

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

In re: Ric¹

BSEA #: 1809434

DECISION

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

A hearing in the above-entitled matter was held on June 19 and 23, 2018 at Catuogno Court Reporting in Worcester, Massachusetts. The record remained open for written final arguments until August 7, 2018.

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

Parent	
Jaimie March	Director, May Institute
Tracey Davis	Attorney, May Institute
Richard Herron	Van Pool Transportation
Sherrie Stevens	Director of Student Services, Westborough Public Schools
Karen Bunton	Special Education Coordinator, Westborough Public Schools
Matthew MacAvoy	Attorney for Westborough Public Schools
Darlene Coppola	Court Stenographer
Raymond Oliver	Hearing Officer, Bureau of Special Education Appeals

The evidence consisted of Parent Exhibits labelled P-1 through P-38, excluding P-10 and P-11; Westborough Public Schools' Exhibits labelled S-1 and S-38; Westborough Public Schools' Rebuttal Exhibit labelled R-1; and approximately 10 hours of oral testimony.

PROFILE OF STUDENT

Ric is a 10 year old young boy who lives with his Mother in Westborough, Massachusetts. He has been diagnosed with autism, receptive language disorder, verbal apraxia, epilepsy, atoxia and Attention Deficit Hyperactivity Disorder (ADHD). He is minimally verbal. His non-verbal IQ, based upon the Stanford-Binet Intelligence Scale – 5th edition, was within the moderately impaired range, which may not be an accurate representation of his cognitive

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

abilities due to his autism. Ric is highly distractible and exhibits many maladaptive behaviors in the form of aggression – hitting, biting, kicking, and grabbing both staff and peers. Ric also exhibits the behaviors of bolting, flopping and loud vocalizations. He exhibits little to no safety awareness. (See testimony, Mother; Bunton; S-2, 3, 7, 31.)

PROCEDURAL HISTORY / STATEMENT OF THE CASE

Parent and Student moved from Rensselaer, New York to Westborough, MA in June 2016. While living in New York, Ric’s special education Individual Education Program (IEP) specified out of district private day school placements (P-7, 9; S-29). Ric was enrolled in the Westborough Public Schools (WPS) on July 5, 2016. Given Ric’s significant special education needs and out of district New York IEPs, WPS had initiated referrals to private, out of district day school placements in Massachusetts prior to his enrollment in WPS (testimony, Bunton; S-31)².

Ric was accepted and Mother consented to Ric’s placement at the Center for Applied Behavioral Instruction (CABI), a Massachusetts Department of Elementary and Secondary Education (MDESE) approved private day school in late July 2016 (testimony, Bunton; S-31). CABI then conducted a Functional Behavioral Assessment (FBA) of Ric (S-28). On September 26, 2016 WPS developed an IEP for Ric providing for his continued placement at CABI for the 2016-2017 school year (S-27). Ric made appropriate educational and behavioral progress at CABI (S-25; testimony, Bunton). However, Mother became increasingly aggressive and belligerent with both CABI and WPS representatives, alleging abuse of Ric (S-31). On February 15, 2017 Mother unilaterally removed Ric from CABI and refused to allow his return (S-31; testimony Bunton; Stevens). Despite his non-attendance, WPS continued to fund/make available to Ric his CABI program and placement (including the funding for his 1:1 paraprofessional) until September 1, 2017 (S-31; testimony Bunton; Stevens). WPS also sought alternative placements for Ric while contracting with two separate private, specialized autism providers (initially Pridestar Services, followed by Autism Behavioral Solutions (ABS)) to provide him interim behavioral services while Mother kept him out of his accepted CABI placement (S-31; testimony Bunton; Stevens).

On March 31, 2017 Mother filed for a BSEA Hearing against WPS. The issue presented at that BSEA Hearing, which took place over three days in October – November 2017, was whether Student was entitled to compensatory services for the time Mother removed him from CABI in February 2017 until the time he was enrolled in another placement (S-31). On January 29, 2018 BSEA Hearing Officer Catherine Putney-Yaceshyn, in an extensive and detailed 20 page decision, found no basis for determining that either WPS or CABI fell short in meeting their federal or state special education obligations to Student and that there was no basis for

² Mother had met with WPS prior to Ric’s enrollment in WPS (testimony, Mother; Smith; Bunton).

awarding any compensatory education. (See S-31 for **DECISION** in BSEA #1708273 also cited at 24 MSER 46 (2018.))

After numerous referrals by WPS, Ric was accepted for placement at the LABBB Collaborative and, with Mother's consent, began in attendance there on September 1, 2017 (S-1). On September 20, 2017 the IEP team met and developed an IEP for Ric at LABBB for the period of September 20, 2017 to September 19, 2018. This IEP was fully accepted by Mother on October 30, 2017 (P-16; S-2; testimony, Bunton; Mother). At LABBB Ric continued to engage in various aggressive and assaultive behaviors (S-4, 9; P-17). On October 15, 2017 Mother accused LABBB of abusing Ric (S-36; P-17; testimony, Mother; Herron.) On October 16, 2017 LABBB notified WPS of its emergency termination of Ric due to his aggressive and dangerous behaviors (S-4, 5, 9; P-17). WPS requested LABBB to delay Ric's termination to allow time for a team meeting and time to locate an alternative placement but LABBB denied WPS' request (S-6; testimony, Bunton). By October 24, 2017 WPS had arranged for Ric to again receive interim specialized behavioral services from ABS for 5 ½ hours per day, 5 days per week (S-8, 9; P-20; testimony, Bunton; Stevens). By late December 2017, WPS had arranged for Ric to receive his related service of speech language therapy and by early January 2018 for him to receive his related service of occupational therapy, pending location of an appropriate special education program. However, WPS has been unable to identify a physical therapy service provider to provide Ric with his related physical therapy services. (See testimony, Bunton; Stevens; P-30; S-13, 20, 21, 33.)

Upon his termination from LABBB, WPS provided Mother with authorizations to release information to allow WPS to refer Ric to multiple out of district private day school programs. Mother allowed certain referrals but declined consent to some programs proposed by WPS (testimony, Mother; Bunton; Stevens; P-23, 24; S-8, 9, 13, 19, 24). On January 16, 2018 ABS notified WPS that it would not renew its contract with WPS for providing behavioral services to Ric due to the intensity of his aggressive and assaultive behaviors. (See P-21; S-11 for ABS' detailed reasons for its termination of services to Ric.) ABS terminated its services to Ric on January 31, 2018.

On March 26, 2018 Ric was accepted at the May Center (May) in Wilmington, MA with an anticipated start date of April 24, 2018. May is an MDESE approved private day school program specializing in the education of children with autism. May required necessary paperwork to be completed by WPS and Mother before Ric began his program there, including a contract between May and WPS; an IEP Amendment, signed by Parent agreeing to changes in Ric's IEP to conform to the May service delivery model; a signed placement page; signed consent/authorization forms; and various medical forms (See P-25; S-14, 15; testimony, Marsh; Bunton; Mother).

On April 4, 2018 WPS sent Mother a copy of the IEP placement page for May and a copy of the IEP Amendment revised to reflect the May service delivery model, requesting her

consents and a return of these documents to WPS by April 12, 2018 (S-17). On April 13, 2018 Mother returned the IEP placement page accepting the May placement. However, Mother rejected the IEP Amendment owing to May's consultation model of related services delivery; rejected the use of a harness during transportation; requested a meeting to discuss the changes in the IEP Amendment; and requested 30 days to review the IEP Amendment (P-25; S-16; testimony Bunton; Mother). On April 5, 2018 May (Ms. Torenn) notified WPS (Ms. Bunton) that May had received consent forms from Mother and that on the Acknowledgement of Behavior Support, Restraint Prevention and Discipline Policies form Mother had written "he is not to be restrained due to seizures, asthma, and communications disorder." Ms. Torenn wrote that she would be meeting with May's Executive and Clinical Director to discuss next steps and would report back to WPS and Mother (P-25; S-14). On April 12, 2018 Ms. Bunton wrote to Mother regarding all of the outstanding items Mother had not yet signed and/or sent to May (S-17; P-25).

On April 27, 2018 May revoked its acceptance of Ric "based upon the failure of the parent to submit the required documentation in the required time frame." (S-18; P-25; testimony Marsh). Ms. Marsh, May Director, testified at this BSEA hearing that May had revoked its acceptance of Ric based upon Mother's failure to file with May the required documentation including acceptance of the IEP Amendment; consent to May's Behavior Support, Restraint Prevention and Discipline Policies; and numerous required medical forms. (See testimony, Marsh. See also S-17 for specific medical forms/documentation which was not submitted timely to May by Mother.)

WPS then, again, began efforts to locate an alternative special education placement for Ric. WPS continued to provide Ric with his speech-language therapy and occupational therapy related services. WPS has identified two potential interim service providers to provide behavioral services to Ric pending referrals for an alternative, appropriate special education program (testimony, Bunton; Stevens; S-19, 34).

Meanwhile, on April 19, 2018, eight days prior to May's revocation of Ric's acceptance, Mother filed for an expedited hearing before the BSEA and the case was assigned to Hearing Officer Rosa Figueroa. On May 1, 2018, pursuant to WPS' Motion, the Hearing Officer placed this appeal on the regular, non-expedited track. Hearing dates were set for July 11, 12, and 13, 2018. Mother requested an advancement of hearing dates. On May 14, 2018 this case was administratively reassigned to Hearing Officer Raymond Oliver. On May 21, 2018 the hearing dates were advanced to June 19 and June 23, 2018 and this hearing took place on those dates.

STATEMENT OF POSITIONS

Parent's position is that: 1) WPS has denied Ric a free and appropriate public education (FAPE) since his placement at LABBB; 2) WPS has interfered with Ric's placements while denying him FAPE; 3) WPS has jeopardized Ric's safety; 4) WPS has denied Ric FAPE by a lack of progress reports; 5) WPS has denied Ric FAPE because his three year re-evaluations are

already 1 ½ years late. Parent requests that: 1) WPS provide Ric FAPE; 2) sanctions against WPS for discriminating against Ric based upon the behaviors related to his disability; 3) payment for a year's loss of education during 2017-2018; and 4) performance of independent educational and occupational therapy evaluations.

WPS' position is that Parent/Student are not entitled to one year of compensatory services from WPS and that Parent is not entitled to payment for any compensatory services that may be owed to Student. WPS does not dispute that Student is entitled to compensatory physical therapy services. WPS does not dispute that Student is entitled to compensatory speech-language therapy services and occupational therapy services that could not be immediately delivered following his emergency termination from LABBB. WPS states that such compensatory services will be delivered directly to Student and not as monetary compensation to Parent. WPS acknowledges that due to the emergency termination from LABBB, with whom WPS contracted to perform Student's three year re-evaluations, it has been unable to complete such evaluations. WPS contends that appropriate and comprehensive evaluations of Student cannot be conducted until he returns to an appropriate special education placement. WPS agrees to fund, pursuant to applicable state rates, Parent's requested independent educational and occupational therapy evaluations. WPS denies that it has denied Student FAPE or that it has discriminated against Student on the basis of his disability.

FINDINGS AND CONCLUSIONS

It is undisputed by the parties and confirmed by the evidence presented that Ric is a student with special education needs as defined under state and federal statutes and regulations. The fundamental issues in dispute are delineated under **STATEMENT OF POSITIONS**, above.

Pursuant to *Schaffer v. Weast* 126 S. Ct. 528 (2005) the United States Supreme Court has placed the burden of proof in special education administrative hearings upon the party seeking relief. Therefore, in the instant case, Parent bears the burden of proof in demonstrating that her allegations against WPS are founded and, if so, that her requests for relief are appropriate.

Based upon two full days of oral testimony, the extensive documentation introduced into evidence, and a review of the applicable law, I conclude that since Ric's placement at LABBB in September 2017 WPS has provided him with FAPE to the extent that circumstances have permitted and to the extent Mother has allowed them to do so. I find no evidence that WPS has interfered with Ric's placements or jeopardized his safety. I further conclude that in those areas WPS has been unable to provide services to Ric it admits same and is prepared to offer him compensatory services in said areas.

My analysis follows.

I.

Mother requests payment for a year's loss of education during 2017-2018 as well as sanctions against WPS for discriminating against Ric based upon behaviors related to his disabilities.

As stated above, BSEA Hearings are conducted pursuant to state (M.G.L.c. 71B) and federal (20 U.S.C. §1400 et seq.) special education law; Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794); and the regulations promulgated pursuant to these statutes. None of the above statutes or regulations grants a BSEA Hearing Officer the authority to order a school to pay a parent monetary damages for an alleged year's loss of education or to order sanctions against a school for an alleged violation of FAPE. See *Nieves-Marques v. Puerto Rico*, 353 F. 3d 108 (1st Cir 2003); *Frazier v. Fairhaven School Committee* 276 F. 3d 52 1st Cir. (2002). Quoting *Frazier* "the array of remedies under the IDEA does not include money damages" 276 F. 3d at 57. If warranted a hearing officer may order the school to place a student at an appropriate placement requested by the parent; reimburse a parent for a unilateral placement; order a school to locate or create an appropriate placement; order a school to provide certain special education services; or order a school to reimburse a parent for providing such necessary services. However, the hearing officer has no authority to award a parent monetary damages or to levy sanctions against a school.

II.

Ric was accepted at LABBB and Mother accepted the LABBB placement on August 21, 2017 (P-17; S-2). Ric attended LABBB from September 1, 2017 and was provided special education and related services until his emergency termination from LABBB on October 16, 2017 (P-17; S-5). Mother formally accepted the IEP placing Ric at LABBB on October 20, 2017 – four days after his emergency termination by LABBB (P-17; S-2).³

Based upon the above I find no basis to award any compensatory services for the time period Ric attended LABBB.

III.

The evidence demonstrates that upon Ric's emergency termination from LABBB,, WPS immediately began efforts to provide services to him and to make referrals to appropriate out of district day school placements. Within 10 days of Ric's termination at LABBB WPS had arranged for him to receive interim specialized behavioral services for 5 ½ hours per day, 5 days

³ Mother alleges abuse of Ric by LABBB personnel in assisting him off of his transportation vehicle from Van Pool upon his arrival at LABBB in early October 2017 (testimony, Mother; Herron). However, such testimony is rebutted by the reports from LABBB (S-4). Further, such incident was screened out by the Massachusetts Department of Children and Families (P-17; testimony, Bunton). Finally, Mother's formal acceptance of Ric's LABBB IEP four days after his emergency termination at LABBB and 5-7 days after the alleged incidents of abuse demonstrates Mother's acceptance of the appropriateness of the LABBB placement for Ric.

per week from ABS, which services remained in place until ABS terminated him on January 31, 2018. By late December 2017, the related service of speech-language therapy was being provided and by early January 2018 the related service of occupational therapy was also being provided. (See **HISTORY/STATEMENT OF THE CASE**, above.) Despite the 6 months delay in finding Ric a new special education program at LABBB after Mother unilaterally removed him from CABI, Mother initially consented to / allowed WPS to make only three referrals to alternate private placements after Ric's termination at LABBB (P-18, 23; S-9, 33), all of which rejected Ric. WPS continued to propose additional referrals to Mother and over time Mother consented to further referrals. (See testimony, Bunton; Mother; P-23; S-33). Mother authorized a referral to May on February 17, 2018 (P-24). On March 26, 2018 May accepted him (P-25; S-15).

Based upon the above, I conclude that over the five-month period after Ric's termination at LABBB until his acceptance at May, WPS used its best efforts to locate and secure an alternative placement for him. With some time gaps, to be addressed below, WPS was able to secure behavioral services and the related services of speech-language therapy and occupational therapy. WPS sent referrals to alternative placements as soon as they could get Mother to consent to such referrals (See detailed testimony of Ms. Bunton). I find no evidence that WPS either denied Ric FAPE during this time period or interfered with his placement. The constellation of Ric's multiple special education needs, including his maladaptive and aggressive behaviors, made him an extremely difficult student to place. I specifically note Ms. Bunton's testimony that WPS sent out and was monitoring approximately 30 referrals or re-referrals for Ric before he was accepted at May. (See testimony, Bunton; Stevens; S-8, 9, 13, 19, 20, 21, 24, 33.)

May accepted Ric on March 26, 2018 with a start date of April 25, 2018. During this one month time period various things needed to occur in order for Ric to begin attending May, including Parental acceptance of an IEP Amendment which modified the delivery of some related services to conform to the May model of service delivery; acceptance/acknowledgement of certain May forms and policies; and submission of required medical documents. In response, Mother: 1) Rejected the IEP Amendment; 2) Specifically did not consent to/objected to May's behavioral/restraint policies; and 3) did not return to required medical forms within the required time frame. On April 27, 2018 May revoked Ric's acceptance. (See **HISTORY/STATEMENT OF THE CASE**, above; testimony, Bunton; Marsh; Stevens; Mother.)

I conclude that, but for Mother's actions, Rick would currently be enrolled at May receiving FAPE (see testimony, Marsh). I find that WPS offered Ric an appropriate special education placement at May, but Mother obstructed the implementation of said May placement. Hence, any interference with implementation of the May placement was attributable not to WPS, but to Mother. Compensatory relief is an equitable remedy. Mother's obstruction of Ric's placement at May, despite the complete unavailability of any other appropriate placement for him, precludes any award of compensatory services for the time period from the time that he

would have and should have been enrolled at May, to wit: late April 2018 forward. (See *C.G. ex rel. A.S. v Five Town Community School District* 513 F. 3d 279, (1st Cir 2008)).

IV.

WPS acknowledges: 1) that since Ric's LABBB termination it has been unable to find a provider to implement his physical therapy related services; and 2) that WPS owes Ric compensatory services for all physical therapy services which have not been provided. Similarly, WPS acknowledges: 1) that there was a time gap between Ric's LABBB termination and the provision of both his related services in speech-language therapy and occupational therapy; and 2) that WPS owes Ric compensatory services for such time periods when these therapies were not provided. (See **STATEMENT/HISTORY OF THE CASE**, above; WPS' position, above; testimony, Bunton; Stevens; S-20, 21.) Indeed, S-20 and S-21 reflect, in painstaking detail, the areas/time periods for which compensatory services are owed by WPS. (See also P-28, 30; testimony Bunton; Stevens). I conclude that this issue is moot.

V.

Mother asserts that Ric's three year reevaluation is past due and that WPS should perform such evaluation. WPS obtained Parental consent to reevaluate Ric upon his enrollment at LABBB (S-9; testimony, Bunton) and WPS contracted with LABBB to perform such reevaluation (S-7). However, due to Ric's termination from LABBB only six weeks after he began there, LABBB was unable to complete such evaluation (S-7, 9; testimony, Bunton). The educational professionals who worked with Rick believe that he should be in an appropriate special education program prior to such assessments being conducted, to ensure the accuracy of the evaluation (testimony, Bunton; Stevens). Ric's placement at May in April 2018 would have allowed such evaluation to be performed. WPS agrees to have Ric's three year reevaluation performed upon his placement in an appropriate special education program.

I find WPS' position to be educationally sound for a student with Ric's multiple disabilities and current educational status. However, if Ric has not been educationally placed within the next three months, WPS should arrange for his three-year reevaluation to take place, if only to re-establish a floor/baseline of his current skill levels.

VI.

Mother requests performance of an independent educational evaluation and an independent occupational therapy evaluation of Ric. WPS has already agreed to fund Parent's chosen independent evaluation in these two areas, subject to state approved rates for such independent evaluations (testimony, Bunton). I can order nothing more than WPS has already agreed to do. This issue is moot. Mother should refer her selected independent evaluators to WPS to make the necessary arrangements for such independent evaluations to occur.

VII.

Mother alleges denial of FAPE because of a lack of progress reports. The record reflects that progress reports were performed at CABI until Mother stopped sending Ric there (S-31). The record also reflects a LABBB Discharge Summary written on November 2, 2017 (S-7), which provides summaries of Ric's progress, or lack thereof, in the areas of behavior, education, speech language therapy, occupational therapy and physical therapy. The Discharge Summary, after noting that his three year reevaluation could not be completed due to his abbreviated time there and the frequency of his interfering behaviors, states:

The above summaries provide information that was gathered during [Ric's] time at LABBB, both through various assessment methods, as well as his general performance while in the LABBB program. (See S-7 for complete Discharge Summary).

Given the revocation of his acceptance at May, Ric has not been in a special education program since his termination at LABBB. Thus, no further progress reports could have been generated.

VIII.

Mother testified that, given Ric's placement situation, WPS should arrange to provide services to him in-district. However, such a scenario would result in Ric, alone, with a teacher, 1:1 aide, and various therapists (testimony, Bunton; Stevens). I find that such a situation would be extremely restrictive to Ric, the very antithesis of the mandates of state and federal special education law. Further, Ric's out-of-state placements prior to Mother's move to WPS were all private out of district placements, demonstrating that these out-of-state school districts adjudged Ric's special education needs in precisely the same manner as WPS. The regulatory scheme of state and federal special education law is designed to provide highly specialized private day or residential school placements to address the significant needs of low incident special education students, such as Ric, whose needs are so severe that they cannot be addressed within a public school environment. The fact that: 1) Ric's last three specialized private day school placements have resulted in Parental withdrawal, termination, and revocation respectively; 2) Ric has been rejected at close to thirty specialized private day school placements (and even terminated at ABS) since moving to WPS, demonstrate the complexity and intensity of his maladaptive behaviors and other special education needs. I conclude that Mother's proposed "solution" is not a solution and, given the difficult relationship between Mother and WPS, would likely serve to further obstruct WPS' attempts to place Ric in an appropriate special education program.

I strongly encourage Mother to work in a cooperative manner with WPS in its efforts to obtain an appropriate special education placement for Ric. Mother testified that Ric has been without a special education placement for an extended period of time. However, but for Mother's actions, Ric would still be at CABI or currently enrolled in May.

ORDER

1. WPS has, to the extent possible, provided Ric with FAPE.
2. WPS has not interfered with Ric's placements or jeopardized Ric's safety.
3. As acknowledged by WPS, WPS owes compensatory services to Ric for his physical therapy related services.
4. As acknowledged by WPS, WPS owes compensatory services to Ric for the finite periods of time it was unable to provide him with his related services of speech-language therapy and occupational therapy.

By the Hearing Officer:

Raymond Oliver

Dated: August 30, 2018