

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

IN RE: DALLAS¹

&

BSEA #15-03566

THE ABBY KELLEY FOSTER CHARTER SCHOOL

DECISION

This Decision is issued pursuant to M.G.L. c. 71B, 20 U.S.C. § 1401 *et seq.*, 29 U.S.C. § 794 and the regulations promulgated under those statutes. A Hearing was held in the above-entitled matter on February 9 and 10, 2016 at the Offices of Catuogno Reporting Services in Worcester, MA. Those present for all or part of the proceeding were:

Ms. D.	Mother
Mr. D.	Father
Amy Thomas	Family Support Partner
AnnMarie Little	Special Education Director, Abby Kelley Foster Charter School
Amy DiDonna	Attorney for Abby Kelley Foster Charter School
Lindsay Byrne	Hearing Officer

The official record of the hearing consists of documents submitted by the Parents marked P-1 through P-26 and P-29, pages 1-6; documents submitted by the School marked S-1 through S-37; and approximately 7 hours of recorded oral testimony. Many of the documents submitted by the Parents contain handwritten additions, underlines, cross-outs, notations and other markings and highlights. The parents provided clean copies of P-1 through P-4. They were unable to offer substitutes for other relevant exhibits. The Hearing Officer accepted the marked documents with the proviso that only the original language of the document would be considered by the Hearing Officer as evidence. Administrative Notice was taken of M.G.L. c. 71B, Section 3, in particular. After the completion of presentation of evidence the Parties chose to submit written closing arguments. The record closed on March 18, 2016.

¹ "Dallas," Ms. "D." and Mr. "D." are pseudonyms assigned by the Hearing Officer to protect the privacy of the Family in documents available to the public.

ISSUES

The Hearing issues on which the Parents sought rulings were set out in an October 20, 2015 Pre-Hearing Order and read into the record on February 9, 2016:

- 1.) Whether the failure of the IEP to include special education services for, or otherwise directly address, Dallas' need for "monitored" social interaction constitutes a procedural and/or substantive denial of his right to a free, appropriate public education?
- 2.) Whether the failure of the IEP to list disciplinary options other than detention constitutes a procedural and/or substantive denial of Dallas' right to a free, appropriate public education?
- 3.) Whether the failure of the February 2014 IEP Team to consider, and/or the resulting IEP to list, the potentially appropriate educational accommodations recommended by the Massachusetts DESE for students with a diagnosis of autism spectrum disorder, constitutes a procedural and/or substantive denial of Dallas' right to a free, appropriate public education?
- 4.) Whether the lack of a weekly special education "pull out" session devoted to math rendered the 2014-2015 IEP substantively and/or procedurally inappropriate for Dallas?
- 5.) Whether Dallas is entitled to compensatory special education services as a result of the School's failure to provide any of the components listed above which then resulted in a denial of a free appropriate public education to Dallas between November 17, 2014 and the conclusion of the 2014-2015 school year?

PARENTS' POSITION

Abby Kelly Foster Charter School (hereinafter "AKFCS" or "School") failed to develop an appropriate IEP for Dallas for the March 2014 to March 2015 time period. The IEP failed to address Dallas' demonstrated need for specialized math instruction in a pull out setting. The IEP failed to include services to address his social-emotional needs such as "monitored" social interactions. The IEP failed to acknowledge and accommodate his learning needs as a student with a diagnosis on the autism spectrum. The IEP failed to provide for appropriate disciplinary measures other than detention when detention proved to be an ineffective response to Dallas' escalating disability-related behaviors. Furthermore, AKFCS failed to convene a Team meeting on Parent request and on presentation of a parent-secured evaluation with a new, relevant diagnosis. These failures led directly to the denial of a free appropriate public education to Dallas during the 2014-2015 school year. Dallas is entitled to compensatory education in the form of individual math tutoring.

SCHOOL'S POSITION

The 2014-2015 IEP was based on all relevant information available to the Team at that time. There were no recommendations at the Team meeting, or anytime during the IEP period, for "monitored" social interactions, specialized math instruction, or alternative discipline. AKFCS properly considered all new information presented to it by the Parents and took

appropriate steps to clarify and supplement the information as necessary to determine its relevance to Dallas' special education program. At all times during the IEP period Dallas was making effective progress in his special education program and general education classes.

SUMMARY OF THE EVIDENCE

This matter concerns the development and implementation of the 2014-2015 Individualized Education Program for Dallas at AKFCS. The evidence is thus confined mostly to that time period.

1. Dallas is now fourteen years old. He entered AKFCS during his second grade year and currently attends the 8th grade there. The time period at issue covers March 19, 2014 through May 14, 2015, the spring of Dallas' 6th grade year and the fall/winter/part of spring of his 7th grade, when Dallas was twelve and thirteen years old, respectively. (S-3; S-4; P-16; P-20)

2. The 2013-2014 IEP implemented during the time period immediately preceding the 2014-2015 IEP at issue here was accepted on May 26, 2013, after an initial period of rejection. That IEP, which identified Dallas as a student with a "health disability" and a specific learning disability in reading, provided for a partial inclusion placement at AKFCS. Dallas received one period per week of specialized math instruction and four periods per week of specialized English language arts instruction in the general education classroom. In addition he received 3-5 periods per week of specialized instruction in a separate setting for reading and written language. The IEP was based on the then most recent evaluations conducted by AKFCS in early 2012 and his teacher reports. (P-16; S-4; S-9; S-10; S-11; P-1; S-1)

3. The Team convened on February 4, 2014 to develop an IEP for the remainder of Dallas' 6th grade year and most of the subsequent 7th grade academic year. The Team had no new evaluations to consider. The teacher reports uniformly noted progress commensurate with expectations. Dallas was awarded average grades in his general education coursework. None of the teachers brought concerns about Dallas' math performance, social interactions or disciplinary history to the Team. The Parents did not request additional math instruction for Dallas nor did they request "monitoring" of Dallas' social interactions. The Parents did not request amendments to the discipline code or alternate disciplinary strategies for Dallas. No evidence of a diagnosis on the autism spectrum was presented to the Team. The Team did not discuss math tutoring, discipline, social interactions or autism disorders. There were no recommendations from any source for "monitored" social interactions, alternate discipline, separate math instruction or program accommodations for a student with Autism Spectrum Disorder. No one on the Team recommended different or supplemental evaluations. (Ms. D.; Ms. Little; S-19; S-13; S-14; S-15; S-9)

4. The Team developed an IEP for the period March 2013- March 2014 continuing the services that Dallas had been receiving in the 6th grade: one period of specialized math instruction and four periods of specialized English language instruction per week in the general

education classroom as well as four periods per week of specialized reading and written language instruction in a separate setting. The IEP listed two goals: English language arts and math. Finding that Dallas had a “Health Disability” and a specific learning disability in the area of reading, the Team set out accommodations to the general education setting appropriate to those goals. Ms. D. accepted the proposed 2014-2015 IEP on March 19, 2014. (P-17; S-6)

5. On July 25, 2014 Dallas was seen by Dr. Nawras Shukair for 90 minutes at University of Massachusetts Memorial Hospital for a psychopharmacology evaluation.² Dr. Shukair noted that Dallas had a history of ADHD and referred him to the CANDO clinic for investigation of parental concerns about Dallas’ social behavior. There is no indication in his report that Dr. Shukair reviewed any of Dallas’ previous evaluations, school records, teacher reports or IEPs. There is no indication that he obtained any information about Dallas’ school, community or family functioning from any source other than Ms. D. and Dallas. To Dallas’ previous diagnosis of ADHD, Dr. Shukair added Axis I diagnoses of Anxiety Disorder and Autism Spectrum Disorder (Asperger Syndrome). Dr. Shukair’s report of the July 25, 2014 evaluation was printed on September 22, 2014. (P-6; S-23; S-27)

6. On August 25, 2014 Dr. Shukair wrote a brief note stating that Dallas had ADHD and “Asperger Syndrome” and required a carefully thought-out IEP. (P-5) Ms. D. forwarded the note to the School on August 27, 2014. (P-26)

8. By electronic mail dated October 6, 2014, Ms. D. requested a Team meeting. AKFCS offered to hold a Team meeting on October 15 or 20, 2014. Ms. D. asked for additional dates. The School offered additional meeting dates of October 22 or 23, 2014. Ms. D. selected October 22nd. On the morning of October 22nd the School cancelled the meeting due to illness. The School offered to reschedule on October 28 or 29, 2014. In emails that crossed over the next 2 days Ms. D. selected October 29 and the School notified the Parent that one Team member would not be able to attend on October 28 and offered October 29, November 4 and November 7. Neither the Parent nor the School confirmed a date for the Team meeting. No Notice of Team Meeting appears in the record. The Parent arrived at AKFCS on October 29, 2014 expecting a Team meeting. Unfortunately, as the date had not been confirmed with the teachers and substitutes none of the teachers could be available. Instead, the Special Education Director, Ms. Little, met with Ms. D. Dr. Shukair participated in the meeting by telephone. There is no indication in the record that the three participants had the report of Dr. Shukair’s July 2014 encounter with Dallas available to them. (P-26; S-25—27; Ms. D., Ms. Little)

9. During, and as a result of the meeting among Ms. D., Ms. Little and Dr. Shukair the School proposed accelerating Dallas’ 3-year reevaluation which was due to begin in January 2015. Ms. D.’s request to change Dallas’ math teacher because “he didn’t get along with her” was denied. At Ms. D.’s request Dallas’ 7th grade teachers sent weekly reports home about his academic work and classroom behavior. None indicated any significant issues. (P-14; P-15; P-24; Little)

² The Parent described this visit as an “IEE”. There is no evidence in the record to support the characterization of this encounter as an authorized Independent Educational Evaluation pursuant to 603 CMR 28.04 (5).

10. At some point in November 2014 AKFCS received Dr. Shukair's psychopharmacology evaluation report. The Team reconvened on December 1, 2014 to discuss Dr. Shukair's report as well as to consider Ms. D.'s requests for specialized math instruction in a separate setting, alternative discipline, "monitored" social interactions and Section 16B accommodations to standardized testing. The Team found Dr. Shukair's diagnosis of autism spectrum disorder unpersuasive. In addition the Team found that Dr. Shukair did not make any specific educational recommendations but recommended further evaluations. The Team determined that Dallas' three year reevaluation should be started as soon as possible to address the Parents' concerns. (S-28; Little) Ms. D. consented to the proposed three year evaluation at the Team meeting on December 1, 2014. She revoked her consent to the proposed evaluation on December 2, 2014. On December 8, 2014 both Parents rescinded their earlier acceptance of Dallas' 2014-2015 IEP. The IEP rejection notice letter of December 8, 2014 contains ambiguous language which could be construed as a revocation of Ms. D.'s earlier objection to the three year reevaluation proposed by the school. (P-19; S-39) The three year reevaluation was subsequently completed within the regulatory timelines. (Little; P-2; P-3)

11. On December 2, 2014 AKFCS issued a "Narrative Description of School District Refusal to Act", popularly known as an "N2". The School refused to amend Dallas' 2014-2015 IEP to include the Section 16 B accommodation, the specialized, segregated math instruction, "monitored" social interaction, alternative discipline, and guidance check-ins requested by Ms. D. (P-18)

Ms. Little testified that the December 2014 Team reached decisions on those specific parental requests after considering all the evaluative information. (See also: P-18; S-28) She testified that the School did not agree with Dr. Shukair's autism spectrum diagnosis.³ The School found that the diagnosis was not supported by information from a variety of sources, and suggested a comprehensive reevaluation. Nevertheless, the Team considered Dallas' social, communication, sensory and disciplinary functioning as required for students with a diagnosis of Autism Spectrum Disorder by M.G.L. c. 71B §3. (Little)

12. Ms. Little explained that the Team found there was no indication from Dallas' in-school behavior that he needed social supports. Dallas participated fully in the regular classroom activities and social times such as lunch. He was a member of the school's football team and band. He had friends and a girlfriend. Furthermore, most social activities at school take place within the view of at least one school staff member. No complaints about Dallas' social behavior were referred to the special education team. (Little; S-28)

There are no recommendations concerning "monitored" social interactions or other social skills supports in the last set of comprehensive evaluations available to the Team. (S-1; P-1) None of Dallas IEPs identified social skills as an area of learning need. (S-4; P-16; S-6; P-17) There are no teacher recommendations for additional social skills instruction. Neither the Team that convened in February 2014 to develop Dallas' 2014-2015 IEP nor the Team that convened in December 2014 to consider the Parents' requests, found that Dallas needed social skills monitoring to receive a free appropriate public education.

³ Note that a subsequent comprehensive evaluation obtained by the Parents in November 2015 at the CANDO Clinic disagreed with Dr. Shukair's ASD finding. (P-9; S-33. See also: P-2; P-3; P-4.)

13. Ms. Little testified that the Team discussed the Parents' request that Dallas' IEP include a weekly segregated "pull-out" session devoted to math. There are no recommendations for specialized instruction in math in any evaluations available to the Team nor from any of Dallas' math teachers. Dallas has consistently functioned within the average range of expectations for math and has passed all general education math courses. (S-19; S-30-32; S11-19) When the Team explained that a math "pull-out" would conflict with Dallas' instrumental music period, Ms. D. agreed that Dallas would prefer music to math and rescinded the request for specialized math instruction outside the classroom setting. (Little)

14. Ms. D. told the team that alternatives to after-school detention such as essay writing or lunch clean-up were more effective disciplinary strategies for Dallas. Ms. D. requested that alternative discipline be included in Dallas' IEP. Ms. Little testified that there were no educational recommendations for alternative discipline for Dallas. AKFCS uses a variety of interventions with students to promote good behavior and adherence to the student code of conduct. During the 2014-2015 IEP period Dallas may have received some after-school detentions from his teachers for infractions such as: throwing paper, failure to turn in homework, and talking in class. Teacher-assigned detentions do not appear in the Student's record. Principal-assigned detentions do. Only one appears in the record before the December 2014 Team meeting. On October 7, 2014 Dallas received a principal's detention after slapping another student in the face. Ms. Little testified that none of Dallas' disciplinary referrals warranted a manifestation determination. He had not been removed from any of his educational programming for disciplinary reasons before the Team meeting took place. He was never in danger of failing any class due to his behavior or to its disciplinary consequences.⁴

15. The accommodation known as "16B" permits standardized test language to be read aloud to a student.⁵ That accommodation was listed on the "State or District-Wide Assessment" page of Dallas' 2013-2014 IEP. (P-16; S-4) It was removed from the 2014-2015 IEP. (P-17; S-6) The Parents objected. The School maintained that Dallas never used the accommodation in any form of testing and did not need it. (S-7; S-28; Little) The Parents secured an outside recommendation for that accommodation. The School developed an Amendment to the 2014-2015 adding the 16B accommodation to Dallas' existing program. The Amendment was accepted on March 4, 2015. (P-20)

16. There are no educational recommendations for math tutoring for Dallas either during the life of the 2014-2015 IEP at issue here or currently.

17. There are no recommendations for, and no evidence of any discussion about, Ms. D.'s October 2014 request for weekly guidance check-ins.

FINDINGS AND CONCLUSIONS

⁴ 20 U.S.C §1415 (K); 34 C.F.R. 300.530.

⁵ See: Requirements for Participation of Students with Disabilities in MCAS, Massachusetts Department of Elementary and Secondary Education, www.doe.mass.edu/mcas/participation/sped.pdf at p.16.

After careful consideration of all the evidence presented at Hearing, and of the arguments of both parties, it is my determination that the Parents have failed to prove by a preponderance of the evidence that AKFCS denied Dallas a free appropriate public education at any point during the development and implementation of his 2014-2015 IEP. Further, they failed to show that any of their specific service requests were appropriate for Dallas during the 2014-2015 IEP period. *Schaffer v. Weast*, 546 U.S. 49 (2005). The Parents' assertion that AKFCS continually ignored their requests, the evaluations they submitted and Dallas' demonstrated disability-related learning needs is not supported by the credible evidence in the record. In particular, the Parents' argument that AKFCS committed grievous procedural errors in connection with their request for a Team meeting to consider Dr. Shukair's reports and their associated service requests in the fall 2014 is not persuasive. On the contrary, the evidence shows that AKFCS responded promptly, fully and flexibly to all parental requests and communications. The evidence also demonstrates that Dallas, at all times during the life of the accepted 2014-2015 IEP, actually received a free, appropriate public education at AKFCS. In reaching these conclusions I note that I found Ms Little, the special education director of AKFCS, to be thoroughly professional under extended difficult circumstances. I found her testimony to be thoughtful, credible and therefore highly persuasive. I address in turn each of the issues brought to the BSEA by the Parents:

1) Whether the failure of the IEP to include special education services for, or otherwise directly address, Dallas' need for "monitored" social interaction constitutes a procedural and/or substantive denial of his right to a free, appropriate public education?

No. As discussed in Paragraphs 10 and 12 above, the Parents did not produce any information from which I could conclude that an appropriate 2014-2015 IEP for Dallas would include "monitored" social interaction. There are no contemporaneous evaluations of Dallas that identify such a need nor are there any educational recommendations for such a service. To the extent that the Parents rely on the September 22, 2014 report of Dr. Shukair to support their request, I find that it does not. Dr. Shukair's report notes that Dallas was seen for a psychopharmacology consultation. (P-6, S-23) This is a medical examination not an educational one. There is no indication in that report that Dr. Shukair based his findings and recommendations on anything other than parental report and physical examination of Dallas. The role of the physician in special education matters is to identify the student's medical condition and describe how that condition affects her/his functioning. The role of the school is to consider that information, along with other information it has about the student's learning profile, and to develop appropriate educational strategies that permit the student to participate in and benefit from the general education curriculum and the necessary specialized instruction to the extent the student is able to do so. The school did precisely that in this instance. Dr Shukair is clearly well-meaning and positively engaged with this family. His findings, however, in so far as they refer to an Autism Spectrum Disorder, are not consistent with the substantial weight of other credible educational observations and evaluations in the record. Furthermore, his recommendations, to the extent they are addressed to possible school- based or provided interventions, are not supported by his own findings or those of education professionals who

have extensive experience both with Dallas and with special education programming. I therefore do not rely upon Dr. Shukair's reports.

2) Whether the failure of the IEP to list disciplinary options other than detention constitutes a procedural and/or substantive denial of Dallas' right to a free, appropriate public education?

No. There is no evidence from which I could conclude that imposition of after school detention as a consequence for violating AKFCS's regular disciplinary code was inappropriate for Dallas during the life of the 2014-2015 IEP. There are no evaluations which identify a disability which would make him unable to conform his behavior to the school's code of student conduct. There are no evaluations or teacher recommendations for alternative discipline of any type or under any circumstances. Finally, there was no showing that serving after school detentions interfered with implementation of the 2014-2015 IEP, or otherwise denied Dallas access to a free appropriate public education.

3) Whether the failure of the February 2014 IEP Team to consider, and/or the resulting IEP to list, the potentially appropriate educational accommodations recommended by the Massachusetts DESE for students with a diagnosis of autism spectrum disorder, constitutes a procedural and/or substantive denial of Dallas' right to a free, appropriate public education?

No. At the time the February 2014 IEP Team met Dallas had not received a diagnosis of autism spectrum disorder ("ASD"). There was no evaluative information available to that Team that suggests that an ASD diagnosis might be warranted, that an ASD diagnosis should be explored, or that programming appropriate for students with an ASD would be appropriate for Dallas. No one on the Team, parents or teachers, brought up the possibility of an ASD diagnosis. Simply, there was nothing to discuss.

As there was no support for suspicion of an ASD, the fact that the Team did not consider adding accommodations recommended by the Massachusetts DESE for students diagnosed with ASD to Dallas' IEP was not error. The absence of those accommodations on the 2014-2015 IEP developed for Dallas did not deny a free appropriate public education to him.

4) Whether the lack of a weekly special education "pull out" session devoted to math rendered the 2014-2015 IEP substantively and/or procedurally inappropriate for Dallas?

No. As discussed above at Paragraph 13, there was no evidence before the Team that convened in February 2014 to support the provision of a specialized math instruction session in a segregated setting in Dallas' 2014-2015 IEP. Dallas was making effective progress in his general education math class with one period of special education support weekly in the general classroom throughout the 2013-2014 school year. He continued to participate in, and to make progress in, the general education math class throughout the 2014-2015 school year. Neither math teacher recommended additional specialized instruction. There are no other evaluations or recommendations concerning math in the record. Therefore I find that the math services listed on the 2014-2015 IEP were substantively appropriate for Dallas. There is no procedural error.

5) Whether Dallas is entitled to compensatory special education services as a result of the School's failure to provide any of the components listed above which then resulted in a denial of a free appropriate public education to Dallas between November 17, 2014 and the conclusion of the 2014-2015 school year?

No. AKFCS did not deny Dallas a free appropriate public education during the life of the 2014-2015 IEP. It appropriately considered the parental requests when made, and any evidence the Parent proffered to support them. The fact that this consideration did not result in the services sought by the Parents does not render either the process flawed or the resulting IEP inappropriate. On the contrary, both the development and the implementation of Dallas' 2014-2015 IEP was based on a professional assessment of all the information in the record, and resulted in the opportunity for Dallas to participate meaningfully in the general curriculum alongside his non-disabled peers, while still receiving the special education support identified as necessary for him to make effective progress commensurate with his potential.

Ms. D. argues that the School's failure to schedule a Team meeting promptly after her October 6, 2014 request demonstrates its lack of concern for Dallas. (See ¶ 8) That scheduling snafu can be blamed - if blame is necessary - on both parties in equal measure: the Parent for clearly failing to recognize and accommodate the genuine personal and professional conflicts and obligations of Team members in the same manner as she sought such consideration for herself; and the School for seeming to permit the Parent to dictate the time, date and conditions of a Team meeting. The responsibility for selecting a date and time reasonably convenient for the majority of Team members, and within regulatory timelines, is the School's. Here I find, under the unique circumstances of this matter, the School's attempts to schedule a Team meeting in the fall 2014 were eminently reasonable and did not infringe upon the procedural protections available to the Parents or the Student under the IDEA.

Compensatory education is an equitable remedy available to Parents who demonstrate at hearing that their child was denied the free appropriate public education to which he was entitled and, as a result of that denial, suffered significant educational harm. *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990) Having made no such showing the Parents and Student are neither legally nor equitably⁶ entitled to an award of compensatory education.

⁶ *C.G. v. Five Town County School District*, 513 F3d 278 (1st Cir. 2008). (See eg. S-38)

ORDER

The 2014-2015 Individualized Education Program developed and implemented by Abby Kelley Foster Charter School for Dallas provided a free appropriate public education to him. The Parents' claims to the contrary, and for specific services not contained in that IEP, are not supported by the evidence and are DISMISSED.

| By the Hearing Officer

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Lindsay Byrne
Dated: April 15, 2016