

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

IN RE: RANDALL¹

&

BSEA #1907008

NORTHBOROUGH-SOUTHBOROUGH
REGIONAL SCHOOL DISTRICT

DECISION

This decision is issued pursuant to M.G.L. c.71B and 30A, 20 U.S.C. §1400 *et seq.* and 29 U.S.C. §794 and the regulations promulgated under those statutes. A Hearing was held on July 18, 2019 at the Offices of Catuogno Reporting Service in Worcester, MA. The Parents proceeded *pro se*. The School District (hereinafter “the School” or “NSRSD”) was represented by Attorney Jeffrey Sankey.

The official record of the Hearing consists of exhibits submitted by the Parents marked P-1 through P-5, exhibits submitted by the School marked S-1 through S-26; and approximately 5 hours of recorded testimony and argument. The Parties elected to submit written closing arguments which were received by the Hearing Officer on July 29, 2019. The record closed on that date.

ISSUE

Whether the November 2018 - November 2019 Individualized Education Program proposed by Northborough-Southborough Regional School District is reasonably calculated to provide a free appropriate public education to Randall?

POSITIONS OF THE PARTIES

Parents: Randall is a bright, capable student who does best in a fully mainstream environment. He avoids situations where he might be singled out or receive different treatment than his classmates. He needs to feel, and be, fully included in order to participate in school. NSRSD

¹ “Randall” and its derivatives “Mr. R. and Ms. R.” are pseudonyms chosen by the Hearing Officer for use in publicly accessible documents to protect the privacy of the Student and family.

has not met Randall's need for full inclusion at his grade level. The substantially separate, therapeutic program NSRSD outlined in the 2018-2019 IEP is not appropriate for Randall. Randall needs a "fresh start" in a general education private school.

School: Randall has significant disabilities that affect his capacity to attend, maintain presence in, and learn in a general education environment without specially tailored supports and services. He has a long history of school avoidance in a variety of different educational settings due to intractable and refractory anxiety. As a result, Randall is not making academic, social or behavioral progress commensurate with his potential. The substantially separate program outlined in the 2018-2019 IEP offers Randall carefully designed therapeutic and academic services in a small, supportive setting with appropriate exposure to mainstream curricula and activities as recommended in all available evaluations.

FINDINGS OF FACT

1. Randall is a 16 year student with autism spectrum disorder ("ASD"), Obsessive-Compulsive Disorder ("OCD") and Generalized Anxiety Disorder ("GAD"). By age and previous grade placement he should be in the 11th grade during the 2019-2020 school year. He has earned fewer than five high school credits due to nonattendance. (S-18; S-19; S-16; S-15; P-5; S-14) Randall has broadly average cognitive skills. His academic skills are consistent with his potential and school exposure. He has a history of significant behavioral dysregulation, emotional outbursts, anxiety-related non-participation and interfering ritualistic behaviors. (S-13; S-14; S-17)
2. Ms. R. testified that 4th grade was Randall's best year in school. According to Ms. R. Randall's good performance during the 2012 – 2013 school year demonstrated that he could be successful in a fully mainstream setting without any special education support. (Ms. R.) Randall was referred for a special education evaluation by his teachers during his 4th grade year due to significant in-school behavioral dysfunction and non-attendance. (S-18) At the end of the 2012-2013 school year NSRSD proposed an IEP calling for a 45-day evaluation through the ACCEPT Collaborative with supportive academic and therapeutic services in the 5th grade. The Parents withdrew Randall from NSRSD and placed him in a parochial school for the 2013-2014 school year. (S-13; Ms. R.)
3. Initially Randall did well academically and socially at the parochial school. By the end of his 5th grade year Randall demonstrated increasing social and attendance difficulties. (Ms. R.) Randall entered the 6th grade in the fall 2014 at the parochial school but was counseled to return to the public school. Randall re-enrolled in NSRSD in January 2015 and was assigned to 6th grade in the Middle School. He underwent a comprehensive special education evaluation during the spring 2015. His attendance continued to be poor. According to Marie Alan, Director of Student Services for NSRSD, Randall attended only 2 full school days during the spring 2015 semester. (Alan)
4. The special education evaluations conducted by NSRSD in the spring 2015 found that Randall's academic performance fell in the average range consistent with his age and grade

placement. (S-13; S-14). His expressive and receptive language skills were also judged to be in the average range. (S-17) The evaluators uniformly identified the most significant barrier to continuing educational achievement as Randall's interfering anxiety and school avoidance. They recommended services targeted to teaching Randall coping skills to manage the anxiety that was preventing him from attending school. They further outlined executive functioning skills instruction and accommodations necessary to meet his need for routine and predictability, and to assist in addressing his academic performance related anxiety.

5. During the spring of 2015 an independent neuropsychological and educational evaluation was conducted by Dr. Pamela Wineman of the Integrated Center for Child Development. (S-15, P-2) Her findings were consistent with those of NSRSD evaluators. Dr. Wineman reported that Randall's broad academic achievement and language skills were consistent with his measured cognitive potential. She found that Randall's anxiety, particularly as it resulted in non-attendance, was the primary factor interfering with Randall's educational progress. She recommended an initial transitional program of home instruction coupled with flexible school scheduling, desensitization, counseling and staff support. She noted, however, that the success of such an approach could not be guaranteed. The alternative recommendation was: placement in a small, separate special education classroom for all content instruction to minimize anxiety and to increase access to the curriculum; direct and consultation services focused on social pragmatics and social thinking skills from a speech-language pathologist; direct instruction in executive function and organizational skills; assistive technology; testing and production accommodations; and regular meetings with a school counselor/psychologist focused on learning effective coping strategies and social pragmatics. Dr. Winehouse also recommended that Randall participate in intensive therapy and social skills instruction outside the school day. She highlighted that investigation into medical management of his debilitating anxiety was warranted. (S-15, P-2)

6. NSRSD offered a partial inclusion program for the 2015-2016 (7th grade) school year. Randall continued to be unable to attend school effectively or consistently. NSRSD filed a CRA based on truancy which resulted in collaboration with the Department of Children and Families (DCF) in a temporary day placement at the Wayside Center and subsequently a residential placement at the Devereaux School for the remainder of the 2015-2016 school year. Randall consistently attended school and made educational progress in those placements. (S-2; Ms. R.; Alan)

7. Randall returned to NSRSD for the 2016-2017 school year and was placed in a partial inclusion program for the 8th grade. The program included substantially separate small group classes in math and English and participation in the general education program for all other subjects and activities. His attendance did not improve. In January 2017 the Parents withdrew Randall from NSRSD and enrolled him in TEC Connections Academy, an on-line instructional program for home-based students. Randall did not fully participate in the program. No progress reports or evaluations from this time appear in the record. It is not clear whether Randall earned any academic credit through TEC (Ms. R.; Alan)

8. In September 2017 the Parents re-enrolled Randall in NSRSD so that he could enter the 9th grade at Algonquin High School. The School developed an IEP providing for substantially

separate classes in English and academic support, special education support within mainstream math, science and social studies classes, daily check-ins with a school adjustment counselor, and a weekly social skills/pragmatic language session with a speech-language pathologist. The IEP also provided significant accommodations to scheduling, teaching methodologies and production and testing demands as well as the assistance of school-based staff and consultants to address Randall's anxiety. (S-9) The Parents accepted the 2017-2018 IEP in November 2017. (S-4) Until then Randall had been fully included in grade level academic classes. (S-5) Randall continued to experience severe interfering anxiety and did not attend the High School regularly. In January 2018 the Parents withdrew Randall from NSRSD and re-enrolled him in TEC Connections Academy. (Ms. R; Alan; S-9; S-22; S-23)

9. TEC Connections Academy convened a Team meeting on May 3, 2018 to develop an IEP for the 2018-2019 school year. No new evaluations were conducted in preparation for the Team meeting. TEC offered Randall specialized classes in English and math along with general education instruction in both subjects. It also offered the service of a "school engagement" counselor. Under 'additional information' TEC advised:

By signing this IEP, the Parent/Student acknowledge that it is mandatory for the student to attend all LiveLessons required to receive the special education services as outlined in the IEP. This includes both services within the general education setting as well as special education support LiveLessons. Failure to attend these LiveLessons will impact TECCA's ability to provide your student with a Free and Appropriate Public Education (FAPE) and will result in the need for TECCA to report the lack of FAPE to the Bureau of Special Education Appeals (BSEA).

Mr. R. accepted the 2018-2019 IEP on May 23, 2018. There are no progress reports or report cards from this time period at TEC in the record.

10. In September 2018 the Parents re-enrolled Randall in NSRSD. It is not clear that the Parents included any previous IEPs in Randall's enrollment application or notified the registration staff that Randall was eligible to receive special education services.

The Team met on September 17, 2018 to develop an IEP reflecting the setting and services appropriate for Randall in a brick-and-mortar High School. The Team proposed immediate placement in the RISE program, a specialized educational approach within the Algonquin High School, designed to address the learning needs of students with significant emotionally based interference with school attendance and participation. (S-2; Alan; Klockner) Mr. R. consented to immediate implementation of the proposed academic schedule. (S-2) Randall did not attend school consistently during the fall 2018 semester. He attended seven consecutive school days in November 2018. At that time he chose to spend the full school day in the Learning Center. He did not return to school at all after the Thanksgiving break. (S-10; S-20; S-21)

11. On September 17, 2018 the School proposed to conduct Randall's 3 year re-evaluation. Randall's Parents declined to consent until after Randall had returned to full time attendance at

school. (Ms. R.; Alan; S-26) Randall never attended school full time during the 2018-2019 school year and the re-evaluation has not been completed.

12. The Team reconvened on November 1, 2018 to discuss Randall's continued absence from school and potential services to address his anxiety. The School offered flexible start/ending times, transportation, escort services, targeted transition/anxiety focused counseling in-person at home, during transportation or at school; on-line on-demand counseling, tutoring at home or school or the library or any other neutral spot, and family meetings with guidance staff off grounds. The Parents declined all proposed therapeutic services and accommodations. (Alan; Ms. R; S-10)

The School re-proposed placement in the RISE program with additional transition to school services, continual assessments and meetings to track the effectiveness of the supports and to consider extended year programming. The Parents declined all home-based, transition to school and counseling services. On November 20, 2018 the Parents accepted-school-based services outlined in the proposed 2018-2019 IEP with the exception of therapeutic services with the school adjustment counselor which they specifically rejected (S-1; Ms. R.)

13. On January 17, 2019 the Parents rejected the 2018-2019 IEP. (P-5, S-12) They requested that NSRSD fund Randall's placement in a "private mainstream school" so that he could attend "regular" classes with "regular" kids. The Parents stated they did not want Randall to receive any therapeutic or specialized academic services. They did not want Randall to attend NSRSD as a general education student because he needed a "fresh start". They rejected options for placement in neighboring public schools or collaboratives. (S-5; Ms. R.; Alan)

14. For the bulk of the 2018-2019 school year Randall remained at home. He did not receive any therapeutic, behavioral, psychiatric or medical services to address his anxiety and/or OCD. He did not engage in any educational services, or receive any educational evaluations, from any source. (Ms. R.; Alan; S-20; S-2)

15. Lisa Klockner, M.Sped, Special Education Liaison for Algonquin High School, attended all the High School based meetings held to plan Randall's 9th and 10th grade programs. She testified that the services and characteristics of the RISE program were discussed at each meeting. Ms. Klockner is the special education teacher assigned to the RISE program and described the program's features. The RISE program is specifically designed to address the learning needs of students with at least average cognitive functioning whose emotional concerns, primarily anxiety, are interfering with their ability to attend school, participate in learning for a full school day, or absorb instruction. The school adjustment counselor creates individual behavioral plans to address each student's school avoidance pattern. (See also: Lipton-O'Connor). Ms. Klockner and 2 paraprofessionals provide small group and individual academic, organizational and executive function instruction and support in a substantially separate classroom to students whose IEPs call for that type of intervention. The classroom also functions as a home base for students in the RISE program who attend academic classes and activities in the mainstream. Ms. Klockner coordinates student schedules, monitors assessments and progress, consults with teachers and related service providers about student needs, teaching strategies and accommodations, assists with assignments, and provides a safe and encouraging

presence to students. Core academic classes (math, science, history and English language arts) are taught by general education, content-certified, teachers following the regular high school curriculum. Typical mainstream classes at Algonquin High School serve 15-22 students. RISE teachers volunteer to teach in the program's smaller, 3-10 student, groups using college prep materials, content and academic expectations. Academic instruction takes place in classrooms scattered in the mainstream of the High School which are indistinguishable from neighboring classrooms. At times, depending on student need, a RISE paraprofessional will assist in the content class. The school adjustment counselor provides check-ins, consultation and direct therapeutic services to students and teachers in the RISE program. Ms. Klockner, the school adjustment counselor, the paraprofessionals, the content teachers, related service providers and, occasionally, outside consultants, meet twice a week to discuss students, programming and progress. (Klockner)

The RISE program follows the regular high school schedule so RISE students have the opportunity to attend mainstream academic and elective courses and activities, lunch in the cafeteria or a variety of alternative settings, and the full roster of after school extra-curricular offerings. There is no typical schedule for a RISE student. Some may spend the full day in the Learning Center; some may have a morning check-in before attending all mainstream classes; some may have a shortened day. The goal for each is a comfortable return to the mainstream and high school graduation. Staff are familiar with the characteristics of OCD, GAD, and ASD as many RISE students carry these diagnoses. Each student has an individually tailored schedule of classes, activities, therapy and related services to address his/her unique abilities, preferences and goals. During the 2018-2019 school year 13 students in grades 9-12 participated in the RISE program. (Klockner; Alan; Lipton-O'Connor.)

16. Jennifer Lipton-O'Connor, the school psychologist at Algonquin overseeing the RISE program, reviewed Randall's educational evaluations and history. She has not had the opportunity to evaluate Randall. Dr. Lipton-O'Connor testified that Randall's emotional/behavioral/educational profile was similar to that of other students receiving services through the RISE program. Although the Team could benefit from updated testing, the available information supports the conclusion that Randall has the cognitive skills to access and benefit from a college prep curriculum. According to Dr. Lipton-O'Connor, Randall has not been successful in school because he has not had the necessary consistency of appropriate therapeutic intervention in and out of school which could support his attendance. Dr. Lipton-O'Connor testified that RISE has the therapeutic services, flexible scheduling, academic challenge and supportive professional assistance to meet the significant learning needs identified by Dr. Wineman. Without those services one could reasonably anticipate Randall's continued failure to attend school. Currently, RISE program services are successfully meeting the educational and therapeutic needs of students with profiles similar to Randall: high functioning autism, severe anxiety and obsessive-compulsive disorder. RISE offers Randall the appropriate suite of specialized educational interventions he needs in order to attend, and benefit from, school. (Lipton-O'Connor)

LEGAL FRAMEWORK

A student with special learning needs as defined by 20 U.S.C. 1401 et seq. and M.G.L.c 71B is entitled to receive a free, appropriate public education. A free, appropriate public education, “FAPE” in special education shorthand, is a set of specialized instructional methods, materials and services, curricular modifications, related therapeutic, supportive and health services, equipment, environmental adaptations and settings that are specifically tailored to an individual student’s unique learning needs and designed to provide a meaningful educational benefit to the student. 34 CFR 300.300(3)(iii); *Endrew F. v. Douglas County School District*, 580 U.S. ___, 137 S. Ct 988(2017); 603 CMR 28.02(17). See also discussion at *Johnson v. Boston Public Schools*, 906 F.3d 182(1st Cir. 2018) and *C.D. v. Natick*, C.A. 18-1794, U.S. Ct. Appeals for 1st Circuit, May 22, 2019.

The primary vehicle for delivery of a FAPE is an Individualized Education Program (“IEP”). The IEP must be custom tailored to the student’s unique needs and potential and designed to produce “meaningful educational benefit” and “demonstrable improvement” in the educational, behavioral and personal skills identified as special needs. *Lenn v. Portland School Committee*, 998 F.2d 1083 (1st Cir. 1993) Whether an educational benefit is meaningful must be determined in the context of the individual student’s “circumstances” and potential to learn. A student’s goals should be appropriately ambitious . . . just as advancement from grade to grade is appropriately ambitious for most students in a typical classroom, *Endrew F.*, *supra*, and be reasonably likely to measurably advance the student toward the goal of increased learning and independence. *D.B. v. Esposito*, 675 F.3d 26 (1st Cir. 2012).

To the maximum extent appropriate, students should be educated in the “least restrictive environment” (“LRE”), with the greatest exposure to and integration in the mainstream of typical school life, students and curriculum that is possible while still delivering the necessary special services. Students with disabilities should be placed in separate settings, such as a private day school, only if the nature or severity of the disability is such that the student cannot benefit from a general public school setting with supports and services, or the student has demonstrated an inability to make appropriate educational progress with carefully designed and provided special education services in a mainstream setting. *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990) quoting *Burlington v. Town of Burlington*, 7136 F.2d 773, 789 n. 190 (1st Cir. 1984).

In a due process proceeding to determine whether a school district has offered or provided a free appropriate public education to an IDEA-eligible student the burden of proof is on the party seeking to change the *status quo*. *Schaffer v. Weast*, 546 U.S. 49 (2005). In this matter the Parents are seeking to remove Randall from a public school setting and to secure public funding for Randall’s placement in a private, non-special education high school. Therefore, the Parents must prove by a preponderance of the evidence that the IEP developed by NSRSD fails to offer Randall a free appropriate public education that meets the standards enunciated above. Should they do so, the Hearing Officer may craft a remedy that would put the Student in the educational situation most likely to carry out the recommendations of expert educators and advance Randall toward learning and independence in compliance with the IDEA and M.G.L. c.71B.

FINDINGS AND CONCLUSIONS

After careful consideration of all the evidence presented at the Hearing, and of the arguments of both parties, it is my determination that the 2018-2019 IEP developed by NSRSD is reasonably calculated to provide Randall with a free appropriate public education. The Parents have not carried their burden of proving otherwise. As a result, the Parents are not entitled to public funding of an alternate educational placement for Randall. My reasoning follows:

Even when viewing the documents and testimony available at the hearing in the light most favorable to the Parents' perspective, and drawing all appropriate inferences from them as I must due to the Parents' *pro se* status, I find that there is no evidence that reasonably supports the Parents' position that Randall can benefit from, or make meaningful educational progress in, a fully mainstream educational environment. All educational and psychological evaluations in the record reach the same conclusion: Randall is a young man with at least average intelligence and ASD, OCD and anxiety, disabilities that prevent him from accessing educational services without specially designed instruction delivered in modified settings. For the past five years, evaluators and teachers have consistently recommended that Randall be placed in small group learning situations with instruction targeted to address gaps in his foundational academic and language skills and to challenge his higher level reasoning and memory skills. They have consistently recommended intensive attention to the development of pragmatic language and social skills, and most importantly, to the development of "coping skills" and mechanisms to help Randall manage debilitating anxiety. The evaluators have consistently recommended that Randall participate in therapeutic services, in and out of school, to address the thoughts and behaviors that prevent him from attending school. They have recommended flexibility in scheduling, production requirements, technological assistance, staffing, and assessment tools to ease Randall into a school setting and routine. There are no contrary recommendations in the record. Specifically, there are no educational or psychological evaluations that support the Parents' request to place Randall in a private school without any special education services. There is no persuasive indication in this record that Randall needs, or even could benefit from, a "fresh start" in a mainstream high school setting other than Algonquin.

On the other hand, NSRSD has developed a plan that addresses Randall's unique presentation and history and provides the staffing, services, modifications, accommodations and setting that evaluators have consistently recommended for him. The RISE program would provide the flexible scheduling and therapeutic support that psychologists have deemed necessary to transition Randall to a school setting and to maintain him there. It also offers the specialized small group academic instruction that can both remediate the deficits in Randall's foundational academic knowledge born of years of truancy and challenge him as a high school student headed for college. Viewed in the context of the educational/psychological recommendations in the record, the conclusion that the RISE program's attributes fit comfortably within the list of educational and therapeutic services deemed necessary for Randall to return to a school setting and to make meaningful educational progress is inescapable. (S-15, P-2; S-16) In reaching this conclusion I rely heavily on the testimony of Dr. Lipton-O'Connor, Ms. Klockner and Ms. Alan, all of whom I found to be knowledgeable, candid and sympathetic to Randall, as well as on the comprehensive evaluation reports of Dr.

Wineman and Dr. Ellis. (S-15, P-2; S-16) I note, however, that as most of the academic/social/behavioral information available to the Team is now more than three years old it would be important to conduct new assessments as soon as possible either within the RISE program or outside school if parental consent can be obtained.

Over the course of the last five years, the only program that succeeded in maintaining Randall's attendance was a highly structured, residential, special education school. Randall's forays into full inclusion (St. Peter's), partial inclusion (Middle and High School), and on-line education (TEC Connections) have not resulted in sustained, engaged attendance or measurable academic/behavioral progress. No party is currently advocating placement in a residential educational program. The substantial weight of the evidence supports attempting the less restrictive option: a substantially separate, therapeutic program within and connected to the mainstream of public high school life. As such, RISE currently holds the best promise for addressing Randall's school avoidance and equipping him with the necessary skills to achieve a high school diploma and independence.

As the Parents have not carried their burden of proving that the 2018-2019 IEP is inappropriate for Randall I need not reach consideration of their request for public funding of a private non-special education school for the 2019-2020 school year.

ORDER

The 2018-2019 IEP developed by NSRSD is reasonably calculated to provide a free appropriate public education to Randall.

By the Hearing Officer

Lindsay Byrne
Dated: August 21, 2019