

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS**

BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Natick and Framingham Public Schools

BSEA No. 1707648

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.

At issue in this case is whether the Natick and/or Framingham Public Schools (hereafter, respectively, “NPS” or “Natick and “FPS” or “Framingham”) violated Parents’ and Student’s procedural rights between approximately March 2015 and March 2016, and if so, whether Student was denied a free, appropriate public education (FAPE) as a result. An additional issue is whether in March 2017, Parents actually or constructively rejected Student’s previously-accepted IEP for the 2016-2017 school year, and, if so, whether that IEP was reasonably calculated to provide the student with FAPE.

The foregoing formulation of the issues arose from Parents’ original allegations, contained in their Hearing Request filed on March 16, 2017, that from 2013 forward, the Natick and Framingham Public Schools had engaged in criminal, tortious, and/or otherwise unlawful activities that deprived Parents of the opportunity to participate in the IEP process, deprived Student of FAPE and otherwise violated her civil rights, and caused Student pervasive and severe emotional injury. Parents sought “exhaustion of administrative remedies” enabling them to seek “monetary damages for injuries suffered by student and the family.”

Both Natick and Framingham filed timely responses to Parents’ hearing request. The parties requested and were granted several postponements of the original hearing date for good cause including clarification of issues, scheduling conflicts, and a pre-hearing conference which was held on June 12, 2017. On June 21, 2017, pursuant to discussions held at the pre-hearing conference, this Hearing Officer issued an order containing a statement of proposed issues for hearing and indicating that statement would be finalized unless Parents filed proposed additions by June 26, 2017 and Framingham and/or Natick filed objections or responses thereto by July 10, 2017. No such filings were received by the applicable deadlines; therefore, in an Order dated July 3, 2017 the issues listed in the Order of June 21, 2017 became the sole issues for hearing.

An evidentiary hearing was held on September 5 and 6, 2017 at the offices of Catuogno Court Reporting Services in Worcester, MA. Mother appeared *pro se* on behalf of both Parents (Mother and Father) as well as Student. Both Natick and

Framingham were represented by counsel. All parties had an opportunity to examine and cross-examine witnesses as well as submit documentary evidence for consideration by the Hearing Officer. The parties requested and were granted a postponement until October 27, 2017 for submission of written closing arguments. Framingham requested and was granted a further such postponement until November 1, 2017. All closing briefs were received by November 1, 2017 and the record closed on that day.

The record in this case consists of the Natick's and Framingham's Joint Exhibits S-1 through S-55. Parents did not file exhibits. Additionally, the record consists of several hours of electronically-recorded testimony and the transcript created by the court reporter.

Those present for all or part of the proceeding were:

Parent	
Penny Smith	Out of District Coordinator, Framingham Public Schools
Laura Spear	Special Education Director, Framingham Public Schools
Timothy M. Luff	Assistant Supt. Student Services, Natick Public Schools
Kathryn Garcia	Out of District Coordinator, Natick Public Schools
Peter Rosenmeier	Clinical Director, Gifford School
Thomas Adams	Middle School Head Teacher, Gifford School
Wilson Fredian	Current Executive Director, Gifford School
Robert McArdle	Former Executive Director, Gifford School ¹
Philip Benjamin, Esq.	Counsel for Framingham Public Schools
Doris R.M. Ehrens, Esq.	Counsel for Natick Public Schools
Sara Berman	BSEA Hearing Officer
Brenda Ginisi	Court Reporter

ISSUES PRESENTED

The following issues were discussed at the pre-hearing conference held on June 12, 2017 listed in the above-referenced order dated June 21, 2017, memorialized in an Order dated July 3, 2017, and read into the record at the hearing.

1. Whether the Natick Public Schools committed procedural violations on one or more occasions from March 2015 until the Student's placement at Gifford in March 2016 by failing to evaluate the Student or convene Team meetings in a timely manner.
2. If so, whether Natick denied the Student a free appropriate public education (FAPE) and/or denied Parents an opportunity for meaningful participation in the Team process.

¹ Robert McArdle was the Executive Director of the Gifford School during Student's enrollment there but had retired as of the hearing dates.

3. Whether NPS failed to offer or provide Student with educational services to which she may have been entitled between March 2015 and her placement at Gifford in late March 2016.
4. Whether NPS and/or Framingham Public Schools failed or refused to convene the Team during the 2016-2017 school year to address issues of concern at Student's Gifford placement.
5. If so, whether NPS and/or Framingham denied Parents or Student a FAPE or deprived Parents of an opportunity for meaningful participation in the Team process.
6. Whether the Parents actually or constructively rejected the Student's previously-accepted IEP and/or placement for the 2016-2017 school year in approximately March 2017.
7. If so, whether the rejected IEP and placement were reasonably calculated to provide the Student with FAPE during the period to which the rejection applied.

POSITION OF PARENTS

Parents' position is that Natick and Framingham engaged in disability-based discrimination, bullying, and creation of a hostile environment regarding Student over a period of years beginning in 2013, and that these actions stemmed from a dispute over whether Student's residence was in Natick, with her Father, or Framingham, with Mother. Parents allege that in so doing, the school districts, particularly Natick, colluded and/or conspired with other agencies or entities, including the Department of Children and Families (DCF), the Department of Elementary and Secondary Education (DESE), and the Office of the Child Advocate. Parents assert that the actions of the school district both denied Student a FAPE and caused her severe emotional injuries. Finally, Parents allege that the Gifford School placement was inappropriate for Student and did not provide her with FAPE. Parents seek "exhaustion of administrative remedies" so that that they can continue litigation in other forums.

POSITION OF SCHOOL

Natick and Framingham assert that throughout the relevant time period, neither district violated any of Student's or Parents' procedural rights, deprived Student of a FAPE, or deprived Parents of the opportunity for meaningful participation in the Team process. On the contrary, Natick conducted evaluations and convened Team meetings in a timely manner, and both districts were highly responsive to Parents' concerns about Student's Gifford School placement. Any lack of parental participation in the Team process is the result of Parents' failure or refusal to attend Team meetings or otherwise respond to the districts' attempts to address Parents' concerns or meet Student's needs. Finally, at all relevant times Natick and Framingham provided Student with all of the special education and related services to which she was entitled.

SUMMARY OF THE EVIDENCE

1. Student is a ninth grader who resides with Father in Natick but spends substantial time with Mother in Framingham. All who know and have worked with Student describe her as a kind, hardworking, intelligent, creative and academically capable teen girl, with many talents and interests. (Adams, Rosenmeier, S-2) There is no dispute that Student also has disabilities, including primarily a longstanding, significant anxiety disorder² and selective mutism. These disabilities have significantly affected Student's school attendance, self-advocacy, general ability to manage the stresses of the school environment, and, consequently, her ability to make educational progress commensurate with her very strong cognitive potential. (Mother, Garcia, Rosenmeier, S-2)
2. Since September 2017, Student has attended a private general education high school at Parental expense. (Mother) As of the hearing dates, Student was receiving no special education services either from the private school or under the auspices of either school district. She has not received any such services since approximately March 2017. The parties do not dispute, however, throughout the period covered in the statement of *Issues Presented*, above, Student was eligible for, and received, special education services from NPS and FPS,³ based on her diagnosed emotional disabilities. (Luff, Garcia)
3. Student's Parents have been divorced and living separately since Student was an infant, with Mother living in Framingham and Father living in Natick. Student has always spent time with both Parents in their respective homes under a flexible parenting arrangement. (Mother, S-54) Until approximately 2012, Student lived primarily with Mother during the school week and attended school in Framingham as a general education student.⁴ In or about 2012, Mother became disabled. In response to this situation, Parents agreed that Student should live primarily with Father in Natick. Student began attending Natick Public Schools in fifth grade, at the start of the 2013-2014 school year and was enrolled in NPS from that time forward. (Mother, S-47)

² In 2013, concerned about Student's persistent worrying about safety, social situations, and other matters, Parents had her evaluated at a university-based clinic, where Student received diagnoses of Generalized Anxiety Disorder and Social Phobia, as well as selective mutism. From that time forward, Parents have provided Student with private counseling services to address her anxiety and related issues. (Mother, S-48)

³ Natick determined that Student was eligible for special education in or about December 2015. In late March 2016, Student began attending the Gifford School, an approved private day school, for an extended evaluation pursuant to an agreement between Parents and Natick, and, beginning in May 2016, under a fully accepted IEP issued by Natick. In or about August 2016, DESE determined that based on Student's IEP calling for a private out-of-district placement and Parents' living in two school districts, FPS and Natick shared programmatic and fiscal responsibility for the private placement pursuant to 603 CMR 28.10(2)(a)(2). (Luff)

⁴ Framingham evaluated Student for special education in approximately 2009 or 2010, but deemed her ineligible. (Mother)

4. In or about September 2014, Parents requested that NPS evaluate Student for special education eligibility. The record does not contain a clear statement of the issues that led Parents to make the referral; however, Parents informed the NPS school psychologist about Student's anxiety diagnosis and also raised concerns about homework completion, organization and memory. (S-47)
5. In or about November 2014, NPS conducted an initial evaluation of Student consisting of formal psychoeducational testing as well as teacher observations and assessments. (Luff, Mother, S-47, 48, 49) The Team convened on or about December 3, 2014. Parents requested a postponement of the meeting because Father had not received evaluation documents 2 days prior to the meeting. In response, NPS asked Parents to waive the 45-day timeline requirement. (Luff) The record does not indicate whether or not Parents did so. The NPS member of the Team met on December 3, 2014 without Parents in order to ensure compliance with timeline requirements and determined that Student was not eligible for special education or a §504 Plan. (Luff, S-34)
6. The N-1 and N-2 forms issued after the December 3 meeting proposed a second Team meeting at which Parents could be present, and listed three possible meeting dates in December 2014. (Luff, S-34) Eventually, the Team reconvened on February 24, 2015 with Parents present. The Team again found Student ineligible for either special education or for a §504 plan on the grounds that despite her anxiety disorder, for which Student was receiving outside treatment, she was making effective educational progress. Parents did not appeal the ineligibility finding, and there was little or no further contact between Natick's special education department and Parents during the remainder of the 2014-2015 school year. (Luff, Mother,)
7. At the beginning of the 2015-2016 school year, in approximately mid-October 2015, Student was psychiatrically hospitalized at Franciscan Children's Hospital for a brief period. Student subsequently moved to a partial hospitalization program at Westwood Lodge and then stepped down to the Wayside program. (Mother, Luff, Garcia, S-54) Student's involvement in these treatment programs ended by approximately late November 2015. (S-53(A), Mother, Luff) Parents contacted NPS in or about late October or early November 2015, after Student had been discharged from Westwood Lodge, to request home-hospital instruction. Parents provided Natick with a physician's statement, dated November 20, 2015, to support the tutoring request. At some point during this period, Parents also provided Natick with hospital discharge summaries. (Luff, S-53(B))
8. NPS deemed the physician's letter of November 20, 2015 to be inadequate because it did not state that Student was confined to home for medical reasons. In a letter to Parents dated November 24, 2015 Student's middle school principal advised Parents that in the absence of a satisfactory physician's letter, NPS would not provide tutoring, and that Student must return to her middle school; otherwise, NPS would consider court or agency involvement to secure Student's school attendance. The letter also recited Natick's efforts to involve Parents in Student's back-to-school

transition, as well as in scheduling a Team meeting to reconsider special education eligibility. The principal's letter indicated that Parents had not been responsive to Natick's overtures. (Luff, S-53(A), (B))

- 9.** In early December 2015, despite its position on the physician's statement, Natick offered tutoring to Student at the local library. Student did not attend the two sessions offered in December, but did attend tutoring during January, February and March 2016. During those months, NPS provided tutoring 4 days per week, with each session lasting approximately 1 ¼ hours. (S-54, Mother, Luff)
- 10.** On December 4, 2015 Natick convened a Team meeting to revisit the issue of Student's special education eligibility. Both Parents attended the Team meeting. The Team reviewed information from Franciscan Hospital and Westwood Lodge, as well as a report from a private neuropsychological evaluation that Parents had obtained for Student in the spring of 2015 and provided to Natick in November 2015.⁵ The Team determined that Student was eligible for special education on the basis of an emotional impairment, but that NPS needed additional information to develop an appropriate IEP. Accordingly, NPS proposed an extended evaluation of Student at one of five possible facilities: the LABBB, TEC, or ACCEPT Collaboratives, Dearborn School or Walker School. On December 8, 2015 Parents consented to referrals to each of these programs, and on December 23, 2015, Parents accepted the proposal for an extended evaluation. (Luff, Mother, S-31)
- 11.** Approximately three months elapsed before Student actually began the extended evaluation. The LABBB and Walker programs had no openings. On December 15, 2015, Mother requested that NPS not send referrals to any collaboratives in which Natick town officials were involved.⁶ Since the NPS Superintendent served on governing boards for both TEC and ACCEPT, Mother's request initially precluded Natick from pursuing these collaboratives as evaluation sites for Student, although at some point, Parents changed their view, at least regarding TEC Collaborative, after learning that TEC administration and staff had virtually no contact with governing board members. (Mother, Luff)
- 12.** On December 22, 2015, Dearborn accepted Student, proposing a start date of January 4, 2016. Parents were interested in both Dearborn and TEC, but requested additional time during January 2016 to visit and further consider these options. Parents ultimately decided not to send Student to Dearborn because of concerns about transportation, and, in January 2016 requested a Team meeting facilitated by the BSEA Mediation Coordinator. The facilitated IEP meeting (FIEP) took place on

⁵ Mother testified that she told the NPS Superintendent about the evaluation in September 2015, but that the Superintendent told her she was not allowed to give the evaluation report to anyone in Natick. Mr. Luff testified that during September and October 2015, he had told Mother via email that she could give the report to him or Student's school principal. Natick finally received the report on November 18, 2015. I credit Mr. Luff's testimony on this issue.

⁶ Parents' objection was related to their ongoing actual or perceived disagreement with Natick over residency issues. (Mother)

February 4, 2016, and both Parents attended. After discussion, Parents and NPS orally agreed that Student would attend the Dearborn program for an extended evaluation, beginning the following week and also appeared to agree to a transportation plan developed at the facilitated Team meeting. (Luff, S-15)

13. On or about February 11, 2016 Parents rejected the proposal for the extended evaluation at Dearborn. (Luff, S-30)
14. During this period, Student was not attending school, but continued to receive tutoring 4 x 1.25 hours per week from Natick, as described above. (Luff, Mother, S-54)
15. The Team convened again in early March 2016 in an effort to develop a plan for Student. Parents were present at this meeting, and were represented by an attorney. The parties executed a "Settlement Agreement" which provided, *inter alia*, that Natick would fully fund Student's placement at and transportation to one of three approved private day schools, Gifford, Dearborn, or Riverside, or another such school if none of these three schools accepted Student, for the remainder of the 2015-2016 school year. The Agreement also provided for additional evaluations over an 8 week period, drafting of goals and objectives, consideration of summer services for summer 2016, and development of an IEP for 2016-2017. Parents signed the Agreement on March 11, 2016. (Mother, Luff, S-50)
16. Student began attending the Gifford School in Weston on or about March 28, 2016 pursuant to the Agreement. Gifford is a private DESE-approved special education day school which serves elementary, middle and high school students who may be capable of grade-level academics but have social/emotional disabilities and need a therapeutic environment to make educational progress. In addition to teachers, the Gifford staff includes social workers and social work interns who are supervised by the clinical director, Peter Rosenmeier. Gifford augments its clinical capacity with its relationship with The Brookline Center, a community mental health center, which provides some students with additional therapeutic services and medication management. Many Gifford students, like the Student in this case, present with anxiety as their primary disability. (Rosenmeier)
17. As stipulated in the Agreement, Student completed an extended evaluation while she attended Gifford. The Team held a mid-evaluation "check-in" on May 2, 2016 to address progress to date. (Garcia, S-27) On May 25, 2016, the Team convened to review the evaluation results and issued an IEP covering the time from May 25, 2016 to May 24, 2017. (Garcia, S-43, S-2). That IEP called for continued placement at the Gifford School for the remainder of the 2015-2016 school year, the summer of 2016, and until late May of the 2016-2017 school year. The IEP contained goals in anxiety management, "social/self-advocacy," and academics. The IEP also provided for special transportation in a small bus or van and included accommodations such as introducing Student to her driver, allowing Student to use her cell phone to text

Mother and/or listen to music.⁷ Father accepted the IEP and placement in full on June 5, 2016. Mother accepted the IEP and placement on June 27, 2016, and added a comment stating “self-advocacy goals—ask to use bathroom. Bus.” (S-2) Student attended the May 25 Team meeting and indicated that she wished to remain at Gifford and felt safe there. (S-26)

18. Student made progress at Gifford during the 2015-2016 school year. In “Present Levels of Educational Performance” (PLEP) A and B, the IEP, which was written after Student had attended Gifford for approximately 8 weeks, noted that Student was slowly improving her ability to ask for help, verbalize her thoughts and concerns, complete assignments, and make connections with peers and adults; all of these skills were affected by Student’s anxiety and executive functioning weaknesses. (S-2) By June 2016, Student’s IEP Progress Report stated that while Student had entered Gifford presenting as anxious and non-verbal, as she became comfortable, she began communicating verbally with staff and peers, participating actively in classes, homeroom, cafeteria, and extracurricular activities. She enjoyed school, was well behaved and well-liked. Student used the supports and structure provided by Gifford to make these gains. (Garcia, Rosenmeier, Adams S-39, 40, 41(A))
19. Student attended the Gifford summer program during the summer of 2016 and continued to make progress. (Adams, S-38)
20. Gifford had a policy of keeping its bathrooms locked during the school day for safety reasons. Students could access the bathroom by asking a staff member to unlock it or asking for a key. The precise arrangements depended on the students’ individual needs. During May or June 2016, Parent emailed Gifford staff to inform them that Student reported having difficulty asking staff for bathroom access. As a result Student was not using the school bathroom during the day. In response, Gifford held meetings in May and June 2016 to refine Student’s self-advocacy goal to address the bathroom issue. (Mother, Garcia, Rosenmeier)
21. Student began 8th grade at Gifford in September 2016. Parents had concerns regarding Student’s program at Gifford, between September and December 2016, including continued concerns about bathroom access, Student’s reported distress about “rowdy” peers in her classroom and on the bus, and insufficiently challenging school work, among other things. (Mother) In September 2016 Parents (primarily Mother) had multiple email exchanges with Gifford and Natick relative to setting up a meeting to address these concerns. (S-23, Garcia, Rosenmeier, Luff)
22. On September 26, 2016, Kathryn Garcia, Natick’s Out of District Coordinator, proposed a Team meeting date of September 29, 2016. Father responded that he was not available and that Parents would not attend any meeting at which Framingham representatives were present. Additionally, Father indicated that he would not attend any meeting without 10 days prior notice and had time and date constraints. On

⁷ Student did not use the provided transportation during the 2015-2016 school year; rather, a Parent drove her to and from school.

September 29, 2016 Ms. Garcia proposed meeting dates of October 25 and 30, 2016 which would meet Father's criteria, as well as three earlier dates if Mother had been available. (Luff, Garcia, S-52(A))

- 23.** Natick scheduled a Team meeting for October 27, 2016 to discuss Parents' concerns. Parents refused to attend because Framingham would be represented at the meeting. (S-52(A), Garcia, Luff, Mother) After this refusal by Parents, Natick attempted to schedule meetings on November 16 and December 20, 2016. On each occasion Natick sent written invitations to Parents. Natick, Framingham, and Gifford staff met on November 16 and December 20, 2016 and on February 16, 2017. Parents refused to attend any of these three meetings, citing unresolved disagreements with Natick over a 2014 residency dispute. At the beginning of each meeting, Team members attempted reach Parents by telephone to secure their participation but were unsuccessful. The meeting agendas consisted solely or primarily of Parents' concerns. (Luff, Garcia, Mother, S-10, 11, 12, 13, 23, 52(A)) Throughout this period, Mother and Mr. Luff exchanged emails the in which Mother focused primarily on residency issues while mentioning some specific concerns relative to Gifford (transportation, peers, and several incidents of school refusal by Student) and Mr. Luff urged Parents to come to the table to address educational concerns. (Luff, S-53)
- 24.** As stated above, the Team met without Parents on November 16 and December 20, 2016 and February 16, 2017. At the November 16 meeting, which was attended by representatives of Gifford, Framingham and Natick, the Team discussed Parents' concerns regarding transportation, bathroom access, and IEP implementation. The Team agreed to make sure certain agreed-upon transportation protocols were followed, including having a consistent driver who used Student's preferred nickname. In fact, Mother and occasionally Father had been transporting Student and the Team agreed to have Student's Gifford counselor meet her at the car to ease her transition to school. (S-24) The Team discussed a transportation incident which Parent had characterized as "bullying," with an aggressive male forcing Student to give up her seat in the van on one of the few occasions when Student used the van. According to Gifford, this was a one-time incident when Student volunteered to give her seat to another student who was having a hard day. (S-24) The Team also discussed an internal plan by Gifford to help Student self-advocate for the bathroom and that while this plan was not immediately in place at the start of the year, it was implemented soon thereafter. In general the Team believed that Student was making effective progress, but was concerned about some absenteeism, which Mother said was "school refusal." The outcome of the meeting was to schedule further meetings and make efforts to have Parents attend. (S-24)
- 25.** The December 20 meeting was also attended by representatives of Framingham, Natick, and Gifford. In addition, Student's outside therapist attended the meeting and attempted to secure Parents' phone participation. Parents declined to participate by phone, and Mother asked the therapist to leave the meeting. The remaining Team members reviewed Student's progress and determined that she was making effective

progress in all domains. She was improving her self-advocacy, including asking to have her homeroom changed and asking to use the bathroom. She was increasingly participating in classes and extracurricular activities. She had exchanged phone numbers with some classmates and was interacting more with peers. Her attendance had improved from 69% as of the November meeting to 91%. The bus incident referred to above was determined not to constitute bullying, since the peer involved had not targeted Student in particular and the behavior was not repeated. Parents were continuing to transport Student to and from school, and asked that transportation services be ended. Parent had expressed a wish to meet with Gifford staff only, without staff from either school district, and the districts did not object as long as these meetings with Gifford and Parents did not discuss changes to the IEP or placement. (S-23)

- 26.** As was the case with the November and December 2016 meetings, Parents did not attend the meeting of February 16, 2017, despite having been sent a written invitation and despite staff having reached out to Parents by telephone at the beginning of the meeting to solicit their participation. The Team members present reported that Student was continuing to have good attendance and make academic and social/emotional progress.⁸ She was able to ask to use the bathroom independently in the same manner as her peers. In response to concerns raised by Parent that Gifford was overly restrictive for Student and not academically challenging enough, as well as Parent's statement regarding suicidal ideation, the Team agreed that Gifford was appropriate, that moving Student at this time would be harmful, and that Student had not expressed any suicidal ideation at school.⁹ (S-22)
- 27.** Mother testified that despite her apparent progress at Gifford, Student was increasingly unhappy at being there during 2016-2017. According to Mother, Student complained about bathrooms, about feeling "unsafe" with peers, and what she felt was the excessive strictness of the school. In or about January, Mother advised Student that she needed to attend Gifford regularly, but that Parents would look for alternatives. Mother testified that Student was not doing grade-level work, and would not be able to be admitted to the private sectarian school that Parents were investigating. (Mother) Mother also testified that staff at Gifford were questioning Student about her residency and that this was upsetting to Student in light of Parents' ongoing involvement with this issue. (Mother)
- 28.** Gifford met with Parents but without Natick or Framingham representatives on approximately two occasions during the second term of 2016-2017 to address the foregoing concerns. Among other things, Gifford staff worked on the bathroom issue, increased Student's academic workload to provide her with more challenge and

⁸ During the second term of the 2016-2017 school year, Student became increasingly involved in the life of the school; she attended a girls' group for a time, joined a ukulele club, participated in the in-house TV news network, and participated in a musical performance in front of a large group of parents. (Rosenmeier, Adams)

⁹ Parent testified that while attending Gifford, Student was being "monitored" for suicidal ideation. Peter Rosenmeier, Gifford's Clinical Director, testified that any reports of suicidal statements or ideation by students at Gifford are relayed immediately to him and that he received no such reports regarding Student.

changed her counselor when Student claimed that the social work intern with whom she had been working asked her questions that to Student sounded like quizzing about residency.¹⁰ (Mother, Rosenmeier)

- 29.** Student's attendance at Gifford declined during March 2017, and she did not return to Gifford after mid-March 2017. Mother had been sending emails to Natick and Gifford indicating that she wanted to homeschool Student, and stating, among other things, that Student did not feel "safe" at Gifford, and that Gifford was no longer an appropriate placement for her. (Mother, Rosenmeier, S-21)) On March 30, 2017 Natick convened a Team meeting to discuss whether or not to continue Student's placement at Gifford. Once again, Parents received a written invitation to the Team meeting, and neither appeared at the meeting nor responded to staff attempts to have them participate by phone. Team members, including staff from Natick, Framingham, and Gifford concurred that Student did very well when she attended at Gifford, which remained an appropriate placement for her. The Team decided to maintain Student's placement at Gifford and meet again for an annual review on May 17, 2017. (S-21, Garcia)
- 30.** Student did not return to Gifford after March 2017, although on one or more occasions during that month, Mother was able to get her to attend school. (Mother, Rosenmeier) On May 17, 2017 the Team convened for Student's previously-scheduled annual review meeting. Parents did not attend this meeting. The Team issued an IEP covering May 2017 to May 2018 calling for continued placement at Gifford, which Mother rejected. (S-1) The Team reconvened on or about June 5, 2017 to review Mother's emailed concerns. The Team issued a revised IEP incorporating responses to those concerns and again calling for placement at Gifford. Mother rejected this IEP. (S-1A)
- 31.** During the spring of 2017, Mother requested approval of a home schooling program from Natick. NPS approved the academic portion of the program but denied full approval because of the absence of therapeutic services. Mother began homeschooling Student. (Mother, Garcia)
- 32.** The Team convened again on June 29, 2017 to consider a private neuropsychological evaluation recently obtained by Parents. The resulting IEP incorporated many of the recommendations of the evaluator and called for continued placement at Gifford. The Team reconvened on July 25, 2017 to address Parents' concerns. Parent stated that Gifford was not appropriate for Student and that she had enrolled Student in a private general education school for September 2017. The Team issued an IEP calling for a private special education day school placement and attached release forms that would allow the districts to refer Student to alternative private special education day placements. As of the hearing date, the documents in the record indicate that Parents had not responded to the most recently proposed IEP. (S-1, 1A, 1B, 1C)

¹⁰ Peter Rosenmeier testified that the intern denied asking Student about residency. Neither Mr. Rosenmeier nor any staff under his supervision asked Student about residency, which would have no bearing on the services that Gifford provided to Student. I credit Mr. Rosenmeier's testimony on this issue.

33. During July 2017 Mother drove Student to the Gifford summer program, in which she was enrolled pursuant to the IEP for 2016-2017, but Student would not leave the car. (Rosenmeier)
34. Student neither returned to Gifford for 2017-2018 nor to any other public or private special education day school. As of the hearing date, she was attending a private general education high school at Parents' expense.

DISCUSSION

LEGAL FRAMEWORK

Substantive Components of FAPE

There is no dispute that Student is a school-aged child with a disability who at all relevant times was 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"). Student was and is entitled, therefore, to a free appropriate public education (FAPE), that is, to a program and services that are tailored to her unique needs and potential, and is 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); *North Reading School Committee v. BSEA*, 480 F. Supp. 2d 489 (D. Mass. 2007); citing *Lenn v. Portland School Committee*, 998 F.2d 1083 (1st Cir. 1993).

While Student is not entitled to an educational program that maximizes her potential, she is entitled to one which is capable of providing not merely trivial benefit, but "meaningful" educational benefit. See *Andrew F. v. Douglas County School District RE-1*, 69 IDELR 174 (March 22, 2017), *Bd. of Education of the Hendrick Hudson Central School District v. Rowley*, 458 US 176, 201 (1982), *Town of Burlington v. Dept. of Education*, 736 F.2d 773, 789 (1st Cir. 1984); 675 F.3d 26, 34 (1st Cir. 2012); *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2014) Whether educational benefit is "meaningful" must be determined in the context of a student's potential to learn. *Rowley, supra*, at 202, *Lessard v. Wilton Lyndeborough Cooperative School District*, 518 F.3d 18, 29 (1st Cir. 2008); *D.B. v. Esposito, supra*. As the U.S. Supreme court recently held in *Andrew F.* at 69 IDELR 174, a disabled child's goals should be "appropriately ambitious in light of [his or her] circumstances, *Id.* Finally, 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. On the other hand, the opportunity to be educated with non-disabled students does not cure a program that otherwise is inappropriate. *School Committee of Town of Burlington v. Dept. of Education of Mass.*, 471 U.S. 359 (1985).

Procedural Components of FAPE

Both federal and state special education law provide procedural protections for students with disabilities and their parents, designed to support the parent-school collaboration envisioned by these statutes. Parents are full members of the Team that develops IEPs, which are the blueprints for providing services for eligible students, 20 USC §1414(d)(1)(b)(i). Parental participation in the planning, developing, delivery, and monitoring of special education services is embedded throughout the IDEA, MGL c. 71B, and corresponding regulations. Courts have consistently emphasized the centrality of parental participation to the IDEA scheme. In *Rowley*, 458 U.S. 405-406 (1982), the Supreme Court stated "...Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process...as it did upon the measurement of the resulting IEP against a substantive standard." See also: *In Re Framingham Public Schools and Quin*, 22 MSER 137 at 142 (Reichbach, 2016), and cases cited therein.

Notwithstanding the above, it is well settled that although parents are Team members, entitled to fully participate in the IEP development process and to have their views considered, they are not entitled to dictate the terms of an IEP. On the contrary, a school is not required to negotiate with parents to reach a result with which parents agree if by doing so they propose an IEP that the school believes is not appropriate for the child. Rather, schools are obligated to propose what they believe to be FAPE in the LRE, whether or not the parents are in agreement. *In Re Natick Public Schools*, 17 MSER 55, 66 (Crane, 2011) Moreover, within the basic framework of an IEP, schools have considerable professional discretion and flexibility in how they fulfill their responsibilities. *M. v. Falmouth School District*, 847 F.3d 19 (1st Cir. 2017).

Burden of Proof

In a due process proceeding to determine whether a school district has offered or provided FAPE to an eligible child, or has committed procedural violations, the burden of proof is on the party seeking to challenge the status quo. In the instant case, as the moving party challenging the districts' substantive and procedural compliance with special education statutes, Parents bear this burden. That is, in order to prevail, Parents must prove, by a preponderance of the evidence, that Natick and/or Framingham violated Student's and Parents' procedural rights, and, that as a result, Student was deprived of a FAPE during the periods at issue. If the evidence is equivalent, the School will prevail. *Schaffer v. Weast*, 546 U.S. 49, 44 (2005)

APPLICATION OF LAW TO ISSUES FOR HEARING

The issues to be determined in this matter are circumscribed. The entire "back story" in this matter—which concerns (1) actual or perceived disputes over residency and allegations of resultant harm to Student and (2) collateral litigation—is completely irrelevant to the narrowly drawn issues, which I will address as follows.

Issue No. 1: Natick did not commit any procedural violations between March 2015 and the time Student was placed on or about March 28, 2016.

Issue No. 2: Natick did not deny the Student a free appropriate public education (FAPE) and/or deny Parents an opportunity for meaningful participation in the Team process.

Issue No. 3: NPS did not fail to offer or provide Student with educational services to which she may have been entitled between March 2015 and her placement at Gifford in late March 2016.

The above-numbered issues are closely intertwined, and will be addressed together for purposes of efficiency. After an initial evaluation, in the fall of 2014, Natick, where Student was enrolled and which was the only school district involved at the time, convened a Team meeting in December 2014 and February 2015 and found Student to be ineligible for special education or a §504 plan. Parents never appealed or otherwise contested this finding of ineligibility. There is no allegation and no evidence in the record of procedural violations during the remainder of the 2014-2015 school year.

Parents again referred Student for special education services in October or November of 2015. The undisputed documentary and testimonial record establishes that Natick conducted evaluations, convened Team meetings, and proposed an IEP (initially, for an extended evaluation) in a timely manner. Further, Natick proposed several possible locations for the extended evaluation by December 2015. Student did not start attending an extended evaluation until her March 2016 Gifford placement. The cause for the delay in placement was Parents' objections to every one of the available settings proposed by Natick. Parents certainly had the right to raise these objections; however, the ensuing delay stems from actions of Parents, not Natick. Moreover, Natick offered or provided tutoring to Student from December 2015 until she entered Gifford in March 2016, despite the absence of a physician's statement that Natick deemed adequate. In sum, the documentary and testimonial record establishes that Natick provided timely evaluations, Team meetings and offers of placement during this time period as well as interim tutoring services. Moreover, the record is replete with examples of opportunities for Parent's involvement with Student's evaluation, IEP development and placement. Any and all delays are attributable to Parents' actions. There is no contradictory evidence in the record.

Issue No. 4: Neither NPS nor Framingham Public Schools failed or refused to convene the Team during the 2016-2017 school year to address issues of concern at Student's Gifford placement.

Issue No. 5: Neither NPS nor Framingham denied Parents or Student a FAPE or deprived Parents of an opportunity for meaningful participation in the Team process.

The undisputed documentary and testimonial evidence in the record is that the districts convened multiple meetings during this time period for the major or sole purpose

of addressing Parents' concerns about Student's Gifford placement. The record also establishes, without contradiction, that despite extensive efforts by the districts to enable Parents to participate (*e.g.*, by actively seeking meeting dates when Parents might be available, by contacting Parents by phone at the start of meetings and to invite them to join, and by conducting follow-up meetings, Parents refused to attend meetings.

The record also establishes that Student received a FAPE while she attended Gifford.¹¹ The testimony of Gifford staff (Mr. Carter, Mr. Rosenmeier) and Natick staff (Ms. Garcia) as well as progress reports and report cards demonstrate that Student made excellent, meaningful progress while she attended Gifford. The record shows that Student entered Gifford as a highly anxious young woman who did not speak or self-advocate and whose academic performance was constricted despite her high ability. Almost immediately, Student began to speak to others, form relationships, and expand her academic performance. She became highly involved in the life of her school. In her testimony, Mother complained about aspects of Student's programming and experience at Gifford, but never disputed the progress cited by Gifford staff and supporting documentation.

Moreover, as stated above, whenever Parents presented concerns about aspects of Student's placement (for example, bathroom access, amount of homework, and transportation) the school districts and Gifford made great efforts to address those concerns and involve Parents in the process, scheduling multiple meetings which Parents did not attend.¹² Even in Parents' absence at these Team meetings, Gifford staff, with the support of the districts, developed and refined a plan to address Student's difficulties accessing the bathroom, supported Student in changing her homeroom, worked with the transportation company to ensure that certain accommodations were in place if Student were to elect to use transportation, investigated a claim of bullying, increased Student's homework load in an effort to challenge her, and changed Student's counselor based on claims (disputed by the counselor) that the latter had discussed residency with Student, thereby upsetting her. The evidence that Gifford and the districts responded promptly and appropriately to Parents' and Student's concerns is overwhelming, and Parents have presented no evidence to the contrary.

6. Issue No. 6: Parents did not actually or constructively reject the Student's previously-accepted IEP and/or placement for the 2016-2017 school year in approximately March 2017.

It is axiomatic that parents may not challenge the appropriateness of an expired previously-accepted IEP that is not rejected while in effect. The only claim available to parents in such situations is a "claim alleging a failure to implement or noncompliance

¹¹ I note that Parents fully accepted the IEP and placement for May 2016 – May 2017, thereby foreclosing their ability to challenge the appropriateness of that IEP after its expiration. Parents' only claim would be that the IEP was not fully implemented, and there is no evidence on the record to this effect. *Doe ex. Rel. Doe v. Hampden-Wilbraham R.S.D.*, 715 F.Supp. 185, 194-195 (2010); *Ross v. Framingham Sch. Comm.*, 44 F. Supp. 2d 104, 106 (D. Mass. 1999).

¹² Parents did attend at least one meeting with Gifford staff alone.

with an appropriately developed and formulated IEP...” See: *Hampden-Wilbraham; Ross supra*, note 11. At issue in the instant case is whether Student’s non-attendance at Gifford between March and mid-May 2017, during which time she was reportedly home-schooled, constituted an actual or “constructive” rejection of the previously-accepted IEP for that period of time. I conclude that the IEP was not actually or “constructively” rejected. My reasoning follows.

On or about May 25, 2016, Natick issued an IEP covering the period from May 25, 2016 to May 24, 2017 and providing for Student’s placement at Gifford. Father and Mother accepted the IEP and placement on June 5 and June 27, 2016, respectively. At various times during Student’s tenure at Gifford, Mother raised concerns about various aspects of Student’s programming. By the winter or spring of 2017, Mother was questioning whether Gifford was an appropriate placement for Student and was exploring alternatives. From March 2017 forward, Student was refusing to attend school; however, Parents never withdrew her formally, and, at various times, made attempts to get Student to attend school.

Parents presented no evidence that they ever formally rejected the previously-accepted IEP or Gifford placement during the term of the IEP, which expired on or about May 24, 2017, nor have they presented evidence that might point to “constructive” rejection such as filing a due process hearing challenging the IEP and placement,¹³ unilaterally withdrawing Student from Gifford and/or unilaterally placing her elsewhere, or withdrawing consent for some or all services contained in the IEP. Indeed, Parents do not appear to have alleged such rejection, whether actual or “constructive.” Rather, Parents did not reject an IEP until June 2017, and this was not the previously-accepted IEP but its proposed successor, covering the period from May 2017 to May 2018.

Issue No. 7: The 2016-2017 IEP was not rejected, but even if it were deemed rejected, the IEP and placement were reasonably calculated to provide the Student with FAPE during the period to which the rejection applied.

While there is no evidence on the record to indicate that Parents rejected the previously-accepted IEP for 2016-2017 during its term, even if the IEP were deemed rejected at some point in the spring of 2017, the overwhelming evidence on the record is that the IEP and placement were reasonably calculated to provide Student with FAPE during the two to three month period to which a rejection would have applied. The documents and testimony clearly establish that the accepted IEP addressed all areas identified as special needs, was based on current evaluations and assessments, and contained goals and objectives that were appropriately “ambitious” in light of Student’s high academic potential. See *Andrew F.* at 69 IDELR 174. Additionally, as stated above, while in attendance at Gifford, Student made substantial gains in her ability to manage her anxiety, self-advocate, form meaningful relationships with adults and peers, engage in grade-level academics, and participate in extracurricular activities. Moreover, both Gifford and the districts were notably thoughtful and responsive to concerns raised by

¹³ While the hearing request in this matter was filed during the term of the accepted IEP, the request did not challenge the appropriateness of the accepted IEP or placement or seek a change in placement.

Parents and Student, even when Parents elected not to participate in meetings to address those concerns. The IEP and placement were clearly appropriate for the period in question, and Parents have presented no evaluations, expert testimony, or other evidence to the contrary.¹⁴

CONCLUSION

For the reasons stated above, I conclude that Natick and Framingham did not commit procedural violations during the time period at issue, did not impede Parents' ability to participate meaningfully in the Team process, and did not deprive Student of FAPE. On the contrary, both districts fulfilled their obligations to conduct evaluations, convene Team meetings, and issue IEPs in a timely manner. Both districts offered Student an IEP, placement, and services that were reasonably calculated to provide her with FAPE and from which she benefitted. Finally, both districts made considerable efforts to include Parents in the decision-making process, even when Parents elected not to participate in the manner contemplated by special education statutes and regulations.

By the Hearing Officer,

Dated: December 11, 2017

Sara Berman

¹⁴ Student's non-attendance from March 2017 forward does not in itself establish that the IEP or placement had become inappropriate, but only that there is a new issue for the Team to discuss and resolve.

