

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

In re: Dave¹

BSEA #: 1812768

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 August 14 and October 10, 2018 at the Bureau of Special Education Appeals in Boston, Massachusetts. The record remained open for telephonic oral final arguments until October 29, 2018.

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

John Queally	Director of Student Services, Walpole Public Schools (Walpole)
Carla Squier	Team Chairperson, Walpole
Pamela Peckinpaugh	School Psychologist, Walpole
Colleen Duggan	Principal, Fisher School, Walpole
Naami Turk	Psychologist / Consultant
Mary Joann Reedy	Attorney for Walpole
Mother	
Father	
Jane Williamson	Court Stenographer
Alexander Loos	Court Stenographer
Raymond Oliver	Hearing Officer, Bureau of Special Education Appeals

The evidence consisted of Walpole's Exhibits labelled S-1 through S-12; Parents' Exhibits labelled P-1 through P-5; and approximately 7½ hours of oral testimony.

STATEMENT OF THE CASE

Dave is a 7 year old boy who resides with his parents in Walpole, Massachusetts. Dave attends the Walpole Public Schools. Dave has attended WPS' Fisher Elementary School, his neighborhood elementary school, for Kindergarten, first grade, and currently, second grade.

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

Dave is a very bright boy. However, as he progressed through his kindergarten year, he exhibited disruptive behaviors including verbal aggression toward peers, non-conversational talk that included themes of anger, frustration and violence, non-compliance, lying, and inappropriate affect. Given these concerns, Dave was referred for a special education evaluation. Based upon educational, speech/language, and functional behavior assessments in April 2017, the team determined that Dave did not then present with a disability that required special education services. (See S-10, 11; testimony, Squier.)

Dave's disruptive behaviors continued into his first grade year (2017-2018). In October 2017 he was again referred for an evaluation (S-9), and more comprehensive testing took place including educational, social, occupational therapy and psychological evaluations performed by WPS staff as well as an outside clinical evaluator. (See S-8A to 8G for evaluations performed in October-November 2017.) On December 4, 2017 the team met, found Dave eligible for special education services based upon an emotional disability, and developed an Individual Education Program (IEP) (S-7). This IEP, which provided for counseling by the school psychologist three times per week and social skills instruction by the speech language therapist twice per week, was accepted by the Parents. The Team also proposed an extended evaluation which was partially accepted by Parents (S-7). Additional evaluations were performed in the areas of social pragmatics and behavior in January 2018 (S-6). On January 31, 2018 the team met and recommended in-class services by the school psychologist and speech-language therapist and that a meeting be held in three weeks to review the success of the additional interventions. These services were accepted by Parents (S-7). The team met again on March 5, 2018. Dave continued to exhibit emotional and behavioral dysregulation. WPS asked Parents to visit the Partnership Program at WPS' Elm Street Elementary School, a program which is designed to offer more intensive therapeutic support to students with emotional and behavioral disabilities. Parents did not agree that Dave required more intensive services and declined to visit the Elm Street Program (S-4; testimony, Squier; Peckinpaugh; Duggan; Father). Father testified that Parents believe that part of Dave's problem is that he is an only child and an only grandchild and that he has been indulged by both Parents and Grandparents. Father also testified that children develop and mature at different rates and that Dave may grow out of these problem areas (testimony, Father.)

Dave's behavior continued to deteriorate with Dave using inappropriate language throughout the school day. Additionally, he wrote a letter directed at another student threatening harm. After a meeting with the principal, Parents kept Dave home from school for several days. Upon Dave's return to school his behaviors continued to interfere with his learning. He continued to talk over everyone, target students, and vocalize his hatred of others as well as wishing them harm. Due to safety concerns, WPS has placed an aide with Dave throughout his school day.

The Team met again on March 28, 2018 and WPS formally proposed moving Dave to the Partnership Program at Elm Street School. Parents rejected this Amendment to Dave's IEP on April 10, 2018. (See S-3; testimony Squier; Peckinpaugh; Duggin; Father.) Dave began receiving private individual therapy from Dr. Chen in March 2018 (P-3, 5; testimony, Father). The team

met for a final time on April 25, 2018 to discuss Parents' rejection of the Partnership Program, but no resolution was reached (S-2).

On June 28, 2018 WPS requested a hearing before the BSEA. The case was assigned to Hearing Officer Lindsey Byrne and a hearing date of August 14, 2018 was scheduled. On August 9, 2018, this case was administratively re-assigned to Hearing Officer Raymond Oliver. The hearing commenced on August 14, 2018 but was not completed on that date. Due to scheduling conflicts of the parties, the final date for taking of testimony was October 10, 2018.

ISSUES IN DISPUTE

1. Does Dave require placement at WPS' Partnership Program at Elm Street School in order to address his special education needs so as to provide him a free and appropriate public education (FAPE) in the least restrictive educational environment (LRE)?
2. If not, is Dave's current program/placement at WPS' Fisher School appropriate to address his special education needs so as to provide him with FAPE in the LRE?

STATEMENT OF POSITIONS

WPS' position is that Dave's current placement at Fisher School (Fisher) is inappropriate to address his special education needs so as to provide him FAPE in the LRE. WPS contends that Dave requires a more therapeutic placement in order to receive FAPE and that such a program exists at WPS' Elm Street School in its Partnership Program.

Parents' position is that Dave's issues are largely maturational/developmental and that his special education needs should continue to be addressed at Fisher, his neighborhood elementary school. Parents contend that Dave should not be moved to the Partnership Program at Elm Street School and that, if such a move is ordered, they will remove Dave from special education so as to enable him to remain at Fisher.

PROFILE OF STUDENT

For a 7 year old in 2nd grade, Dave has been extensively evaluated. On the educational assessment and teacher summary done by Ms. Giampietro, his 1st grade teacher on December 4, 2017 (S-8A, 8C), it is noted that Dave does not focus on non-preferred activities and is angry or frustrated with many classroom activities during which he will hum, sing, chant, talk over everyone, or shout out inappropriate phrases. She reported that Dave has difficulty engaging with peers, turn taking, sharing, and does not know how to approach his peers appropriately to ask to join them, even though such skills have been taught and practiced in class. She reported that Dave's performance is affected by his mixed up thoughts, dark thoughts and conversations: "I want to pour hot lava on my face"; "I want to be evil"; and that Dave has expressed feeling frustrated and angry by his own thoughts. She reported that Dave frequently talks without being in a conversation with anyone, with some talk being frightening and disturbing (using words about self harm or being evil). (See S-8A, 8C for complete educational assessment and teacher summary.)

On his occupational therapy evaluation done on November 7-13-15, 2017, Dave demonstrated “definite dysfunction” in the areas of social participation, hearing, body awareness and planning/ideas. However, given his observed challenges with attention/impulsivity and application of known pragmatic social skills, it was not clear that the primary etiology of his challenges was sensory processing (S-8C).

Based upon Dave’s psychological and educational evaluation done on November 6-8-13-20, 2017, School Psychologist Pamela Peckinpugh found as follows in her Summary and Recommendations:

[Dave] is a 6.5 year old first grade student referred for a psychological and educational assessment due to recurrent patterns of verbal aggression, disruptive behaviors and non-conversational talk that is filled with anger, frustration and violence...

Behavior rating scales were completed by [Dave’s] teacher and mother. Items endorsed by Dave’s first grade teacher resulted in clinically significant Hyperactivity, Aggression, Conduct Problems, and Attention Problems scale scores. Elevated scores are noted on the internalizing scales of Depression and Anxiety, suggesting increased levels of internal distress. His elevated score on the Negative Emotionality content scale suggests irritability and poor self-regulation and may be an underlying factor in his externalizing and anxious symptoms. Item endorsements by his teacher resulted in clinically significant Withdrawal and Developmental Social Disorders content scale scores. As to be expected given his difficulties adjusting to school, lagging skills are noted within the adaptive domain. Parental responses indicated typical levels with the exception of Social Skills (at-risk classification range). [Dave’s] responses to a sentence completion task suggest low self-esteem as well as negative emotionality. Academic testing indicates basic reading skills within the superior range. Performances on the written expression, mathematics and math fluency composites fall in the average or below average range. However, during these measures he showed a low tolerance for frustration and noncompliance. In summary, [Dave] is a bright boy who demonstrates significant deficits in affective modulation and self-regulation. These traits are necessary to adapt to environmental changes or demands as well as internalizing standards of conduct. With his disordered self-regulation, he demonstrates poor impulse control, a low tolerance for frustration, resistance to directions, mood instability, hostile behaviors and verbal aggression. His deficits in self-regulation and affective modulation need to be primary targets for intervention. Intervention should focus on teaching and refining cognitive skills critical to: modulating affective arousal in the midst of frustration, recognizing and labeling affective states, articulating the source of frustration, linking feelings and actions, delaying gratification and negotiating and resolving conflicts with others productively.

(See S-8F for complete psychological and educational evaluation; testimony, Peckinpugh.)

Dave also underwent a clinical evaluation on October 18, 2017 conducted by Dr. Naami Turk, licensed psychologist who serves as clinical/neuropsychological consultant to WPS (S-

8G). In addition to performing testing, Dr. Turk observed Dave within his classroom and at recess and interviewed Parents. Dr. Turk observed that when task demands were placed upon him, Dave became restless, noticeably agitated and oppositional, with high irritability, labile mood, tearfulness, anger, and aggressive language. In her results Dr. Turk found that Dave endorsed ideation associated with self-harm and harm of others, but did not offer specific plans or intent. Dave's wishes included violent and destructive content such as "getting an axe and chopping down trees and then making an evil lab and making a mask and turning bad and burning my face." When asked to provide additional wishes, Dave became increasingly agitated stating that he never gets what he wants. Dave stated that "I get mad a lot. I even want to break myself." He was able to identify only one friend (female) in his class.

Dr. Turk found:

Overall in the context of this evaluation, [Dave's] responses contained aggressive content with prevalent themes associated with destruction and consumption. Themes associated with poor locus of control over focus on becoming bad, being bad and being perceived as bad all prevailed suggesting a high degree of frustration and diminished self-esteem. These social and emotional factors - that can be viewed as challenges and deficits are interfering with his educational experience with increasing frequency, severity and duration.

[Dave] presents as a child who is struggling with emotional regulation and is easily triggered by both internal and external stimuli. He does not appear to have consistent effective coping skills and while he seeks to avoid his affective experience he appears to end up engaged with components of anger, sadness and frustration that he is unable to predict or regulate...

[Dave] appears unable to predict when and where the triggers will exacerbate his internal state and externalizing behaviors. Similarly, it appears that presently, the complexity of [Dave's] clinical profile and behaviors make it difficult for adults who are working with [Dave] to work with him in a proactive manner to identify the same. While [Dave] does not directly endorse ideation associated with self-harm, the increase of irritability and agitation in the context of his ideation with regard to social relationships and the associated aggressive ideation within that context is of concern given his limited repertoire of adaptive coping skills and challenges with effective self-regulation.

From a diagnostic perspective, [Dave] presents as a complex child. At present, he meets criteria for the DSM5 diagnosis of **Disruptive Mood Dysregulation Disorder**. Additional diagnoses that merit consideration include an anxiety disorder, depression and attention disorder. These should be considered rule-out diagnoses, designed for a clinician working with [Dave] on a regular basis.

Dr. Turk went on to recommend:

- Within the school setting, [Dave] will benefit from
 - ! Regularly scheduled and as-needed counseling supports to proactively identify and manage frustration within his academic and social environments during his school day as well as in the moment strategies to assist with regulation when his behaviors escalate.
 - ! Social pragmatic supports to help him develop pro-social and generally adaptive coping and problem solving skills to assist with developing positive social connections with peers and appropriate interactions with adults.
 - ! Accommodations including teacher check-ins, frequent breaks, consistent and clear consequences for behavior, a behavior intervention and support plan, positive specific verbal praise, paired visual and verbal cues to support recall and implementation of rules and expectations associated with expected and unexpected behavior are recommended.

(See S-8G for complete clinical evaluation; testimony, Turk.)

The extended evaluation speech-language assessment to re-assess social/pragmatic skills (S-6A) was administered by speech-language pathologist Megan Pelissier on January 18 and 23, 2018. On the Pragmatic Profile of the Clinical Evaluation of Language Fundamentals – Fifth Edition (CELF-5) which is designed to assess verbal and non-verbal language skills, Dave earned a score of 2; an average score is between 8-12. Ms. Pelissier, who also observed Dave within his classroom as well as at recess found:

Overall [Dave] demonstrated knowledge of school rules and the ability to interpret social cues (i.e. body language of those around him); however, given his level of impulsivity and his difficulties regulating his emotions, he often struggled to demonstrate “expected” or appropriate behaviors throughout his school day.

(See S-6A for complete Speech-Language Pragmatics Assessment.)

Ms. Squier performed the extended evaluation behavioral assessment over 4 days from January 22-26, 2018. (S-6B). She found:

Results show that [Dave’s] language is not typical of a first grader on many school days in common school situations and that inappropriate speech represents a clear threat to his development of peer relationships. Results also show that inappropriate speech is likely maintained by social reinforcement of attention and possibly to a lesser extent by escape when [Dave] receives instructions or redirection. Inappropriate speech can also be potentially understood as a social skill deficit. At times throughout the observations [Dave] worked to join a group of peers but did not know how to, so he resorted to use of inappropriate language. When things do not go as [Dave] plans them to, or a non-

preferred task is given [Dave] will use inappropriate language to escape. [Dave] needs a systematic behavior program such as “catching him being good” and reward him with attention for appropriate speech. [Dave] needs social pragmatic instruction within his classroom setting in the moment.

(See S-6b for complete Behavior Assessment; testimony, Squier.)

On June 12, 2018, psychiatrist Juliana Chen, M.D. wrote a note indicating that Dave had been receiving care in her clinic since March 2018.

Dr. Chen wrote:

[Dave] has a current working diagnosis of anxiety unspecified. He struggles with reported difficulties with attention, inappropriate speech, impulse control, and self-regulation, most notably and primarily at school, with no significant mood or behavioral concerns reported by parents or observed in therapy to date.

[Dave] does not currently take any psychiatric medication. Current treatment plan involves regular therapy and monthly medication appointments for on-going evaluation through our clinic.

(See P-3 for complete note.)

On October 4, 2018 Dr. Chen wrote an updated note which delineated an initial consultation with her in March 2018, three additional psychopharmacological evaluation appointments with her, and twelve individual therapy sessions with two different psychology interns.

Dr. Chen wrote:

[Dave] previously had a working diagnosis of anxiety unspecified, but currently does not have a clinical diagnosis. It is my understanding there have been reported difficulties with attention, inappropriate speech, impulse control, and self-regulation, most notably and primarily observed at school. [Dave] has exhibited some social skill deficits and attentional difficulties in therapy with no significant mood, behavioral, or safety concerns reported by parents or observed in our clinic to date.

[Dave] does not take any psychiatric medication with no current indications for medication intervention. Recommended treatment plan involves regular therapy for support and skill building and more comprehensive neuropsychological testing and possible occupational therapy evaluation to further assist with diagnostic clarification and recommendations.

(See P-5 for complete note.)

SCHOOL'S PROPOSED PROGRAM

WPS proposes that Dave be transferred to the Partnership Program located at the Elm Street School (PPES), another public elementary school within WPS. PPES is a district-wide therapeutic program which provides wrap around services for students with social, pragmatic, emotional, and/or behavioral challenges. The program provides access to a licensed clinical social worker, a special education teacher, related service providers (speech-language pathologist, Board Certified Behavior Analyst) and other educational support professionals as needed. Students also have access to a substantially separate special education setting throughout the school day for their therapeutic needs. Services, accommodations and modifications outlined in the proposed IEP Amendment are designated components of the PPES.

(See S-2, 3; testimony Turk; Peckenpaugh; Squier.)

PARENTS' PROPOSED PROGRAM

Parents propose that Dave remain at Fisher, his neighborhood elementary school and continue to there receive his special education services as delineated in the last accepted IEP. Parents are adamant that Dave not be uprooted from Fisher and forced to go to another WPS school with new teachers and new peers. Parents are concerned that such a change in schools will negatively impact Dave's self-esteem.

(Testimony, Father; Mother.)

FINDINGS AND CONCLUSIONS

It is undisputed by the parties and confirmed by the evidence that Dave is a student with special education needs, as defined by state and federal statutes and regulations. The fundamental issues in dispute in the instant matter are listed under **ISSUES IN DISPUTE**, 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, WPS bears the burden of proof in demonstrating that continued placement at Fisher is not appropriate to provide Dave FAPE in the LRE; and that placement of Dave at PPES would meet these standards.

Based upon 1½ days of oral testimony, the extensive exhibits introduced into evidence, and a review of the applicable law, I conclude that Dave's emotional, social, and behavioral disabilities necessitate his placement in a program which can comprehensively address such needs. I conclude that placement at PPES would provide him with FAPE in the LRE. I further conclude that Dave's continued placement at Fisher does not currently provide him with FAPE.

My analysis follows.

While I empathize with Parents' desire to keep Dave at Fisher, the evidence is clear that within the school environment at Fisher Dave is experiencing significant behavioral, social and emotional dysfunction.² The evidence is also clear that such dysregulation and dysfunction was observed early in Dave's kindergarten year and has continued throughout kindergarten, his entire first grade year and now into his second grade year within the school setting, despite the prompt evaluations and intervention by WPS and the implementation of an IEP and special education services during his first grade year. (See **STATEMENT OF THE CASE**, above; testimony Squier; Peckinpaugh; Duggan; Turk.) In summary, the evidence amply demonstrates that Dave is not "outgrowing" his behavioral, social and emotional issues within the school environment. Despite the implementation of both out of class and in class special education services at Fisher, as well as private, individual outside therapy, Dave's behavioral social and emotional dysfunction continues in school, negatively impacting his educational performance and his ability to form and maintain social relationships with peers. Based upon the vast preponderance of the evidence, I conclude that Dave is not currently receiving FAPE in his Fisher placement.

I place substantial weight upon the testimony and evaluations of Ms. Peckinpaugh and Ms. Squier both of whom have evaluated and observed Dave and have been involved with his case over the last two years. Additionally, Ms. Peckinpaugh has been working with Dave, both outside of class and in the classroom since December 2017. I further found the clinical evaluation, observation and testimony of Dr. Turk to be both comprehensive and insightful.

At PPES Dave would be home based in a general education second grade classroom, where he would receive his academics, recess, lunch and specials (gym, art, music, etc) with his second grade classmates. Dave would also have support within his second grade general education class from a dedicated, experienced aide from the PPES special education classroom. If Dave becomes dysregulated, his aide would take him to the PPES classroom, which is a less stimulating environment, where Dave could deescalate. There Dave would be able to talk 1:1 with the clinical social worker to process his feelings, problem solve and learn appropriate social, pragmatic strategies to utilize in his regular education classroom. If necessary, Dave could also receive academic instruction within the PPES classroom from a masters level special education teacher, helping him to perform non-preferred tasks, breaking down assignments or completing unfinished work. Access to the PPES clinical social worker or special education teacher is on an as needed basis and can happen as often as is necessary to address Dave's issues. PPES is not a substantially separate program because students go into the special education classroom only when necessary and go back to their regular classrooms as soon as possible. The clinical social worker also provides wrap around services with parents and outside clinicians to assure continuity of care and partnership between the school, family, and outside agencies. Both School Psychologist Peckinpaugh and Ms. Squier also work at Elm Street School (Ms. Squier oversees

² Dr. Turk's provided an addendum to her evaluation based upon additional information provided by the Parents at the December 3, 2017 team meeting. Dr. Turk reported the following: "[Dave's] parents conveyed information indicating that agitation, aggressive, cognitive rigidity, and aggressive verbalizations and ideation associated with self-harm and harm of others occur in the home setting as well. While the severity and duration of episodes are somewhat less than what occur in the school setting, [Dave's] parents shared that it can take up to 30 minutes for him to de-escalate and regroup following behavioral manifestations of dysregulated behavior. The episodes occur regularly and the reactions, borne of low frustration tolerance, are disproportionate to the trigger/precipitant." I note that Parents did not refute the veracity of Dr. Turk's addendum via testimony or exhibits.

PPES), which would provide continuity for Dave. (See testimony, Peckinpaugh; Squier; Turk; S-1.)

I conclude that PPES will provide Dave with the same type of enriching general education experience at Elm Street as he enjoys at Fisher. I further conclude that PPES will provide Dave the necessary special education services, support and placement which he requires, in the moment, and the direct and explicit teaching to develop tools and strategies for self-regulation and interaction with peers so to address his behavioral, social and emotional needs in a comprehensive, consistent and timely manner. I note that Parents raised no specific objection to PPES per se, rather only the move from Fisher to Elm Street School.

WPS is neither proposing that Dave be transferred to an out-of-district private placement nor to a public out-of-district collaborative placement. WPS is simply proposing that Dave be transferred to a different public school within WPS, one which has the necessary special education program to address Dave's specific special education needs. While Parents want Dave to remain at Fisher and have his special education needs addressed there, a public school system cannot be required to have programs to fit every specific special education need at every school within its district.

ORDER

1. The PPES program/placement proposed by WPS is appropriate to address Dave's special education needs so as to provide him FAPE in the LRE.
2. Dave's continued placement at Fisher pursuant to his last accepted IEP is not appropriate to provide him FAPE in the LRE.

By the Hearing Officer,

Dated: November 19, 2018