

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

**In Re:** Student v.  
Belmont Public Schools &  
Devereux Advanced Behavioral Health

**BSEA# 2103476  
& BSEA# 2104694**

**DECISION**

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL ch. 71B), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under these statutes.

On November 6, 2020, Parents filed an Accelerated Hearing Request and Motion for Stay Put in the instant matter. Thereafter, on December 15, 2020, Parents filed a Motion for Leave to Amend their Accelerated Hearing Request, which request was granted. Later, Parents requested to take the matter off the Accelerated track. At the request of and by agreement of the Parties, the matter was continued for Hearing in January of 2021.

On December 22, 2020, Devereux Advanced Behavioral Health filed a Request for Accelerated Hearing and a Motion to Consolidate this with Parents' Hearing Request, which Motion was Granted, and the matters were consolidated and scheduled to be heard on the previously selected dates in January 2021.

The Hearing was held remotely via Zoom on January 6, 7, 11 and 14, 2021, before Hearing Officer Rosa Figueroa. Those present for all or part of the proceedings were:

Mother<sup>1</sup>

Father

Alicia Warren, Esq.	Attorney for Parents/ Student
M. Elizabeth Latimer, M.D.	Pediatrician and neurologist, Parents' expert
Joseph Moldover, Psy.D.	ABPP/CN, Parents' expert
Cheryl Davis, Ph.D., LABA, BCBA-D	Parents' expert
Melanie Jarboe, Esq.	Attorney for Parents/ Student
Ariana Flessas	Parents' Attorney's Law Clerk, observer
Colby Brunt, Esq.	Attorney for Belmont Public Schools
Mary Jane Weinstein	Out of District Coordinator, Belmont Public Schools

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<sup>1</sup> While both parents attended the Hearing, the term "Parent" throughout this Decision refers to Mother.

Joshua Krell, Esq.	Attorney for Devereux Advanced Behavioral Health
Eric MacLeish, Esq.	Attorney for Devereux Advanced Behavioral Health
Anne Minihane	School Principal, Devereux Advanced Behavioral Health
Nadya Abbas-Peck, Psy.D.	Assistant Executive Director, Devereux Advanced Behavioral Health
Ashley Warhol	Director of Clinical Services, Devereux Advanced Behavioral Health
Alison Khan	Program Director, Devereux Advanced Behavioral Health
Lorna Gross	Assistant Nurse Manager, Devereux Advanced Behavioral Health
Alex Loos	Stenographer, Doris O. Wong Associates
Carol Kusintz	Stenographer, Doris O. Wong Associates
Alina Kantor-Nir	BSEA Hearing Officer, observer

The official record of the hearing consists of documents submitted by Parents marked as exhibits PE-1 to PE-48, Devereux Advanced Behavioral Health (Devereux) documents marked as DE-1 to DE-33, DE-35 to DE-38, DE-40 to DE-48, Belmont Public Schools' (Belmont) documents marked as exhibits SE-1 through SE-18, recorded oral testimony, and written closing arguments.

On January 12, 2021, Devereux Advanced Behavioral Health requested and was granted a request to keep the record open through January 26, 2021 to complete the testimony of one of the witnesses and to submit written closing arguments. The deadline for submission of written closing arguments was set for January 26, 2021 via an Order issued on January 12, 2021. The taking of the testimony portion of the case concluded on January 14, 2021.

On January 19, 2021, Parents filed a Motion for Leave to Supplement the Administrative Record (Motion), seeking to add PE-49, a summary of Student's behaviors for the week ending on January 15, 2021, noting that Parents had not received any behavior summaries from Devereux after December 18, 2020. Devereux filed an Opposition to Parents' Motion on January 21, 2021, citing the limited reason for which the record had been held open through January 26, 2021 and stating that Devereux would not have an opportunity to address the document. Parents' Motion to Supplement the Administrative Record is **DENIED**.

The record closed on January 26, 2020 upon receipt of the Parties' written closing arguments.

**ISSUES FOR HEARING:**

1. Whether Devereux continues to be an appropriate placement for Student;
2. Whether the BSEA has authority to order stay-put at a private school; if so,
3. Whether Devereux should remain Student's stay-put placement until a DDS adult placement is identified and available for Student.

## **POSITIONS OF THE PARTIES:**

### **Parents' Position:**

Parents seek a determination that Devereux's emergency termination of Student is inappropriate and dispute Devereux's assertion that it cannot offer Student a free, appropriate, public education (FAPE).

Moreover, Parents seek a determination that Student's stay-put placement is Devereux and that Student "does not present a clear and present threat to the safety of [Student] or others", noting that Student's termination from that program was initiated four months into a pandemic which caused interruption of Student's much needed medical care by way of antibiotic injections.

Parents argue that Devereux ignored Student's behavioral needs, allegedly because of their medical nature, while simultaneously disregarding medical needs. Moreover, despite having the staff and expertise to "identify, analyze and target" the interfering behaviors, it failed to develop and implement an evidence-based behavioral program or avail itself of the supports offered by Belmont (with the exception of additional staff during the overnight hours).

Parents further argue that contrary to Devereux's assertions, Student's behaviors have improved since his termination was initiated in the summer of 2020. According to Parents, Student's IEP can be modified in a simple and discrete manner to render it appropriate and increase the safety of all involved. Were the Hearing Officer to disagree, Parents assert that Student should stay-put at Devereux until his twenty second birthday or another appropriate program admits him and has an immediate vacancy.

Lastly, Parents assert that Student must remain at Devereux because JRC is not viable (it does not currently have a vacancy) and, more importantly, because Parents question its appropriateness for Student.

### **Devereux's Position:**

Devereux asserts that it is no longer a safe or appropriate placement for Student, noting that Parents' stay-put request is equivalent to an injunction that would compel Devereux to maintain Student's placement despite how unsafe or inappropriate it may be, especially given that he has conditionally been accepted to JRC. According to Devereux, Student's stay-put rights are with Belmont Public schools, not Devereux, and further, Devereux disputes the BSEA's jurisdiction to determine that Devereux is Student's stay-put placement.

Devereux also argues that Parents failure to accept placement at JRC prevents Student from being placed on a waitlist and eventually secure his placement there. Given the severity of Student's behaviors, and in light of Parents' lack of cooperation in proceeding with an alternative placement for Student at JRC, Devereux asserts that it is within its right to

terminate Student's enrollment immediately on an emergency basis. Moreover, if Student's dangerous conditions linger, Devereux asserts that it may be necessary to have Student receive his services in a hospital or rehabilitation setting. Devereux asserts that there are no modifications or accommodations that can be implemented so as to decrease or reverse Student's unsafe behavior trends including bolting and aggression.

Devereux seeks a finding that it is no longer an appropriate placement for Student because his unsafe behaviors prevent him from accessing a FAPE, and that it is only providing Student with custodial care. Devereux seeks an order that it is within its rights to terminate Student on an emergency basis consistent with 603 CMR 18.05(7)(d) and 603 CMR 28.09(12) because he "presents a clear and present threat to his own health and safety." Finally, asserting that stay-put rights apply only to public schools, herein Belmont, Devereux seeks an order that sets aside stay-put right at the private school, or in the alternative, an order stating that Devereux is not Student's stay-put placement.

### **Belmont's Position:**

Belmont asserts that at all times it has worked with all involved to provide Student a FAPE and to find a successor placement for Student; it has also offered to modify the IEP in any way possible by adding staff and/or services to support Student's placement at Devereux until a new, viable placement is identified.

Belmont asserts that despite its intense search, which included funding an adult placement through DDS until Student turns 22 years old, no school/ placement other than JRC has accepted Student. Student's full acceptance at JRC is conditioned on a determination of its ability to meet Student's medical needs and having an opening (which it does not currently have).

Belmont remains steadfast in its offer to do everything within its power to service Student and secure a successor placement, while maintaining that in the interim, Student cannot be left without a placement.

### **FINDINGS OF FACT**

1. Student is a twenty-one-year-old resident of Belmont, Massachusetts who has been attending Devereux, located in Rutland, Massachusetts, pursuant to fully accepted IEPs since late March of 2017 (PE-1; PE-2; Parent). Parents are Student's guardians, and Belmont remains the LEA responsible for Student's education (PE-33). Student presents with a complex medical and learning profile, with deficits that entitle him to special education services (PE-1).
2. Devereux is a 365 day per year residential program. Its day school operates 216 days per year. Student's placement includes extended school year services to prevent substantial regression (SE-18; DE-1). Devereux's Statement of Purpose, mission, program and staff

description, and information regarding Hillcrest group home (which serves 15 male students between the ages of 12 and 21), is described at DE-29. The Hillcrest Program Model section of the document notes that “in addition to using Applied Behavior Analysis, as an overarching evidence based model of care, the group home treatment model also endorses the use of positive behavioral intervention and trauma informed care with a relational approach to create an environment in which youth thrive and develop new skills that replace barrier behaviors” (DE-29). ( Devereux staff testified that the program was only “ABA informed”.)

3. A narrative description of Devereux’s residential and day program notes that

Behaviorally, students [at Devereux] present with a multitude of characteristics, including but not limited to: self-harm; suicidal behavior; suicidal ideation; bolting or runaway behavior; low frustration tolerance; verbal aggression; physical aggression; property destruction; tantrum behavior; defiance; inability to follow rules; over reliance on staff prompting. Students generally have a difficult time remaining on task, are easily distracted and have low tolerance for prolonged academic, functional, or social engagement. Some students struggle with strict adherence to routine, ritualistic behavior, rule governed behavior, and difficulty with transitioning from subject, task, person or location. Some students may isolate when dysregulated while others engage in externalizing behavior as indicated above. Many students seek to escape or avoid task demands, seek attention through maladaptive ways, are motivated by external stimuli, such as access to tangibles, or have sensory processing disorders that impact their ability to be educated in a less restrictive setting (DE-17).

4. Student has been diagnosed with autoimmune encephalopathy (AE)/ PANDAS resulting from a strep infection when Student was in seventh grade, which has contributed to a significant loss of skills, including cognitive and expressive language decline, and neuropsychiatric issues (PE-1; PE-16; DE-1; SE-18; Mother). His medical issues cause behavioral symptoms featuring tics and choreiform involuntary movements, pacing, facial grimacing and Obsessive-Compulsive Disorder (OCD) tendencies (PE-42). Student’s medical condition impacts his functioning and engagement in school (PE-1; PE-20; PE-27).
5. Student’s medical condition requires that he receive antibiotic injections (PE-14; Parent). Since the fall of 2020, he has also initiated an intravenous infusion treatment in Washington, D.C, discussed later. Parents transport Student to Washington, D.C. for this procedure (Parent).

6. In March of 2017, Student was placed at Devereux as a residential student pursuant to an accepted IEP promulgated by Belmont (PE-1). Throughout the relevant periods in this Decision Belmont has remained financially and programmatically responsible for Student fully funding his placement (Weinstein).
7. 2017 and 2018 Case Review summaries note Devereux's concern that while Parents visited Student regularly in the residence and were actively engaged in his care/ placement, their expectations of Devereux' ability to manage some of Student's medical and behavioral needs were inconsistent with the limitations presented in the school's group home (DE-7).
8. Student's preferred staff informed Parents that she would be leaving Devereux during the summer of 2019 (Parent). Parents became concerned that this may cause problems with Student's placement (*Id.*).
9. Student's health and neurological issues negatively affect his ability to access the curriculum effectively and impact attention and impulsivity (SE-18). His ability to consistently complete schoolwork is directly related to his response to the medical treatment he receives (SE-18).
10. Since his arrival at Devereux, the school developed an Early Intervention Plan to address Student's interfering behaviors, which plans were periodically minimally updated. The plans list the same four aggressive behaviors during Student's tenure at Devereux and behaviors indicating Student's intention to leave/ bolt. Devereux also drafted Interaction Guidelines (DE-9).
11. Student requires regular antibiotic treatment injections to address his medical needs. Until late 2019, Devereux's nurse administered Student's antibiotic injections at his residence on campus. These injections have been described as painful and often required that Parent, who visited frequently, or a staff member to apply a "calming hug" while the injection was being administered. The calming hug was applied at Parents' request. On December 4, 2019, (and again via email on January 7, 2020) Devereux notified Parents that it would stop giving the injections because of the need to use supportive holds, which Devereux opined was akin to a restraint requiring approval from Devereux's legal, licensing and administrative staff (DE-33; Parent). Moreover, while administration of the injections was often completed within ten minutes, at times the process lasted over one hour and on occasion required the nurse to return the following day. Devereux concluded that administration of the injections went "beyond [the school's] ability to deliver." Thereafter, Student received his injections at an off-campus doctor's office to which Parent or Devereux transported him. This practice, however, was interrupted during the COVID 19 pandemic restrictions, and Student instead began to receive oral antibiotics, which lacked the desired or intended level of effectiveness (Parent). When the practice resumed around July of 2020, Student was transported three times by Devereux, but a bolting incident during one of those trips resulted in Parent providing the transportation again and Student's compliance with medication administration increased (Abbas).

12. Devereux first raised issues regarding its ability to serve Student in the late fall of 2019, following the departure of Student's preferred staff during the summer of that year (Parent).
13. Email communications dated December 4, 2019 document Devereux's concerns regarding Student's presentation, expectation of Student's transfer to another school and plans to reconvene the Team in January 2020 (DE-15).
14. In December of 2019, Parents alerted Belmont of the concerns regarding the appropriateness of Devereux for Student. Belmont immediately sent out packets to explore other potential placements including placements proposed by Parents (Parent). During 2020, packets were specifically sent to: Guild School, Crystal Springs, Meadowridge, Dr. Franklin Perkins, Cardinal Cushing School, Evergreen School, Ivy Street, Amego, Melmark New England, Latham Centers, Seven Hills in Groton MA, Stetson, May Center, Boston Higashi, New England Center for Children, Hillcrest, Swansea Wood School, Easter Seals of New Hampshire, Becket Organization of New Hampshire, Crotched Mountain School, Groden Network of Schools in Rhode Island, Archway School, Berkshire Meadows, Judge Rotenberg Center (JRC) (SE-1; SE-2; SE-3; SE-4; SE-5; SE-6; SE-7; SE-9; SE-10; SE-11; SE-12; SE-13; SE-14; SE-15; SE-16; SE-17; Weinstein). Parents consented to forwarding of the packets (PE-29, Parents).
15. Nicole Mahoney, M.S. CCC/SLP, Belmont's speech and language pathologist, performed a communication evaluation of Student in October and November of 2019. She administered the Peabody Picture Vocabulary Test (PPVT-4), the Expressive Vocabulary Test (EVT-2), and conducted classroom and therapy informal observations (PE-8). Her report, dated January 15, 2020, notes that Student presents with a moderate receptive language disorder and a severe expressive language disorder, which make it difficult for Student to access the curriculum. Student has significant deficits in expressive vocabulary skills which supported the need for assistive and alternative communication. His reading fluency was good, and he demonstrated reading comprehension abilities at the functional reading level. He understood basic vocabulary, concrete concepts and rehearsed routines. The evaluator noted that Student's verbal comprehension was enhanced when he was provided with visual supports. However, Student's distractibility and processing delays interfered with his performance despite multi-modal supports. He also evidenced weak expressive language skills (SE-18; DE-1). Ms. Mahoney recommended that Student have access to tablets or other electronic devices to help with acquisition of vocabulary, reading comprehension and to increase receptive and expressive communication. She also recommended that he be evaluated by a speech and language pathologist who specialized in augmentative/ assistive communication technology. Lastly, Ms. Mahoney recommended one-to-one language therapy sessions and opportunities for generalization to address his language weaknesses, including pragmatic skills deficits (PE-1; SE-18; DE-1).

16. An occupational therapy evaluation was performed by David Alex on seven separate dates in October and November of 2019 (PE-10). Mr. Alex noted that there had been a decrease in monthly consultation due to Student's lack of purposeful, consistent participation in occupational therapy, thereby recommending cessation of occupational therapy sessions. Mr. Alex, however, recommended that Student receive assistance from an experienced, consistent one-to-one aide as well as numerous other accommodations including provision of consistent daily routine with visual schedule, the use of an incentive and or food reinforcer paired with the task, and allowing Student to "engage in sensory seeking behaviors in-between tasks" to help him self-regulate (SE-18; DE-1).
17. A letter dated November 5, 2019, from Francisco Bonilla, MD, notes that Student is generally compliant for injections, but on occasion may need a therapeutic calming hug during the injection, explaining that this does not constitute a restraint (PE-12). Previously, on October 31, 2019, Dr. Elena O. Volozhanina, MD, made a similar recommendation during administration of the biweekly antibiotic injections (PE-13).
18. Dr. Joann Frankhouser, Belmont's School Psychologist, conducted a psychological evaluation of Student on December 11, 2019. Her report, dated January 15, 2020, included the results of Student's ABAS-3, on which Student's scores fell in the extremely low range in every category except home living where he scored in the low classification (PE-7). The cognitive assessment results of this evaluation demonstrate that Student's ongoing infection process related to his AE/ PANDAS continued to impact Student's neurocognitive functioning and interfered with his educational progress, specifically in regard to his "learning, memory and processing, language, independence in managing day-to-day activities, ability to access prior knowledge (although he can under some conditions), self-regulation, and emotional modulation" (PE-1; PE-7; SE-18). While Student demonstrated some age-appropriate cognitive skills, test results per the CTONI-2 showed that he struggles to sustain the mental effort necessary to perform reasoning and academic tasks. Adaptive functioning skills also fall below the average level. Student struggles to interact with his environment and appears to derive the greatest level of comfort from retreating into his own world via listening to music and walking/ pacing. Activities that foster greater level of social interactions were recommended to reduce Student's social isolation as well as activities that increase his cognitive stimulation without taxing his judgment and reasoning skills too much. Student appeared to have a very limited repertoire of things that give him joy or pleasure (PE-1; SE-18; DE-1).
19. Student's Team convened on January 15, 2020, at which time Devereux's ability to continue to offer services to Student was discussed, and Devereux's staff expressed their opinion that it was no longer a safe placement for him. The ensuing IEP, covering the period from 1/15/2020 to 1/14/2021, called for residential placement at Devereux. This IEP contains goals to address social-emotional issues (with a focus on the use of adaptive communication strategies through adaptive technology so that he can "access adaptive coping strategies and utilize appropriate replacement behaviors in order to decrease his frequency in safety-interfering behaviors"), functional academics, communication, residential, transition and activities of daily living (ADL). The Service Delivery Grid

calls for the following direct special education services (under the C grid): one hour counseling services per week; 360 minutes per week of social/ emotional/ academic/ behavioral services; thirty minutes weekly speech and language services; residential services twenty-four hours per day, seven days per week when Student is not in school; one-to-one paraprofessional services 24 hours per day, seven days per week (24/7); and extended school year social/ emotional/ academic/ behavioral services (ESY) for 360 minutes, five days per week (PE-1; SE-18). The IEP also offers a thirty minute monthly occupational therapy consultation. The one-to-one paraprofessional service was later increased to two-to-one staff during the night-time hours starting in July of 2020 (PE-1). The IEP goals note that goal achievement is to be determined through: “teacher observation, [a] token economy system, quarterly reports and work samples” (PE-1; SE-18).

20. Parents fully accepted the proposed IEP and placement on February 10, 2020, adding the following comment:

Regarding pg. # 18, “hasn’t entered the school building in several months.” This comment is not correct. [Student] has been to speech and art class several times this week. The weekly progress notes sent by the case coordinator confirm this.

Regarding pg. #10, “continues to engage in aggressive bolting” [Student] has bolted once this year, after his tonsillectomy and even at that time he expressed “bad mon, I stayed within the perimeter of the area” (his exact words). So, in his mind he was still trying to stay within school bounds. This is a substantial improvement from the previous year. Re. aggression, also substantially. He is calm most of the time but will push when pressed on showering or when verbal skills etc. (PE-1; SE-18).

21. The January 2020 to January 2021 IEP residential goal notes Student’s continuous struggles with peer social engagement and with safety maintenance, noting that “during periods of dysregulation or increased medical needs, he continues to engage in aggressive and bolting behaviors at the residence” (SE-18). During this time, Student was also not accessing his academic instruction regularly.
22. To date, Student has been denied admission at every school except for JRC. According to Mary Jane Weinstein, Belmont’s Out of District Coordinator, Student is extremely difficult to place because of his age and profile; he is almost 22 years old. While Melmark New England found Student appropriate, it had no available openings. Her numerous referral efforts and results are documented in an August 25, 2020 email to Devereux staff, Parents and Jan Costa of DDS (DE-11; See also PE-35).
23. Ms. Weinstein is Massachusetts DESE certified in moderate special needs, and as a special education administrator and school principal (SE-13; Weinstein). She testified that Belmont has offered to provide additional staffing and services to support Student’s placement at Devereux, but except for the two-to-one staff at night, neither Devereux nor

Parents requested any additional services or supports from Belmont (Weinstein). Throughout Student's tenure at Devereux, Belmont has not denied any services or staff requests at any time (Abbas, Minihane, Parents).

24. On March 9, 2020, Student participated in an Augmentative Communication Evaluation conducted by Easterseals, Massachusetts, with Jeanne Mahanna MS CCC/SLP. The evaluator made numerous recommendations including provision of an iPad with Touch Chat app. and training noting the need to trial a "communication system modified for his specific need" to assist Student communicate easily with a variety of messages (PE-39). To date, Devereux and Belmont have not convened Student's Team to discuss this evaluation because Parents agreed that due to the pandemic and an unfinished vocational transition evaluation that had not been completed, the Team would convene to discuss both evaluations together (Weinstein, Minihane).
25. Ms. Minihane, Devereux's Principal, opined that assistive technology would not help Student because his cognition was profoundly affected, akin to an individual with Dementia. Ms. Minihane is not a speech and language pathologist, is not a behaviorist and lacks formal training in ABA; prior to becoming school principal she was a special education teacher (*Id.*).
26. Nadya Abbas-Peck, Assistant Executive Director, Dr. Ashley Warhol, Director of Clinical Services and Anne Minihane, School Principal at Devereux, opined that addition of staff or services would not render Devereux appropriate for Student (Abbas, Minihane, Warhol). They testified that Student's presence at Devereux presented safety issues for Student and others due to the frequency and intensity of his behaviors, especially his bolting and aggressive behaviors at night. They, as well as Dr. Latimer, agreed that Student's unsafe behaviors, including unintentionally striking at people as well as bolting, resulted from his medical condition, and Devereux staff opined that the school could no longer care for him safely (Latimer, Abbas, Minihane).
27. Student paces outside the buildings and often does not dress appropriately for the weather, i.e., does not wear his coat during winter and/ or wears sandals, or walks out of the building wearing only his socks when it is cold (Abbas, Warhol).
28. Student has a history of bolting on and off campus (Abbas, Warhol). Dr. Warhol noted that Student was very fast, making it hard for the staff to catch up with him. He further noted that Student can quickly run into dangerous areas such as the construction sites on campus, traffic (in and/or outside school grounds) and into the woods, which, if it occurred at night, would make it difficult for staff to locate him. Dr. Warhol expressed concerns that at night she worried that she would hear about "something very tragic happening" to Student or staff because of something Student did (Warhol).
29. Ms. Abbas testified that Devereux cannot use physical restraints to prevent Student from leaving his residence except in emergency cases.

30. Devereux's data suggests that there was a significant increase in Student's unsafe behavioral incidents between 2019 and 2020 (Warhol). Covid-19 related restrictions impacting Parent's ability to visit Student on campus (which she did often prior to that) and Student's inability to be transported to receive his antibiotic injections may have contributed to the increases in behaviors (Parent, Abbas).
31. DE-3, DE-30 and DE-31 contain charts prepared by Devereux in anticipation of this Hearing and were created under the direction of Ms. Abbas. At Hearing, Ms. Abbas experienced difficulty explaining the incidents characterized as "risky behaviors", a subjective category which required interpretation of the RADAR reports and which lacked consistency in the determination of what constituted a risky behavior. Ann Minihane prepared the charts, and she explained that the risky behaviors category included incidents of eating inedible objects, posturing, attempts to assault, running into the woods or the construction site (bolting), going to other students' rooms to retrieve items and the like. She too had difficulty during her testimony reconciling what she had included in this category, concluding that DE-30 and DE-31 were under-inclusive and over-inclusive of incidents (Minihane).
32. The charts in DE-3, DE-30 and DE-31 track multiple events within a single incident and may be misleading; for example, reporting Student's refusal to take his gummy vitamin as medication refusal (see DE-25). Parent testified that while desirable, it is not required that Student take vitamins daily. Additionally, the information contained in the bar graphs is inconsistent with the information contained in PE-28; comparison of these exhibits reflects discrepancy between the number of incidents occurring in 2017 and 2018.
33. Student's bolting out-of-area incidents include bolting down the campus road and running into the active construction site on campus and off the van during a trip to his physician to receive the antibiotic injection. At times he has not been suitably dressed for the weather, when he has bolted, and at least once in 2020 he ran during inclement weather. According to Ms. Abbas, Student is not the only individual bolting into the construction sites, acknowledging that while the site across from Hillcrest where Student resides is fenced in, a thin individual may still be able to get through the gap between the locked gates (DE-40; PE-48).
34. During a Treatment Review Meeting held on June 23, 2020, Parents attributed the increase in Student's refusal to participate in academics and his increase in unsafe behaviors to the pandemic and the fact that Student did not receive his antibiotic injections during that time (Parent). Student received oral antibiotics during part of the time, but these lacked the level of effectiveness provided by the injections (Parents).
35. On July 20, 2020 Devereux issued an emergency 60-day discharge letter as a result of Student's increasingly unsafe, challenging behaviors which were increasing in frequency and intensity, including but not limited to: aggression toward staff, medication refusal, bolting, and refusal to attend school. Devereux noted that it could no longer support

Student safely and effectively despite the increase in overnight staffing starting in early July 2020. Devereux forwarded the letter to Parents and to Belmont, requesting that the Team be convened within 30 days and noting an expected administrative discharge date of September 20, 2020 (PE-17; DE-12).

36. Devereux also forwarded a Form 2 Immediate Notification to the Massachusetts Department of Elementary and Secondary Education (DESE) on or about July 20, 2020. Around that time, Ms. Minihane also contacted both the DESE, regarding Devereux's intention to terminate Student, and Devereux's other licensing agency, DEEC (DE-6). Neither agency raised concerns regarding Devereux's decision (Minihane).
37. Dr. Mary Elizabeth Latimer is a nationally acclaimed, physician treating individuals with Student's medical presentation. She holds double medical residencies in neurology and pediatrics (Latimer).
38. On July 21, 2020, Dr. Latimer wrote a Medical Necessity Statement for Specialized Immunotherapy Treatment regarding Student, then 20 years old. Dr. Latimer detailed Student's physical and mental decline secondary to a strep infection in 2013, describing it as tragic. She further listed the medical interventions provided including antibiotics, steroids, IVIG, Cytoxan, and antidepressants and antipsychotic medications (to which Student had a paradoxical and negative response), noting that overall Student's response to medication had been weak and transient. He, however, responded well to the Bicillin and Rocephin IM antibiotic therapy injections (PE-5; DE-10). The Statement notes that,  
  
[Student's] quality of life is very poor. He is nearly nonverbal, presents as being unaware of his surroundings, and displays chronic ticks and hand movements that occasionally become intense and appear to bring on frustration, anger and pain (*Id.*).
39. Dr. Latimer diagnosed Student with an inflammatory disease of the brain, that is, autoimmune encephalitis (AE) and Sydenham's Chorea, noting that Student's behavioral presentation and history were consistent with the diagnoses. She recommended that Student participate in an immunotherapy treatment regime developed by her which is intended to reset the adaptive immune system. Specifically, she would administer multiple Rituximab treatments augmented by IVIG as needed, noting that her treatments produced durable results and while results could not be guaranteed, they would likely significantly improve the quality of life for Student. Dr. Latimer noted that this intervention was possibly Student's "last chance for avoiding a life of institutionalization". To evidence the desired treatment results, the infusion medication treatment would take two to three years, but generally improvement could be seen within a couple of months. She expected that Student's treatment would take three years (PE-5; DE-10; Latimer).

40. Dr. Latimer provided Parents an explanation of what Parents should expect with the Rituximab Therapy and her recommendations for other medications to be taken during the treatment period (PE-40).
41. Dr. Latimer testified that she wished someone had told her about the night-time incidents, stating repeatedly that she could have helped with that. She was not surprised by Student's night-time presentation, instead explaining that this was not uncommon in individuals with Student's medical presentation, and that she herself had suffered a broken nose when treating patients. She explained that these individuals were not able to achieve REM sleep at night, stating that while Student was up and engaging in behaviors that could be aggressive, he was not awake or conscious of his actions-akin to sleepwalking. She testified that there were numerous medications (or combinations of medications) from mild to more intense that caused little, moderate or no side-effects, that helped individuals with Student's presentation achieve restorative REM sleep and proved successful in reducing or eliminating the sleepwalking/ aggressive behaviors. Dr. Latimer suggested working in conjunction with Student's physicians and psychiatrist as well as Devereux's medical staff to select the correct combination of medication to help Student sleep, including: melatonin, Adderall, Benzodiazapine, Atavan, Valium and the like. Dr. Latimer further explained that difficulties with communication and inability to get words out to express feelings was terrifying to individuals with Student's diagnosis.
42. At Hearing, Parent raised concerns about the possible side effects of some of the medications recommended by Dr. Latimer based on Student's reactions to similar medications in the past (Parent).
43. Dr. Latimer indicated that to stop Student's behaviors during the night-time he would need to be awakened (e.g., turning the lights on and off, throwing water on his face). She expected that once his sleep was restored, the bolting and night-time incidents would reduce or disappear.
44. Dr. Latimer testified that she expected the infusion treatment to show results anywhere between two to six months (and up to a year) from when the treatments started. During this time, she recommended that Student not be stressed. She noted that implementation of a rigid ABA plan at this time would be counterproductive as it would only stress Student. Dr. Latimer explained that Student's situation was directly related to his medical condition/ imbalance which condition was not amenable to ABA interventions until Student entered the recovery phase.
45. An undated Statement by Dr. Latimer (PE-4), her second statement, notes the importance of providing Student with a "supportive residential educational programming and care that is properly informed on the nature of his condition." Dr. Latimer suggested administration of antibiotics, especially Bicillin, in addition to the Rituxan therapy. This Statement explains that Student's brain disease and autoimmune dysregulation are the cause of his behaviors, noting that,

His behavioral feature involuntary movements (including tics and choreiform), facial grimacing, constant pacing, and OCD tendencies. In addition [Student's] cognition is profoundly affected, resulting in a state resembling near-dementia. None of these behaviors are voluntary or purposeful. They are the symptoms of severe neurological disease resulting in-part from the inflamed basal ganglia. Appropriate residential programming for [Student] includes a living environment that actively avoids stress and is capable of keeping him safe and calm, particularly during flairs in the severity of his symptoms, which will, in turn, make him more available and progress across his varied areas of need (SE-4).

46. Dr. Latimer noted in her second Statement that ABA and cognitive behavior therapy would be harmful and inappropriate, noting that such intervention would similarly not be appropriate to treat individuals with Lupus or Multiple Sclerosis, and would only serve to stress Student (PE-4).
47. Dr. Latimer recommended that Student undergo a psychiatric evaluation and noted her willingness and desire to work with Student's medical team, including Devereux personnel.
48. Dr. Leslie Vogel, psychiatrist, wrote a letter To Whom It May Concern on July 29, 2020, based on conversation and history provided by Parents. Dr. Vogel discussed Student's medical history and notes his response to various medications. In addition to the effective medications and interventions mentioned by Dr. Latimer in her two Statements, Dr. Vogel notes that while Benadryl and antibiotics have been helpful, psychotropic medications/ neuroleptics have been harmful, further noting Student's negative responses to SSRI, benzodiazepines and antipsychotics (PE-6; PE-27).
49. Devereux staff testified that between late 2019 and throughout 2020 Student had minimally accessed academic instruction. He did not attend his classes, and when he did, he left the classroom early after only a few minutes. He also did not participate in speech and language consistently. When instruction was offered at the residential unit, Student engaged briefly in academic instruction a few minutes at a time (SE-18). Ms. Minihane testified that Student declined to participate in academic instruction and related services noting that throughout 2020 he received the equivalent of a half-an-hour of educational programming. In her opinion, an increase in occupational therapy, assistive device instruction or speech and language therapy would not have mitigated Student's behaviors (Minihane).
50. Dr. Warhol testified that the Devereux Team had put in place "interaction guidelines" aiming to make Student's placement safer, but the staff was unable to follow the guidelines with fidelity because Parents requested that staff provide rewards or allow him to engage in preferred activities even when he had failed to meet the conditions required for him to earn the reward. Parent testified that this had to do with van rides to get ice cream, a preferred activity. Dr. Davis testified that since the van rides were important to

Parents, the Parties could have worked together with the BCBA to change the reward (Davis).

51. On August 4, 2020 Parents forwarded a letter and prescription from Dr. Volozhanina noting that Student “require[d] a gentle physical restrain [sic] by physical hold for the duration of I/M [intramuscular injection] medication administration” (PE-15).<sup>2</sup> A previous letter by Dr. Volozhanina documented his difficulties due to pandemic related missed appointments (PE-11).
52. An emergency Team meeting was held on August 5, 2020.
53. On September 2, 2020, Ms. Weinstein emailed Sherrie Rotenberg of JRC, inquiring about Student’s admission status. The following day, Ms. Weinstein was informed that Student’s application was being reviewed, that there were medical questions regarding Student and noting that while he seemed to be an appropriate candidate, locating a bed would be challenging given Student’s age (SE-17). Additional email communication between JRC and Devereux between August and November 2020 detail the Parties’ efforts regarding Student’s admission process and Parents’ visit at JRC (DE-13; DE-14; DE-16).
54. On or about September 15, 2020, Devereux extended the timeframe for termination because the Team appeared to be in the process of securing placement at JRC. Parents, however, would not visit JRC until mid-October 2020.
55. Between July 10 and September 29, 2020, Devereux’s incident reports documented 27 incidents. Dr. Warhol testified that she was unsure as to how incident data was summarized in Student’s October 2020 progress review/ weekly reports. A cross-reference with Devereux’s weekly reports for the same time-period shows that each incident is listed in the order in which it occurred (DE-3; DE-20; DE-31; PE-20; PE-21E). Of the 27 incidents documented in PE-20, only three (possibly 4) involved physical aggression (7/26/2020, 8/13/2020 and 9/23/2020) (*Id.*).
56. On October 1, 2020, Student had his first Rituximab infusion treatment (PE-25; Latimer). Dr. Latimer expected to see “a pretty significant improvement” in Student’s presentation within four to six months after initiation of the Rituximab infusion (that is between February and April of 2021), noting that on occasion positive results could take up to a year to manifest.
57. Graphs appearing at PE-22, PE-23 and PE-24 detail the rise and decline of Student’s incidents between July of 2019 and October 13, 2020, the impact of administration of medication and the types of restraints used. PE-23 additionally correlated the incidents

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<sup>2</sup> Devereux argued that its license from DESE does not allow for this type of physical intervention and medication cannot be administered to a person against the individual’s will, especially when, as in the instant case, Student is an adult and there is no *Rogers* order authorizing the intervention.

with administration of antibiotic injections, showing a decline in incidents when the injections were administered (PE-23).

58. Student's unsafe behaviors continued through the fall of 2020. Devereux's Treatment Team Meeting Progress Review, dated October 7, 2020, documents the significant increase in Student's aggressive incidents and the need for the staff to use physical management during this period stating that "[t]his increase was likely impacted by disruptions in [Student's] medication regimen due to the COVID-19 pandemic, as well as disruptions in his daily routine (PE-20). Relying on their graphs, Devereux staff testified that the most notable increases in Student's unsafe behaviors occurred between October 2020 and the time of the Hearing (DE-3; DE-4; DE-30; DE-31; Warhol).
59. PE-21 A through K, Devereux's weekly updates, documents numerous instances during which Student responded to instructions and required low-level hands-on interventions, and weeks during which no incidents and/ or minor incidents were reported, for the period from mid-July to late November of 2020 (PE-21A; PE-21B; PE-21C; PE-21D; PE-21E; PE-21F; PE-21G; PE-21H; PE-21I; PE-21J; PE-21K).
60. On October 19, 2020, Ms. Weinstein inquired about Student's admission status at JRC. The next day she learned that Parent had visited JRC the previous week. She learned of Parent's apparent hesitation about the appropriateness of the program, as Parent had raised concerns regarding the level of noise and activity because, in her opinion, Student needed a quiet environment. Ms. Rotenberg's communication noted JRC's opinion that Student's behavioral needs could be met at JRC but raised questions as to whether JRC could meet Student's medical needs. Ms. Rotenberg once again shared that there was a small waiting list and that there were no vacancies at that time. Lastly, Ms. Rotenberg noted that once Parents accepted placement at JRC, the program still had to review the medical piece to receive medical clearance from JRC's physician and then present the case to the Admissions team in order to issue a formal acceptance (SE-17; PE-30; PE-31).
61. In an effort to minimize transitions for Student who is fast approaching the end of his special education entitlement period, and in light of Devereux's discharge, Belmont and Parents worked with the Department of Developmental Services (DDS) to attempt to place Student early (PE-32; PE-36).
62. Email communication between Belmont and Patrick Palmaccio, responsible for admission screening at Evergreen's Adult Residential Services, dated April 3, 6 and July 29, 2020, notes Ms. Weinstein's desperate efforts to secure placement for Student in a DDS Adult program. She also sought assistance from DESE regarding potential programs (SE-8). Despite offering to fund a DDS program until Student turned 22 years old, no potential DDS placement has been identified, nor has DDS offered adult placement to Student (SE-8; Weinstein, Parent).

63. On or about October 31 and November 3, 2020, Marilisa Strand, Community Administrator at Devereux wrote to Parents regarding the status of Student's admission process at JRC, noting Devereux's November 14, 2020 discharge deadline for Student (PE-26).
64. Ms. Weinstein testified about her efforts and her concerns that Student not be left without a program. In addition to DDS and DESE, she sought assistance from other out of district coordinators and was provided professional input from Devereux staff during the search process to assist with locating an alternative placement for Student (Weinstein). As of the conclusion of the Hearing in January 2021, other than potentially JRC, no placement had been identified, including DDS Adult services or DESE identified programs (Weinstein).
65. Student's Progress Reports for the IEP period from January 2020 to January 2021 document Student's struggles accessing adaptive coping strategies and engagement in safety-interfering behaviors, poor school attendance and poor class activity participation in academics and speech and language, noting that Student was unlikely to meet any of the goals and objectives in his IEP (DE-2). In the residence, he experienced challenges accessing adaptive social skills, coping strategies and replacement behaviors in the moment owing, to his physical health and mood. The June 24, 2020 Communication goal report notes that the AAC evaluation was conducted, and that Student had not attended speech services since the onset of the pandemic. The November 12, 2020 Transition goal report notes that in response to being given reading items, he paced around the room; he struggled to follow written directions and his schedule; he had difficulty complying with his showering and washing routines, but when directed to do so, was able to make his bed, brush his teeth and clean his room. Similarly, the ADL report for the same period documents Student's continued struggles completing his hygiene and self-care routines (DE-2).
66. Ms. Abbas testified that she instructed Ms. Minihane to create graphs reporting Student's behavioral incidents. After reviewing the Radar Incident Reports, Ms. Minihane created the graphs appearing in DE-3 reporting "risky behaviors", out of supervision/ program area, physical aggression to person, the need to administer standing two-arm control method and supine restraint in November and December 2020. These graphs show a decrease of incidents in "out of supervision/ program area" (5 to 4) and "physical aggression to person" incidents (5 to 3), but also show an increase in supine restraint (1 in November to 3 in December) (DE-3). The rest of the graphs detailed incident reports from the time Student entered Devereux in 2017 through 2020. DE-4 provides the explanations for the graphs in DE-3.
67. Between December of 2020 and mid-January of 2021, Student engaged in numerous incidents of bolting, night-time aggression and unspecified "risky behaviors", resulting in preparation of twelve RADAR Incident Reports, reports prepared by Devereux staff when a student engages in unsafe behaviors (DE-19; DE-20; DE-21; DE-22; DE-23; DE-24; DE-25; DE-26; DE-38; DE-41; DE-43; DE-44; DE-45; DE-46; Abbas, Minihane).

68. Incident Reports DE-43 and DE-46 document an event that occurred during the overnight of January 5 and 6, 2021 at approximately 2:20 a.m. involving Student and two staff members. During this event, one of Devereux's staff suffered a broken nose (DE-43; DE-46). Ms. Abbas testified that Student's reach is long because he has long arms, which make it easier for him to strike people when he swings his arms during events. Ms. Minihane testified that as a result of Student's behaviors another staff had also been injured, was receiving medical treatment and required a CAT scan (Minihane).
69. Devereux staff testified that as a result of Student's behaviors in the past year and a half, many Devereux staff have refused to work with him, concerned for their physical safety (Abbas, Warhol, Minihane). None of Student's one-to-one aides, the BCBA, Hillcrest service providers, or any of the individuals involved in Student's day-to-day direct care/ instruction testified at Hearing.
70. Ms. Abbas and Ms. Minihane opined that there are no modifications or accommodations that can be implemented by Devereux to decrease or reverse Student's unsafe behavior trends, noting that it has remained willing to try new approaches suggested by Parents and Belmont (Abbas, Minihane, Weinstein). According to Ms. Abbas and Ms. Minihane adding staff will not make the placement safer and will likely result in more hands-on restraints for Student. Additionally, they noted that the COVID-19 pandemic made it harder if not impossible to hire new staff.
71. Ms. Abbas and Ms. Minihane testified that most of Student's incidents occurred without antecedent events. The record shows that the more serious incidents occur during the night-time hours.
72. Joseph Moldover, PsyD, ABPP/cn provided consultation to Student's family regarding transition issues as relate to Student after conducting a record review, and had discussions with Devereux staff. He learned that Devereux had used ABA behavioral methodologies with Student in the past, but had discontinued them when they were not successful, and were no longer part of Student's IEP. His report dated December 2, 2020, recommends that a BCBA observe Student to ascertain whether an ABA program would promote Student's developmental progress and ascertain whether it would be feasible to implement such program at Devereux, instead of transitioning Student to a program that was "specifically oriented to ABA" (PE-3; PE-34).
73. Regarding Student's then current IEP, Dr. Moldover testified that the Present Levels of Educational Performance section (PE-1), did not reflect the methodologies necessary to support Student and the Service Delivery did not make any reference to involvement of Devereux's BCBA with Student. He also noted that the goals did not reflect the level of behavioral issues reported by Devereux and did not include goals regarding safety and bolting at night. Dr. Moldover testified that Devereux represented that they had exhausted their behavioral repertoire with Student.

74. On December 28, 2020, Dr. Moldover wrote a second letter describing his remote observation of Student at Devereux on December 15, 2020, at the beginning of which Student was not engaging in functional, social or communicative behaviors, but later complied with some of the requests made by his aide (PE-41). Dr. Moldover also observed Student with Parents during one of the trips to Washington D.C., noting that Student sat without restraints in the back of the car and was more emotionally responsive (PE-41; PE-47).
75. Dr. Moldover recommended that Student's placement provide low stimulation and 24/7 supervision for safety, and offer an environment where Student is able to self-regulate/soothe. Dr. Moldover found that the use of headphones helped Student self-regulate. He further stressed the need for close collaboration between Student's medical and therapeutic/ educational providers. He again discouraged the use of ABA without the guidance and supervision of a doctorate level BCBA. Dr. Moldover stressed the need for "careful management of antecedent stimulation", so as to be proactive in intervening with Student, noting that Devereux's incident reports lacked information regarding antecedent behaviors (PE-41).
76. Dr. Moldover testified that he had concerns about Student's health and safety at Devereux, agreeing that at present, Student was at risk. He opined that given Student's presentation, academic instruction should not be prioritized but rather Student's safety and communication needs should take precedence, so as to minimize Student's frustration and anxiety. He testified that he did not observe Student use or access communication devices at Devereux, something that Easter Seals had recommended in March of 2020 (Moldover).
77. Cheryl Davis, Ph.D., LABA, BCBA-D, conducted an extensive record review, interviewed Parents and Devereux staff, and performed school and community-based observations of Student on December 18 and 23, 2020.<sup>3</sup> Dr. Davis is a licensed, doctorate level BCBA (PE-43). Her report, dated December 28, 2020, offers insight into Student's current level of need and placement options (PE-42). As noted in her report, Dr. Davis considered Dr. Latimer's findings and recommendations regarding Student's need for residential programming that offered a living environment devoid of stress and focused on keeping Student safe and calm (PE-42).
78. Student demonstrated many of the typical behaviors associated with his diagnoses during her observations (PE-42). Devereux staff reported that listening to music helped to calm Student and "be in a 'better place'" and noted that he was motivated by food. They further reported Student's need to gain communication, self-preservation and daily living skills, noting that he rarely brushes his teeth and does not shower daily and that performing desired activities of daily living decreased during the pandemic. Student's

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<sup>3</sup> Dr. Davis conducted a one-hour observation of Student at a hotel and thirty minutes at his residence at Devereux. Her observations were cut short due to complications caused by the pandemic.

continued pacing has injured his feet, as he goes outdoors without appropriate attire or shoes even in inclement weather, and at times eats inedible items (although he was not engaging in that behavior at the time of the evaluation). When desiring an item, he did not typically vocalize his wish, but rather walked over to retrieve the item or used one-word utterances to request it. The staff reported that Student experiences significant difficulty sleeping (engaging in pacing), and that most of the incidents involving bolting and physical aggression occurred at night (*Id.*). Lastly, the staff reported that Student had stopped socializing with peers and writing about himself, activities in which he engaged before the pandemic (PE-42).

79. Dr. Davis reported that Student was compliant with Parent's directions and instructions regarding self-grooming routines while being observed at the hotel, noting that he had received his medication the previous day (PE-42).
80. Dr. Davis concluded that Student was performing significantly below age expectations and that his level of need was great (PE-42). She made numerous recommendations including: limiting his placement transitions; securing placements that provided a high staff to student ratio, including at DDS, with staff trained to manage aggressive behaviors; more intensive 24 hour services including additional staff during daytime; a functional behavioral assessment to identify problem behaviors with a focus on effective antecedent behaviors; Team consultation with a doctorate level BCBA; development of a behavior support plan that considers the medical nature of the behaviors and focuses on teaching functional replacement behaviors and more effective functional communication, implemented with fidelity; regular communication between the educational and the medical team for implementation of a program that combined direct instruction and natural environment teaching to focus on ADL, social behaviors, communication and functional replacement behaviors before addressing vocational and community skills; and, programmatic changes that increased age-appropriate leisure skills, waiting skills and response to denied access without adult support. Dr. Davis cautioned about the effects of using more rigorous behavior change procedures on Student, to avoid distressing Student, noting that "the primary focus should be rapport building, increasing student's desire to participate in preferred activities with others, and functional communication responses" (PE-42).
81. During testimony, Dr. Davis noted her concern that Devereux's BCBA, Anna Dodier, had only been licensed for approximately one and a half years, opining that she lacked the expertise to address Student's issues. She further raised concern that Devereux had failed to conduct a functional behavioral analysis (FBA) and develop a support plan and properly implement it. She found that the teaching aspect was missing from the interventions, noting that the time to teach was when the individual was better regulated.
82. Dr. Davis was sympathetic to the predicament in which Devereux's staff found themselves, feeling that they were in harm's way and stating that it was "a terrible position for a school to have to say 'we can't service this student anymore because of safety concerns'" (Davis). She attributed Student's behaviors to poor implementation of

ABA services, opining that a better designed plan implemented with more fidelity in a therapeutic setting could reduce Student's behaviors, especially during the overnight hours. She recommended a gentler approach to ABA, using rewards and a "first/ then" type plan, and that it be developed with input from the family. Dr. Davis testified that if Student was sleep-walking, he needed to be awakened and then staff should follow the appropriate behavior support plan (Davis).

83. Dr. Davis recommended that a functional behavioral assessment be performed, and a support plan be developed. She opined that before considering a move to a different program, more structured ABA principles should be implemented and supports added to Student's Devereux program to evaluate its effectiveness. She recommended a shift in Student's program from management of behaviors to prevention, with a focus on behavioral antecedents, and testified that even if the nature of the behavior was medically driven, interventions could be put in place to achieve the desired result (PE-41; PE-42; Davis).
84. Dr. Davis's numerous recommendations included an increase in Student's functional communication, regular consultation with Student's medical team, and that a doctorate level BCBA provide weekly consultation to the educational team. She aimed to address Student's Devereux program to create a safer environment for him (PE-3; PE-41; PE-42; Davis). Dr. Davis recommended an increase in the daytime staffing, something that Belmont had suggested, but Devereux had not pursued.
85. Dr. Davis discussed her views, opinions and findings with Dr. Moldover. Both opined that a rigorous, strict ABA program such as JRC may have a negative impact given Student's ability to understand his circumstances, but not express his needs, causing him distress. She agreed that a shift to a strict, rigorous ABA program would likely cause a temporary increase in behaviors. She opined that Student did not fit the profile of students at JRC and was concerned that according to the Director, Student would not be allowed to pace/ walk outside as he can do at Devereux (PE-41; PE-42). Dr. Davis supported Student's early transition to a DDS Adult program if he left Devereux (Davis).
86. Dr. Davis opined that Devereux's current Early Intervention Plan lacked the critical elements of a well-developed, robust, evidence-based plan and was outdated (DE-9; Davis). Similarly, the Interaction Guidelines dated March 6, 2019, needed to be updated (Davis).
87. Ms. Minihane testified that Devereux was "ABA informed" explaining that they utilized various types of ABA programming principles, but that Devereux did not offer the rigid, intense adherence to ABA techniques typically found in ABA programming (Minihane).
88. When asked about its BCBA staff, Dr. Warhol testified that said individual was affiliated with the residential portion of the program, not the day program. Ms. Minihane, and Dr. Warhol opined that the Devereux program could not be modified to offer the level of ABA intensity recommended by Dr. Davis (Minihane, Warhol). Given the difficulties

managing Student’s behaviors as they have been manifesting, Devereux would not be able to handle any increases in frequency or intensity of behaviors by Student (Warhol).

89. Devereux Weekly Updates for the weeks from November 21 to December 18, 2020 note the staff’s use of “bear hugs” and benefits of the two-to-one staff ratio to address Student’s challenging behaviors including bolting. While more significant bolting (toward the construction site and to the building’s back deck), aggression (pushing staff) and compliance refusal behaviors are noted in November, almost no incidents are reported after the first week in December 2020 (SE-44; PE-45; PE-46). The positive trend continued until January of 2021 when a significant episode overnight resulted in a staff member incurring a broken nose. On this night, Student was only staffed one-to-one (Minihane).

## CONCLUSIONS OF LAW:

The Parties in the instant matter agree that Student is an eligible student pursuant to the Individuals with Disabilities Education Act<sup>4</sup> (IDEA) and Massachusetts special education law<sup>5</sup>, and that despite approaching the end of his entitlement, he currently remains entitled to the protections afforded under these statutes. Furthermore, the Parties do not dispute Student’s diagnoses, or that Student requires a high level of care such as that offered in residential placement, to which he is entitled consistent with the IEPs promulgated by Belmont over the past several years.

The IDEA and the Massachusetts special education law, as well as the regulations promulgated under those acts, mandate that school districts offer eligible students a FAPE. A FAPE requires that a student’s individualized education program (IEP) be tailored to address the student’s unique needs<sup>6</sup> in a way “reasonably calculated to confer a meaningful educational benefit”<sup>7</sup> to the student.<sup>8</sup> Additionally, the program and services offered to the

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<sup>4</sup> 20 USC 1400 *et seq.*

<sup>5</sup> MGL c. 71B.

<sup>6</sup> E.g., 20 USC 1400(d)(1)(A) (purpose of the federal law is to ensure that children with disabilities have FAPE that “emphasizes special education and related services designed to meet their unique needs . . . .”); 20 USC 1401(29) (“special education” defined to mean “specially designed instruction . . . to meet the unique needs of a child with a disability . . . .”); *Honig v. DOE*, 484 U.S. 305, 311 (1988) (FAPE must be tailored “to each child’s unique needs”).

<sup>7</sup> See *D.B. v. Esposito*, 675 F.3d 26, 34 (1<sup>st</sup> Cir. 2012) where the court explicitly adopted the meaningful benefit standard.

<sup>8</sup> *Sebastian M. v. King Philip Regional School Dist.*, 685 F.3d 79, 84 (1<sup>st</sup> Cir. 2012) (“the IEP must be custom-tailored to suit a particular child”); *Mr. I. ex rel L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 4-5, 20 (1<sup>st</sup> Cir. 2007) (stating that FAPE must include “specially designed instruction . . . [t]o address the unique needs of the child that result from the child’s disability”) (quoting 34 C.F.R. 300.39(b)(3)). See also *Lenn v. Portland School Committee*, 998 F.2d 1083 (1<sup>st</sup> Cir. 1993) (program must be “reasonably calculated to provide ‘effective results’ and ‘demonstrable improvement’ in the various ‘educational and personal skills identified as special needs’”); *Roland v. Concord School Committee*, 910 F.2d 983 (1<sup>st</sup> Cir. 1990) (“Congress indubitably desired ‘effective results’ and ‘demonstrable improvement’ for the Act’s beneficiaries”); *Burlington v. Department of Education*, 736 F.2d 773, 788 (1<sup>st</sup> Cir. 1984) (“objective of the federal floor, then, is the achievement of effective results--demonstrable improvement in the educational and personal skills identified as special needs--as a consequence of implementing the proposed IEP”); 603 CMR 28.05(4)(b) (Student’s IEP must be “designed to enable the student to progress effectively in the content areas of the general curriculum”); 603 CMR 28.02(18) (“*Progress effectively in the*

student must be delivered in the least restrictive environment appropriate to meet the student's needs.<sup>9</sup>

The above standard, which has been adopted by courts and hearing officers in Massachusetts, is aligned with the Supreme Court's decision in *Andrew F. v. Douglas County Sch. Distr.*, 137 S. Ct. 988 (March 22, 2017) requiring that a student's program and placement be "reasonably calculated to enable [the student] to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas County Sch. Distr.*, 137 S. Ct. 988 (March 22, 2017); *D.B. ex rel. Elizabeth B.*, 675 F.3d at 34. In *Andrew F.*, the Court rejected the "merely more than *de minimus*" standard adopted by the Tenth Circuit, a standard that afforded students significantly less than the standard adopted in Massachusetts.

Pursuant to the standard embodied in *Andrew F.* and consistent with the Massachusetts standard, *supra*, public schools must offer eligible students a special education program and services specifically designed for each student so as to develop that particular individual's educational potential.<sup>10</sup> Educational progress is then measured in relation to the potential of the particular student.<sup>11</sup> At the same time, the IDEA does not require the school district to provide what is best for the student.<sup>12</sup>

The instant matter comes to the BSEA on Hearing Requests by Devereux and by Parents. Devereux is seeking a finding that it is not an appropriate placement for Student because given Student's unsafe behaviors, it is neither able to maintain his safety or the safety of others and it is unable to appropriately educate him, basically providing custodial care. It further seeks a determination that it is therefore entitled to proceed with an emergency

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*general education program* shall mean to make documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the child, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district.").

<sup>9</sup> 20 USC 1412 (a)(5)(A).

<sup>10</sup> MGL c. 69, s. 1 ("paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential..."); MGL c. 71B, s. 1 ("special education" defined to mean "...educational programs and assignments . . . designed to develop the educational potential of children with disabilities . . ."); 603 CMR 28.01(3) (identifying the purpose of the state special education regulations as "to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential..."). See also Mass. Department of Education's Administrative Advisory SPED 2002-1: [Guidance on the change in special education standard of service] from "maximum possible development" to "free appropriate public education" ("FAPE"), effective January 1, 2002, 7 MSER Quarterly Reports 1 (2001) (appearing at [www.doe.mass.edu/sped](http://www.doe.mass.edu/sped)) (Massachusetts Education Reform Act "underscores the Commonwealth's commitment to assist all students to reach their full educational potential").

<sup>11</sup> *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 199, 202 (court declined to set out a bright-line rule for what satisfies a FAPE, noting that children have different abilities and are therefore capable of different achievements; court adopted an approach that takes into account the potential of the disabled student). See also *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 518 F.3d 18, 29 (1st Cir. 2008), and *D.B. v. Esposito*, 675 F.3d at 36 ("In most cases, an assessment of a child's potential will be a useful tool for evaluating the adequacy of his or her IEP.").

<sup>12</sup> E.g. *Lt. T.B. ex rel. N.B. v. Warwick Sch. Com.*, 361 F.3d 80, 83 (1st Cir. 2004) ("IDEA does not require a public school to provide what is best for a special needs child, only that it provide an IEP that is 'reasonably calculated' to provide an 'appropriate' education as defined in federal and state law.")

termination of Student. Devereaux disputes the BSEA's authority to mandate Student's stay-put rights at Devereux, a private school. In the alternative, Devereux seeks an order that it is not Student's stay-put placement, but rather, Belmont is.

Parents seek a finding that Student must remain at Devereux pursuant to stay-put until another appropriate, viable placement is identified. Moreover, it is Parents' position that JRC is not viable because it does not have a vacancy at present and, more importantly, because they its appropriateness for Student.

Parents and Devereux carry the burden of persuasion at this Hearing as to the issues they each raise, and as such, must prove their respective cases by a preponderance of the evidence, pursuant to *Schaffer v. Weast*, 126 S.Ct. 528 (2005).

Upon consideration of the evidence, the applicable legal standards and the arguments offered by the Parties, I find that Devereux has met its burden of persuasion regarding the inappropriateness of its program because of safety concerns but did not meet its burden of persuasion regarding the applicability of stay-put rights to private schools or that it is not Student's stay-put placement, and Parents have met their burden of proof that Devereux remains Student's stay-put placement until another viable placement is secured, or one is created by Belmont. I note that I have changed the order of discussion of the issues raised by the Parties to address the jurisdiction of the BSEA first. My reasoning follows.

#### **Stay-put rights at private placements:**

In the instant case, Devereux challenges the jurisdictional authority of the BSEA over private special education schools that serve IDEA eligible students whose placement at said private special education school is publicly funded pursuant to an accepted IEP.

To ascertain the rights and responsibilities of the aforementioned private schools, the Hearing Officer must consider, among other factors, federal and state special education laws and regulations governing the BSEA and its jurisdictional authority. 20 USC §1415(b)(6); M.G.L. c.71B §2A; 34 CFR 300.507(a)(1); 603 CMR 28.08 (3).

M.G.L. c.71B §2A delineates the jurisdictional authority of the BSEA to resolve special education related disputes. Consistent with the statute, 603 CMR 28.8(3) specifically addresses the jurisdiction of the BSEA,

In order to provide for the resolution of differences of opinion among school districts, private schools, parents and state agencies, the Bureau of Special education Appeals pursuant to G.L. c. 71B §2A, shall conduct mediations and hearings to resolve such disputes. [Emphasis supplied].

It is precisely this regulation which grants Devereux the right to request a Hearing before the BSEA and in doing so in the instant case, submits to the jurisdiction of the BSEA and the determinations of this forum regarding special education rights and responsibilities.

The jurisdictional authority of the BSEA over private schools is however, limited to its mandate to resolve special education related disputes consistent with 603 CMR 28.08(3)(a). The latter regulation describes the types of controversies that may be entertained by a BSEA hearing officer, which include,

... the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities. A parent of a student with a disability may also request a hearing on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973, as set forth in 34 CFR §§104-31-104-39. 603 CMR 28.28(3)(a).

The right to “stay-put”, which assures a student’s right to remain in the then current placement pursuant to an accepted IEP during the pendency of a dispute, is central to the procedural protections afforded eligible students under the IDEA. Moreover, procedural protections under state and federal law fall squarely within the types of issues commonly addressed by the BSEA. The BSEA’s authority to enter determinations over these matters among parents, public schools and private special education schools who educate Massachusetts publicly funded, IDEA eligible students, is undisputable and includes Devereux, a party in this proceeding.

Devereux’s reliance on *In Re: Student v. Agawam Public Schools & Melmark-New England, Inc.*, BSEA #15-04488, is not persuasive when considering the facts in the case at bar. In the *Agawam* matter, the Hearing Officer correctly found that she lacked authority to order services and or/ methodologies different from those used by the school. To the extent that any party to a BSEA proceeding seeks relief inconsistent with the services provided by the private special education school, Devereux is correct that the BSEA lacks authority to order those additional services. However, if the services sought fall within the array of services and methodologies implemented at the special education private school, the result is different. Similar to the rationale involved in the BSEA’s jurisdiction over state agencies, as long as the private school is a party, as is Devereux, and the remedies sought are among those consistent with the nature of the services offered at the private school, and the public school funds the student’s attendance at the private school, the BSEA may order the services necessary to support the student’s placement and afford the student the procedural protections granted under federal and state special education law.

Devereux’s jurisdictional challenge to the effect that it is entitled to its own treatment and education philosophy and that the BSEA may not enter procedural due process determinations against it and “must resist the temptation” is unpersuasive.

I find that the BSEA is charged with the responsibility to enter determinations that protect

Student's procedural due process rights at Devereux.<sup>13</sup>

I note that the issue of Student's stay-put was already addressed in the *Ruling on Parents' Motion for Stay Put* issued on December 8, 2020 in BSEA # 2103476, involving the same issue as against the same parties. I hereby rely on and incorporate this Ruling by reference.

**Appropriateness of Devereux's placement for Student:**

Devereux seeks an order stating that Devereux is no longer an appropriate placement for Student because Student's unsafe behaviors prevent him from accessing a FAPE and that at present, it is only providing Student with custodial care, noting that throughout 2020, Student received less than a half-an-hour of actual educational programming, because he refused to attend his classes (Minihane). Devereux argues that if academics should not be prioritized, Student should leave Devereux as it is not a locked facility licensed to provide custodial care. Devereux asserts, and all Parties agree, that the main cause of Student's unsafe behaviors is his complex medical presentation, particularly his Autoimmune Encephalitis/ PANDAS.

Devereux further asserts that it may terminate Student's admission on an emergency basis due to Student's unsafe behaviors. It further argues that the BSEA cannot compel it to implement the types of treatment programs recommended by Parents' experts because Parents' witnesses contradicted each other and because none of them participated in any of Student's IEP meetings. Moreover, Devereux argues that, with the exception of Dr. Davis, up to the time of Hearing, no expert, including Dr. Frankhouser, the expert retained by Belmont, proposed the type of intensive ABA suggested by Dr. Davis.

Devereux also argues that Student is only entitled to an appropriate, successor placement and not an ideal placement, noting that Parents preference for Devereux is irrelevant.

Arguing that Belmont is ultimately responsible for Student's education, Devereux seeks an order that it is within its rights to terminate Student on an emergency basis consistent with 603 CMR 18.05(7)(d) and 603 CMR 28.09(12) because he "presents a clear and present threat to his own health and safety."

Parents argue that consistent with the applicable Massachusetts Regulations, termination involves a two-step analysis: 1) determination that the student's continued placement at the special education school presents a clear and present threat to the health and safety of students and staff consistent with 603 CMR 18.05(7)(d); and 2) a determination that the school has complied with all the procedural requirements involved in the emergency termination in accordance with 603 CMR 28.09(12)(b).<sup>14</sup> Addressing emergency termination of enrollment, this last regulation provides that,

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<sup>13</sup> See e.g., *In Re: Norwood Pub. Sch.*, BSEA #11-5444, 17 MSER 228 (Crane, 8/4/2011); see also, *In Re: Andover Public Schools*, BSEA #1805127 (Berman, 7/9/2018); and, *In Re: ABC Pub. Sch.*, BSEA # 1303742, 19 MSER 71 (Crane, 2/20/2013).

<sup>14</sup> See, e.g., *Mercy Centre and Brockton*, BSEA #1304173, 19 MSER 142 (Putney-Yaceshyn, 2013).

The special education school shall not terminate the enrollment of any student, even in emergency circumstances, until the enrolling public school district is informed and assumes responsibility for the student. At the request of the public school district, the special education school shall delay termination of the student for up to two calendar weeks to allow the public school district the opportunity to convene an emergency Team meeting or to conduct other appropriate planning discussions prior to the student's termination from the special education school program. With the mutual agreement of the approved special education school, and the public school district, termination of enrollment may be delayed for longer than two calendar weeks. 603 CMR 28.09(12)(b).

In their closing, Parents further urge that the BSEA should also consider,

(1) the frequency, intensity, and spontaneity of the student's behavior; (2) the nature of the special education school and its students; and (3) the steps that the special education school has taken to ensure the health and safety of the student and others in light of the student's behavior, prior to emergency termination. *Mercy Centre and Brockton*, BSEA #1304173, 19 MSER 142 (2013).<sup>15</sup> ... Those factors taken together, must then necessarily support a conclusion that the student's continued presence renders the special education school's ability to maintain health and safety "not possible." *Id.* at 42.

Relying on the aforementioned, Parents assert that Student's behaviors are predictable and that with reasonable accommodations to Student's programming, it is possible for Devereux to maintain the health and safety of all concerned.

Devereux is correct that the testimony at Hearing supports a finding that, at present, the Devereux program as currently constituted is not appropriate, as serious safety issues that impact Student and those around him exist (Abbas, Moldover, Minihane, Warhol). Long term, Devereux is not the appropriate placement for Student, but as discussed below, since Student is legally entitled to stay-put at Devereux, safety concerns must be addressed to increase everyone's safety while he is there. The evidence supports a finding that modifications consistent with the nature of Devereux's program can be implemented. Parents persuasively argued that additional services and supports (as well as Parents' cooperation), may increase safety for Student and everyone at Devereux, until an appropriate program becomes available.

The evidence shows that Student's behaviors increased between 2019 and 2020, and more specifically between January and July of 2020. This increase coincided with restrictions

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<sup>15</sup> See also, *Steve and Worcester Pub. Sch. and Central Mass. Collab.*, BSEA #1808823, 2018 MSE LEXIS 27, at 71 (Aug. 30, 2018).

imposed by the COVID-19 health emergency, and Massachusetts school closures/ program disruptions, during which Student did not have access to the high-dose steroid medication and antibiotic injections he requires to address his medical needs. According to Parents, this in turn, impacted his behaviors (PE-20; PE-22; DE-35).

The evidence also shows that Student's unsafe behaviors decreased during the second part of 2020, after the medical treatments resumed. However, Parents' arguments ignore the unpredictable nature of the behaviors directly related to Student's medical presentation, which to date, is not yet sufficiently, effectively medically managed. This variability in Student's behavior is depicted in the Weekly Updates, Treatment Meeting Reports, Progress Reports and the RADAR Incident Reports.

Regarding the reports, in anticipation of Hearing, Devereux created several charts depicting Student's incidents using information available through its RADAR Incident Reports. These were DE-3, DE-30 and DE-31. Devereux made much of these graphs which in the end proved to be unreliable.<sup>16</sup>

Parents dispute Devereux's position that the level of safety issues manifested by Student is new, and that Student cannot be restrained pursuant to 603 CMR 46 or be prevented from exiting the unit to pace. Parents note, and the record supports a finding that, most of Student's bolting and aggressive incidents occur at night-time, and that issues are associated with Student's sleep disorder related to his medical diagnoses. Parents further argued that the record lacked testimonial evidence from any of Student's direct providers/ aides, including the Hillcrest personnel working with him on a day-to-day basis, noting that Student's RADAR Reports and the weekly Updates show a downward trend in incidents since the fall of 2020. Parents also dispute that the incidents are as significant and frequent as Devereux portrays. However, while Parents' arguments have merit, they can hardly dispute that an incident resulting in a broken nose, even if unintended, is insignificant and does not warrant attention.

Student was placed at Devereux in March of 2017, when after reviewing his records including information regarding his behaviors and complex medical issues, Devereux determined in good faith that it could offer him an education that met his unique needs.

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<sup>16</sup> At Hearing, Devereux's witnesses had difficulty explaining which specific incidents were included in the "risky behaviors" category, ultimately conceding that this was the result of Ms. Minihane interpretation of the information contained in the RADAR Reports. The charts also tracked multiple events within a single incident and can be misleading, e.g., reporting Student's refusal to take his gummy vitamin as medication refusal (see DE-25). Moreover, Parents are correct that the information contained in the bar graphs is inconsistent with the information contained in PE-28 which reflect discrepancy between incidents occurring in 2017 and 2018. All of the aforementioned, combined with Ms. Minihane testimony that DE-30 and DE-31 were under-inclusive and over-inclusive of incidents, render the charts unreliable. Furthermore, review of the information in PE-21 A through K, Devereux's Weekly Updates, documents the numerous instances during which Student responded to instructions and required low-level hands-on interventions between mid-July and late November of 2020. Notably, the Weekly Report for the week of November 23 through December 4, 2020 note the staff's use of "bear hugs" to address Student's bolting and challenging behaviors and the benefits of the two-to-one staff (PE-44).

Indeed, Devereux was able to do so until the fall of 2019, coincidentally following the departure of his preferred staff person the summer of that year.

Parents are correct that Student's presentation and the types of behaviors he displays fall squarely within those described in Devereux's program description, and that Student's profile has generally remained unchanged since his enrollment in 2017. His performance, however, has decreased and his refusal to participate in academic opportunities has increased.

Devereux's arguments regarding the "newness" of Student's presentation and that staff cannot implement reasonable means to prevent Student from bolting into dangerous sites are not persuasive.<sup>17</sup>

While I am persuaded by the legitimacy of Devereux staff reservations regarding Student's behavioral presentation, I am also persuaded that more interventions, consistent with the types of services and methodologies already implemented at Devereux, can be put in place as an interim measure to alleviate Devereux's concerns regarding safety. Again, at this point, given the documented lack of progress Student has made in any area over the past year and a half, one cannot conclude that Devereux is an appropriate placement for Student long-term. Student is entitled to receive a FAPE, which he is not currently receiving at Devereux, and while the program may be modified in the short run, ultimately it would require too many modifications to render it appropriate for Student.

Student is entitled to a placement that is willing and able to serve him through the end of his entitlement period, and this is not Devereux. Therefore, it must be emphasized that the services ordered in this Decision (below) are intended only to be implemented on an interim basis while an appropriate, viable placement is available to Student.

To ascertain what types of services/ supports may be needed while Student is at Devereux pursuant to stay-put, I turn to the expert recommendations in the record. I note that while Parents' experts expressed differing opinions and recommendations as to what services/methodologies Student should be provided, sufficient relevant information can be gleaned from their collective positions regarding the manner in which Student's current needs can be better addressed. The relevant, appropriate elements of their recommendations, discussed below, can (and should) be implemented at Devereux until an appropriate program

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<sup>17</sup> Devereux's witnesses testified that restraints may be used in times of emergency. Given their collective concern that bolting at night into a construction site, the road or the woods, especially if unsuitably dressed during winter, constitutes clear and present danger, such behaviors would arguably constitute the type of emergency warranting some form of hold. Indeed, Devereux has used holds to restrain Student without violating any laws. Student's Weekly Update for the week including incidents on December 3, 2020 document that a "bear hug" was used to prevent him from running into the construction site (PE-44).

is available to Student. With the appropriate accommodations and services in place, the likelihood of keeping everyone safe short-term should increase.<sup>18</sup>

Dr. Latimer, the physician who specializes in Student's disorder and provides his infusion therapy, was clear that *at present*, a strict ABA-based program would not be appropriate for Student. In her opinion, the value of ABA interventions may come when Student reached the recovery phase of his infusion treatment, but he is not yet there. She opined that the demands of a strict ABA program were counterproductive because Student rather requires a calm environment without demands and consequences.

Dr. Moldover was concerned about proper implementation of an ABA program. He noted that a rigorous ABA program required a doctorate level BCBA to oversee implementation. He found Dr. Latimer's opinion regarding the appropriateness of ABA interventions for individuals with Student's profile overly broad. He and Dr. Davis agreed that a functional behavioral assessment should be performed by an experienced BCBA and that elements of an ABA program could and should be implemented. (Dr. Davis raised concerns about Devereux's BCBA possessing the level of expertise needed to address Student's needs.)

While supporting immediate, proper implementation of an ABA program, Dr. Davis also testified that a gentle ABA approach with a focus on "first/ then" principles, implemented with fidelity would be appropriate for Student, including a more steady and structured use of ABA. Dr. Davis recommended that Student's program focus on antecedent management to better predict and address Student's triggers. Once the plan was developed, she opined that it should be implemented with fidelity, noting that this should occur under the supervision of a doctorate level BCBA with vast experience. She supported addition of supports and staff at Devereux, recommending that the effectiveness of such a program be assessed before considering Student's transfer to a different program. (PE-41; PE-42; Davis, Moldover).

The undisputed fact is that Student's medical diagnosis (PANDAS) is at the core of his behaviors and presentation. As such, to ignore medical advice would not be prudent, especially when the record contains such rich guidance from Dr. Latimer, a renown national expert in the field. I find Dr. Latimer's credible testimony to be credible, persuasive and this to provide the guidance needed to determine the type of programming Student requires *at this time*. As such, I rely on her recommendations.

Dr. Latimer, Dr. Moldover and Dr. Davis stressed the importance of consultation among Student's relevant medical providers and the educational staff at Devereux. Given that Student's behaviors stem from his medical difficulties this element is key. Since Parents have consented in the past to communications between the Parties and providers it is likely that they will consent to and support this type of consultation as well.

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<sup>18</sup> While Belmont has remained sympathetic to Devereux, Student and Parents, it is adamant that Student cannot be without a placement and disagrees with Devereux's view that the safety concerns in the instant matter are akin to those in *Dracut v. Melmark*, 14 MSER 286 (Crane, 2008).

At Hearing, Parent explained that Parents' refusal to consider night-time medication was based on their concern over unspecified possible side effects. The record lacks sufficient reliable evidence to support Parents' assertion. In contrast, Dr. Latimer reliably testified that Student's sleep (including REM sleep) can be improved, and the night-time behaviors effectively managed, through medication. She testified to numerous options ranging from less to more aggressive treatments, some with few secondary effects. At Hearing, she was surprised to learn that Student was having behavioral issues at night, as she had not previously been informed, repeatedly stating that she could have helped by prescribing medication which has proven effective with her many other patients with PANDAS. Parents' position in refusing to try medication is puzzling, in light of the fact that the safety concerns which triggered Devereux's termination process and Hearing Request might well have been ameliorated.

The safety of all concerned is paramount. Given Parents' expectations and reliance on the success of the infusion treatments, and their desire that Student stay-put at Devereux until his natural transition into DDS Adult services, it behooves them to trust Dr. Latimer's recommendation for alternative options that can curtail Student's behavioral outbursts and keep him and others safe. Also, according to Dr. Latimer, the numerous medications designed to improve Student's REM sleep would help make him more available to receive an education. Given how close he is to the end of his entitlement, one would think that making decisions that help Student access his education more readily would be a priority; to deny Student this option, given the current circumstances, is to place him in harm's way. Furthermore, Dr. Latimer testified that the medical infusion treatment should begin to show positive results within the next couple of months. If it is fruitful, Student may not require sleep medication for an extended period of time. Whether or not to avail themselves of this option is of course entirely within Parents' purview, however, they are strongly encouraged to consider this alternative until the efficacy of the infusion treatments is ascertained. The testimony supports a finding that the recommended type of educational environment already exists at Devereux. Provided with additional supports and staff, and assuming parental cooperation regarding the types of medical interventions recommended by Dr. Latimer, until another appropriate program offers Student immediate placement, Devereux has the capacity to assist Student.

Devereux's staff represented that it was an ABA informed program, and that if Student required a strict ABA approach it could not be done there.<sup>19</sup> With its current staff this appears to be correct, but the evidence is persuasive that strict implementation of ABA services would be counterproductive, thus not needed. Instead, the types of more gentle, de-stressing supports already available, albeit with some modifications, is what is needed.

In addition to being able to provide the types of interventions recommended by Parents' experts discussed above, to a great extent Devereux already employs the type of personnel that will be required to implement the recommendations. That is, behavioral staff (including

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<sup>19</sup> Devereux also argued that JRC was better suited to implement the type of strict ABA programming recommended by Dr. Davis.

a BCBA), a psychiatrist who consults to the school and a nurse from whom Student received the antibiotic injections, between 2017 and 2019. Devereux also has personnel to deliver speech and language services, and if needed again, OT. The school also offers vocational and transitional services/ opportunities.

Ms. Weinstein testified that at all times, Belmont has been willing to do everything necessary and continues to do so. Belmont also has acquiesced to every request to forward packets to potential placements. Upon learning about concerns regarding the appropriateness of the program for Student, Belmont immediately made multiple referrals to potential placements. It made twenty-four referrals including early access to DDS Adult services and consulted with DESE, to no avail.<sup>20</sup> To date, only JRC has made a conditional offer, noting that it had a small waiting list.

Belmont also consulted with the staff at Devereux, offered to fund any additional supports and services to assist Devereux make that placement work for Student. The evidence shows that other than funding an additional one-to-one staff person during the evening hours, Devereux has not requested or accepted any other offer, holding steadfast to the position that there is nothing Devereux can do to make the program appropriate for Student even in the short term (Weinstein).

I find that Dr. Latimer's assistance in fully understanding Student's presentation and her recommendations to Parents, Belmont and the Team may help ensure everybody's safety in the short term, especially when considering that some of Devereux's staff, while well-intentioned, may lack the training and expertise to address the needs of the Student. Dr. Latimer indicated that she remained willing to work with Parents and Student's Massachusetts physicians to determine the appropriate medication combination for Student.

The record lacks evidence that despite Student's behaviors, Devereux ever conducted a functional behavioral assessment. An FBA may help the Parties understand the triggers of Student's bolting behaviors so as to provide him with a behavior support plan to prevent an escalation of behaviors during waking hours and possibly to better address his sleep-walking-like behaviors.

Devereux and Belmont shall immediately convene Student's Team, inclusive of Dr. Latimer and any other relevant professional deemed necessary by the TEAM to assist in recommending ways to support Student's programming and maximize everyone's safety. This may include addition of consultation support, services and staffing while Student remains at Devereux, consistent with my analysis above. Belmont shall be responsible to fund additional staff as needed. Given the present circumstances at Devereux, this will at minimum require that Belmont: fund a doctorate level BCBA consultant capable of

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<sup>20</sup> Contrary to Devereux's assertions, Belmont is under no obligation to specifically look for hospital or rehabilitation settings or for that matter, explore every possible residential placement across the United States. Belmont was mandated to exercise due diligence in searching for and in forwarding referral packets to potentially appropriate educational, residential placements; this it did in Massachusetts, New Hampshire and Rhode Island and it also sought assistance from DESE and DDS.

addressing Student's present medical constraints and prepare for the possibility that Student may enter the next phase of his infusion treatment before he transitions to a different placement; fund and facilitate consultation by Dr. Latimer; and fund additional support staff during waking hours.

Lastly, Student's Team shall also discuss the Augmentative Communication Evaluation conducted in March of 2020.

**Student's stay-put placement:**

First, contrary to Parents' assertions, the record shows that Devereux and Belmont have fulfilled their mandates pursuant to 603 CMR 28.09(12)(b); it has now been more than six months since Devereux invoked emergency termination.

The Parties agree that because of his age and medical/ behavioral issues related to PANDAS, Student is very difficult to place. Devereux argues that Student is only entitled to an appropriate, successor placement, despite Parents' preference for an ideal one, stressing that Parents' preference for Devereux over JRC is irrelevant. Devereux asserts that Parents' hesitation about JRC is based on their concerns regarding the program's rigid implementation of ABA, which, Devereux asserts, is supported by Parents' experts. Parents are further concerned about the level of activity and noise at JRC given Dr. Latimer's recommendation that Student be in a quiet environment with reduced stressors. Furthermore, Parents desire for Student to remain at Devereux is also rooted on their belief that Student cannot return home, and Parents' desire to minimize transitions over the next nine months before Student ages out of special education and transitions into DDS Adult services (or until he is accepted at a DDS Adult placement early).

Belmont argued that given Student's age, a transition to another program is inevitable. As such, Belmont supports continuing to pursue JRC's placement as well as exploring additional potential placements. Until that happens, Belmont supports maintaining Student's placement at Devereux and as stated in the previous section, remains committed to providing any additional supports, staff and services necessary during any period of time that Student remains at Devereux.

Belmont is further correct that the stay-put issue in this matter is complicated, noting that BSEA cases addressing stay-put and private schools are school specific and involve comparable placements. This case is different in that JRC, the only potential option, has offered Student a conditional acceptance and only when it has a vacancy. As such the issue is not ripe. See *Framingham v. Guild School*, 118 LRP 21037 (Putney-Yaceshyn, 2018).

I join Hearing Officer Putney-Yaceshyn in her opinion that leaving Student without an equivalent appropriate placement is contrary to the IDEA. As stated in *Guild*,

As a matter of public policy and if the IDEA's stay put provisions are to have any meaning, the BSEA cannot issue a decision finding that Student

does not have any placement in which to remain during the pendency of this matter. *Framingham v. Guild School*, 118 LRP 21037 (Putney-Yaceshyn, 2018).

Devereux is correct that the JRC application process must be completed despite Parents' apprehensions about this program, given that this is at present the only possible viable successor placement for Student. Belmont too disagrees with Parents that moving forward with Student's placement at JRC should be halted, noting inconsistencies in the testimony offered by Parents' experts regarding the type of program Student needs. Whether or not JRC is appropriate is an issue not yet ripe. At the time of the Hearing the application process had not been completed and JRC did not have an immediate vacancy. Additionally, no other program whether through DDS, DESE or other agency was available.

Lastly, I note that there are inconsistencies between Devereux's online website program description and Devereux's witnesses' testimony regarding the methodologies used in the day and residential portions of the program, implementation of ABA, availability of the BCBA and the like. While Devereux's witnesses testified that the program is "ABA informed" the written description of the program submitted into evidence and the website description contain no such distinction.

According to the program's website, the "Devereux School is a private, special needs school for students with emotional, behavioral and cognitive differences." It boasts offering "a challenging academic program" to its students "while simultaneously focusing on therapeutic issues." Devereux services students whose profiles include disruptive behaviors, mood/anxiety disorders, complex trauma, psychotic symptoms, high functioning pervasive developmental disorders (PDD), abuse-reactive behaviors, and Autism Spectrum Disorders. According to the *Devereux School Family Handbook* which is posted on their website, Devereux's "treatment approach uses character education, behavioral and cognitive-based principles within the context of a safe, strengths-based therapeutic community." Specifically, their "treatment model is based on Positive Behavioral Interventions and Supports (PBIS)" and "TBCG- Therapeutic Behavior Change Guidelines."<sup>21</sup> The behavior change guidelines are designed to help direct care staff respond accurately and consistently to student misbehaviors. The guiding principles shape therapeutic interactions with students. The intent of this behavior change system is to promote adaptive behaviors while maintaining the safety of the campus." Meanwhile, Devereux's group homes "provide a therapeutic environment with flexible individualized services that vary in intensity based upon the needs of youth and their families. Treatment integrates trauma informed care, evidence-based approaches and best practices, such as Applied Behavior Analysis (ABA) and Positive Behavioral Interventions and Supports (PBIS)."

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<sup>21</sup> A search of this term (TBCG) did not elicit any specific results, but offered a link: <https://childmind.org/guide/guide-to-behavioral-treatments/>. The link includes a list of behavioral treatments, one of which is ABA.

Consistent with Dr. Davis's testimony, successful implementation of ABA requires fidelity and consistency across settings. It is unclear why Devereux would allegedly implement ABA techniques in the group home and not during the day program where staff were allegedly only "ABA informed". Similarly, Devereux's staff testimony regarding Dr. Davis's comments with respect to the BCBA and why no FBA appeared on the record were not addressed and only vague explanations were offered. Devereux's staff's testimony in this regard was lacking, vague and unhelpful. This, combined with the partially subjective graphs prepared at the direction of counsel specifically for the purpose of this Hearing, compromised the credibility of Devereux's witnesses.

**ORDER:**

1. Devereux and Belmont shall immediately convene Student's Team inclusive of Dr. Latimer and any other relevant professional or consultant that can help support Student's program to maximize everyone's safety.
2. Devereux and Belmont shall discuss the Augmentative Communication Evaluation conducted in March 2020 when it convenes the Team.
3. Belmont shall be responsible to fund the additional staff needed including, but not limited to, Dr. Latimer, a doctorate level BCBA consultant, and additional support staff.
4. Together with Parents, Belmont shall facilitate completion of the application process to JRC.
5. Belmont shall continue the search for an alternative placement until one becomes available for Student.
6. If, after making the necessary modifications as recommended by the Team, the Parties cannot implement sufficient measures to increase safety, and/or Student's behaviors deteriorate, Devereux may avail itself of additional remedies in court and Belmont shall create a program for Student until he transitions into DDS Adult Services.

By the Hearing Officer,

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Rosa I. Figueroa

Dated: February 5, 2021

**February 5, 2021**

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

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**BELMONT PUBLIC SCHOOLS &  
DEVEREUX ADVANCED BEHAVIORAL HEALTH  
BSEA # 2103476 &  
BSEA # 2104694**

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**BEFORE**

**ROSA I. FIGUEROA  
HEARING OFFICER**

**ALICIA M. P. WARREN, ESQ., ATTORNEY FOR PARENTS  
RODERICK MACLEISH, ESQ. & JOSHUA D. KRELL, ESQ.,  
ATTORNEYS FOR DEVEREUX ADVANCED BEHAVIORAL  
HEALTH  
COLBY BRUNT, ESQ., ATTORNEY FOR  
BELMONT PUBLIC SCHOOLS**