

**COMMONWEALTH OF MASSACHUSETTS  
BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Randolph Public Schools**

**BSEA #10-5994**

**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 c. 71B), the state Administrative Procedure Act (MGL c. 30A), and the regulations promulgated under these statutes.

A hearing was held on April 6, 2010 in Malden, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student's Mother

Student's Father

Michael Dodd

Private Psychologist and Consultant

Judith Smith

Paraprofessional, Randolph Public Schools

Stephen Babbitt

School Adjustment Counselor, Randolph Public Schools

Susan Eliot

Special Education Teacher, Randolph Public Schools

Laurie Smith-Michaels

Special Education Coordinator, Randolph Public Schools

Ann Knapp

Special Education Coordinator, Randolph Public Schools

Beth Gannon

Principal, Donovan Elementary School, RPS

Karen Clasby

Director of Student Services, Randolph Public Schools

Lillian Wong

Attorney for Parents and Student

Mary Joann Reedy

Attorney for Randolph Public Schools

The official record of the hearing consists of documents submitted by the Parents and marked as exhibits P-1 through P-30; documents submitted by the Randolph Public Schools (Randolph) and marked as exhibits S-1 through S-13; and approximately one day of recorded oral testimony and argument. As agreed by the parties, oral closing arguments were made at the end of the hearing day on April 6, 2010, and the record closed on that date.

**PROCEDURAL HISTORY**

On March 22, 2010, Parents filed a request for expedited hearing. The BSEA allowed expedited status and set the expedited hearing date for April 6, 2010. Randolph filed its response on March 29, 2010.

Pursuant to a conference call on April 5, 2010, the BSEA bifurcated Parents' claims, with the result that only Parents' expedited claim regarding prospective services was heard on April 6, 2010, and it is only this claim that is being addressed in the instant Decision.

All of Parents' remaining claims, which are not expedited, challenge the appropriateness of a number of actions taken by Randolph and are predominantly compensatory in nature. These remaining claims will be addressed at an evidentiary hearing scheduled for May 17, 2010.

## **INTRODUCTION**

This case involves the implementation of a behavior plan that has been specifically designed to address Student's history of inappropriately touching other students and a school custodian. Dr. Michael Dodd (a private psychologist) has developed a proposed behavior plan to address Student's behaviors and allow him to return to school.

The parties do not dispute the seriousness of Student's behavior, the appropriateness of the proposed behavior plan to address Student's behavior, the need for the plan to be implemented as soon as possible, and the importance of Student's returning to school. However, the parties dispute (and the focus of this Decision is) how and where the behavior plan should be implemented.

Parents take the position that the behavior plan can and should be implemented appropriately and safely within the mainstream educational environment so that Student can continue to participate in his regular education classes. Randolph takes the position that the plan can only be implemented appropriately and safely within a substantially-separate classroom, with the participation of the special education staff assigned to that classroom.

For reasons that will be explained below, I agree with Parents regarding the disputed issues.

## **ISSUES**

The issues to be decided in this case are the following:

1. Is Randolph's most recently proposed individualized education program (IEP) calling for Student to be placed in a substantially-separate classroom at the Therapeutic Learning Center (TLC) at the Lyons Elementary School (exhibits S-1, P-30) reasonably calculated to provide Student with a free appropriate public education (FAPE) in the least restrictive environment?
2. If not, can Student's special education and related services be appropriately provided by his continuing placement within a general education classroom?

## **FACTUAL BACKGROUND**

Unless otherwise noted, the following facts are not in dispute.

Student, who lives with his Parents in Randolph, MA, is an 11 year old, 5<sup>th</sup> grader who has been placed at Randolph's Donovan Elementary School (Donovan). He has been placed in the regular education classroom, with special education services and supports. Testimony of Mother; exhibits P-17, S-6.

Student is friendly, energetic, caring, and determined. If he encounters a problem, he tries to work through it. When he walks into a room, he "lights up" the room. He is also persistent and outgoing, and he can get "in your face". Student has a very small stature for his age (his height falls within the bottom 1% for his age), and he is occasionally teased by peers because of his height. Testimony of Mother; exhibits P-10, P-17, S-6, S-13.

Student has been diagnosed as having Post Traumatic Stress Disorder (PTSD) which, reportedly, was the result of abuse and neglect in his biological home and his last foster care placement, prior to placement with and adoption by Parents. Outside of school, Student receives private counseling and pharmacological treatment for PTSD. Student has also been diagnosed as having Attention Deficit Hyperactivity Disorder (ADHD). Testimony of Parent; exhibits P-10, P-17, S-6, S-13.

As a result of his disabilities, Student sometimes has difficulty staying on task and controlling his impulses. Consequently, he can be fidgety, impulsive, distractible, and over-active. He has a difficult time sitting still in the classroom, and he is also socially immature for his age. His disabilities also negatively affect his organizational skills. Testimony of Parent, Eliot; exhibits P-10, P-17, S-6, S-13.

On March 26, 2008, Parents requested that Randolph evaluate Student for special education services owing to his ADHD and behavior issues. Parents repeated this request on May 13, 2008 and again on May 30, 2008. On August 28, 2008, Randolph proposed to evaluate Student for special education services. Allegations in hearing request, admitted by Randolph.

On October 14, 2008, Randolph determined Student to be eligible for special education services. Eligibility was based, in part, on Randolph's educational assessment, psychological evaluation, and educational diagnostician's academic report. Testimony of Smith-Michaels.

Randolph's educational assessment, completed by Randolph staff, provided in part: "It takes a while for [Student's] meds to take effect in the morning. During that time he doesn't respect other students [sic] personal space or privacy." Exhibit P-8.

Randolph's psychological evaluation by Anson Chan, MA, CAGS, School Psychologist, found that Student's full scale IQ was 82, placing his general intellectual ability in the lower end of the average range. However, the report further noted that "[Student's] history of

neglect and previously unstable home situations likely hampered his acquisition of school knowledge.” The report recommended that certain accommodations be made and certain strategies be taught to Student in the classroom. Exhibits P-10, S-13.

Randolph’s educational diagnostician’s academic report by Judith Wilson, MEd, CAGS, Educational Diagnostician, found that, on standardized testing, Student attained below average scores in reading, written language, and mathematics. The report recommended a number of supports and strategies to address Student’s various educational weaknesses. Exhibit S-12.

On the basis of its finding of eligibility and the above-referenced evaluations, Randolph proposed an IEP for Student on October 14, 2008. The IEP proposed special education support in Student’s regular education math class (2 x 45 minutes) and academic support (for organizational support) (6 x 20 minutes) within the regular education classroom. Pull-out, specialized services were proposed to address Student’s reading (5 x 30 minutes) and written language deficits (2 x 30 minutes). This IEP was fully accepted by Parents on November 12, 2008. Exhibits P-12, S-7.

Student’s next IEP, for the period of 10/28/09 to 10/27/10, proposed a continuation of math support (5 x 30 minutes) and academic support (5 x 10 minutes) in the regular education classroom, with the addition of special education support in reading (5 x 30 minutes) and written language (2 x 30 minutes) within the general education classroom. Pull-out services for reading and written language were deleted from the IEP, and occupational therapy services (1 x 30 minutes) were added. This IEP was fully accepted by Parents. Testimony of Mother; exhibits S-6, P-17.

In Student’s classroom for the current school year (2009-2010), there are 23 or 24 children and a general education teacher and sometimes an aide. Student participated in a counseling group led by the Randolph School Adjustment Counselor (Mr. Babbitt). Mr. Babbitt also was available to see Student individually as needed, and this occurred approximately twice each month. Mr. Babbitt testified that he has a very positive and trusting relationship with Student that has been developed over time. Testimony of Babbitt, Smith-Michael.

An incident report, dated October 6, 2009, stated that Student attempted to put his hands down the pants of another boy on two separate occasions. Testimony of Babbitt; exhibits P-14, S-4.

An incident report, dated November 25, 2009,<sup>1</sup> stated that Student asked a 1<sup>st</sup> grade boy to give him a wedgie and when the boy refused, Student asked the boy if Student could give him a wedgie, which the boy also refused. The report further stated that later the same day, a male custodian reported that Student approached him from behind, placed his hands down the back of the custodian’s jeans and attempted to give the custodian a wedgie. The report

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<sup>1</sup> The report is erroneously dated October 25, 2009 at the top of the report and correctly dated November 25, 2009 at the bottom of the report. Testimony of Gannon.

then stated that the custodian told Student to “stop” and brought Student to Mrs. Gannon’s office. There was contradictory testimony as to whether these incidents actually occurred on the same day or on two different days. Testimony of Mother, Babbitt, Gannon; exhibits P-18, S-4.

In early December 2009, Randolph developed a behavior plan to address Student’s inappropriate touching of others. Pursuant to the plan, Student was to be rewarded with a special, private lunch with his friends if, for five days, he keeps his hands to himself (including any inappropriate touching, pushing, hitting, kicking or other aggression). The plan indicated that the consequences for inappropriate behavior would be an indefinite loss of the “privilege” of eating in the cafeteria or going outside for recess. The plan was signed by Student, Parents, and Randolph staff. Testimony of Smith-Michaels, Babbitt; exhibits P-20, S-5.

The plan also stated that Student would have an aide with him throughout the school day as a visual reminder for Student, and also for the aide to offer “support/suggestions if needed.” Randolph assigned an aide (Ms. Smith) to supervise and monitor Student beginning when he arrives at school and when he is in unstructured times, such as in the hallways and recess. Another aide supervises and monitors Student during lunch. When Student was in a classroom or resource room, Student was supervised and monitored by the teacher. Testimony of Smith-Michaels; exhibits P-20, S-5.

The plan was not developed on the basis of a functional behavioral assessment, but rather on the basis of prior behavioral incidents and staff observation of Student. Pursuant to the behavior plan, Student was able to earn two special lunches. However, there followed another incident (described below) on January 20, 2010, which resulted in Student’s losing cafeteria and recess privileges for the remainder of the year. Testimony of Smith-Michaels, Babbitt.

With respect to the behavior plan (and its reward of Student after five days of keeping his hands to himself), Dr. Dodd testified that behavioral rewards are most effective when delivered immediately and no later than the same day. With respect to the behavior plan (and its indefinite suspension of cafeteria and recess), Dr. Dodd testified that under an appropriate behavior plan, Student would always need a positive reinforcer towards which he could work. Mr. Babbitt, who was the principal drafter of the plan, testified that although he had been hopeful that the behavior plan would be effective, he did not believe that it would effectively address Student’s behavior. Testimony of Dodd, Babbitt

Notwithstanding the behavior plan (including the supervision and monitoring by staff), Student continued to have incidents of inappropriate touching, as discussed below.

An incident report, dated January 20, 2010, stated that a boy was observed pushing Student’s hands, and the boy later explained that Student “was trying to touch me”. At the time of this incident, Student was being monitored by a special education teacher (Ms. Eliot). When the incident occurred, about nine students were in the process of leaving the room, Ms. Eliot was

about 12 feet from Student, and Ms. Eliot had turned her head in another direction for about five to ten seconds. Testimony of Eliot; exhibits P-21, S-4.

An incident report, dated February 5, 2010, stated that a boy reported that Student “was trying to touch me again.” According to the report, the boy said that Student was trying to lift up his shirt and touch his “butt”. This incident occurred with a boy whom Student had allegedly offended previously. Testimony of Gannon; exhibits P-23, S-4.

On February 5, 2010, Student was suspended from the Donovan Elementary School. On February 8, 2010, Student’s IEP Team, the school principal and Parents met to discuss the incidents that resulted in the suspension. In a letter dated February 10, 2010 from Laurie Smith, SPED Coordinator, to Parents, Randolph recited six separate occasions of “unwelcomed physical contact” with two male peers and one male adult during the school year. The letter stated that Randolph “see[s] [Student] as presenting a significant risk to his peers.” The letter then said that Randolph had placed Student “on home tutoring” until such time as the “family obtains a risk assessment indicating the likelihood of [Student] reoffending in this manner.” The letter concluded by stating that after receipt of such assessment, the IEP Team would re-convene to develop an appropriate IEP and placement. Testimony of Gannon; exhibits P-25, S-4.

Initially, Randolph took the position that it was Parents’ responsibility to obtain the above-referenced risk assessment. Eventually, Randolph agreed to pay for the assessment. Randolph referred Parents to Michael Dodd, PhD, for purposes of conducting a risk assessment at Randolph’s expense. Mother contacted Dr. Dodd to arrange for the assessment. Dr. Dodd conducted the evaluation in three sessions from 2/23/10 to 3/1/10. Dr. Dodd’s evaluation report made specific recommendations “to limit [Student’s] risk of offending sexual behavior.” Testimony of Mother, Dodd; exhibits P-27, S-2.

A manifestation meeting was convened on February 26, 2010, but because Dr. Dodd’s report was not then complete and available to the IEP Team, Randolph deferred its manifestation determination. Testimony of Mother, Gannon.

Student’s suspension (that began on February 5, 2010) continued until March 8, 2010. On March 8, 2010, having received Dr. Dodd’s report, the Team re-convened the manifestation meeting and determined that Student’s conduct was a manifestation of his disability. The Team immediately held a second meeting to determine, based on Dr. Dodd’s conclusions and recommendations, where Student should be placed. At the meeting, the Team proposed that Student be placed at the TLC program at Randolph’s Lyons Elementary School. This placement was reflected within an IEP, dated March 15, 2010, that Randolph proposed for the period 3/8/10 to 3/7/11. Testimony of Eliot, Gannon, Mother; exhibits P-30, S-1.

The TLC program includes three substantially-separate classrooms and serves approximately 24 or 25 special education students. Student would be placed within the classroom for 5<sup>th</sup> and 6<sup>th</sup> graders that now has seven students and is taught by an experienced special education teacher and a paraprofessional. Each student within TLC is on an individual behavior plan

that allows the student to earn points towards shopping. Within the TLC program, Student would always be accompanied by a staff person. There is a full-time social worker dedicated to TLC. Testimony of Knapp.

Mother visited the TLC program twice and discussed the program with Ms. Knapp. Parents concluded that the TLC program was not appropriate for their son and declined to place him there. As a result, Student has been out of school since his February 5, 2010 suspension. Randolph has provided tutoring to Student. Testimony of Mother; exhibit P-29.

## DISCUSSION

It is not disputed that Student is an individual with a disability, falling within the purview of the federal Individuals with Disabilities Education Act (IDEA)<sup>2</sup> and the Massachusetts special education statute.<sup>3</sup> The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."<sup>4</sup>

Within this general mandate, the IDEA provides a specific mainstreaming directive, requiring that, to the maximum extent appropriate, a student be educated with other students who are not disabled.<sup>5</sup> Courts have recognized that in the IDEA, Congress created a strong preference in favor of mainstreaming<sup>6</sup> and that if a proposed placement does not satisfy this mandate, the placement may not be offered or provided by the school district, nor may a Hearing Officer order it.<sup>7</sup>

The relevant statutory language from the IDEA reads as follows:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the

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<sup>2</sup> 20 USC 1400 *et seq.*

<sup>3</sup> MGL c. 71B.

<sup>4</sup> 20 USC 1400(d)(1)(A). *See also* 20 USC 1412(a)(1)(A).

<sup>5</sup> 20 USC 1412(a)(5)(A); 34 CFR 300.114(a)(2)(i); MGL c. 71B, ss. 2, 3; 603 CMR 28.06(2)(c).

<sup>6</sup> *See, e.g., Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993); *DeVries v. Fairfax County School Board*, 882 F.2d 876, 878 (4<sup>th</sup> Cir. 1989); *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1044 (5<sup>th</sup> Cir. 1989).

<sup>7</sup> *See, e.g., Burlington v. Mass. Department of Education*, 471 US 359, 369 (1985) (federal statute "contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children"); *Rome Sch. Comm. v. Mrs. B.*, 247 F.3d 29, 33 (1<sup>st</sup> Cir. 2001) ("mainstreaming may not be ignored, even to fulfill substantive educational criteria"), quoting *Roland v. Concord School Committee*, 910 F.2d 983, 992-993 (1<sup>st</sup> Cir. 1990); *Board of Education of LaGrange School District No. 105 v. Illinois State Board of Education*, 184 F.3d 912, 916 (7<sup>th</sup> Cir. 1999) (placement proposal, which did not enable the student to share a classroom with typically developing children, did not satisfy mainstreaming requirement because student's disability and IEP did not prevent him from benefiting educationally in a more inclusive setting).

nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>8</sup>

Consideration of the underlined statutory language quoted above may be central to an analysis of whether educational services are being provided within the least restrictive environment. For example, when determining whether this mandate has been satisfied in a particular dispute, courts may begin with a consideration of whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily for a student.<sup>9</sup> Several courts have also explained that, if feasible, services equivalent to those offered in a segregated setting may need to be added to a mainstream setting so that a student can be placed with regular education students.<sup>10</sup>

Courts have also noted the “apparent tension within the Act between the strong preference for mainstreaming” as reflected within the above-quoted statutory language, and the requirement that schools provide individualized programs tailored to the specific needs of each disabled student.<sup>11</sup> The IDEA’s resolution of this tension is through “the school’s proper use of ‘supplementary aids and services,’ which may enable the school to educate a child with disabilities for a majority of the time within a regular classroom, while at the same time addressing that child’s unique educational needs.”<sup>12</sup>

The instant dispute involves the question of how (and in what setting) Randolph should appropriately address Student’s behavioral difficulties and whether supplemental services may allow Student to continue to receive educational services within a mainstream classroom. It is not disputed that Student has significant behavioral difficulties and that these difficulties have been a manifestation of his disabilities. It is also agreed that his disabilities substantially impact his learning or that of others. Testimony of Smith-Michaels; exhibits S-1, S-6, P-17, P-30.

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<sup>8</sup> 20 USC 1412(a)(5)(A) (emphasis supplied). Massachusetts regulations (603 CMR 28.06(2)(c)) similarly provide as follows:

Least restrictive environment (LRE). The school district shall ensure that, to the maximum extent appropriate, children with disabilities are educated with children who do not have disabilities, and that special classes, separate schooling, or other removal of children with special needs from the general education program occurs only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily.

[Emphasis supplied.]

<sup>9</sup> See, e.g., *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 390 (3<sup>rd</sup> Cir. 2006); *L.B. ex rel. K.B. v. Nebo School Dist.*, 379 F.3d 966, 976 (10<sup>th</sup> Cir. 2004); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1215 (3<sup>rd</sup> Cir.1993); *Daniel R.R. v. Bd. of Educ.*, 874 F.2d 1036, 1048 (5<sup>th</sup> Cir.1989).

<sup>10</sup> See *A.W. v. Northwest R-I School Dist.*, 813 F.2d 158, 163 (8<sup>th</sup> Cir.1987); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6<sup>th</sup> Cir.1983).

<sup>11</sup> *Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1214 (3<sup>rd</sup> Cir.1993) (footnote and internal citations omitted). See also *Roland v. Concord School Committee*, 910 F.2d 983, 993 (1<sup>st</sup> Cir. 1990) (“desirability of mainstreaming must be weighed in concert with the Act’s mandate for educational improvement”).

<sup>12</sup> *Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1214 (3<sup>rd</sup> Cir.1993) (internal citation omitted).

The IDEA provides that:

In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall . . . in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior . . . .<sup>13</sup>

A number of courts have further concluded that a school district must develop an appropriate behavior plan through the IEP process and that failure to do so may result in a denial of FAPE.<sup>14</sup> The First Circuit has also noted the importance of parents and a school district working together, within the context of IEP Team, to determine how to address a student's behavioral difficulties that impact upon the student's learning.<sup>15</sup>

In the instant dispute, the fundamental question to be resolved is whether Randolph is correct that Student's behavioral needs cannot be appropriately and safely addressed through his continued placement in regular education classes at the Donovan, and therefore Randolph's proposed placement of Student within the substantially-separate classroom at the TLC program is necessary and appropriate; or, conversely, whether there are "supplementary aids and services" (which Randolph must provide pursuant to 20 USC 1412(a)(5)(A) as discussed above) that would allow Student's behavioral needs to be addressed appropriately and safely within the general education environment, in which case he would be entitled to return to the Donovan. Parents have the burden of persuasion regarding this issue.<sup>16</sup>

As noted above in the factual background section of this Decision, Randolph required that Parents obtain a risk assessment of Student's ability to return safely to school prior to Randolph's being willing to consider his return to any school placement. For purposes of this assessment, Randolph referred Parents to Michael Dodd, PhD, and Randolph paid for this assessment. Testimony of Mother, Dodd.

Dr. Dodd is the founder and director of the Aggressive Sexual Behavior Evaluations & Group Treatment Program. He is also an Instructor in Psychology, Department of

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<sup>13</sup> 20 USC 1414(d)(3)(B)(i). See also the comparable requirement found within the federal special education regulations. 34 CFR 300.324 (a)(2)(i).

<sup>14</sup> See *Neosho R-V School Dist. v. Clark*, 315 F.3d 1022, 1028 (8th Cir. 2003) (finding that a student did not receive FAPE where IEP failed to provide an adequate behavior management program); *Penn Trafford School Dist. v. C.F. ex rel. M.F.*, 2006 WL 840334 (W.D.Pa. 2006) (IEP's failure to provide a behavior management plan was a "serious omission"); *Indiana Area School Dist. v. H.H. ex rel. K.H.*, 2005 WL 3970591 (W.D.Pa. 2005) (court affirmed hearing officer's finding that by failing to develop a behavior intervention plan through the IEP Team process, school district denied student FAPE); *County School Bd. of Henrico County, Vir. v. Palkovics ex rel. Palkovics*, 285 F.Supp.2d 701, 709 (E.D.Va. 2003) (20 U.S.C. § 1414(d)(3)(B)(i) did not require the inclusion of a behavior intervention plan in the IEP until Student's behavior impeded his own learning or the learning of others).

<sup>15</sup> *Rome School Committee v. Mrs. B.*, 247 F.3d 29, 33, 34 (1st Cir. 2001).

<sup>16</sup> *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief; a party who has the burden of persuasion "loses if the evidence is closely balanced").

Psychiatry, Harvard Medical School. Dr. Dodd has conducted approximately 200 to 300 assessments similar to the one he conducted of Student, and approximately one-third of those assessments have been of children. Dr. Dodd consults to public and private schools, as well as to other government and private organizations. He has served as the Clinical Director for two privately-operated inpatient psychiatric units for children and adolescents. In short, Dr. Dodd has very extensive experience behavioral difficulties of children. He also has a particular specialization in offending sexual behavior. Testimony of Dodd; exhibit S-3 (resume).

I found Dr. Dodd's testimony to be comprehensive, candid, careful, authoritative, and credible. No other witness evidenced expertise or experience relevant to assessing or addressing a student's offending sexual behavior. Student had not previously or subsequently been evaluated for aggressive sexual behavior. For these reasons, in this Decision, I have placed substantial reliance upon Dr. Dodd's report and testimony relevant to Student's behavioral needs and how they should be addressed at school.

Dr. Dodd's evaluation included three sessions from 2/23/10 to 3/1/10, totaling approximately seven hours, with Student and his Parents. He also spoke to Ms. Smith on three separate occasions, and reviewed Student's previous evaluations and his incident reports that are summarized earlier in the instant Decision. Testimony of Dodd; exhibits P-27, S-2.

Dr. Dodd's evaluation report noted that the purpose of the assessment was to make recommendations to "minimize the risk of re-offense upon returning to school." And his report made specific recommendations "to limit [Student's] risk of offending sexual behavior." Dr. Dodd opined that if his recommendations are implemented, Student should return to school. His report stated: "[Student] demonstrates every quality of a child who is ready to join authorities in a systematic behavior plan by which he can demonstrate that he is able to return to his regular classroom activities safely." Testimony of Dodd; exhibits P-27, S-2.

Dr. Dodd testified that the critical ingredient to reducing and eliminating Student's inappropriate sexual behavior is for Student to learn to identify thoughts of sexual behavior and then to talk about those thoughts with an adult prior to his acting on them. The goal is "to help [Student] to stop 'unwanted' thoughts about sexually touching others that precede (and will predict) offense." Dr. Dodd was clear in his testimony that if Student can talk about how to control his behavior, he will not commit the offending behavior. Testimony of Dodd; exhibits P-27, S-2.

For this purpose, Dr. Dodd's report contains a proposed behavior plan for Student, to be implemented at school. Dr. Dodd used the following color scheme for Student to identify thoughts: green (no unwanted thoughts), yellow (some unwanted thoughts), and red (unwanted thoughts or actions likely). There should be a pre-determined number of check-ins for Student each day, at which times he would indicate the relevant color code. If, at any time during a check-in or at any other time during the school day, Student checked in with yellow or red, he would be immediately escorted by staff to a predetermined respite space

(for example, an office). Once in his respite space, Student would be directed by staff to “bust” his thoughts, with staff using the so-called “Penny, Prayer, Person” method described in Dr. Dodd’s report. If at any time, Student wished to leave school because he could not “bust” the unwanted thoughts, or for any other reason, he should be allowed to do so. Dr. Dodd explained that he had developed this plan with Student’s active participation during their sessions together, and Student was enthusiastic about using the plan. Similarly, Mother testified that she had been practicing the plan at home with Student, he now understood the plan and how it works, and he wanted to implement the plan at school. Testimony of Dodd, Mother; exhibits P-27, S-2.

In his report, Dr. Dodd also recommended that Student be restricted from the boy’s bathroom and any other unsupervised setting at school where he may encounter other children (particularly boys) who are toileting or changing. It was recommended that Student be closely monitored by familiar school staff when he is in “unstructured open school settings” such as hallways, recess, and lunch. The report provided guidance in the event that Student demonstrates a new sexual assault at school. It was also recommended that Student be closely monitored at home, presumably by his Parents. Testimony of Dodd; exhibits P-27, S-2.

Dr. Dodd testified that implementation of his recommendations (and, in particular, his proposed behavior plan) is staff-intensive. He identified essentially two staff components for purposes of implementation of the behavior plan. First, one person would coordinate the plan and train the other staff who would have responsibility for implementing the plan. Second, one or more staff persons would provide an immediate resource for Student at any time during the school day when he has any unwanted thoughts relevant to his sexual behavior. The staff person(s) would immediately escort Student to a respite area where he would be directed to utilize the “Penny, Prayer, Person” method. Although it does not appear in his report, Dr. Dodd testified that it may also be useful, until such time as Student fully understands the plan and how it is utilized, for Student to spend one or two hours in the afternoon (from 1 to 3 pm, or from 2 to 3 pm) in the respite area with staff since this appears to be his most vulnerable time of day. He noted that it may take Student only a week to have sufficient understanding of the plan so that this daily, afternoon respite period can be dispensed with entirely.<sup>17</sup> Testimony of Dodd; exhibits P-27, S-2.

Dr. Dodd testified that all of the parties involved in the implementation of the plan should meet once each month to address any parts of the plan that are not working appropriately. Changes to the behavior plan should occur only within the context of these meetings. Testimony of Dodd.

There is no substantive dispute between Parents and Randolph regarding the appropriateness of Dr. Dodd’s above-described recommendations and, in particular, Dr. Dodd’s proposed

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<sup>17</sup> In light of Mother’s testimony that Student has been practicing the behavior plan at home and understands the plan, it may be that the initial period of daily afternoon respite will be unnecessary.

behavior plan for Student. The entire disagreement between the parties focuses on how and where these recommendations are to be implemented at school.

Dr. Dodd testified that when he wrote his assessment report, he understood that Student was attending mainstream classes at the Donovan Elementary School and that he assumed that when Student returned to school and the behavior plan was implemented, Student would be resuming his education at the Donovan. Dr. Dodd also explained that his report and the recommendations therein are location “neutral”—that is, the recommendations are not specific to (and do not require any particular kind of) educational setting in order to be implemented appropriately. He stated that the proposed behavior plan can be implemented any place where the space (for respite) and staff (coordinating and implementing the plan) are available. It was not until Dr. Dodd attended a meeting on March 8, 2010 to explain his report to Randolph staff that he learned that Student’s placement might be changed by Randolph for purposes of implementing the behavior plan and recommendations. Testimony of Dodd; exhibits P-27, S-2.

Dr. Dodd testified regarding the qualifications (in terms of experience and expertise) needed by those who would implement the proposed behavior plan. As discussed above, there are essentially two categories of staff—the plan coordinator and the other staff who would actually implement the plan. With respect to the plan coordinator, this person would need to have had clinical training. Dr. Dodd identified a school social worker or adjustment counselor as a likely appropriate choice for this position. With respect to the implementing staff, Dr. Dodd testified that they do not need to have any particular expertise or experience. Rather, the two criteria for these staff are that (1) they have been trained (for approximately one hour) to understand Student’s behavior plan, and (2) Student must be able to trust the staff person(s) so that he will be willing to talk to them about his unwanted thoughts. Testimony of Dodd.

Dr. Dodd testified that it is critical that Student understands that a staff person is always available to him so that he can immediately discuss his unwanted thoughts. To the extent possible, the plan should be implemented consistently, and it should be monitored for this purpose. Testimony of Dodd.

Dr. Dodd testified that from his assessment of Student, it was clear that Student already trusts a number of Donovan School staff as people with whom he would feel comfortable talking about these issues. He also noted that Student is an affable child who genuinely wants to try out this behavior plan. Dr. Dodd found this to be encouraging. He concluded that Student is an excellent candidate for this plan to be successful. Testimony of Dodd.

Finally, Dr. Dodd testified that he had successfully implemented a similar behavior plan for a 4<sup>th</sup> grader placed in a relatively large, regular education classroom within a private school. The implementation staff for the plan was a 1:1 aide who was dedicated to the student but who helped out generally in the classroom (so as not to draw attention to the one student and minimize self-esteem issues), while always keeping an eye on the student. Dr. Dodd testified

that the student was able to be free of his unwanted behavior for the remainder of 4<sup>th</sup> grade and for the entire 5<sup>th</sup> grade year. Testimony of Dodd.

On the basis of his testimony and report, I find that all of Dr. Dodd's recommendations can be immediately implemented for Student at the Donovan Elementary School and Student can return to his regular education classroom, provided that there is appropriate staff and space available at the Donovan.

The issue of available respite space was addressed through the testimony of Randolph staff. Although there is no ideal room for this purpose (for example, a conference room attached to the Principal's office could be used, but it has poor acoustics), I have no doubt that the staff at Donovan can find at least minimally appropriate space for Student to use as a respite area—either an office or a conference room. Moreover, there is no indication that the space at the Lyons Elementary School that would be used for this purpose (the TLC social worker's office) would be any better than the spaces that are available at Donovan. Testimony of Smith-Michaels, Knapp.

Mr. Babbitt (Randolph school adjustment counselor) testified that although he had the requisite clinical training (according to Dr. Dodd's criteria) to be the coordinator of the plan, he did not sufficiently understand the plan (or how it would work) to coordinate the implementation of the plan or train other staff to implement the plan, and did not feel qualified to be the plan coordinator. Testimony of Babbitt.

Mr. Babbitt and other Randolph staff further testified that it would not be appropriate to implement Dr. Dodd's proposed behavior plan at Donovan or in any general education classroom. Their objection was that neither the Donovan special education staff nor any general education staff would have sufficient experience or training to be the implementing staff—that is, to process with Student his unwanted thoughts. These witnesses considered this to be a clinical responsibility that could only be appropriately undertaken by someone such as the 5<sup>th</sup>/6<sup>th</sup> grade teacher at the TLC program who has specific training and experience working with students with serious emotional and social deficits. Testimony of Gannon, Smith-Michael, Eliot, Knapp, Babbitt.

For reasons explained above, these opinions of Randolph staff do not comport with Dr. Dodd's understanding of the proposed behavior plan and what needs to occur for its successful implementation. This is because the processing role by staff, as envisioned by Randolph witnesses, is substantially different than the processing role of staff as envisioned by Dr. Dodd. Dr. Dodd sees this task as something that can be (and has been done) successfully by an aide or paraprofessional who has had one hour of training on the plan and who is trusted by Student. From Dr. Dodd's perspective, the process may be characterized more appropriately as an opportunity for Student to talk with an empathic staff who understands the purpose of the discussion, as compared to an intervention by a trained clinician who is skilled in working with a trauma survivor. I find Dr. Dodd's testimony regarding staff qualifications for implementation of the behavior plan to be more persuasive than the testimony of the Randolph witnesses.

However, I credit the testimony of Mr. Babbitt with respect to his not feeling comfortable or capable of coordinating the plan and training other staff regarding the plan. And at the same time, because of Mr. Babbitt's relationship with and knowledge of Student and because he satisfies Dr. Dodd's criteria for someone qualified to coordinate the behavior plan, Mr. Babbitt would appear to an excellent person to be the behavior plan coordinator. I also take the testimony of Randolph staff to mean that they also do not feel entirely comfortable with or are not entirely familiar with Dr. Dodd's proposed behavior plan and how it would be implemented, even after their reviewing Dr. Dodd's report, meeting with Dr. Dodd on March 8, 2010 and hearing his testimony in this case. This points to the necessity of Dr. Dodd's spending additional consultation time with Randolph staff (both the plan coordinator and the implementing staff) for purposes of training them regarding the behavior plan and how it can be implemented.

Randolph has raised one additional argument. Randolph expressed concern that it would not be sufficiently safe for Student to return to the Donovan. Randolph took the position that supervision by the TLC staff, who have expertise regarding someone with Student's disabilities, and the smaller classes at the TLC program would likely allow staff to monitor and supervise Student more effectively than at the Donovan.

The evidence does not support Randolph's concern regarding safety if Student returns to the Donovan. As Dr. Dodd made clear in his report and testimony, safety will be attained through effective implementation of an appropriate behavior plan for Student. When specifically asked by the Hearing Officer whether there would be an advantage or disadvantage between implementation of the behavior plan at Donovan and implementation in the TLC program at the Lyons, Dr. Dodd did not identify anything intrinsic to the TLC program or its substantially-separate classroom and experienced special education teacher (as compared to a general education placement) that would likely make the implementation of the behavior plan more effective or successful. To the contrary, Dr. Dodd noted the fact that Student already trusts a number of Donovan staff, and essential to the plan's success is having staff whom Student trusts and is willing to talk with regarding his unwanted thoughts. In addition, Dr. Dodd's other recommendations call for monitoring and supervision of Student sufficiently to minimize risk of harm, and these can be implemented at the Donovan. Also, as discussed below, I recommend that in order to implement the behavior plan effectively, Randolph identify or hire a 1:1 aide who would be dedicated to monitoring and supervising Student throughout the school day at the Donovan. For these reasons, I find the evidence persuasive that there is no basis for concluding that placement at the TLC program, as compared to returning Student to the Donovan, would increase the safety of Student's return to school.

For all of these reasons, I reach the following findings and conclusions:

1. Dr. Dodd's recommendations, which include but are not limited to a proposed behavior plan for Student, are appropriate for purposes of Student's safe return to school.

2. Dr. Dodd's recommendations can be appropriately implemented at the Donovan Elementary School, provided that there is appropriate space (for respite) and staffing (for coordinating and implementing the plan).
3. Donovan has space that is at least minimally appropriate for purposes of implementing Dr. Dodd's recommendations.
4. Pursuant to the above-discussed legal standards (that include the responsibility of Randolph to use "supplementary aids and services" to allow Student to continue to attend regular education classes), Randolph shall identify or hire sufficient staff to coordinate and implement the plan at Donovan.
5. The Randolph clinical staff person who is to coordinate the behavior plan (i.e., either Mr. Babbitt or another clinical staff person) shall receive consultation and training from Dr. Dodd, the parameters of which should be determined by Dr. Dodd.
6. Randolph has not identified any Donovan staff person(s) who would monitor Student and be immediately available to Student at any time of the school day for purposes of processing unwanted thoughts and implementing the behavior plan. Therefore, Randolph shall immediately identify or hire such a person. This position may be shared by more than one person. The person(s) may be an aide or paraprofessional, provided that the person(s) can be readily trained to understand and implement the behavior plan, and can quickly develop a trusting relationship with Student. The person(s) shall be trained by Dr. Dodd since Randolph does not have any staff capable of providing this training. I recommend, but do not require, that for this purpose Randolph identify or hire a single person who would be Student's 1:1 aide throughout the school day, similar to what Dr. Dodd described had been successfully done in another school for a 4<sup>th</sup> grader (discussed above).
7. As necessary, Randolph shall further engage Dr. Dodd for assistance with monitoring and adjusting implementation of the behavior plan over time and for purposes of providing any further consultation to Randolph staff.
8. Randolph shall immediately seek to engage Dr. Dodd for the above-stated purposes. In the event that Dr. Dodd is unable or unwilling to provide the requisite consultation services to Randolph, Randolph shall seek to engage someone recommended by Dr. Dodd for this purpose. In the event that Dr. Dodd is not able or willing to recommend such a person, Randolph shall hire a consultant with expertise in addressing behavioral difficulties of children, with particular knowledge regarding offending sexual behavior.
9. Randolph shall immediately appoint a Randolph staff person to oversee all aspects of the implementation of Dr. Dodd's recommendations, and this person shall keep Parents informed of Randolph's implementation efforts. With the assistance of this

person, Randolph shall immediately begin the process of implementing Dr. Dodd's recommendations, including identification of respite space, identification or hiring of a clinical person to coordinate the behavior plan, identification or hiring of staff to implement the behavior plan, hiring Dr. Dodd as a consultant, training Randolph staff involved with the behavior plan, preparation of documents relative to the behavior plan, and all other steps necessary to implement fully the behavior plan.

10. Full implementation of all of Dr. Dodd's recommendations must be completed by April 26, 2010.

### **ORDER**

Randolph's most recently proposed IEP calling for Student to be placed in a substantially-separate classroom at TLC at the Lyons Elementary School (exhibits S-1, P-30) is not reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment because Student can be appropriately and safely placed and educated within the less restrictive environment of a general education classroom.

Student is entitled to return immediately to his placement at the Donovan Elementary School.

As discussed in more detail above, Randolph shall implement all of Dr. Dodd's recommendations as soon as possible, with full implementation of all recommendations to occur no later than April 26, 2010.

By the Hearing Officer,

William Crane  
Dated: April 9, 2010

**COMMONWEALTH OF MASSACHUSETTS  
BUREAU OF SPECIAL EDUCATION APPEALS**

**THE BUREAU'S DECISION, INCLUDING RIGHTS OF APPEAL**

**Effect of the Decision**

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Accordingly, the Bureau cannot permit motions to reconsider or to re-open a Bureau decision once it is issued. Bureau decisions are final decisions subject only to judicial review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. Rather, a party seeking to stay the decision of the Bureau must obtain such stay from the court having jurisdiction over the party's appeal.

Under the provisions of 20 U.S.C. s. 1415(j), "unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement," during the pendency of any judicial appeal of the Bureau decision, unless the child is seeking initial admission to a public school, in which case "with the consent of the parents, the child shall be placed in the public school program". Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington, v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child's placement during the pendency of judicial proceedings must seek a preliminary injunction ordering such a change in placement from the court having jurisdiction over the appeal. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1st Cir. 1983).

**Compliance**

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the facts on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

## **Rights of Appeal**

Any party aggrieved by a decision of the Bureau of Special Education Appeals may file a complaint in the state court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review of the Bureau decision. 20 U.S.C. s. 1415(i)(2).

An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

## **Confidentiality**

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove School District v. Pulitzer Publishing Company*, 898 F.2d 1371 (8th Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

## **Record of the Hearing**

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to federal law, upon receipt of a written request from any party, the Bureau of Special Education Appeals will arrange for and provide a certified written transcription of the entire proceedings by a certified court reporter, free of charge.