

October 17, 2014

**COMMONWEALTH OF MASSACHUSETTS**

*Division of Administrative Law Appeals*

**Bureau of Special Education Appeals**

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**DECISION**

**BSEA # 1404036**

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**BEFORE**

**RAYMOND OLIVER  
HEARING OFFICER**

**PARENTS, PRO SE  
AMY ROGERS, ATTORNEY FOR TEWKSBURY PUBLIC SCHOOLS**

# COMMONWEALTH OF MASSACHUSETTS

## Division of Administrative Law Appeals

### Bureau of Special Education Appeals

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

BSEA #: 1404036

#### DECISION

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

A hearing in the above-entitled matter was held on August 15 and September 4, 2014. The record remained open for receipt of written transcripts and written final arguments until September 22, 2014.

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

Mother

Father

Richard Pelletier

Amy Rogers

Anne Bohan

Raymond Oliver

Director of Special Education, Tewksbury Public Schools

Attorney for Tewksbury Public Schools

Court Reporter

Hearing Officer, Bureau of Special Education Appeals

The evidence consisted of Parents' Exhibits labeled P-1 through P-8b with extensive subparts; Tewksbury Public Schools Exhibits labeled S-1 through S-23<sup>2</sup>; and approximately 12 ½ hours of oral testimony.

#### STATEMENT OF THE CASE

Lee is a 17 year old young man who resides with his family in Tewksbury, Massachusetts. He is currently an 11<sup>th</sup> grade student who attends Presentation of Mary Academy, a private, Catholic parochial school in Methuen, MA funded by Parents (testimony, Mother).

Lee attended private Catholic school for pre-school and for Kindergarten (2 years). He began in the Tewksbury Public Schools (TPS) in 1<sup>st</sup> grade and attended public school in TPS during grades 1 through 5. In 6<sup>th</sup> grade, Parents transferred Lee to St. Augustine School, a parochial school in Andover, MA where he attended grades 6 through 8. For 9<sup>th</sup> grade he transferred to Presentation of Mary Academy (POMA). Lee has attended POMA for 9<sup>th</sup>, 10<sup>th</sup> and now 11<sup>th</sup> grade, and it is Parents hope he will be able to graduate from POMA in June 2016 (testimony, Mother).

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

<sup>2</sup> All exhibits concerning settlement or settlement positions and any references to same are excluded from evidence.

Lee first received special education services under an Individual Education Program (IEP) during 4<sup>th</sup> grade at TPS. Said services, which consisted of speech-language and an FM system for an auditory processing disorder, continued through 5<sup>th</sup> grade at TPS. When Lee transferred to St. Augustine in 2009 for 6<sup>th</sup> grade, the FM system went with him and Mother brought him to TPS for speech-language therapy at 7:30A.M., then drove him to school at St. Augustine. In December 2009 TPS changed his speech time to Tuesday and Thursday in the middle of the school day at TPS, which made it impossible for Lee to continue to receive such speech services (testimony, Mother; P-6a).

Lee's 9/11 to 6/12 IEP from TPS (S-14) again provided for communication/speech language services for 45 minutes per week. In accepting the IEP, Mother requested that Lee receive individual speech-language therapy during his non-school hours, noting that Lee's school did not begin until 8:30A.M. but that the public school in Tewksbury where the speech-language therapy was to be provided (Wyman) started at 7:30A.M. (See S-14.) No services were provided by TPS to Lee. (testimony, Parent; Pelletier). Lee's next TPS IEP ran from October 2012 to October 2013 (P-4dd, ee; S-15). Again this IEP provided for communication/speech language therapy for 45 minutes per week. Again Mother accepted. Again such services were not provided (testimony, Mother, Pelletier).

Also in October 2012, Mother requested that TPS re-evaluate Lee and his three year evaluation was advanced by several months. TPS performed cognitive and achievement testing in November 2012 (P-2f; S-1) and a speech-language evaluation in December 2012 (P-2e; S-2). As a result of these evaluations, in March 2013 TPS found that Lee was no longer in need of special education services. Parents disagreed, invoked stay-put rights, and requested an independent education evaluation (IEE). (See P-4t, 4v; S-17; testimony Mother.) An IEE was performed at Children's Hospital (CH) over the 2013 summer. CH performed evaluations in auditory processing, mathematics and oral and written language, as well as two psychological evaluations, a neuropsychological evaluation, a neurological evaluation, and a coordination of findings. (See P-2cl, c2, c3, c4, c5, c6 and 2h; S-3, 4, 5, 6, 7, 8.) The TPS team reconvened in October 2013 to review the CH evaluations. While again finding that Lee had disabilities, TPS concluded that his disabilities did not affect his ability to make educational progress and again found Lee ineligible for special education. (See P-4l, m, n; S-18; testimony Mother; Pelletier.)

This case went to BSEA mediation in February 2014 and while the overall issues were not resolved, the parties did reach agreement for Lee to receive a TPS funded assistive technology evaluation (P-4j; S-19). The assistive technology evaluation was performed in March-April 2014 by Cotting Consultants (P-2b; S-13). On March 18, 2014 Mother filed for a hearing request with the BSEA (P-6a) and the hearing was scheduled for April 22, 2014 (P-6b). Parents requested postponement of the hearing date because the parties were awaiting the results of the assistive technology evaluation; Parents had scheduled a private neuropsychological evaluation for April 25, 2014; and the team would need to meet to consider these updated evaluations. During the initial pre-hearing conference call on April 7, 2014 the Hearing Officer granted Parents' request for postponement of the hearing. Because Mother could only attend a hearing on Fridays, Friday hearing dates of June 13 and June 27, 2014 were scheduled.

On April 25, 2014 the private neuropsychological evaluation by the Child Development Network in Lexington, MA was performed (P-2a; S-11) and on the same day the assistive technology (AT)

evaluation report (P-2b; S-13) was written. On May 30, 2014 the team convened, reviewed these evaluations, found Lee eligible for special education, and an IEP was written for the period June 2, 2014 to May 30, 2015. (See P-4a, b, c, d, e; S-20.) On June 3, 2014 TPS requested that the initial hearing date of June 13, 2014 be converted into a mediator assisted pre-hearing conference in an attempt to settle the case. During a June 4, 2014 conference call Parents agreed. The parties met on June 13, 2014 with two BSEA mediators facilitating, but no agreement was reached.

On June 27, 2014 the parties met for the initial day of hearing. Before going on the record and in discussion of preliminary matters/exhibits, Parents offered two additional exhibits which were accepted into evidence and labeled P-2g and 2h. P-2g was an updated written report by Eavan Miles-Mason, Ph.D. who had performed the April 25, 2014 Child Development Network (CDN) neuropsychological evaluation. In this report, Dr. Miles-Mason indicated that she had reviewed the June 2, 2014 – May 30, 2015 IEP proposed by TPS and found it “largely appropriate in meeting his educational needs.” (See P-2g.) Mother announced that she was prepared to accept the services proposed in TPS’ IEP, but to reject the placement at Tewksbury High School (THS). The parties then spent the rest of June 27, 2014 attempting to resolve the remaining outstanding issues. By the end of the day Parents had signed the June 2014 – May 2015 IEP (P-4; S-20) accepting the special education services but rejecting the THS placement and the parties had drafted a tentative settlement agreement. On June 30, 2014 Mother requested new hearing dates. On July 1, 2014, pursuant to the signed IEP, TPS offered Lee summer services in reading, speech-language, and AT (S-22a). On July 3, 2014 Mother responded (S-22b). Lee accessed AT services but did not access reading or speech-language services over the 2014 summer (S-22b; testimony, Mother). On a July 17, 2014 conference call a hearing date was scheduled for August 15, 2014 and the initial day of hearing took place on that date. The final day of hearing was September 4, 2014.

## **ISSUES IN DISPUTE**

- 1) What services, modifications and technologies are necessary, if any, for implementing the current, accepted IEP?
- 2) What compensatory services and/or retroactive reimbursement, if any, does TPS owe Parents/Lee?

## **STATEMENT OF POSITIONS**

Parents’ position is that, pursuant to their original hearing request, TPS should: 1) reinstate Lee’s IEP incorporating the CH (and new CDN and AT) recommendations; 2) develop a transition plan for college; 3) pay for Lee’s speech-language therapy (SLT) and cognitive behavioral therapy (CBT) prospectively and reimburse Parents for co-pays Parents already paid for said services; 4) provide and pay for any technologies recommended by the CH, CDN, and AT evaluations; and 5) follow through with what is necessary to obtain the extra time which Lee will require on the PSAT/SAT examinations. Parents also contend that they/Lee are owed compensatory services/reimbursement from TPS for

services offered on accepted IEPs which were never provided. Parents request that SLT and CBT services be provided at POMA.

TPS' position is that Parents have accepted the IEP for June 2014 – May 2015; that TPS services provided by said IEP meet state standards; that Mother has testified that she does not want certain services on the IEP but wants TPS to provide other services instead; and that TPS is under no obligation to provide Parents different services. TPS also contends that Parents/Lee are not entitled to any compensatory services or reimbursement.

## **PROFILE OF STUDENT**

As stated above, Lee is a 17 year old young man currently in 11<sup>th</sup> grade at POMA where he has been educated throughout his high school years. POMA is not a Massachusetts Department of Elementary and Secondary Education (MDESE) approved private special education school. POMA is a private, parochial, regular education high school which does not offer special education services. Lee's only accommodation at POMA is that he receives extra time to complete tests and assignments. (See testimony, Mother). On his high school placement test (P-3h) taken on November 12, 2011 – two months into his 8<sup>th</sup> grade year -Lee achieved grade equivalent scores of 7.9 in reading; 10.5 in mathematics; and 6.8 in language. For 9<sup>th</sup> grade (2012-2013) Lee received the following final grades at POMA (P-3g1):

Honors Geometry	87	B+
Honors Literature	82	B-
Honors Spanish	80	B-
College Prep Physical Science	90	A-
College Prep World History	85	B

For 10<sup>th</sup> grade (2013-2014) Lee received the following final grades at POMA (P-3g2):

Honors Algebra II	89	B+
College Prep American History	86	B-
College Prep Biology	92	A-
College Prep English Literature	91	A-
College Prep Spanish II	89	B+

Thus, Lee's overall academic score for 9<sup>th</sup> grade was an 84.8; overall academic score for 10<sup>th</sup> grade was an 89.4; and his overall academic score for his 9<sup>th</sup> and 10<sup>th</sup> grades at POMA combined was an 87.1.

On the TPS cognitive/achievement evaluations performed in November 2012, Lee's overall intellectual ability was found to be in the high average range, thinking ability in the high average range, with verbal ability and cognitive efficiency in the average range, based upon the Woodcock-Johnson Tests of Cognitive Ability – 3<sup>rd</sup> edition (WJ-III – Cognitive). On WJ-III Achievement Testing, broad reading, word identification and passage comprehension were all in the average range, while reading fluency was in the low average range. Lee, then at a 9.2 grade level received grade equivalent scores of 8.0 in broad reading, 10.6 in word identification, 5.6 in reading fluency, and 13.0 in passage comprehension. (P-2f; S-1). The TPS speech-language evaluation, performed in December 2012 (P-2e; S-2), yielded above average scores in core language, expressive language and language memory and

average scores in receptive language and language content as measured by the Clinical Evaluation of Language Fundamental – 4<sup>th</sup> edition (CELF-4). All subtest scores were within average to above average range with the exception of figurative language which was low average. Despite his solid language skills, the TPS speech-language pathologist noted that Lee exhibited areas of communication weakness in terms of formulation of complex sentence structure and utilized primary single words in communicating. The examiner could not rule out social anxiety as a contributing factor.

The CH IEE was performed after Lee completed the 9<sup>th</sup> grade at POMA during the 2013 summer. On the audiological evaluation (P-2d; S-3) all areas were found to be normal, including auditory processing, where Lee had been previously diagnosed with an auditory processing disorder. The neurologic evaluation showed Lee to be fundamentally intact (P-2c6; S-9). Lee's psychological evaluation found him quite limited in his functioning in academic and social situations with peers and evidencing signs of both social anxiety and selective mutism (P-2c3; S-6. See also letter summarizing Dr. D'Angelo's earlier psychological evaluation, P-2h.) The oral and written language evaluation found Lee's discrete language skills (knowledge of vocabulary and syntax) to be within age appropriate expectations. However, his moment to moment expressive language was significantly impaired on academic tasks and in informal conversation. The evaluator found that Lee's language profile likely exacerbates his social anxiety and explains the current manifestation of his selective mutism, and further that his writing is significantly impaired and his reading rate/fluency is about one-half the rate of typical students in early high school (P-2c; S-7). See also neuropsychological evaluation (P-2c6; S-9) and mathematics evaluation (P-2c2; S-4.)

The results of the CH evaluations were summarized in a Coordination of Findings (COF) by David Urion, M.D., Senior Neurologist in CH's Learning Disabilities Program and Director of the Pediatric Neurology Clinic and Programs (P-2c1; S-8). Dr. Urion wrote:

On assessment [Lee] was demonstrated to be a young man whose formal measures of cognitive potential were quite strong, and who manifested a Specific Learning Disability in the domains of reading and writing, which in certain settings can exacerbate his co-existing social anxiety disorder and selective mutism. Thus, he is also coded as an individual with a Communication Disorder and an associated Emotional Impairment..... [Lee's] current rate of reading comprehension is instructional at his grade placement but his reading rate is significantly reduced, and comparable to a sixth grade reading level..... Math skills are grade appropriate, if slow in execution.

Dr. Urion's COF concludes that Lee's diagnostic profile is consistent with a 1) Specific Learning Disability; 2) Communications Impairment and 3) Emotional Impairment as those terms are used in 603 CMR 28.02(j), (g) and (f). Specific recommendations from the CH team included intensive and personalized support from a speech-language pathologist with experiences in selective mutism; social skills training; and cognitive behavioral therapy. (See P-2c1, 2, 3, 4, 5, 6; S-4, 5, 6, 7, 8, 9 for complete CH evaluations.)

On April 25, 2014 Lee underwent a neuropsychological evaluation from the CDN by Dr. Miles-Mason, a pediatric neuropsychologist (P-2a; S-11). Under her Summary and Impressions, Dr. Miles-Mason noted:

[Lee] is a lovely young man with many personal and cognitive strengths. He exhibits an incredible work ethic and dedication to his education, putting forth immense effort on a daily basis to learn and perform well academically. He is a polite, cooperative student and a talented athlete who participates in numerous varsity sports. [Lee] also has exceptional cognitive abilities, including superb visuospatial skills, very strong nonverbal/analytical reasoning abilities, and excellent novel problem solving skills. Language skills such as vocabulary knowledge and categorical reasoning were also well developed. These assets will help him acquire new knowledge and skills as he progresses through high school and post-secondary settings. Coupled with his fierce determination to learn and master academic material, and given the correct supportive environment, he should have great success.

Despite [Lee's] many strengths, he presents with a remarkably uneven neurocognitive profile, which compromises his ability to access his full range of assets and skills. First, [Lee] presents with longstanding language-processing weaknesses which impact his (sic) to take in, process and generate language based information, especially in the context of learning...

Second, [Lee] exhibits severe deficits in processing speed across cognitive modalities, including language production, written output, reading, etc. In the context of classroom learning and school performance, he will require additional time to encode (learn) new information as well as generate output and demonstrate what he knows.... Finally [Lee] exhibits significant fine motor deficits.... This further compromises his ability to produce written output and slows his ability to complete work in academic contexts.

Dr. Miles-Mason's Diagnostic Impressions were:

- 1) Communications Disorder – Not Otherwise Specified
- 2) Specific Learning Disability  
with impairment in Reading  
with impairment in Writing
- 3) Developmental Coordination Disorder
- 4) Selective Mutism (anxiety)
- 5) Dysthymia

Dr. Miles-Mason / CDN's Recommendations were:

- I. [Lee] receive interventions and supports through an IEP to support his development and functioning, including speech and language therapy, social skills training and reading intervention. Placement to remain at POMA.

- II. Speech and language therapy to strengthen his expressive language skills, including pragmatics to address his social communication deficits by a speech-language pathologist with training in selective mutism.
- III. Social skills training in a social skills group with peers.
- IV. Reading intervention targeting reading fluency to improve his speed and accuracy which drastically compromises his reading rate, 2-3 weekly in small groups.
- V. Writing intervention and support through individualized writing instruction.
- VI. Assistive technology accommodations and supports given fine motor weaknesses and Developmental Coordination Disorder. Dictation software such as Dragon Naturally Speaking and Kurzweil may be appropriate.
- VII. Extended school year services in speech-language, reading/writing, psychotherapeutic services and AT.
- VIII. Adaptive functioning skills instruction in basic social and communicative skills related to his social anxiety and language processing weaknesses.
- IX. Extended educational services until age 22 given his complex profile of language, learning and emotional disabilities.

Finally, given Lee's social anxiety, selective mutism and ongoing chronic depressive symptoms, CDN recommended that Lee continue to work with a CBT oriented therapist to reduce social anxiety and build coping mechanisms for managing stress. Pharmacological treatment was also recommended. (See P-2a; S-11 for complete neuropsychological evaluation by CDN/Dr. Miles-Mason.)

The Cotting Assistive Technology Evaluation (Cotting) was performed in March-April 2014 by Melissa Mulvey, a speech-language pathologist who has her Certificate of Clinical Competency (CCC) and is also an Assistive Technology Practitioner (ATP). Various assistive technology tools were utilized with Lee. (See P-26; S-13 for this assistive technology assessment.) Pursuant to the newly accepted IEP, Ms. Mulvey also provided four hours of AT services to Lee over the 2014 summer (P-8a).

## **SCHOOL'S PROPOSED PROGRAM**

TPS proposes implementing the accepted June 2014 – May 2015 IEP (P-4; S-20). Direct Services include: 1) communication speech-language services by a speech-language pathologist twice a week for 30 minutes each session; 2) reading services by a special education teacher or reading specialist twice a week for 30 minutes each session; 3) counseling by a school psychologist twice a week for 30 minutes each session; 4) social skills by a school social worker twice a week for 30 minutes each session; 5) technology by an assistive technologist twice a week for 30 minutes each session and 6) academic support by a special education teacher twice a week for 64 minutes each session. Consultation



would be provided to Parents and School for 15 minutes per month each by the speech-language pathologist, special education teacher, social worker, and assistive technologist. Extended School Year (ESY) services over the summer include one hour per week of SLT with the speech-language pathologist for 4 weeks; reading fluency 2 hours per week with a special education teacher for 4 weeks; and AT with an assistive technologist one hour per week for 4 weeks. A transition plan is included in the IEP. Location for these services is listed as THS. (See P-4; S-20 for complete 2014-2015 IEP goals, objectives, services, transition plan etc. See also testimony Pelletier; S-22a.)

## **PARENTS' PROPOSED PROGRAM**

Parents rejected the location of THS for Lee's placement in favor of POMA, but accepted the IEP services on June 27, 2014. Parent accepted the AT services TPS provided over the 2014 summer but rejected the reading and speech-language services due to summer vacations and other factors (See S-22b; testimony, Mother.) Parents request that services be provided at POMA – specifically that SLT and AT be provided during Lee's free period at POMA. Parents request that TPS provide a private speech-language pathologist who has experience in selective mutism. Parents request that TPS pay the copayments for Lee's private CBT which he receives once weekly for one hour in the evening. Parents request that TPS implement all of the recommendations, including technology recommendations proposed by CH and CDN and Cotting. Parents reject the TPS proposal of 2 hours per week of academic support as unnecessary because Lee is very well organized. Parents also reject the one hour of reading support per week and propose that TPS buy Read Naturally, a program which Lee can utilize on his computer at his own pace and his own time. (See testimony, Mother; P-2a; S-2a)

Parents argue that because: TPS provided no special education services (i.e., communication/speech language services for 45 minutes was offered on Lee's prior accepted IEPs but never delivered despite being his last agreed upon placement /placement pending appeal (stay-put) ; TPS provided no IEP/special education services and found Lee ineligible for special education after the CH evaluation recommended services for the 2013-2014 school year; and in lieu of social skills for one hour per week as proposed on the current, accepted IEP; TPS should fund two summer courses at Landmark College (LC). Over the 2015 summer (between 11<sup>th</sup> and 12<sup>th</sup> grades) Parents propose that TPS fund LC's Social Pragmatics Program. Over the 2016 summer (after Lee's anticipated high school graduation from POMA) Parents propose that TPS fund LC's Transition to College program. Both of these programs are two weeks in length. Also Parents request reimbursement for the co-pays which they expended for Lee's prior private SLT and CBT for the times and amounts Parents have specified. (See testimony, Mother; P-1d.)

## **PROCEDURAL NOTE**

Prior to the taking of testimony, TPS brought a Motion to Dismiss Parents' Appeal (MTD). TPS' MTD contended that the BSEA had no jurisdiction/authority to hear Parents' Appeal based upon 34 CFR §300.140 which states that there are no due process rights afforded to parentally placed private school students at private expense because such students have no individual entitlement to receive special education services (34 CFR §300.137) from their Local Education Authority (LEA). Under federal law, the only responsibility of the LEA is to spend a proportionate share of their federal funding

on these students as a group and at the LEA's discretion. TPS also argued that since Parents had accepted the current IEP their case was moot.

The Hearing Officer ruled that under federal law there is no individual student/parent right to due process before the BSEA for parentally placed private school students at parental expense.<sup>3</sup> However, under Massachusetts law (603 CMR 28.03(1)(e)) parents/students do have an individual entitlement to receive special education services and have due process rights before the BSEA. Therefore, Parents' Appeal would proceed under Massachusetts law only. Clearly, as articulated in **PARENTS' POSITION**, above, there are disputed issues between Parents and TPS both currently and retroactively.

Therefore TPS' MTD was **DENIED** and the hearing proceeded.

## **FINDINGS AND CONCLUSIONS**

It is now undisputed by the parties and confirmed by the evidence presented that Lee is a student with special education needs as defined under state statute 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, Parents bear the burden of proof in demonstrating that Lee requires IEP services/service delivery in the manner which Parents contend rather than in the manner TPS has proposed. Parents also bear the burden of proof in demonstrating that they are entitled to retroactive reimbursement and to compensatory services and that such compensatory services should be implemented/provided in the manner contended by Parents.

Based upon two full days of oral testimony, the voluminous documentation introduced into evidence, and a review of the applicable law, I conclude that TPS' IEP proposed for Lee is appropriate to address his special education needs so as to provide him with a free and appropriate public education (FAPE) in the least restrictive educational environment (LRE) with several modifications/amplifications to be specified below. I also conclude that TPS owes Parents retroactive reimbursement and compensatory services, specified below, for past non-implementation of prior accepted IEPs and a failure to implement stay put rights.

My analysis follows.

### **ISSUE I – CURRENT IEP SERVICES**

603 CMR 28.03(1)(e) is the state regulation which deals with parentally placed children at private schools at private expense. 603 CMR 28.03(1)(e) provides, in its entirety:

(e) Private schools at private expense. Nothing in 603 CMR 28.00 shall be construed to limit the rights of parents to have their children educated at private schools, completely at private expense. To the extent that public school districts provide and pay for special education services for

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<sup>3</sup> Of course, nothing contained herein would preclude TPS from spending a proportionate share of its federal funding to provide Lee services (SLT, AT) at POMA, should it elect to so do. (603 CMR 28.03(1) (e) (3); SPED Advisory 2007-2).

eligible students enrolled in private schools at private expense, the following requirements shall apply:

1. Each school district shall provide special education designed to meet the needs of eligible students who are attending private schools at private expense and whose parents reside in the jurisdiction of the school district. The school district shall provide to such students genuine opportunities to participate in the public school special education program *consistent with state constitutional limitations*.<sup>4</sup>
2. The school district shall provide or arrange for the provision of evaluation services and an IEP for any eligible private school student whose parent resides in the jurisdiction of the school district. The evaluation may take place in the public school, the private school, or an appropriate contracted facility, provided that the school district shall ensure that a representative of the student's private school is invited to participate as a member of the Team pursuant to 603 CMR 28.05.
3. The school district shall provide or arrange for the provision of the special education described by the student's IEP *provided that school districts shall ensure that special education services funded with state or local funds are provided in a public school facility or other public or neutral site*. When services are provided using only federal funds, services may be provided on private school grounds.
4. Special education provided by the school district to a private school student shall be comparable in quality, scope, and opportunity for participation to that provided to public school students with needs of equal importance. Programs in which both public and private school students participate may not include classes that are separated on the basis of school enrollment or the religious affiliation of the students. Emphasis added.

(See also MDESE Administrative Advisory – SPED 2007-2.)

Consistent with Massachusetts constitutional limitations, 603 CMR 28.03(1)(e)(3) holds that provision of special education services with state or local funds to a parentally placed student at private school at private expense must be provided in a public school facility or other public or neutral site. SPED Advisory 2007-2 explains that IEP services provided with state funds may be provided at a public or neutral site convenient/close to the private school that the student attends; or the LEA may contract with local services providers – individuals, community agencies or organizations – to provide the IEP services at neutral sites within the community. If, after making reasonable efforts to provide the special education services to the student in the community where the private school is located, the LEA determines that no such arrangements are feasible, the LEA may service the student in his home community, providing transportation if necessary. (See SPED Advisory 2007-2.)

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<sup>4</sup> See Massachusetts Constitution Article XVIII – Religious Freedom – Expenditures of Public Money for Certain Institutions Prohibited (More commonly referred to as the Massachusetts Anti-Aid Amendment).

Therefore, based upon Massachusetts law I cannot order that special education services be provided to Lee at POMA. However convenient it may be for Lee to receive speech-language services or AT services during his school day/free period at POMA, Massachusetts law prohibits state or locally funded special education services to be provided at a private, parochial school. This reality was made known to Parents by the Hearing Officer numerous times prior to the commencement of the actual hearing during pre-hearing conference calls, the pre-hearing conference of June 14, 2014 and the June 27, 2014 meeting. Additionally, after the commencement of the hearing on August 5, 2014, subsequent to denial of TPS' MTD, and after Parent and TPS had made their opening statements, the Hearing Officer specified the following on the record:

Before we get to the presentation of evidence, I want to make something clear at the beginning of the hearing, because there have been continual references from the Parent to her desire that these services be provided at Presentation of Mary. I say this now because I don't wish anybody to think that this was not made aware to the parties prior to the case and at the immediate beginning of the case rather than at the end of the case.

State law specifically prohibits me from authorizing services to be provided at parochial schools. There is an amendment to the Massachusetts Constitutions which prohibits this, and this is referenced in the state regulations in terms of Massachusetts state law. Massachusetts state law gives the student many more rights than federal law, but there are some limitations on the provision of services...

So I want to be specific that I cannot order, and Parents and the School have been apprised prior to the hearing and during the hearing that the Hearing Officer cannot order services to take place at Presentation of Mary.

(Tr. – Day 1 p68, 69, 70)

I acknowledge Parents' frustration that Lee must work exceptionally long hours after school doing his homework and to keep up with his classes at POMA. However, the evidence demonstrates that Lee has achieved all A's and B's in honors level or college preparatory courses at a regular education private placement: 1) receiving no special education services; 2) with no modifications of schoolwork other than extended time to complete homework assignments and tests; and 3) while participating in after school sports. The evidence also demonstrates that Lee has strong intellectual capacity/cognitive functioning, good non-verbal skills, does well in math, has many good language skills, is able to comprehend what he reads at grade level, and has an exceptionally strong work ethic. (See **PROFILE OF STUDENT**, above summarizing Lee's various evaluations.)

Despite his many areas of educational strength, Lee also has specific learning, communication and emotional disabilities which result in discreet areas of weakness in reading fluency, language processing speed, writing/fine motor deficits, expressive language, selective mutism and a social anxiety disorder. (See **PROFILE OF STUDENT**, above; CH and CDN evaluations.)

In comparing the CH recommendations and the CDN recommendations (See **PROFILE OF STUDENT**, above; CH and CDN evaluations) with the special educational services provided on TPS'

parentally accepted IEP (See **SCHOOL'S PROPOSED PROGRAM**, above; P-4; S-20), I find that TPS' proposed special education services address the vast preponderance of the CH and CDN recommendations. Indeed, Dr. Miles-Mason of CDN in her June 2014 report (P-2g) after having reviewed her evaluation results, recommendations and TPS' proposed IEP, reported:

*The most recently proposed IEP dated (5/30/2014) offers these services with the exception of writing support. As such it appears largely appropriate in meeting his educational needs.*  
Emphasis added.

Dr. Miles-Mason then reiterated her and Dr. Urion's recommendation that, given Lee's emotional disabilities, he remain at POMA where he is stabilized and surrounded by teachers/peers who support him and accept his disabilities. Dr. Miles-Mason then ended her report as follows:

*Given these findings, I strongly recommend that [Lee] receive the academic and emotional supports and services offered in the IEP proposed (5/30/2014), receive outpatient therapeutic treatment, but remain in his current educational program at the Presentation of Mary Academy to maintain continuity and support his emotional functioning.* Emphasis added.

(See P-2g for Dr. Miles-Mason's complete report update.)

Mr. Pelletier, TPS' Director of Special Education, testified as to the manner in which TPS could deliver Lee's special education services. Regarding SLT, Mr. Pelletier testified that it could be provided through/by the Methuen Public Schools, since POMA is located in Methuen, during the school day or before/after school; or via a contract with a private vendor to provide the service. TPS would agree to have Lee's SLT provided through Parents' preferred agency (Northeast Rehabilitation) which has a direct understanding of students with selective mutism. Reading services would be provided by a reading specialist who is willing to travel to a mutually agreeable site in Methuen and accommodate Lee's class schedule, or either before/after school. Social skills would be provided preferably before/after school in THS with a social worker where a social skills group of peers could be found. Alternatively, social skills could be done at a mutually agreeable site in Methuen, but it would have to be done in isolation with the social worker which would not be as effective. AT by Ms. Mulvey from Cotting, who has already evaluated Lee and worked with him over the 2014 summer, could be done preferably in THS but could also be done in a neutral site in Methuen before/after school. Similarly so with academic support. Mr. Pelletier also described Lee's transition plan and how it would help him in the areas of pursuing higher education, employment and community services. (See testimony, Pelletier; P-4; S-20.)

Mother, through her testimony, has specifically rejected academic support services entirely and has rejected the reading services and social skills, requesting a different configuration of services in these areas. Parent has accepted the speech-language services and AT services with Ms Mulvey but wants them done at POMA during Lee's free period and requests a specific service provider (Northeast Rehabilitation), which TPS has agreed to, to provide such services. Parent has also accepted counseling services but rather than counseling provided via TPS, Parent requests that TPS reimburse Parents for

their co-pays for CBT which Lee is receiving from a private provider, once weekly in the evening. (See testimony, Mother; **PARENTS' PROPOSED PROGRAM**, above.)

With respect to SLT, I order, as already offered by TPS, that TPS utilize Northeast Rehabilitation, which has speech-language professionals experienced in selective mutism, to provide SLT either before/after school at a neutral site, as close as possible to POMA. Similarly, I order, as already offered by TPS, that TPS utilize Cotting/Ms. Mulvey, who has already evaluated/worked with Lee, to provide AT services either before/after school at a neutral site as close as possible to POMA.

Both CH and CDN have specifically recommended that Lee receive CBT for his emotional/social anxiety issues. However, there is nothing in TPS' IEP that specifies CBT. TPS does not have a school counselor certified in CBT (testimony, Pelletier). Given these facts, combined with the fact that Lee already has an ongoing relationship with his CBT private therapist, further complicated by the logistics of attempting to provide the IEP counseling services to Lee given the constraints of state law, I conclude that TPS should pay the co-pay for his once weekly private CBT in lieu of providing counseling twice weekly with a new person at an undetermined site/time.

With regard to TPS' proposed reading services, Mother has rejected them and instead proposes that TPS fund Read Naturally, a computer based reading program that Lee could use at home and/or at his own pace. No professional evaluation written for Lee has recommended Read Naturally to address his reading issues. In fact, Dr. Miles-Mason specifically recommended reading intervention 2-3 times weekly (P-2a; S-11). Mother has produced no documents describing such program or any evidence (other than her opinion) of how such program would address his reading needs. Therefore, I have no basis on which to order Mother's proposal. TPS shall continue to offer reading services with a reading specialist to be provided at a neutral site close to POMA if Mother should change her mind and accept such reading services.

The issue of Lee receiving extra time in taking his PSAT and SAT examinations has already been resolved by POMA (testimony, Mother).

## **ISSUE II – COMPENSATORY SERVICES/REIMBURSEMENT**

The statute of limitations (SOL) for special education appeals is two years. Therefore, in the instant case, Parents may reach back two years from the date they filed their BSEA Hearing Request on March 18, 2014 to March 18, 2012.

Under the accepted IEP in effect in March 2012 (S-14) TPS offered communication speech-language services once weekly for 45 minutes, and in accepting the IEP Mother specifically requested such services in the early morning when TPS was in session but before the start of Lee's school day at POMA. Such speech-language services were never provided by TPS. Similarly Lee's next IEP (P-4; S-15) provided the same services which were again accepted by Mother and were again not provided by

TPS. (See **STATEMENT/HISTORY OF THE CASE**, above; testimony, Mother.) These time periods are within the SOL.<sup>5</sup>

Mr. Pelletier testified that, to his knowledge, these services were offered on the above cited IEPs and were not provided. However, he testified that he was not present for those team meetings and he had no specific information as to why, nor did he have any evidence or proof that such services were ever actually offered to Parents or at what daily time periods they were specifically offered (testimony, Pelletier). Mother testified that no one from TPS ever contacted Parents about providing these accepted services on Lee's IEPs (See testimony, Mother.) TPS argues that it is well settled BSEA practice that once an IEP has been accepted and has expired, Parents cannot re-open said IEP, citing numerous BSEA cases. TPS is correct. In fact a number of the cases cited by TPS were authored by this Hearing Officer. However, in all the BSEA cases cited by TPS, Parents had accepted *and received the IEP services* – then later attempted to reject those expired IEPs *after having received those accepted services* and thereafter filed a BSEA appeal. The crucial distinction in the instant case is that Parents accepted the IEP services but such IEP services were simply never delivered by TPS.

Similarly, after the March 2013 finding of ineligibility, Parents invoked their stay-put rights. Still no weekly speech services were provided to Lee by TPS. The same is true after the CH evaluations when TPS again found Lee ineligible for special education – no weekly speech services were provided pursuant to Lee's stay put rights. (See **STATEMENT/HISTORY OF THE CASE**; testimony, Mother.)

Mother's testimony on these points stands essentially un rebutted. TPS has presented no evidence that communication/speech/ language services offered on the above-cited accepted IEPs and which TPS was further obligated to provide after Parents' invoked their "stay-put" rights were not provided by TPS due to Parents' failure or refusal to access same. Therefore, I conclude that TPS is responsible for providing compensatory services for 45 minutes of weekly communication - speech-language therapy that was not provided to Lee despite being accepted on his IEPs and/or were not provided to Lee despite his stay put rights from March 18, 2012 to the date that Northeast Rehabilitation begins to provide Lee SLT, pursuant to his current accepted IEP.

I also conclude that TPS is responsible to retroactively reimburse Parents for the co-pays they expended on SLT and CBT from the time TPS received the CBN evaluation in April 2014 to the beginning of the 2014-2015 school year. Dr. Miles-Mason's neuropsychological evaluation and recommendations were detailed and specific regarding Lee's educational need to receive SLT and CBT. (See **PROFILE OF STUDENT**, above; CDN evaluation.)<sup>6</sup> The CH evaluation also recommended SLT

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<sup>5</sup> Mother also testified that TPS changed the time for Lee's speech services on an earlier IEP from before school to twice a week during the middle of the day, making it impossible for Lee to receive those services, but this action occurred beyond the SOL. (See testimony, Mother; P-6a.)

<sup>6</sup> I note that the 2013 CH independent evaluation also recommended SLT with a person experienced in selective mutism and CBT. However, the CH SLT and CBT recommendations were not as specific, educationally, as CDN's. Lee's SLT is already covered by his "stay-put" rights as I have ordered such compensatory services until Lee begins SLT with Northeast Rehabilitation pursuant to his current accepted IEP. The CH recommendations for CBT were not sufficient in themselves for me to order CBT back to the CH evaluations.

and CBT. I found both the CBN and CH evaluations to be much more comprehensive than the TPS evaluations. Indeed, TPS did not do any psychological evaluation.

As compensatory services for the two years of not providing SLT pursuant to accepted IEPs and pursuant to stay put; and in lieu of the social skills for an hour per week proposed in the currently accepted IEP, Parents propose that TPS fund two LC summer placements: Social Pragmatics over the 2015 summer and Transition to College over the 2016 summer. I deny Parents' requests for a number of reasons. First, LC College is not a MDESE approved special education placement. Second the current IEP offers summer services which were accepted by Parents, were only partially accessed by Lee over the 2014 summer; and were found appropriate by Dr. Miles-Mason (P-2g). Third, the 2015 summer is beyond the scope of the current IEP which goes from June 2014 through May 2015. Fourth, no professional evaluation from CH or CDN has recommended LC as a summer program for Lee. Fifth, no evidence has been submitted by Parents regarding the specifics of these two LC programs. Sixth the summer of 2016 is over one year beyond the current IEP and will likely be after Lee has graduated from POMA or some other high school. Graduation terminates all rights to LEA funded special education services under both state and federal special education law. I note Mother's testimony that a student must have graduated before he can be accepted into LC's Transition to College Program (testimony, Mother).

Kurzweil computer programming software is a tool for text to speech reading and structured reading activities, note taking, dictation to print, and writing activities. After the Cotting/Mulvey AT evaluation and the current IEP services were accepted, but before Ms. Mulvey actually began providing AT services to Lee over the 2014 summer, Mother purchased the Kurzweil 3000 firefly software for Lee which he can utilize on both his computer and his Ipad. TPS has refused to reimburse her for it. However Kurzweil was specifically recommended by Dr. Miles-Mason (P-2a; S-11), utilized by Ms. Mulvey in the Cotting AT evaluation (P-2b; S-13), and utilized by Ms. Mulvey in providing AT services to Lee over the 2014 summer (P-8a). Lee utilized the Kurzweil 3000 firefly over the summer in AT services with Ms. Mulvey to practice writing, draft essays from his graphic organizer and in several reading activities. (See Mulvey update, P-8a.) I find that this computer software directly addresses Lee's reading disabilities, his writing disabilities and his fine motor weakness/developmental coordination disorder. I might not normally order an LEA to reimburse a Parent for such a computer software program when such a program could be utilized in a public school and/or purchased by the LEA for student use. However, given the non-provision of once weekly speech services for two years on accepted IEPs/pursuant to stay-put status by TPS; given my finding that TPS owes Parents for compensatory service for these weekly services which were not provided; and given that the SLT and CBT services which Parents have provided during said time period and for which I have ordered TPS to reimburse Parents do not fully compensate Parents for this two year period, I find payment to Parents for this computer software program is appropriate as a compensatory service. Similarly, I order TPS to pay Parents for their purchase of Dragon Naturally Speaking dictation software, which was specifically recommended by Dr. Miles-Mason as related to Lee's disabilities/weaknesses described directly above, as a compensatory service.



## ORDER

IA. TPS shall provide Lee SLT via Northeast Rehabilitation Services and AT services via Cotting/Ms. Mulvey at a neutral site as close as possible to POMA before school begins or after school ends at POMA unless TPS, in its sole discretion, elects to utilize federal proportionate share funds to provide such SLT and AT at POMA during Lee's free period.

IB. TPS shall prospectively pay to Parents their co-pay for Lee's CBT from the beginning of the 2014-2015 school year until the end of this school year upon presentation of the private CBT providers bill to Parents for said services.

IC. Pursuant to the current IEP, TPS shall provide Lee reading services and/or social skills services and/or academic support services should Parents change their minds regarding receipt of such services by Lee.

IIA. TPS, as compensatory services, shall reimburse Parents for any co-pays they expended for SLT Lee received from March 18, 2012 until Northeast Rehabilitation begins providing SLT pursuant to the currently accepted IEP.

IIB. TPS shall reimburse Parents for co-pays for once weekly CBT from April 25, 2014 to the beginning of the 2014-2015 school year upon presentation of the CBT provider's bill to Parents for such co-pays.

IIC. TPS shall, as compensatory services, reimburse Parents for their purchase of the Kurzweil 3000 computer program software upon presentation of Parents' bill for same.

IID. TPS shall, as compensatory services, reimburse Parents for their purchase of Dragon Naturally Speaking software upon presentation of Parents bill for same.

Compliance with **ORDER IIA through IID** shall constitute the entirety of TPS' obligation to provide Parents compensatory services/reimbursement.

By the Hearing Officer,

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Dated: \_\_\_\_\_