UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANTHONY CORDEIRO, ET AL., Plaintiffs, v. DAVID DRISCOLL, COMMISSIONER OF THE DEPARTMENT OF EDUCATION FOR THE COMMONWEALTH OF MASSACHUSETTS and BRISTOL COUNTY AGRICULTURAL SCHOOL SCHOOL COMMITTEE, RUSSELL G. JAMES, AND TRUSTEES OF THE BRISTOL COUNTY AGRICULTURAL SCHOOL, Defendants.	)	CIVIL ACTION NO. 06-10854-DPW

MEMORANDUM AND ORDER
March 8, 2007

After exhausting their administrative remedies at the Bureau of Special Education Appeals (BSEA) of the Massachusetts Department of Education, the plaintiffs, Anthony Cordeiro and his parents, initiated this action to challenge the denial of Anthony's application for admission to the Bristol County Agricultural High School (BCAHS). Plaintiffs claim that BCAHS, a vocational secondary school in Massachusetts, discriminated against Anthony, who is diagnosed with Asperger's Syndrome.[1]

[1] The parties are in agreement that Anthony suffers from Asperger's Syndrome (or Disorder) and that this is a disability. Perhaps for that reason, a definition of this condition was not developed in the record. The First Circuit has explained that "Asperger's Disorder is a developmental disability on the autism spectrum that is associated with significant misperceptions of otherwise routine elements of daily life that is not treatable

They seek judicial review of the BSEA action, an order requiring admittance of Anthony into BCAHS, and damages under the Americans with Disabilities Act (Count 1), 42 U.S.C. §§ 12101-12213, Section 504 of the Rehabilitation Act of 1973 (Count 2), 29 U.S.C. § 794, and 42 U.S.C. § 1983 (Count 3).

Defendants David Driscoll, Commissioner of the Department of Education for the Commonwealth of Massachusetts (Department), and BCAHS, its superintendent, Russell G. James, and its Trustees have moved for summary judgment as to all counts pertaining to them. Plaintiffs have filed a cross-motion for summary judgment. For the reasons stated below, I conclude that BCAHS's admissions procedure has not been shown to discriminate against Anthony on the basis of his disability and did not deprive him of a property interest. Consequently, I will grant the defendants' motion for summary judgment and deny the plaintiffs' cross-motion.

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with medication." *L.I. v. Maine School Admin. Dist. No. 55*, 2007 WL641988 at *3 n.2 (1st Cir. Mar. 7, 2007) (quoting *Greenland School Dist. v. Amy N.*, 358 F.3d 150, 154 (1st Cir. 2004). The plaintiffs in their summary judgment briefing make reference to the American Psychiatric Association's Diagnostic and Statistical Manual IV (2000) which explains that "[t]he essential features of Asperger's Disorder are severe and sustained impairment in social interaction...and the development of restricted, repetitive patterns of behavior, interests, and activities...[and further that the] disturbance must cause clinical significant impairment in social, occupational, and other important areas of functioning." DSM-IV-TR 299.80 at 80. Anthony's Individualized Education Plans (IEP) for 2002-2003, 2004-2005 and 2005-2006 report lack of social skills, with the 2005-2006 IEP noting that "Asperger's Syndrome affects Anthony's ability to 'read' social situations and interact with peers."

I. BACKGROUND

A. Facts

Anthony is a seventeen-year-old student residing in Fairhaven, a town in Bristol County, Massachusetts, and is enrolled in the Fairhaven Public Schools System. Having been diagnosed with Asperger's Syndrome, he receives special education services under an individual education plan (IEP). In January 2003, while an eighth-grader at Hastings Middle School, a Fairhaven public school, Anthony applied to BCAHS, seeking acceptance for the 2003-2004 school year as a freshman.

BCAHS is an independent vocational technical educational school, created pursuant to MASS. GEN. LAWS ch. 71, § 14B and approved under MASS. GEN. LAWS ch. 74, § 25. It receives funding from Bristol County, towns and cities sending students, and the state and federal governments. Providing a regular high school curriculum together with agricultural and technical programs such as arboriculture and landscaping, BCAHS currently educates 420 students in grades 9-12, with roughly 110-120 openings in every ninth grade class. BCAHS typically receives up to 400 applications for each ninth grade class. Because BCAHS receives more applications for admittance than there are openings, it employs an admissions policy for interested students.

In January 2003, when Anthony applied to the school, BCAHS's admissions policy evaluated candidates on the following six

criteria: academic record, attendance record, conduct, effort, interests and activities, and faculty recommendations.[2] BCAHS scored each criteria on a scale of 1-5 and scored separately a student's seventh and eighth grade performance in the first five criteria. BCAHS also required each applicant to participate in an interview.

Additionally, the BCAHS admissions policy included Section C.3(a), which provided as follows:

> Special Needs students' applications must have all the above requested data and a copy of their current Individual Educational Plan attached. The Bristol County Agricultural High School Admissions Board may request having a representative from our school participate in an annual review of the pupil's educational plan or any re-evaluation meeting on any applicant having special needs. The evaluation team must make a recommendation that the student can successfully perform at Bristol County Agricultural High School.

Based on an evaluation of the applicant's application and interview, BCAHS assigned each applicant a numerical score; the maximum score was 55. Applicants were then placed on a ranked list, and students with the highest scores were given first consideration for final acceptance. Once BCAHS reached its class size limit, it placed the remaining applicants on a waitlist.

Pursuant to MASS. GEN. LAWS ch. 74, § 32, BCAHS enrolled students who do not reside in Bristol County when these non-

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[2] This policy was effective from November 2000 until February 2004. The school's current policy, not at issue in this case, can be found at http://www.bristolaggie.mec. edu/ BCAHS_ Admissions_Policy_Jan_04.pdf.

resident students do not have a comparable agricultural program in their counties of residence. Non-resident students participate in the same admissions procedure. If non-resident students do not receive a high-enough score to be admitted, they do not receive the waitlist option enjoyed by Bristol County residents and are instead rejected.

Anthony sent his application for admission to BCAHS on January 13, 2003, and the school received it on January 16. The application contained Anthony's academic transcript and attendance record, a letter of recommendation from two teachers, the speech language pathologist, and the Director of Special Education at Hastings Middle School, a letter of recommendation from Dr. Kevin F. Manning, a rehabilitation consultant for Fairhaven Public Schools, and information about his special education services. On January 14, 2003, Anthony interviewed with BCAHS and expressed interest in the school's landscaping program.

After reviewing Anthony's application, BCAHS gave him a score of 32 out of the possible 55 points. Anthony received scores of four in attendance, conduct, and effort for both seventh and eighth grades (for a total of 24 points). BCAHS assigned Anthony scores of two for academic records for both seventh and eighth grades (4 points), scores of one for interests and activities for both seventh and eighth grades (2 points), and a score of two for his recommendations. Due to his lower point

score in comparison to other applicants, Anthony was placed on the school's waitlist and notified of this placement on April 10, 2003. The school did not inform Anthony of any appeals process and did not offer one at that time.[3]

Of the other applicants for the 2003-2004 school year, BCAHS admitted sixteen students with IEPs. At least twenty-five students with IEPs and twenty-five regular education students were waitlisted ahead of Anthony.

For his ninth and tenth grade years, Anthony attended Fairhaven High School and received special education services and modifications in accordance with his IEP. Anthony's parents approved and signed his developed IEP both years.

On July 19, 2005, the parents rejected Fairhaven Public Schools's proposed IEP and placement for Anthony's eleventh-grade year (2005-2006) but accepted all of the services in the IEP. Mr. Cordeiro wrote, "I accept all services as they are all

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[3] At the time Anthony applied to BCAHS, neither applicable regulations nor Department policy required an appeals process. In April 2003, the Department proposed amendments to the Vocational Technical Education Regulations, 603 MASS. CODES. REGS. § 4.00. Because these proposals changed the requirements for admissions policies of vocational technical secondary schools, the Department withheld final approval of BCAHS's November 2000 admission policy. When the Board of Education approved the Department's proposed amendments on April 29, 2003, the Department notified BCAHS and all other vocational technical programs and requested revised admissions policies by December 30, 2003. BCAHS's revised policy includes a blind admission process that does not require applicants with disabilities to provide an IEP or Section 504 plan. The revised policy also includes an appeals procedure, consistent with the new regulations at 603 MASS. CODES. REGS. § 4.03(6).

Fairhaven can provide even though the team recommends Bristol Aggie as the proper placement that they cannot provide."

B. Procedural History

In May 26, 2005, Anthony's parents filed a request for a hearing before the Massachusetts Bureau of Special Education Appeals (BSEA) against Fairhaven Public Schools, BCAHS, and the Department. The complaint alleged that BCAHS, in denying Anthony admission, had discriminated against Anthony on the basis of his disability and thus violated Section 504 of the Rehabilitation Act of 1973 (Section 504), the Americans with Disabilities Act (ADA), and 42 U.S.C. § 1983 (Due Process Clause). The plaintiffs requested damages against BCAHS and the Department for denial of admission and an order requiring BCAHS to admit Anthony.

On March 13, 2006, the BSEA hearing officer denied the plaintiffs' Motion for Summary Judgment, granted BCAHS's Motion to Dismiss the Section 504 claim, and declined jurisdiction over the ADA and Due Process Clause claims. It additionally refused to consider and dismissed with prejudice all claims against Fairhaven Public Schools. The hearing officer concluded that the plaintiffs had failed to show that BCAHS's facially neutral admissions policy discriminated against Anthony solely because of his disability. The hearing officer further determined that Anthony did not meet the Section 504 standard of an "otherwise qualified individual with a disability."

The plaintiffs thereupon filed this action in federal court. In due time, BCAHS and its affiliates moved for Summary Judgment and the Department joined this Motion on November 20. The plaintiffs meanwhile filed their motion for summary judgment.

II. DISCUSSION

A. Standard of Review

In addressing the claims under the ADA, Section 504, and 42 U.S.C. § 1983, I apply the customary protocol for summary judgment motions. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment must make a preliminary showing that no genuine issue of material fact exists. *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995), *cert. denied*, 515 U.S. 1103 (1995). Once the movant makes such a showing, the nonmovant must point to specific facts demonstrating that there is, indeed, a trialworthy issue. *Id.*

A fact is "material" if it has the "potential to affect the outcome of the suit under the applicable law." *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 52 (1st Cir. 2000), and a "genuine" issue is one supported by such evidence that "a

'reasonable jury, drawing favorable inferences,' could resolve it in favor of the *nonmoving party." Triangle Trading Co., Inc. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (quoting *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 428 (1st Cir. 1996)). "[C]onclusory allegations, improbable inferences, and unsupported speculation," are insufficient to establish a genuine dispute of fact. *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990).

Separately from the damage claims, Count 2 of the complaint involves an appeal of the BSEA determination that BCAHS and the Department did not violate Section 504. BSEA's interpretation of a statute under which it operates warrants some deference, but "this deference is constrained by [the] obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 411 (1979), citing *Int'l Bd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979). Ultimately, "the question of weight due the administrative findings of fact must be left to the discretion of the trial court." *Burlington v. Dept. of Educ.*, 736 F.2d 773, 791-92 (1st Cir. 1984) (reviewing a BSEA decision involving the Individuals with Disabilities in Education Act), *aff'd,* 471 U.S. 359 (1985). "The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each

material issue. After such consideration, the court is free to accept or reject the findings in part or in whole." *Burlington*, 736 F.2d at 792.

B. Analysis

1. ADA Claim (Count 1) and Section 504 Claim (Count 2)

Defendants contend they did not violate the ADA and Section 504 because Anthony is not a qualified individual with a disability and, alternatively, because the plaintiffs have failed to offer evidence tending to show that Anthony was denied admission to BCAHS as a result of his disability. Because ADA and Section 504 claims have parallel requirements and are analyzed in a similar manner, *Bercovitch v. Baldwin*, 133 F.3d 141, 152 n.13 (1st Cir. 1998); *Guy Amir v. St. Louis Univ.*, 184 F.3d 1017, 1029 (8th Cir. 1999), I will address Count 1 and Count 2 of the plaintiffs' complaint simultaneously.

Title II of the ADA (Title II) prohibits discrimination on the basis of disability by public entities. 42 U.S.C. § 12132.[4] To prevail on a claim under Title II, a plaintiff must show: (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services or programs; and (3) that this

[4] Title I of the ADA concerns discrimination on the basis of disability in employment; Title III focuses on discrimination in places of public accommodation; and Title V addresses retaliation and coercion. *Darian v. Univ. of Mass.*, 980 F.Supp 77, 79 (D. Mass. 1997).

exclusion was by reason of the plaintiff's disability. *Nieves-Marquez v. Dept. of Educ.*, 353 F.3d 108, 125 (1st Cir. 2003), citing *Race v. Toledo-Davila*, 291 F.3d 857, 858 (1st Cir. 2002).

The second element of a Title II prima facie case is not disputed. Defendants BCAHS and the Department are public entities as defined by 42 U.S.C. § 12131(1), and Anthony was excluded from participation in BCAHS.

For its part, Section 504 mandates that "no otherwise qualified individual with a disability. . .shall, solely by reason of her or his disability, be excluded from the participation in. . .any program or activity receiving Federal financial assistance." 29 U.S.C. § 794. The parties agree that Anthony suffers from a disability falling under both the ADA and Section 504 protections and that he was denied participation in a program receiving Federal funding.

The defendants dispute the same elements of the ADA claim and the Section 504 claim. First, they assert that Anthony is not an "otherwise qualified" individual. Alternatively, the defendants argue that the plaintiffs present no sufficient evidence to suggest that Anthony was excluded from BCAHS because of his disability.

a. "Otherwise Qualified Individual"

Both Title II of the ADA and Section 504 require that the

disabled individual claiming discrimination on the basis of his disability be "otherwise qualified." Title II defines a "qualified individual with a disability" as

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Id. at § 12131(2). The Supreme Court, analyzing a Section 504 claim, has defined an "otherwise qualified individual" as "one who is able to meet all of a program's requirements in spite of his handicaps." *Davis*, 442 U.S. 397 at 406. With respect to vocational educational services, the United States Department of Education's Section 504 regulations define a "qualified handicapped person" as an individual "who meets the academic and technical standards requisite to admission or participation in the recipient's educational program or activity." 34 C.F.R. § 104.3(l)(3).

Ultimately, an individualized inquiry is necessary to determine whether an individual is "otherwise qualified." *Sch. Bd. v. Arline*, 480 U.S. 273, 287 (1987); *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 24 (1st Cir. 1991) (requiring school to undertake a reasonable inquiry into student's ability). When reviewing a genuinely academic decision, a court should respect

faculty's professional judgments as to potential accommodations. *Id.* at 25, citing *Regents of Univ. v. Ewing*, 474 U.S. 214, 225 (1985).

In the present case, BCAHS adopted and employed the same facially neutral admissions procedure for each student applicant. Such a policy is necessary because BCAHS receives far more applicants than it can accommodate. In 2003, BCAHS assessed each applicant on the same six criteria and generated a numerical score, with a maximum of 55, for each applicant. The school based its acceptances on these scores. Among the applicants accepted for the 2003-04 school year were 15 students with IEPs. Additionally, at least twenty-five students ranked above Anthony on the waitlist had IEPs.

Anthony received a score of 32, a score below the cut-off mark for acceptances for the 2003-04 school year. While Anthony has shown he has a disability, the plaintiffs have failed to show, as required by *Davis*, that Anthony is able to meet all of BCAHS's requirements in spite of his disability. As noted, the United States Department of Education requires a disabled student applying to a vocational educational program to meet the academic standards requisite to admission. 34 C.F.R. § 104.3(1)(3). Anthony did not meet BCAHS's academic standards for admission and therefore does not fall within the protection of Title II of the ADA and Section 504 of the Rehabilitation Act of 1973.

Plaintiffs present no evidence to suggest BCAHS did not provide the requisite individualized inquiry into Anthony's application. In *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791 (1st Cir. 1992) (hereinafter *Wynne 2*), the First Circuit noted that a court's focus rests not on whether the school is right or wrong in its ultimate decision but whether the school undertakes a diligent assessment of the student and potential accommodations. *Id.* at 795; *see also Axelrod v. Phillips Acad.*, 46 F.Supp.2d 72, 84 (D. Mass. 1999) (noting the case is about discrimination, not whether school correctly assessed plaintiff). BCAHS's admissions policy employs an individual inquiry of each applicant, evaluating the student on a variety of criteria and an interview. Anthony received this individualized treatment, and based on his resulting score, which included low marks in grades, interests and activities, and recommendations, BCAHS determined that Anthony was not qualified, as compared to other applicants for admission.

The plaintiffs have not meaningfully argued that BCAHS's six criteria, which included an applicant's grades, conduct, attendance, and activities, were unrelated to the goals of the academic program and the necessary qualifications of its students. From all that appears in the record, they would be hard pressed to do so. The criteria appear directed to identifying students who would perform successfully in the school

community and thereafter.

Finally, as discussed below, BCAHS did not refuse to make any requested reasonable modifications to its admissions policy in order to accommodate Anthony. For these reasons, plaintiffs have failed to carry their burden of demonstrating that Anthony was a "qualified individual" as required by both Title II and Section 504. Summary judgment for the defendants on Counts 1 and 2 is warranted.

b. Exclusion by reason of one's disability

Although the plaintiffs' failure to establish the "otherwise qualified" requirement is dispositive on both the ADA and Section 504 claims, I also observe that the plaintiffs fail to produce evidence showing that Anthony was denied admission to BCAHS because of his disability. Title II of the ADA and Section 504 require that a plaintiff demonstrate he was excluded from participation by reason of his disability. 42 U.S.C. §12132; 29 U.S.C. § 794.[5]

I recognize that under both Title II and Section 504, a public entity may be required to make reasonable modifications of its program to accommodate an otherwise qualified individual with a disability. 42 U.S.C. at § 12131(2); *Alexander v. Choate*, 469 U.S. 287, 300 (1985). Thus, refusal to modify an existing

[5] Section 504 requires that the disability be the sole reason for exclusion. 29 U.S.C. at § 794 (emphasis added).

program might be unreasonable and discriminatory. *Davis*, 442 U.S. at 413. Moreover, failure to make modifications that result in an "unjustifiable disparate impact" on otherwise qualified individuals may violate Section 504. *Alexander*, 469 U.S. at

However, neither Title II nor Section 504 require a public entity to make fundamental or substantial modifications that are unduly costly or burdensome. *Alexander*, 469 U.S. at 300; *Bercovitch*, 133 F.3d at 152. Thus, for example, where accommodation of a disabled student would have forced the school to alter its discipline code, the court held that the school need not compromise its integral criteria to accommodate the disabled individual. *Id.*

The plaintiffs argue that BCAHS's facially neutral admissions policy excluded Anthony by reason of his disability. Specifically, they contest BCAHS's consideration of an applicant's interests and activities. The plaintiffs contend that Asperger's Syndrome, from which Anthony suffers, manifests itself in decreased social skills and social involvement. Therefore, the plaintiffs argue, the use of this particular admissions factor discriminated against Anthony.

The use of criteria or methods of administration "that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap" are prohibited under Section 504. 34 C.F.R. §104.4(b)(4). But even assuming *arguendo*

Anthony to be a qualified individual, the plaintiffs do not suggest the school's use of this criterion is pretextual. Nor do they argue that BCAHS's interest in an applicant's activities is unrelated to the objectives of the school's academic program and the vitality of the school community.[6] In any event, the plaintiffs fail to offer evidence that shows that BCAHS's use of this contested criterion accounted for the ultimate outcome of Anthony's application and thereby caused actionable discrimination against him because of his disability.

More generally, other special education applicants, including at least forty-one students (sixteen admitted and at least twenty-five ahead of Anthony on the waiting list), received higher point totals than Anthony. Plaintiffs concede that BCAHS's admissions policy is facially neutral. Further, the number of applicants with IEPs who were admitted or placed higher than Anthony on the waitlist suggests a lack of unjustifiable disparate impact arising from special need status as such. Under the circumstances, requiring BCAHS to modify the criteria of its admissions policy would constitute a fundamental change in the program without any demonstrated justification.

Ultimately, I need not determine whether such an

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[6] I note that under the BCAHS criteria, an applicant's activities and interests do not need to be communal; individual activities can count toward an applicant's score. BCAHS Admissions Policy at 7 (2000). This impairment regarding social interaction need not necessarily lead to a lower score regarding activities.

accommodation was warranted here. Regardless of whether requiring BCAHS to amend its facially neutral admissions policy would constitute an unwarranted fundamental change, *see Bercovitch*, 133 F.3d at 152 (holding school need not compromise its code of conduct, an integral criteria, to accommodate the disabled individual), the plaintiffs did not request any specific accommodation when Anthony applied to BCAHS.

While public entities like BCAHS are required to make reasonable accommodations for disabled individuals seeking access to their programs, Title II and Section 504 require the disabled party to request such modifications. *See Id.* (noting, "if the requested accommodations call for 'substantial modifications'. . ." (emphasis added)) (citing *Davis*, 442 U.S. at 405). Ultimately, "an academic institution can be expected to respond only to what it knows" of a plaintiff's needs. *Wynne 2*, 976 F.2d at 795. *See also Johnson v. Gambrinus*, 116 F.3d 1052, 1059 (5th Cir. 1997) (noting burden is on plaintiff in claim under Title III of ADA to show modification was requested); *Axelrod*, 46 F. at 84 (determining onus is on plaintiff to request reasonable accommodations under Title III of the ADA).

The plaintiffs do not provide any evidence to establish that the contested admissions criterion served the purpose or had the effect of discriminating against Anthony on the basis of his disability. More fundamentally, the plaintiffs did not request a

pertinent accommodation during the application process. Therefore, the plaintiffs fail to meet their burden of showing that Anthony's exclusion from BCAHS was by reason of his disability.

2. 28 U.S.C. § 1983 Claim (Count 3)

Finally, plaintiffs assert that BCAHS's application policy, which lacked an appeals process at the time Anthony applied, violated Anthony's due process rights under 28 U.S.C. § 1983 (§ 1983). To succeed on a procedural due process claim, the plaintiff must demonstrate that "the procedures provided by the state in effecting the deprivation of liberty or property are [inadequate] in light of the affected interest." *Pittsley v. Warish*, 927 F.2d 3, 6 (1st Cir. 1991).

To be sure, BCAHS did not provide an appeals process for applicants in 2003 when it placed Anthony on its waitlist. But neither the statutory scheme nor the Department's regulations required vocational schools to offer an appeals process at that time. More fundamentally, Anthony had no property interest in enrollment at BCAHS. A property interest requires "more than an abstract need or desire for it. . .[or] a unilateral expectation of it. [One] must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents v. Roth*, 408 U.S. 564, 576 (1972). Property interests must be based on "existing rules or understandings that stem from an independent source such as state

law." *Id.*

While Anthony's interest in landscaping substantiates his desire to attend BCAHS, no law or regulation creates a property right to this particular educational placement. Instead, the state law and the Department's regulations make clear that applicants are not guaranteed admission into vocational educational schools. State law expressly acknowledges that BCAHS may lack the space to accommodate all interested students. MASS. GEN. LAWS ch. 74, § 33 (stating BCAHS "shall be free to residents. . .except that free attendance shall be limited by the capacity of the courses provided"). The Department also recognizes that some vocational schools will be selective in terms of admissions and promulgates regulations to address the schools' application processes. 603 MASS. CODE. REGS. § 4.03(6).

Thus, the plaintiffs cannot assert a property interest in a BCAHS education; rather, their contentions evidence unilateral expectations. Meanwhile, Anthony is not prevented from pursuing a landscaping career. *See Tobin v. Univ. of Me. System*, 59 F. Supp.2d 87, (D. Me. 1999) (noting that plaintiff was not foreclosed from pursuing and obtaining a law degree elsewhere).

Section 1983 claims may also focus on substantive due process. "Properly construed, section 1983 'supplies a private right of action against a person who, under color of state law, deprives another of rights secured by the Constitution or by

federal law.'" *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 57 (1st Cir. 2002) (quoting *Evans v. Avery*, 100 F.3d 1033, 1036 (1st Cir. 1996)). Here, BCAHS was acting under color of law in establishing and carrying out its admissions policy.

However, to state a substantive due process claim under § 1983, the plaintiffs must allege an act or omission which deprived Anthony of a "federally-protected right." *Nieves v. McSweeney*, 241 F.3d 46, 53 (1st Cir. 2001) (emphasis added). While absolute deprivation of education triggers strict scrutiny analysis, *Plyler v. Doe*, 457 U.S. 202 (1982), the pursuit of particular education opportunities is not a fundamental, *federally-protected right*. *San Antonio Indep. Sch. Dis. v. Rodriguez*, 411 U.S. 1, 35-37 (1973). For the entirety of his high school career, Anthony has attended Fairhaven High School. He receives instruction in general education subjects and additional services pursuant to his IEP. BCAHS's decision not to admit Anthony did not result in a deprivation of basic educational opportunity and therefore did not implicate a federally-protected right. The plaintiffs have failed to support their § 1983 claim.

III. CONCLUSION

For the reasons set forth more fully above, the plaintiffs' motion for summary judgment on all counts is DENIED and the

defendants' motion for summary judgment on all counts is GRANTED.

/s/ Douglas P. Woodlock

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DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE