

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

In re: Lee¹

BSEA #: 1404036c

RULING ON PARENTS' MOTION FOR COMPLIANCE WITH BSEA DECISION

This ruling 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 **DECISION** in the above-entitled matter was rendered on October 17, 2014. That **DECISION** is hereby incorporated in its entirety by reference in this Ruling on Parents' Motion for Compliance with BSEA Decision (Compliance Ruling).² The **ORDER** in the above-entitled **DECISION** referenced two issues: Issue I – Current IEP Services, and Issue II – Compensatory Services/Reimbursement. The dispute over compliance involves **Order IA**, to wit:

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.

(Note: With respect to the above: TPS is Tewksbury Public Schools; SLT is speech-language therapy; AT is assistive technology; and POMA is Presentation of Mary Academy, the private, non-special education parochial school located in Methuen, MA, which Lee attends at private expense.)

On November 6, 2014 Mother filed a Motion of Non Compliance (MNC) alleging that TPS was not complying with Section IA of my **ORDER** in BSEA #1404036, along with written argument and eight exhibits labelled P-1 through P-18. On November 14, 2014 TPS filed its Opposition to Parents' MNC (Opposition) along with written argument and 13 exhibits labelled S-1 through S-13. On November 17, 2014 Parents filed a Rebuttal with additional documentation, most of which had already been filed by one or both parties. Any new documents will be individually referenced, if necessary, in this Compliance Ruling. The Hearing Officer scheduled a conference call for November 25, 2014 but Mother requested a postponement, so the conference call took place on December 3, 2014. During this call the Hearing Officer informed the parties that they had submitted sufficient information via their exhibits and written arguments for the Hearing Officer to render a Compliance Ruling without the need for a hearing or oral argument on Parents' MNC or TPS' Opposition thereto. Final written clarifications were submitted by the parties by December 5, 2014.

603 CMR 28.08(6)(b) provides, in its entirety:

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

² Readers are referred to the underlying **DECISION** for a fuller understanding of this Compliance Ruling.

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the facts on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b). Emphasis added.

This regulation is appended to all BSEA Decisions along with other post decision rights and procedures. (The language of this regulation also appears as BSEA Hearing Rule XV – Compliance with Decision.)

PARENTS' POSITION

Parents contend that TPS has failed to comply with Section IA (quoted above) of my **ORDER**. Mother also contends that she exercised “stay put” rights to Lee’s placement at POMA but that TPS has failed to do so implement same.³

SCHOOL'S POSITION

TPS contends that it has repeatedly attempted to implement Section IA of the Hearing Officer’s **ORDER** but that Parents have objected to all TPS proposals for implementation. TPS also contends that Parents have no placement pending appeal or “stay put” rights at POMA because, in this matter, stay put refers to services provided to Lee, not Lee’s physical placement at POMA.

RULING

Based upon a review of my **DECISION** and **ORDER**; Parents’ MNC; TPS’ Opposition; Parents’ Rebuttal; all exhibits submitted by both Parents and TPS; and a review of the applicable law; I conclude that: 1) TPS has attempted to comply with Section IA of my **ORDER**; and 2) Lee has no placement pending appeal or “stay put” rights to receive his special education services at POMA. Therefore, Parents MNC is **DENIED**.

My analysis follows.

I.

TPS has made numerous attempts to implement Section IA of my **ORDER**. My **DECISION/ORDER** was issued and mailed to the parties on Friday October 17, 2014, likely reaching the parties on Monday October 20, 2014. On October 22, 2014 TPS special education director, Mr. Pellitier, sent Parents a detailed letter delineating how TPS would implement all aspects of my

³ Parent has, subsequent to her MNC, attempted to raise numerous other issues. Such issues are either beyond the scope of a compliance ruling, have no relevance to the ultimate outcome of this appeal, or are beyond the scope of the entire BSEA decision on the merits because they involve issues of federal law and the hearing was conducted pursuant to Massachusetts law only. (See **PROCEDURAL NOTE**, pages 8-9 of **DECISION**.)

DECISION (P-3; S-2). On October 23, 2014 Parent wrote to TPS regarding her objections to TPS' proposed implementation of Section IA of my **ORDER** (P-4). On October 25, 2014 Parent invoked "Stay-Put on [Lee's] current IEP to include delivery of services at PMA" (P-5). On October 27, 2014 Mr. Pellitier wrote to Parents disputing "stay put" and indicating that they would try to see if service providers could accommodate Lee's schedule between 3PM to 5PM Monday through Thursday (P-6; S-3). On October 29, 2014 Mr. Pellitier attempted to address Parents' transportation concerns and updated the issue of service providers' availability (S-4). On October 31, 2014 in response to a Parent e-mail of October 29-30, 2014 (in Parents' supplemental documents) Mr. Pellitier offered a different configuration of services/locations either before or after school, noting that Northeast Rehabilitation may not be available to provide SLT before 8AM or after 3PM (P-7; S-5). Parent responded on November 1, 2014 objecting to all TPS' 10/31/14 proposals (P-8). On November 4, 2014 Mr. Pellitier requested a meeting between Parents, TPS, and the proposed service providers to work together given parental limitations on Lee's schedule and Northeast Rehabilitation, the ordered SLT provider's, availability limited to 8AM to 2PM. Mr. Pellitier offered 4 potential meeting dates with wide time flexibility on each date (See P-11; S-9). Parents declined the meeting that same day, November 4, 2014 (P-13).

On November 6, 2014 Mr. Pellitier wrote to Parents (S-6):

Given that none of the options I have suggested is agreeable to you, and given that you have rejected my offer to meet and discuss the time and location of services, I am arranging services for [Lee] as follows:

1. SLP services on Tuesday and Friday at 8:30-9:15a.m. at the Crest Collaborative;
2. AT services on Thursday at 2:30-3:30p.m. at the CREST Collaborative.

A vehicle will pick [Lee] up at PMA at 8:15a.m. and transport him to Crest Collaborative. A vehicle will pick him up at 9:15a.m. and return him to PMA on Tuesday and Friday. A vehicle will pick [Lee] up at PMA after dismissal and bring him to CREST Collaborative on Thursday afternoon. A vehicle will then transport him home to 120 Bligh Street, Tewksbury, MA. This schedule meets your concerns, Cotting Consulting and Northeast schedule constraints, enables the district to provide transportation, and complies with the BSEA Order. Donna Parker has agreed to these arrangements.

This arrangement will begin on the week of Monday, November 10th. Please confirm.

On November 7, 2014 Mother responded to Mr. Pellitier's letter of November 6, 2014 alleging that such arrangement was not in compliance with the BSEA **ORDER** and that "stay-put at POMA" was still in effect. Mother also inquired whether under such an arrangement Lee would have the same service providers along with several other questions. Mother ended her e-mail (S-10) as follows:

If you keep [Lee's] SLP at PMA and move his AT either off site with transportation on Thursdays... you will be in compliance under the BSEA Order.

Also on November 7, 2014, Mr. Pellitier responded (S-8):

Thank you for your two emails last night. I am happy to hear that we are in agreement with respect to AT services. In answer to your question, Melissa Mulvey will remain the service provider as she has agreed to do so. I will confirm with Melissa Mulvey and make the necessary arrangements for transportation from PMA to CREST and from CREST to your home in Tewksbury. Service will resume next week.

With respect to speech and language services, Melissa Pierce would remain the provider, and services would continue to be delivered during [Lee's] free period, albeit at a neutral site. CREST Collaborative is a public special education day school, and is located on Broadway 1.3 miles from PMA. As explained, transportation would be provided to and from PMA. PMA has no objection to this arrangement; and yes, Mrs. Parker did state [Lee] would need your permission. Please advise if this arrangement is acceptable.

On November 11, 2014 Mother e-mailed TPS and all service providers that there was no agreement between the parties regarding the time and location of services, that Parents did not agree to the CREST Collaborative site because it was inappropriate, and that stay-put was still in effect (S-12).

Based upon the above, I find that any lack of compliance with my **ORDER** was not due to any delay or lack of effort by TPS. TPS has diligently attempted to implement my **ORDER** but has been thwarted by Mother at every attempt.

Mother had specifically requested Northeast Rehabilitation because it could provide a speech/language therapist with training/experience in selective mutism. Such qualifications were specifically recommended in both the Children's Hospital and Child Development Network evaluations. TPS specifically agreed to contract with Northeast Rehabilitation to provide Lee's SLT because of this expertise. Therefore the Hearing Officer incorporated same in his **ORDER**⁴. The fundamental reality, however, is that due to Northeast Rehabilitation's schedule restrictions, my **ORDER** cannot be implemented precisely as written. Given that Northeast's availability is limited (8A.M. to 2 P.M.), and given that Lee's POMA school day this year runs from 7:30A.M. to 2 P.M. each day, it is impossible for Lee to receive SLT from Northeast Rehabilitation either before or after school. My authority extends over TPS – it does not extend over Northeast Rehabilitation and I cannot order such agency to provide Lee's SLT after school. Therefore, if Parents wish Lee to receive his SLT from Northeast Rehabilitation with its expertise in selective mutism, such SLT services must be provided during Lee's school day. Ironically, Mother actually wants Lee's SLT to be provided during his free periods during the school day at POMA rather than after school. However, when offered the opportunity for Lee to receive SLT during his school day free periods but not at POMA, Mother refuses. As explained at length in the **DECISION**, because of Massachusetts constitutional limitations, I cannot order Lee's state funded special education services to be provided at a religiously affiliated private school such as POMA. Rather, such services must be provided at a nearby public school facility or other public or neutral site (See **DECISION** p.9-11.)

⁴ Similarly Cotting/Ms. Mulvey was specifically ordered to provide AT to Lee because Ms. Mulvey had performed Lee's AT evaluation, had already worked with Lee over the 2014 summer, was requested by Mother, and was offered/agreed to by TPS.

I conclude that TPS' November 6, 2014 offer to Parents (see S-6 quoted above) comes as close as possible to implementing Section IA of my **ORDER**. It provides Lee his AT after school on Thursday and his SLT during his free periods at POMA on Tuesday and Friday utilizing the AT(Cotting/Ms.Mulvey) and SLT(Northeast Rehabilitation) service providers that were agreed upon/ordered. Actual provision of services is physically located at the CREST Collaborative, a public educational facility only 1.3 miles from POMA. (See also S-8.) Transportation is provided to/from POMA/CREST Collaborative by TPS for Lee's SLT during his free periods at POMA on Tuesday and Friday. Transportation is provided by TPS from POMA to CREST Collaborative for Lee's after school AT on Thursday and then from CREST Collaborative to Lee's home. (See S-6, 8.) I conclude that implementation of S-6 by TPS constitutes compliance with Section IA of my **ORDER**.

II.

Mother contends that Lee has "stay put" rights at POMA. TPS contends that Lee has no placement pending appeal rights to receive his special education services at POMA.

Whether referred to as "stay put" rights or placement pending appeal rights, the common denominator is that a student has the right, pending appeal, to remain in his last agreed upon special education placement i.e., the last special education placement agreed to by Parents and School. POMA was never Lee's stay put placement or placement pending appeal. TPS never agreed to place Lee at POMA or to fund such placement. POMA was purely a parental choice and a parentally funded private school placement. Further, POMA is not a special education placement. It is a private, parochial college preparatory high school which specifically does not provide special education services. Further still, due to Massachusetts constitutional limitations, TPS could not place/fund Lee at POMA. Finally, based upon those same Massachusetts constitutional limitations, I cannot order TPS to provide Lee special education services at POMA. For all of the above reasons, Lee clearly has no placement pending appeal rights or stay put rights to a physical placement at POMA.

In this case Lee's placement pending appeal rights are the rights to the specific special education services proposed in his last accepted IEP in June 2014 when Parents accepted the special education services proposed by TPS but rejected TPS' proposal placement at Tewksbury High School. Placement pending appeal rights insure the same kind of special education program and/or services which have been agreed to by the parties or ordered by the Hearing Officer.

COMPLIANCE ORDER

- 1) Parents' MNC is **DENIED**.
- 2) Lee has no placement pending appeal or stay put rights to receive his special education services at POMA.

By the Hearing Officer,

December 16, 2014