

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

In Re: Whiteacre Public Schools¹ v. Student

BSEA No. 2303703

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act or IDEA (20 USC Sec. 1400 et seq.); Section 504 of the Rehabilitation Act of 1973 (29 USC Sec. 794); the Massachusetts special education statute or “Chapter 766” (MGL c. 71B), the Massachusetts Administrative Procedures Act (MGL c. 30A) and the regulations promulgated under these statutes.

In the instant case, the moving party is Whiteacre Public Schools (District, or School), which seeks an order allowing it to place Student, who currently attends the District’s public high school, in an as-yet unidentified public or private out-of-district day program. Parents oppose the District’s position, contend that Student should remain in his current setting, with modifications, and that transferring him to an outside placement would cause him harm.

On October 31, 2022, the District filed a hearing request with the Bureau of Special Education Appeals (BSEA) in which they alleged that the District is no longer able to provide Student with a free, appropriate public education (FAPE). In the original hearing request, the District sought an order allowing it to send referral packets to six² named public and private out-of-district special education schools, and to such additional schools as the District and Parents agree, as well as an order to place Student in an out-of-district program designed for children with Student’s profile.

Upon receipt of Parents’ hearing request, the BSEA scheduled an initial hearing date of November 21, 2022. At the request of the parties, the hearing was postponed on several occasions for good cause. A pre-hearing conference³ took place on December 22, 2023, at which Parents agreed to allow referrals to be sent to the six programs referred to in the hearing request. Subsequently, on February 7, 2023, Parents filed a *Motion to Dismiss* in which they argued, among other things, that their consent to the referral rendered the hearing request moot. The School filed an opposition to the *Motion to Dismiss* on February 21, 2023. In a *Ruling* dated February 23, 2023, the Parents’ *Motion* was granted as to the School’s request for an order allowing it to send referrals to the six

¹ “Whiteacre” is a pseudonym for the school district. Due to unique circumstances in this case, a pseudonym for the district is being used to provide an additional layer of protection of the confidentiality of Student.

² Prior to the filing of the hearing request, the school had originally sought to submit referral packets to a total of seven schools. Parents agreed to allow the school to send one referral packet.

³ In addition to the pre-hearing conference, several conference calls were held to discuss procedural matters.

outside placements referenced in the hearing request, but denied as to its request for an order for an out of district placement for Student.

The hearing was held on March 2, 3, 8, 10, and 15, 2023. With the consent of both parties, the hearing took place via Zoom videoconference. The District was represented by counsel and Parents proceeded *pro se* on behalf of themselves and Student. Both parties had an opportunity to examine and cross-examine witnesses, as well as to submit documentary evidence for consideration by the Hearing Officer. The parties requested and were granted a postponement until March 15, 2023, for oral closing arguments, and the record closed on that date.

The record in this case consists of School's Exhibits S-1 through S-73, Parents' Exhibits P-1 through P-9, as well as stenographically-recorded witness testimony and argument. Those present for all or part of the proceeding were the following:

Student's Mother	
Student's Father	
Jill Childress	Speech/Language Therapist, District
Paul Giacobbe	Student's 1:1 Paraprofessional, District
Katelyn Hilton	BCBA, District
James Mellekas	Student's Special Education Teacher, District
Justine Muir	Director of Student Services, District
Paula Parker	Team chair, District
Gretchen Timmell	Parents' consultant, Lurie Center, Mass. General Hospital
Alisia St. Florian	Attorney for the District
Jane M. Werner	Court Reporter
Carol Kusinitz	Court Reporter
Sara Berman	BSEA Hearing Officer

ISSUES PRESENTED

The issue to be decided is the following:

1. Whether Student requires an out-of-district placement in order to receive a FAPE.

POSITION OF SCHOOL

Beginning in approximately March 2022, Student experienced a sharp uptick in disability-related maladaptive behavior, including non-compliance, flopping, eloping, aggression, self-injury, and disrobing. This behavior has persisted despite the best efforts of staff to provide appropriate intervention. As a result, Student spends much of every school day either engaged in inappropriate behaviors or in his "break" area rather than engaging in learning and is not making effective progress towards his IEP goals. Moreover, some of Student's behaviors put the safety of Student or others at risk. The District has exhausted every available strategy to support Student without success and has concluded that Student cannot receive a FAPE in his current placement. Rather, to make

effective progress, Student needs a full-year program that uses ABA methodologies and is specifically tailored for children and teens with profiles similar to his. Such a program could provide Student with the smaller school environment, specialization, and increased numbers of expert staff that Student requires to be able to attend to learning and receive a FAPE.

POSITION OF PARENTS

Parents agree that Student is not presently making effective progress in his current placement; however, he could make progress if the School were willing to work collaboratively with Parents to identify and correct the conditions that are giving rise to the problematic behavior, much of which may be the result of factors such as Student's communication difficulties, the onset of puberty and an absence of appropriate education in this area, a Registered Behavior Technician (RBT) who does not work effectively with Student, and a behavior management system that "rewards" Student's inappropriate behavior with extensive "breaks." In contrast to District personnel, Parents are able to manage Student's behavior both at home and in a wide variety of community settings. They are willing and able to work with the School to develop solutions, but have met with resistance to their suggestions.

Moreover, an out-of-district placement is not only premature, but also is potentially harmful to Student. Student has spent his entire school career in District schools, struggles to adjust to working with strangers, and would have difficulty adapting to removal from his school community. Further, the commuting involved with an out-of-district placement would be harmful. All but one of the placements suggested by the District would require over one hour of travel time in each direction (taking traffic into account). The lengthy commute would be overly stressful and tiring for Student, would pose a health risk given his seizure disorder, and would prevent Parents from getting to him quickly in case of illness or emergency.

Parents feel so strongly about the potential detrimental effect of an out-of-district placement that if such placement is ordered, they intend to educate him at home (with special education services from the District) to prevent harm, despite their strong belief that Student should be educated in a school setting.

SUMMARY OF THE EVIDENCE

Overview of Student Profile

1. Student is a 15-year-old young man who lives with Parents in a town served by the District. Student's eligibility for special education and related services from the District pursuant to the IDEA and MGL c. 71B is not in dispute. Student has attended District schools for his entire educational career, including preschool, elementary and middle schools. Since on or about August 30, 2022, Student has attended the regional high school operated by the District, where he is enrolled as a ninth-grader in a sub-

stantially-separate program for students with developmental disabilities. (Parents, Muir, Parker)

2. Student is described as “sweet and fun.” In school, he enjoys cooking and art activities, as well as watching videos on his iPad. (S-56) With Parents, he enjoys frequent trips to various venues, including restaurants, trampoline parks, shopping malls, beaches, and local outdoor fairs and festivals. (Parents) Student has a number of functional academic, pre-vocational and life skills, which he can perform with close supervision and prompting. Some of these skills include recognizing some sight words, using a calculator for simple math problems, following a daily routine and visual schedule, cooking activities, shopping for groceries, toileting, hygiene, dressing, and eating meals.
3. The parties do not dispute Student’s disability profile. Student was diagnosed with autism spectrum disorder (ASD) at approximately age 18 months, and subsequently with a communication disorder. He also has received diagnoses of developmental delay and intellectual disability. (Father, S-67)

In addition to ASD, Student has a seizure disorder, and a severe allergy to propylene glycol. The seizure disorder manifests with “absence seizures,” *i.e.*, periods of staring during which Student appears to be awake but does not respond to communication. These absence seizures may not be obvious to a person who is not familiar with Student, may last up to 20 minutes, and are followed by a period of extreme fatigue and lethargy. Student’s seizures currently are controlled with daily medication,⁴ and his most recent episode took place in 2021. (Parents, S-42, S-43) As a result of the propylene glycol allergy, Student cannot receive the COVID-19 vaccine, which contains the chemical, and must avoid certain medications, processed foods and numerous other products in the environment. (Mother) The School has developed a Classroom Health Care Plan to address Student’s seizure and allergy-related needs. (Parents, Timmel, S-42, S-43)

Outside of the school setting, Student receives regular care and monitoring for his ASD and seizure disorder from the Lurie Center at Massachusetts General Hospital, as well as from providers closer to his home. (Parents, Timmel, S-42)

4. Student’s ASD and communication disorder have a global impact on his functioning. Student is non-speaking and is considered a “total communicator.” As such, he expresses himself with many modalities, including gestures, facial expressions, vocalizations, and modified sign language, as well as with an Augmentative, Alternative, Communication (AAC) device, informally referred to as his “talker.” At home, Parents communicate with Student primarily by speaking to him, but also encourage him

⁴ In addition to the daily seizure medication, Student has been prescribed a nasal spray for emergency use in case of a seizure that does not abate in a short time but has not needed to use it during the relevant period. (Mother)

use his AAC device. Parents have purchased a second AAC device, which they use to support reciprocal communication at home. Student also has an iPad, which he uses for recreation (such as watching videos). (Parents, Quill, Childress)

5. To make educational progress, Student requires highly individualized programming, in which all skills are taught using principles of Applied Behavioral Analysis (ABA), as well as a multi-sensory approach, an individualized behavior plan, and opportunities to generalize skills across environments. To learn new skills, Student requires multiple trials and repetitive exposure. (S-33, S-52, S-56)
6. Student's disabilities have given rise to a number of problematic behaviors that interfere with his learning. Although the parties may disagree on the function and interpretation of these behaviors, as well as the appropriate response to them, there is no dispute that from approximately March 2022 to the present, Student has exhibited the following within the school setting: non-compliance, "flopping," bolting, aggression (*e.g.*, pinching, scratching, pushing, grabbing), self-injury (hitting head, biting hands), mouthing of non-edible objects, disrobing, and behavior, usually when when disrobed, that appears sexualized, although that parties agree that it is unlikely that Student understands the social implications of such behavior.

As a result of these behaviors, and the School's efforts to manage them with a range of strategies including having Student take breaks from his planned activity, Student has spent a substantial amount of time "away from learning"—*i.e.*, either engaged in an unwanted behavior or on a break--during the latter portion of eighth grade (2021-2022) as well as during the current school year. (Muir, Giacobbe, Hilton, Mellekas)

Student demonstrates little or none of the problematic behavior referred to above when he is with one or both Parents, either at home or in the community. (Parents)

Chronology

7. Student received Early Intervention services as a toddler, and, at the age of three, received an IEP and transitioned to a District preschool. Student spent his elementary years in substantially separate classrooms, where he received specialized instruction based on ABA as well as related services such as occupational, physical, and speech/language therapy. Student was assigned a 1:1 ABA-trained paraprofessional during most of elementary school. He had some, limited inclusion opportunities. Overall, the parties were satisfied with Student's progress during elementary school. (Parents, Parker, S-52)
8. Student entered middle school (sixth grade) in the fall of 2019, where he was placed in a substantially separate classroom serving students with developmental disabilities, and also had some inclusion opportunities. Student's instruction was based on ABA principles, and focused on skills in the following areas: self-help, communication,

functional academics, social, school behavior, community, and independence. Student had a successful experience in sixth grade and most of seventh grade. (Parker, S-36)

9. In February and March of 2021, when Student was in seventh grade, he underwent a three-year re-evaluation, which consisted of assessments in the areas of academics, speech-language, occupational therapy (OT), and physical therapy. (Parker, S-52-55, S-59)

On April 7, 2021, the School issued an IEP covering March 25, 2021, to March 24, 2022. (S-56) This IEP contained goals in Communication (increasing ability to respond to greetings, request attention, and form sentences), Functional Academics (matching sight words to pictures, answering comprehension, using debit or gift card, complete math problems with calculator); Pre-Vocational (increase independence and learn new tasks such as sorting items), Self-Help (increase independence with toileting and hygiene), School Behavior (maintain then-current low rate of disruptive behavior), Occupational Therapy (improve some ADL skills), and Community (develop shopping skills).

The IEP provided for Grid A consultation among service providers along with monthly “clinic” meetings at which Parents and staff would discuss Student progress. Grid C indicated that occupational and speech/language therapy (4x30 minutes/cycle, each) and “academic/behavioral” services would all be provided in a substantially separate setting. The IEP provided for an extended school year (ESY) program for summer 2021. Because Student spent little or no time in the general education classroom setting, there were no services listed for Grid B.

The “Additional Information” section reported that the School had an “action plan” to respond to seizures, that Student would have inclusion opportunities for gym, health, lunch, and other activities if appropriate, and that Parents and School would exchange a daily home-school log and have monthly clinic meetings.

This section of the IEP also stated that Student and Parents would be provided with social stories surrounding puberty and “private time,” and that Student’s health curriculum would be adjusted as needed to address this issue. The record contains no information as to whether this was implemented.

Lastly, the IEP contained a Transition Planning Form (TPF) stating that Student would be afforded the opportunity to work in the middle school store as appropriate, to engage in various pre-vocational activities such as stocking shelves, washing tables, and the like, as well as to go on grocery store shopping trips. The TPF further stated that the School was in the process of developing a plan to transition Student from eighth to ninth grade at the end of the 2021-2022 school year.

The IEP indicated that placement would continue to be the substantially separate program at the District middle school. Parents accepted the IEP and placement in full on May 6, 2021 (S-56)

10. In October or November 2021, Student underwent an augmentative communication evaluation by Easter Seals of Massachusetts. The evaluator assessed Student's ability to use his AAC device to communicate and made multiple recommendations for optimizing his skills and the usefulness of the device. (S-39). The IEP Team reviewed the evaluation and agreed to adopt some recommendations for adjustments to the AAC device but did not issue an amendment to the IEP at that time. (S-38)
11. Between January and March 2022, an Assessment of Functional Living Skills (AFLS)⁵ was completed by Katelyn Hilton, a Board Certified Behavior Analyst (BCBA) employed by the School, and Student's eighth grade special education teacher.⁶ Using this instrument, Ms. Hilton and the teacher assessed Student's skills in a variety of areas, including "school skills," (encompassing a range of skills and behaviors for functioning in the school setting such as, for example, following routines, eating meals, and performing core academic tasks), "basic living skills," (such as toileting, hygiene, dressing, and communication), "community knowledge," (including shopping, eating in public, handling money, using a phone and telling time."

Student's performance on the AFLS indicated that he had relative strengths in many areas, including eating meals, following routines, dressing, toileting, basic mobility and shopping; however, he needed significant support to execute his skills, and would show little or no progress in skills without explicit instruction. He showed relative weaknesses in academic skills. The evaluators recommended that Student's next IEP focus on functional skills and functional academics. (S-36)

On March 10, 2022, during Student's eighth grade year, the Team convened to review the AFLS and to develop an IEP for the period from March 2022 to March 2023, which would encompass Student's transition from middle to high school in the fall of 2022. The IEP, issued on March 23, 2022, contained the same goals and accommodations as the predecessor IEP, with updated benchmarks incorporating some of the findings and recommendations from the Easter Seals AAC evaluation and AFLS. Similarly, the IEP service delivery grid continued provisions for monthly "clinic meetings" with Parents and delivery of all services within a substantially separate classroom. As was the case with the predecessor IEP, the IEP issued in March 2022 reflected a low level of problematic behavior (an average of approximately 0.5

⁵ The AFLS is a criterion-referenced skills assessment tool, tracking system, and curriculum guide for teaching persons with autism or other developmental disabilities the skills needed to maximize independence. (S-36)

⁶ Parts of the AFLS had been administered at the time of Student's March 2021 re-evaluation, but the assessment could not be completed because the hybrid learning model was in place at that time. Therefore, the AFLS was completed between January and March 2022. (S-72)

episodes per day of non-compliance, aggression, flopping, mouthing or self-injury). Parents accepted this IEP and placement in full on April 20, 2022. (S-36)

12. In March 2022, at the time of or shortly after the IEP meeting referred to above, Student experienced a significant uptick in problematic behaviors, which included non-compliance, aggression towards staff and, occasionally, to peers (pinching, hitting, pushing, or grabbing), flopping on the floor, destruction of objects in the room, and self-injurious behavior. Student also demonstrated a resurgence of disrobing behavior (removal of shirt, pants, and underwear) that had been part of his repertoire when he was younger, but which had stopped for several years.

Lastly, Student began engaging in behaviors described as “sexualized,”⁷ including rubbing his genital area on objects when clothed or disrobed, and, while lying on the floor, wrapping himself around staff members’ ankles or legs and engaging in humping motions. On several occasions, Student’s peers were removed from the classroom during Student’s behavioral episodes. On one occasion, Student fully disrobed during a speech therapy session, and four staff persons were required to control the situation; two to stay with Student within the room and two others outside the door. On a few occasions in or about June 2002, Student touched or attempted to touch staff inappropriately.

Parents were informed generally of the behavioral changes, but did not receive contemporaneous, specific reports of inappropriate touching. Neither the daily data sheets filled out by the RBT and ABA paraprofessional nor the daily home logs exchanged between Parents and School specifically mentioned these incidents. (Hilton, Childress, Parents, S-13. S-20)

Student’s behavioral episodes were frequent, reduced the amount of time spent on learning activities, and reduced inclusion opportunities. There had been no obvious change in Student’s life that would explain the reason for this abrupt change in behavior. (Hilton)

13. Staff responded by gathering data to determine the cause of the uptick in problematic behavior, as well as implementing various strategies to manage or correct it, including providing Student with breaks, as well as having Student receive all instruction in an unused room next to his assigned classroom. Beginning in or about May 2022, Kate-lyn Hilton began conducting an FBA focused on Student’s then-current behavioral

⁷ Parents object to the use of the term “sexualized” to describe Student’s behavior, arguing that he does not understand sexuality or related social rules, and does not intend his behavior to be sexually or otherwise offensive. As such, they believe his behavior cannot be viewed in the same light as similar behavior by a child or teen who does not have disabilities. I credit Parents’ assertion regarding Student’s intentions as supported by the record and largely uncontested by the School. For purposes of brevity and clarity, however, I will use the term “sexualized”, in this Decision, when necessary or appropriate, to refer to the behavior at issue.

presentation, for purposes of revising his behavior plan. (Hilton, Muir, Childress, Parker)

14. As part of this process, in May 2022, the District retained an outside consultant, Dr. Kathleen Quill to work with staff on development of the FBA. Dr. Quill has master's and doctoral degrees in developmental psychology with a specialty in behavioral disorders and is also qualified as a doctoral-level BCBA. Since 1990, she has maintained a private practice specializing in autism and focusing on consultation with public school districts in New England. Dr. Quill also lectures nationally and internationally on subjects related to autism, has authored numerous books and articles, and currently is an adjunct professor at Endicott College. Dr. Quill testified that she is an advocate for educating children with autism in the least restrictive environment. (Quill, S-73)

Dr. Quill reviewed Student's assessments, observed Student virtually for approximately four hours, and reviewed the FBA that was in progress. Dr. Quill observed that Student was very prompt-dependent, did not communicate or perform tasks spontaneously, or generalize communication or skills across different settings or different adults, and that he became confused when changes were made in his routine. She noted, however, that this had always been the case with Student, and these factors did not explain his recent behavioral change. During this consultation, Dr. Quill neither interviewed Parents nor observed Student at home or in the community with Parents. (Quill)

Dr. Quill further testified that, with respect to the sudden increase in problematic behaviors, based on the limited information she had at the time, "there was a physical, an internal component to what was going on that we, as behaviorists, don't understand," and hypothesized that certain behaviors had quickly become "ritualized." (Quill). With respect to Student's behavior plan, Dr. Quill advised his School-based team to expand Student's opportunities to communicate what he wants as well as to provide him with "controlled choices," to increase his visual supports, to re-engineer his AAC device to improve communication opportunities, and examine the structure of his breaks to enable him to be de-escalated and returned to his tasks more quickly. Lastly, Dr. Quill testified that at the time of her observation in May 2022, because of his behavior, Student was accessing "very little" of his instruction or inclusion opportunities. (Quill) The record contains no written report based on this consultation of May 2022; however, Dr. Quill referenced such report in a report dated February 2023. (P-5)

15. In June 2022, Katelyn Hilton, the District's BCBA, produced an extensive report of the results of the FBA referenced above. The FBA targeted "noncompliance" and "behavior episodes," as these were the behaviors that occurred at the highest rates and for the longest durations, and, therefore, had the most significant impact on Student's learning and progress at school. (S-22) "Noncompliance" was defined as Student's

not complying with an adult directive within 30 seconds. A “behavior episode” was defined as “any two or more” of the following behaviors occurring together and lasting more than 15 seconds: disrobing (removing shirt or pants), aggression (uninvited bodily contact with force including grabbing, pinching, slapping, biting, etc.), bolting (moving quickly more than 10 feet away from teacher and not returning when called), self-injurious behavior (hitting head, biting wrist/knuckle/arm), and mouthing inedible items. (S-22, Hilton)

Ms. Hilton and staff used a variety of assessment measures to gather data regarding the above-listed behaviors, including review of records, interviews with Parents and teachers, formal assessment tools, and observation of Student.

The report concluded that the primary function of the targeted behavior was escaping/avoiding demands, the secondary function was accessing tangible items, and that there was a possible tertiary function of attention from teachers and access to sensory stimulation.

The FBA report contained multiple recommendations for revisions to Student’s existing behavior intervention plan, including providing the “functionally equivalent” replacement behavior for targeted behavior of taking a break. The report further stated that Student should be able to take a break “whenever he needs one,” should control the duration of the break, and freely access “break items.” (S-23)

The report further recommended modifying Student’s environment (including setting up a defined “break” area) and providing him with 1:1 support from a Registered Behavior Technician (RBT), working under the supervision of the BCBA. The report further suggested that Parents seek out home-based ABA services. (S-23)

16. On June 10, 2022, the Team (including Parents) reviewed the completed FBA and proposed an amendment to March 2022-March 2023 IEP. In pertinent part, this amendment added functional communication goals, provided that most of Student’s instruction be provided on a 1:1 basis by a Registered Behavior Therapist (RBT) and increased the amount of direct instruction from the BCBA. Parents accepted the IEP amendment in full on June 17, 2022. (S-32)
17. Meanwhile, throughout the 2020-2021 and 2021-2022 school years, District staff had engaged in activities to support Student’s fall 2022 expected transition to the high school. Specifically, for most of both school years, James Mellekas, the special education teacher who would be working with Student in ninth grade, attended monthly clinic meetings with the staff who were working with Student in middle school and with Parents. Mr. Mellekas also attended several IEP meetings between March 2021 and March 2022, discussed Student’s allergy-related needs with middle school staff, and observed Student in the middle school setting on approximately four occasions during his eighth-grade year. (Mellekas, S-18)

Paul Giacobbe, who would be Student's 1:1 ABA-trained paraprofessional for ninth grade, observed Student in the middle school for approximately 80 hours during the 2021-2022 school year. (Giacobbe) In order to maintain continuity, the high school speech/language therapist, Jill Childress, began working with Student in eighth grade so that he would not have to change therapists when he moved to the high school. Additionally, his BCBA, Katelyn Hilton, and Team chair, Paula Parker, all would continue to work with Student in ninth grade. (Childress, Hilton, Parker)

Student already had some familiarity with the high school building from having attended ESY programs there in the past. He was offered ESY programming for the summer of 2022 but did not attend. Parents declined ESY because most of the summer staff would be persons who had not worked with Student at the middle school and would not be working with him in the high school, and Parents felt that two changes in staff would be overly stressful for Student. (Parents)

While Parents and District staff were concerned about Student's move to the high school, they were hopeful that the transition would be successful, that Student would have a positive experience, and that the change in setting would reduce the problematic behavior. (Parents, Mellekas, Giacobbe)

18. Student entered the district high school as a ninth grader on or about August 31, 2022. His placement was, and continues to be, in a substantially separate life skills classroom for students with disabilities staffed with a lead teacher, (James Mellekas), a dedicated, 1:1 ABA-trained paraprofessional, (Paul Giacobbe), and an RBT. The classroom serves a total of five students, including Student, who are enrolled in grades 9 through 12. (Mellekas)
19. Shortly after entering the high school, the School reported multiple behavioral issues, including "behavior episodes" lasting anywhere from a few minutes to over an hour, of bolting, disrobing, self-injurious behaviors, aggression to staff and mouthing. These took place both inside and outside of the classroom, such as corridors and offices. (Hilton, S-13) According to his ABA paraprofessional, Student was missing up to three hours of instructional time per day. (Giacobbe, S-11)
20. In response, the District's IEP Team convened on September 19, 2022, to review his progress to date and adjustment to the high school. At that meeting, the School-based Team determined that due to the increase in Student's problems, "his safety and the safety of others was too compromised to continue to identify [the high school] as the LRE." Parents were sent release forms to allow referrals to the following potential placements: Keystone Educational Collaborative (Fitchburg, MA), Crossroads School (Marlborough, MA), May Center (Randolph, MA), Nashoba Learning Group (Bedford, MA), Melmark (Andover, MA), and Crest Collaborative. (S-11)

Parents voiced their disagreement with the School's position, and declined to sign any of the releases except for the release for Keystone.⁸

On the same date as the Team meeting (September 19, 2022), the District issued an N-1 form proposing an out of district day placement for Student. No changes were made to Student's previously-accepted IEP.

21. Student's lead teacher, James Mellekas, testified about Student's ninth grade experience. Mr. Mellekas holds a master's degree in special education, and a Massachusetts certification in severe special needs. He has taught in the District for six years. Prior to coming to the District, he worked for eight years as a teacher at the New England Center for Children (NECC), a private special education school serving children with significant disabilities, including autism.

Mr. Mellekas testified that Student is on a much lower academic level than his classmates, who function academically at a third to sixth grade level, and who are working on skills needed for finding and keeping a job, budgeting, and functioning in the community. Student requires much more support, prompting, modification of curriculum, and errorless teaching. He is the only member of the class with ASD, the only non-speaking student, and the only one who uses an AAC device. (Mellekas)

At the beginning of the 2022-2023 school year, Mr. Mellekas sought to include Student in all class activities, including group mini-lessons, even though his instruction and schedule were different from those of the other four students. He had hoped that "by kind of changing the way instruction was presented to him, he might break out of some of the behaviors that everybody has been talking about," This was mostly unsuccessful, so the staff began having Student do prevocational tasks (such as recycling) to get him out of the classroom and have him work directly on IEP goals rather than some group activities that were not related to his IEP. (Mellekas)

Mr. Mellekas testified that the changed environment did not have the desired effect; Student's problematic behaviors continued, as did his time away from learning. (Mellekas)

22. Paul Giacobbe testified in detail about his work with Student. Mr. Giacobbe has worked in public education for eight years and is in his fifth year at the District's high school in Student's substantially separate program. He has prior experience working as a paraprofessional with students having a variety of challenges, including physical and neurological disabilities. Mr. Giacobbe began receiving specific ABA training when he was paired with Student at the beginning of the 2022-2023 school year, and

⁸ Representatives from Keystone observed Student at the high school and invited Parents to visit. Parents declined, stating that they felt the referral was premature, and that they wanted to first reconvene the Team with their advocate. (S-11)

has continued to receive training and supervision in ABA methodologies from Kate-lyn Hilton during the course of this year. (Giacobbe)

23. Mr. Giacobbe testified that Student began having behavioral issues from the start of the 2022-2023 school year, including bolting and disrobing in his inclusion physical education class. In response, in late September or early October of 2022, the District decided to remove Student from inclusion physical education and to assign Mr. Giacobbe to Student as a dedicated ABA paraprofessional in addition to the RBT who was already assigned to him. (Student previously had received 1:1 assistance solely from his RBT). (Giacobbe)
24. Mr. Giacobbe explained that the school day at the high school is divided into four, 83-minute instructional blocks, as well as times for homeroom and lunch. Student's individual schedule is primarily driven by his IEP, however, and does not strictly follow the schoolwide block schedules. In a typical day, assuming no disruptions from Student's behavior, Parent drops Student off at the school entrance, where he is met by his RBT, who escorts him to his classroom. After removing his coat and backpack, Student transitions to snack time, then has a prevocational activity involving mail, possibly followed by a desk activity such as matching words and pictures. He then transitions to his inclusion homeroom, followed by a return to the classroom for functional academics (reading and math using a specialized curriculum and errorless teaching). Student eats lunch in the cafeteria, where, with guidance, he uses his AAC device to select food. Following lunch, Student may participate in an activity with the peers in his class, such as cooking. During the last period of the day, while his peers are in inclusion classes, Student may be involved in a variety of activities, ranging from working on hygiene, to tasks around the school, arts and crafts, or additional cooking. (Giacobbe)

According to Mr. Giacobbe, the days on which Student is able to complete the schedule outlined above are "extremely rare." During the first months of the school year, Student's day would be interrupted by multiple behavioral incidents such as self-injurious behaviors, aggressions, or behavioral episodes involving disrobing and/or "sexualized" behavior. Since approximately January 2023, these incidents have decreased because Student will take breaks in his break room as a substitute behavior; however, it is difficult for staff to get him to leave the break room and return to his schedule, although staff have tried multiple techniques to support this process. (Giacobbe)

25. Because of his behaviors, which can be disruptive and unpredictable, Student usually is isolated not only from the larger school community but also from his peers in the substantially separate classroom, Student interacts primarily with Mr. Giacobbe and the RBT. He has had few opportunities to accompany his peers on community outings or field trips. (Giacobbe)

26. Mr. Giacobbe feels that the School has exhausted all techniques and resources for Student. (Giacobbe)
27. Student's speech/language therapist, Jill Childress, testified that she is scheduled to meet with Student twice weekly to work on his communication goals; however, during the current school year, Student has missed approximately 37% of his speech therapy time, either because he has been engaged in targeted behaviors, or, more recently (since approximately January or February 2022), because he has been remaining in his break room. Ms. Childress believes that Student has much potential to increase his communication skills, but that he requires much repetition and reinforcement to learn. She further stated that, at least in part because he has missed so much speech/language instruction, his skills have plateaued, and he has not made the progress which he is capable of making. (Childress)
28. During September and October 2022, Mother observed Student in school on four separate occasions, for one class period (approximately 80 minutes) per observation. The observations were conducted virtually, from the principal's office. (Mother, Muir, S-7)
29. During an observation on September 28, 2022, Mother saw the RBT place her hands on Student's shoulders. Student appeared to react with discomfort. Parent testified that she felt this was "inappropriate touch," reported same to School administration as well as the School resource officer, and followed up with a written request to remove the RBT. (P-6) After an inquiry, the School determined that the RBT had not acted inappropriately. Parents, however, testified that this was one of several indications that the RBT was a poor fit for Student and should be removed from that position. Parents made several requests to have the RBT removed, which were declined. (Parents, Muir, P-6)
30. Student continued to experience problematic behaviors during October 2022, and staff began communicating their concerns to School administration. In an email dated October 5, 2022 to Special Education Director Justine Muir, a female administrator stated that Student had reached out and "grabbed" her breast when walking past her in the hallway. At the time this occurred, there was a staff member on either side of him. He was redirected and kept walking. (S-5) This event did not appear in the data sheets or home logs, and Parents reported that they were not aware of the incident until a later date. (Parents)

In another email dated October 19, 2022, directed to Ms. Muir and several other administrators, Paul Giacobbe, Student's ABA paraprofessional, stated that he had a "growing feeling of discomfort" about "how physical things are on a day to day basis," that counting behaviors and break time, Student had a total of 3 hours and 16 minutes away from learning on that day, and "was continually hitting, kicking, pinching and grabbing staff members for the majority of the day." (S-3)

Mr. Giacobbe further stated that he had “minimal training” regarding Student, that a prior request for “CPI training” for him or other staff had been denied as unnecessary, and that he had “no training on physical de-escalation techniques.” He requested that he either receive professional development time for additional training or be removed from his assignment to Student. (S-3)

The record does not indicate when Parents were made aware of the contents of Mr. Giacobbe’s email, or the reportedly high level of aggressions towards staff. (Parents) The record also does not indicate whether or not further staff training was provided as requested.

31. On November 9, 2022, the Team convened to discuss Parents’ request for (1) changing Student’s staff from an RBT to “another type of highly qualified staff person;” (2) a 45-day extended evaluation conducted within the School in lieu of an out of district placement. The District declined both of Parents’ requests, but did agree to a consultation with a BCBA-D. Parents again declined to sign releases for out-of-district placements. (S-14)
32. Meanwhile, prior to this meeting, on October 31, 2022, the School filed its hearing request in the above-entitled matter. After a pre-hearing conference held on December 22, 2022, Parents signed releases allowing referral packets to be sent to the remaining six out-of-district placements proposed by the School: Crossroads School, May Center, Nashoba Learning Group, Melmark (Andover, MA), and Crest Collaborative. The School agreed to set up a second consultation from Dr. Kathleen Quill.
33. Dr. Quill conducted a virtual school visit on January 27, 2023, and a virtual Parent meeting, which included incidental observation of Student at home, on January 30, 2023. For the school visit, Dr. Quill reviewed Student’s updated BIP and behavioral data and met with his team, and observed Student in four different settings within the school, where he participated in cooking and moved through the school building for other activities. Dr. Quill observed one behavioral episode; Student bit his hand when asked to do a task. He was offered a break, and moved to his break room, where he was offered his iPad and prompted to stand up every two minutes, and responded with shaking his head “no,” loud vocals, and hand biting. This episode lasted 25 minutes before Student calmed and complied with leaving the break room. Dr. Quill hypothesized that the episode was triggered to escape demands and “escalated into an automatic reinforcement pattern.” (Quill, P-5)

Dr. Quill interviewed Parents at home with Student present and lying on a couch watching videos. Parents reported that Student is “fine” in the community, and that they can anticipate what he wants and needs. Dr. Quill concluded that Mother “reads his subtle behavior signals as communication and can anticipate his wants, needs, and how to help him stay calm.” Parents view all behaviors as communication frustration and have not seen changes in his behavior at home in the past year.

In her report, dated February 5, 2023, Dr. Quill opined that Student is “easily over-aroused and engages in behavior patterns that quickly become ritualized.” She recommended that the School conduct a “scatterplot analysis” of behavioral data to identify triggers, and for the family to ask his medical team to examine the effects of puberty on his behavior. Dr. Quill recommended outside placement, stating that despite in-school supports, Student “remains unsafe, risking harm to himself and others.”⁹ (Quill, P-5)

34. Meanwhile, from approximately December 2022 until the hearing date, the frequency and duration of Student’s targeted behaviors (including aggression, disrobing, and bolting), declined significantly, while his time in his break room increased. School staff attributed the decline in behaviors as attributable to use of breaks and other preventive measures such as having Parents dress Student in jeans with a belt and snugly-tied boots, which were harder for him to remove than clothing he had worn previously. (Hilton) Student’s time away from learning did not decrease. During much of January and early February 2023, Student was spending approximately 1.5 to 2.5 hours per day in the break room. (S-13)
35. At present, Student is continuing to attend his current placement.
36. To date, none of the out of district programs to which Student was referred has accepted him.¹⁰

Program Proposed by the School

37. In addition to the Keystone Collaborative, the School referred Student to the six out of district programs listed in Paragraph 20, above, including both collaboratives and private day schools. There is no dispute that all of the above-listed programs are duly licensed or approved, specialize in educating students with ASD and related behavioral issues and use an ABA approach to educating students. There is no information on the record regarding the various programs’ philosophies, staffing patterns or levels, or experience with non-speaking students who use total communication and augmentative communication devices. There also is no information regarding each program’s experience with accommodating students with seizure disorders.

⁹ In her report, Dr. Quill stated that Parents had told her that they had not secured routine medical care for Student since the beginning of the pandemic. Parents strenuously disagree with this statement, and have submitted a letter from Student’s community primary care physician as well as appointment records from the Lurie Center indicating that Student has received both routine well-child care and multiple contacts with professionals at the Lurie Center in 2021 and 2022. (Parents, S-7) Based on the record, I credit the evidence presented by Parents and do not credit Dr. Quill’s assertion regarding Student’s medical care.

¹⁰ On information and belief, some programs determined that Student did not meet their admissions criteria, some did not respond, and some did not have openings. Melmark expressed interest in Student but would not have openings until summer 2023

38. According to information that Parents obtained from Google Maps, the travel time between Student's home and the programs to which he was referred is the following, at between approximately 7:45 and 8:00 PM: Crossroads School—54 minutes, The Guild for Human Services—57 minutes, Melmark New England—59 minutes, Nashoba Learning Group—1 hour, 2 minutes, The May Center—1 hour, 20 minutes. No travel time information was provided for Crest Collaborative. No information was provided as to the travel times during the hours of the morning and mid-afternoon commute to and from school. (P-8)
39. The parties do not dispute that if Student were to attend one of the listed schools, the District would provide door-to-door specialized transportation with a nurse and a monitor.
40. When asked why an out-of-district program would be appropriate for Student, School witnesses testified that such programs would be able to provide Student with a smaller, more controlled environment than a large public high school, with more specialized resources to support his use of his AAC device, and with a larger complement of specialized staff, so that if one of teachers or providers were to be absent, another qualified individual could quickly step into place. (Hilton, Mellekas, Childress, Muir, Quill)

Plan Proposed by Parents

41. Parents testified that they agree that Student is not currently receiving a FAPE, but that he could receive FAPE in the District high school with some changes, including removal of the current RBT, more "guidance" and explicit correction to reduce, Student's problematic behavior, and deeper exploration of what Student is trying to communicate when he engages in behaviors. (Mother)
42. Parents further testified that they are not educational experts, and they do not have a detailed proposal for how to change Student's programming, but that the School should consider retaining such experts for this purpose. (Father)

Parents would like to work collaboratively with the School to develop strategies for getting Student back on track, possibly with the help of outside consultants. They feel that their suggestions and offers of input are rejected, despite their ability to successfully manage Student at home.¹¹ (Parents)

43. Father testified that he asked staff from the two out of district schools that Parents visited what they would do differently than the high school and did not receive a clear answer. (Father)

¹¹ Mother has taken coursework and passed an examination to qualify as an RBT.

44. According to Parents, Student does not exhibit the behaviors at home that he shows at school; he does not flop, disrobe, aggress, have lengthy behavioral episodes, or engage in sexualized actions. Student does frequently engage in hand-biting if frustrated but will stop upon a Parent's request. The Parent then explores with Student what he is trying to communicate, and this resolves the behavior. (Father)
45. Parents do not avoid asking Student to engage in non-preferred activities at home, such as cleaning up after himself, do not avoid denying him something he wants but cannot have (such as unneeded items at the grocery store), and do not always offer a substitute item or activity. At times Student protests when asked to do something he doesn't want to do, but Parents are able to guide and redirect him, usually just by speaking to him calmly and firmly, and sometimes by engaging him in an alternate activity. If he starts to get what Mother describes as "silly" or "fresh" for no obvious reason, they ask him, verbally and/or with their AAC devices, what he needs (*e.g.*, food, bathroom, etc.) (Parents)
46. Parents testified that they try to get Student out into the community as much as possible, accompanied by one or both of them, and, often, with Student's service dog.¹² One or both Parents take Student to the supermarket daily. He also is taken on routine errands, to visit relatives, and, nearly every weekend, on some type of family outing, often in large venues such as malls. Student's behavior is generally appropriate in the community. Occasionally he will try to walk away from Parents or will vocalize loudly, but they are able to redirect him. They may take him for a short walk or engage him in a brief activity if they believe he is getting bored or impatient (Parents)
47. Dr. Quill attributes Parents' success in managing Student's behavior to Mother's ability to "read" his "subtle behavioral signals as communication, and can anticipate his wants, needs, and help him stay calm." (Quill, P-4)
48. Parents believe the spike in Student's behavior since March 2022 is partially attributable to hormonal changes from puberty. They testified that they have sought help from medical providers, specifically with the sexualized behaviors. One provider hypothesized that the behavior was due to extreme communication frustration but did not provide any written communication to this effect. Parents did not share this information with the District. (Father) Generally, the medical providers directed the family to the School for guidance, and the School has sent them to the providers. (Mother) Parents are willing to allow limited communication between the School and Student's medical providers to obtain information that might be relevant to Student's educational programming, but they are not willing to allow the School to have unlimited access to Student's medical records. (Father)
49. Parents feel very strongly that an out-of-district placement would be detrimental to Student. They believe that the lengthy commute would be harmful, in that it would

¹²Usually, Mother has control of the dog, and Student also holds the leash. (Mother)

lengthen Student's school day to at least eight hours and that riding in a van for two or more hours per day with strangers (driver, nurse and monitor) would be unduly stressful. They are further concerned that if Student were to become ill or have an emergency at school, they would not be able to get to him for at least an hour. Parents find this particularly worrisome given Student's seizure disorder, since the signs of Student's seizures are very subtle and might not be recognized by individuals who are not familiar with him. (Parents, Timmel)

Parents also testified that Student would be harmed by removal from his community. He has been educated in the District for his entire life. He recognizes peers that he grew up with even though he does not really interact with them. It takes him a long time to warm up to strangers and new people, and removal from people he has known all his life would be very difficult for him. (Parents)

Lastly, Parents testified that they believe Student would imitate problem behaviors of other students if he were in a setting where all of the students have ASD or similar disabilities, as Student is good at imitation and seemed to have picked up the hand-biting behavior from a classmate in early elementary school. (Parents)

50. Parents have not submitted evaluations or expert testimony in support of their position. They did provide a letter dated January 30, 2023, from Student's primary care physician since his birth, Michele C. Parker, M.D. Dr. Parker's letter states that in addition bringing Student to her for routine care, Parents have contacted her many times by phone to discuss medical issues and "the challenges with escalation of problematic behaviors and frustrations with communication and support from [Student's] school." The letter further states that Student is going through puberty and "it is likely that increase in testosterone has been contributing to some changes in [his] behavior." (P-7)

Regarding Student's school placement, Dr. Parker's letter states that the school should make "all efforts" to anticipate and intervene to prevent some of Student's "difficult behaviors" before relocating his placement. As to the issue of commuting time, Dr. Parker states that Student would require a nurse on the vehicle due to his seizure disorder. She further states the following:

More concerning than that is the effect this would have on his mental health and wellbeing. Many children struggle with long car rides, but for people with autism and sensory needs, even a short ride can be difficult due to the sensory elements such as motion, noises, and sights, which can be overwhelming. (P-7)

Dr. Parker concludes by recommending that "every effort" be made to keep Student in his current setting, stating that the benefits of his current setting outweigh the bur-

dens on the School of maintaining him there, and the “detrimental effects of displacing him so far away are significant.” (P-7)

51. Dr. Parker did not appear to testify at the hearing.

52. Parents have retained Gretchen Timmel as an advocate and consultant in this matter. Ms. Timmel is employed by the Lurie Center and several other departments of Massachusetts General Hospital (MGH) as an educational liaison for students with ASD, seizure disorders, and other developmental and medical conditions. In that capacity, she provides educational communication to school systems regarding students’ medical and learning needs. She has worked with the Lurie Center for 12 years and at MGH for 30 years. Ms. Timmel holds a Master’s degree in psychology and is certified as a school psychologist and general education teacher. (Timmel, P-9)

Ms. Timmel has reviewed some of Student’s records, has attended one Team meeting, and has spoken extensively with Parents. She testified that she understands Parents’ concerns about outplacement for Student. In her testimony, she recommended additional consultation to review Student’s programming, including his behavior plan and the methodologies of instruction, in the context of his medical needs, prior to changing his placement. Previously, at the November 2022 Team meeting, Ms. Timmel had recommended a 45-day, in-house extended evaluation that would include a home assessment for purposes of forging a stronger home-school connection. At that time, she had suggested that the School might have developed “functional fixity” or “blindness” from having worked with Student for a long time, and, therefore, might not be aware of additional or different strategies that could be employed. (Timmel)

Ms. Timmel acknowledged that she has not formally evaluated Student, has not conducted a formal observation of him in school or at home, and that she is not a BCBA. She stated that she did not feel prepared to testify as to an appropriate placement for Student, other than to state that any placement would need to ensure his safety from a medical perspective as well as his “educational safety.” (Timmel)

53. Student is scheduled to undergo a neuropsychological evaluation at the Lurie Center in the near future. Father initially indicated that he would be willing to share the results of that evaluation with the District. (Father) Mother would be willing to do so if Student remains in the District as a result of this hearing, but would not be willing to share the evaluation if the result of this hearing is an order for an out-of-district placement. (Mother)

DISCUSSION

Legal Framework

The FAPE Standard: Meaningful Benefit

Student is a school-aged child with a disability who is eligible for special education and related services pursuant to the IDEA, 20 USC Section 1400, *et seq.*, and the Massachusetts special education statute, M.G.L. c. 71B (“Chapter 766”). As such, Student is entitled to a free, appropriate public education (FAPE) from the District. FAPE “comprises ‘special education and related services’--both ‘instruction’ tailored to meet a child’s ‘unique needs’ and sufficient ‘supportive services’ to permit the child to benefit from that instruction.”¹³ *C.D. v. Natick Public School District, et al.*, 924 F.3d 621 (1st Cir. 2019), quoting *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 748-749 (2017); and 20 USC§1401 (9), (26), (29).¹⁴

Student’s IEP, which is “the primary vehicle for delivery of FAPE, must be “reasonably calculated to enable [him] to make progress appropriate in light of [his] circumstances.” *C.D. v. Natick, supra*, at 625, quoting *D. B. v. Esposito*, 675 F. 3d 26, 34 (1st Cir. 2012), and at 629, quoting *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 1001 (2017).

While Student is not entitled to an educational program that maximizes his potential, he is entitled to one which is capable of providing not merely trivial benefit, but “meaningful” educational benefit. *C.D. v. Natick, supra*, at 629; *D.B. v. Esposito, supra*, at 34-35; *Johnson v. Boston Public Schools*, 906 F.3d 182 (1st Cir. 2018). *See also, Bd. of Education of the Hendrick Hudson Central School District v. Rowley*, 458 US 176, 201 (1982); *Town of Burlington v. Dept. of Education (“Burlington II”)*, 736 F.2d 773, 789 (1st Cir. 1984). Whether educational benefit is “meaningful” may be different for different children and must be determined in the context of a student’s potential to learn. *Endrew F.* 137 S. Ct. at 1000, *Rowley*, 458 US at 202; *Lessard v. Wilton Lyndeborough Cooperative School District*, 518 F3d 18, 29 (1st Cir. 2008); *D.B. v. Esposito*, 675 F.3d at 34-35. Within the context of each child’s unique profile, a disabled child’s goals should be “appropriately ambitious in light of [the child’s] circumstances, *Endrew F.* 137 S. Ct. at 1001; *C.D. v. Natick*, 18- 1794 at 14.

Least Restrictive Environment

Under both federal and state law, eligible children must be educated in the least restrictive environment (LRE) consistent with an appropriate program; that is, students should be placed in more restrictive environments, such as private day or residential schools, only when the nature or severity of the child’s disability is such that the child cannot receive FAPE in a less restrictive setting, with supportive aids and services. *See, for example*, 20 USC §1412(a)(2)(5)(A); 34 CFR §300.114(a)(2)(i); MGL c. 71B, §§2, 3;

¹³ FAPE comprises both the substantive adequacy of an IEP and compliance with the procedural requirements of the IDEA. Because the School’s compliance with such procedural requirements are not at issue in this case, they need not be discussed in this decision.

¹⁴ In *C.D.*, the First Circuit reiterated its definition of FAPE set forth in earlier cases as educational programming that is tailored to a child’s unique needs and potential, and designed to provide “‘effective results’ and ‘demonstrable improvement’ in the educational and personal skills identified as special needs.” 34 C.F.R. 300.300(3)(ii); *Burlington II, supra*; *Lenn v. Portland School Committee*, 998 F.2d 1083 (1st Cir. 1993); *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012)

603 CMR 28.06(2)(c). *See also Burlington v. Mass. Department of Education*, 471 US 359, at 369, holding that the federal statute “contemplates that such education shall be provided where possible in regular schools, with the child participating as much as possible in the same activities as nonhandicapped children.”

On the other hand, “the IDEA’s preference for mainstreaming ‘is not absolute.’ *C.D. v. Natick* at 625 (internal citations omitted), and “the desirability of mainstreaming must be weighed in concert with the Act’s mandate for educational improvement.” *Id.*, quoting *Roland M. v. Concord School Committee*, 910 F.2d 983, at 991. (1st Cir. 1990). For schools, such “weighing” involves “evaluating potential placements’ ‘marginal benefits’ and costs and choosing a placement that strikes an appropriate balance between the restrictiveness of the placement and educational progress.” *C.D., supra*, at 631, citing *Roland M., supra*. “Mainstreaming may not be ignored even to fulfill substantive educational criteria,” *Roland M., supra*, at 993; however, “...the least restrictive environment guarantee cannot be applied to cure an otherwise inappropriate placement.” *Burlington II, supra*, 736 F.2d at 789, n. 19.

Burden of Proof

In a due process proceeding to determine whether a school district has offered or provided FAPE to an eligible child, the burden of proof is on the party seeking to challenge the *status quo*. In the instant case, as the moving party challenging Student’s current placement, the School bears that burden. That is, in order to prevail on its request for an order for Student to be placed in an out-of-district public or private day school the School must prove, by a preponderance of the evidence, that Student is not receiving a FAPE in his current placement, and that he requires an out-of-district placement in order to do so. *Schaffer v. Weast*, 546 U.S. 49 (2005)

Analysis

After a careful review of the testimony and documentary evidence presented by the parties, as well as the thoughtful arguments of counsel for the School and the *pro se* Parents, I conclude that the School has met its burden of proof in this matter. My reasoning follows.

The parties agree, and the record establishes, that Student has a complex profile including ASD, a communication disability, and cognitive limitations, together with a seizure disorder and severe allergy to propylene glycol. Student is non-speaking and relies on total communication to interact with others. His constellation of disabilities and medical conditions have a global impact on his day-to-day functioning. The parties further agree that to make progress that is meaningful in light of his unique circumstances, Student requires individualized programming that addresses his needs in the areas of communication, functional academics, pre-vocational and daily living skills, and behavioral regulation, and which also accommodates his medical needs. There is no dispute, and ample evidence in the record, that since approximately March 2022, Student’s in-school behavior has significantly disrupted his educational progress. On the

other hand, Parents presented uncontroverted testimony that with their support, Student functions reasonably well both in the home and in a variety of larger settings and does not display the problematic behavior seen at school.

Where the parties differ is on whether, in light of Student's in-school behavioral dysregulation and the School's struggle to manage it, he can receive FAPE within his current public school setting, or whether he must be educated in a more specialized, but also more restrictive out-of-district placement. The School contends, and bears the burden of proving, that it has exhausted all reasonable avenues for rectifying Student's behavioral trajectory, that Student needs resources that the District simply does not have, and that Student is missing out on instruction and not making the educational progress of which he is capable in his current setting. According to the District, an appropriate specialized collaborative or private day school will have the personnel and expertise to educate Student.

Parents disagree, and assert that there is more that the School can and should do, in collaboration with Parents, to get Student back on track behaviorally so that he can be educated in the least restrictive environment of his home high school. They further argue that it is unclear what an as-yet unknown and unavailable out-of-district placement could do for Student that the District could not do itself with modifications of its program. Moreover, they contend, Student would be harmed by having to leave his current school to attend an as-yet unidentified, overly-restrictive outside placement.

Student is Not Currently Receiving a FAPE in the High School

It is clear from the record that Student is not receiving a FAPE in his current setting. The School presented the uncontroverted testimony of multiple witnesses, as well as documents, that demonstrate that beginning in March 2022, Student experienced an abrupt and rapid uptick in behaviors (such as flopping, bolting, aggression, hand-biting, disrobing, and "sexualized" behaviors) that previously had either been absent or existed at a low and manageable level. Shortly thereafter, the School conducted an extensive FBA, with input from an outside consultant (Dr. Quill), developed hypotheses for the function of Student's behavior, but found no definitive cause for the sudden change in his presentation. Revision of Student's behavior intervention plan, the addition of 1:1 support from an RBT and removal Student from his classroom to a separate room for 1:1 instruction were not successful.

The parties hoped that Student's situation would improve with his move to the high school, where he would have a fresh start and opportunities for activities that might engage his interest. Their hopes did not come to fruition. Despite efforts by both School and Parents to ease Student's transition to the high school, Student's problematic behavior continued, and the School further revised his behavior plan to provide him with breaks as an alternative. While the breaks have reduced many of the behaviors at issue, especially disrobing and associated "sexualized" actions, this has been at the expense of Student participating in learning, because multiple strategies to get Student to leave the break room and resume a learning activity, or to perform learning tasks within the break

room, have been unsuccessful. The record indicates that Student sometimes spends as much as two to three hours per day in the break room rather than participating in learning activities. As Dr. Quill testified, the targeted behaviors are being prevented but not eliminated. Moreover, Dr. Quill also noted that the pattern of behavioral episodes followed by a break may have become entrenched. It is reasonable to infer that the longer this pattern continues, the more difficult it will be to undo so that Student can return to learning.¹⁵

Additionally, Student's providers testified without contradiction that many of Student's skills have plateaued. For example, Jill Childress, speech/language therapist, testified that Student has missed approximately 37 hours of speech/language services during the current school year, and he has not demonstrated meaningful progress with his communication skills, despite having the potential for considerable growth in this area. Ms. Childress attributed at least some of this lack of progress to missed services. Student's lead teacher and paraprofessional also testified that Student's skills have not progressed, at least in part because he spends a significant amount of time either engaged in a behavior or in his break room. Given that Student requires explicit and repetitive instruction to acquire skills, this loss of instructional time is concerning.

Moreover, even when Student is not in the break room, he has lost other learning opportunities such as community outings with his classmates and inclusion activities such as physical education. As Paul Giacobbe testified, Student is isolated from peers both within and outside of his substantially separate classroom.

There is a notable contrast between Student's presentation in his substantially separate school program and his functioning at home and in the community when he is with Parents.¹⁶ Parents testified persuasively that Student does not present the seriously problematic behavior that he shows in school within the home setting, and Parents are readily able to manage any potentially difficult behavior (such as hand-biting or loud vocalizations) that does arise by redirection or by determining what Student needs in the moment. Moreover, Parents testified that Student is generally able to perform non-preferred tasks (such as cleaning up after himself) when asked to do so and is able to accept being denied something that he wants without necessarily being given a substitute. Student has not learned to generalize these considerable out-of-school skills to the school setting, however, and there has been no formal assessment to determine why this is the case.¹⁷ (The AFLS evaluation assessed Student's home skills via interviews with, and/or questionnaires from, Parents, as opposed to physical observation.) Such an on-site assessment might be helpful in planning for Student. There is no expert testimony or

¹⁵ Notably, Parents agree that the extensive use of breaks is problematic and assert that Student is being "rewarded" for maladaptive behavior by receiving a break from non-preferred tasks. (Parents)

¹⁶ I note, however, that when Student is in the setting of the break room, and no demands are made of him, his presentation is similar to that of the home.

¹⁷ Dr. Quill suggested that Parents are able to "read" Student's subtle, non-verbal signals and communicate with him in a way that keeps him calm and ensures that his needs are met. Mother's testimony about her ability to communicate with Student corroborates Dr. Quill's opinion. There also is a significant difference between Student's familiar, nurturing home where he needs to interact only with Parents who understand him well, where there is "down time," and where demands are limited and routine, and the physical, sensory, cognitive and academic challenges of a high school.

evaluation in evidence that such an assessment would enable the School to provide Student with a FAPE in the current setting within a reasonable period of time, if at all; meanwhile, Student would continue to lose valuable opportunities to learn. Lastly, the fact that Student can demonstrate skills with Parents that he cannot generalize to the school environment leads to the conclusion that he needs services that are more intensive, and/or differently structured in order to effectuate generalization and thus make effective progress.

In sum, the evidence is overwhelming that Student is not receiving a FAPE in his present placement. He has much potential for growth that is not being fulfilled because he simply is not able to access his educational program as it is constituted. As such, Student is not receiving the “meaningful benefit” from his educational program to which he is entitled. *Endrew F. and C.D. v. Natick, supra*.

Parents have suggested that there might be a way to “tweak” or adjust Student’s program in order to meet his needs. They have, however, presented no evaluations, expert testimony, or other evidence that would define how Student’s program could be changed. Parents’ consultant, Gretchen Timmel, while supportive of Parents concerns, could provide only vague and general suggestions for further examination of Student’s program for possible changes.

School personnel have tried multiple strategies to support Student’s effective progress, without success. School witnesses testified unanimously that they have exhausted all available resources in this regard. There is no evidence to the contrary. While it might theoretically be possible to make improvements in Student’s program, nothing in the record indicates what they would be or how it could be done. Based on the foregoing, I find that the School has met its burden of proving that Student is not receiving FAPE in his current program, and, further, that the program cannot reasonably be changed in a timely manner to meet Student’s needs, if at all. The record amply supports the conclusion that Student has potential for progress that cannot be developed in his current setting.

An Out-of-District Placement is an Appropriate Remedy

Having made the foregoing determination, I turn now to the remedy requested by the District, that is, an order that Student be placed in an out-of-district placement. Based on the record, I find that such remedy is appropriate, because “education of [Student] in a less restrictive environment with the use of supplementary aids and services could not be achieved satisfactorily.” 603 CMR 28.06(2)(f). This is a case where the general preference for mainstreaming “cannot be applied to cure an otherwise inappropriate placement.” *Burlington II, supra*, 736 F.2d at 789, n. 19.

The School has referred Student to seven out-of-district programs, including private day schools and collaboratives. On information and belief, all of these programs are duly approved to serve students with autism diagnoses and related disabilities, and

none has made an offer of placement. Further, the School has not presented specific information about any of these out of district programs. Parents' hesitation in the face of this lack of information is understandable. Their concerns can and should be addressed by the School's providing them with additional information about the programs to which it is referring Student.

Additionally, Parents have serious misgivings about the travel time required (just under one hour during non-rush hour periods, potentially more than one hour during rush hours) if Student were to attend any of the schools to which he has been referred. They worry about the risk that if Student were to experience a seizure or other health problem on the vehicle or in school, staff might not recognize and be able to address his needs, and Parents would not be able to get to him quickly. Additionally, Parents cited the length of the school day—six hours in school plus two or more hours of travel time—as potentially overly tiring and stressful for Student. Student's medical provider and Ms. Timmel also shared concerns about travel time. Neither stated that such travel would be medically contraindicated, however, but only made general statements about the need to exhaust all options in Student's current school before sending him elsewhere. The School addressed Parental concerns about travel by representing that Student would have a monitor and nurse on the transportation vehicle.

According to 603 CMR 28.06(2)(8)(a), "the district shall not permit any eligible student to be transported in a manner that requires the student to remain in the vehicle for more than one hour each way except with the approval of the team. The Team shall document such determination in the IEP." This regulation also contains requirements for "clear written information" on any travel-related needs or problems, necessary emergency measures, in-service training for transportation providers about needs of students being transported, and inspection of vehicles. 603 CMR 28.06(b)-(d). I find that the instant case is one where one-way travel time of one hour or slightly more, while not ideal, would be warranted if necessary for Student to attend an appropriate program. That said, I take Parents' concerns in this regard seriously, and the School will, therefore, be directed to cast a wider net in an effort to locate an out-of-district program within one hour of Student's home. Such search should include not only approved public or private day schools but also public high schools in nearby school districts that may have more resources than Student's home district and may be willing and able to consider admitting a non-resident student.

Lastly, it is clear that notwithstanding this decision, there is no placement available for Student at present, and he will remain in his current setting until such placement becomes available. To potentially alleviate some immediate concerns, while Student remains in the District, the School, if it has not already done so, will be directed to offer the in-service training requested by Mr. Giacobbe or such other training as may be appropriate. Additionally, if Parents so consent, the School will be directed to conduct a home assessment that includes observation of Student at home and in the community with Parents to potentially gain information relative to Student's generalization of home-based skills to the school environment, and shall convene a Team meeting to review its findings for implementation during the period when Student continues in his "stay put"

placement at the high school, pending placement in an appropriate out-of-district program.

Lastly, I note that possible medical or developmental contributors to the exacerbation of Student's behavioral issues have not been determined. Parents are urged to continue exploring this issue with Student's treaters, and to share relevant information with the District so that Student can be provided with changes, if any, to his services and/or accommodations during his stay-put tenure at the high school.¹⁸

CONCLUSION AND ORDER

Based on the foregoing, I conclude that the School has met its burden of proving that Student's current services and placement do not provide Student with a FAPE and cannot feasibly be modified to do so. I further conclude that Student requires placement in an approved public or private out of district setting, which may include a private or public day school or a program within a public high school in a different district, that is designed for students with autism or related disabilities, and that can provide Student with ABA programming, expertise with the communication needs of students who are non-speaking and who use total communication and assistive communication technology, an appropriate peer grouping, necessary safety precautions and accommodations for his medical conditions, and extended school year programming.

Therefore, I order the following:

1. The School shall broaden its search for potential programs for Student that meet the above-listed criteria that are located within an hour's distance or less from Student's home. Such search shall include exploration of appropriate programs within public high schools as well as private day schools and collaboratives. The School shall provide Parents with available information on all schools to which it refers Student. The School shall also inform Parents on how it complies with 603 CMR 28.06(8) with respect to transportation.
2. If and when a program meeting the above criteria becomes available, the School shall issue a placement page designating that program as Student's placement.
3. If Parents so consent, the School shall conduct a home assessment that includes observation of Student with Parents in the home and community, including observation of Parents having Student perform non-preferred tasks, to explore strategies to generalize Student's home-based skills for the period of time that he

¹⁸ In this regard, Student's upcoming neuropsychological assessment will be a valuable source of information. Parents are urged to reconsider their decision not to share the information from the evaluation with the District. Regardless of where Student is placed, the District retains responsibility for issuing an appropriate IEP and ensuring that it is implemented. If the Team cannot consider findings and recommendations from the outside evaluation, it will not have complete information for fulfilling its responsibilities.

remains in attendance at the School, pending placement in an out-of-district program.

4. If it has not already done so, the School shall offer staff working directly with Student the in-service training requested by Mr. Giacobbe, or such other in-service training as may be appropriate to address Student's needs while he remains in attendance at the school pending placement at an out-of-district program.
5. Parents are strongly encouraged to share relevant information from Student's medical treaters and outside evaluators as outlined above.

Lastly, both parties and counsel are commended for their patient, courteous, and thorough presentation in this challenging case and clear concern for Student's best interests. I particularly commend the *pro se* Parents, who did an admirable job in litigating this matter. The outcome of this case is in no way intended to diminish their obvious dedication and commitment to their son, or the skill that they demonstrated in the course of this hearing.

By the Hearing Officer,

/s/ *Sara Berman*

Sara Berman

Dated: April 7, 2023