in to help support Student when Student was dysregulated. Mr. Poulin was responsible for reviewing and revising Student's treatment goals, which he did in consultation with the on-staff psychiatrist with whom he met monthly. (Poulin)
43. Student was not assigned a roommate at Swansea Wood. He had an individual seating plan and was never transported in a van to community activities. Swansea Wood attempted to segregate Student from other students, but it is a small school that is "intrinsically integrated." (Poulin, Pavao)
44. Swansea Wood minimized Student's access to materials with which he could attempt to use to self-harm; hence, Student's personal belonging were kept in a locked closet, and all cords, strings, socks, etc. were removed from his room. (Williamson, Poulin, Pavao)
45. Beside using physical management, as discussed above, Swansea Wood staff also responded to Student with "therapeutic conversations" or proposing that Student go into time out or the safe room. Student was often warned about "restrictions" which were subsequently imposed. The crisis team was also often called in response to suicidal statements, and at times, at Student's request. Police were called when Student left the premises. (S-2, S-5, Medeiros, Williamson, Medina, Pavao)
46. Student often indicated to Swansea Wood staff that he did "not want to be there." He also indicated that he did not want to hurt himself but wanted to go to the hospital, which he found "comforting. Incident reports show that Student often requested to be admitted to the hospital and to ride in an ambulance. He often asked to call the crisis team. (S-2, Medeiros, Poulin, Pavao)
47. Swansea Wood neither assessed nor requested that the District assess Student. (Medeiros, Williamson, Poulin)
48. On June 17, 2021, Mr. Medeiros emailed Ms. Watson "to discuss [Student's] placement at Swansea Wood School," advising:

As you know[,] he has been hospitalized and also gone to the ED several times now for unsafe behavior. We are not equipped to provide the specialized services [Student] needs. Due to his increase in sexualized behaviors and his unsafe behavior[,] he needs specialized services in a program that will address his sexualized thoughts and behaviors. We suggest you send referrals to Stetson or Stevens Treatment Programs. If you are unable to have him transition within the next two weeks to another placement[,] we will need to terminate his placement. We are concerned about the safety of others due to [Student's] unsafe behaviors. (S-4, Matson, Medeiros)

On June 21, 2021, Ms. Matson replied that she "was afraid of this" and noted that she had "started to reach out to the programs [he] suggested." (S-4, Matson, Medeiros) Mr. Medeiros recommended to Ms. Matson that she look into an assessment program for Student to help "figure out his needs," but Student was too old to participate in such a program. (Medeiros)

49. Even before she received Parent's consent, Ms. Matson reached out to the programs suggested by Mr. Medeiros. Both Stevens and Stetson indicated they would not consider Student due to his low intellectual functioning and need for one-to-one support, respectively. (D-6, D-7, Matson) Ms. Matson also reached out to Hillcrest but was informed that they had no immediate openings. (D-10, Matson) With Parent's consent, she also sent a referral packet to Whitney Academy. In total, Ms. Matson reached out to 4 programs but only sent referral packets to 3. She did not explore any out of state options at that time. (Matson)
50. On July 15, 2021, Mr. Medeiros informed Ms. Matson via email that Swansea Wood "... will be terminating [Student's] placement at the Swansea Wood School on August 16, 2021, if no alternative placement has been found before then....Swansea Wood School is unable to provide the specialized support that [Student] needs for his sexualized behaviors and aggression. We are also struggling to maintain safety for the other students at the school and staff. ... [Swansea Wood is] committed to working closely with [the District] on an alternative placement for [Student]." (D-3, S-3, Matson, Medeiros)
51. Ms. Matson testified that she was not consulted regarding the August 16 termination date. (Matson)
52. Swansea Wood did not develop a written termination plan for Student. (Matson, Medeiros)
53. On July 16, 2021, Mr. Medeiros issued a letter, declining to extend Student's termination date but indicating that if Swansea Wood received "an actual intake date from Whitney Academy or another placement that is within a few weeks of August 16, 2021 [Swansea Wood would] consider extending the date." (D-3, S-3, Matson, Medeiros) Ms. Matson testified that she had not formally requested an extension. (Matson)
54. On July 26, 2021, Benjamin Allen, Director of Admissions at Whitney Academy, informed the District of Student's acceptance, but no admission date was available. (D-5, Matson, Medeiros, Poulin) Subsequently, Mr. Poulin, Ms. Matson and Mr. Allen connected on a weekly basis to discuss Student and his status at Whitney Academy. (Matson, Medeiros, Poulin)
55. On August 11, 2021, the District proposed, and Parent accepted, an IEP for the period 8/3/2021⁶ to 8/2/2022 with residential placement at Swansea Wood. (D-22, Matson, Medeiros) Swansea Wood participated in the IEP meeting. (Matson, Poulin) The N1 noted Student's acceptance to Whitney Academy and that the Team was awaiting a start date. The Team noted that Student was making very slow progress in his ability to access coping skills independently when feeling dysregulated. (D-22, Matson, Medeiros, Poulin)
56. On August 24, 2021, Director Allen indicated that Student may be able to attend "by Thanksgiving" but that Whitney Academy could not "do any type of 'hybrid' placement" for Student as the school was not "licensed to take day students." (D-5, Matson)
57. On September 10, 2021, Student was hospitalized at St. Elizabeth's following an elopement incident from Swansea Wood. (S-2, D-4, Gilman, Medeiros, Poulin) During the incident, Student and staff were at risk of injury as Student ran into traffic, but no one was actually injured. (Medeiros, Williamson)

⁶ The gap between the 2020-2021 and 2021-2022 IEPs was not addressed at Hearing.

58. Ms. Matson testified that Parent, rather than Swansea Wood, made her aware of Student's hospitalization. (Matson)
59. Dr. Robert Gilman is an attending psychiatrist on the general psychiatric in-patient unit at St. Elizabeth's to which Student transitioned on September 15, 2021. Dr. Gilman has approximately 17 years of experience in in-patient psychiatry. He has been working as an attending psychiatrist at St. Elizabeth's for 3 years. He completed a medical residency in general adult psychiatry and a fellowship in forensic medicine. At St. Elizabeth's, Dr. Gilman is responsible both for the direct care of patients and for supervising care provided by resident psychiatrists. According to Dr. Gilman, the reason for Student's admission was "to evaluate" suicidal statements "in association with reported auditory hallucinations" and the concern that Student "might engage in self-harm due to suicidal thoughts"; it was not due to aggression or "actual" self-harm. Also according to Dr. Gilman, it "became pretty apparent that there was not a psychosis component to his behavior." Instead, Student's statements were consistent with "somebody who was cognitively limited ... essentially expressing what appeared to be just an internal thought process...." Dr. Gilman indicated that Student does not actually intend to harm himself. (Gilman)
60. The general psychiatric in-patient unit is a locked adult unit with 30 beds. Patients carry a "mix" of psychiatric diagnosis. It is very highly staffed with attending physicians, resident students, nurses and nursing students, occupational therapists, and mental health counselors. There are no teachers, "academics" or "educational opportunities" at the unit. St. Elizabeth's has a "group-based program" focused on "developing coping skills." Dr. Gilman testified that he is uncertain whether Student receives much benefit from the groups in light of his cognitive ability and developmental level. (Gilman)
61. Student's unit provides acute care. It is designed for patients requiring hospitalization for 30 days or less. It is not a "chief care facility." As of the Hearing, Student had been residing in the unit for 9 weeks. (Gilman)
62. At St. Elizabeth's, Student has been assigned to a single bedroom due to his history of sexualized behaviors. He has been receiving one-to-one support at all times. Twice per day, he goes outside with a staff member to an enclosed courtyard that is inaccessible to the public. Dr. Gilman testified that if Student is agitated, staff will not take him outside because the outside setting is less restrictive than the in-patient unit. Student is cooperative with staff. (Gilman)
63. Dr. Gilman reported that Student has engaged in 4 aggressive episodes since he was admitted. The first three incidents occurred soon after admission. Dr. Gilman attributed these early incidents to Student's "chronic issues" with maladaptive behaviors, acclimation to a new environment,⁷ and an adverse reaction⁸ to a trial of increased Depakote.⁹ The fourth and last incident took place on October 20, 2021, when Student punched a staff member and tugged on his identification tag.¹⁰ This resulted in injury necessitating the staff member missing one day of work. Dr. Gilman opined that there

⁷ Student was "fixated" on going to an adolescent unit rather than the adult unit to which he was admitted. Adolescent units have a "different structure." (Gilman)

⁸ According to Parent's report to St. Elizabeth's, prior attempts to increase Depakote had similar adverse effects on Student. (Gilman)

⁹ Depakote is an anti-seizure medication that is also used to control impulsivity and mood disorders. (Gilman)

¹⁰ The staff member did not utilize a pull-away lanyard. (Gilman)

was “no hostility ... in the nature of the act [Student was not] expressing a desire or intent to harm somebody or anger towards the individual, but he does have periods of impulsivity and poor social interactions.” Dr. Gilman reported that Student has not caused any other injuries to staff. (Gilman)

64. Dr. Gilman testified that Student’s sexualized behavior has been limited to “aggressive hugs”¹¹ and attempts to touch staff faces. Once, Student attempted to touch a female staff member’s breast. Dr. Gilman opined that such behavior is not inconsistent with Student’s poor impulse control and poor social interaction skills. Student has not exposed himself, masturbated or propositioned other patients. (Gilman)
65. Initially upon Student’s admission, St. Elizabeth’s reached out to Swansea Wood to discuss Student. Swansea Wood informed St. Elizabeth’s that Student would not be returning there. As a result, St. Elizabeth’s has not involved Swansea Woods in Student’s treatment plan, as the hospital typically would with an educational placement. (Gilman, Matson)
66. Mr. Poulin testified that he initially spoke with St. Elizabeth’s because he wanted to utilize the time that Student was there to work on “closure” with Devereaux, the perseveration on which “held [Student] back” at Swansea Wood. Mr. Poulin “wanted Devereaux to be involved” in the process at the hospital. He expected that subsequently Student would return to Swansea Wood “with a lot of additional supports.” (Poulin)
67. Student’s medication has been adjusted during his time at St. Elizabeth’s. As noted above, although initially increased, Student’s Depakote was then reduced to its previous level due to the adverse impact on Student’s impulsivity and aggression. In addition, Student’s Trilafon dosing schedule was adjusted, and Trilafon and Haldol were also prescribed to be used as needed (PRN).¹² The Trilafon PRN can be used several times per day, while Haldol is often utilized at night as it is more sedating.¹³ The medications are administered by a nurse when Student feels anxious or agitated and requests a PRN, or when staff¹⁴ observe increased impulsivity and/or grabbing/touching behavior. (Gilman)
68. According to Dr. Gilman, as of the date of the Hearing, Student had not needed the PRN in over a week, except for the night prior to the Hearing, as Student was anxious and could not sleep.¹⁵ (Gilman)

¹¹ Dr. Gilman described these as the hugs of someone who does not know that he is no longer a child and needs to be reminded and redirected. (Gilman)

¹² Both Trilafon and Haldol are anti-psychotic medications utilized to treat psychosis, impulsivity and aggression. (Gilman)

¹³ Student has an order for each scheduled medication as well as for the PRNs. (Gilman)

¹⁴ Although the medication must be administered by a nurse, Dr. Gilman reported that at St. Elizabeth’s the nurse makes the decision to administer the PRN based on the observations and feedback of non-medical staff members “who are able to identify the behavior.” No special expertise is required for said administration, and staff can be trained on detecting the symptoms that would necessitate an administration of a PRN. (Gilman)

¹⁵ Even before, Student has not needed additional doses regularly so as to necessitate adjusting the scheduled dosing of the Trilafon. (Gilman)

69. Dr. Gilman testified that Student has been compliant with medication¹⁶ and has responded well to it. Dr. Gilman described Student's medication regiment as effective in eliminating suicidal ideation and aggression while not sedating Student.¹⁷ (Gilman)
70. Dr. Gilman testified that Student needs to be in a school with a high level of supports. Dr. Gilman is not familiar with residential educational placements or with Swansea Wood specifically. (Gilman)
71. Dr. Gilman opined that Student's history of elopement is consistent with Student's poor impulse control. Student has not attempted to elope while at St. Elizabeth's nor has he tied any objects around his neck or attempted to eat non-edibles, as he had at Swansea Wood. Dr. Gilman testified that Student's one-to-one supervision at St. Elizabeth's would make such actions difficult. In addition, there are "no laces or nooses or long cords" available to Student. (Gilman)
72. On September 28, 2021, Mr. Medeiros wrote to Ms. Matson stating that Swansea Wood was "unable to keep [Student] and other students safe due to his risky behaviors. Therefore, [Swansea Wood is] closing his bed effective immediately." (D-3, S-3, Matson, Medeiros) Mr. Medeiros testified that Student was terminated because he had attempted to "kiss" and "touch" a nurse at St. Elizabeth's. Swansea Wood was concerned that Student would engage in such behavior upon his return. Mr. Medeiros also testified that he was aware that Student's placement at Whitney Academy was not imminent at that time. (Medeiros) In response, the District wrote that Swansea Wood may not, pursuant to state regulations, "close" Student's "bed effective immediately" and must reenroll Student until the District is able to enroll Student at another residential placement. (D-3, Matson) Swansea Wood declined to do so. (Matson)
73. Mr. Poulin testified that he spoke to Student once during his time at St. Elizabeth's. According to Mr. Poulin, Student has a very difficult time with transitions. Mr. Poulin was concerned that without a proper termination plan, Student would "fixate" on Swansea Wood at his next placement. Mr. Poulin wanted to "model an appropriate closure" for Student and to help transition him to his new placement. However, he was not involved in Student's termination nor did he participate in informing Student of it. According to Mr. Poulin, in late September, Mr. Medeiros asked him to "hold off" reaching out to Student. (Poulin)
74. Despite the District's attempt to provide Student with tutoring at St. Elizabeth's through Swansea Wood, Swansea Wood did not offer Student any educational services during his hospitalization. (D-4, Gilman, Matson, Medeiros)
75. Amy Reese is the Director of Student Services at the Chelmsford Public Schools. She has served in this role for six years. She testified that due to an oversight in billing invoices, the District failed to pay invoices for July, August and September,¹⁸ but, upon noticing the issue in early September, the District reached out to Swansea Wood, requested invoices, and paid them. (S-6, Reese, Matson)

¹⁶ Initially, St. Elizabeth's had to chemically restrain Student on a few occasions to help control aggressive episodes. At the time of the Hearing, Student had not required any restraints, but Dr. Gilman could not remember the last incident necessitating a restraint. At Hearing, Dr. Gilman also could not remember Student's precise dosages. (Gilman)

¹⁷ Dr. Gilman testified that Student has been "active on the unit" and is "not overmedicated." (Gilman)

¹⁸ Ms. Reese testified that the tuition amounts for Student's tuition at Swansea Wood had been "encumbered," or set aside for payment. (Reese, Matson, D-4)

76. At the end of October 2021, the District sent additional referral packets for Student's immediate residential placement. (D-6, D-7, D-8, D-9, D-10, D-11, Matson). Student was not, and has not since, been accepted at any placement other than Whitney Academy, which has no bed currently available. Although Mt. Prospect School in New Hampshire is considering Student, there is a six to nine month waiting list at this time. Ms. Matson testified that other than Swansea Wood, there is no other educational placement currently available to Student at this time. (Matson)
77. Dr. Gilman testified that he discharges approximately 700 patients per year. In general, when discharging a patient, Dr. Gilman considers safety in the environment to which Student will be returning. He does not recommend discharge if he believes that there is a substantial likelihood of injury. In his opinion, Student has been ready for discharge since the end of September. Although Swansea Wood is not a locked premises, cannot forcibly administer medication,¹⁹ cannot seclude Student in his room, and is not as highly staffed as St. Elizabeth's, Dr. Gilman opined that Student is "safe to be discharged to Swansea Wood" with the continued high level of support that he had been receiving prior to his hospitalization and with the new medication regimen, including the PRNs. (Gilman)
78. Dr. Gilman has been meeting with Student approximately 5 days per week, though their current interactions are briefer than they were initially. He testified that Student does not require a locked facility as there is no evidence of psychosis²⁰ or suicidal ideation.²¹ Student is "at a point where his care would normally be given in an outpatient setting." Student has "chronic issues around behavior" that are not within the "domain" of the hospital. Student no longer meets the criteria for acute psychiatric care. (Gilman)
79. To date, Student has not been discharged solely because he has "no place to go." Student cannot return home because of his need for constant professional supervision. (Gilman, Poulin) At the time of the Hearing, Student remained hospitalized on a conditional voluntary status and is cooperating with his care. (Gilman) Swansea Wood staff have not seen Student since his hospitalization. (Medeiros, Poulin)
80. Swansea Wood staff believe that Swansea Wood cannot presently serve Student. Mr. Medeiros testified that Student is safe at St. Elizabeth's because it is a locked facility. (Medeiros) Mr. Poulin also testified that based on the behaviors Student engaged in on a regular basis at Swansea Wood, he does not believe that Swansea Wood is "able to contain" Student. He worries that Student's self-harm attempts would become "more creative" and could result in serious harm. Although Mr. Poulin does not believe that Student "wants to die," Student does not understand the effects of his self-injurious behavior; instead, he understands that if he acts in a certain way, he may get to ride an ambulance or go to the hospital. According to Mr. Poulin, Student's behavior is a "means to go somewhere or do something." Student feels remorse if he hurts others, but he is unable to stop himself the next time. (Poulin)
81. Mr. Poulin also testified that Student could return safely to Swansea Wood if "additional" supports and "precautionary measures" were provided. Because Student can "overpower" a single staff member, Mr. Poulin recommended "dedicated" two-to-one staffing with

¹⁹ Dr. Gilman testified that he does not anticipate Student requiring forceful administration of medication as he has been compliant in taking his medication when offered. (Gilman)

²⁰ According to Dr. Gilman, if there had been psychosis, it is not present now. Even if Student was having psychosis and hallucinations, said symptoms have been addressed by the current medication. (Gilman)

²¹ Dr. Gilman opined that Student's suicidal statements are behavioral and are not predicated on a depressive episode or hallucination. (Gilman)

paraprofessionals who would directly report to him for additional clinical training and support. He also recommended increasing his time with Student to two or three times per week. In addition, he suggested that a sensor be placed on Student's bedroom door. (Poulin)

82. During Student's tenure at Swansea Wood, the Team did not reconvene, save for the IEP meeting in August 2021, nor did Swansea Wood ask the District to adjust Student's level of support. (Matson, Medeiros)

83. Despite significant efforts for the past year to recruit additional staff, Swansea Wood has nine full time residential positions and three clinical positions open. (Medeiros, Medina)

84. Student's spot at Swansea Wood was filled shortly after his termination. (Medeiros, Poulin)

85. On October 18, 2021, the District filed the instant Request for Hearing. (D-1)

DISCUSSION:

A. Legal Framework:

1. Free Appropriate Public Education

The Individuals with Disabilities Education Act (IDEA) was enacted "to ensure that all children with disabilities have available to them a free appropriate public education" (FAPE).²² To provide a student with a FAPE, a school district must follow identification, evaluation, program design, and implementation practices that ensure that each student with a disability receives an Individualized Education Program (IEP) that is: custom tailored to the student's unique learning needs; "reasonably calculated to confer a meaningful educational benefit"; and ensures access to and participation in the regular education setting and curriculum as appropriate for that student so as "to enable the student to progress effectively in the content areas of the general curriculum."²³ The IDEA mandates that participating states extend to disabled children, parents, teachers, school officials, and educational institutions a host of procedural protections and administrative safeguards.²⁴

2. IDEA's Stay Put Provision

The IDEA's "stay put" provision requires that unless the State or local educational agency and the parents otherwise agree, during the time that a parent and school district are engaged in an IDEA dispute resolution process, "the child shall remain in the then-current educational

²² Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 (d)(1)(A).

²³ See 20 USC §1401 (9), (26), (29); 603 CMR 28.05(4)(b); *Endrew F. v. Douglas Cty. Reg'l Sch. Dist.*, 137 S. Ct. 988, 1001 (2017); *Sebastian M. v. King Philip Reg'l Sch. Dist.*, 685 F.3d 84, 84 (1st Cir. 2012); *C.D. v. Natick Pub. Sch. Dist., et al.*, No. 18-1794, at 4 (1st Cir. 2019) (quoting *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 748-749 (2017)); *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F. 3d 18 (1st Cir. 2008); *C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2008); *In Re: Chicopee Pub. Sch.*, BSEA # 1307346, 19 MSER 224 (Byrne, 2013).

²⁴ 20 U.S.C. § 1415.

placement.”²⁵ Preservation of the “status quo” assures that the student “stays put” in the last placement the parents and the local education agency (LEA) agreed was appropriate for him.²⁶ In addition, the stay put provision reflects “the preference of Congress for maintaining the stability of a disabled child’s placement and minimizing disruption to the child while the parents and school are resolving disputes.”²⁷

Generally, the last accepted IEP and the placement therein constitutes stay put,²⁸ but, often, an individualized assessment of the facts is required.²⁹ To determine a child’s stay put, courts often look for the “operative placement,” or the IEP that is “actually functioning at the time the dispute first arises.”³⁰ One circuit court has placed great emphasis on the impact of the proposed change on the student.³¹ BSEA decisions and rulings have similarly examined the impact of the proposed change on the student³² and the extent of the disruption to the student’s educational life.³³ In one BSEA matter, a Hearing Officer concluded that even though an IEP had been accepted by the parents, where it was not yet implemented, maintenance of the status quo called for the student to remain at his last attended placement rather than the one identified in the most recently accepted IEP.³⁴

3. Stay Put and Private Programs

Stay put applies to disabled students whether they are placed in-district or in publicly funded out-of-district.³⁵ “There are no qualifiers. [The regulatory language] does not distinguish between types of placement: public or private; day or residential; home-based or center-

²⁵ 34 CFR 300.518(a); 20 U.S.C. §1415(j); 34 CFR §300.514; 603 CMR 28.08(7); *Honig v. Doe*, 484 U.S. 305, 325 (1988); *Verhoven v. Brunswick Sch. Comm.*, 207 F.3d 1, 10 (1st Cir. 1999); *M.R. and J.R. v. Ridley Sch. Dist.*, 744 F.3d 112, 117 (3d Cir. 2014); *In Re: Framingham Pub. Sch. and Quin*, BSEA # 1605247, 22 MSER 12 (Reichbach, 2016); *In Re: Abington Pub. Sch.*, BSEA # 1407763, 20 MSER 198 (Figueroa, 2014).

²⁶ See *Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 918 (1st Cir. 1983) (“We therefore join the Seventh Circuit in its view that (e)(3) establishes a strong preference, but not a statutory duty, for maintenance of the status quo We do not believe Congress intended to freeze an arguably inappropriate placement and program for the three to five years of review proceedings. To construe (e)(3) in this manner would thwart the express central goal of the Act: provision of a free appropriate education to disabled children”) (internal citations omitted).

²⁷ *Student & Concord & Natick Pub. Sch.*, BSEA # 18-00182, 23 MSER 210 (Berman, 2017).

²⁸ See 20 U.S.C. §1415(j); 34 CFR §300.514.

²⁹ See *Student & Concord & Natick Pub. Sch.*, BSEA # 18-00182.

³⁰ *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 867 (3d Cir. 1996); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 626 (6th Cir. 1990).

³¹ See *AW ex rel. Wilson v. Fairfax Cty. Sch. Bd.*, 372 F.3d 674, 683 (4th Cir. 2004).

³² See *In Re: Agawam Pub. Sch. and Melmark-New England*, BSEA # 1504488, 21 MSER 81 (Berman, 2015).

³³ See *Student & Concord & Natick Pub. Sch.*, BSEA # 18-00182.

³⁴ See *In Re: Brockton Pub. Sch. v. Student*, BSEA # 16-01536 (Figueroa, 2015) (citing *Thomas*, 918 F.2d at 626).

³⁵ See *Grossmont Union High Sch. Dist.*, SN 486-00, 102 LRP 3208 (SEA CA, 2000) (“There is no exception to stay put simply because the student is placed in a nonpublic school or nonpublic agency”).

based."³⁶ This premise is further supported by Massachusetts regulations which state that students in in out-of-district placements are entitled to the full protections of state and federal special education laws and regulations.³⁷

4. *Location Changes and Stay Put*

As a general rule for purposes of stay put, "'educational placement' fixes the overall instructional setting in which the student receives his education, rather than the precise location of that setting."³⁸ At the same time, stay put analysis may not simply ignore the relevance of the location, where a change in location may substantially interfere with the quality of a student's education.³⁹ As recognized by Hearing Officer William Crane in *In re: Newton Public Schools, Southborough Public Schools, and New England Center for Children*, BSEA # 1306409 and # 1306414,

“For a change of setting to be consistent with stay-put, the "new setting [must] replicate[] the educational program contemplated by the student's original assignment" and there may be no "dilution of the quality of a student's education or a departure from the student's LRE-compliant setting." This is in accord with the general principles of stay-put since the "touchstone in interpreting section 1415 has to be whether the decision is likely to affect in some significant way the child's learning experience.”⁴⁰

Because the “law entitles [students with disabilities] to stability while the parties determine the FAPE issues,” in some cases “a move to a different – even if similar—residential placement would likely have a significant effect on Student’s learning experience.”⁴¹

³⁶ *In Re: Northampton Pub. Sch. & Lolani*, BSEA # 04-0359, 9 MSER 397 (Byrne, 2003) (finding that to "fail to extend the same measure of 'stay-put' protection to an eligible student who, because of the nature or extent of her disability cannot be educated within the public school system, as is without question enjoyed by students attending public school programs, would be to fail to deliver on the IDEA's promise of equal education for all students with disabilities"); see also *In Re: Framingham Pub. Sch., Guild for Human Serv., Inc. and the Dep't of Dev. Serv.*, BSEA # 1808824, 24 MSER 68 (Putney-Yaceshyn, 2018) (finding that the regulations governing private special education schools "relate back to the general special education regulations found at 603 CMR § 28.00, which includes the 'stay-put' provision and do [not] provide for any exemption for publicly placed private school students").

³⁷ 603 CMR 28.06(2)(f)(1).

³⁸ *AW ex rel. Wilson*, 372 F.3d at 683.

³⁹ See *In re: Newton Pub. Sch., Southborough Pub. Sch., and New England Ctr. for Children*, BSEA #s 1306409 and 1306414, 19 MSER 277 (Crane, 2013) (citing *Lunceford v. D.C. Bd. of Educ.*, 745 F.2d 1577, 1582 (DC Cir. 1984) ("type of program required by a profoundly handicapped child such as Pierce is too individualized to enable us to say that a move from one 'residential' placement to another can never be a change in educational placement"); *R.B. v. Mastery Charter Sch.*, 762 F. Supp. 2d 745, 763 (E.D. Pa. 2010); *George A. v. Wallingford Swarthmore Sch. Dist.*, 655 F. Supp. 2d 546, 550-551 (E.D. Pa. 2009) ("while educational placement may not be synonymous with location, it cannot be entirely divorced from the inquiry and this Court cannot overlook the extensive history that Ricky has with WSSD and Strath Haven. WSSD cannot simply dictate that the physical location where Ricky attends school plays no role in his educational placement").

⁴⁰ See *In re: Newton Pub. Sch., Southborough Pub. Sch., and New England Ctr. for Children*, BSEA #s 1306409 and 1306414 (internal citations omitted)

⁴¹ *In Re: Agawam Pub. Sch. and Melmark New England*, BSEA #1504488 (internal citations omitted); see also *Lunceford*, 745 F.2d at 1582 ("appellee must identify, at a minimum, a fundamental change in, or elimination of a basic element of the education program in order for the change [from one location to another] to qualify as a change in educational placement").

Some BSEA hearing officers have concluded that stay put requirements could be fulfilled by providing a student with services that were "comparable" to those he or she had been receiving, but in a different location. These determinations, however, depend on the availability of another "viable" placement.⁴² Where a student placed at a private school has no other placement available to him and is unable to return home safely, his stay put could remain the then-current placement at the private school until a new appropriate placement is identified.⁴³ Taken together, these cases highlight the "[p]ublic policy concerns [that] are at issue - the importance of changing a student's school placement (and location) as few times as possible, and the importance of having private schools that serve a specific population of students."⁴⁴

5. *Exceptions to Stay Put*

Nevertheless, a student's right to stay-put does not bar a publicly funded private program from terminating a student appropriately.⁴⁵ 603 CMR 18.05(7)(b) states that a private "school shall, at the time of admission, make a commitment to the public school district or appropriate human service agency that it will try every available means to maintain the student's placement until the local Administrator of Special Education or officials of the appropriate human service agency have had sufficient time to search for an alternative placement." However, 603 CMR 18.05(7)(d) allows for an emergency termination which it defines as "circumstances in which the student presents a clear and present threat to the health and safety of him/herself or others." The regulation clarifies that "emergency termination" shall mean "removal of a student from a program due to an unplanned circumstance, including a student endangering his/her physical health or safety or endangering the physical health or safety of others."

⁴² *In Re: Framingham Pub. Sch., Guild for Human Serv., Inc. and the Dep't of Dev. Serv.*, BSEA # 1808824 (finding that "the comparability line of cases does not pertain to the instant case, because there simply is no other placement available to Student. If there was a viable option of placing Student in another residential school which could implement his accepted IEP, there would be no dispute in this matter")

⁴³ See *In Re: Student and Quincy Pub. Sch. and League Sch. of Greater Bos.*, BSEA # 2202940 (Mitchell, 2021) ("in cases where a student has no available alternate placement and cannot safely return home, the private school may have a continued obligation to provide the stay-put placement"); *In Re: Belmont Pub. Sch. and Devereaux Advanced Behavioral Health*, BSEA # 2103476, 26 MSER 325 (Figuerola, 2020) (the reality is that Student currently has no other possible stay-put option); *In Re: Framingham Pub. Sch., Guild for Human Serv., Inc. and the Dep't of Dev. Serv.*, BSEA # 1808824 ("As a matter of public policy and if the IDEA's stay-put provisions are to have any meaning, the BSEA cannot issue a decision finding that Student does not have any placement in which to remain during the pendency of this matter"). Compare *In Re: Northampton Pub. Sch. & Lolani*, BSEA# 04-0359 (as "there has been no showing of an existing, comparable special education program, the only appropriate interim relief the Bureau could order would be continued placement at Clarke. Were Clarke relieved of its responsibility to maintain the Student's status quo placement, it is likely Student would be without a free, appropriate public education for an indefinite period of time"); *In Re: Quincy Pub. Sch.*, BSEA # 2005974, 26 MSER 50 (Putney-Yaceshyn, 2020) (finding that although the district "has met its burden of showing that maintaining Student's placement ... is substantially likely to result in injury to Student or others, ... it did not present evidence that Student has been accepted into any program" thereby preventing the Hearing Officer from ordering "placement in a specific program"). But see *In Re: Dracut Pub. Sch. and Melmark New England*, BSEA # 09-1566, 14 MSER 286 (Crane, 2008) ("Dracut correctly points out that if Melmark is not considered Student's stay put placement, Student may possibly be left with no educational program in the event that he is discharged from Bradley. Notwithstanding the potential difficulty of this scenario, it cannot justify a stay put placement into a program that has been demonstrated to be unsafe").

⁴⁴ *In Re: Falmouth Pub. Sch., The Cotting Sch., and Susan S.*, BSEA # 05-1581, 10 MSER 496 (Sherwood, 2004).

⁴⁵ See *In Re: Georgetown Pub. Sch. and Landmark Sch.*, BSEA # 1408733, 20 MSER 169 (Oliver, 2014).

The regulations governing private programs direct that in cases of an emergency termination, the school shall follow the procedures required under 603 CMR 28.09(12)(b) when terminating a student. Specifically,

“The special education school shall not terminate the enrollment of any student, even in emergency circumstances, until the enrolling public school district is informed and assumes responsibility for the student. At the request of the public school district, the special education school shall delay termination of the student for up to two calendar weeks to allow the public school district the opportunity to convene an emergency Team meeting or to conduct other appropriate planning discussions prior to the student's termination from the special education school program. With the mutual agreement of the approved special education school and the public school district, termination of enrollment may be delayed for longer than two calendar weeks.”

Hence, Massachusetts regulations allow private special education schools to terminate students for safety concerns but condition such termination on providing the public school sufficient time to search for an alternative placement and assume responsibility for the student.⁴⁶

Furthermore, private programs can pursue “planned” terminations as follows

1. Except in emergency cases, the school shall notify the school district of the need for an IEP review meeting. The school district shall arrange such meeting and provide to all parties including the parent and if appropriate, the student, notice of this meeting (10) days in advance of the intended date of the meeting. The meeting shall be held for the purpose of planning and developing a written termination plan for the student.
2. The plan shall describe the student's specific program needs, the short and long term educational goals of the program, and recommendations for follow-up and/or transitional services.
3. The school shall thoroughly explain termination procedures to the student, the parents, the Administrator of Special Education and officials of the appropriate human service agency.
4. The written termination plan shall be implemented in no less than (30) days unless all parties agree to an earlier termination date.⁴⁷

In “reviewing an emergency termination, a hearing officer will typically look at whether there is evidence that the special education school could no longer provide a safe environment for the student, whether the special education school attempted modifications to make the school safe for the student, whether the student's behaviors are within the purview of the special education school's expertise, and whether the student's behavior is consistent with, or different from, descriptions available to the special education school prior to his acceptance.”⁴⁸ As recognized by Hearing Officer Amy Reichbach in *In Re: Steve and Worcester Public Schools and Cent. Mass. Collab.*, BSEA # 1808823, 24 MSER 162 (Reichbach, 2018), “Absent ‘insurmountable

⁴⁶ See 603 CMR 28.09(12); see also *In Re: Falmouth Pub. Sch., The Cotting Sch., and Susan S.*, BSEA # 05-1581.

⁴⁷ 603 CMR 18.05(7)(c).

⁴⁸ *In Re: Steve and Worcester Pub. Sch. and Cent. Mass. Collab.*, BSEA # 1808823, 24 MSER 162 (Reichbach, 2018); see also *In Re: Scituate Pub. Sch.*, BSEA #07-0521, 13 MSER 13 (Crane, 2007).

safety concerns' that cannot be overcome through modifications, a special education school cannot terminate a student until a new placement is located."⁴⁹ Moreover, the interim alternative educational setting must be "appropriate" for the student and offer a free and appropriate public education.⁵⁰

In addition, despite the stay put provision, in a discipline context, a district that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others may request an expedited hearing seeking a hearing officer's order to place the student in an interim alternative educational setting (IAES).⁵¹ However, such a change in placement can be made only if the district demonstrates that it has done "all that it reasonably can" to reduce the risk that the child will cause injury.⁵²

6. Burden of Persuasion

⁴⁹ *Id.*

⁵⁰ See 34 CFR 300.532(b).

⁵¹ See 20 U.S.C. § 1415(k)(3)(B)(ii)(II); see also 34 CFR 300.532(a) and (b); 603 CMR 28.08(7)(c) ("A hearing officer may order a temporary change in placement of an eligible student for reasons consistent with federal law, including but not limited to when maintaining such student in the current placement is substantially likely to result in injury to the student or others"); see *In Re: Falmouth Pub. Sch., The Cotting Sch., and Susan S.*, BSEA #05-1581 (finding that "neither a lengthy stay at Cotting nor moving [the student] to a different program is in her interest unless it is deemed to be FAPE.") See 20 U.S.C. § 1415(k)(3)(B)(ii)(II); 603 CMR § 28.08(7)(c); see also, *In Re: Mercy Ctr. & Brockton Pub. Sch.*, BSEA # 1304173, 19 MSER 142 (Putney-Yaceshyn, 2013) (finding "ample evidence" that maintaining student's placement "even for a two week period would have presented an unreasonable risk of harm to the students and staff at Mercy Centre" and to the student herself); see also, *In Re: Dracut Pub. Sch. and Melmark New England*, BSEA # 091566, (holding that notwithstanding the difficulty of a scenario where "if Melmark is not considered [s]tudent's stay-put placement, [s]tudent may possibly be left with no educational program,... it cannot justify a stay-put placement into a program that has been demonstrated to be unsafe"); *In Re: Quincy Pub. Sch.*, BSEA # 2005974 (noting that because a district was unable to reduce a 9-year-old's frequent elopement, tendency to throw furniture, and other risky behaviors, the student was substantially likely to injure himself or others and required placement in an IAES, but because no such placement had yet accepted the student, the hearing officer was unable to order placement in a specific program).

⁵² See *Independent Sch. Dist. No. 270, Hopkins Pub. Sch.*, OAH 5-1300-31399, MDE 14-019-H, 114 LRP (SEA MN 2014) (finding that the two incidents that did result or could have resulted in harm to others were attributable to the behavioral intervention plan not being followed the ALJ concluded that the incidents did not warrant changing the student's placement to a more restrictive setting); see also *In Re: Braintree Pub. Sch.*, BSEA #08-2415, 14 MSER 62 (Crane, 2008); *In Re: Bos. Pub. Sch.*, BSEA # 01-3375, 7 MSER 29 (Figueroa, 2001); *In Re: Shutesbury Pub. Sch.*, BSEA #00-3803, 6 MSER 131 (Crane, 2000). Similarly, in the context of seeking a court order to change a "dangerous" student's placement, the Eighth Circuit concluded that a school district seeking to remove an assertedly dangerous disabled child from her current educational placement must show (1) that maintaining the child in that placement is substantially likely to result in injury either to himself or herself, or to others, and (2) that the school district has done all that it reasonably can to reduce the risk that the child will cause injury. The Court explained that this "second inquiry is necessary to ensure that the school district fulfills its responsibility under the IDEA to make available a free appropriate public education for all handicapped children" and that "school districts should not seek to remove disabled children until reasonable steps have been taken to mitigate the threat of injury. The scope of this inquiry is indicated by 20 U.S.C. § 1412(5)(B), which requires that the "removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily...." *Light v. Parkway C-2 Sch. Dist.*, 41 F.3d 1223, 1228 (8th Cir. 1994).

In a due process proceeding, the burden of persuasion is on the moving party that is seeking relief. If the evidence is closely balanced, the moving party will not prevail.⁵³

B. Application of Legal Standard:

I note, at the outset, that this is not a discipline case. Swansea Wood correctly asserts that 603 CMR 28.08(7)(c) allows a hearing officer to order a temporary change in placement of an eligible student for reasons consistent with federal law, including but not limited to, when maintaining such student in the current placement is substantially likely to result in injury to the student or others.⁵⁴ Swansea Wood asks that I find that Student cannot return to Swansea Wood and that Student requires an interim alternative educational setting (IAES) at St. Elizabeth's. However, because the present matter does not involve discipline, there are no "reasons consistent with federal law" that would allow me to apply 603 CMR 28.08(7)(c) here.

Student is an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act (IDEA)⁵⁵ and the state special education statute.⁵⁶ Neither Student's eligibility status nor his entitlement to FAPE is in dispute. Instead, the issue to be decided in this case is whether Swansea Wood is Student's stay put placement until he can begin attending Whitney Academy. Embedded in this issue is the question whether an exception to the stay put provision exists in this matter, that is whether maintaining Student's placement at Swansea Wood implicates the safety of Student and others. If I conclude that Swansea Wood is not Student's stay put placement, then I must determine what constitutes such placement.

As the District is seeking relief, in this matter Chelmsford has the burden of persuasion regarding whether Swansea Wood is Student's stay put placement until he can begin attending Whitney Academy. Because Swansea Wood is seeking a determination that an exception to stay put exists, Swansea Wood bears the burden of persuasion on that claim.

I find that the District has met its burden to show that Swansea Wood is Student's stay put placement until he is able to attend Whitney Academy. Swansea Wood is an approved private residential special education school program. (Medeiros) Hence, students who are publicly funded and attend Swansea Wood are entitled to the full protections of state and federal special education laws and regulation⁵⁷, including stay put.⁵⁸ Student has attended Swansea Wood since November 2020 pursuant to two consecutive, fully accepted IEPs (for the period 8/11/2020 to 6/28/2021 and for the period 8/3/2021 to 8/2/2022, respectively), both of which place Student at Swansea Wood. (S-1, D-19, D-22, Matson, Medeiros, Poulin) Swansea Wood participated in Student's annual Team meeting on August 11, 2021 and proposed Swansea Wood for Student.

⁵³ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005)

⁵⁴ See 603 CMR 28.08(7)(c).

⁵⁵ 20 USC 1400 *et seq.*

⁵⁶ MGL c. 71B.

⁵⁷ See 603 CMR 28.06(2)(f)(1).

⁵⁸ See *Grossmont Union High Sch. Dist.*, SN 486-00, 102 LRP 3208 (SEA CA, 2000) ("There is no exception to stay put simply because the student is placed in a nonpublic school or nonpublic agency").

Parent accepted this proposal. (D-22, Matson, Poulin) Swansea Wood is therefore Student's "last accepted placement."⁵⁹ (D-1)

Even though the N1 issued on August 11, 2021 notes Student's acceptance at Whitney Academy, at the time of the instant appeal, Student had yet to have a start date much less transition to Whitney Academy. (D-22, Matson, Poulin, Medeiros) In fact, there is no IEP proposing Whitney Academy or any other program.⁶⁰ At the time of the Hearing, Student did not have any program available to him in the immediate future, and he has been unable to go home from his hospital setting due to the level of supports he requires. (Matson, Gilman) Because of his age, complex profile, and extensive needs, Student is very difficult to place. (D-6, D-7, D-8, D-9, D-10, D-11, Matson) As Student has, to date, not attended any educational program other than Swansea Wood since November 2020, his return to Swansea Wood would least disrupt his educational programming and maximize his stability.⁶¹

Swansea Wood's termination attempts do not alter this finding. In accordance with state law, when admitting Student in November 2020, Swansea Wood made "a commitment to [the District] that it will try every available means to maintain [Student's] placement until the [District has] had sufficient time to search for an alternative placement,"⁶² in the event it determined it could no longer serve him. Although Mr. Poulin testified to amending Student's treatment goals and interventions, the record is full of evidence of options that could and should have been pursued, especially when evaluated against the extensive record of "serious" incidents and staff concerns regarding risk of harm. (S-2, S-5, Medeiros, Williamson, Medina, Pavao, Poulin) First, Swansea Wood failed to implement Student's IEP, which clearly provided for one-to-one support in the residence. (D-19). Equally concerning is the fact that none of the staff who worked with Student were aware that such support was part of the IEP they were responsible for implementing. (D-19, Medeiros, Williamson, Medina, Pavao) Nevertheless, Student clearly required added support. Not only was Student placed on "watch" for almost the entirety of his time at Swansea Wood, but staff also testified that they "all" believed that Student required a "funded" one-to-one staff member for support. Yet none requested it. (Williamson, Medina, Pavao) Moreover, in violation of 603 CMR 28.09(12)(a)⁶³, Swansea Wood failed to inform the District of Student's "serious incidents" and extensive struggles; Ms. Matson's testimony that she received no incident reports from Swansea Wood was persuasive since, when questioned, no witness, including the Program Director, Mr. Medeiros, could identify who had forwarded the District incident reports. Each confirmed that he or she had not done so. (Matson, Medeiros, Williamson, Poulin, Medina, Pavao)

⁵⁹ See 20 U.S.C. §1415(j); 34 CFR §300.514.

⁶⁰ See *In Re: Brockton Pub. Sch.*, BSEA # 1601536 ("since the IEP proposed by Brockton ... had not yet been implemented, albeit initially accepted, maintenance of the *status quo* would call for Student to remain at the Italian Home for Children, the placement he last attended").

⁶¹ See *Student & Concord & Natick Pub. Sch.*, BSEA # 18-00182.

⁶² 603 CMR 18.05(7).

⁶³ In the event of serious injury or death of a student, criminal activity on the part of a student or staff member, or other serious incident affecting the well-being of any student, the approved special education school shall immediately notify, by telephone and by letter, the parents, the sending school district(s), any state agency involved in student care or program placement, and the Department of Elementary and Secondary Education.

Nor did Swansea Wood propose to assess Student or to reconvene the Team, despite concerns to which staff members attested. (Medeiros, Matson, Poulin, Williamson, Medina, Pavao) Mr. Medeiros clearly believed that Student's needs required "figuring out" because he suggested that Ms. Matson pursue an assessment program for Student when he spoke with her in June 2021. (Medeiros, Matson) Despite his testimony that Student's behaviors were increasing in intensity, Mr. Medeiros did not propose an assessment for Student nor did he request that the District assess him. (Medeiros) Although Dr. Poulin consulted monthly with Swansea Wood's on-staff psychiatrist and made several changes to Student's behavioral interventions, he testified that they had minimal impact on Student's behaviors, a sentiment that was echoed by all Swansea Wood witnesses. (Poulin, Williamson, Medina, Pavao) Furthermore, there is no evidence that changes to Student's medications were pursued by Swansea Wood. (Medeiros)

Swansea Wood's attempts to terminate Student's placement are confusing and flawed. In fact, it is unclear whether Swansea Wood intended that Student's termination be a planned termination or an emergency termination. Swansea Wood ignored the process outlined in 603 CMR 18.05(7)(c) for a planned termination, and Student continued to attend the program following Swansea Wood's communications to the District on June 17, July 15, and July 16, 2021 referencing its intent to terminate Student's enrollment. (Medeiros, Matson) Subsequent to each communication, Swansea Wood failed to request that the District convene an IEP team, to work with the Team to develop a termination plan describing the short and long term educational goals of the program, and recommendations for follow-up and/or transitional services, to explain the termination procedures to Student or the District, and to implement the termination plan within 30 days of the meeting, steps which are required for a planned termination.⁶⁴ (D-3, S-3, S-4, Matson, Medeiros, Poulin) To date, no written termination plan exists for Student. (Poulin, Matson)

Swansea Wood's termination also failed to follow the procedures required under 603 CMR 28.09(12)(b) or to meet the substantive requirements of 603 CMR 18.07 for an emergency termination. Procedurally, even if Student's behaviors qualified as "emergency circumstances," Student could not be terminated "effective immediately" on September 28, 2021.⁶⁵ (D-3, S-3, Matson, Medeiros) On September 28, 2021, the District requested additional time, and, in accordance with state regulations, Swansea Wood should have "delay[ed] termination of [Student] for up to two calendar weeks to allow [the District] the opportunity to convene an emergency Team meeting or to conduct other appropriate planning discussions prior to [Student's] termination from the special education school program."⁶⁶ (D-3, Matson) Swansea Wood did not allow the District sufficient time to "assume responsibility" for Student⁶⁷ even though Mr. Medeiros testified that he was aware that Student's placement at Whitney Academy was not immediate. (D-3, S-3, Matson, Medeiros) "Planning discussions" were especially critical in this case, as Mr. Poulin testified that Student struggles with acclimating to new environments and requires methodical transition planning that takes into consideration his tendency to perseverate on old programs. (D-18, Gilman, Poulin) Mr. Poulin expected to be an active participant in Student's transition to a new program. However, he was not consulted

⁶⁴ 603 CMR 18.05(7)(c).

⁶⁵ 603 CMR 28.09(12)(b)

⁶⁶ *Id.*

⁶⁷ *Id.*

about Student's termination on September 28, 2021 and was told to "hold off" contacting Student at St. Elizabeth's. (Poulin)

Furthermore, Student's behaviors did not in fact substantively meet the standard for an emergency termination. An emergency termination necessitates "circumstances in which Student presents a clear and present threat to the health and safety of him/herself or others."⁶⁸ Having been hospitalized at St. Elizabeth's since September 10, 2021, on September 28, 2021, Student was not residing at Swansea Wood. (S-2, Medeiros, Poulin, Gilman). In addition, Student was not terminated for any behavior that took place on Swansea Wood premises; termination resulted from an incident involving Student's attempt to kiss and grope a nurse at St. Elizabeth's. (Medeiros) Mr. Medeiros testified that he was concerned that Student would attempt to engage in such behavior upon his return to Swansea Wood. (Medeiros)

"In reviewing an emergency termination, a hearing officer will typically look at whether there is evidence that the special education school could no longer provide a safe environment for the student, whether the special education school attempted modifications to make the school safe for the student, whether the Student's behaviors are within the purview of the special education school's expertise, and whether the student's behavior is consistent with, or different from, descriptions available to the special education school prior to his acceptance."⁶⁹ As already discussed, there is evidence that Swansea Wood did not "attempt[all] modifications to make the school safe for the student."⁷⁰ Swansea Wood failed to provide Student with his IEP-required one-to-one assistant, to reconvene the IEP team, to request additional support from the District, to seek consent for assessments of Student, or to seek consultation from other outside professionals. (Matson, Medeiros, Poulin, Williamson, Medina, Pavao)

As discussed *supra*, Swansea Wood has failed to show that the gamut of supplementary aids and services have been explored and reasonable steps have been taken to mitigate the threat of injury.⁷¹ Pivotal to my determination in this regard is the testimony of Mr. Poulin. Mr. Poulin, a Swansea Wood staff member who has been Student's clinician since February 2021, credibly testified that Student can return to Swansea Wood if "additional" supports and "precautionary measures" were provided, such as "dedicated" two-to-one staffing with paraprofessionals who would directly report to him for additional clinical training and support; increased frequency of clinical services; and a sensor on Student's bedroom door. (Poulin)

⁶⁸ 603 CMR 18.05(7)(d) (emphasis added).

⁶⁹ *In Re: Steve and Worcester Pub. Sch. and Cent. Mass. Collab.*, BSEA # 1808823; *In Re: Falmouth Pub. Sch., The Cotting Sch., and Susan S.*, BSEA # 05-1581; see also *In Re: Scituate Pub. Sch.*, BSEA # 07-0521.

⁷⁰ See *In Re: Falmouth Pub. Sch., The Cotting Sch., and Susan S.*, BSEA #05-1581 ("Cotting failed to try every available means to maintain Susan's placement at least until Falmouth has had sufficient time to search for an alternative placement and assume responsibility for Susan. Although Falmouth has actively sought a placement for Susan, it has not yet met with success. Thus, Falmouth requires more time to search, and absent a showing of insurmountable safety concerns, Susan must continue her education at Cotting until an alternative placement is located").

⁷¹ *Id.* In contrast, in *In Re: Dracut Pub. Sch. and Melmark New England*, BSEA # 09-1566, Melmark had "literally run out of options in its efforts to keep Student and others safe." Therefore, Hearing Officer Crane found that Melmark could not be the student's stay put placement.

In addition, Swansea Wood is a DESE-approved special education school serving students, who like Student, are diagnosed with intellectual disabilities and mental health issues. (D-12, Medeiros, Poulin) Many of the students are also on the autism spectrum. (Poulin) Like Student, students at Swansea Wood engage in assaultive behavior, elopement and self-harm behaviors such as cutting, ingesting objects, hair pulling, and tying objects around their necks. (Pavao) Swansea Wood students routinely require additional staff support, since, at any one time, one to five students are on “watch.” (Pavao) Students are placed on “levels” and “restrictions” because they engage in behaviors that necessitate such measures. (Williamson, Poulin)

This premise is further supported by the definition of emergency termination in 603 CMR 18.02(8) which allows removal “due to an unplanned circumstance.” Mr. Medeiros testified that he was part of Student’s admission process. (Medeiros) As part of that process, he had an opportunity to review Student’s then-current IEP and the 2020 psychological assessment which Ms. Matson had provided in the referral packet. (D-12, D-13, Matson, Medeiros) The extreme safety concerns posed by Student’s behaviors were “highlighted” in both documents and by Ms. Matson in her conversations with Swansea Wood. (D-12, D-19, Matson) Swansea Wood was made aware of Student’s increasing need for vigilant observation and supervision, as only a few months prior to his admission to Swansea Wood, a one-to-one had been added to Student’s IEP for the residence hall as a result of escalating behaviors. (D-19)

There is no evidence that Student’s aggressive, sexualized and elopement behaviors at Swansea Wood were not “consistent with... descriptions available to the special education school prior to his acceptance.”⁷² Although Swansea Wood argued that Student’s aggressions, elopement, and hypersexualized behaviors had escalated and could not be contained even with two-to-one staffing, a DESE-approved special education program cannot, on the one hand, fail both to provide a student with the supports listed in his IEP and to reconvene the IEP Team to assess whether additional assessments, supports and/or services are needed, and, on the other hand argue that Student’s circumstances deteriorated in a period of 11 months to the point that an emergency termination was indicated or that additional supports beyond those provided for in his IEP will not be sufficient. (S-2, Matson, Medeiros, Poulin, Williamson, Medina, Pavao) To endorse such an argument would undermine the obligations of DESE-approved private programs to the students they enroll.

Hearing officers have considered whether “insurmountable safety concerns”⁷³ exist when determining whether a Student can remain in an educational setting for purposes of stay put.⁷⁴ Under specific circumstances, hearing officers and courts have found that a change of location

⁷² *In Re: Steve and Worcester Pub. Sch. and Cent. Mass. Collab.*, BSEA # 1808823; *In Re: Falmouth Pub. Sch., The Cotting Sch., and Susan S.*, BSEA # 05-1581; see also *In Re: Scituate Pub. Sch.*, BSEA # 07-0521.

⁷³ *In Re: Falmouth Pub. Sch., The Cotting School, and Susan S.*, BSEA # 05-1581.

⁷⁴ See *In Re: Dracut Pub. Sch. and Melmark New England*, BSEA # 09-1566. See also *In Re: Northampton Pub. Sch. & Lolani*, BSEA # 04-0359.

does not violate the stay put provision,⁷⁵ but such a finding necessitates a case-by-case analysis.⁷⁶

In the present matter, the severity of Student's behaviors cannot be minimized. It is indisputable that Student presents with significant behavioral, social, and emotional challenges. (S-2, S-5, D-12, D-13, D-14, D-15, D-16, D-17, D-18, Matson, Gilman, Medeiros, Poulin, Williamson, Medina, Pavao) In fact, his behaviors are so intense and difficult that he had been supported by one-to-one staff not only in his educational placement but also at his residence at his placement prior. To Swansea Wood. (D-19, Matson) His most recent psychological assessment "highlighted" the "seriousness" of Student's "safety risk" and stressed his need for "environmental containment." (D-12) At Swansea Wood, all staff members agree that he required a "funded 1:1". (Medina, Pavao)

Nevertheless, Student's behaviors have never resulted in injury to himself or others while at Swansea Wood. (Medeiros, Williamson, Poulin, Pavao, Medina) As such, it is difficult for me to find that injury is "substantially likely" to occur, that Student's safety concerns are "insurmountable," or that additional modifications would not mitigate any safety concerns⁷⁷, where no injuries have in fact occurred. As Hearing Officer Marguerite Mitchell recently stated in *In Re: Student and Quincy Public Schools and League School of Greater Boston*, BSEA # 2202940 (Mitchell, 2021), where, in contrast to the present matter, ongoing physical injuries to the student and others did, in fact, result, "[o]ngoing safety concerns are far different than [Student] presenting a 'clear and present threat to the health and safety of him/herself or others,' which is a prerequisite for an emergency termination."

Moreover, based on his extensive experience in the field of psychiatry, Dr. Gilman persuasively testified that Student's current medication regimen, including the new PRNs of Trilofan and Haldol, has been effective in managing Student's behaviors. Since Student no longer presents with suicidal ideation, aggression, or hyper sexualization, he no longer meets the standard for acute care. Dr. Gilman testified that a nurse needs no special training to administer Student's medications, and staff can be trained to observe the symptoms that may necessitate a PRN. (Gilman) Because Dr. Gilman has been responsible for approximately 700 discharges per year in his 17 years of practice, I found his testimony that Student is ready to be discharged persuasive. (Gilman) I also found Dr. Gilman's testimony credible because at no point did he suggest that Student's chronic behaviors will abate; to the contrary, Dr. Gilman explained that Student will continue to present in this manner, but, at this time, Student's medication is controlling his symptoms effectively. Dr. Gilman testified that Student has been compliant with his medication regimen. (Gilman) This testimony is supported by Student's history at Swansea Wood too, wherein he refused medication on only two documented occasions. (S-2) Even if such a number is an underrepresentation of Student's noncompliance with medication regimens, as Mr. Medeiros testified to, there is no reason to believe that Student would not be amenable to taking

⁷⁵ See *In Re: Falmouth Pub. Sch., The Cotting Sch., and Susan S.*, BSEA # 05-1581 (referring to federal commentary, volume 64 of the federal register at page 12616); see also *In Re: Georgetown Pub. Sch. and Landmark Sch.*, BSEA # 1408733.

⁷⁶ See *Hale v. Poplar Bluff R-I Sch. Dist.*, 280 F.3d 831(8th Cir. 2002) (which calls upon the fact finder to inquire as to the specific facts of the case to examine the impact that educational changes may have on the student).

⁷⁷ *Parkway C-2 Sch. Dist.*, 41 F.3d at 1228; see also 603 CMR 18.05(7).

his medications when offered, as he has consistently been doing at St. Elizabeth's. (S-2, Medeiros, Gilman)

St. Elizabeth's cannot be entertained as a placement for Student. St. Elizabeth's is a hospital, not an educational placement. There are no special education teachers or educational opportunities at St. Elizabeth's. (Gilman) There are no other students who are of the same age or of the same educational profile as Student in his unit; it is a general psychiatric in-patient unit with no specific patient profile. (Gilman) Swansea Wood suggests that Student's IEP could be implemented at St. Elizabeth's, and this would not violate stay put because it would only constitute a change in location. Such a placement, however, would constitute more than merely a change in location; it would "substantially interfere with the quality of [Student's] education."⁷⁸ At Hearing, Swansea Wood presented no evidence to demonstrate that St. Elizabeth's can "replicate[] the educational program contemplated by" Student's IEP without "dilution of the quality of [his] education or a departure from [his] LRE-compliant setting."⁷⁹ (Gilman) Even if St. Elizabeth's could offer Student *some* educational opportunities, it cannot be Student's stay-put placement because it was never intended to be anything other than a temporary arrangement.⁸⁰ Most patients stay for only 30 days, and Student's stay has been longer only due to the present conflict between the parties. (Gilman)

I thus find that Student must remain at Swansea Wood, with the modifications recommended by Mr. Poulin (and any others that are deemed necessary by Student's team) until Whitney Academy is able to admit him.⁸¹ Where I have not found safety concerns to be "insurmountable," and where it is indisputable that there are no viable educational placements for Student, who cannot return home and has no starting date at Whitney Academy, Swansea Wood should be Student's educational placement.

This should be the end of my decision. However, Swansea Wood has filled Student's spot. (Medeiros, Poulin) Swansea Wood's decision to fill Student's spot during an ongoing dispute⁸² shows a concerning disregard for Student's rights. While I am not unsympathetic to Swansea Wood's current staffing limitations, Student is protected by federal and state special education laws,⁸³ which must control. By filling Student's spot, Swansea Wood has created a very difficult situation. Because I am unable to "issue a decision finding that Student does not have any

⁷⁸ See *In Re: Newton Pub. Sch., Southborough Pub. Sch., and New England Ctr. for Children*, BSEA #s 1306409 and # 1306414.

⁷⁹ *In Re: Newton Pub. Sch., Southborough Pub. Sch., and New England Ctr. for Children*, BSEA # 1306409 and # 1306414; see also *Fairfax Cty. Sch. Bd.*, 372 F.3d at 683.

⁸⁰ See *Verhoeven*, 207 F.3d at 10 ("a reading of 'current educational placement' that includes the temporary ... placement at issue here would thwart the purpose of section 1415(j), [and] we decline to adopt such a reading").

⁸¹ See *Thomas*, 918 F.2d at 626 ("If an IEP has been implemented, then that program's placement will be the one subject to the stay put provision. And where, as here the dispute arises before any IEP has been implemented, the 'current educational placement' will be the operative placement under which the child is actually receiving instruction at the time the dispute arises"); see also *In Re: Framingham Pub. Sch., Guild for Human Serv., Inc. and the Dep't. of Dev. Serv.*, BSEA # 1808824; *In Re: Belmont Pub. Sch. and Devereaux Advanced Behavioral Health*, BSEA #2103476.

⁸² On September 28, 2021, counsel for the District wrote to Swansea Wood demanding reenrollment of Student. (D-3)

⁸³ See 603 CMR 28.09(12).

placement,”⁸⁴ I find that Swansea Wood must reenroll Student immediately, consistent with the Order below, and maintain his placement until a different placement is secured by the District and Student has begun attending that placement.

ORDER:

Student’s stay put placement pending his start at Whitney Academy or any other program is Swansea Wood School. Swansea Wood shall reenroll Student immediately. Swansea Wood’s clinical staff shall forthwith contact St. Elizabeth’s Medical Center in order to coordinate a discharge plan for Student. In addition, Student’s IEP Team must reconvene within 7 calendar days of the issuance of this Decision to identify what modifications, additional services and/or supports are necessary in order to enable Student to return to Swansea Wood School safely. Unless otherwise indicated by St. Elizabeth’s, Student should be transported back to Swansea Wood as soon as possible. At such time, the modifications identified by Mr. Poulin, and any other modifications identified by the IEP Team, shall be implemented immediately.

Chelmsford Public Schools shall fund any additional modification identified by Student’s IEP Team. It is also ordered to make diligent efforts to expand its search for an appropriate placement for Student. If such placement is identified, Student shall be placed there immediately, with the consent of Parent.

By the Hearing Officer,

/s/ Alina Kantor Nir

Alina Kantor Nir, Hearing Officer

December 2, 2021

⁸⁴ *In Re: Framingham Pub. Sch., Guild for Human Serv., Inc. and the Dep’t. of Dev. Serv.*, BSEA # 1808824 (emphasis added).

.COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS
EFFECT OF FINAL BSEA ACTIONS AND RIGHTS OF APPEAL

Effect of BSEA Decision, Dismissal with Prejudice and Allowance of Motion for Summary Judgment

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. Similarly, a Ruling Dismissing a Matter with Prejudice and a Ruling Allowing a Motion for Summary Judgment are final agency actions. If a ruling orders Dismissal with Prejudice of some, but not all claims in the hearing request, or if a ruling orders Summary Judgment with respect to some but not all claims, the ruling of Dismissal with Prejudice or Summary Judgment is final with respect to those claims only.

Accordingly, the Bureau cannot permit motions to reconsider or to re-open either a Bureau decision or the Rulings set forth above once they have issued. They are final subject only to judicial (court) 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. This means that the decision must be implemented immediately even if the other party files an appeal in court, and implementation cannot be delayed while the appeal is being decided. Rather, a party seeking to stay – that is, delay implementation of – the decision of the Bureau must obtain request and 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 while a judicial appeal of the Bureau decision is pending, 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 (including keeping the child in his or her placement prior to issuance of the BSEA Order) during the pendency of while judicial proceedings are pending must ask the court having jurisdiction over the appeal to grant a seek a preliminary injunction ordering such a change in placement from *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 of Special Education Appeals 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 Elementary and Secondary Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

Rights of Appeal

Any party aggrieved by a final agency action by the Bureau of Special Education Appeals may file a complaint in the state Superior Court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review. 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.