

# COMMONWEALTH OF MASSACHUSETTS

## Division of Administrative Law Appeals

### Bureau of Special Education Appeals

In re: Roy<sup>1</sup>

BSEA #: 1900585

#### 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 September 4, 7 & 12, 2018 at the Nauset Regional School District Administration Building in Orleans, MA. The record remained open for written final arguments until October 15, 2018.

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

Ann Caretti	Director of Student Services, Nauset Regional School District
Amanda Citrone	School Psychologist, Nauset
Mae Timmons	Speech-Language Pathologist, Nauset
Simone Byrne	BCBA Consultant, Nauset
Jessica Everett	Licensed Psychologist / Behavioral Analyst
Christine Caputo	Assistant Director, Cape Code Collaborative
Mary Joann Reedy	Attorney for Nauset
Mother	
Father	
Carol Balstad	Outpatient Therapist
Michael Turner	Attorney for Parents
Jane Williamson	Court Stenographer
Raymond Oliver	Hearing Officer, Bureau of Special Education Appeals

The evidence consisted of Nauset's Exhibits labelled S-1 through S-16; Parents' Exhibits labelled P-1 through P-6; and approximately 11 hours of oral testimony. By Agreement of the Parties, along with their written final arguments, Nauset and Parents filed a Joint Stipulation of Facts (SOF) which is incorporated into the record.

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<sup>1</sup> Roy is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in publicly available documents.

## STATEMENT OF THE CASE

Roy is a 17 year old young man who resides with his family in Brewster, MA. Brewster is a member of the Nauset Regional School District (Nauset) for middle school and high school. Roy is beginning his senior year at Nauset High School. As of the date of hearing he had not passed his MCAS exams in math and science and will not graduate at the end of the 2018-2019 school year. (See SOF.)

Roy has been a special education student with an Individual Education Program (IEP) since pre-school. Given Roy's complex disabilities and educational profile, he requires primarily small group and individual services to provide him with the support and structure he needs in order to make educational progress. Over the years Roy's special education programs have been substantially separate special education placements, with limited inclusion in mainstream classes.

In 2015, when Roy entered Nauset High School (NHS) for 9<sup>th</sup> grade, he was placed in Nauset's Independent Learning Program (ILP) which essentially provided substantially separate special education classes for all academic classes with mainstreaming for non-academic and elective classes.<sup>2</sup> Roy remained in the ILP for his 10<sup>th</sup> grade year at NHS. When Roy began his junior year (11<sup>th</sup> grade) at NHS, all other upper class ILP students had moved into education inclusion programs, and the ILP consisted of all 9<sup>th</sup> grade students and ILP courses classes which Roy had already completed. Given that the ILP was no longer a viable option for Roy, and Mother's wishes that Roy participate more in education inclusion classes, Nauset proposed providing Roy with 1:1 support in all mainstream classes, as well as an academic support class with the goal that Roy could remain at NHS and participate in grade appropriate curriculum with peers. Nauset also proposed a vocational exploration class. Mother accepted this IEP Amendment on November 1, 2017, with the exception of the vocational exploration class which she rejected. (See testimony Citrone; Timmons; Byrne; Mother; S-5, 6, 8, 9, 11, 12.)

In January 2018, the team reconvened to review the efficacy of Roy's IEP. Nauset staff was unanimous that the program and placement at NHS promulgated in the IEP was not appropriate to address Roy's special education needs. As a result, an out-of-district placement was proposed, but rejected by Parents (testimony, Citrone; Timmons; Byrne; Mother; S-5). Nauset then proposed, and Parents accepted, an updated neuropsychological evaluation which was performed by Dr. Everett (of Melmark) in March-April 2018. Dr. Everett recommended Roy's placement in an intensive, alternative, therapeutic program (S-3; P-6; testimony Everett). At a June 6, 2018 team meeting Nauset again recommended an out-of-district placement (S-2) as originally recommended in January 2018.

On July 16, 2018 Nauset requested a hearing before the BSEA. On August 7, 2018 a pre-hearing conference took place but resolution was not possible and a hearing was scheduled for August 21, September 4 and September 7, 2018. Due to a parental accident, the hearing was re-scheduled to September 4, 7, and 12, 2018 and took place on those dates.

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<sup>2</sup> Roy had also been in the ILP while at Nauset Middle School.

## **ISSUES IN DISPUTE**

- 1) Does Roy require an out-of-district placement in order to appropriately address his special education needs so as to provide him with a free and appropriate public education (FAPE) in the least restrictive educational environment (LRE)?
- 2) If not, is Roy's current placement at NHS appropriate to address his special education needs so as to provide him with FAPE in the LRE?

## **STATEMENT OF POSITIONS**

Nauset's position is that Roy's current placement at NHS is inappropriate to address his special education needs so as to provide him with FAPE in the LRE. Nauset contends that Roy requires an out-of-district intensive program in order to receive FAPE. Nauset proposes that Roy be educated at the Wayside Program located in Sandwich, MA.

Parents' position is that Roy should be allowed to have his "senior year" at NHS and that his special education needs should continue to be addressed at NHS where he can participate in the extracurricular activities of varsity tennis and mountain biking club.

## **PROFILE OF STUDENT**

Roy has been extensively evaluated. Nauset referred him for a neuropsychological evaluation in April 2015 when he was completing 8<sup>th</sup> grade, which was performed by Jessica Garagosian of NESCA (S-14; P-4). Dr. Garagosian found:

Overall [Roy] is presenting with an atypical neurodevelopmental profile that is quite complex and features significant cognitive, language, attention and behavioral challenges. The findings of the current evaluation are consistent with previous diagnoses of Autism Spectrum Disorder and Attention Deficit Hyperactivity Disorder. His current academic, social, and behavioral challenges should be examined in the context of all of these diagnoses.

[Roy's] language is an area of significant weakness. Reports from school and home suggest that [Roy] has great difficulty both understanding complex directions and expressing himself appropriately... This language deficit, along with poor problem solving, will likely result in continued behavioral problems without additional support and structure.

[Roy] continues to exhibit a profile consistent with Autism Spectrum Disorder (DSM-5: 299.00). From a social communication perspective [Roy] appears to be a complex individual who is likely to appear more capable than he truly is with regard to navigating

interpersonal interactions and understanding and complying with boundaries of social expectations.

[Roy's] overall functioning, including his social functioning, appears to be chronically impacted by significant difficulty regulating his attention and activity level, and subsequently engaging in inappropriate problem solving and behavioral regulation. While these deficits are not uncommon in children diagnosed with ASD, his issues are severe enough to be addressed separately and meet full criteria for a diagnosis of Attention Deficit Hyperactivity Disorder, Combined Type (DSM-5: 314.01]

[Roy] also displayed significant difficulties with executive function processes, or those skills needed to manage complex information...

Emotionally, [Roy] is vulnerable to be depressed and anxious due to low self-esteem. [Roy's] lack of social success further contributes to his emotional vulnerabilities.

[Roy] is at risk for worsening academic, behavioral and social functioning. His difficulties with accurately interpreting social communications place him at risk of acting in a way that violates social expectations. His problems with word retrieval and language processing make it difficult for him to participate in social conversations, and his problems with grasping more abstract concepts means that he will struggle to understand the same sophisticated language of many of his peers. His poor attention increases the probability of missing important information and his challenge with problem solving make it quite difficult to manage important tasks and handle himself in unstructured situations. He will need a high level of external structure, support, and monitoring in order to make effective progress...

Dr. Garagosian concluded: 1) Roy continued to require intensive education services and interventions to address his disabilities; 2) that due to his high level of individualized need a substantially separate, highly structured classroom with a high staff to student ratio was imperative; and 3) that Roy was unable to participate in mainstream classes and activities because he was not able to regulate his behavior with the inherent reduction in supervision and structure outside of his ILP setting.

(See S-14; P-6 for complete Garagosian evaluation and recommendations.)

A Functional Behavioral Assessment (FBA) was performed between March – June 2015 by Simone Byrne, MA, BCBA, and several Behavior Support Plans (BSPs) have been implemented targeting the behaviors of compliance, interactions with adults, appropriate social approach and use of electronics. (See S-13 for FBA & BPSs; testimony, Byrne.)

A speech-language evaluation was performed over 4 days in September 2016 by speech-language pathologist Mae Timmons MS/CCC (S-10). In her summary, Ms. Timmons concluded:

[Roy] has a significant discrepancy between his stronger expressive language ability and his much weaker ability to comprehend spoken language, which can place him at risk

within social contexts. In addition, results of both the Test of Pragmatic Language, the CELF-4 Pragmatic Profile and use of the Social Communications Profile... indicate that [Roy] has a very significant communication disorder and that he is functioning at the level of Challenged Social Communicator... [Roy] will require continued significant support and supervision for social skills development.

Ms. Timmons recommended a structured language program focusing on intervention and compensation for both expressive and receptive language deficits, individual social coaching to build self-awareness and understanding of his own and others social thoughts, and a once weekly social skills group with no more than 2 peers.

(See S-10A for complete evaluation and recommendations; testimony, Timmons.)

Also in September 2016, School Psychologist Amanda Citrone M.Ed, CAGS administered an educational evaluation. On the Wechsler Individual Achievement Test – 3<sup>rd</sup> Edition (WIAT-III) Roy scored below average in the following areas; Total Reading (5<sup>th</sup> percentile); Reading Comprehension (2<sup>nd</sup> percentile) Written Expression (4<sup>th</sup> percentile) and Total Math (5<sup>th</sup> percentile). (See S-10 B for complete education evaluation; testimony, Citrone.)

Nauset also funded an independent Diagnostic Evaluation by Psychologist Paul Lapuc in May 2017 (S-7; P-5). While Dr. Lapuc diagnosed Roy with ASD and ADHD, he also found that:

[Roy] meets the criteria for Oppositional Defiant Behavior Disorder. He continues to have difficulty in identifying with others and empathizing with others. His reactive, offensive words and actions are his way of trying to insure self-preservation, avoid situations, and get attention. They keep others at a distance. They minimize his having to look at his own actions and words in a given situation. In short, being offensive is a good defense. Although he is capable of presenting in a positive, respectful and reserved manner, his characteristic unpredictability, impulsiveness, resentment and moodiness becomes manifest when he is stressed. The resulting behaviors generate negative reactions from others. He continues to have difficulty having any degree of insight into how his actions create stress, uncertainty, and negativism from those who are exposed to them.

Dr. Lapuc's recommendations included medication as an integral part of his treatment; ongoing therapy to teach him social coping strategies and social awareness; and social coaching. Dr. Lapuc also specified:

At home and at school it is essential to intervene at the point of performance. This means shaping social skills by responding at the points in time where undesirable and/or unacceptable behaviors occur, i.e., in the classroom, outside of classroom, transitional times, etc. Immediacy of reinforcement is the key to his understanding of and learning how to operate socially. There is a need to externalize the source of motivation for [Roy.]

(See S-7; P-5 for Dr. Lapuc's complete evaluation and recommendations.)

Finally, Nauset funded an updated, independent neuropsychological evaluation which was performed in late March 2018 and completed in April 2018 by Jessica Everett Ph.D. BCBA, licensed psychologist and behavior analyst from Melmark (S-3; P-6). Dr. Everett found Roy to present with verbal comprehension skills in the very low range; limited cognitive flexibility and self-monitoring, which impacts both his planning and organization and his ability to regulate his own behavior and emotions; and difficulty with the executive functioning tasks of emotional and behavioral regulation across school and home settings.

Dr. Everett continued in her summary;

[Roy] continues to be significantly impacted by symptoms of ADHD including difficulty with sustaining attention, impulsivity, and poor attention to detail. These difficulties impact his functioning in both academic and non-academic settings. His ability to recognize emotional states in others is weak and paired with his difficulty in cognitive flexibility it is likely that [Roy] will continue to struggle with adjusting his behavior to meet the expectations of others.

[Roy] is demonstrating adaptive skills that are low compared to same age peers. His communication skills are low across school and home while his daily living skills are in the low average range at home and the very low range at school. Socialization skills are rated as low at home and very low in school. [Roy's] social communication skills are also an area of weakness. While [Roy] experiences difficulty in social awareness and social communication, he does not show any limitations in social motivation. Thus, [Roy] has a high likelihood of social misunderstandings which may have varying degrees of consequences for him. As [Roy] does not possess adequate self-monitoring skills, it is likely that he will not be aware of social missteps as they are happening. This, paired with the belief that the 'rules don't apply to me', put him at significant risk for behavioral difficulties in home, school, and community settings.

As noted in previous assessments, [Roy] presents with a complex profile. His ability to verbally reason and problem solve is significantly lower than his other cognitive skills. As a result, [Roy] presents as having higher language capacity than he actually has. [Roy] also has a desire to 'fit in' and is resistant to receiving help that may make him look different from peers. Consistent with his diagnosis of ASD, [Roy] has significant difficulty being flexible and monitoring his own behavior. While his externalizing behaviors are more prevalent, he also presents with internalized behaviors (e.g., depression, withdrawal), particularly within the school environment where he struggles more with adaptive behavior. [Roy] has experienced behavioral issues at home and school but does not appear to have the emotion regulation skills to effectively manage his own behavior and external supports such as environmental limitations (e.g., monitoring of devices) and one to one support are needed. Currently, [Roy] is in an educational setting where the behavioral expectations set for him are not the same as the ones that other students follow. This is likely confusing for [Roy] and contributes to behavioral difficulties. Diagnostically, [Roy] continues to meet diagnostic criteria for autism spectrum disorder, level 1 – requiring support (F84.0), attention deficit hyperactivity disorder, combined type (F90.2), and oppositional defiant disorder (F91.3). Though [sic]

it is important to understand the behavioral features of opposition defiant disorder within the context of autism spectrum disorder. For example, [Roy's] tendency to blame others may be rooted in social perception weaknesses, and arguing with authority figures may be the result of adherence to routines and fixed, rigid thinking patterns. [Roy's] profile is also supportive of an unspecified communication disorder (F80.9) [Roy] presents with a variety of strengths and weaknesses. At the current time, his biggest challenge may be his reluctance to engage with the supports that are available to him to learn skills and strategies that will help build on his weaknesses and ensure his success as an adult.

Dr. Everett supplemented her testing with an observation of Roy in his classes at NHS. She specifically found that Roy's current educational program and services were not meeting his needs academically, socially, behaviorally, or emotionally and that it was critical for Roy to develop the social, behavioral and emotional skills which he will require as an adult. Dr. Everett recommended an alternative educational program for Roy which included the following components: 1) small class size with peers having similar learning and behavioral problems; 2) a high teacher to student ratio; 3) consistency between behavioral expectations for Roy and other students; 4) structured, organized classes with direct, specialized instruction in all academic subjects; 5) an embedded social pragmatics curriculum; 6) a functional approach to behavior with positive behavior supports integrated within the program; 7) a therapeutic, supportive environment where Roy can align with teachers rather than view them as authority figures who are working against him.

(See S-3; P-6 for complete neuropsychological evaluation; see also testimony, Everett.)

## **SCHOOL'S PROPOSED PROGRAM**

Nauset proposes that Roy be placed at Waypoint Academy (Waypoint), an out-of-district placement located at the Wing School in Sandwich, MA. Waypoint is a program of the Cape Cod Collaborative, a special education collaborative of Cape Cod towns which provides programs for students with low incidence disabilities that cannot be provided within individual school districts.

The high school component of Waypoint serves a population which currently consists of 36 students, 9 of whom (4 girls and 5 boys)<sup>3</sup> are in the 12<sup>th</sup> grade. Most students are diagnosed with ADHD, with significant struggles in executive functioning, planning, coordination and organization. Many students have social-emotional impairments. Several students are diagnosed with Autism Spectrum Disorder. Several are diagnosed with Oppositional Defiant Disorder. Some students have dual diagnose, i.e., ADHD/ASD. The student to staff ration is 3:1, with six high school teachers and ten teaching assistants. Teachers are either in special education, specific subject matter, or hold dual certification. There are two school adjustment counselors/social workers who provide therapeutic counseling services to students and ongoing daily support throughout the milieu.

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<sup>3</sup>There is a total of 17 females and 19 males at the high school level.

Waypoint's overall behavioral approach utilizes an evaluation/points system which is a tiered based system with five levels, 5 being the highest level. Based upon their behavioral presentation and goal attainment, students progress from level to level with each higher level representing a decrease in the level of supervision and an increase in student privileges. There are both general schoolwide behaviors/goals and specific student behavior/goals which are addressed. Waypoint is a therapeutic environment with a consistency of approach, therapeutic supports, social skills supports and visual supports embedded throughout the program. Transitional planning, vocational exploration and vocational programming are also incorporated into the program. Students can attend Waypoint until age 22.

Waypoint's school day runs from 7:15AM to 1:45PM. Some Waypoint students play sports for their sending town teams.

Based upon Nauset's referral packet and Roy's two visits to its school, Waypoint has accepted Roy and believes its program is a good fit to address his special education needs.

(See testimony, Christine Caputo, Assistant Director, Cape Cod Collaborative; S-1, 16.)

## **PARENTS' PROPOSED PROGRAM**

Parents propose that Roy continue under his last agreed upon IEP at NHS for his 12<sup>th</sup> grade senior year. Under this IEP (P-1; S-5) Roy was mainstreamed into general education classes, with a 1:1 aide assisting him/shadowing him at all times. Roy also had a special education academic support class every other day for 1½ hours and a speech-language or communications class, which averaged out to ½ hour per day. Vocational services were offered but rejected and extended year services were not accessed.

(See P-1, S-2, 5; testimony, Citrone; Timmons; Byrne; Mother.)

## **FINDINGS AND CONCLUSIONS**

It is undisputed by the parties and confirmed by the evidence presented that Roy is a student with special education needs as defined under state and federal statutes and regulations. The fundamental issues in dispute are listed under **ISSUES IN DISPUTE**, above. It is also undisputed that Roy had not passed his MCAS exams in math and science and will not graduate at the end of the 2018-2019 school year. (See SOF.)

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, Nauset bears the burden of proof in demonstrating that continued placement at NHS is not appropriate to provide Roy FAPE in the LRE; and that placement of Roy at Waypoint is appropriate to provide him FAPE in the LRE.

Based upon 2½ days of oral testimony, the extensive exhibits introduced into evidence, and a review of the applicable law, I conclude that Roy's continued placement at NHS is not appropriate to provide him FAPE in the LRE. I conclude that Roy's specific constellation of special education needs necessitate his placement in an out of district placement and that Waypoint would provide him FAPE in the LRE.

My analysis follows.

The evidence amply demonstrates that Roy has multiple, longstanding, significant disabilities including Autism Spectrum Disorder (ASD), Attention Deficit Hyperactivity Disorder (ADHD), and Oppositional Defiant Behavior Disorder (ODD). He also has both a receptive and expressive language disorder and a significant communications disorder, functioning at the level of a challenged social communicator. He has significant verbal processing and problem solving skill deficits, major difficulties with executive functioning processes, significant attentional, emotional, and behavioral regulation skill issues across both school and home settings, and poor adaptive/social skills (See **PROFILE OF STUDENT**, above; testimony, Everett; Timmons; Byrne.) In sum, Roy exhibits significant cognitive, language, social and behavioral disabilities which interact with each other to present a complex neurodevelopmental and educational profile.

The evaluations of Dr. Garagosian, Dr. Lapuc, and Dr. Everett all demonstrate Roy's need for a substantially separate special education placement where his academic, language and attentional needs can be systematically and comprehensively addressed in all classes, and where necessary school and behavioral interventions can occur immediately at the point of performance. I place substantial weight upon these three evaluations which have all been performed by independent neuropsychologists/ clinical psychologists over an extended three year time period (from the end of Roy's 8<sup>th</sup> grade school year to the end of his 11<sup>th</sup> grade school year).

Further, the testimony of Nauset professionals Ms. Timmons, Ms. Byrne and Ms. Citrone was unanimous that Roy was unable to progress in mainstreamed, classes at NHS, even with the support of a 1:1 aide throughout the day in conjunction with academic support periods. Again, I place substantial weight upon the testimony of the speech-language therapist Timmons and board certified behaviorist Byrne who have both worked with Roy over an extended three year period at Nauset (from the end of 8<sup>th</sup> to the end of 11<sup>th</sup> grade). (See testimony, Timmons; Byrne; Citrone.)

Nauset's exhibits and the testimony of Nauset's witnesses is essentially un rebutted. Parents have submitted no expert testimony or exhibits which support their position that Roy's current NHS placement appropriately address his special education needs so as to provide him with FAPE.<sup>4</sup> While I empathize with Parents' desire for Roy to remain in his home school community and participate seamlessly in the extracurricular activities of varsity tennis and mountain biking club, I cannot let such factors undermine Roy's right to receive FAPE.

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<sup>4</sup> Roy's therapist, Ms. Balstad, testified regarding her therapy with Roy but did not address appropriate special education programming for him.

Mother testified that Roy did not get along with his 1:1 aide last year and that a change in aides would address the problem. Based upon the vast preponderance of the evidence presented, I conclude that the fundamental reality is that the programmatic model of an inclusion program, even with a full time 1:1 aide and an academic support class simply does not work for Roy, given his multiple, serious, complex disabilities delineated above. Indeed, the testimony and report of Dr. Everett and the testimony of Ms. Timmons and Ms. Byrne (and even that of Mother) clearly illustrate that Roy experiences significant difficulty being treated differently from his peers. Yet that is exactly what his current programmatic model provides – Roy, at age 17 has a 1:1 aide with him in all classes and is subject to a different set of criteria and academic, social and behavioral rules than anyone else in his mainstream classes. Given such a situation it is hardly surprising that Roy believes that “The rules don’t apply to me.”<sup>5</sup>

I conclude that Roy’s placement at Waypoint would address the concerns and recommendations expressed in the testimony and/or evaluations of Dr. Everett, Dr. Garagosian, Dr. Lapuc, Ms. Timmons and Ms. Byrne. Waypoint is a small group, intensive, special education alternative program where Roy would receive the academic, attentional, behavioral, social and emotional instruction and support he requires in order to make meaningful educational progress. Furthermore, he would be treated in the same manner as all other Waypoint students (see **SCHOOL’S PROPOSED PROGRAM**, above; testimony Caputo; S-16). Given the schedules of Waypoint and NHS, Roy would be able to continue to participate as a Nauset student in the extracurricular activities of varsity tennis and mountain biking club, thereby preserving his participation in his home community activities.

## ORDER

- 1) Nauset’s proposed out-of-district placement at Waypoint is appropriate to address his special education needs so as to provide him FAPE in the LRE.
- 2) Roy’s continued placement at NHS pursuant to his last accepted IEP is not appropriate to provide him FAPE in the LRE.

By the Hearing Officer,

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Raymond Oliver

Dated: November 8, 2018

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<sup>5</sup> While Roy’s behavioral manifestations are particularly problematic at school (see S-15 Conduct Reports for Roy’s extensive in-school behavioral infractions), such behaviors are also evidenced outside of school and in the home setting. Parents have sought assistance in dealing with Roy’s at home behaviors. Parents filed a Child Requiring Assistance petition with the courts in 2016 and Roy appeared before a judge. Parents have sought support from Family Continuing Support Services. Also, a stay-away order has been entered against Roy by the Brewster Police Department. (See testimony, Mother.)