

September 4, 2020

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

DECISION

BSEA # 2005814

BEFORE

**RAYMOND OLIVER
HEARING OFFICER**

PARENT, PRO SE

**MARY ELLEN SOWYRDA AND VINEESHA SOW,
ATTORNEYS FOR MARSHFIELD PUBLIC SCHOOLS**

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

In re: Ruth¹

BSEA #2005814

DECISION

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

A hearing in the above-entitled matter was held on March 3 and 4, 2020 and June 2, 4, and 18, 2020. The March dates were held in person at the BSEA. The June dates were held virtually via videoconferencing. The record remained open for receipt of written transcripts and written final arguments until August 12, 2020.

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

Mother	
James Mehegan	Private Psychologist for Ruth
Dan Leventhal	Academic Dean, Middlebridge School
Amy Scolaro	Director of Special Education, Marshfield Public Schools
Erin Wiggins	Head of Special Education, Marshfield High School
Michael Fish	School Psychologist, Marshfield Public Schools
Amanda Benard	Guidance Counselor, Marshfield Public Schools
Mary Diethofer	Special Education Teacher, Marshfield Public Schools
Mary Ellen Sowyrda	Attorney for Marshfield Public Schools
Vineesha Sow	Attorney for Marshfield Public Schools
Jane Williamson	Court Reporter
Raymond Oliver	Hearing Officer, Bureau of Special Education Appeals

The record consisted of Parent's Exhibits labeled P-1 through P-54 and P-A through P-Q; Marshfield Public Schools' Exhibits labeled S-1 through S-20; and approximately 25 hours of oral testimony.

PRELIMINARY STATEMENT

The instant case is the fifth (5th) BSEA appeal involving this Parent and this school system. Marshfield Public Schools (MPS) initially filed against Parent on July 19, 2019 in BSEA #2000680. MPS withdrew this appeal on August 14, 2019. However, MPS then refiled against Parent on August 15, 2019 in BSEA #2001880. Parent filed against MPS on August 29, 2019 in BSEA #2002450. MPS withdrew its appeal (BSEA #2001880) on October 21, 2019. Parent withdrew her appeal (BSEA #2002450) on November 7, 2019. All the above cases were assigned to Hearing Officer Amy Reichbach and all have been closed.

¹ Ruth is a pseudonym assigned by the hearing officer to protect the privacy of the student in publicly available documents.

MPS then filed an appeal against Parent on November 8, 2019 in BSEA #2004535 and this appeal was assigned to Hearing Officer Raymond Oliver. Parent then filed against MPS on December 27, 2019 in BSEA #2005814 and this appeal was also assigned to Hearing Officer Oliver. MPS withdrew its appeal (BSEA #2004535) on January 30, 2020. Thus, the only case remaining open, and the subject of this decision, is BSEA #2005814, Ruth v. Marshfield Public Schools. Any references in this decision to other BSEA proceedings (i.e. mediation, pre-hearing conferences, ordered resolution sessions, etc.) refer to prior closed BSEA appeals between these two parties.

STATEMENT OF THE CASE

Ruth is a fifteen year old tenth grade student who currently attends Middlebridge School (a private school which is not approved by the Massachusetts Department of Elementary and Secondary Education), as the result of a unilateral placement made by Mother in February 2020. Ruth and mother reside in Marshfield, MA. The Marshfield Public Schools is the local educational authority (LEA) responsible for providing education and any necessary special education services to Ruth.

Ruth has been on an Individual Education Program (IEP) since second grade. Mother and Ruth moved to Marshfield when Ruth was in fourth grade. Her last accepted MPS IEP was for the 2017-2018 school year, Ruth's eighth grade year (P-3). She began at Marshfield High School (MHS) as a ninth grader in September 2018, had a perfect attendance record for the first term and participated in cheerleading. However, in November 2018 Ruth experienced her first migraine headache in school. The migraines increased into December 2018 (P-13) and Mother had Ruth's neurologist file a home/hospital tutoring form that month (P-15). Home tutoring was set up in January 2019. Ruth returned to MHS in February 2019 and attended the Returning After Missing School (RAMS) program, which transitions students who have been out of school for medical reasons back to the classroom, helping them catch up on their work. Ruth received an updated evaluation at Massachusetts General Hospital (MGH) in March 2019 (P-18). She received medical clearance to participate in a school choral trip to California in April 2019. MPS questioned the neurologist's medical clearance. Mother called the Massachusetts Department of Elementary and Secondary Education – Program of Quality Assurance, which intervened, and Ruth was allowed to go on the trip without incident.

On June 5, 2019 the parties attended a BSEA mediation to address make up work that resulted in a mediation agreement (P-23) which provided a plan of summer tutorial services so that Ruth could finish her 9th grade curriculum. The mediation agreement provided for up to 72 hours of tutoring over the 2019 summer. In fact, Ruth received 91 hours of 1:1 tutoring over the 2019 summer provided by two certified special education teachers. (See testimony, Mother; Scolaro; Wiggins; P-23.) The IEP team met again on June 18, 2019 to get updated information from Dr. Lebel, Ruth's neurologist, followed by a facilitated team meeting in which an IEP for 6/19 – 6/20 was proposed. (See P-23; S-2, 3.)

On August 28, 2019 Ms. Scolaro, MPS' Director of Special Education, sent Mother an e-mail regarding MPS' implementation of unilateral changes to Ruth's IEP, which included

placing a special education teacher in all of Ruth's academic classes to assist her and other students and to act as a tutor to insure that Ruth did not fall behind if her migraines caused her to miss school; and a doubling of her special education strategies class to two periods daily, thereby removing her daily study hall period. (See P-28; testimony, Mother; Scolaro.) This unilateral action resulted in Mother's filing a BSEA appeal on August 29, 2019 (P-31) which, as noted above, has since been withdrawn. Ruth attended MHS for the first three days of school (Wed – Thurs – Fri) in early September 2019. She was absent Monday September 9. She became aware of the doubling of her special education strategies class and the loss of her study hall on September 10, 2019. This upset Ruth and that morning she experienced a migraine headache and had to be removed from school. Mother went to MHS on September 10, 2019 to pick up the Freedom of Information Act (FOIA) Discovery Records which she requested from MPS and she also spoke to Ms. Scolaro about Ruth's situation. Ms. Scolaro indicated that she would return Ruth to her original schedule (eliminating the double strategies class in favor of a single daily strategies class and restoring her daily study period); and that the special education teacher in the classroom would not tutor Ruth but would remain in the classroom for the other students). (See testimony, Mother; Scolaro.)

On September 11, 2019 Ruth went back to school. She called Mother in mid-morning reporting that she had been kicked out of study hall because she was not on the roster and she didn't know what to do. Mother told her to go to her grade office. There she was told to follow the schedule that was in the system (the double strategies class). Mother then went to MHS. When she arrived the MHS principal was on the phone with Ms. Scolaro. The principal informed Mother that he was arranging with the guidance counselor to change Ruth's schedule per Ms. Scolaro's instructions and that he would personally walk Ruth back to her study hall and inform the teacher and class that she was on the study hall roster. (See testimony, Mother; Scolaro.) Ruth finished out the school day. That night Ruth awoke in excruciating pain (a 10 out of 10) which lasted 12-18 hours. For the next several months this cycle continued. Ruth would be fine when she went to bed, then awaken in the early morning hours in extreme pain for 12+ hours, then feel fine in the afternoon and at bedtime until the cycle repeated itself. Ruth never returned to MHS. (See testimony, Mother.) Ruth was home tutored until December 2019. (See S-15 for Timeline and Supporting Documentation regarding Home Tutoring Services provided to Ruth from 12/17/18 to 1/2/20; testimony, Mother; Scolaro; Wiggins.)

On September 13, 2019, the parties held a resolution meeting. It did not go well. Ms. Scolaro terminated the resolution meeting. Mother left the resolution meeting but returned several minutes later to retrieve her briefcase/car keys. MPS personnel were still there. Mother accused them of continuing the meeting without her. Ms. Scolaro escorted Mother out of the building. That same day the MPS Superintendent of Schools issued a No Trespass Order against Mother, limiting her access to MHS. (See P-30; testimony Mother; Scolaro; Wiggins regarding 9/13/19 resolution meeting and the resulting No Trespass Order.) The No Trespass Order was removed on January 13, 2020 (P-46).

In early October 2019 Mother sent MPS updated medical reports and requested to reconvene a team meeting so Ruth's neurologist could be present by phone to update the team.

On October 7, 2019 Mother filed a motion with the BSEA (prior closed case) alleging that MPS was “acting with a pervasive disregard for the health and wellbeing of the child.” (See P-32; testimony, Mother.) On October 8, 2019 MPS filed a Chapter 51A Neglect Complaint against Mother with the Massachusetts Department of Children and Families (DCF) (See P-33, 34, 35, 36). On November 1, 2019 DCF sent to MPS a Closure Letter that their 51A Neglect Complaint against Mother was Unsupported (P-39). Also on November 1, 2019 Ms. Scolaro sent an e-mail to Mother which included an apology to Mother for some of the e-mails mother had received from MPS via her FOIA Discovery Request (See S-7, ¶ 2). That apology read, in pertinent part:

...I wish to acknowledge that the district is aware that you are in possession of a handful of emails written by certain staff members at MHS that can only be read as disrespectful and unprofessional. While there is never an excuse for any staff member to communicate in this way, please know that these few isolated comments were made by staff in an impromptu fashion in response to a specific set of circumstances. They do not capture the true feelings of staff and they do not in any way represent the attitude of the Marshfield Public Schools. Please accept my apologies on behalf of the staff members involved...

The team met on December 13, 2019 at the Marshfield Public Library. Dr. Lebel provided an updated medical note and participated by telephone. Mother agreed to an updated MPS evaluation to be performed by MPS School Psychologist Michael Fish, who does not work at MHS, to be performed at the public library. MPS offered to research neighboring school systems as a possible placement for Ruth (S-14; testimony, Scolaro; Mother). On December 16 and 18, 2019 Mr. Fish performed an Educational/Psychological Evaluation of Ruth (S-6; testimony, Fish). On December 23, 2019 Ruth began a six-week partial hospitalization program at Boston Children’s Hospital’s Pediatric Pain Rehabilitation Center (PPRC), which is a day treatment program for children diagnosed with chronic pain disorders. On January 7, 2020 the team reconvened to consider Mr. Fish’s evaluation. MPS proposed an IEP for Ruth covering 1/7/20 – 1/6/21 (S-4, 5). While this IEP indicated placement at MHS, MPS stated its intention to propose Ruth’s actual placement in a neighboring school system and obtained Mother’s consent to send referral packets to a number of nearby LEAs. At this same January 7, 2020 team meeting, Mother gave MPS oral notice that when Ruth completed her PPRC treatment program, she intended to enroll Ruth in Middlebridge School (Middlebridge), and followed this oral notice with a written notice (P-51). On January 23, 2020 Ruth was accepted by Middlebridge. On January 31, 2020 the PPRC sent Middlebridge a report on Ruth’s treatment along with its recommendations (P-48) which Mother made available to MPS on February 5, 2020. On February 3, 2020 Ruth began attending Middlebridge. On February 11, 2020 the team reconvened to consider the PPRC report and to review Ruth’s acceptances by neighboring LEAs. MPS proposed a new IEP covering 2/11/20 – 1/6/21. (See S-9.) Again, this IEP indicated MPS as the placement but MPS proposed sending this new IEP and referral packets to two nearby collaborative placements. Mother did not consent to the above so MPS sent redacted referral packets and Ruth was accepted at the two collaborative placements. (See S-14; testimony Mother; Fish; Scolaro; Wiggins; Leventhal.)

Ruth attended Middlebridge as a day student from February 3, 2020 until March 13, 2020, when the COVID-19 crisis caused her to return home. She attended virtual classes at Middlebridge from approximately one week later until the end of the 2019-2020 school year. Ruth has been accepted at Middlebridge as a residential student for the 2020-2021 school year and it is Mother's intention to so enroll Ruth.

(See testimony, Mother; Leventhal; P-54.)

ISSUES

1. Is the 1/7/20 to 1/6/21 IEP (S-4) proposed by MPS appropriate to address Ruth's special education needs so as to provide her with a free and appropriate public education (FAPE) in the least restrictive educational environment (LRE)?
2. Is the 2/11/20 to 1/6/21 IEP (S-9) proposed by MPS appropriate to address Ruth's special education needs so as to provide her with FAPE in the LRE?
3. If the above MPS IEPs are inappropriate to address Ruth's special education needs so as to provide her with FAPE in the LRE, did Ruth's unilateral placement at Middlebridge as a day student from February 3, 2020 until the end of the 2019-2020 school year provide her with FAPE in the LRE?
4. If the above MPS IEPs are inappropriate to address Ruth's special education needs so as to provide her FAPE in the LRE will Ruth's prospective unilateral residential placement at Middlebridge for the upcoming 2020-2021 school year provide her with FAPE in the LRE?
5. Is Student entitled to compensatory services?
6. Is MPS entitled to attorney fees for defending this BSEA appeal?

STATEMENT OF POSITIONS

Parent's position is that neither of the two IEPs proposed by MPS for Ruth provides her with FAPE in the LRE. Parent further contends that the 2/11/20 – 1/6/21 IEP was proposed after Ruth was already enrolled and attending Middlebridge and should not be considered. Parent contends Ruth's placement at Middlebridge as a day student from February 3, 2020 until the end of the 2019-2020 school year was appropriate to provide Ruth FAPE in the LRE, and further that her placement as a residential student at Middlebridge for the 2020-2021 school year will provide her with FAPE in the LRE. Finally, Parent contends that Ruth is entitled to compensatory services in light of both MPS' actions and/or inactions.

MPS' position is that either the 1/7/20 – 1/6/21 IEP (S-4) or the revised 2/11/20 -- 1/6/21 IEP (S-9) is appropriate to address Ruth's special education needs so as to provide her with FAPE in the LRE. MPS contends that both Ruth's unilateral placement at Middlebridge as a day

student from February 3, 2020 until the end of the 2019-2020 school year, as well as her prospective unilateral residential placement at Middlebridge for the upcoming 2020-2021 school year are inappropriate and too restrictive to provide her with FAPE in the LRE. Therefore, MPS contends that it should not bear any financial responsibility for Parent's unilateral placement of Ruth at Middlebridge. MPS further contends that this BSEA action was an abuse of process designed to punish MPS, that federal special education law permits schools to be awarded attorneys' fees in limited, specific circumstances, and that this case meets the federal standard.

PROFILE OF STUDENT

Ruth has been recently evaluated by both Parent and MPS evaluators. On March 6, 2019 when she was 14½ years old, she underwent a neuropsychological evaluation at Massachusetts General Hospital's Learning and Emotional Assessment Program (LEAP) conducted by Gina Forchelli, Ph.D., NCSP (P-18). Dr. Forchelli referenced that Ruth had undergone a prior neuropsychological evaluation at LEAP from Dr. Wilson (in 2015 per Mother's testimony) and had been diagnosed with Attention Deficit/Hyperactivity Disorder (ADHD) and Dyslexia/Specific Learning Disability with Impairment in Reading. Dr. Forchelli's Diagnostic Impressions were Mild Neurocognitive Disorder due to severe migraines impacting co-existing: Dyslexia/Specific Learning Disorder with Impairment in Reading Fluency, Reading Comprehension and Math Problem Solving; Attention Deficit Hyperactivity Disorder (AD/HD), Inattentive Type with associated executive function and processing weaknesses. (See P-18.)

In December 2019 MPS School Psychologist Michael Fish, M.Ed, C.A.G.S., CSP performed a psychoeducational evaluation of Ruth (S-6). On the Woodcock-Johnson Tests of Cognitive Ability 4th edition (WJ-Cognitive) her overall General Intellectual Ability score was 97, placing her in the average range of intellectual functioning, with 8 subtest scores falling within the average range, 1 subtest high average, 2 subtests low average and 2 subtests within the low range. On the Woodcock-Johnson Tests of Achievement 4th edition (WJ-Achievement) Ruth's scores in Broad Reading, Reading Fluency, Broad Mathematics, Academic Skills, Academic Fluency and Broad Achievement all fell within the average range, while her Academic Application score fell within the high average range. Two math subtests and a spelling subtest were low average. All other subtests were average or above average, with her written expression and writing sample subtests falling within the very superior range. On the Grey Oral Reading Test – 5th Edition (GORT-5) all subtest scores fell within the average range.

(See S-6 for Summary and Recommendations; testimony, Fish.)

Dr. Lebel, Ruth's neurologist, has authored multiple "To Whom It May Concern" letters regarding Ruth's condition (October 16, 2019 and December 5, 2019 (P-36; 45). In her December 2019 letter (P-45) Dr. Lebel writes:

[Ruth] is regularly followed within the headache program at Boston Children's Hospital in Waltham. She has a diagnosis of chronic intractable migraine, now present on a daily basis, associated with additional symptoms including lightheadedness, near syncope, nausea, vomiting, photophobia, tinnitus, unusual loss of appetite. She has had disruption

in sleep. She has had difficulty maintaining regular attendance at school, due to exacerbation of her symptoms within that setting...

Due to difficulty regarding communication and actions involving [Ruth's] family and her school system, she has had an exacerbation of symptoms. It is unlikely that a solution for supported partial school attendance will be adequate for maintaining [Ruth's] stability of health and advancing her academic skills, at present. Therefore, consideration following admission to a partial hospitalization program (PRRC) may be given to placement in an alternative supportive school where Ruth will receive a multidisciplinary approach to managing learning disability as well as her ongoing health challenges.

Ruth attended the PPRC from December 23, 2019 through January 31, 2020. On January 31, 2020 the PPRC sent Middlebridge a letter providing information regarding her condition, treatment, and recommendations (P-48). The PPRC reported that chronic pain is not a signal of bodily damage but that the pain experienced is very real. However, such pain can lead to disability if treated with rest and disuse. The PPRC report states:

To treat chronic pain, we teach children and families to respond through activity, minimizing focus on pain, encouraging active coping strategies and normalizing expectations and routines. This change in response is critical in breaking the cycle of disuse and disability...

Children and adolescents with chronic pain often experience difficulties in the school setting. Chronic pain symptoms are recurrent in nature, meaning that the symptoms wax and wane, with periods of better and worse functioning that may be largely unpredictable. This can create challenges in school. While the condition is biological in nature, pain has both physiological and psychosocial consequences. Most chronic pain symptoms are made worse by stress, so it is typical for symptoms to increase when a child is faced with a stressful situation. For many pediatric chronic pain patients, symptoms are more severe on school days given the increased stress level in terms of time, memory, and concentration demands, the need to get up early in the morning, the social dynamics and need to navigate the busy and stimulating school environment. Furthermore, many children and adolescents with chronic pain syndrome do not always look like they are in the amount of pain they describe. This does not however suggest that the pain is "all in their heads" or that they are "faking" or otherwise exaggerating their symptoms. The pain and other physical symptoms are very real.

As part of the rehabilitation for this type of pain, we strongly encourage children and adolescents to engage in as much normal functioning as possible, including attending school as consistently as possible and for the fullest day possible.

The PPRC letter then listed strategies to help Ruth succeed in school despite her pain. (See P-48 for full PPRC report.)

Clinical Psychologist James Mehegan, Ph.D. is Ruth's therapist. As of the date of his March 4, 2020 testimony, he had seen Ruth for about 30 sessions over the prior 9 months

(approximately on a weekly basis), and such sessions were continuing. Dr. Mehegan is a pediatric behavioral medicine specialist and Ruth sees him for self-control measures and learning to cope and compensate with her migraine issues. He has spoken with doctors at the PPRC as well as Dr. Lebel. Dr. Mehegan testified that the PPRC is a state-of-the-art treatment program for medical pain disorders which have interfered with functioning sufficiently to cause significant and ongoing distress. He testified that migraine is a disorder of which stress is a major exacerbating factor and that Ruth has migraines plus a variety of education related difficulties as well – dyslexia, attentional issues and executive functioning issues. Therefore the classroom is a major stressor for Ruth because of the combination of the psychophysiological disorder she has (migraines) and her various learning issues.

Dr. Mehegan testified that he endorses the PPRC report and school management plan. He testified that Ruth is never completely pain free but rather with a constant low level of pain with occasional breakthrough pain. He stated Ruth's academic issues exacerbate her symptomology and that her symptomology exacerbates her academic issues. He testified that at her worst, Ruth is completely dysfunctional.

Dr. Mehegan testified that Ruth feels the tension between her mother and the school and it has risen to the point where it is untenable and, as a result, MPS is not an environment that is going to work for her. He testified that the discord between school and family has had a negative impact on Ruth's headaches; that Mother has spoken to him both in Ruth's presence as well as separately regarding her displeasure with MPS; and that MPS is not conducive to Ruth's health and welfare

(See testimony, Mehegan.)

PARENT'S PROPOSED PROGRAM

Parent proposes that Ruth be educated at Middlebridge School (Middlebridge) located in Narragansett, Rhode Island. Middlebridge is both a day and residential school placement. This past year it had a total of 75 students– 5 day students and 70 residential students. It is approved by the state of Rhode Island as an independent school. It is not approved by the Massachusetts Department of Elementary and Secondary Education (MDESE) as a private school. It is not approved by either MDESE or Rhode Island as a special education private day school or a special education residential school placement. All teachers have at least bachelor's level degrees in the academic subject areas that they teach. No teachers have any special education teacher certifications.

From Ruth's home in Marshfield, MA to Middlebridge in Narragansett, RI is approximately a 1½+ hour drive each way. Middlebridge had no residential openings for the 2nd semester of the 2019-2020 school year so Ruth attended as a day student. Mother or Uncle drove Ruth to Middlebridge in the morning and home again each night for the approximately 6 weeks Ruth physically attended Middlebridge prior to the COVID 19 shutdown. Ruth has been accepted as a residential student for the upcoming 2020-2021 school year.

The average class size at Middlebridge is 4-5 students, with the largest class 7 students. The school day starts at 8:40am. There are seven class periods per day, each 40 minutes long, consisting of subject matter classes; a daily social pragmatics class to address areas of students' social-emotional development that might be impacted by their learning differences; and a 1:1 tutorial which, for Ruth, focuses on remedial language and executive functioning. All students have a proctored study hall at the end of the school day with the same teacher every day so that Middlebridge can know their patterns of strengths and challenges and support them in areas such as executive functioning and study skills. The school day ends at 4pm. There is an afterschool programming elective period where students participate in different extracurricular activities such as art, athletics, meditation, yoga, and community service, which ends at 5:15pm. At this time day students return home. Residential students have dinner. From 6:30-9:30pm there is a residential independent living skills curriculum consisting of dorm curriculum, residential life skills, club activities, and time for students to socialize. On weekends there is an activity period on Friday night, 3 activity periods on Saturday and one activity period on Sunday. Activities include going to plays, museums, cultural activities, community service events, athletic events and "fun stuff" including movies and bowling. Thus, there is a calendar of structured and unstructured time but all activities are supervised.

All Middlebridge classes were virtual classes after the March 13, 2020 shutdown, with the schedule totally in place, via Zoom, by April 1, 2020 until the end of the school year in late May 2020.

Only 20% of the students who attend Middlebridge are on IEPs that Middlebridge has agreed to implement. All of the students who attend Middlebridge have a diagnosis of learning differences or disabilities.

(See testimony, Leventhal; Mother; P-54.)

SCHOOL'S PROPOSED PROGRAMS

The IEP proposed by MPS for Ruth from 6/19 to 6/20, i.e., the 2019-2020 school year (S-3) proposed direct special education services from a special education teacher via a Strategies special education classroom for 85 minutes 3 times per 6 day cycle (85 minutes every other day) for a total of 3 ¾ hours of direct special education services per 6 day cycle. Such services did or would have taken place at MHS. (See S-3).

The IEP proposed by MPS for Ruth from 1/7/20 to 1/6/21 (S-4) which considered the December evaluation of School Psychologist Fish (S-6) provided Ruth with direct special education services in executive functioning for 45 minutes per day (6x45 minutes per day per 6 day cycle) from a special education teacher plus 10 minutes daily consultation between the special education teacher and regular education teachers. This placement is checked off on the IEP as a full inclusion placement. The IEP notes in the Narrative Description of School District Proposal:

The district is proposing that Marshfield High School is no longer the appropriate educational setting for [Ruth]. However, [Ruth] is a student who could be educated at

Marshfield High School. However, the district recognizes that [Ruth] may be more comfortable in a high school within one of our surrounding communities. The district proposed at the meeting and [Mother] consented for referral packets to be sent to local high schools to determine if these settings can effectively meet [Ruth's] needs. Until the placement is formally determined, [Ruth's] PL1 will remain as Marshfield High School. This form will be updated by the Out of District Coordinator when placement decisions have been finalized.

The district is proposing to provide transportation services for [Ruth] during the regular start and end time of the school day. In home tutoring services (provided by an adult) to support [Ruth's] executive functioning and academics throughout this IEP period. The district has approved as much tutoring as [Ruth] can tolerate until she is regularly attending school. Then, she will continue to be eligible for 10 hours of in home tutoring per week...

The team rejects the need for transportation to be available on demand. (See S-4.)

The above-cited IEP Narrative Description was amended on January 29, 2020 (S-5), in pertinent, part as follows:

The district acknowledges that Dr. Lebel and [Mother] believe that Marshfield High School is no longer the appropriate educational setting for [Ruth]... [Mother] emphasized [Ruth's] level of trust with the district... This form will be updated by the Out of District Coordinator if it is determined that placement will be a district other than Marshfield. (See S-5.)

The IEP proposed by MPS for Ruth from 2/11/20 – 1/6/21 (S-9) considered the PPRC report of 1/31/20 (P-48). This IEP continued to provide direct special education services in executive functioning from a special education teacher for 45 minutes per day (6x45 minutes per day per 6 day cycle) plus 10 minutes daily consultation time between the special and regular education teachers. This placement is also checked off on the IEP as a full inclusion placement. The Narrative Description of the School District Proposal noted:

The TEAM discussed the recommendations within the (PPRC) letter and determined that the document in its entirety should be available to [Ruth's] current and future teachers. Therefore, this letter, as well as the two included documents ([Ruth's]) School Management Plan and [Ruth's] Keep Moving Plan should be considered attachments to, and part of, this IEP...

In response to the recommendation for a “highly structured and individualized academic environment” stated in the PPRC letter, and in continued acknowledgement that Dr. Lebel and [Mother] believe that Marshfield High School is no longer the appropriate educational setting for [Ruth], Ms. Scolaro proposed sending referral packets to both Pilgrim Area Collaborative (Pilgrim Academy) and South Shore Educational Collaborative (South Shore High School). [Mother] was uncomfortable signing the

consent form without more information and the ability to preview the newest IEP proposed. (See S-9.)

With Mother's consent, MPS sent referral packets to the following neighboring LEAs – Cohasset, Norwell, Pembroke, Scituate, Duxbury, Hanover and Hingham Public Schools. Ruth was accepted at Hanover on January 22, 2020; at Norwell on January 23, 2020; and at Duxbury on January 24, 2020, all pending Parent's acceptance. As noted in **STATEMENT OF THE CASE**, *supra*, MPS sent redacted IEP referral packets to the two collaborative placements referenced above. Pilgrim Academy accepted Ruth on February 28, 2020 and South Shore High School on March 2, 2020. (See testimony, Scolaro; S-14.)

On January 28, 2020 Mother's visited/toured the proposed Norwell placement, met with Norwell's special education director, Susan Theodorou, and inquired if Ruth could attend the Norwell placement via a 45 day extended evaluation. On January 30, 2020 Ms. Theodorou confirmed that Ruth could attend Norwell via one 45 day extended evaluation and MPS also agreed to such a plan, i.e., "we will fund whatever you work out with Mom." (See testimony, Mother; Scolaro; S-14.)

FINDINGS AND CONCLUSIONS

It is undisputed by the parties and confirmed by the evidence presented that Ruth is a student with special education needs as defined under state and federal statutes and regulations. The fundamental issues presented in this matter are listed under **ISSUES IN DISPUTE**, above.

Pursuant to *Schaffer v. Weast*, 126 S. Ct. 520 (2005), the United States Supreme Court has placed the burden of proof in special education administrative hearings upon the party seeking relief. Therefore, in the instant case, Parent bears the burden of proof in demonstrating that: 1) MPS' IEPs did not/do not provide Ruth with FAPE in the LRE; and 2) placement of Ruth at Middlebridge as a day student from February through May 2020 and prospective residential placement of Ruth at Middlebridge was/is necessary in order to provide Ruth FAPE in the LRE.

Based upon five days of oral testimony and several thousand pages of written documentation², I conclude that MPS' proposed IEP (S-4,5) placing Ruth at a neighboring school system would be appropriate to address her special education needs so as to provide her FAPE in the LRE. But for the relationship between the Parties, to be addressed below, I find that Ruth's special education needs could be appropriately addressed within MHS so as to provide Ruth with FAPE in the LRE. Although not necessary to provide Ruth FAPE, I find that MPS' proposed IEP for Ruth in a collaborative placement (S-9) would provide Ruth FAPE in a less restrictive, closer to home special education environment than either a day or residential placement at Middlebridge.

My analysis follows.

The evidence overwhelmingly demonstrated, as did the conduct and demeanor of the parties during this 5 day hearing, that the relationship between Parent and MPS is completely

² Most of Parent's numbered and lettered exhibits contained numerous diverse documents covering multiple areas. Further, many of MPS' exhibits were extremely lengthy.

toxic, malignant and beyond repair. Based on the past and continuing antagonism between Parent and the district, I agree with the parties that Ruth cannot be educated within MPS at the current time.

It is not, however, my job or responsibility as a BSEA Hearing Officer to determine who is at fault for each of the different events which have occurred, nor to quantify blame, nor to fashion any type of sanction or punishment for same. Rather, it is my responsibility to determine whether MPS has proposed an IEP/placement which provides Ruth FAPE in the LRE; and if not, whether Parent's chosen placement has/will provide Ruth FAPE in the LRE.

Based upon the testimony and exhibits introduced into evidence, Parent has failed to meet her burden of proof to demonstrate that Ruth cannot be educated within a program in a public school setting as proposed in Marshfield's proposed IEPs, or that Ruth requires either a private day school or residential school placement to address her special education needs.

Out of district day or residential placements are only required if FAPE cannot be provided to a student in a less restrictive program. Parent has provided no evidence from any educator or educational expert that Ruth requires an out of district private day school placement or residential placement in order to appropriately address her special education needs.

Parent testified that Ruth required a "warm transfer" when she completed the PRRC program; that she investigated a number of out of district placements; and that the only available placement was Middlebridge (testimony, Mother). Mr. Leventhal testified regarding the Middlebridge program and that Ruth functioned well there. Dr. Mehegan testified regarding Ruth's migraines and the impact of the migraines on her educational performance. He noted that in a residential program if Ruth did not feel well in the morning she might be able to recover and then go to classes in the afternoon. He offered no testimony that a residential placement was necessary in order to address her special education needs. Dr. Lebel's letters primarily deal with Ruth's migraines. Her letters did note the poor relationship between the parties; that Ruth should not be educated within MPS; and that consideration should be given to an alternative supportive school. However, Dr. Lebel's letters did not state that Ruth required a private day or residential placement to address her needs (See P-36, 45.) Thus, no witnesses called by Parent substantiated Parent's position that Ruth required a private day or residential program to address her special education. While Parent also called MPS witnesses – Ms. Scolaro, Ms. Wiggins – neither of them supported Parent's position, nor did School Psychologist Fish, called by MPS. (See testimony, Mehegan; Leventhal; Fish; Wiggins; Scolaro ; P-36; 45; 54.)

The December 2019 MPS psychoeducational evaluation (S-6) found Ruth's overall functioning to be approximately at grade level and higher than the March 2019 MGH neuropsychological evaluation (P-18). Since different testing instruments were utilized, a practice effect was unlikely. What did occur over the interim is that Ruth received 71 hours of 1:1 tutoring from special education teachers over the 2019 summer. In any event, even the MGH evaluation did not recommend that a private day school or a residential placement was necessary to address Ruth's special education needs. (See P-18; S-6.)

In summary, Parent has not presented, nor do I find sufficient evidence in the record, that the restrictiveness of a private day or residential school placement is required in order to appropriately address Ruth's special education needs.

The PPRC report, [Ruth's] School Management Plan, and [Ruth's] Keep Moving Plan (P-48), which was not provided to MPS until February 5, 2020 (S-14), states in pertinent part (emphasis in original):

Strategies to help [Ruth] succeed in school despite her pain include the following:

1. [Ruth] is medically cleared to attend school and should plan on attending for the fullest day possible. If Ruth is having difficulty attending school due to pain, the first priority should be to encourage school attendance. A modified academic schedule or workload may be warranted on such occasion.
2. She is cleared to participate in physical education...
3. A strong emphasis of the rehabilitative process is encouragement in normal functioning and a reduction of the perception of disability. Therefore, we encourage those working with [Ruth] to help her focus on her functioning rather than focus on her pain or other physical symptoms. This includes avoiding asking [Ruth] directly about her pain or anxiety symptoms.
4. If [Ruth] is having a hard time managing her pain, the first strategy should be to try to manage her pain by using active coping strategies while in class as the goal of her rehabilitation is to engage in as much normal activity as possible and to try and take her mind off of her pain.
 - a. Specifically [Ruth] should be able to take stretch break within the classroom when needed (i.e., at her desk or at the back of the classroom...
 - b. Her School Management Plan, which outlines these strategies, will be provided to keep on file should [Ruth] need to access this plan while in school.
5. When her pain has been particularly difficult to manage [Ruth] shall take short breaks outside of the classroom. During these breaks she should be allowed to use her individualized, step by step plan to help her regulate herself and return to class.
 - a. Her individualized Keep Moving Plan, which outlines these strategies, will be provided to keep on file should [Ruth] need to access this plan while at school...
6. Academic accommodations will be important in her successful return to school. In addition to her identified academic needs based upon her learning differences, the

following academic accommodations are recommended to occur **within the least restrictive environment** (emphasis not in original):

- a. Ruth would benefit from a highly structured and individualized academic environment that may include, but is not limited to the following supportive services that will assist [Ruth] in maintaining her gains from pain treatment and support her progress towards functioning:
 - i. The availability of an academic coordinator to assist with planning, organization, and management of assignments
 - ii. Small class sizes
 - iii. Focus on social skills and pragmatics
 - iv. Opportunities for recreation, social activities and/or physical activities within the structure of the school day....

(See P-48 for complete PPRC Report; Management Plan; and Keep Moving Plan).

Mother has focused on the PPRC recommendation of small classes. However, I find that the overwhelming thrust of the PPRC report stresses normalization, normal functioning, school attendance, a re-direction of the perception of disability, and strategies to help Ruth manage her pain and function in the least restrictive environment possible. I find that the vast majority of the PPRC recommendations can be addressed in a public school educational environment with appropriate supports.

Mother argues that the MPS IEP proposing potential collaborative placements (S-9) should not be considered because that team meeting did not occur until Ruth was already in attendance at Middlebridge. However, Mother did not provide the PPRC Report to MPS until February 5, 2020 (S-14) which was already after Ruth began at Middlebridge. MPS timely convened a team meeting on February 11, 2020 to consider the PPRC Report. Mother cannot have it both ways – introducing the PPRC Report into evidence in an attempt to support her position, not providing said report to MPS until after the unilateral placement was made, and then arguing that MPS’ IEP in response to consideration of said report should be barred from hearing officer consideration.

I conclude that MPS’ proposed January 7, 2020 – January 6, 2021 IEP (S-4) addresses Ruth’s special education needs so as to provide her FAPE in the LRE. In addition to addressing her specific special education needs, this IEP contains numerous and detailed references to Ruth’s migraines, Dr. Lebel’s input, and significant modifications and accommodations to address her migraine medical issues, including in-home tutoring, access to a designated go to person as needed, and access to an adjustment counselor and/or guidance counselor as needed. (See S-4 for complete list of modifications and accommodations.) Norwell, Duxbury and Hanover have all accepted Ruth based upon this IEP³.

Ms. Wiggins and School Psychologist Fish both testified that this IEP addressed Ruth’s special education needs. I place substantial weight on the testimony of these two witnesses. Ms. Wiggins was one of the two special education tutors who provided Ruth 91 hours of 1:1 tutoring

³ I note that all these acceptances occurred prior to Ruth’s beginning at Middlebridge.

over the 2019 summer. She was therefore in a position to assess Ruth's level of academic functioning. I similarly credit the findings of Mr. Fish as he is not an employee of MPS who works at MHS, and he performed the most recent testing of Ruth prior to her unilateral placement. (See testimony, Wiggins; Fish; Scolaro; Mother.)

I also conclude that MPS' proposed February 7, 2020 – January 6, 2021 IEP (S-9) addresses Ruth's special education needs so as to provide her FAPE, although a collaborative placement would not appear to constitute the LRE. (Again, this IEP specified that its proposed services could be provided within MPS so could also likely be provided within a neighboring school system.) This IEP continues to address all of Ruth's specific special education needs and continues the detailed references to Ruth's migraines and an even more expanded list of modifications and accommodations, including that the PPRC report should be appended to the IEP (See S-9 for complete list of modifications and accommodations). Again, both Ms. Wiggins and Mr. Fish testified that this IEP would address Ruth's special education needs.

I feel compelled to note that if MPS had proposed sending Ruth to Middlebridge as a private day school placement, I would have had to find such a proposed placement inappropriate because Massachusetts special education regulations mandate that no student should be transported more than 1 hour each way. Mother has testified that it took at least 1½ hours each way to travel to/from Middlebridge. Even Mr. Leventhal of Middlebridge testified that such a commute was onerous. The school day at Middlebridge runs from 8:40a.m. – 5:15pm. Thus, Ruth's school day was 8 hours long, in addition to a 3 hour daily round trip commute for a total of 11 hours per day, 5 days per week. Given the above, I would be unable to find a day placement at Middlebridge appropriate in any event.

Finally, I address the August 28, 2019 email of Ms. Scolaro to Mother (P-31), unilaterally doubling Ruth's special education strategies classes and the assignment of a tutor to be in Ruth's classes to assist Ruth where necessary and to assure that Ruth not fall behind in her schoolwork if her migraines again caused her to miss significant time from school (See P-31 email #4 for complete text referenced above). I acknowledge Ms. Scolaro's testimony that she did this in response to Parent's questions regarding the plan for Ruth as she began the 2019-2020 school year; and that her actions were an attempt to help ensure that Ruth would be able to keep up when in school and to have support if she needed to be out of school due to her migraines. Despite her intentions, however, such actions should not have been taken without a team meeting or, at the very least, without parental input and written consent. I admonish MPS not to take such unilateral actions in the future.

ORDER

1. MPS' January 7, 2020 – January 6, 2021 IEP, calling for placement in a neighboring LEA, is appropriate to address Ruth's special education needs so as to provide her FAPE in the LRE. The PPRC report, received 1 month after this IEP was proposed, should be appended to said IEP.

2. MPS' February 11, 2020 – January 6, 2021 IEP, calling for placement in a collaborative, is appropriate to address Ruth's special education needs so as to provide her FAPE, albeit in a more restrictive setting than the January 7, 2020 IEP.
3. MPS is not financially responsible for Parent's unilateral placement of Ruth at Middlebridge as a day student from February 3, 2019 to the end of the 2019-2020 school year.
4. MPS is not financially responsible for Parent's prospective unilateral placement of Ruth as a residential educational student at Middlebridge for the 2020-2021 school year.
5. Parent is not entitled to compensatory services based upon the instant record.
6. MPS is not entitled to court ordered attorney's fees based upon the facts of this case.

By the Hearing Officer,

Raymond Oliver

Dated: September 4, 2020