

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

**Framingham Public Schools and Student v.  
Guild for Human Services, Inc. and the Department of  
Developmental Services**

**BSEA # 1808824**

**DECISION**

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC § 1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 USC § 794), the state special education law (MGL ch. 71B), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under these statutes.

**PROCEDURAL HISTORY**

Framingham Public Schools (hereinafter, Framingham) and Parent/Guardian (hereinafter, Parent) requested an expedited hearing on April 6, 2018. On April 13, 2018, The Guild for Human Services (hereinafter, the Guild) filed its Response to the hearing request and Motion to Dismiss the claims related to “stay put”. Framingham filed its Opposition to the Guild’s Motion to Dismiss on April 17, 2018. An expedited hearing was scheduled for and proceeded on April 23, 2018. The Parties made oral closing arguments immediately following the hearing, the Guild renewed its Motion to Dismiss and the record closed.

Those present for all or part of the hearing were:

Parent	
Penelope Smith	Out of District Coordinator, Framingham Public Schools
Laura Spear	Special Education Director, Framingham Public Schools
Philip Benjamin	Attorney, Framingham Public Schools
Amy Sousa	CEO, The Guild for Human Services
Susan Hayes	Behaviorist, The Guild for Human Services
Josh Krell	Attorney, The Guild for Human Services
Marie Blanciforte	Attorney, Department of Developmental Services
Carol Kusinitz	Court Reporter
Catherine Putney-Yaceshyn	Hearing Officer

The official record of this hearing consists of Framingham’s exhibits marked F-1 through F-13 and The Guild for Human Services’ (hereinafter, the Guild) exhibits marked G-1 through G-8 and approximately four hours of recorded oral testimony.

**ISSUE**

1. Whether Student is entitled to “stay put” at his current placement, The Guild for Human Services.

## **SUMMARY OF THE EVIDENCE**

1. The student (hereinafter, “Student”) is a nearly 22 years old and has been placed at the Guild by the Framingham Public Schools. He has attended the Guild since July 2013, first as a day student and beginning in November 2013, as a residential student. (F-11, Smith) Student transitioned to the residential program at the Guild due to extreme safety concerns in the home involving Student destroying property and physically interacting with his parents. Student has been diagnosed with autism, an intellectual disability, and intermittent explosive disorder. (F-11, Smith) Student requires a great deal of structure throughout his program. Student has periods when he engages in aggressive behaviors. Between 2015 and 2017 there was a decline in the number of incidents of his aggressive behaviors, but there has been a recent increase in such behaviors. (Smith)
2. The Guild operates a 365 day residential school licensed to serve students aged six to twenty-two years old and is approved by the Massachusetts Department of Elementary and Secondary Education. (Sousa, Response to Framingham Public Schools’ Request For Expedited hearing and Motion to Dismiss Framingham’s Claims Relating to “Stay-Put”) There are currently 81 students in attendance at the Guild, the majority of whom are residential students. The students are housed in 8 homes that are in community based settings. Each house is staffed with a house manager, assistant managers and residential assistants. Resident assistants are trained for at least 80 hours in areas including working with students with special needs, implementing behavior plans, the Crisis Prevention Institute’s Nonviolent Crisis Intervention, and human rights. Overnight staffing at the Sassafra House, where Student resides, is one staff person for every four residents. There is video surveillance of all common areas for youth residences. Footage is reviewed to ensure staff is doing what they are supposed to do, for training purposes, and to understand what occurred in the case of an incident or accident. (Sousa)
3. The Team convened on or around January 24, 2018 for Student’s annual review meeting. The resulting N1 form indicates that Student continues to require support in a highly structured residential school setting in order to access the curriculum and make academic progress. The IEP provided for Student’s continued placement at the Guild as a residential student until July 10, 2018, the day before his twenty-second birthday. Parents accepted the IEP in full on April 2, 2018. (F-11)
4. While a student at the Guild, Student at times engaged in aggressive behaviors including instances when he has engaged in property destruction and has been physically aggressive with staff and adults. (G-4) One of the more significant incidents occurred in 2004, when Student bit another student’s ear and the other student required three stitches. (Sousa) There was a second instance when Student bit another student’s ear in January 2016. The student required seven stitches. As a result of that injury, the other student, who lived in the Cedar House with Student, became fearful of Student. The Guild added approximately two additional staff to the Cedar House to keep the other student safe until they were able to move Student to a different residence, the Sassafra House, in October 2016. (Sousa) There were approximately 75 instances between January 28, 2014 and April 21, 2018 in

which Student was involved in incidents of aggression, both as the aggressor and the victim. (G-4)

5. On Saturday, March 24, 2018, at approximately 5:00 p.m., Student was in his Guild residence visiting with a family member and walked toward the kitchen to get a drink. As he got his drink, he said something under his breath to another student, (hereinafter, Peer) who was talking to a staff member in the kitchen. Peer did not respond to Student and continued speaking with the staff person. Student then yelled, "Do you want to fight?" Student grabbed Peer's hoodie and tried to scratch his face. Student then pushed Peer into a wall which caused Peer to fall to the ground. While Peer was on the ground, Student kicked him in the head/face several times. As a staff member tried to end the altercation, Peer was able to get up. Student then attempted to punch the staff member and pulled at Peer's hoodie. Peer was able to get away from Student and a staff member followed Peer. The on call manager, a back-up staff member, and a nurse were called. (F-5, G-1) Peer suffered injuries including a severe concussion and consequently missed one week from school and work. (Sousa)
6. Sharon DiGrigoli, Chief Education Officer for the Guild, sent a letter dated March 29, 2018, to Penelope Smith, Out of District Coordinator, Framingham, providing formal written notification of the emergency termination of Student from the Guild. It stated, "The Guild feels that [Student] presents as a danger to himself and others and the Guild can no longer effectively program for him." It concluded that emergency termination proceedings, pursuant to 603 CMR 28.09(12) are in effect as of today, March 29, 2018. (F-3) Ms. Smith spoke to Ms. DiGrigoli about Student's termination and asked whether the Guild would permit Student to remain there while Framingham located an appropriate placement for Student to transition. The Guild was willing to schedule a meeting to discuss the possibility. (Smith)
7. The Guild's termination policy describes both planned and unplanned terminations. Unplanned termination is utilized when the Guild determines that "Emergency Circumstances" exist which warrant an unplanned termination of the student. The Guild defines emergency circumstances as "where a student's behavior is uncontrollable and presents such a clear and present danger to themselves and/or others or where they engage in unlawful or other behavior which endangers themselves, others in the program or in the community." Their policy states that in the event of an unplanned termination the Director of Education will immediately notify parents, the special education director, all appropriate human service agencies, and the Department of Elementary and Secondary Education of the emergency circumstances it believes warrants termination. Next, according to the policy, the Guild will arrange for a team meeting with the appropriate parties to provide information and assistance necessary for the public school officials to implement their responsibilities under the special education regulations. Finally, the policy states that at the request of the school district, the Guild will make every attempt to delay termination of the student for up to two weeks to allow the district the opportunity to convene an emergency Team meeting or conduct appropriate planning discussions prior to the student's termination. (G-5)

8. The Guild did initially agree to delay termination and, during this interim period sought to keep Student and Peer separated. They placed extra staff in the residence and tried to prevent contact. Student's and Peer's schedules were rotated in the dining room and staff ensured they did not watch television together. However, their home was a single family residence, and it was impossible to keep them completely separated. (Sousa)
9. On April 2, there was another incident involving Student and Peer. Student was in the kitchen and he saw Peer. He told Peer he was going to kill him and kill his family member. He then made a gesture and cursed at Peer. Staff got between them and brought Peer downstairs. Staff called the on-call manager, dialed 9-1-1, and notified the clinical team. A police officer spoke to Student and Student said he should not have done what he did. Student then went to bed. (F-2) Ms. Smith was notified of this incident on April 3, 2018. (Smith)
10. Staff have tried to assist the Student and Peer in repairing their relationship (they were previously best friends), but Peer was quite frightened by Student's actions. He had physical and psychological symptoms and did not want to be anywhere near Student. When Student threatened to kill Peer and his family member, Peer believed he would do so and would not return to the residence. The Guild has had to rent a hotel room since the incident to allow Peer to live separately from Student. Further, the Guild has modified its staffing. It has made the overnight and weekend shift supervisor's station the Sassafras House and has added an additional two staff members to ensure Student's aggressions do not cause harm to other students. Peer also requires twenty-four hour supervision which has put a further strain on staffing levels. (Sousa)
11. On April 4, 2018, the Parties to this matter met at the Guild<sup>1</sup>. They reviewed the two recent incidents and the Guild said it would be moving forward with the termination. The Parties developed a plan to transition Student to a new placement. They discussed the importance of minimizing the number of transitions for Student given his particular difficulty with transition. They hoped to find a DDS placement where Student could remain after he turns twenty-two in July. (Smith, F-12)
12. The Guild does not believe it can continue to keep Student and those around him safe. It has considered different options such as housing Student at a hotel and hiring a security service with trained personnel to respond to Student's physical needs when he becomes aggressive. They were unable to find a security company willing to provide the service. It also considered providing additional trained staff to be assigned to Student. It determined that would not be feasible because new staff requires 80 hours of training and the Guild does not have sufficient available staff to provide additional personnel to Student's residence and continue to maintain adequate staffing throughout its program. (Sousa)
13. Since the Guild made the decision to terminate Student's placement, and up until the commencement of the hearing, the Parties were not able to identify a placement to which Student could transition. The Parties agree that it is necessary to locate a new placement

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<sup>1</sup>The Department of Developmental Services participated by telephone. (F-12)

for Student. Framingham initially sent referral packets to four placements. Two were not able to provide the necessary services, one did not have an opening, and one did not have a current opening, but might have one in May. Framingham sent an additional five referral packets when the initial referrals did not lead to an available placement. DDS made a number of referrals to programs. (Smith, Sousa) The Guild has worked closely with DDS to locate adult placements and forensic beds. It has looked at the possibility of Student being admitted to a hospital<sup>2</sup> and providing educational programming in a hospital setting. It has offered to continue to provide Student with educational services if a residential setting were willing to transport Student to their school. (Sousa)

## **FINDINGS AND CONCLUSION:**

Student is an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act (IDEA)<sup>3</sup> and the state special education statute.<sup>4</sup> As such, he is entitled to a free appropriate public education (FAPE). Neither his status nor his entitlement is in dispute.

The IDEA was enacted “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education, employment and independent living.”<sup>5</sup> FAPE must be provided in the least restrictive environment. Least restrictive environment means that, “to the maximum extent appropriate, children with disabilities are educated with children who are not disabled, and special classes, separate schooling or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”<sup>6</sup>

Student’s right to a FAPE is assured through the development and implementation of an individualized education program (“IEP”).<sup>7</sup> An IEP must be custom-tailored to address a student’s “unique” educational needs in a way reasonably calculated to enable him to receive

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<sup>2</sup>It is unclear that hospitalization would be a viable option. As Ms. Sousa testified, Student tends to escalate quickly and deescalates quickly. After past incidents Student has been brought to a hospital and has not been admitted, as he had calmed significantly since the aggression. (Sousa)

<sup>3</sup>20 USC 1400 *et seq.*

<sup>4</sup>MGL c. 71B.

<sup>5</sup> 20 USC 1400(d)(1)(A). See also 20 USC 1412(a)(1)(A); *Mr. I ex. Rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007)

<sup>6</sup> 20 USC 1412(a)(5). See also 20 USC 1400(d)(1)(A); 20 USC 1412(a)(1)(A); MGL c. 71B; 34 CFR 300.114(a)(2)(i); 603 CMR 28.06(2)(c)

<sup>7</sup> 20 USC 1414(d)(1)(A)(i)(I)-(III); *Honig v. Doe*, 484 U.S. 305 (1988); *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982)

educational benefits.<sup>8</sup> For an IEP to provide a FAPE, it must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>9</sup> A student is not entitled to the maximum educational benefit possible.<sup>10</sup> Similarly, the educational services need not be, “the only appropriate choice, or the choice of certain selected experts, or the child’s parents’ first choice, or even the best choice.”<sup>11</sup> The IDEA further requires that special education and related services be designed to result in progress that is “effective.”<sup>12</sup> Further, a student’s level of progress must be judged with respect to the educational potential of the child.<sup>13</sup>

IDEA’s “stay put” provision requires that during the time that a parent and school district are engaged in an IDEA dispute resolution process, “unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child...” 20 U.S.C. § 1415(j); 34 CFR § 300.518; 603 CMR 28.08(7); *Honig v. Doe*, 484 U.S. 305 (1988); *Verhoven v. Brunswick School Committee*, 207 F.3d 1, 10 (1<sup>st</sup> Cir. 1999). To determine a child’s “stay put” placement, courts look to the IEP that is “actually functioning at the time the dispute first arises.” *Drinker v. Colonial School District*, 73 F.3d 859, 867 (3<sup>rd</sup> Cir. 1996).

The BSEA has addressed students’ rights to “stay-put” numerous times. Framingham correctly notes that the BSEA cases applying the “stay put” provision when there is a proposed change from one private school to another have fallen into two categories. The two categories are “school specific” cases, where a hearing officer has determined that “stay put” applied to a particular private school and “comparability cases” where “stay put” requirements could be fulfilled by providing student with services that were “comparable” to those he or she had been receiving, but in a different location.

The comparability line of cases does not pertain to the instant case, because there simply is no other placement available to Student. If there was a viable option of placing Student in another residential school which could implement his accepted IEP, there would be no dispute in this matter. Thus, I look to the “school specific” cases for guidance. The case of *Lolani and Northampton Public Schools* (BSEA #04-0359, 2003) provides useful and persuasive guidance.

The Guild argues that the IDEA’s “stay put” provision does not apply to it. It claims that it followed the procedures required by the Massachusetts special education regulations and its own policies, and thus is entitled to terminate Student.

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<sup>8</sup> *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083 (1st Cir.1993)

<sup>9</sup> *Andrew F. v. Douglas County. Sch. Dist.*, 580 U.S. \_\_\_ (2017)

<sup>10</sup> *Rowley*, 458 U.S. at 197

<sup>11</sup> *G.D. Westmoreland Sch. Dist.*, 930 F.2d 942 (1st Cir. 1991)

<sup>12</sup> 20 USC 1400(d)(4); *North Reading School Committee v. Bureau of Special Education Appeals*, 480 F. Supp.2d 479 (D.Mass. 2007)(the educational program must be reasonably calculated to provide effective results and demonstrable improvement in the various educational and personal skills identified as "special needs")

<sup>13</sup> *Lessard v. Wilton Lyndeborough Cooperative School District*, 518 F.3d 18 (1st Cir. 2008)

603 CMR 28.09(12), Student Protections, states in relevant part:

Students shall be entitled to protections and standards in accordance with 603 CMR 18.00. In addition approved special education schools shall observe the following requirements:

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

603 CMR 28.06(2)(f)(1) provides, "Students in out-of-district placements shall be entitled to the full protections of state and federal special education law and regulation." As noted by the hearing officer in *Lolani and Northampton*, "There is no legislative language exempting publicly funded students placed in private special education facilities from application of the 'stay put' doctrine." Further, the provisions of 603 CMR 18.00, the regulations governing private special education schools, relate back to the general special education regulations found at 603 CMR 28.00, which includes the "stay put" provision and does not provide for any exemption for publicly placed private school students. As noted in *Lolani*, if the drafters of the regulations had "intended to strip private school students of a right accorded to public school students they would have said so."

It is undisputed that the Guild has followed 603 CMR 28.09(12) and its own termination policy. It is further undisputed that it has maintained Student even beyond the two calendar weeks required by the regulation. The Guild cannot be faulted for any of their actions. However, under the unique circumstances of this case, where Student has no other placement available to him and is unable to safely return home, his "stay put" placement has to be the Guild. As a matter of public policy and if the IDEA's stay put provisions are to have any meaning, the BSEA cannot issue a decision finding that Student does not have any placement in which to remain during the pendency of this matter.

Therefore, even though the Guild has followed the requirements of both 603 CMR 28.09(12) and their own emergency termination policy, under the very limited circumstances surrounding this case, Student is entitled to "stay put" at the Guild.

### **ORDER**

For the reasons stated above, the Guild's Motion to Dismiss is DENIED.

Student is entitled to remain at the Guild during the pendency of this dispute.

The Parties shall immediately convene a Team to determine what safety measures are necessary to maintain Student at the Guild until another placement is identified. Framingham shall be responsible for arranging and funding any additional personnel or service deemed necessary by the Parties.

The Parties shall continue to work cooperatively to identify a new residential placement for Student.

By the Hearing Officer,

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Catherine M. Putney-Yaceshyn  
Dated: May 7, 2018