COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals**

**1 Congress Street, 11th Floor**

**Boston, MA 02114**

**www.mass.gov/dala**

**Michael Biundo**,

Petitioner

v. Docket Nos. CR-15-416 and 417

**Massachusetts Teachers’ Retirement System**,

Respondent

**Appearance for Petitioner**:

Matthew D. Jones, Esq.

Massachusetts Teachers Association

2 Heritage Drive, 8th Floor

Quincy, MA 02171-2119

**Appearance for Respondent**:

Cristina I. Keefe, Esq.

Associate General Counsel

Massachusetts Teachers’ Retirement System

500 Rutherford Avenue, Suite 201

Charlestown, MA 02129-1628

**Administrative Magistrate**:

Kenneth Bresler

**SUMMARY OF DECISION**

The denial by the Massachusetts Teachers’ Retirement System of the petitioner’s application to buy back service at private schools is affirmed because he was not teaching academics to pupils, and he did not prove that the Commonwealth of Massachusetts paid all or part of each pupil’s tuition.

**DECISION**

 The petitioner, Michael Biundo, appeals the denial by the Massachusetts Teachers’ Retirement System (MTRS) of his application to buy back service at two private schools.

 I held a hearing on June 28, 2018, which I recorded digitally. Dr. Biundo testified, and called no other witness. I accepted into evidence 14 exhibits, including a thumb drive. After the hearing, on my own initiative, I admitted Exhibit 15, which shows that Dr. Biundo timely appealed by fax on July 20, 2015.

 Exhibit 14 depicts Dr. Biundo with children whom he worked with. Although a prehearing order impounded it, I gave it back to the petitioner’s lawyer at the end of the hearing.

Both parties submitted post-hearing briefs.

**Findings of Fact**

 1. Dr. Michael Biundo is a licensed psychologist and licensed school psychologist. He is not certified as a teacher. (Testimony.)

 2. Dr. Biundo is an MTRS member. (Testimony.)

 LCDC

3. Dr. Biundo worked at the Learning and Cognitive Development Center (LCDC) from 1994 to 1997. (Ex. 10.)

 4. LCDC was a school for children with autism. (Testimony.)

 5. LCDC’s goal was to transition the children enrolled there to another school. (Testimony.)

6. Dr. Biundo saw up to five children each day, generally one-on-one. They were 3 to 6 years old. (Testimony.)

7. The children were so low functioning that only some of them learned letters, numbers, and colors. (Testimony.)

8. The classroom teachers taught the children functional skills, such as taking turns, and communication, by, for example, playing Candyland. (Testimony.)

 9. Dr. Biundo did not work with children in a classroom. He pulled them out of their classrooms and taught them play skills. (Testimony.)

 10. Dr. Biundo played with children with balls, balloons, water, toy cars, and other items. (Testimony.)

 11. One video depicts Dr. Biundo playing with a four-year-old boy with a ball and narrating for him. (Ex. 14; testimony.)

 League School

 12. Dr. Biundo worked at the League School of Greater Boston from 1997 to 1999. (Ex. 4.)

 13. Dr. Biundo’s title at the League School was Behavior Coordinator. (Testimony.)

 14. In the classroom, students were taught history, mathematics, reading, and social studies. Dr. Biundo was not familiar with the details of this teaching, because he did not work in the classroom. (Testimony.)

 15. Dr. Biundo worked with approximately 12 middle-school students on the autism spectrum. He worked one-on-one with at least five students each day. (Testimony.)

 16. The students also had difficulties in body organization (which includes balance and, as lay people would put it, hand-eye coordination), language processing, social understanding, and cognition. (Testimony.)

 17. Dr. Biundo taught skills and functions for independent living and sheltered work, such as working in a food pantry, to students. (Testimony.)

 18. Dr. Biundo also taught social skills, such as not raising hands in ways that are seen as threatening to other people, to students. He taught students to take turns through board games.

 19. Dr. Biundo’s sessions with students were called “interventions.” (Testimony.)

Applications

20. On October 29, 2012, Dr. Biundo applied to buy his creditable service as a school psychologist at LCDC from September 4, 1994 to August 30, 1997. (Ex.10.)

 21. When LCDC was asked to describe his duties and attach a job description if available, it described his duties as “testing, educational and behavioral interventions with children that have special needs.” (Ex. 10.)

 22. Whether or not LCDC attached a job description to Part 2 of Dr. Biundo’s application, a job description appears in the record. It does not include any classroom teaching duties. (Ex. 13.)

 23. Also on October 29, 2012, Dr. Biundo applied to buy his creditable service as a school psychologist/behavior coordinator at the League School of Boston from September 7, 1997 to February 5, 1999. (Ex. 4.)

 24. When the League School was asked to describe his duties and attach a job description if available, it did not describe his duties. (Ex. 4.) It did attach a job description for behavior specialist (Ex. 7), which it explained was the same as a behavior coordinator. (Ex. 4.) The job description does not include any classroom teaching duties. (Ex. 7.)

 25. On July 7, 2015, MTRS denied Dr. Biundo’s application to buy creditable service for LCDC from September 1994 to August 1997. MTRS stated that

based on the information we received from you, your position of “School Psychologist” does not meet the statutory requirement of “engaged in teaching pupils.”

(Ex. 2.)

 26. Also on July 7, 2015, MTRS denied Dr. Biundo’s application to buy creditable service at the League School from September 1997 to February 1999. Using almost the same words, MTRS stated that

based on the information we received from you, your position of “Behavior Coordinator/Behavior Specialist” does not meet the statutory requirement of “engaged in teaching pupils.”

(Ex. 3.)

 27. In an undated letter that he faxed on July 20, 2015, Dr. Biundo timely appealed both denials. (Ex. 1.)

 28. One appeal was assigned the docket number CR-15-416. The other was assigned CR-15-417. His appeals were consolidated.

**Discussion**

G. L. c. 32, § 4(1)(p) allows an MTRS member to purchase prior service if he or she was

engaged in teaching pupils in any non-public school in the commonwealth, if the tuition of all such pupils taught was financed in part or in full by the commonwealth....

Teaching academics

 The statute’s phrase “teaching pupils” has a “narrow interpretation”: that of “teaching pupils academics.” *Janet Kraskouskas v. Massachusetts Teachers’ Retirement System*, CR-09-288 \*8, 9 (DALA 2014). There is no need to over-discuss this issue. A teacher must be teaching academic subjects to pupils – and Dr. Biundo was not doing so.

Dr. Biundo’s sessions with students were called “interventions” (Testimony), not, for instance, “classes” or “lessons.”

 Dr. Biundo’s work was inspired and valuable to children, their families, and society, but it did not involve teaching academics.

 A person can belong to MTRS for doing work, such as being a school psychologist, while being unable to buy back creditable service for his or her previous and similar work in a private school. The criteria for a person to belong to MTRS are different from the criteria for a person to buy back service that happened before joining MTRS.

Funding

 At the hearing, MTRS did not dispute that the Commonwealth paid all or part of the tuition for all pupils at LCDC whom Dr. Biundo worked with. However, in its brief, MTRS stated: “LCDC accepted approximately 1% of their students from out of state, and these children’s tuition was privately paid.” (MTRS Br. 2.) MTRS did not cite this alleged fact or explain why it is now contesting this element of G. L. c. 32, § 4(1)(p). I do not remember testimony about this alleged fact or see it in evidence.

 What is in evidence is a To-Whom-It-May-Concern letter from the Department of Elementary and Secondary Education, dated October 17, 2012. (Ex. 11.) Dr. Biundo submitted it in his attempt to prove that the Commonwealth paid all or part of each pupil’s tuition at LCDC. It reads in part:

This letter certifies that the Language and Cognitive Center previously operated as an approved private school in the Commonwealth of Massachusetts. In Massachusetts the local school committee of each city/town approves private schools for school attendance purposes in accordance with Massachusetts General Laws, Chapter 76, Section 1.

 This letter says nothing explicit about tuition and who paid it. It implies that the Commonwealth paid tuition. However, the letter says nothing about the possible presence of out-of-state pupils whose tuition was not paid by the Commonwealth.

 To try to prove that the Commonwealth paid all or part of each pupil’s tuition at the League School, Dr. Biundo submitted a To-Whom-It-May-Concern letter from the school, dated October 10, 2012. (Ex. 9.) It reads, confusingly and contradictorily, in part:

During the time that Mr. Biundo was employed by the League School, League School students had all or part of their tuition paid for by the Commonwealth of Massachusetts. Out of state students were accepted, but always private funded.[[1]](#footnote-1) There are no records of how many out of state students there may have been at the time of his employment. The League School historians say “NONE”- as out of state students are rare and only recently started to attend the League School.

 G.L. c. 30A, § 11(2) allows me to accept hearsay

only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.

 I’m willing to accept hearsay on routine information, such as a petitioner’s title and dates of employment. I *might* be willing to accept hearsay on an element of G. L. c. 32, § 4(1)(p), such as tuition funding, if a statement is authoritative, unambiguous, and signed under the penalties of perjury. But Exhibit 9 is none of these things. I don’t know if the League School had out-of-state students (the second sentence states that it did) or possibly not (the third sentence states that “there may have been”) or “NONE” (third sentence) or “rare” (third sentence). I don’t know the time frame of this paragraph. It begins with “During the time that Mr. Biundo was employed by the League School” and ends with “only recently.” The person who signed the letter apparently does not have personal knowledge; she relied on unnamed historians.

 As I said in another case, in which an MTRS member submitted a similar letter:

 Mr. Weinstein’s letter is ambiguous. It does *not* unambiguously say: Massachusetts funded the tuition of all pupils whom Ms. Happ worked with….

 Ms. Happ (1) submitted a letter, not an affidavit; (2) submitted an *ambiguous* letter, which was not subject to clarification from cross-examination or my questions; and (3) did not call Mr. Weinstein as a witness….

 If I parse this letter, it could mean what Ms. Happ contends it means. But I should not have to parse a letter when I should have had the opportunity to hear Mr. Weinstein cross-examined on an element of Ms. Happ’s claim or the opportunity to ask him myself.

*Susan Happ v. Massachusetts Teachers’ Retirement System*,CR-16-130 (DALA 2017).

 It is true, as Dr. Biundo argues in his post-hearing brief (Pet. Br. 9), that the League School, in filling out Part 2 of his application to buy back service, wrote that 0% of students came from out of state and 0% paid private tuition. (Ex. 4, p. 3.) However, the person who signed Part 2 on October 10, 2012 is the same person who signed the confusing and contradictory To-Whom-It-May-Concern letter from the League School on the same date. Part 2 is not further evidence of this element of Dr. Biundo’s claim.

 If in fact Dr. Biundo’s students were on Individual Education Plans (IEPs) and school districts receive money from the Commonwealth for students on IEPs, that does not “lead to the conclusion” that the Commonwealth paid all students’ tuition wholly or partly, as Dr. Biundo argues. (Pet. Br. 9.) We simply don’t know if out-of-state students also had IEPs.

 In a footnote to his brief, Dr. Biundo notes that the basis of the denials did not include funding. (Pet. Br. 9 n.2.) However, because this appeal is *de novo*, *e.g.*, *Namay v. Contributory Retirement Appeal Board*, 19 Mass. App. Ct. 456, 462 (1985), I can affirm a retirement system’s denial on a ground other than the one it originally invoked as long as the petitioner had sufficient notice of the new ground. *See Constance E. Strauss v. Teachers’ Retirement System*, CR-07-488 (DALA 2008)(“The decision of the Teachers’ Retirement System is affirmed, but not for the reasons stated in the Board’s denial letter.”).

 I affirm MTRS’s denial of Dr. Biundo’s application for a second reason: He did not prove that the Commonwealth funded the tuition, partly or fully, of all pupils at LCDC and the League School whom Dr. Biundo worked with.

 It is true that MTRS did not dispute at the hearing that the Commonwealth funded the tuition at LCDC and it is possible that had MTRS had disputed it, Dr. Biundo would have provided more evidence at the hearing. However, I doubt it. Dr. Biundo did submit a To-Whom-It-May-Concern letter (Ex. 11) with his prehearing memorandum. Had MTRS disputed this issue, I doubt that Dr. Biundo had more documents to submit. In addition, Dr. Biundo testified, despite MTRS’s position not disputing the funding of tuition, that as best as he could recall, all of his pupils at LCDC were from Massachusetts. That is, despite MTRS’s position at the hearing, Dr. Biundo testified about this issue anyway, but did not testify convincingly and certainly did not prove this element with his testimony.

Furthermore, even if Dr. Biundo had presented more evidence about who paid tuition at LCDC, he would not prevail in his appeal because he was not teaching academics to pupils.

**Conclusion and Order**

 MTRS’s denial of Dr. Biundo’s application to buy back service at private schools is affirmed because he did not teach academics at the schools and did not prove that the Commonwealth paid partly or fully all pupils’ tuitions there.

 DIVISION OF ADMINISTRATIVE LAW APPEALS

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 Kenneth Bresler

 Administrative Magistrate

Dated: December 14, 2018

1. This sentence seems to contradict the first one. The Commonwealth paid for *all* tuition, wholly or partly – but *some* students were privately funded. [↑](#footnote-ref-1)