

August 25, 2015

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

DECISION

BSEA # 1508235

BEFORE

**RAYMOND OLIVER
HEARING OFFICER**

**CHARLES VANDER LINDEN, ATTORNEY FOR PARENTS
KATHLEEN CIAMPOLI, ATTORNEY FOR WEST BOYLSTON PUBLIC SCHOOLS**

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

In re: Curt¹

BSEA #: 1508235

DECISION

This decision is rendered pursuant to M.G.L. Chapters 30A and 71B; 20 U.S.C. §1400 et seq.; 29 U.S.C. § 794; and the regulations promulgated under the statutes.

A hearing in the above-entitled matter was held on July 7 and 8, 2015 at Catuogno Court Reporting in Worcester, Massachusetts. The record remained open for receipt of written transcripts and written final arguments until August 3, 2015.

Those in attendance for all or part of the hearing were:

Mother

Eileen Antalek

Educational Psychologist, Educational Directions, Inc.

Kelly Harris

Director of Learning Advocacy Support and New Teacher Development, Winchendon School

Charles Vander Linden

Attorney for Parents

Sherri Traina

Director of Pupil Services, West Boylston Public Schools

Elizabeth Schaper

Superintendent, West Boylston Public Schools

Kathleen Ciampoli

Attorney for West Boylston Public Schools

Ami Rumba

Court Reporter

Raymond Oliver

Hearing Officer, Bureau of Special Education Appeals

The evidence consisted of Parents' Exhibits labeled P-1 through P-46; West Boylston Public Schools' Exhibits labeled S-1 through S-43; and approximately 9 hours of oral testimony.

STATEMENT/HISTORY OF THE CASE

Curt is a young man, 17 years of age, who resides with his family in West Boylston, MA. He has completed his tenth grade year at the Winchendon School, a private, college preparatory high school located in Winchendon, MA.

Curt is a special education student based upon a specific learning disability in reading. Curt was unilaterally placed by Parents at Carroll School (Carroll), an approved Massachusetts

¹ Curt is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in publicly available documents.

Department of Elementary and Secondary Education (MDESE) private special education day placement for students with learning disabilities for his fifth grade school year. West Boylston Public Schools promulgated individual educational plans (IEPs) placing Curt at Carroll for grades six through grade nine, all of which were accepted by Parents. (Refer to testimony, Mother; Traina; P-2, 3, 4; S-5.)

Carroll ends after ninth grade. Therefore Curt's team had to prepare a new placement for his tenth grade year beginning in September 2014. Curt's IEPs were written to run from October to October so planning for his transition from Carroll to a new placement for tenth grade began at his October 2013 team meeting. (Refer to testimony, Mother; Traina; P-4; S-5.) All parties at the October 2013 team meeting – Parents, West Boylston Public Schools (WBPS), and Carroll - agreed that Landmark School would be an appropriate placement for Curt. Landmark School (Landmark), like Carroll, is a MDESE approved special education private school for special education students with language based learning disabilities. However, unlike Carroll, Landmark runs through the high school level and has both day and residential components. (Refer to testimony, Mother; Antalek; Traina.) Following the October 23, 2013 team meeting, WBPS sent a referral to Landmark, Curt applied to and visited Landmark, and was accepted there on January 30, 2014 for the 2014-2015 school year. (Refer to testimony, Mother; Traina; S-14, S-22, 24, 25.)

Parents became concerned with the travel/commute time between their home and Landmark which exceeded the one hour time limit provided in state special education regulations. On March 14, 2014 Mother met with Ms. Traina, WBPS' Director of Special Education. WBPS offered to fund Curt as a residential student at Landmark, with Curt coming home on weekends. WBPS also offered to explore the potential appropriateness of other special education schools in the area, including Learning Prep School (LPS), another MDESE approved special education private day school for students with language based learning disabilities. Mother agreed to a WBPS referral of Curt to LPS.² Mother also requested that WBPS consider Winchendon School (Winchendon) and Chapel Hill – Chauncy Hall (CHCH), both private, general education high school college preparatory schools (testimony, Mother; Traina).

Ms. Traina visited both Winchendon and CHCH in late March/early April 2014 but informed Mother that neither was appropriate for Curt because neither could provide the special education services or special education staff necessary to implement Curt's IEP (testimony, Traina). On April 3, 2014 Mother, Ms. Traina, and WBPS Superintendent Schaper met to discuss Mother's request that WBPS fund Curt's placement at Winchendon for the 2014-2015 school year. WBPS did not agree to fund Winchendon but was willing to explore other MDESE approved private special education programs or to create a program within West Boylston High School to address Curt's special education needs (Refer to testimony, Mother; Traina; Schaper.)

On June 4, 2014 a placement meeting was held to determine Curt's placement to begin the 2014-2015 school year (his accepted IEP did not end until October 2014. See P-4; S-5.) The only approved placement to have accepted Curt was Landmark. Therefore, on the IEP placement page, WBPS designated Curt's proposed placement as a Landmark day school placement with

² Mother later stopped the LPS referral process, informing LPS that Curt was going to Landmark. (Refer to testimony, Mother; Traina.)

the N-1 specifying that a residential placement was available at Landmark to accommodate any concerns with travel time. (Refer to testimony, Traina; Mother; S-3.) This proposed placement was rejected by Parents. (See P-4, 6; S-5, 13.)

On June 24, 2014 Parents signed the enrollment form (S-20) placing Curt at Winchendon beginning in September 2014 for his tenth grade year and formally requested WBPS to fund Curt's Winchendon placement (P-32). WBPS declined to do so (S-8, 12). On October 20, 2014 the team met and proposed a new special education private day school IEP for Curt for the period October 2014 to October 2015 at a placement to be determined. This 10/14 to 10/15 IEP was accepted by Parents as to content but rejected as to placement. (See P-5, 7, 8; S-1, 2.)

On April 23, 2015 Parents requested a hearing before the BSEA. Several conference calls took place and the parties agreed to a pre-hearing conference which was held on June 11, 2015. The case proceeded to a full hearing as to merits on the dates specified above.

ISSUES IN DISPUTE

1. Are the IEPs/placements proposed by WBPS for Curt from September 2014 to October 2015 appropriate to address his special education needs so as to provide him with a free and appropriate public education (FAPE) in the least restrictive educational environment (LRE)?
2. If not, does Parents' unilateral placement of Curt at Winchendon appropriately address his special education needs so as to provide him with FAPE?

STATEMENT OF POSITIONS

Parents' position is that WBPS' proposed IEP placing Curt at Landmark as a day student is inappropriate because the travel exceeds the one hour maximum travel time provided under state special education regulations. Parents contend that placement of Curt as a residential student at Landmark is overly restrictive and would not address his special education needs in the LRE. Parents contend that no other placements were formally presented to them as IEPs. Parents' position is that Curt's placement at Winchendon is appropriate to address his special education needs so as to provide him with FAPE and that he was successful at Winchendon during the 2014-2015 school year. Parents contend that they are entitled to both retroactive reimbursement for Curt's unilateral placement at Winchendon for the 2014-2015 school as well as prospective placement at Winchendon.

WBPS' position is that its proposed IEPs/placements for Curt at Landmark, as either a day or residential student for the 2014-2015 school year, were appropriate to address his special education needs so as to provide him FAPE in the LRE and that Parents are not entitled to any reimbursement for their unilateral placement of Curt at Winchendon, an unapproved general education college preparatory private school which cannot implement Curt's IEP and address his special education needs. WBPS also contends that it made other offers to Parents (an approved special education placement (LPS); development of an appropriate in-district special education placement) to meet Curt's special education needs, but Parents refused such offers along with the IEPs for Curt at Landmark. WBPS contends that the equities favor a finding that reimbursement

to Parents for their unilateral Winchendon placement is not appropriate. WBPS further contends that Parents are not entitled to prospective placement at Winchendon because if Curt has been so successful there and has made so much progress in a regular education placement, then he no longer requires/is no longer eligible for special education services.

PROFILE OF STUDENT

The Parties are in agreement that Curt is a student with reading and language based learning disabilities which require that he receive all of his education within a special education setting; and that all services be provided under GRID C of the IEP i.e., all special education with no mainstreaming into general education classes. Indeed, even the IEPs/placements which Parents rejected as to physical location were accepted by Parents as to content i.e., special education services provided within a special education environment. (See P-4, 5, 7, 8; S-1, 2, 3, 5.)

PARENTS' PROPOSED PROGRAM

Parents propose that they be reimbursed for their unilateral placement of Curt at Winchendon for the 2014-2015 school year and prospectively.

Winchendon is a private, college preparatory, general education school offering both day and residential placements located in Winchendon, MA. Winchendon is not a MDESE approved special education private day or residential program. Winchendon does not provide its students with IEPs nor does it implement IEPs from public schools.³ Winchendon does not accept funding from public schools so any reimbursement or prospective payment by WBPS would have to be made to Parents and not directly to Winchendon. Winchendon teachers are not certified in special education with the exception of Ms. Harris who taught Curt a course entitled Reading Strategies and Mixed Media for three periods per week during the 2014-2015 school year. At Winchendon Curt had a Student Services Plan (P-21; S-34) which consisted of a parental input/vision statement, student input, a summary of some prior testing and the accommodations Winchendon would provide. No specific special education or remediation services were listed. The Academic Support section of the Winchendon school catalogue never mentions any special education. (Refer to testimony, Harris; Traina; Mother; Antelek; P-19, 20, 21, 22, 23, 24, 25, 26, 27; S-30, 31, 32, 33, 34.)

SCHOOL'S PROPOSED PROGRAM

WBPS proposes that Curt be educated at Landmark as either a day or residential school student. Landmark is MDESE approved as both a special education private day school program and as a residential special education program.

Landmark is acknowledged to be an appropriate special education for Curt by WBPS; by Carroll, the private special education day school Curt attended for the prior five years; by Parent's expert witness, Dr. Antelek; and by Parents themselves. (Refer to testimony, Traina;

³ The Winchendon School Academic Program for 2014-2015 (P-20) provides at page 11, #12: "We reserve the right to alter Individual Education Plans and accommodations to fit our policies and practices."

Antelek; Mother.) A Carroll Transition Document provided to parents of students graduating from Carroll delineates Landmark as a MDESE approved private special education school which provides full service specialized and remedial support to learning disabled students via either a day school or residential school with maximum support (P-18; S-36)⁴ Parents accepted the WBPS IEPs proposing Landmark as to context/services but rejected the location. (See P-4, 5; S-1, 5.)

FINDINGS AND CONCLUSIONS

It is undisputed by the parties and confirmed by the evidence presented that Curt is a student with special education needs as defined under state and federal statutes and regulations. It is further undisputed by the parties that Curt requires a private school special education placement in which he receives all of his education via special education services within a special education environment. Finally, it is undisputed that programmatically/in terms of special education content and staff, Landmark would provide Curt with an appropriate special education program. The fundamental issues in dispute are listed under **ISSUES IN DISPUTE**, above.)

Pursuant to *Shaffer v. Weast*, 126 S. Ct. 528 (2005) the United States Supreme Court has placed the burden of proof in special education administrative hearings upon the party seeking relief. Therefore, in the instant case, Parents bear the burden of proof in demonstrating that WBPS' proposed IEPs/placements proposing Landmark either day or residentially, are not appropriate to address Curt's special education needs so as to provide him FAPE in the LRE; and also that placement of Curt at Winchendon is appropriate to address his special education needs so as to provide him FAPE.

Based upon two full days of oral testimony, the extensive exhibits introduced into evidence, and a review of the applicable law, I conclude, based upon the unique facts of the instant case, that either a day or residential placement at Landmark was appropriate to address Curt's special education needs so as to provide him FAPE in the LRE. I further conclude that placement at Winchendon was not appropriate to address Curt's special education needs so as to provide him FAPE. Therefore, I conclude that Parents are not entitled to reimbursement from WBPS, either retroactively or prospectively, for their unilateral placement of Curt at Winchendon.

My analysis follows.

This is a most unusual case. The nature of Curt's special education needs is not disputed. The type of special education services/special education programming necessary to address his special education needs is not disputed. In fact, the actual special education program in which to appropriately address Curt's special education needs (Landmark) is not disputed. The dispute is grounded in the travel time to Landmark, and, given that, whether Parent should be reimbursed for their unilateral placement of Curt at Winchendon.

⁴ Similarly Carroll lists Learning Prep as a MDESE approved special education day school providing maximum specialized and remedial support to learning disabled students. (See P-18; S-36.)

The fundamental reality is that Curt's significant special education needs have necessitated his being educated in a total special education placement/environment (at Carroll) for the last five years. WBPS' proposed IEPs/placements for Landmark demonstrate that, in the view of the team, Curt's special education needs continued to require such a total special education placement for the 2014-2015 school year. Parents' acceptance of the content of WBPS' proposed IEPs/placements for Curt for the 2014-2015 school year demonstrates that Parents agree that Curt continues to require such a total special education placement. Curt's prior IEPs from Carroll as well as the currently proposed IEP for Landmark delineate all of his services on the C Grid, with all services to be provided by special education certified teachers. Under Curt's prior accepted Carroll IEPs and current proposed (and accepted as to content) IEPs no academic classes/services could be provided within a general education classroom even if special education services and support were there to be provided i.e., no B Grid services are on the IEP).

I find that Landmark provides precisely the special education placement specified in the WBPS proposed and parentally accepted (as to content) IEPs – specialized instruction provided by special education staff within a special education placement.

I further find that Winchendon offers Curt none of what his proposed (and accepted as to content) IEPs provide. Winchendon does not provide Curt with special education instruction and remediation in a special education environment. Rather, Winchendon provides a solid general education program within a private general education setting where Curt is educated with other general education students i.e., mainstreamed. Winchendon provides Curt only with basic accommodations and one course, taught by their only staff person with special education certification. I therefore find that Winchendon did not and cannot provide Curt with the special education services and remediation that he requires pursuant to his accepted IEP.

Mother testified and presented several exhibits she prepared, attempting to favorably compare the Winchendon program to Curt's IEP and to the services he received at Carroll. (Refer to testimony, Mother; P-30, 31.) However, Mother, through her acceptance of the content of WBPS' proposed IEP, agreed with WBPS that Curt required all of his academics to be special education services within a special education program (GRID C services). Further, Mother would not consider a WBPS proposal which would have allowed Curt to be educated within West Boylston High School because, under such proposal, he would not be able to receive all of his academic classes within a Grid C special education placement but rather would have received some classes in mainstream co-taught classes, i.e. general education classes staffed by a general education subject matter teacher and a special education teacher. (Refer to testimony, Traina; Schaper; Mother; P-43.) Yet Parent apparently has no issue with Curt receiving all of his education in general education classes at Winchendon, with no IEP, and virtually no special education classes.

Perhaps Winchendon itself articulates most clearly why I cannot find Winchendon appropriate to address Curt's special education needs, and why I cannot order WBPS to reimburse Parents for Curt's Winchendon placement. On June 24, 2014 Parents signed the Enrollment Agreement to unilaterally place Curt at Winchendon and put down a deposit (S-20). On June 23, 2014, one day prior to Parents' commitment to Winchendon, Ellen Baldini, Director

of Admissions at Winchendon, emailed Mother. Said E-Mail (S-35) is reproduced, in its entirety below. Please note the term “766 school” equates to a MDESE approved school:

Please don't lose sleep over this. We don't want to mislead you and do a disservice to [Curt]. Talking with you will help put this in perspective.

Winchendon is a mainstream school. We can't begin to be compared to Landmark in terms of program, support, teacher training, and philosophy. We apparently don't qualify as a 766 school for good reason. We don't even know what that means.

My concern is that the knowledgeable professionals believe Landmark has the supports [Curt] needs. We just want to make sure you are choosing Winchendon over Landmark for the right reasons. Is it the best match for support or for logistical reasons? Winchendon may be closer to home, but is it better?

What if all our “safety nets” are just not enough for [Curt] to succeed, because we are just mainstream, without assistive technology or other supports offered by a 766 school?

We all want [Curt] to succeed. Winchendon is limited in what we can do. He has a better chance of succeeding at Landmark, because of the many support options available. Will he need more than Winch[endon] has available? Will our daily and weekly slips and small classes be enough?

Our offices are closed tomorrow, so, unfortunately, we'll have to wait until Wed. We've never had to go through this process before and want to confirm that you are aware of our limitations.

Best regards,
Ellyn.

Parents, relying on *Florence County School District Four v. Carter By and Through Carter* 510 U.S.7 (1993), argue that their failure to select a MDESE approved placement is not itself a bar to reimbursement. While this may well be true, in *Mr. I. v. Maine School Administrative District No. 55* 480 F. 3d 1, 25 (1st Circuit 2007), the First Circuit clarified:

But the reasonableness of the private placement necessarily depends on the nexus between the special education required and the special education provided.

In this case the parentally selected placement provided no special education to a student for whom all parties agree that a total special education program was required. (See **PROFILE OF STUDENT**, above; **PARENTS' PROPOSED PLACEMENT**, above; **SCHOOL'S PROPOSED PLACEMENT**, above; Quote from Winchendon Director of Admissions Baldini,

above.) Further, unlike *Florence County* in which the public school program was found programmatically inappropriate, in the instant case WBPS' proposed Landmark placements clearly offered Curt FAPE.

Regulation 603 CMR 28.06(8)(a) Transportation Services provides, in pertinent part:

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 on the IEP. Emphasis added.

It is not an absolute bar to transporting a student more than one hour each way but rather allows a waiver of such time limit by the Team. Thus, Parents could have allowed WBPS to transport Curt to Landmark so as to receive FAPE in the LRE, but chose not to waive the one hour limitation.

Similarly, Parents could have opted to allow WBPS to fund Curt's placement residentially at Landmark. While more restrictive than a day school placement such a residential placement would have allowed him to have his IEP implemented, and access FAPE. Hearing Officers not infrequently order public schools to reimburse Parents for unilateral residential school placements when a public school placement has been found to be inappropriate, even if the student's needs could have been addressed in a day school placement and the residential component was not necessary for the student to receive FAPE but only for geographical reasons. Similarly, in this case, since Parents were unwilling to waive the one hour travel limitation, I conclude that the Landmark residential component is a necessary related service to allow Curt to access the Landmark day school program and receive FAPE.

Finally, as noted above, Parents could have accepted WBPS' proposal of an in-district program which would have offered him a significant amount of special education services, yet they opted not to, in favor of a program that provided him none. I understand and sympathize with Parents' position that Curt is a gymnast and puts in many hours learning/practicing these skills. However, I cannot let that factor dictate my decision. I cannot find Winchendon appropriate to address Curt's special education needs when it clearly does not do so. I cannot order WBPS to fund a private, general education preparatory school that does not address Curt's special education needs simply because it is closer to his home and makes it easier for him to pursue gymnastics when WBPS has offered either a day or residential special education program which would clearly provide Curt FAPE. Parents and Curt are certainly free to choose Winchendon for their own personal reasons⁵. However, given that either Landmark placement offered by WBPS offers Curt FAPE, I cannot order WBPS to fund Winchendon which by definition and in practice cannot address his accepted IEP and special education needs.

⁵ It is noted that Parents had initially explored and Curt had been accepted at Winchendon prior to Curt even entering Carroll for his ninth grade year. Further, Curt had already been accepted at Winchendon for 10th grade prior to Mother's March 2014 meeting with Ms. Traina/WBPS regarding the time/distance factor to Landmark. (See testimony, Mother; Traina; S-26, 27, 28, 29, 35.)

ORDER

- 1. WBPS' proposed Landmark placements were appropriate to address Curt's special education needs so as to provide him with FAPE in the LRE.

- 2. Parents are neither entitled to retroactive reimbursement for their unilateral placement of Curt at Winchendon, or for any prospective placement at Winchendon.

By the Hearing Officer

Date: _____