

COMMONWEALTH OF MASSACHUSETTS  
LAND COURT  
DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss.

16 MISC 000694 (KFS)

THE MCLEAN HOSPITAL CORPORATION,  
Plaintiff,

v.

TOWN OF LINCOLN, JOEL FREEDMAN, DAVID  
HENKEN, WILLIAM CHURCHILL, ERIC SNYDER  
AND DAVID SUMMER, as they are Members of the  
TOWN OF LINCOLN ZONING BOARD OF APPEALS,  
et al,<sup>1</sup>

Defendants

**DECISION**

The McLean Hospital Corporation (McLean) initiated this action on November 15, 2016, seeking a determination pursuant to G. L. c. 240, § 14A, that McLean’s proposed use of property it owns in Lincoln (Property) is “educational within the meaning of [General Laws] c. 40A, § 3, second par. (Dover Amendment.)” Such a determination would allow the proposed use as a matter-of-right in the residential zoning district in which the Property is located. Plaintiff describes the proposal as “a residential program implementing a highly structured model of learning behavior through a specialized curriculum known as Dialectical Behavior Therapy (DBT).” The program is currently one of two residential programs located on the grounds of McLean Hospital in Belmont and is referred to as the “3East Boys Program.”

By First Amended Complaint, McLean added a second count under G. L. c. 40A, § 17, seeking annulment of a decision of the Zoning Board of Appeals (Decision), whose members are Defendants (Board). The Decision overturned a determination of Lincoln’s Building

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<sup>1</sup> Other individual Defendants (including those allowed to intervene) are neighbors to the Property. They are: Jay Gregory, Douglas Elder, Lisa Elder, Edwin David, Nandini David, Beverly Peirce, Daniel Peirce, Michael Gurrie, Lisa Gurrie, Arthur Anthony, Lara Anthony, Linda Kanner, Steven Kanner, Robyn Laukien, Donald McCarthy, and Daniel McCarthy.

Commissioner (Commissioner) that the 3East Boys Program is educational within the meaning of the Dover Amendment, and entitled to its benefits and protections. McLean claims the Board was “arbitrary, unreasonable, untenable and incorrect as a matter of law,” and the Commissioner’s determination was correct. All individual Defendants support the Decision, deny that McLean’s proposed use is entitled to Dover Amendment protection, and assert the Commissioner’s determination was incorrect.

By agreement, the parties framed the sole issue for trial as “whether the proposed use of [the Property] is educational as that term is used in G. L. c. 40A, § 3, Lincoln By-law § 6.1(g), and case law interpreting the so-called Dover Amendment.” The case was tried over four days in October 2017. McLean called five witnesses: (i) Philip Levendusky, Senior Vice President of Business Development and Communication, Director of the Psychology Department and Co-Director of Psychology Training at McLean Hospital (Dr. Levendusky); (ii) Alan E. Fruzzetti, Director of Training and Family Services for the 3East Programs at McLean Hospital (Dr. Fruzzetti); (iii) Alec Miller, Co-Founder and Clinical Director at Cognitive & Behavioral Consultants, LLP (Dr. Miller); (iv) Stephen Paul Reville, a professor at the Harvard Graduate School of Education (Professor Reville); and (v) James Victor Major, the Executive Director of the Massachusetts Association of 766 Approved Private Schools (Mr. Major). Intervenors called one witness, Dr. Elizabeth Simpson, Medical Director and Acting DBT Program Director at the Massachusetts Mental Health Center (Dr. Simpson). Twenty-three exhibits were entered in evidence.

For the reasons set forth below based on the trial evidence, this court determines that McLean’s proposed use of the Property is primarily therapeutic, and the use is not “educational”

within the meaning of the Dover Amendment. Accordingly, a judgment on both counts of the First Amended Complaint will issue.

The parties stipulated numerous facts pre-trial, which are incorporated in this court's findings below:

Parties and Administrative Process

1. McLean is a not-for-profit corporation organized under G. L. c. 180, with a principal business address of 115 Mill Street, Belmont, Massachusetts. Per its Articles of Incorporation, among McLean's purposes are the operation and maintenance of: "(i) a psychiatric hospital in Belmont, Massachusetts, for the care and treatment of the . . . mentally ill; (ii) other health care programs and facilities of any type; and (iii) related programs and facilities, including programs and facilities engaged in education, science, and research." Consistent with these Articles, McLean operates, among many other programs: a residence at 5 Old Cambridge Turnpike in Lincoln for individuals transitioning back into the community, which is recognized by the Town of Lincoln as an educational facility under the Dover Amendment; and two Chapter 766 schools.<sup>2</sup>
2. Defendant Town of Lincoln is a duly organized municipality (Town). Defendants Joel Freedman, David Henken, William Churchill, Eric Snyder, and David Summer are members of the Board, and participated in the vote issued by the Board on December 9, 2016. The decision that issued following the vote of the Board members determined: "that the proposed use of the Property by McLean is not for educational purposes and is not entitled to the benefit of the Dover Amendment exempting it from local regulations, and, therefore, that the decision of the Building Commissioner to the contrary. . . is hereby overturned."
3. Defendants Jay Gregory, Lisa Elder, Douglas Elder, Nandini David, Edwin David, Beverly Peirce, Daniel Peirce, Lisa Gurrie, Michael Gurrie, Lara Anthony, and Arthur Anthony are Lincoln residents who appealed to the Board seeking reversal of the Building Commissioner's determination that the 3East Program is educational under the Lincoln By-law.
4. Intervenors Linda Kanner, Steven Kanner, Robyn Laukien, Donald McCarthy and Daniel McCarthy, whose residences abut the Premises, appealed to the Board seeking reversal of the Building Commissioner's determination and intervened in this case.<sup>3</sup>
5. In May 2016, McLean purchased the 5.56 acre Property which comprises two adjoining residential properties at 16-22 Bypass Road in Lincoln located in an R-1 Residential

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<sup>2</sup> Chapter 766 refers to the original statutory provision which required public schools to provide educational programs and special services to students with special needs. See St. 1972, c. 766.

<sup>3</sup> In this decision, the individual Intervenors and all other individual Defendants sometimes are referred to as non-municipal Defendants.

Zoning District. Each parcel is improved with a single-family residence. The Property is accessed by a private shared driveway that runs parallel to Bypass Road and is shared by several adjacent residences.

6. Before it purchased the Property, McLean wrote to the Commissioner, and to Lincoln's Director of Land Use and the Planning Board. The April 22, 2016 letter advised its recipients of McLean's proposed use that, in McLean's view, was educational. The letter sought the Town's concurrence that the proposed use would be an educational use permitted as of right pursuant to G. L. c. 40A, § 3, and Lincoln By-law § 6.1(g).
7. By letter dated June 2, 2016, McLean sought a written determination from the Commissioner regarding the proposed use. By letter dated July 8, 2016, the Commissioner stated that McLean's proposed use was educational and permitted under the By-law and G. L. c. 40A, § 3 (Commissioner's Determination). The non-municipal Defendants appealed the Commissioner's Determination to the Board under G. L. c. 40A, § 8.
8. Sometime after McLean received the Commissioner's Determination, it filed for a site plan review with the Planning Board in connection with the proposed use of the Property to address landscaping, screening, traffic impacts, drainage, and other issues pursuant to the Town's site plan review By-law. By decision dated September 13, 2016, the Planning Board approved McLean's site plan subject to certain conditions, including that McLean apply to Massachusetts Department of Transportation for a new curb cut for the Property.<sup>4</sup>
9. The Board held a public hearing on the non-municipal Defendants' appeal on September 29, 2016, with continuations held on October 20, 2016 and November 3, 2016, at which time the Board closed the hearing, deliberated, and voted (4-1) to overturn the Commissioner's Determination.
10. In the Decision, filed with the Town Clerk December 9, 2016, the Board recognized that while there "are aspects of the methodology used by DBT that look similar to the standard methods of education," they are "not being utilized for the purpose of education, in either the traditional or non-traditional sense. Rather, they are being used as a therapeutic technique (and a recognized and effective one) to address and treat a psychological condition, to cure or ease the effects of BPD on young males." The Board concluded "the objective of the program is treatment of a mental disease or disorder; the curative aspects of the program predominate."

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<sup>4</sup> The site plan as approved (conditionally) by the Planning Board is Exhibit 4. It is not clear under what provision of the By-law McLean filed for site plan review. The court notes that By-law Section 19.1 (e), provides for site plan review by the Planning Board "in conjunction with any application for a building permit involving land or structures devoted to . . . educational uses governed by G. L. c. 40A, s. 3."

## The Proposed Boys 3East Program and Curriculum

11. McLean currently operates the 3East Boys Program and a similar program for girls (3East Girls Program), in a shared building on the campus of McLean Hospital. McLean proposes to relocate the boys program to the Property. As proposed, the Property would be the residence for young adults, ages 15 through 21, whose principal diagnosis is Borderline Personality Disorder (BPD), or similar diagnosis characterized by “emotional dysregulation.”<sup>5</sup> The maximum number of residents at any one time would be twelve and the average length of enrollment in the program is expected to be 60 to 120 days.
12. Although not all residents have a confirmed diagnosis of BPD, all residents suffer from varying degrees of emotional dysregulation. Typical residents have histories of suicidal thoughts (ideation), self-harm behavior, or attempts at suicide. Emotional dysregulation is a central problem for the BPD population and makes functioning day-to-day extremely difficult. In some cases it may be life-threatening and in some cases interferes with learning and development. The skills in DBT training reduce those problematic behaviors by putting “something in their place.”
13. There are no medical interventions that are part of the DBT training curriculum, but there is “psychosocial intervention.” The program proposed for the Property is specifically tailored for a subset of boys with the proper diagnosis who require significant assistance to develop behavioral and cognitive skills, have demonstrated the readiness and willingness to devote themselves to learning those skills, and do not require inpatient treatment in the form of hospitalization. McLean has developed an admissions process to ensure that applicants to the program fall within this subset.
14. The 3East Program will adhere to a Dialectical Behavior Therapy (DBT) approach. DBT is a behavioral skills development model, originally developed by Marsha Linehan, Ph.D. (Dr. Linehan), to assist individuals diagnosed with BPD. The program involves group sessions; worksheets to be completed by the participants as homework; examples and demonstrations of behavior conducted by qualified professionals and participants alike; and interaction between the participants and qualified professionals and staff.<sup>6</sup>
15. The 3East curriculum is highly structured and is designed to teach skills that will allow the residents, all of whom have skills deficits related to “emotional dysregulation”, to lead productive lives and return to their families and communities. Coping skills are at the “core” of a DBT treatment program. Individual therapy in the 3East program is designed to help each resident practice these skills and coach him in the skills that he has learned.<sup>7</sup>

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<sup>5</sup> In his testimony, Dr. Fruzzetti defines “emotional dysregulation” as “effective instability due to marked reactivity of mood.”

<sup>6</sup> Dr. Fruzzetti’s testimony regarding how the Boys 3East Program would operate if located on the Property is based largely on the current 3East Boys Program, which he directs.

<sup>7</sup> The details of the curriculum are in evidence as Exhibits 2, 3, and 12.

16. The DBT curriculum involves the teaching and development of the following behavioral and cognitive skills:
- a. Mindfulness (defined as “being able to pay attention on purpose in the present moment and without being judgmental”), increases cognitive awareness, cognitive control, and non-judgmental awareness. Residents learn the ability to maintain attention and block out distractions.
  - b. Emotional regulation (so as to: better understand one’s emotions; increase facilitation and recognition of positive emotions; and accept negative emotions).
  - c. Development and maintenance of interpersonal relationships (focused on the improvement, development, and maintenance of adaptive self-esteem and pro-social skills).
  - d. Distress tolerance (so as to better cope with and tolerate distressful experiences and situations).
  - e. Validation (so as to validate others and empathize with them, and to self-validate so as to avoid prevalent feelings of shame).
17. The average day in the program involves approximately four hours of classroom training in at least three different skill areas, 45 minutes of skills practice, and 45 minutes of mindfulness exercises. In addition to the skills practice and mindfulness exercises, participants are given homework in the form of worksheets. Four out of every five weekdays also include athletic exercise, tailored to foster mind-body awareness. A typical day at the 3East Boys Program begins at 8:30 a.m., with a community mindfulness exercise that involves teaching some aspect of mindfulness followed by a practice that reinforces mindfulness as a core life skill for everybody. Staff use and demonstrate the skill in the same way the residents are being asked to learn it.
18. In addition to classroom sessions where specific skills are taught, the residential setting provides opportunities for residents to practice the skills learned and apply those skills in a daily living situation. According to Dr. Fruzzetti, whose opinion I credit, a DBT therapy program that is residential provides a significantly greater degree of programming and treatment.
19. The morning skills sessions are taught principally by clinical educator specialists trained to teach and coach skills. These specialists have a Bachelor’s degree, experience as community residents’ counselors, and coaching skills. They are given specific training in DBT curriculum and coaching. Formal practice sessions are led by a clinical educator or senior staff consisting of a therapist, the psychiatrist, or Dr. Fruzzetti.

20. The program employs a medical director who is a psychiatrist. The medical director also participates in the formal education curriculum and practice sessions. The only other staff medical staff member employed by the program is a nurse. Currently, the 3East Boys Program shares a nurse with the 3East Girls Program. The 3East Boys Program proposed budget includes a half-time nurse if the program relocates to the Property.
21. In the 3East Boys Program, each of the boys is assigned a therapist at the beginning of the program and meets with that therapist on an individual basis twice a week to review progress with the various skills and to practice and evaluate the progress in achieving proficiency at those skills. Each resident has a skills plan identifying individual goals and after each morning's session, practices the skills with respect to these individualized goals.

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McLean's count against the Town seeks relief under G. L. c. 240, § 14A, which provides:

The owner of a freehold estate in possession in land may bring a petition in the land court against a city or town wherein such land is situated, which shall not be open to objection on the ground that a mere judgment, order or decree is sought, for determination as to the validity of a municipal ordinance, by-law or regulation, passed or adopted under the provisions of chapter forty A or under any special law relating to zoning, so called, which purports to restrict or limit the present or future use, enjoyment, improvement or development of such land, or any part thereof, or of present or future structures thereon, including all alterations or repairs, or for determination of the extent to which any such municipal ... by-law or regulation affects a proposed use, enjoyment, improvement or development of such land by the erection, alteration or repair of structures thereon or otherwise set forth in such petition ... The court may make binding determinations of right interpreting such ordinances, by-laws or regulations whether any consequential judgment or relief is or could be claimed or not.

G. L. c. 240, §14A, as amended by St. 1975, c. 808, §5.

The second count for judicial review of the Decision against the Board (and, in compliance with G. L. c. 40A, §17, the individual Defendants who appealed the Commissioner's Determination to the Board), is a de novo appeal of the Board's Decision under G. L. c. 40A, §

17. In that context, it is the court's responsibility to "hear all the evidence pertinent to the

authority of the board . . . and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such board . . . or make such other decree as justice and equity may require.” This involves a “‘peculiar’ combination of de novo and deferential analyses.” Wendy’s Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica, 454 Mass. 374, 381 (2009). The court is obliged to find facts de novo and may not give any weight to those facts found by the local board. G. L. c. 40A, § 17; Britton v. Zoning Board of Appeals of Gloucester, 59 Mass. App. Ct. 68, 72 (2003) (“[i]n exercising its power of review, the court must find the facts de novo and give no weight to those the board has found”).

After finding the facts de novo, the court’s “function on appeal” is “to ascertain whether the reasons given by the [board] had a substantial basis in fact, or were, on the contrary, mere pretexts for arbitrary action or veils for reasons not related to the purpose of the zoning law.” Vazza Props., Inc. v. City Council of Woburn, 1 Mass. App. Ct. 308, 312 (1973). McLean carries the burden, “as the party seeking zoning relief[,] to produce evidence . . . that the statutory prerequisites [have] been met and that zoning relief [is] justified.” Tamerlane Realty Trust v. Board of Appeals of Provincetown, 23 Mass. App. Ct. 450, 454 (1987); Vazza, 1 Mass. App. Ct. at 312.

Here, the question that resolves both counts is whether, based on the facts established at trial, McLean’s 3East Boys Program constitutes an educational use which enjoys the benefits and protections of the Dover Amendment. The Town has expressly adopted the criteria of the Dover Amendment by reference in By-law Section 6.1(g), allowing in an R-1 Single-Family Residence District, any “. . . educational uses governed by [the Dover Amendment].” Because the By-law expressly references the Dover Amendment and does not purport to expand the definition of education beyond the case law interpreting the statute, the determination sought by McLean



pursuant to G. L. c. 240, § 14A, is determinative of McLean’s G. L. c. 40A, § 17 appeal of the Decision. As instructed by Shirley Wayside Ltd. P’ship v. Board of Appeals of Shirley, 461 Mass. 469, 475 (2012), the reviewing court does not defer to a local board in matters of statutory interpretation. (citations omitted.)

General Laws c. 40A, § 3, second par., commonly referred to as the “Dover Amendment,” mandates:

No zoning ordinance or by-law shall . . . prohibit, regulate or restrict the use of land or structures for religious purposes *or for educational purposes* on land owned or leased by . . . , or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.<sup>8</sup> (italics added).

Massachusetts courts have consistently recognized the definition of “education” is broad and comprehensive. Gardner-Athol Area Mental Health Ass’n v. Zoning Bd. of Appeals of Gardner, 401 Mass. 12, 17 (1987); Fitchburg Hous. Auth. v. Board of Zoning Appeals of Fitchburg, 380 Mass. 869, 874 (1980); Mount Hermon Boys’ School v. Gill, 145 Mass. 139, 146 (1980). “Education may be particularly directed to either the mental, moral or physical powers and faculties, but in its broadest and best sense it relates to them all.” Mount Hermon, 145 Mass. at 146; Harbor Schools, Inc. v. Board of Appeals of Haverhill, 5 Mass. App. Ct. 600, 604 (1977).

“Education” also includes a variety of activities which may not necessarily be taught in a classroom, but may fall outside the realm of a traditional curriculum. Fitchburg Hous., 380 Mass. at 874. A proposed use therefore can have an educational purpose even if it serves “nontraditional communities of learners in a manner tailored to their individual needs and

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<sup>8</sup> In some cases analyzing whether a particular use is entitled to the benefits and protections of the Dover Amendment, the courts have wrestled with whether owning entity is a “nonprofit educational corporation.” That issue is not presented here. The parties stipulated that McLean is a nonprofit corporation, and its corporate by-laws sufficiently include education as one of the corporate missions.

capabilities.” Regis College v. Town of Weston, 462 Mass. 280, 285 (2012), citing Fitchburg Hous., 380 Mass. at 874–875. Importantly, the educational use must be the “primary or dominant purpose” of the proposed project, and the court must look beyond individual activities, which by themselves may constitute educational use, and determine whether, in the aggregate, the primary use of the property in question is educational. Whitinsville, 394 Mass. at 760.<sup>9</sup>

The trial testimony and documentary evidence painted a detailed picture of McLean’s 3East Boys Program as a residential program for adolescent boys whose principal diagnosis is Borderline Personality Disorder, or BPD (or similar diagnosis.) The program follows a Dialectical Behavior Therapy (DBT) plan, which is the behavioral skills development model developed by Dr. Linehan, who authored the first book on DBT in 1993, titled *Cognitive Behavioral Treatment of Borderline Personality Disorder*. The evidence established that the program as proposed hues closely to the DBT model developed by Dr. Linehan and will be replicated as designed, focusing on development of five skill sets: mindfulness, emotional regulation, development and maintenance of interpersonal relationships, distress tolerance, and validation.

The parties generally do not dispute the parameters of the program, nor do they dispute the description of the program’s components. They disagree, however, on the characterization of the program - whether the primary or dominant purpose is educational as required under the Dover Amendment - or predominantly therapeutic and curative. If the latter, the use is not benefitted by the Dover Amendment despite the educational components.

Case law has established that a residential program teaching core life skills by trained professionals falls within the educational protection of the Dover Amendment. See, e.g.,

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<sup>9</sup> In this case there is no question that the operation of the 3East Boys Program is the primary use of the Property because it is the only use proposed. The only question is whether this primary use is one which is benefitted by the Dover Amendment.

Fitchburg Hous., 380 Mass at 875 (finding the teaching of skills for independent living, such as self-care, cooking, job seeking, and budgeting, to formerly institutionalized adults with histories of mental illness in a residential facility is “educational”); Gardner-Athol, 401 Mass. at 14 (teaching vocational and independent living skills to adults with mental disabilities in a residential program deemed “educational”); Harbor Schools, Inc., 5 Mass. App. Ct. at 603–04 (providing “emotionally disturbed children” with psychiatric adjustment as well as “daily educational indoctrination” in basic studies like math and science deemed “educational”). A program is educational if its students “learn or relearn skills . . . developing their powers and capabilities as human beings,” and imparting a “basic understanding of how to cope with everyday problems and to maintain oneself in society” qualifies as an “educational process.” Fitchburg Hous., 380 Mass. at 875. Consistent with these cases, there is a residence in the Town of Lincoln for individuals transitioning back into the community, which the Town recognizes is an educational facility under the Dover Amendment.

In this case, the Town contends that the 3East Boys Program components are not the type of everyday living skills which are the focus of the cases cited above interpreting the meaning of “education” under the Dover Amendment. McLean argues the skills taught through the DBT curriculum are core life skills similar to those deemed educational in Fitchburg Hous. and Harbor Schools, Inc., while Defendants claim the program is predominantly therapeutic.

In this court’s view, the expansive case law interpretation of education does not reach the use proposed in this case for two reasons: First, to the extent the cases have broadened the traditional definition of education (i.e. coursework in school settings), the cases have embraced teaching in non-traditional settings, or to non-traditional learners, or both. The nature of the curriculum has been what the courts have characterized as ‘core life skills’ such as cooking,

shopping, job-seeking, or other skills people need on a daily basis to function in society.

Programs more medical in nature have been excluded from the broad definition.

Unlike the programs described in Fitchburg Hous. and Gardner-Athol, for example, McLean's proposed program does not teach such core life skills. Instead, the skills training offered by the 3East Boys Program targets the "emotional dysregulation" caused by Borderline Personality Disorder and related mental health diagnoses. The goal is self-management of the disorder so the participants can rejoin their families, return to school, or, in some cases, return to residential treatment centers. Rather than educating the participants in daily living skills focused outward - toward assimilation into the community - and which are distinct from the participants' mental illness - the 3East Boys Program focuses on developing skills which look inward and pointedly address the manifestations of the individual's diagnosis.

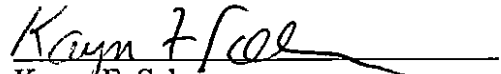
Second, to the extent one could characterize the curriculum of the 3East Boys Program as educational due to the manner of teaching or the structure of the program itself, those components are secondary to the dominant and primary purpose. This court is persuaded that the purposes that are primary and dominant are therapeutic and curative, providing individuals who need significant intervention and tools at their disposal to help them deal with the inability to regulate their emotions due to their mental illness. The skills offer a chance to get beyond crisis points in their lives and have a method to call on in the future when needed.

The fact that the program follows a well-developed curriculum does not automatically make it 'educational' within the meaning of the Dover Amendment. The Regis College court cautioned "the term 'educational purposes' should be construed as to minimize the risk that Dover Amendment protection will improperly be extended to situations where form has been elevated over substance." Regis College, 462 Mass. at 289-290. In this case, the evidence at

trial established that the 3East Boys Program is a structured, skills-based curriculum with formal classroom-based sessions in addition to individual therapy sessions aimed at providing residents with critical coping skills to mitigate the effects of BPD. But to conclude that the structure of the program essentially transforms a therapeutic program into an educational one for the purposes of Dover Amendment protection would, in fact, elevate form over substance.

The primary and predominant purpose of the 3East Boys Program is the treatment of a serious mental condition. Accordingly, this court finds and rules that McLean's 3East Boys Program is not an educational use entitled to the benefits and protections of the Dover Amendment, and, for that reason, the Decision was not legally untenable and must be affirmed.

Judgment to enter accordingly.

  
Karyn F. Scheier  
Associate Justice

Date: October 22, 2018