

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

IN RE: DARNELL¹

BSEA #1801959

DECISION

This Decision is issued pursuant to M.G.L. c. 71B and c. 30A, 20 U.S.C. § 1400 *et seq.*, 29 U.S.C. 794, and the regulations promulgated under these statutes. A Hearing was held on June 29 and July 10, 2018 at the Bureau of Special Education Appeals in Boston, MA. Ms. D., the Parent, and exclusive legal guardian, proceeded *pro se*. Silver Lake Regional School District (hereinafter “Silver Lake” or “School”) was represented by Attorney Andrea Bell. The official record of the Hearing consists of: exhibits submitted by the Parent marked P-1-13, P-15-20 and P-22; exhibits submitted by the School marked S-1 through S-28; and approximately 8 hours of recorded oral testimony. The Parties made oral closing statements after completing presentation of evidence and the record closed on July 10, 2018.

ISSUES

- 1) Whether the 2017-2018 IEP proposed by the Silver Lake Regional School District, which calls for a day placement at the New England Center for Children (hereinafter “NECC”) is reasonably calculated to provide the Student with a free appropriate public education?
- 2) If not, is a residential placement at the Cardinal Cushing School the least restrictive appropriate special education program available for the Student?

PARENT POSITION

Darnell has not made sufficient progress in his placement at NECC. He has aggressive episodes at home which cause harm to his Parent and the family dog. He has also had episodes of elopement in the community. The family is no longer able to provide appropriate supervision in the home. He needs a residential placement to meet all his needs. He also needs direct speech/language, physical and occupational therapies as well as a vocationally oriented program. Cardinal Cushing offers all those elements.

¹ “Darnell” is a pseudonym chosen by the Hearing Officer used to protect the privacy of the Student in documents available to the public. “Ms. D.” and “Mr. D. Jr.” are derivative pseudonyms for the Parent and brother respectively.

SCHOOL POSITION

Darnell has made consistent progress in all IEP goal areas in the 15 years he has been attending NECC. He does not display any aggressive or otherwise unsafe behaviors at school. The Parent has not requested additional behaviorally oriented educational services in the home. There is no indication that Darnell needs a residential placement for educational reasons. The School has offered to place Darnell as a day student in the school preferred by the Parent, the Cardinal Cushing School. The Parent has declined.

SUMMARY OF THE EVIDENCE

1. Darnell is a good natured 20 year old resident of the Silver Lake Regional School District. He has Autism Spectrum Disorder, Obsessive-Compulsive Disorder and Language Learning Disorder. Darnell functions in the extremely low range of intellectual performance in all domains. He has no spontaneous social communication and markedly limited receptive/expressive language skills. He does not demonstrate any fluid or abstract reasoning. His adaptive skills fall below the 1st percentile. He shows atypical social interactions and stereotypical self-stimulatory behaviors. (Fahey; Bauman; Young; S-13; S-14; P-2; P-8; P-1, S-20; P-3, S-2; P-4, S-1)

2. Darnell has attended NECC since he was five years old. NECC provides intensive, ABA-based, one-to-one teaching for individuals with autism. All teaching is based on data collected about the student's response to goals set out in the student's IEP and behavioral plans. Each student's educational program is supervised and coordinated by a Board Certified Behavioral Analyst ("BCBA"). Each student's progress is documented in charts, graphs, narrative progress reports and ACE notes. These are formally shared with the Parents during monthly "clinic" meetings among the BCBA, the 1:1 teacher and the Parent, and with the sending school district at Team meetings or on request. (See *eg.* S-12) On-site occupational therapists, physical therapists and speech-language therapists provide evaluation and consultation to student programs. The 1:1 teachers deliver the service, intervention or equipment recommended by the therapist. The NECC program includes two hours weekly of home training. For Darnell, each parent receives the home training service twice per month. (Young)

3. The last accepted IEP for Darnell covered the period December 2016 – December 2017 and called for Darnell to receive all his special education services through a day placement at NECC. (P-4; S-1)

4. Beth Young is a program specialist at NECC who is both licensed to teach students with severe special needs and a BCBA. She has supervised Darnell's participation in the NECC program since 2014. Ms. Young testified that Darnell has made stable and steady progress toward achievement of his IEP goals throughout his tenure at NECC. In particular, during the 2016-2017 school year Darnell met some of his communication objectives and made sufficient progress toward others. (S-7, 9, 10). Darnell has acquired the skills to use an IPAD for

communication repair. He can use it appropriately in all settings. He cannot, however, independently write a sentence, count to 25 or make purchases. (Young)

Ms. Young stated that Darnell does not display aggressive or injurious behavior at school. The BCBA and the 1:1 teacher developed a behavior plan to track and address Darnell's interfering behaviors at school. Though the plan, titled Management and Enforcement Guidelines, lists a history of aggression and bolting, the target behavior for the plan in use for Darnell during the 2016-2017 IEP period was repetitive behavior. Ms. Young explained that repetitive behavior was the only significant concern brought to the Team by the school service providers. According to NECC's data collection during the 2016-2017 IEP period there were no instances of aggression or bolting. The only interfering behavior noted was repetitive behavior. There was a sudden increase in this behavior during June 2017 which corresponded with a medication change. The recorded instances of repetitive behavior returned to baseline in July 2017. The 2017 behavioral chart also notes an isolated spike in the weekly average of repetitive behaviors in mid-October 2017. This spike corresponded with a home report of a sleepless night. (S-11; S-12; S-19; Young)

During the monthly "clinic" meetings between Ms. D. and the NECC Team, Ms. D. reported that Darnell had been aggressive with a family member once in June 2017 and with a family pet once in July 2017. On June 11, 2017 Ms. D. emailed Ms. Young explaining that Darnell had bitten his father. (P-11) Home-school Daily Communication Logs completed between December 2016 and June 2018 indicate: one parental report of aggression toward a home service worker in January 2017 (See also P-11); one parental report of aggression toward the Parent in September 2017 and three similar reports during the latter part of February and early March 2018, a period of time roughly corresponding with school vacation week; two parental reports of aggression toward the family pet, one time each in November and December 2017; and one parental report of untargeted aggression in June 2018. During this time there were no reports of aggression in the school setting. (P-9; S-19; S-25)

Ms. Young testified that Darnell responds well in all settings to the following behavior strategies for interrupting/redirecting problematic behaviors: use of picture/gesture cues; reduced/absent verbal prompts; maintaining/reinforcing schedules; limiting "down" time; limiting time demands. (Young)

5. Throughout the effective period of the 2016-2017 accepted IEP, NECC provided all services outlined in the IEP. (P-4; S-1; Young). During that time Darnell received additional home-based ABA, respite and PCA services funded and implemented by state and private entities. (Mr. D. Jr.; Ms. D.; Erikson; S-15) The Parents terminated home services in December 2017. Neither Silver Lake nor NECC learned of the lack of in-home ABA service until May 2018. (Young, Erikson)

6. In December 2016 the School referred Darnell to the Massachusetts Department of Developmental Services (hereinafter "DDS) for adult services. (P-4; S-1)

7. Leslie Erikson is the Assistant Special Education Administrator for Silver Lake. She has a Master's degree in intensive special education and extensive experience working with and for students with autism. She has been the liaison for Darnell's IEP services and placement since July 2016. Ms. Erikson testified that she received several emails from Ms. D. in spring 2017 asserting that Darnell had been aggressive in the home. Ms. Erikson immediately arranged for a Home Assessment. (Erikson)

8. The Home Assessment was conducted by the Pilgrim Area Collaborative over three non-consecutive days in April 2017. Ms. D. reported that Darnell had episodes of aggressive behavior in the home toward family members or the family pet on average once per week. Ms. D. reported that Darnell needs more supervision and structure in the home than she is able to provide. The assessor did not observe any of the problematic behaviors reported by Ms. D.. She recommended consistent use of visual supports and schedules; regular and scheduled collaboration between home-based service providers, school and Parents, a behavior support plan geared toward the home environment and respite services. The assessor concluded with the advice: should the then current level of home ABA service, 2 hours per day, 4 days per week, be reduced, or Darnell's aggressive behaviors escalate, the Team should reconvene to discuss additional in-home supports. (S-15)

9. Ms. Erikson also arranged for an in-home Functional Behavioral Assessment (hereinafter "FBA"). A BCBA associated with the Pilgrim Area collaborative conducted the FBA over the course of 3 non-consecutive days in July and August 2017. Based on informal and structured interviews with family members and home service providers, the assessor concluded that Darnell's aggressive behavior occurs as a means to access attention. The assessor did not observe any aggressive behavior. Darnell engaged in other interfering behaviors when adult attention was not directed at him. When he had adult attention and/or when provided with a clear visual schedule, Darnell engaged successfully with no problematic behaviors. The assessor recommended use of a visual schedule at all times and in all settings, teaching Darnell a replacement behavior and the introduction of a response cost token economy. (S-16; S-17)

10. The Team met to review the Home Assessment and the Functional Behavioral Assessment on Sept 18, 2017. Ms. D. reported that no aggressive behaviors had occurred since a medication change in July 2017. NECC staff and the home services provider communicated with the goal of sharing information and strategies. The Team concluded that Darnell's then current IEP and day placement at NECC remained appropriate for him. (Erikson; Young; S-18)

11. The Team reconvened on October 16, 2017 for an annual review. The Parent offered an additional assessment, The Supports Intensity Scale completed by DDS as part of its eligibility and planning process. (S-20) The Parent also offered a letter from the BCBA supervisor of the in-home services Darnell received through Southeastern ABA. The BCBA noted that, due to parental reports of increasingly difficult behaviors in the home, additional morning services would be provided. (S-21) None of the assessors recommended a residential educational placement. The Team concluded that Darnell was receiving an appropriate and meaningful education in his day placement at NECC. Silver Lake proposed updated goals and objectives and continued placement at NECC (P-3; S-2; Erikson)

12. On October 27, 2017 Ms. D. rejected portions of the updated goals and objectives and rejected the placement at NECC. She requested a residential placement. Ms. D. testified that Darnell needs 24-hour supervision and that she is no longer able to provide that level of structure and monitoring for him as he is a grown man and she is aging. (P-3; Ms. D.) Ms. D. also testified that Darnell needs direct 1:1 services by an occupational therapist, a physical therapist and a speech-language therapist in order to progress in those skill areas. NECC does not offer 1:1 related services as it uses a consultative model. Ms. D. would also prefer that vocational/transition services be emphasized and that Darnell have ongoing experiences with peers. Ms. D. stated that Cardinal Cushing Academy offers the residential setting and all the services she believes necessary for Darnell. (Ms. D.)

13. In November 2017 Silver Lake offered to place Darnell at the Cardinal Cushing Academy as a day student. Ms. D. declined, asserting that Darnell required a residential placement and that until that is secured he could remain at NECC. As of the Hearing date Silver Lake remains open to a day placement at Cardinal Cushing for Darnell (Erikson)

14. In December 2017 Ms. D. spoke to Margaret Bauman, M.D., a pediatric neurologist with extensive experience in evaluating the medical needs of children and youth with autism. As a result of that conversation Dr. Bauman wrote a letter in support of Ms. D.'s request for a residential placement. She wrote that placement in a residential program at age 19 would provide an excellent transition to adult programming at age 22. She noted that residential placement could be justified on the basis of Darnell's personal safety and the safety of those around him. (Bauman; Ms. D.; P-8)

Dr. Bauman conducted a neurological consultation with Darnell on May 10, 2018. Based on that examination and information provided by Ms. D., Dr. Bauman recommended that Darnell receive direct school-based speech and language therapy, occupational therapy and physical therapy. She also concluded that a recent neuropsychological evaluation conducted by Dr. John Fahey "strongly supports the need for a residential placement". Dr. Bauman had not, at that time, read Dr. Fahey's report. (P-8; Bauman)

15. There are no speech-language, occupational therapy or physical therapy evaluations in the record that recommend the provision of direct services to Darnell. The most recent evaluations recommend that related therapeutic services be provided to Darnell using a consultative model. (S-14)

16. On April 5, 2018 at Ms. D.'s request, Dr. John Fahey conducted a Neuropsychological Evaluation of Darnell. Dr. Fahey had previously evaluated Darnell in September 2013 and April 2016 (See S-13). In general Darnell's performance on all test measures, as well as reports from Ms. D. and Darnell's teachers at NECC, are consistent with the results of earlier evaluations. Darnell has severe Autism and moderate cognitive impairment. Dr. Fahey wrote:

[Darnell]'s neuropsychological profile and his profile of special needs is identical to that determined through evaluations in 2013 and 2016. [Darnell]'s special needs, due to Autism are maximal. In this vein,

recommendations for his education and care will remain largely identical. There is one major departure in my recommendations for [Darnell]. Given his increasing age and the age of his family, as well as his increased size, there is a decreased capacity to manage his special needs and behavior, including aggression at home. I do not see [Darnell] as uncontrollably aggressive at all, but his behavioral issues when present will be increasingly difficult for him and his family to manage. Providing the necessary level of care for [Darnell] is not reasonable for a single family. For this reason, my recommendation is for [Darnell] to be placed in a residential program when he can have 24-hour close supervision from a trained staff. The residential program should be experienced and competent in working with students with Autism and substantial cognitive deficits.

With regard to his education, [Darnell] requires placement with a full-day, substantially separate educational program designed to meet the needs of students with severe Autism. Year-round placement is necessary to prevent regression in his skills. A 1:1 aide will be necessary to ensure [Darnell]'s safety and to guide and reinforce his focus on the task at hand. Multimodal and multisensory teaching techniques, including facilitating devices for communications will be most essential for progress. In particular it will be most important when feasible to apply stimulation of sufficient intensity and interest to [Darnell] to capture his attention. Generally, a focus on functional life skills appears appropriate for [Darnell]. Helping him to communicate verbally or nonverbally his most basic needs will be essential.

As I had recommended previously, ...[Darnell]'s Autism means that he is at constant risk for harming himself accidentally and possibly others or becoming confused or lost outside very familiar circumstances. He will require nonstop vigilance and supervision from concerned adults. This is the rationale for now placing [Darnell] in a residential program.
(P-2)

Dr. Fahey also recommended: occupational therapy and speech/language therapy delivered individually or in a group setting; an ABA-based behavior modification component supervised by a BCBA and implemented consistently in school and community-based settings; vocational training and work experiences; and supportive adult services through DDS. (P-2)

Although none of the information he gleaned from the teachers' input for the Vineland Adaptive Scales indicated that a residential placement was necessary for Darnell, Dr. Fahey testified that, based on information and concerns presented to him by Ms. D., Darnell needs a residential placement now because his size makes it difficult for an aging parent to control him and prevent bolting. (Fahey)

17. On May 21, 2018 the Team reconvened to consider information from Darnell's in-home ABA service provider and the results of the evaluations secured by Ms. D.. At that meeting, Silver Lake and NECC representatives learned that Darnell had not received any ABA home services since December 2017. Silver Lake immediately offered to re-evaluate Darnell's need for home services and to reconvene the Team. Neither the Parents nor NECC reported an increase in interfering behaviors during the six months without an ABA based home service component. (Erikson; Young; Ms. D; P-7,S-24; S-12;P-10; S-11; See also: P-3; S-2 p. 4 of 24) NECC reported continued progress toward achievement of 22 of 23 IEP goals and objectives (P-7, S-24) Finding that Darnell continued to make functional, academic, adaptive and behavioral progress with the services outlined in the last accepted IEP and his day placement at NECC the Team rejected the recommendations of the Parent's evaluators for a residential placement. (P-6; S-26; Erikson; Young; Ms. D.)

LEGAL FRAMEWORK

Once determined to be eligible for special education, a school age child with a disability is entitled to an educational program and related services tailored to her/his unique needs and potential and designed to produce "meaningful educational benefit" and "demonstrable improvement" in the educational, behavioral and personal skills identified as special needs. 34 C.F.R. 300.300(3) (iii); *North Reading School Committee v. BSEA*, 480 F. Supp. 2nd 489 (D. Mass. 2007), citing *Lenn v. Portland School Committee*, 998 F.2nd 1083 (1st Cir. 1993). Whether an educational benefit is "meaningful" must be determined in the context of the individual student's "circumstances" and potential to learn. *Andrew F. v. Douglas County*, 580 U.S. ___, 137 S. Ct. 988 (2017); *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); *Lessard v. Wilton-Lyndeborough Cooperative School District*, 518 F.3d 18 (1st Cir. 2008). A student's goals should be appropriately ambitious... just as advancement from grade to grade is appropriately ambitious for most students in a typical classroom, and be reasonably likely to measurably advance the student toward the goal of increased learning and independence. *Andrew F., supra; D.B. v. Esposito*, 675 F.3d 26 (1st Cir. 2012)

IDEA eligible students are entitled to be educated in the "least restrictive environment", one that offers the greatest amount of integration in and/or exposure to the mainstream of typical school life that is feasible while maintaining appropriate special education services. *Committee of the Town of Burlington v. Dept. of Education Mass*, 471 U.S. 359 (1985).

When evaluating whether a residential placement is appropriate for a particular student, the Hearing Officer must determine whether around-the-clock educational services are necessary to enable the student to make meaningful educational progress in the areas identified as special needs, or whether the challenges a student experiences or presents outside of the school setting are "separable from [the student's] educational problems." *Gonzalez v. Puerto Rico Dept. of Education*, 254 F3d 350, 352-353 (1st Cir. 2001)

In keeping with the IDEA's explicit preference for educating students with disabilities in the least restrictive environment, placement in a residential program is warranted only when the nature or severity of the student's disability is such that the student cannot make meaningful educational progress while remaining at home or in the community. 603 CMR 28.06 (2).

In a due process proceeding to determine whether a school district has offered or provided a free appropriate public education to an IDEA-eligible student the burden of proof is on the party seeking to change the *status quo*. *Schaffer v. Weast*, 546 U.S. 49 (2005). In this matter, the Parent is seeking a change in the *status quo* to a more restrictive placement for the student. Therefore, she bears the burden of proving by a preponderance of the evidence that the 2017-2018 IEP offered by Silver Lake is not reasonably calculated to provide a free appropriate public education to Darnell.

CONCLUSIONS

There is no dispute that Darnell is a student with special learning needs as defined by 20 U.S.C. § 1400 *et seq.* and M.G.L. c. 71B and is thus entitled to receive a free, appropriate public education. The issue for Decision is solely whether the 2017-2018 IEP developed by Silver Lake is reasonably calculated to provide Darnell with a free appropriate public education. After careful consideration of the evidence introduced at the Hearing and the arguments of the Parents and the School, it is my determination that it is. My reasoning follows:

At the outset I note that, apart from limited references in Ms. D.'s testimony, there is no evidence in this record concerning the program(s), services, setting, licenses, staffing, curriculum, etc. of the Cardinal Cushing Academy. Without that information I cannot make a finding that Cardinal Cushing could provide an appropriate special education to Darnell. Therefore I analyze Ms. D.'s challenge to the 2017-2018 IEP as a request for a hypothetical residential program.

First, I find that none of the evidence offered by Ms. D. in support of her argument that Darnell needs a residential educational placement is persuasive. Ms. D. asserts that Darnell has failed to make educational and behavioral progress while placed at NECC. A fair reading of the documents, and the uniform testimony of witnesses with knowledge of Darnell's day-to-day functioning, compel the opposite conclusion. The progress reports from NECC, covering the IEP periods 2016-2017 and 2017-2018 provide detailed information about Darnell's stable progress toward acquisition of skills identified as priority target areas in each year's IEP: English Language Arts, mathematics, social behavior, self-help, motor skills, community and leisure skills and vocational preparation. NECC also provided ongoing assessment and management of behaviors that interfere with, or could present challenges to, Darnell's learning and functioning in school, work and community through behavioral data collection, intervention plans and home training programs. In all areas Darnell's progress is noted. There is no significant evidence of failure to achieve agreed upon objectives, no pattern of over or underachievement, no instances of unexplained regression. There is no evidence that failure to make progress toward the achievement of any IEP goal was reported by any teacher, related service provider, home service provider or evaluator. There was no evidence that any Team meeting entertained a discussion of failure to progress or regression. Ms. Young and Ms.

Erikson, both of whom I found to be thoroughly professional and credible, did not express any concerns about Darnell's participation and placement in NECC. In short, there is simply no persuasive evidence that Darnell is not making effective progress commensurate with his educational potential, nor that he could derive a significant educational benefit from a different, or differently structured, educational program. In particular, I note that Darnell did not demonstrate any regression in behavioral, academic or language skills during the six months he did not receive daily in-home ABA services. This fact lends further support to the conclusion that he is deriving a meaningful educational benefit from his school day length programming at NECC. Ms. D. did not prove otherwise.

Ms. D. also argues that both Dr. Fahey and Dr. Bauman strongly support Darnell's placement in a residential educational program. I disagree. Dr. Fahey and Dr. Bauman were very careful in their evaluation reports and their testimony to limit the reason behind their respective residential placement recommendations to Darnell's need for supervision. Neither said that Darnell needs 24-hour intervention and programming in order to maintain acquired academic, language, social or behavioral skills or to learn necessary new ones. Neither said that Darnell could not make educational progress in the absence of 24-hour educational programming. Neither said that Darnell could not reach his identified educational potential absent 24-hour programming. Neither said that, due to the nature and/or extent of his disability, Darnell could not access or benefit from the day programming at NECC. Instead both identified Darnell's size and age, as well as Ms. D.'s concerns for her capacity to supervise him and for her own safety, as the factors prompting them to make their recommendations for a residential placement. To warrant placement in a residential educational program a student's need for the most intensive, and restrictive, placement must be inextricably linked to the development of attainable, educational skills. Neither Dr. Bauman nor Dr. Fahey suggested such a link. Nor did any other professional working with Darnell. I am constrained to find, therefore, that Ms. D.'s request for placement in a residential educational program is not supported by any expert educator or evaluator in this record. The family's need for supportive, respite or custodial support is real and compelling. It is not, however, a need the IDEA requires a public school district to meet.

Next, in arguing that Darnell's current programming at NECC does not meet his special learning needs Ms. D. contends that Darnell is not receiving appropriate transition and vocational preparation. Ms. Young described Darnell's participation in the vocational activities available at NECC. Progress Reports indicate his growth in identified target areas. There is no evidence in this record that the vocational and transitional services at NECC, or the relevant goals in his IEP, are inappropriate or inadequate for Darnell.

Further, Ms. D. asserts that NECC is inappropriate because it does not provide Darnell with direct individual services in the areas of occupational, physical and speech/language therapy. While Dr. Bauman discussed Darnell's need for this approach to the delivery of related services, the speech/language, physical and occupational therapists who conducted profession-specific evaluations uniformly recommended the consultative model of delivering those therapies to Darnell. There are no speech/language, physical or occupational therapy evaluations in this record that recommend otherwise. NECC provides those related services to Darnell in accordance with a consultative model. There is no evidence that that choice has been

ineffective for Darnell. Therefore, I find that NECC is appropriately implementing a consultative model of delivering speech/language, physical and occupation therapy to Darnell in accordance with expert recommendations and the IEP. I further find that placement at NECC is not inappropriate for Darnell due to its use of the consultative related services model. Finally, I note that, even were there evidence that Darnell needed, or could benefit from, direct related service delivery, those services could be delivered as a replacement or adjunct to NECC's day program and would not, in themselves, require placement in a residential program.

In sum, Ms. D. has not carried her burden of proving that Darnell requires a residential educational placement in order to make meaningful educational progress commensurate with his potential. Nor has she met her burden of proving that Darnell's current placement at NECC has failed to offer him a program of services tailored to his unique needs as identified by expert educational evaluators. There has been no showing that, at any time, Silver Lake failed to properly address Darnell's needs or Ms. D.'s legitimate concerns. Instead Ms. D. persuasively demonstrated the unfortunate gap in supportive services available to the hardworking and vulnerable families the Commonwealth relies on to meet the multifaceted, day-to-day needs of family members with significant disabilities. That we should do better is without question. The how is beyond the scope of the IDEA. It lies with our communities and our legislature.

ORDER

The 2017-2018 IEP developed by Silver Lake which provides for a private day placement at NECC is reasonably calculated to ensure that Darnell receives a free, appropriate public education.

By the Hearing Officer,

Lindsay Byrne
Dated: August 2, 2018