

December 19, 2013

**COMMONWEALTH OF MASSACHUSETTS**

*Division of Administrative Law Appeals*

**Bureau of Special Education Appeals**

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**DECISION**

**BSEA # 1400255**

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**BEFORE**

**RAYMOND OLIVER  
HEARING OFFICER**

**ELLEN KOLTUN, ATTORNEY FOR PARENT/STUDENT  
REGINA TATE, ATTORNEY FOR KING PHILIP REGIONAL SCHOOL DISTRICT**

# COMMONWEALTH OF MASSACHUSETTS

## Division of Administrative Law Appeals

### Bureau of Special Education Appeals

In re: Ken<sup>1</sup>

BSEA #1400255

#### DECISION

This decision is rendered pursuant to M.G.L. Chapters 30A and 71B; 20 U.S.C. §1400 et seq.; 29 U.S.C. §794; and the regulations promulgated under these statutes.

A hearing in the above-entitled matter was held on October 31 and November 1, 2013 at Catuogno Court Reporting in Worcester, Massachusetts. The record remained open for oral summations until November 25, 2013.

Those in attendance for all or part of the hearing were:

Audrey Lacher	Director of Special Education, King Philip Regional School District
Barbara Collins	Out of District Coordinator, King Philip Regional School District
Erin Monnell	School Adjustment Counselor, King Philip Regional School District
Lisa Oliveira	High School Principal, King Philip Regional School District
Kirsten McCray	Special Education Teacher, King Philip Regional School District
Dennis Durkin	Former Special Education Teacher, King Philip Regional School District
Marylyn Callahan	Special Education Teacher, King Philip Regional School District
Patricia Dennis	BCBA, King Philip Regional School District
John Gould	High School Assistant Principal, King Philip Regional School District
Regina Tate	Attorney for King Philip Regional School District
Mother	
Student	
Ellen Koltun	Attorney for Parent/Student
Annie Rumbo	Court Stenographer
Raymond Oliver	Hearing Officer, Bureau of Special Education Appeals

The evidence consisted of King Philip Regional School District Exhibits labelled S-1 through S-93; Parent Exhibits labelled P-1 through P-6; and approximately eight hours of oral testimony.

#### STATEMENT OF THE CASE

Ken is a 16 year old young man who resides with his family in Wrentham, Massachusetts. Wrentham is a member town of the King Philip Regional School District (KP).

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<sup>1</sup> Ken is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in publicly available documents.

Ken is a student with special needs who receives special education services pursuant to an Individual Education Program (IEP). From 3<sup>rd</sup> grade through 8<sup>th</sup> grade Ken attended the Bi-County Collaborative (BICO), a special education collaborative of which Wrentham/KP are members. At BICO Ken participated in a substantially separate, therapeutic special education program. Ken's most recent three year evaluation occurred in January 2011, midway through Ken's 8<sup>th</sup> grade year at BICO. (See S-13, 14, 15, 16, 17, 18; P-1.)

In early 2012 the team determined that Ken should be transitioned to his local school district for high school, beginning in September 2012. In February 2012 an IEP was proposed by KP and was accepted by Mother whereby Ken would complete the 2011-2012 school year at BICO and begin attending KP High School as a 9<sup>th</sup> grader in September 2012 (S-44). Ken made several visits to KP High School (KPHS) during the 2<sup>nd</sup> semester of the 2011-2012 school year to become acquainted with the size and physical layout of KPHS, as well as to attend several KP classes. (Testimony, Tobin; Collins.)

In September 2012 Ken began 9<sup>th</sup> grade at KPHS in the ACE program, and in October 2012 a new IEP (covering October 2012 to October 2013) was proposed by KP and accepted by Mother, which formally placed Ken in the ACE program at KPHS. (See S-49, 50, 51, 52.) Ken received all of his daily academic subjects – English, mathematics, history and science – within the ACE special education program, as well as a daily resource room class within ACE. Ken also received weekly individual counseling and weekly group counseling from the school adjustment counselor. Ken also participated in a regular education computer class. (See S-50; P-2; testimony, Tobin; Monnell; Durkin; Ken.)

Although there were some adjustment issues, the parties agree that Ken had a relatively successful 1<sup>st</sup> semester at KPHS. He passed all of his academic subjects and played on the KPHS football team. (Testimony, Ken; Mother; Tobin; Durkin; S-50, 52.)

During the 2<sup>nd</sup> semester of the 2012-2013 school year Ken began to experience numerous social/emotional difficulties within his classes and with other students. Several incidents resulted in the classroom having to be cleared of all other students while a teacher remained with Ken in the classroom while he de-escalated. In April 2013 Ken brought "stink bombs" to KP and set off at least one. During this time period Ken became disenchanted with KPHS and repeatedly expressed his displeasure at being at KPHS and his desire not to be there. Progress meetings and team meetings were held, one of which, in April 2013, included Ken's private therapist. Finally, on May 7, 2013, Ken expressed a desire to set fire to KPHS. (These incidents will be described more fully, below.) Parents were called to take Ken home and have Ken undergo a risk/crisis assessment. (Testimony, Tobin; Monnell; Oliveira ; Durkin; Ken; Mother; S-58, 59, 60, 61, 63.)

From May 7, 2013 until September 2013 communications between Parents and KP virtually ceased. KP officials called Parents and left messages but Parents did not respond or communicate with KP. A progress meeting and a manifestation determination (MFD) meeting took place but Parents did not attend either meeting. Parents did get a risk/crisis assessment done and then placed Ken at Westwood Lodge for a day hospitalization program, but did not communicate same to KP. Parents did not allow Westwood Lodge to communicate with KP and

rescinded consent for Ken's private therapist to speak to KP. KP filed a 51A with the Massachusetts Department of Children and Families. ( See S-61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 91, 92; P-5; testimony, Tobin; Collins; Maxwell; Oliveira; Mother.)

On May 10, 2013 the team, without Parents in attendance, conducted a progress meeting (S-64) after the May 7, 2013 incident. On May 16, 2013 the team, again without Parents in attendance, conducted a MFD and determined that Ken's behavior and the May 7, 2013 incident were a manifestation of his disability. (See S-66, 67, 68.) On May 28, 2013 KP sent to Parents KP's proposal for a 45 day assessment and extended evaluation at BICO (S-70). On August 15, 2013, Mother rejected this extended evaluation at BICO (S-81).

On September 19, 2013 KP and Mother met and Ken returned to school at KPHS (S-82). On September 19, 2013, Mother requested updated evaluations (S-83). On September 20, 2013, KP sent Parents a request to release information regarding Ken to four other potential placements to conduct a 45 day assessment/extended evaluation including: 1) Dearborn Academy; 2) South Shore Educational Collaborative; 3) READS Collaborative; and 4) Assabet Valley Collaborative (S-84). Parents have not consented to release information to any of these placements to conduct an extended evaluation of Ken. (Testimony, Mother; Tobin; Collins.)

On October 10, 2013 there was an incident involving physical contact between Ken and his homeroom/resource room/history teacher/and special advisory liaison Mr. Kelly, which resulted in Parents being called and Ken going home from school. (Testimony, Ken; Mother; Tobin; Oliveira.) A team meeting took place on October 11, 2013 (S-87) and an incident/investigative report was also filed on October 11, 2013 (S-89). Since that time Ken no longer receives any instruction from Mr. Kelly and is no longer in his homeroom. A 1:1 aide now escorts Ken throughout his school day and is in all of his classes including history, geometry and biology where Ken receives 1:1 teacher instruction (S-90, 93; testimony, Ken; Tobin; Oliveira).

KP filed this BSEA appeal over the 2013 summer. Conference calls were held and the case was postponed while settlement was attempted by the parties, without success. The hearing took place as noted above.

## **ISSUES IN DISPUTE**

1. Does Ken require a 45 day placement/extended evaluation?
2. If so, can the extended evaluation be done at KP or should it be done at a placement outside of KP?
3. Should substitute consent for an outside extended evaluation be ordered by the Hearing Officer given Parents' lack of consent to any outside extended evaluation?

## STATEMENT OF POSITIONS

KP's position is that Ken requires a 45 day placement/extended evaluation (EE) so that Ken can be thoroughly evaluated and transitioned into an appropriate placement where he can receive a free and appropriate public education (FAPE) in the least restrictive educational environment (LRE). KP initially proposed an EE at BICO, Ken's former placement, but has added four additional alternatives as specified above. Given Ken's history, the behavioral incidents over the 2012-2013 school year at KPHS, and the incident in October 2013 during the 2013-14 school year at KPHS, KP believes such EE should take place outside of KP in a special education therapeutic setting. KP seeks an order overriding Parents' lack of consent to an EE and refusal to consent to release of information so that EE referrals can be made to outside placements.

Parents' position is that Ken does require updated evaluations but that any evaluations should be done at KPHS which is Ken's existing educational placement. Parents contend that evaluating Ken in his actual placement will produce more accurate results. Parents refuse to consent to any EE of Ken which would result in Ken's leaving KPHS.

## PROFILE OF STUDENT

Ken is a young man with multiple disabilities. Based upon his most recent clinical psychological evaluation in January 2011 (S-14) performed by clinical psychologist Barry Plummer, Ph.D. of Brown Medical School, Ken qualifies for the following DSM-IV diagnoses:

AXIS I: Asperger's Syndrome

Major Depressive Disorder, recurrent, moderate

Attention Deficit Hyperactivity Disorder, combined type<sup>2</sup>

AXIS IV: Psychological and Emotional Factors:

Continued difficulties with school learning and behavior, problems in peer relationships, parent-child difficulties

Under his Clinical Findings and Impressions, Dr. Plummer noted:

Projective testimony and clinical interview information suggest that [Ken] has rigidly organized psychological defenses and considerable difficulty both recognizing and regulating affective states. He tends to react quickly to stressors in his environment with immature coping skills, inflexible expectations that others will meet his needs quickly and poor tolerance of frustration... Also [Ken] has considerable difficulty understanding how his actions impact others or forecasting his behavior. When he "is in his comfort zone" he can be articulate and more motivated for academic tasks and addressing requests from others. However, as he feels overloaded with expectations (such as schoolwork) or becomes confused about what to do his frustration sets in quickly. Thus, [Ken] has significant vulnerability for rapid emotional overload and continued difficulties

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<sup>2</sup> All of these diagnoses are also prior diagnoses. The Asperger's Syndrome diagnosis was made by Massachusetts General Hospital in 2008. (See S-14.)

with self-regulation. As he begins to experience task confusion his emotions escalate quickly leading to more impulsive behaviors. [Ken] views the world around him in very rigid terms.

Dr. Plummer performed the Wechsler Intelligence Scale for Children – 4<sup>th</sup> Edition (WISC-IV). Ken achieved the following Index Scores: Verbal Comprehension 102; Perceptual Reasoning 94; Working Memory 80; Processing Speed 83; Full Scale IQ 89. These scores place Ken's overall verbal and non-verbal functioning solidly within the average range with weaknesses in the areas of working memory and visual processing speed.

In addition to the diagnoses (above), Dr. Plummer noted the following in his Summary and Recommendations:

...[Ken] is highly susceptible to fluctuations in mood with a significant depressive and irritable component. He tends to get very irritable, angry, tired, aggravated, and more dysphoric. These depressive symptoms also interfere with learning and school and social performance. Irritability and dysphoric affect tend to lower his threshold for frustration and tolerance for change. Moreover, [Ken] is a very rigidly organized young man who has great difficulty integrating new information, especially if he is in a distressed state.

[Ken's] significant problems with working memory, mood regulation, and coping skills also interfere with his social relationships... [Ken] has considerable deficits in a variety of social communication skills including forecasting his behavior, reading nonverbal cues, understanding interpersonal feedback, and taking the perspective of others. He gets confused easily when there are quick shifts in interpersonal interactions and is unsure of what to do. This is an ongoing area of vulnerability that will require considerable intervention.

A final area of concern involves [Ken's] perceptions of conflict in his relationships with his parents. He... frequently perceives that he is not meeting their expectations.

Dr. Plummer's recommendations included: 1) continued outpatient treatment with a combination of individual therapy, collateral family meetings and psychopharmacological management with intensive intervention in the acquisition of social skills and interpersonal communication strategies; 2) participation in a social skills group and receipt of prompting and scripting strategies from his in-school counselor and educational staff; and 3) Ken's educational program should take place in a highly structured environment. Dr. Plummer stated that Ken continued to require a highly structured therapeutic school program with in-school counseling, participation in a social skills group and flexible curriculum, with the ability for rapid intervention when Ken's mood became more aggravated and dysphoric, leading to outbursts of frustration and disruptive behavior.

(See S-14, Dr. Plummer's evaluation.)

In January 2011 Ken underwent an academic assessment at BICO, performed by Suzanne Prall, M.Ed. Based upon the Woodcock-Johnson Tests of Achievement – 3<sup>rd</sup> edition (WJ-3), Ken's academic scores all fell within the average range. (See S-11, 12, 13.)

Mother testified that prior to the May 9, 2013 school incident Ken's prescription medications, when he took them, consisted of Adderall XL 20mg; Adderall 10mg; and Concerta. Since his partial day hospitalization at Westwood Lodge in June 2013, Ken's medications consist of Zoloft, Concerta, and Clonidine. (Testimony, Mother; P-5; S-69.)

## **FINDINGS AND CONCLUSIONS**

It is undisputed by the parties and confirmed by the evidence presented that Ken is a student with special education needs as defined under state and federal statutes and regulations. The fundamental issues in dispute are listed under **ISSUES IN DISPUTE**, above.

Pursuant to *Schaffer v. Weast*, 126.S. Ct.528 (2005), the United States Supreme Court has placed the burden of proof in special education administrative hearings upon the party seeking relief. Therefore, in the instant case, KP bears the burden of proof in demonstrating that Ken requires an EE and that he requires such EE in a placement outside of KPHS.

Based upon two days of oral testimony, the extensive exhibits introduced into evidence, and a review of the applicable law, I conclude that: 1) Ken does require an EE; and 2) such EE should occur in a therapeutic special education environment outside of KP. Therefore, substitute consent is granted for KP to send referral packages to BICO and to the four other alternative placements offered to Parents to perform the 45 day EE.

My analysis follows.

Pursuant to 603 CMR 28.05(2)(b), if the team finds the evaluative information insufficient to develop an IEP the team, with parental consent, may agree to an extended evaluation period. The team meets at periodic intervals during the EE. The EE shall not exceed 8 school weeks. When the EE is complete the team reconvenes with all of the new information acquired during the EE to develop a new IEP. The EE is not considered a placement. (See 603 CMR 28.05(2)(b). If Parents and School do not agree upon the IEP that results from the EE, the Student returns to his last accepted IEP prior to the EE until the matter is settled by the parties or decided by the BSEA.

Pursuant to M.G.L.c.71B s. 2A and 603 CMR 28.07(1)(b-c), a school may bring an appeal to the BSEA seeking substitute consent to school evaluations so long as the requested evaluation is not an initial evaluation of the student. (See also 7 MSER 149, In re: Nashoba Regional School District (Putney-Yaceshyn, 2004)) finding that the IDEA authorizes the school to proceed to a due process hearing in order to pursue evaluations to which parents have refused consent.

Ken is due for his next three year re-evaluation in January 2014. Ken's difficulties maintaining his emotions and behaviors within KPHS from February to May 2013 amply

document his need for updated evaluations and for such evaluations to be done over an extended period of time to understand the antecedents/triggers to his emotional/behavioral escalations, shutdowns, and outbursts and to devise better strategies for dealing with Ken when these situations occur. Clearly, Ken's IEP/KPHS placement was not providing him FAPE during the 2<sup>nd</sup> semester of the 2012-2013 school year.

KP has compiled a Time Line of Concerning Events with specific dates from March 2013 until May 2013 when Ken left KP for the rest of the school year. (See S-61.) Many of these events were also testified to by various KP witnesses (Tobin; Durkin; Monnell; Oliveira) as well as Ken. There are three incidents of Ken not following directions, refusing to do work, getting agitated, the assistant principal being called to the classroom, Ken refusing to leave the classroom with the assistant principal, and the entire classroom having to be evacuated while Ken and a teacher remained in the classroom while Ken de-escalated. There is the April 22, 2013 incident of Ken's setting off a stink bomb in history class that necessitated that classroom being cleared. This incident occurred on the Monday after April school vacation which was the first day of school after the Boston Marathon bombings (testimony; Tobin). There are numerous incidents of Ken refusing to do work, leaving class, pacing the hallways and mumbling to himself. There are repeated and numerous instances of Ken stating that he hated KP, he wanted to get thrown out of KP, and what did he have to do to get thrown out of KP. There is an incident of Ken leaving KPHS/school property and going to Dunkin Donuts. There are incidents of conflict with Ken harassing and/or bullying peers. Finally there is the May 7, 2013 incident in which Ken stated that he wanted to come to school with a can of gasoline, run up and down the hallways pouring it on everything and lighting the school on fire. (See S-61; testimony Ken; Tobin; Durkin; Monnell; Oliveira.)

On April 12, 2013 Ken's private therapist, Dr. Marjorie Rohde who has been seeing Ken on a weekly basis for the last six years, attended a team meeting regarding Ken. At that meeting Dr. Rohde expressed concern that Ken was experiencing symptoms of psychosis, that she believed Ken might have a thought disorder and that she hoped that Ken did not have access to any weapons at home. (Testimony, Tobin; Oliveira; Mother; S-70.) In an April 23, 2013 phone conversation between Dr. Rohde and Ms. Monnell, Ken's in-school counselor, Dr. Rohde reported to Ms. Monnell that Ken was increasingly depressed, angry, unhappy, was drawing pictures that were concerning to her, and again raised the possibility of Kim having a thought disorder<sup>3</sup>. Then on May 7, 2013 Ken made the threat to set fire to KPHS.

I find the incidents described above and Dr. Rohde's comments to be significant and serious, not only regarding Ken's KP placement but, even more importantly, Ken's safety and the safety of others attending or working at KPHS. While Ken subsequently attended a partial hospitalization day program at Westwood Lodge from May 21, 2013 to May 31, 2013 and his medications have been changed and/or adjusted, Parents/Westwood Lodge have not provided any evaluations, assessments or reports other than four pages of discharge instructions which lists an Axis I diagnosis of Mood Disorder, not otherwise specified, and notes that Ken demonstrated adequate safety for discharge. (See P-5; S-69.)

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<sup>3</sup> Dr. Rohde was on Parents' witness list but was not called by Parents at this BSEA hearing.



With respect to the current (2013-2014) school year, Ken testified that he does not benefit from his 1:1 counseling twice weekly with Ms. Monnell. (Testimony, Ken.) (Note that Ken receives 1:1 counseling twice weekly rather than individual counseling once weekly and group counseling once weekly because during the last school year Ken refused to participate in either large group or small group counseling, and he has shown no interest in participating in group counseling this school year.) (Testimony, Monnell; Durkin.) Ms. McCray, Ken's 1:1 biology teacher this school year, testified that she has a good working relationship with Ken. However, Ms. McCray also testified that possibly every day Ken makes comments about hating this school, how KP "sucks", and how he wishes he wasn't there. Ms. McCray also testified about several occasions when Ken shut down and refused to do work, even in her 1:1 setting. (Testimony, McCray.) Prior to the October 10, 2013 incident of physical contact between Ken and Mr. Kelly, Ms. Monnell was in Ken's homeroom and testified that Ken appeared emotionally upset; interjected himself into a conversation between Mr. Kelly and another student, stating that the other student should skip detention so he could get suspended and that Ken wanted to get suspended; and refused her attempts to de-escalate the situation, telling her to leave him alone and that he was not talking to her ever again. (Testimony, Monnell.)

Shortly thereafter, on October 10, 2013, the incident of physical contact (arm to shoulder) between Mr. Kelly and Ken occurred. (Testimony, Ken; Mother; Oliveira; Tobin; S-89, 90). Based upon the meeting that took place at 8:00 A.M. the next morning, and the various incident reports filed, KP found the contact to be unintentional and that Mother also believed the contact to be unintentional (See S-89; testimony, Oliveira; Monnell; Tobin.) Ken and Mother testified at this BSEA hearing that the contact was intentional and Mother accused Ms. Tobin, Ms. Monnell and Dr. Oliveira of lying. (Testimony, Mother.)

Based upon the above, I find that while Ken has maintained better school behavior during the 2013-2014 school year at KPHS, his fundamental issues remain unresolved. Despite his testimony to the contrary, Ken appears to continue not to want to be at KPHS and even in 1:1 classroom settings with maximum teacher attention Ken shuts down. Ken's emotional and social issues, while under better control, are still present. Further, Ken's current situation of having 3 classes on a 1:2 basis (Ken with a teacher and a teacher's assistant) is not an appropriate environment to promote and improve Ken's social interactions and social relationships. Finally, the current relationship between Ken, Mother and KP is completely non-trusting and essentially non-functional. Under such circumstances, to attempt to do an EE within a large public high school where Ken experiences such frustration and distress would be unproductive and inappropriate. An EE at an independent, therapeutic, special education environment outside of KPHS will allow Ken a new start and will allow a fresh perspective to be brought to the situation without any prejudices or perceptions of bias.

Finally, I note that both Ken and Mother testified that Mother, Father, a sister and all aunts and uncles have gone to KPHS. Attendance at KPHS appears to be extremely important to Mother, and also important to Ken. Given Ken's repeated comments within KPHS about not wanting to be at KPHS, I question whether the pressure for Ken to attend KPHS may be a cause of some of the tension and conflict he is experiencing.

**ORDER**

- 1) Ken requires a 45 day EE.
- 2) Such EE should occur in a therapeutic, special education environment outside of KP.
- 3) Substitute consent is granted for KP to send referral packages to BICO, Dearborn Academy, READS Collaborative, South Shore Collaborative and Assabet Valley Collaborative regarding performance of a 45 day EE.

By the Hearing Officer

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Date: \_\_\_\_\_