

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

In Re: Student and Lincoln-Sudbury
Regional School District

v.

BSEA #1905403

Boston Public Schools

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act or IDEA (20 USC Sec. 1400 et seq.); Section 504 of the Rehabilitation Act of 1973 (29 USC Sec. 794); the Massachusetts special education statute or “Chapter 766” (MGL c. 71B), the Massachusetts Administrative Procedures Act (MGL c. 30A) and the regulations promulgated under these statutes.

The instant case requires a determination of which school district is programmatically and/or fiscally responsible for Student’s day placement at the LABBB Collaborative: Lincoln-Sudbury Regional School District (Lincoln-Sudbury or LSRSD), in which Student was enrolled under the METCO program, or the Boston Public Schools (Boston or BPS), which is Student’s district of residence. After a Team determination that Student, who had been attending Lincoln-Sudbury High School, needed an out-of-district placement in order to receive a free, appropriate public education (FAPE), LSRSD issued an Individual Education Program (IEP) and placement page calling for the LABBB placement. BPS objected to funding the LABBB placement on the grounds that it had offered Student an appropriate in-district placement at the McKinley School in Boston and that LSRSD had failed to follow the protocol prescribed by Massachusetts regulations for METCO students requiring out-of-district placements. Student and LSRSD now seek retroactive and prospective funding from BPS for Student’s placement at LABBB.

PROCEDURAL HISTORY

On December 24, 2018, Student’s Guardian (Guardian) and LSRSD (collectively, “Moving Parties”) jointly filed a request for hearing with the Bureau of Special

Education Appeals (BSEA) in which they alleged that BPS had acquired programmatic and fiscal responsibility for Student’s proposed placement at the LABBB Collaborative but refused to fund such placement, and that, as a result, Student’s agreed-upon and duly accepted IEP and placement at LABBB could not be implemented. The Moving Parties requested that the hearing be expedited on the grounds that Student lacked an available educational placement due to BPS’ refusal to fund the LABBB placement. The BSEA denied the request for expedited status, and assigned a hearing date of January 28, 2019. At the request of the parties, this date was postponed for good cause to March 14 and April 21, 2019.

On December 26, and December 28, 2018 respectively, the Moving Parties filed a *Motion for Summary Judgment* and *Amended Motion for Summary Judgment* in which they asserted that there were no issues of material fact, and that as a matter of law, BPS was required to fully implement Student’s accepted IEP by funding her placement at LABBB as well as her transportation. On February 7, 2019, after considering the *Amended Motion for Summary Judgment*, Boston’s *Opposition* thereto, and LSRSD’s *Second Motion for Summary Judgment and Reply to Boston Public Schools’ Opposition to the Amended Motion for Summary Judgment*, this Hearing Officer issued a ruling denying the *Motion for Summary Judgment* on the grounds that there existed a dispute of fact as to one or more material issues in the matter, such that an evidentiary hearing was required.

Such evidentiary hearing was held on April 21, 2019,¹ at the office of the BSEA, 14 Summer Street, Malden, MA. All parties had an opportunity to examine and cross-examine witnesses and present documentary evidence for consideration by the Hearing Officer. At the request of the parties, the hearing was postponed to May 21, 2019 for the filing of written closing arguments. On that date, the BSEA received the parties’ written closing arguments, and the record closed. Those present for some or all of the hearing were the following:

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| Student’s Guardian | |
| Laura Rice ² | Clinical Director, Dearborn STEP program |
| Aida Ramos | Director of Student Services, Lincoln-Sudbury High School |
| Christine Stella ³ | Program Director, McKinley Schools, Boston Public Schools |
| Dennis Tromblay | Out of District Coordinator, Lincoln-Sudbury High School |

¹ Meanwhile, on January 2, 2019, this Hearing Officer issued an *Order* determining that Student’s placement pending appeal was the LABBB Collaborative program housed in Lexington High School as prescribed by the IEP issued by LSRSD and accepted by the Student’s Guardian on December 20, 2018. The *Order* further stated that LSRSD was responsible for funding the costs of that placement plus transportation, “unless or until relieved of that responsibility by a *Ruling* on the then-pending *Motion for Summary Judgment* or by a decision after an evidentiary hearing, and also stated that such a *Ruling* or *Decision* could determine that Boston “was or is responsible for some or all of the costs of the LABBB placement and may order Boston to reimburse LSRSD for such costs.”

²Ms. Rice testified telephonically.

³Ms. Stella testified telephonically.

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| Catherine Morrissey-Bickerton | Senior Program Director of Mediation and Dispute Resolution, Boston Public Schools |
| Michele Scavongelli | Attorney for Guardian/Student |
| Erin O’Sullivan | Attorney for Guardian/Student |
| Mary Ellen Sowyrda | Attorney for Lincoln-Sudbury RSD |
| David Satin | Attorney for Lincoln-Sudbury RSD |
| Carolyn Weisman | Attorney for Boston Public Schools |
| Sara Berman | BSEA Hearing Officer |
| Carol H. Kusnitz | Court Reporter |

The following documents were accepted into the record: Student/Lincoln-Sudbury Exhibits S-1 through S-30; and Boston Public Schools’ Exhibits BPS-1 through BPS-13.⁴

ISSUE PRESENTED

The issue for hearing is: whether Boston is programmatically and fiscally responsible for Student’s placement at the LABBB Collaborative from January 2019 forward.

PARTIES’ POSITIONS

Position of Guardian

BPS fully and meaningfully participated in the Team process that led to Student’s placement at the LABBB Collaborative in full compliance with applicable regulations. Moreover, while the pertinent regulations require LSRSD to consider “in-district” options offered by BPS as the school district of residence, the McKinley School is, in fact, an out-of-district program operated by BPS, not an “in-district option” described by the regulations. Since Boston never proposed an in-district option to the Team, the Team properly considered out-of-district placements for Student and proffered an IEP for the LABBB Collaborative. Following the Guardian’s acceptance of that proposed IEP and placement, which were produced in compliance with the applicable regulations, programmatic and fiscal responsibility for the LABBB placement shifted to Boston.

Further, even assuming *arguendo* that the McKinley School is an “in-district” program, the Team was only required to consider it, and it did so. The Team was not required to adopt the McKinley placement and was not precluded from either considering additional possible placements or from writing an IEP for a placement other than the McKinley School. Finally, the LABBB Collaborative is capable of implementing Student’s IEP and constitutes a less restrictive environment than the proposed placement at the McKinley School.

⁴ Additionally, several Statements of Undisputed Fact contained within the January 2, 2019 *Ruling* on the parties *Motions for Summary Judgment* are adopted and incorporated in the Summary of Evidence in this Decision.

Position of LSRSD

Lincoln-Sudbury shares Guardian's position, as stated above, that it fully complied with the pertinent regulations concerning METCO students who may require an out-of-district placement, because it provided BPS with relevant information about Student and her needs well in advance of the Team meetings that led to Student's LABBB placement, and invited Boston to not one, but two Team meetings. Additionally, LSRSD argues that instead of fully considering Student's needs, Boston pre-determined the McKinley placement outside of the Team process. Lincoln-Sudbury further asserts that state regulations did not prohibit Lincoln-Sudbury, as the district with longstanding knowledge of, and programmatic responsibility for, Student, from sending referral packets to placements in addition to McKinley. Boston cannot shield itself from supporting Student's placement at LABBB by alleging that Lincoln-Sudbury violated procedures that do not exist.

Position of BPS

When Lincoln-Sudbury unilaterally placed Student at the LABBB collaborative, despite Boston's contention that it could meet Student's needs within an in-district program, it violated pertinent state regulations governing the respective responsibilities of METCO districts and districts of residence for students who may need out-of-district placements. The actions of LSRSD unlawfully precluded BPS from meaningfully participating in the development of Student's IEP and placement. BPS should not be held programmatically or financially responsible for Student's placement at LABBB where that placement resulted from egregious procedural and substantive violations on the part of Lincoln-Sudbury that denied Student FAPE and effectively excluded Boston from the placement process.

SUMMARY OF THE EVIDENCE

1. At all relevant times, Student is and has been eligible for special education and related services, pursuant to the Individuals with Disabilities Education Act, (IDEA), 20 USC §1400 *et seq.*, and the Massachusetts special education statute, MGL c. 71B.
2. Student and her Guardian are residents of Boston. Student has been enrolled continuously in the METCO program since first grade. She attended the Sudbury Public Schools until September 2017, when she entered ninth grade at L-S High School, which is operated by the LSRSD. At all relevant times, pursuant to 603 CMR 28.10, BPS has been Student's "district of residence" and LSRSD has been her "program school."
3. Student is described as a friendly, fun-loving girl who works hard in school and wants to succeed. She forms strong and positive relationships with adults (including teachers) and peers, and has always been well-liked within LSRSD. Student loves sports, and played on several competitive teams at L-S High School. (Guardian, Rice, Ramos, S-8)

4. Student's disabilities include anxiety, which has caused physical symptoms leading to several brief hospitalizations, as well as ADHD and a specific learning disability affecting reading. (S-8, Rice)
5. Student received a diagnosis of ADHD when she was in approximately first grade. She first became eligible for special education services from Sudbury Public Schools in or about third grade on the basis of a health impairment (ADHD) and specific learning disabilities. From third through fifth grade, Student received academic support and accommodations to address her identified learning needs pursuant to IEPs issued by Sudbury. Student enjoyed elementary school in Sudbury and was academically and socially successful. (Guardian, S-8)
6. Student transitioned to middle school in Sudbury at the beginning of the 2014-2015 school year (sixth grade) and attended through the end of the 2016-2017 school year (eighth grade). Student's IEPs continued to provide for academic modifications and supports. In middle school, Student was well-liked by peers and teachers and participated in sports, which she greatly enjoyed. Student generally felt positively about middle school; however, she had difficulty focusing in class and staying on task, struggled to keep up with the curriculum, and began to experience mood swings. She had increasing difficulty regulating her behavior during seventh and eighth grade, and was sometimes rude and disruptive in class. The Team and Guardian collaborated in an effort to meet Student's changing needs. (Guardian, S-8)
7. Student entered ninth grade at L-S High School in the fall of 2017. Her IEP for the period October 2017 – October 2018 provided for small academic classes with accommodations and modifications to address her learning disabilities, classes in "learning skills," and access to in-school counseling. Student found the transition from her small elementary and middle schools in Sudbury to the much larger high school to be challenging and stressful. She continued to struggle with emotional regulation, focus, and academic participation. (S-8, Guardian, Ramos)
8. Student's emotional difficulties worsened during ninth grade. She became very preoccupied with and anxious about other students' behavior and was increasingly emotionally dysregulated during class. She began to make frequent, tearful phone calls to call her Guardian during the school day, which was new behavior for Student. (Guardian, S-8) Student's special education program was designed to accommodate her learning disabilities but was not equipped to address her escalating emotional and behavioral concerns. (Ramos)
9. In May 2018, Student was involved in an after-school altercation with another student who was a LSRSD resident. The other student filed charges against Student (which were eventually dropped through a diversion program), and Student was excluded from L-S High School for the remainder of the school year as a result. (Guardian, Ramos)

10. During May or June 2018, anticipating Student's possible future exclusion due to the charges as well as determining that the Team needed additional information about Student's needs and functioning, Student's Team recommended an extended evaluation of Student at the Dearborn STEP (STEP) program in Arlington, MA.⁵ (S-29, Rice, Guardian, Ramos) In June 2018, Dr. Aida Ramos, Director of Student Services for L-S High School, contacted Michelle Plasse-Collins, who at that time was a METCO liaison employed by BPS, to inform her that Student would be undergoing an extended evaluation at STEP. Ms. Plasse-Collins advised Dr. Ramos that the extended evaluation was LSRSD's responsibility and asked her to contact BPS when the evaluation was completed. (Ramos)
11. In accordance with this Team recommendation, Student participated in an extended evaluation at STEP between approximately September 11, 2018 and November 16, 2018. During this period, Student received daily classroom instruction in English, math, science and social studies using assignments provided by Lincoln-Sudbury. She also received individual and group counseling, psychiatric consultation, and a therapeutic milieu. (Rice, S-8, S-16-18)
12. Student underwent one standardized assessment while she attended STEP, the Kaufman Test of Educational Achievement, Third Edition (KTEA-III). Student's scores on the KTEA-III showed that she had weaknesses in "foundational decoding skills," reading comprehension and fluency, as well as math concepts. She had generally "average" scores in oral fluency, math computation, and academic fluency. (S-8)
13. Within the STEP classrooms, Student demonstrated inconsistent academic skills. Her strengths included grade-level math skills, motivation and desire to succeed, good advocacy skills, and the ability to form relationships with teachers and counselors and to seek their help when needed. Her performance was negatively affected by gaps in her reading, writing, and organizational skills (such as decoding) as well as by difficulty with attention and significant anxiety. (S-8, Rice)
14. With respect to her social/emotional functioning, Laura Rice, the Clinical Director of Dearborn STEP, testified that Student "was a pretty fragile student...that does really well with significant adult supports..." and that she "needed significant support around completing academics as well as...helping her stabilize her emotional status." According to Ms. Rice, Student was "a very anxious student, has a really hard time problem solving, and is dependent on the adults around her to...help navigate that." Ms. Rice further noted that Student's anxiety was particularly triggered by unpredictable situations as well as by conflicts or misunderstanding among peers, and that she would likely find a large school environment with a chaotic atmosphere to be overwhelming. (Rice)

⁵ Dearborn STEP is a 45-day stabilization and assessment program for students who have been temporarily excluded from their educational placements. STEP provides students with academic, behavioral and therapeutic assessment and intervention to address the issues that led to their exclusion and prepare them to transition to an appropriate educational setting. STEP is affiliated with Dearborn Academy, a state-approved private day school. (S-8, Rice)

15. A Team meeting was held on October 19, 2018, which was the midpoint of Student's extended evaluation at STEP. Prior to that meeting, on October 16, 2018, Dr. Ramos sent an email to Ms. Plasse-Collins at BPS stating, in pertinent part,

"I am Aida Ramos and we have spoken before about other cases. I have a student by the name of [Student] that is currently attending Dearborn STEP for a 45 day evaluation... We are having her mid-cycle meeting this Thursday at Dearborn at 12:00 pm. The Team is looking for a therapeutic program... based on the observations so far. We do not have this in-district. Her IEP meeting is scheduled for Nov. 15 at 12 at Dearborn. I could email you the most recent information about the student. Please let me know if you can attend the meetings." (S-25)

16. On October 19, 2018, Ms. Plasse-Collins, who did not attend the mid-cycle meeting at Dearborn, responded as follows:

"I am sorry I could not be at today's meeting. I have put [November] 15 on my calendar. We are in the process of restructuring positions. There may be someone else in my place by then who will be doing this meeting. If not, I will attend... Meanwhile, please send all info and reports and last IEP." (S-25)

That day, Dr. Ramos emailed to Ms. Plasse-Collins Student's IEP and psychological and educational evaluations from LSRSD from 2015, as well as "STEP Program Weekly Reports" for the weeks of September 24 -28 and October 8-12, 2018. (S-23, 24: BPS-1, Ramos)

17. On November 9, 2018, Dr. Ramos sent an email to Ms. Plasse-Collins and Cindie Nielson, BPS Director of Special Education, which stated the following:

"Michelle, as you are aware, LS has a student in an extended eval. that is coming to an end next week. I have sent you all the documents and her progress reports while at Dearborn. I sent you a meeting invitation too. On a previous email you said you would be there, and I have not heard from you again. I hope you attend. This is where we are, most likely she needs a substantially-separate program either for behavior or for learning disability/emotional. The small setting at Dearborn is good for her and she still is struggling. LS does not have any sub sep program in any area other than for cognitive delayed students. So I am guessing that this case will return to Boston. I personally think McKinley might be a great place for her based on my impressions of over 10 years ago when I worked in BPS. The programs might have changed so there might be other possible options. I encourage you to be ready to have some

options for [Student] as the parent is very reluctant to send the kid back to BPS. They are looking for 766 schools. The only obligation LS has is to deliver a signed IEP that may include a BPS or private school...” (S-20)

18. On November 9, 2018, Ms. Plasse-Collins forwarded the above-referenced email to Catherine Morrissey-Bickerton, who had assumed the position of BPS METCO liaison.⁶ On that date, Ms. Morrissey-Bickerton requested updated information on Student from Dr. Ramos. On November 13, 2018, Dr. Ramos sent Ms. Morrissey-Bickerton a weekly report from STEP covering October 22-26, 2018 and Student’s final evaluation report from STEP, referred to below at Paragraph 23, which had been issued that day. (S-15, 16, 17)
19. At the hearing, Dr. Ramos testified that she had made multiple attempts to reach Michelle Plasse-Collins or any other person serving as METCO liaison, but got no response. At some time in the fall of 2018, Dr. Ramos, frustrated by the lack of BPS response, texted her former co-workers in BPS with whom she maintained contact. The former co-workers directed Dr. Ramos to Ms. Nielson, who then connected her with Ms. Morrissey-Bickerton. (Ramos)
20. During this same period,⁷ Dr. Ramos also contacted Christine Stella, Director of the McKinley Schools, whom she also knew from her former BPS employment. Dr. Ramos discussed Student with Ms. Stella and forwarded information to her. She requested feedback from Ms. Stella as to whether McKinley might be an appropriate placement for Student if she were to return to Boston. (Ramos)
21. Dr. Ramos testified as follows regarding her rationale for reaching out to Boston prior to the post-evaluation Team meeting:

“I need to have Boston Public Schools on the table, because the way that this is set up right now is that if we put a kid in a 45-day, and then we think that we can sustain, but Boston was not invited, and the recommendation is out of district, we didn’t invite Boston... Then so we invite them, then we get criticized for determining the placement before. No, I have to invite you either way.” (Ramos, Tr., p. 165)
22. On November 15, 2018, the Team convened to discuss the results of the evaluation. The following persons attended: Guardian, Student, Dennis Trombly (Out of District Coordinator for L-S High School), Aida Ramos, Sandy Crawford (L-S High School

⁶ Since November 2018, Ms. Morrissey-Bickerton has served as Senior Program Director of Mediation and Dispute Resolution. Her responsibilities include serving as the BPS representative at Team meetings involving METCO and charter school students who may be returning to BPS. (Morrissey-Bickerton)

⁷ Dr. Ramos recalled that she had contacted Ms. Stella at least “a couple of weeks” before the November 15 Team meeting, but possibly earlier. (Ramos) Ms. Stella testified that Dr. Ramos had begun contacting her in September or October of 2018, had provided her with information about Student, and suggested that McKinley might be a good fit for Student. (Stella).

Associate Principal), Mary Ellen Sowyrda (Attorney for LSRSD), Lisa Lana (Student's attorney), Shelley Hinds (METCO Director), Laura Rice (Clinical Director of Dearborn STEP), a teacher, educational coordinator, and clinical intern from STEP, Catherine Morrissey-Bickerton (Boston METCO representative), and Christine Stella (Director, McKinley Schools, by telephone). (S-28, BPS-11, Ramos, Rice)

23. The report of this STEP evaluation contained multiple recommendations, including placement in a “small therapeutic classroom with a high staff to student ratio, clearly defined expectations and boundaries, minimal distractions, including therapeutic and individualized academic supports.” Additional recommendations included, but were not limited to, access to therapeutic supports throughout the day, opportunities for breaks in identified spaces, opportunities for continued involvement in athletics, and various academic accommodations and supports in each subject. (S-8)
24. The Team discussed Student's experience at STEP, and made recommendations relative to her academic and clinical needs. These included a therapeutic milieu in a small school setting with counseling and academic modifications and supports, as well as a designated “check-in” person. (Morrissey-Bickerton, Trombley, Ramos, BPS-10) According to Dennis Trombley, the out of district coordinator for L-S High School, “it definitely was clear that she required a therapeutic level program...a therapeutic day program, in regards...of the fact that the majority of her education, both academically and social-emotionally, needed to be provided in a smaller supported environment.” (Trombley, Tr. p.343) Contemporaneous Team meeting notes reflect that a large high school environment such as L-S High School “would not be in her best interests.” (S-12, BPS-10)
25. Christine Stella, who had been invited to the meeting by both Aida Ramos and Catherine Morrissey-Bickerton, participated by telephone and provided the Team with detailed information about the high school programming offered at the McKinley School, including the physical location of programs and classrooms, student profiles, and academic and clinical services. (Stella, Guardian, Ramos, Trombley, Morrissey-Bickerton, BPS-10)
26. Ms. Morrissey-Bickerton testified that, to avoid predetermination, she usually does not attend Team meetings to develop IEPs for METCO students who have not yet been determined to need an outside placement. Rather, pursuant to applicable regulations, she exclusively attends separate placement meetings. Such meetings are convened only if the program school Team has concluded—without input from Boston--that it cannot serve the child in-district, and has written an IEP to this effect. She then receives and reviews the IEP and other pertinent information, determines whether BPS has an appropriate in-district option, and presents that option—if it exists—at the placement meeting. If BPS also is unable serve the child in-district, upon the child's enrollment, BPS would be responsible to make out-of-district referrals. (Morrissey-Bickerton)

27. The Team members, (exclusive of Catherine Morrissey-Bickerton, who did not consider herself a Team member) determined that Student’s primary disability category should be changed from “other health impaired” to “emotional impairment.” The Team further concluded that LSRSD did not have an in-district program that could meet Student’s needs, and began discussing sending referral packets to several out-of-district placements. Ms. Morrissey-Bickerton objected to the Team’s sending the referral packets because, she believed, the Team had decided on a placement type before having developed a new IEP. Ms. Morrissey-Bickerton further stated that Boston had an available in-district program (McKinley) that was less restrictive than the out-of-district placements proposed by LSRSD, and that could meet Student’s needs. (BPS-10, Morrissey-Bickerton)
28. Finally, the Team decided to extend Student’s stay at Dearborn STEP, at LSRSD expense, until December 21, 2018 while the referral process was underway. (Rice, Ramos, Trombley)
29. On November 15, 2018, the same date as the Team meeting, LSRSD issued a N-1 form that provided, in part, that “[t]he Team is recommending a therapeutic day program for [Student].” The N-1 form extended Student’s stay at STEP “until a formal placement is identified,” but no later than December 21, 2018, and stated that “through this time, [Student] will be visiting McKinley, Granite, and Dearborn Academy.” Accompanying the N-1 form was a placement page calling for Student’s continued placement at STEP until December 21, 2018. Guardian consented to the extension of Student’s time at STEP on November 15, 2018. (S-5)
30. At some time following the meeting of November 15, 2018, LSRSD issued referral packets to McKinley, Dearborn Academy, Colebrook High School (operated by CASE Collaborative), Granite Academy, and LABBB Collaborative. (Trombley)
31. On November 27, 2018, LSRSD issued a second N-1 form outlining proposed actions as a result of the extended evaluation and November 15 Team meeting. The form outlined LSRSD’s proposal to designate “emotional impairment” as Student’s primary disability category. The form further stated that Student “requires a small therapeutic classroom” which included “both therapeutic and academic supports,” that the “current IEP services with inclusion supports were insufficient to support her social, emotional and academic needs,” and that Student needed a “smaller group outside of general education environment within a therapeutic day program.” Finally, the form stated that “specific therapeutic day programs were discussed at the meeting and [Student] and her guardian requested the district to forward referrals to these programs.. The school district has agreed...and has sent referral packets to the following schools: McKinley...Granite Academy, Dearborn Academy, and LABBB Collaborative at Lexington High School.” (S-4)
32. The IEP accompanying the N-1 form referred to above covered the period from November 15, 2018 to December 21, 2018, the period corresponding to Student’s extended stay at Dearborn STEP. The IEP added information from the extended

evaluation in the “Student Strengths and Key Evaluation Results Summary.” The goals and benchmarks from the previously-accepted IEP for L-S High School were basically unchanged. The service delivery grid was changed to show all services in Grid C. The section entitled “Nonparticipation Justification” stated that due to Student’s various disabilities she required “specialized instruction in a therapeutic school setting in order to make effective progress emotionally and academically.” The attached Placement Consent Form (PL-1) designated an unnamed “Separate Day School-Private.” (S-4, Trombley) The Response Section of the above-described IEP was blank—it contained no signature from the LEA representative and no response from the Guardian. (S-4)

33. During the weeks following the November 15, 2018 Team meeting, Student and Guardian, accompanied by Student’s attorney, Lisa Lana, visited McKinley, Dearborn Academy, and LABBB Collaborative at Lexington High School. Student did not visit Granite Academy or Colebrook High School. During her visit to McKinley, police officers and emergency medical personnel arrived to attend to a crisis involving another student. Student found this incident upsetting. (Guardian)
34. On December 13, 2018, LSRSD’s Out of District Coordinator, Dennis Trombley, contacted BPS representative Catherine Morrissey-Bickerton via an email to “schedule a follow up meeting for [Student].” The email stated, “as you know, [Student] and [Guardian] have had an opportunity to visit and tour the different therapeutic programs we have sent referrals to,” and went on to propose a meeting for December 20, 2018. (Trombley, Morrissey-Bickerton, S-13)
35. Ms. Morrissey-Bickerton replied that she would participate in the meeting but stated that “if packets were in fact sent to out of district placements, this was over Boston’s objection and in violation of 603 CMR 28.10(6).” (*Ruling on Motion for Summary Judgment*, Statement of Undisputed Facts, No. 10)
36. LSRSD’s counsel, Mary Ellen Sowyrda, responded to Ms. Morrissey Bickerton by stating, in essence, that the Team would review the placements under consideration (including McKinley), that LSRSD was not aware of any regulatory prohibition on considering placements other than the placement proposed by BPS, and that LSRSD expected that BPS would “immediately comply with its 603 CMR 28.10(6) programmatic and fiscal obligations, even if Boston seeks to challenge the placement determined by the team.” (*Ruling on Motion for Summary Judgment*, Statement of Undisputed Facts, No. 11; S-9, BPS-8)
37. On December 13, 2018, LSRSD issued a Meeting Invitation scheduling a Team meeting for December 20, 2018 to “[r]eview recently developed IEP and discuss placement.” Catherine Morrissey-Bickerton was included in the list of invitees. (*Ruling on Motion for Summary Judgment*, Statement of Undisputed Facts, No. 12)
38. In an email dated December 18, 2018, Student’s attorney notified LSRSD counsel that after considering available placements, including McKinley, Student and

Guardian believed that the LABBB Collaborative program at Lexington High School would “best meet the goals of her IEP and prepare her for transition out of high school” in the least restrictive environment. (*Ruling on Motion for Summary Judgment*, Statement of Undisputed Facts, No. 13)

39. Guardian based her preference for LABBB on its calm atmosphere, academic and therapeutic supports, vocational opportunities, potential for inclusion opportunities within Lexington High School (LHS), and access to LHS athletics. Guardian, Dr. Ramos, and Mr. Trombley testified as to the importance of Student’s “buy-in” for the success of an out-of-district placement. Guardian, Dr. Ramos, and Ms. Rice testified that Student became dysregulated in the presence of commotion, voiced concern that Student would be exposed to such at McKinley, and noted that Student had expressed, after her visit, that she could not tolerate McKinley. (Guardian, Ramos, Trombley, Rice) Dr. Ramos also testified that Student was a “follower,” who would be vulnerable to the influence of students at McKinley with “externalizing” behavior. (Ramos)
40. On December 19, 2018, Dennis Trombley sent Catherine Morrissey Bickerton, via email, a copy of the IEP for November 15, 2018 to December 21, 2018. (S-11, Trombley)
41. On December 20, 2018, shortly before the meeting, Mr. Trombley sent a copy of a “Draft IEP” to Ms. Morrissey-Bickerton. (S-10) This “Draft IEP” covered the period from December 20, 2018 to December 20, 2019 and appears to be similar or identical to the prior, short-term IEP with the exception of the Placement Page, which designates an unspecified “public day” placement, rather than the “private day” placement specified in the prior IEP. (S-10, BPS-7, Trombley)
42. On December 20, 2018, LSRSD conducted the placement meeting. Ms. Morrissey-Bickerton attended by telephone. Also in attendance were Guardian, Student, Student’s attorney, representatives of LSRSD and its counsel, and staff from Dearborn STEP. The participants discussed the draft IEP. Student’s attorney presented the reasons why Guardian and Student felt that the LABBB Collaborative was the most appropriate placement for Student, as outlined in the attorney’s December 18, 2018 email referred to in Paragraph 38, above. These reasons included the availability of inclusion possibilities and participation in athletics at LABBB. Ms. Morrissey-Bickerton had not been copied on this email and was not aware of its existence until the meeting, but was present for the discussion about inclusion opportunities (Morrissey-Bickerton, BPS-11). She also was not aware of any concerns that Guardian and Student had regarding McKinley, since the family reportedly reacted positively to their visit to that program. (Morrissey-Bickerton)
43. Throughout the meeting, Ms. Morrissey-Bickerton maintained that BPS would offer McKinley as an in-district program that could implement Student’s IEP. BPS did not offer any other Boston options. At some point, upon hearing this information about

McKinley, Student ran out of the room in tears. (Morrissey-Bickerton, Trombley, Guardian, Ramos)

44. Ms. Morrissey-Bickerton had to leave the meeting before it ended. After she got off the telephone, the Team added the following accommodations to the draft IEP: “access to therapeutic supports throughout the day, continued involvement in athletic activities as an emotional outlet; engagement in physical activities throughout the day; opportunities for hands-on learning activities; increased opportunities for independent skill development by becoming involved in employment and empowering community-based groups.” These additional accommodations corresponded to some of the features of the LABBB-Lexington program. This version of the IEP was never sent to Ms. Morrissey-Bickerton. (S-1, Trombley)
45. At the end of the meeting, LSRSD presented Guardian with a proposed IEP containing the above-listed additional accommodations and designating placement at the LABBB Collaborative at Lexington High School. This IEP covered the period from December 20, 2018 to December 20, 2019.⁸ The accompanying N-1 form explicitly rejected the McKinley program for reasons related to the relative lack of potential inclusion opportunities. (S-2). The Guardian accepted the proposed IEP and placement on the same day they were issued, December 20, 2018. (S-1, Trombley)
46. On December 24, 2018, Guardian and LSRSD filed the hearing request in this matter, seeking an order to BPS to fund the LABBB placement.
47. Pursuant to an *Order as to Stay Put* issued on January 2, 2019, referred to in Note 1, above, Student has been attending the LABBB Collaborative program at Lexington High School since approximately January 7, 2019, with LSRSD funding both the tuition and transportation costs. LSRSD has been monitoring Student’s progress in the LABBB placement. (Guardian, Ramos, Trombley)

Evidence Pertaining to the McKinley School

48. The McKinley Schools (“McKinley”) is a public therapeutic day school comprising elementary, middle and high school programs that are located at several different sites within Boston. McKinley exclusively serves special education students with IEPs and placement pages designating a public “separate day school.” McKinley does not enroll students without disabilities or students whose IEPs call for a less restrictive placement such as a full or partial inclusion setting. Further, the BPS buildings in which McKinley programs are located do not house any other, non-McKinley educational programs. Nearly all McKinley students are residents of Boston, although the school occasionally enrolls students who live in other districts. (Stella)

⁸ The “Narrative Description of School District Proposal” section of the N-1 form for this IEP, dated December 20, 2018, stated “The N-1 letter will be completed as a follow-up to the meeting once the draft IEP has been proposed by the district.”

49. According to Christine Stella, the Program Director at McKinley Schools, McKinley is “within the Boston Public Schools,” and its students are enrolled in BPS. Ms. Stella testified that she is employed by “the City of Boston, Boston Public Schools.” (Stella, Tr., p. 249) There is no evidence on the record that any entity other than the Boston Public Schools (such as a Board of Directors) is involved in McKinley’s governance.
50. McKinley is an “Approved Public Special Education School” as defined by 603 CMR 18.02 because it has successfully completed the process to receive such approval from the Department of Elementary and Secondary Education (DESE) pursuant to 603 CMR 28.09. (Stella)

FINDINGS AND CONCLUSION

At issue in this case is whether or not Lincoln-Sudbury correctly followed applicable regulations when it issued an IEP and placement page calling for Student’s placement at the LABBB Collaborative. Student’s Guardian accepted that IEP and placement before she and LSRSD filed the instant hearing request, and Student has been attending the LABBB placement pursuant to the accepted IEP since January 2019. Boston is challenging the legitimacy of this IEP and placement on the basis of alleged procedural violations by LSRSD. As the party seeking to change the *status quo*, Boston has the burden of proof in this matter pursuant to *Schaffer v. Weast*, 546 U.S. 49 (2005). Specifically, Boston must prove, by a preponderance of the evidence, that LSRSD failed to follow the procedures for transferring programmatic and fiscal responsibility to Boston as set forth in applicable regulations, such that Boston has no programmatic or financial responsibility for Student’s LABBB Collaborative placement.

Based on a careful review of the record in light of applicable law, I conclude that Boston Public Schools has not met its burden of demonstrating that Lincoln-Sudbury committed procedural violations that would relieve Boston of its responsibility to fund Student’s placement at the LABBB Collaborative-Lexington. My reasoning follows.

Legal Framework

Pertinent Legal Background Regarding METCO

METCO is a state-funded grant program, founded in 1966 which is “intended to expand educational opportunities, increase diversity, and reduce racial isolation by permitting students in certain cities⁹ to attend public schools in other communities that have agreed to participate.” *Source: website of Department of Elementary and Secondary Education, doe.mass.edu/metco/*. The METCO enabling statute, MGL c. 76, §12A, is entitled *Plan for Attendance in Public School to Eliminate Racial Imbalance; Adoption; Financial and Technical Assistance*. It authorizes school districts to enroll non-resident children coming from districts deemed by statutory formula to have “racial imbalance,” and provides for state grants of financial aid to such receiving districts. Such

⁹ Currently, those cities are Boston and Springfield.

financial assistance “shall include payments for: (i) the cost per pupil of educating each non-resident child... (ii) the cost of transportation of each such child,...; and (iii) the cost... of special education services provided to each such child determined to be in need of such services pursuant to chapter seventy-one B. The board [of Education] shall, by regulation, define the special education costs eligible for such financial assistance.” *Id.* A METCO receiving district’s obligation for “costs eligible for such financial assistance” is defined in 603 CMR 10.07(2), which provides that “[s]chool districts which enroll non-resident students pursuant to MGL c. 76, §12A (METCO receiving districts)... shall provide and pay for the special education and related services specified in the approved individual education plan for every student so enrolled whose special education needs can be met in a program operated by the district.” 603 CMR 10.07(2).

Application of Special Education Regulations to METCO

The procedure for implementing 603 CMR 10.07(2) is set forth in state special education regulations at 603 CMR 28.10(6), which governs “program schools,” a category that includes METCO receiving schools.¹⁰ That regulation provides that when a program school student’s IEP team “determines that the student may need an out-of-district placement, the Team shall conclude the meeting pursuant to 603 CMR 28.06(2) (e)¹¹ without identifying a specific placement type, and shall notify the school district where the student resides within two school days.” 603 CMR 28.10(6)(a). The program school then must schedule a placement meeting, and invite members from the district of residence to participate. The regulation prescribes the following procedure at 603 CMR 28.10(6)(a)(1)-(3):

1. Upon a determination [that the student may need an out-of-district placement] the program school shall schedule another meeting to determine placement, and shall invite representatives of the school district where the student resides to participate as a member of the placement team pursuant to 603 CMR 28.06(e).
2. The Team meeting convened by the program school shall first consider if the school district where the student resides has an in-district program that could provide the services recommended by the Team, and if so, the program school shall arrange with the school district where the student resides to deliver such services or develop an appropriate in-district program at the program school for the student.
3. If the placement Team, in accordance with the procedures of 603 CMR 28.06(2)(e) determines that the student requires an out-of-district program to provide the services identified on the student’s IEP, then the placement proposed to the parent shall be an out of

¹⁰ Vocational, charter, and Commonwealth of Massachusetts virtual schools are also included in the definition of “program schools.” 603 CMR 28.10(6)

¹¹ This regulation governs the procedure for all students, whether or not enrolled in a program school, who may need an out-of-district placement.

district day or residential school... Upon parental acceptance of the proposed IEP and proposed placement, programmatic and financial responsibility shall return to the school district where the student resides. The school district where the student resides shall implement the placement determination of the Team consistent with the requirements of 603 CMR 28.06(3). *Id.*

As stated above, at issue in the instant case is whether LSRSD followed the procedures set forth in 603 CMR 28.10(6). If LSRSD did follow those procedures, Boston would be programmatically and financially responsible for Student's LABBB placement and would be required to reimburse LSRSD for costs it has incurred for this placement, as well as to fund the placement prospectively for the remainder of the current IEP period. In making a determination on this issue, I will first look to the purpose of all of the above-cited statutory and regulatory provisions, which when examined together, seem designed to ensure that students with disabilities have equal access to program schools such as METCO, while avoiding burdening program schools with the potentially higher cost of out-of-district programming.¹² This purpose is effectuated by the two-step process prescribed by the pertinent regulation, 603 CMR 28.10(6).

An additional effect of the process outlined in this regulations is—or should be—to ensure that the METCO district, which has first-hand knowledge of, and primary responsibility for, an eligible student, fulfills that responsibility within the METCO district, if possible, rather than prematurely transferring it to the district of residence. Thus, under 603 CMR 10.06(a), the Team may not propose an out-of-district placement until after it has developed an IEP and determined that it most likely cannot implement that IEP within the district. Once the Team makes that determination, it must then convene a separate placement meeting, to which it invites the school district of residence, pursuant to 603 CMR 28.10(6).¹³ The school district of residence must be invited to this meeting and must present a placement option within the district of residence if one is available. The Team must “consider” whether the in-district placement can implement the student's IEP. The regulations do not explicitly prohibit parents or program school districts from exploring out-of-district placements at this juncture; however, only after a Team determination that the district of residence cannot implement the Student's IEP within that district can the Team actually propose such an out-of-district placement.

Based upon a review of the facts, in light of the pertinent regulations, I find that LSRSD did meet the fundamental requirements of the regulations. My reasoning follows.

The notes from the Team meeting of November 15, 2018 reflect that the Team determined that Student's therapeutic needs could not be met within L-S High School because Student needed a small school, with few transitions, and that a “large school was

¹² As stated above, 603 CMR 10.02(d) states that METCO grants to receiving districts are designated only for in-district special education programming.

¹³ Such a separate meeting is optional under 603 CMR 28.06(3)(e).

not in her best interests.”¹⁴ (S-10) This finding was memorialized in the N-1 forms accompanying both the short-term IEP issued on November 27, 2018 and the IEP of December 20, 2018.

Further, Lincoln-Sudbury clearly “considered” the McKinley option as required by the regulations. McKinley’s Director, Christine Stella, attended the November 15, 2018 Team meeting and provided a detailed description of the program. LSRSD sent a referral packet to McKinley. Guardian and Student visited the program, toured the building and met with one or more staff members. The Team discussed Student’s concerns regarding limited opportunities for inclusion or for participation in integrated athletics if Student were to attend McKinley at the placement meeting. The N-1 form issued with the IEP of December 20, 2018 explicitly rejected the McKinley option, citing Student’s concerns.

While LSRSD may have deviated from the protocol set forth in 603 CMR 10.06 by inviting BPS to the November 15, 2018 Team meeting instead of deferring such invitation to the placement meeting; by waiting to issue a draft IEP until one or two days prior to the placement meeting; and by sending referral packets to out of district placements prior to the placement meeting, none of these deviations constituted violations of the applicable regulations. As stated above, the regulations do not allow LSRSD to designate an out of district placement without first considering Boston’s proposal at a placement meeting, but do not prohibit LSRSD from sending referrals to such placements prior to the placement meeting. Further, the regulations did not require LSRSD to invite BPS to the Team meeting of November 15, 2018 but did not preclude it from doing so.

Lincoln-Sudbury’s actions did not prejudice Boston by excluding it from participation in the Team process as argued by BPS. On the contrary, the record shows that Boston had notice of Student’s possible return to BPS as early as May or June 2018. Boston was informed of Student’s potential need for an out-of-district placement as early as October 2018, and was in receipt of clinical information from LSRSD. And, finally, Boston attended the November 15, 2018 Team meeting to review the results of the STEP evaluation. BPS arguably had more information about Student than it would have had if LSRSD had waited to bring Boston on board until after that meeting, which would have been permissible under the regulations.

Having found that Lincoln-Sudbury did not commit procedural violations that would invalidate the IEP and placement page issued on December 20, 2018, I conclude that, by operation of law, Boston became programmatically and financially responsible for Student’s placement at the LABBB Collaborative at Lexington High School on the date the Guardian accepted that IEP and placement on that day, pursuant to 603 CMR 28.10(6)(a)(3).¹⁵

¹⁴ I recognize that “best interests” is not the legal standard for determining FAPE; I construe this phraseology as the Team’s shorthand for stating that Student needed a smaller environment than L-S High School.

¹⁵ I need not reach the issue of whether the McKinley School is an out-of-district placement because any conclusion that I might reach would not affect the outcome here.

ORDER

Based on the foregoing, the Boston Public Schools shall reimburse the Lincoln-Sudbury Regional School District for tuition and transportation costs incurred by Lincoln-Sudbury relative to Student's placement at the LABBB Collaborative, including transportation, from December 20, 2018, to date, and shall be responsible for such costs prospectively for the duration of the accepted IEP and placement.

By the Hearing Officer

Sara Berman

Dated: June 28, 2019

