

# COMMONWEALTH OF MASSACHUSETTS

## Division of Administrative Law Appeals

### Bureau of Special Education Appeals

In re: Student v. Georgetown Public Schools  
& Landmark School

BSEA #1408733

#### **RULINGS ON PARENTS' MOTION FOR SUMMARY DECISION, PARENTS' MOTION FOR STAY PUT AND LANDMARK SCHOOL'S MOTION FOR SUMMARY JUDGMENT**

#### **BACKGROUND**

On May 19, 2014, Parents filed for an expedited hearing before the BSEA. On May 20, 2014 expedited status was granted and a hearing was scheduled for June 3, 2014 before Hearing Officer William Crane. The basis for expedited status was that Landmark School (LM) had dismissed/excluded Student for violation of LM's drug policies. LM agreed to allow Student to attend LM for the remainder of the 2013-2014 school year and all parties agreed to removal of this case from expedited status. Several conference calls took place. Hearing Officer Crane was to retire from the BSEA on June 26, 2014. On June 16, 2014 Hearing Office Crane issued an ORDER establishing timelines for Parents to file an amended hearing request, clarification of their motion for stay put, and potentially a motion for summary judgment; for LM and Georgetown Public Schools (GPS) to file any responses; and for the filing of affidavits.

On June 17, 2014 Parents filed an Amended Request for Hearing (as a verified complaint also serving as Parents' and Student's affidavits); a Motion for Stay-Put; and a copy of the most recently accepted Individual Education Program (IEP). On June 18, 2014 LM filed affidavits and documents. On June 24, 2014 this case was administratively re-assigned to Hearing Officer Raymond Oliver. On July 14, 2014 LM filed a Motion for Summary Judgment (MSJ) with accompanying memorandum. On July 16, 2014 Hearing Officer Oliver scheduled a conference call for July 18, 2014 which took place on that date. As a result of the July 18, 2014 conference call the parties agreed and it was so ordered that Parents would file any opposition to LM's MSJ and/or their own MSJ by July 30, 2014; that any response from LM and/or GPS was to be filed by August 5, 2014; and that a telephonic motion session on all motions would take place on August 7, 2014.

On July 30, 2014 Parents filed a Motion for Summary Decision (MSD) and Opposition to LM's MSJ with accompanying memorandum. On August 5, 2014 LM filed its Opposition to Parents'

MSD. Per Parent request, the telephonic motion session took place on August 8, 2014 instead of August 7, 2014.

## **STATEMENT OF THE CASE**

Student is a 17 year old young man with a language based learning disability (LBLD) and Attention Deficit Hyperactivity Disorder (ADHD) who has been found eligible to receive special education. He and his family live in Georgetown, MA and GPS is the school district responsible for his education. Student initially attended LM during his 9<sup>th</sup> grade school year (2011-2012) as a privately placed, parentally funded day school student. On May 29, 2012 Parents and GPS entered into a Settlement Agreement (SA) specifying placement of Student at LM for his 2012-2013, 2013-2014 and 2014-2015 school years, along with an apportionment of costs between Parents and GPS for those three school years and a waiver by Parents of retroactive reimbursement for the 2011-2012 school year, as well as prospective transportation funding. This SA contained various conditions, one of which specified that its terms applied:

*so long as the STUDENT continues to be accepted by, and participates in these special education and related services as specified by the IEPs; and otherwise remains in good standing as a student at Landmark during these periods.* (Emphasis added.)

Other pertinent portions of the SA include:

7) *Should the STUDENT be dismissed or become permanently separated from Landmark for any reason or at any time prior to June 2015, the parties agree to reconsider a TEAM meeting to discuss appropriate education planning and to develop an IEP for STUDENT.*

9) The PARENTS stipulate that Landmark is wholly of their own selection; that the COMMITTEE represented nothing to them in relation to the merits of such placement; and that they relied solely on their own evaluations of the placement to determine its appropriateness.

11) This Agreement does not constitute an admission by the COMMITTEE that Landmark constitutes the least restrictive appropriate placement capable of assuring the STUDENT's free appropriate public education....

14) The parties to this Agreement acknowledge that they have had the opportunity to be represented by counsel in the negotiations of this Agreement and have signed this Agreement voluntarily with full understanding of its terms. Without limiting the foregoing generality, *the PARENTS specifically acknowledge that they are waiving any and all specific rights which might accrue to them under M.G.L. ch.30A, 71B, 20 U.S.C. 1400 et seq; Section 504 of the Rehabilitation Act of 1973; the Americans with Disabilities Act, and the Regulations issued pursuant thereto; and 42 U.S.C. 1983.... Further the parties have read the entire Agreement carefully and have discussed it with their attorneys, understand it and accept its terms.*

16) *The Parties agree that the terms of the written Settlement Agreement are deemed to be incorporated into the IEPs development for the STUDENT, and that said terms shall*

be subject to the jurisdiction of the BSEA in the event of any dispute between the parties as to the enforcement of the written Agreement (See SA). Emphasis added.

As part of the enrollment package and as a condition of his enrollment at LM, Student executed an Abstinence Contract on August 21, 2011 which states, in pertinent part (LM #5):

*I, [Student] understand that the policy of Landmark School forbids me from being in the presence and possession of, or use of drugs.... My continued enrollment at Landmark School is contingent upon complete abstinence from the aforementioned substances. This policy will be in effect for my entire tenure at Landmark....* In order for this policy to be enforced by Landmark School, I agree that it may become necessary to conduct drug/substance screenings, searches of individual students and/or their luggage, rooms and belongings, including vehicles and backpacks or lockers.... I understand that a positive screen will be deemed accurate and therefore indicative of substance abuse.

Further, I understand and agree to adhere to the disciplinary steps outlined in the Student Handbook regarding substance usage and that failure to comply with drug screenings, counseling referrals, searches and disciplinary steps may result in expulsion from Landmark School. Emphasis added.

Parents also executed said Abstinence Contract with the following specific points:

As parents... We hereby authorize Landmark School to search the person or property of our son... and to have him... willingly submit to a urinalysis and/or Breathalyzer for the intent purpose of identifying drug, alcohol and/or illicit substance use... we give permission for authorized Landmark staff to obtain the sample, and... we authorize the medical facility or practitioner to report these test results directly to authorized Landmark Staff.

Further, ... we understand and agree to adhere to the policy and disciplinary steps outlined in the Student Handbook regarding substance usage and that failure to comply with drug screenings, counseling referrals, searches, and disciplinary steps may result in expulsion from Landmark School. (See LM#5 for complete Abstinence Contract.)

Each year LM publishes a Student Handbook (LM#2) which provides a detailed section on LM's Substance Abuse Policy. LM explains what constitutes a first and second offense and what the consequences are for each offense. For a first offense any student determined to be in possession of or using alcohol or drugs or caught tampering with or falsifying a urine sample will be suspended for five days, lose privileges, and be subject to further testing in thirty days. Upon return from suspension the student is required to complete an interview with a substance abuse specialist and then participate in a six session substance abuse psycho-educational program. This first offense remains in effect for twelve months from the date of the offense. For a second offense within this twelve month period the student will be dismissed from LM. (See LM#2 for full explanation.)

On September 30, 2012 Student and Parents acknowledged receipt of, review of and agreement with the policies and procedures in the LM 2012-2013 Student Handbook (LM#4). On August 3, 2013, Student and Parent acknowledged receipt of, review of, and agreement with the policies and procedures in the LM 2013-2014 Student Handbook (LM#3).

On November 11, 2013 Student tested positive for marijuana as determined by a drug test.<sup>1</sup> (See Affidavit Jamieson; Genetelli.) On November 19, 2013 LM convened its Standards Committee to review the infraction and its consequences. GPS was notified. As a first offense to LM's substance abuse policy detailed in the Student Handbook, the consequences were a five day suspension; participation in a psychoeducational clinical dependency group with a private psychologist; and a statement that a second offense would result in dismissal. Mr. Genetelli spoke directly with Student and Parents regarding the implications of a first offense and the consequences of a second offense (See Affidavit, Genetelli; LM #6.)

On January 29, 2014, Student again tested positive for marijuana (LM#7). Student denied usage, said the test was incorrect, and stated his desire to remain at LM. Student then submitted to a second urine sample which came back negative. LM decided to accept Student's statement of non-use of marijuana, Parents were informed of the incident, and LM did not consider this incident as a second offense. (See Affidavit, Jamieson.)

On April 11, 2014 Mr. Jamieson, Assistant Dean of Students at LM, brought Student to his office for the purpose of a drug screening test. Mr. Jameson informed Student of the purpose and told him if he was going to test positive then no test would occur on that day because the goal was to keep him enrolled at LM and avoid a second offense. Student denied usage and proceeded to the Health Center with Mr. Jamieson for the drug test. During the drug testing process Student was caught with a vial of urine up his sleeve. Mr. Jamieson then informed Parents of the incident, that this would likely be considered a second offense, and that another Standards Committee meeting would be scheduled. Parents requested a delay in the meeting to which LM agreed. The Standards Committee met on May 13, 2014<sup>2</sup>, discussed the manifestation determination standard and determined that there was no link between Student's disability and the incident, as evidenced by Student's planning and execution of being in possession of an alternative urine sample.<sup>3</sup> The Standards Committee determined that the April 11, 2014 incident constituted a second offense. (See affidavit, Jamieson.) On May 13, 2014 Mr. Jamieson formally wrote to Parents that the Standards Committee had determined that Student's behavior was not a manifestation of his

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<sup>1</sup> In their Amended Request for Hearing (filed as a verified complaint also serving as their affidavit), Parents state that Student was selected for a drug test in November 2013 because he had been observed in possession of a cellular phone case with a marijuana leaf design.

<sup>2</sup> During the time period between the April 11, 2014 incident and the May 13, 2014 Standards Committee meeting, Student continued to attend LM with no consequences.

<sup>3</sup> In their Amended Request for Hearing, Parents indicate that no formal manifestation determination occurred at the May 13 meeting, and they suggest that LM violated Student's rights by excluding him from school without a lawful manifestation determination process. While it is unclear from the evidence before me whether LM complied with the formal requirements of 20 U.S.C. § 1415(k), that obligation belongs to the public school district, not a private school placement. *See* 20 U.S.C. § 1415(a) (providing that "[a]ny State educational agency, State agency, or local educational agency that receives assistance under this part [20 U.S.C. §§ 1411 *et seq.*] shall establish and maintain procedures in accordance with this section . . ."); and refer to discussion of state action, below.

disability and that Student was dismissed from LM (LM#8). This dismissal letter was also sent to GPS which had participated in the May 13, 2014 Standards Committee meeting via telephone.

As stated above, Parents filed for a BSEA hearing on May 19, 2014 against GPS and LM. LM allowed Student to return to LM on June 2, 2014 and he was permitted to finish the school year at LM. However, LM has informed Parents that it does not intend to allow Student to return to LM for his final year, the 2014-2015 school year, in September 2014. There is no indication that GPS has identified an alternative placement that can implement Student's IEP for the upcoming school year. (See Parents' verified complaint.)

## **STATEMENT OF POSITIONS**

### Parents' Position

In their Motion for Stay Put Order Parents contend that Student is entitled to stay put rights at LM as his last accepted IEP/last accepted placement. Parents cite two BSEA decisions, *In re: Northampton Public Schools 9MSER 397* (2003) and *In re: Falmouth Public Schools and Cotting School 10 MSER 496* (2004), in support of their position.

In their MSD Parents reiterate their position that a Stay Put Order should issue for LM as Student's last accepted placement. Parents state that GPS has not proposed a placement or initiated a search for an alternative placement. Parents rely on the above-cited *Northampton* decision as authority for Student's stay put rights at LM. Parents also argue that LM has no authority to terminate Student, as he is a publicly funded student with an IEP from GPS, and GPS could not expel Student under same circumstances were he to be attending GPS. Parents contend that when a public school places a student in a private school in order to provide that student with FAPE, the student is entitled to all of the rights he would have if he were attending a public school. Parents contend that any rule or policy that GPS could not apply to Student cannot be applied to Student by LM. Parents contend that by accepting public funding for providing special education services to publicly placed students under the IDEA and MGL c71B, LM must be bound by all relevant federal and state requirements. Parents distinguish between purely privately placed/funded students at LM and publicly placed/funded students at LM. Parents also attack LM's drug policies and drug screening as contrary to several Massachusetts laws.

### LM's Position

LM states that it is a private special education school approved by the Massachusetts Department of Elementary and Secondary Education (MDESE) to serve publicly funded special education students. LM is governed by an independent board of trustees, owns its own facilities, maintains an endorsement funded by private donors, hires its own personnel and implements its own specialized curriculum. Approximately 50% of its students are privately placed/funded with no local or state involvement and approximately 50% of the students are either fully funded by local school districts or through cost-share agreements between parents and local school districts. As a condition of enrollment at LM, parents and students are required to review and execute documents relating to enrollment including an Abstinence Contract and acceptance of the LM Student Handbook.

LM argues that stay put is not applicable to LM in this case because stay put is the educational program and not the specific placement. See *In re: Dracut Public Schools and Melmark 14 MSER 286* (2008). LM argues that stay put does not attach specifically to LM and that under 603 CMR 18.05(7) GPS has the responsibility to craft a new appropriate and equivalent IEP for Student.

LM argues that Parents effectively waived stay put via the SA that resulted in Student's continuation at LM after his first, privately funded year; via Student's and Parents' execution of the Abstinence Contract; and via repeated acceptances of the terms and conditions of the Student Handbook acknowledging the explicit consequences of failure to adhere to LM's substance abuse policies.

LM states that it is a private school and that LM's receipt of state/federal funds does not convert LM from a private school to a public school. Citing *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), LM argues that a private school is not transformed into a state actor (or a public school) by the mere receipt of public funds. As a private school LM has the authority to promulgate and enforce its own rules and procedures and that all LM students – privately funded, publicly funded, or cost-shared/placed there via a settlement agreement between Parents and their public school – are bound by LM's conditions for enrollment/attendance. LM contends that its dismissal of Student was proper and appropriate.<sup>4</sup>

#### GPS' Position

GPS has taken no formal position in this matter and has submitted no written or oral argument supporting either Parents or LM. GPS states that, pursuant to 603 CMR 18.05(7), it has convened a team meeting and developed the required termination plan in the form of a new IEP for Student. Said IEP addresses Student's special education needs and the services to address these needs but does not identify a specific placement to address such needs (See GPS IEP). GPS states that if Student remains at LM there would be no need to identify another placement. If the BSEA rules that Student is not entitled to remain at LM, GPS will reconvene the team to address the issue of a specific placement.

#### **RULINGS**

Pursuant to 801 CMR 1.01(7)(h), Summary Decision is available to parties when there is no genuine issue of fact relating to all or part of a claim or defense and the moving party is entitled to prevail as a matter of law. This rule of administrative practice is modeled after Rule 56 – Summary Judgment – of both the Massachusetts and Federal Rules of Civil Procedure. The party seeking summary judgment bears the burden of proof, and all evidence and inferences must be viewed in the light most favorable to the party opposing summary judgment. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252 (1986).

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<sup>4</sup> While LM did not initially wait the requisite 30 days to allow GPS to develop its written termination plan pursuant to 603 CMR 18.05(7), its readmittance of student to finish out the school year allowed GPS time to develop its termination plan after school ended on June 12, 2014.

In this case both Parents and LM agree that there are no genuine issues of fact and both Parents and LM believe that they are entitled to a Summary Decision / Summary Judgment based upon the facts and the law.

Based upon the exhibits and affidavits submitted by the parties, the written and oral arguments advanced by the parties, and a review of the applicable law, I conclude as follows:

- I. Parents' Motion for Stay Put at LM is **DENIED**.
- II. LM's Motion for Summary Judgment is **GRANTED**.
- III. Parents Motion for Summary Decision is **DENIED**.

My analysis follows.

- I. Denial of Parents' Motion for Stay Put and**
- II. Allowance of LM's Motion for Summary Judgment**

20 U.S.C. §1415(j); 34 CFR 300.518; and 603 CMR 28.08(7) provide that during the pendency of a due process proceeding, a student is entitled to remain in his then current educational placement unless the parents and the school agree otherwise. The above statute and regulations do not define this term. Parents contend that these provisions require Student to remain at LM and that any parental waivers are invalid if they contravene federal law. Parents distinguish between publicly funded students at LM and privately funded students, suggesting that the former have greater rights than the latter by virtue of the source of their tuition. LM contends that Student is entitled to remain in the same type of special education program pending appeal, but that stay put does not attach specifically to the LM placement. LM contends that, pursuant to 603 CMR 18.05(7), GPS has the obligation to propose the required program for Student. LM also contends that Parents have effectively waived stay-put by numerous actions, as set forth in **STATEMENT OF THE CASE**, above.

BSEA administrative decisions, while instructive, do not have precedential value as judicial decisions do. Because most BSEA cases are highly fact-intensive, it is not unusual for different hearing officers to rule differently on the same or similar issues, based upon different fact patterns and circumstances. This is well illustrated in the instant matter by the fact that both Parents and LM cite BSEA decisions in support of their differing positions. Hence, while useful guidance may be gleaned from consideration of the BSEA decisions cited by the parties (discussed below), I note that none of those cases involved a private school termination of a student for disciplinary reasons. Therefore, this case is one of first impression.

*In re: Northampton Public Schools* 9 MSER 397 (2003) supports Parents' position in this case<sup>5</sup>, while *In re: Dracut Public Schools and Melmark* 14 MSER 286 (2008) supports LM's position,

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<sup>5</sup> I note that the hearing officer in *Northampton* cites no judicial authority for her holding that stay put applies to private schools.

holding that Melmark School, Student's then current private school, did not constitute Student's stay put placement. The hearing officer in *Dracut* found that a student's stay put placement may refer to the type of special educational program and services rather than to a specific school, citing *A.W. v Fairfax County School Board* 372 F.3d 674, 682 (4th Cir. 2004):

To the extent that a new setting replicates the educational program contemplated by the student's original assignment and is consistent with the principles of mainstreaming and affording access to a FAPE, the goal of protecting the student's educational placement served by the stay-put provision appears to be met.

Interestingly, a third BSEA Decision, *In re: Falmouth Public Schools and the Cotting School* 10 MSER 496 (2004) offers support for both Parents' and LM's positions. While ultimately holding, based upon the specific facts of that case, that Cotting could not terminate the student's placement, the hearing officer went on to find:

Although it is clear that [student] has the right to "stay-put", what that right means is a different question. In ensuring "stay-put" rights, the regulation makes no distinction between public school students and publicly-funded private school students. Further, publicly-funded private school students are entitled to the "full protections of state and federal special education law and regulation," 603 CMR 28.06(2)(f). One might argue that this ends the debate – [student] has a right to stay at Cotting. However, there are several other factors to consider. First, a "stay-put" right does not necessarily ensure staying at the same location, but rather, ensures the same program and kind of placement – that, potentially, can be provided at a different location. (See federal commentary, volume 64 of the federal register at page 12616.) Further, one must consider the applicable Massachusetts regulations for private special education schools. They provide guidelines for terminating students, and make no reference to the student's "stay-put" rights. Nor do they condition termination (a change in placement) on student/parental consent. Rather, they condition termination on a) the public school's having sufficient time to search for an alternative placement and assuming responsibility for the student, or b) safety concerns. See 603 CMR 28.09(12), 603 CMR 18.05(7)(b), (d). 10 MSER at 501.

Regulations for MDESE approved private special education school are codified at 603 CMR 18.00 and, as cited in *Falmouth*, 603 CMR 18.05(7) addresses termination of students from said private special education schools.<sup>6</sup>

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<sup>6</sup> (7) Termination.

(a) Upon admission of a student pursuant to 603 CMR 28.00, the school shall ascertain a school district contact person. The school shall keep such person informed of the progress of the student and shall notify that person immediately if termination or discharge of the student is being discussed.

(b) The school shall, at the time of admission, make a commitment to the public school district or appropriate human service agency that it will try every available means to maintain the student's placement



Based upon *Dracut*, *Fairfax* and *Falmouth*, as well as 603 CMR 18.05(7), I find that Student's placement pending appeal in the instant disciplinary termination case is the educational program promulgated in his last accepted IEP but not specifically LM. I find the above-cited analysis in *Fairfax* and *Falmouth* to be persuasive. I conclude that the hearing officer in *Dracut* put it most succinctly:

In sum, IDEA stay put principles that determine a student's "then-current educational placement" are neither rigid nor automatic. The specific facts of the particular case guide the determination of whether a student's specific school placement must be maintained as his or her stay put placement.

I further find that Parents' argument in this case flies in the face of 603 CMR 18.05(7). If parental assertion of stay put rights to a particular private school barred any publicly funded student from termination, the regulation covering that specific topic - termination of publicly funded students from a private school - would serve no purpose. I conclude that such termination regulation was written for the precise purpose and situation presented by the instant case.

In addition, as discussed below, I find that the explicit SA provisions which were accepted by Parents, the Abstinence Contract accepted by both Student and Parents, and the acceptance, annually, of the terms and conditions of the LM Student Handbook by Student and Parents, effectively waived Student's right to stay put specifically at LM.

Student was not placed at LM by GPS in the normal course pursuant to a Team recommendation and resulting IEP. Rather, he was placed at LM pursuant to a SA between Parents and GPS where costs of LM were waived and/or apportioned between the parties; where Parental entitlement to transportation costs were waived; and where specific legal rights under state and federal special education law were waived. The SA specifically stated that Student's placement at LM was entirely of Parents' choosing and that the SA did not constitute an admission by GPS that LM was the least restrictive placement capable of assuring Student FAPE. The SA included

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until the local Administrator of Special Education or officials of the appropriate human service agency have had sufficient time to search for an alternative placement.

(c) Planned Terminations:

1. Except in emergency cases, the school shall notify the school district of the need for an IEP review meeting. The school district shall arrange such meeting and provide to all parties including the parent and if appropriate, the student, notice of this meeting (10) days in advance of the intended date of the meeting. The meeting shall be held for the purpose of planning and developing a written termination plan for the student. 2. The plan shall describe the student's specific program needs, the short and long term educational goals of the program, and recommendations for follow-up and/or transitional services. 3. The school shall thoroughly explain termination procedures to the student, the parents, the Administrator of Special Education and officials of the appropriate human service agency. 4. The written termination plan shall be implemented in no less than (30) days unless all parties agree to an earlier termination date

provisions requiring Student's continued acceptance and good standing at LM and provided for contingencies if Student were to be dismissed by LM. Parents expressly waived their rights under state and federal special education law. The SA is explicitly incorporated into the IEPs developed for the Student at LM. The executed Abstinence Contract was for Student's entire term at LM. Parents and Student repeatedly accepted the terms and conditions in LM's Student Handbook for Student's subsequent years at LM. (See **STATEMENT OF THE CASE**, above.)

20 U.S.C. §1415(e) and (f)(B)(1) as well as 300 CFR 506 and 510 provide options for the resolution of disputes by agreement without going through the time, expense, and emotional investment of litigating a due process hearing. Parties may resolve special education disputes via resolution sessions, mediations, settlement conferences, pre-hearing conferences or private negotiations outside of the parameters of the IDEA. As part of this settlement process, parents and schools may waive rights under state and federal special education law to achieve their desired objectives and outcome. (See *In re: Longmeadow School District* 14 MSER 249 (2008)).

I find that the SA, the Abstinence Contract and LM Handbook are abundantly clear regarding the waivers of rights and/or obligations and the conditions for enrollment and maintenance of placement at LM in the context of substance abuse. Indeed, the SA even provides for the particular situation of Student being dismissed from LM. Where, as in the instant situation, "the wording of the contract is unambiguous, the contract must be enforced according to its terms." See *Alison H. v. Byard* 163 F. 3d 2, 6 (1st Cir. 1998). If Parents did not wish to waive certain rights and/or entitlements and did not intend to abide by the terms and conditions of the SA with GPS, they should have not executed the SA. If Student and Parents did not wish to abide by the terms and conditions of LM's Abstinence Contract and Student Handbook they should not have accepted them and should not have enrolled Student at LM.

### **III. Denial of Parents' Motion for Summary Decision**

As described above, in their Request for Hearing Parents argued that LM violated Student's rights by improperly forcing him to submit to drug screens that could not have been required of him if he were attending a public school, and by forcing him to submit to a drug screen as a sanction for protected expression. Expanding on this argument in their Motion for Summary Decision, the Parents contended that LM has no authority to terminate services for a publicly-funded student for reasons that could not cause termination of services in the sending district, and that when a public school places a student in a private school in order to provide that student with a FAPE, the student is entitled to all the rights he would have held were he in a public school.

At the core of these arguments is the suggestion that although he attends a private school, because he is publicly-funded Student cannot be treated any differently from a student attending a public school. Specifically, as to the issue of drug screens, the Parents contend, without citing legal authority, that GPS may not require school-wide drug screens or exclude a student for a positive screen, and therefore neither can LM. This appears to be an argument based on the Fourth and Fourteenth Amendments and case law interpreting these Amendments in the public

school context. Even if LM could drug test students randomly, Parents continue, the school may not select students based upon their exercise of freedom of expression, as they allege LM did when it tested Student after an administrator had observed him with a marijuana leaf design on his cellular phone case. This allegation sounds in violations of the First Amendment and M.G.L. c. 71 § 82. Finally, Parents contend that the Massachusetts Controlled Substances Act prohibits LM from imposing a penalty or sanction for a positive drug screen. I shall address these arguments in turn, but because the issue of state action runs through all of them, I shall address it first.

#### Supreme Court tests for whether the acts of a nominally private entity comprise state action

Parents concede that LM is not a state actor, but they contend that to the extent GPS is prohibited from drug testing students randomly, penalizing a student for the exercise of free expression, or punishing a student for a positive drug screen LM must be as well because by accepting public funding for performing the government function of providing educational services to publicly-placed students, LM agrees to be bound by all relevant state and local requirements.

The Supreme Court has held that under certain circumstances, “acts by a nominally private entity may comprise state action – *e.g.*, if, with respect to the activity at issue, the private entity is engaged in a traditionally exclusive public function; is ‘entwined’ with the government; is subject to governmental coercion or encouragement; or is willingly engaged in joint action with the government.”<sup>7</sup> I will analyze briefly whether the actions of LM could constitute state action under any of these circumstances.

The first question is whether LM is engaged in a traditionally exclusive public function. The United States Supreme Court has held previously that education “is not and never has been a function reserved to the state.”<sup>8</sup> As a private institution that provides education, therefore, LM is not engaged in a traditionally exclusive public function.

Second, although a private entity may be considered a state actor “when it is ‘entwined with governmental policies’ or when government is ‘entwined in [its] management or control,’”<sup>9</sup> it appears difficult for a private school to meet this standard. In *Logiodice v. Trustees of Maine Central Institute*, the First Circuit held that even where a private school provided education to all public school students in several school districts under a contract that was regulated by the state in various respects, most (80%) of the private school’s students were sponsored by the school district, the school district contributed about half of the private school’s budget, and in certain respects (including public busing and transfer of records), private school students were treated as if they were regular public school students, the private school did not fit within this state-action

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<sup>7</sup> *Logiodice v. Trustees of Maine Central Inst.*, 296 F. 3d 22, 26 (1st Cir. 2002) (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295-96 (2001)).

<sup>8</sup> *Id.* at 26, 27 (holding that even private schools that serve largely public school students are not state actors); see *Johnson v. Pinkerton Acad.*, 861 F.2d 335, 338 (1st Cir. 1988 ) (declining to describe private schools as performing an exclusive public function).

<sup>9</sup> *Logiodice v. Trustees of Maine Central Inst.*, 296 F.3d at 27 (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. at 296 (internal citations omitted)).

exception.<sup>10</sup> In so finding the Court noted that the school was run by private trustees rather than public officials, and emphasized the fact that as to the particular activity in question – imposition of discipline on students – the private school’s trustees had the sole right to promulgate, administer and enforce rules and regulations pertaining to student behavior and discipline.<sup>11</sup> Given that LM is governed by an independent board of trustees, owns its own facilities, maintains an endorsement funded by private donors, hires its own personnel and implements its own specialized curriculum, and approximately 50% of its students are privately placed/funded, (see **STATEMENT OF FACTS**, above), it certainly falls short of being ‘entwined with governmental policies’ or having the government ‘entwined in [its] management or control.’<sup>12</sup>

The third test examines “whether the government exercised coercive power or provided such significant encouragement that the complained-of misconduct . . . must be deemed to be the conduct of the government.”<sup>13</sup> In applying the test, the court “must focus on the state’s role in the complained-of conduct . . . rather than the state’s relationship to [the school] itself.”<sup>14</sup> Because it is bound up in the specific action taken by LM, I reserve application of this prong of the test for further discussion below.

The joint action analysis has also been referred to as the “symbiotic relationship” test, and it requires a court to consider whether the government “has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity.”<sup>15</sup> “A significant, though not dispositive, factor is whether the public entity shares in any profits made by the private organization.”<sup>16</sup> There is no evidence before me that suggests this is the case here.

As to three of the four tests, LM does not fit within the circumstances outlined by the Supreme Court under which the acts of a nominally private actor may be considered state action.<sup>17</sup> Because the results of the “coercion or encouragement” test may vary based on context, I apply it below, as I discuss each of Parents’ arguments.

### Random drug screens

As explained above, the Parents’ argument that LM cannot require school-wide drug screens or exclude a student for a positive screen appears to be based on the Fourth and Fourteenth Amendments and case law interpreting these Amendments in the public school context.

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<sup>10</sup> *Id.* at 28.

<sup>11</sup> *See id.*

<sup>12</sup> *See id.*

<sup>13</sup> *Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 84 F. 3d 487, 493 (1st Cir. 1996).

<sup>14</sup> *Logiodice v. Trustees of Maine Central Inst.*, 170 F. Supp. 2d 16, 29 (D. Maine 2001).

<sup>15</sup> *Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 84 F. 3d at 494 (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)).

<sup>16</sup> *Logiodice v. Trustees of Maine Central Inst.*, 170 F. Supp. 2d at 29.

<sup>17</sup> Although courts have at times applied the state action label outside of these specific exceptions, Parents have not suggested that I do so here.

In *Vernonia School District v. Acton*, the United States Supreme Court held that public schools may subject student athletes to suspicionless drug testing.<sup>18</sup> In reaching this conclusion, the Court balanced students' privacy interests against the governmental concern at issue and the efficacy of the chosen means for meeting it.<sup>19</sup> The Court determined this search was reasonable in part because like First and Fourteenth Amendment rights, the Fourth Amendment inquiry "cannot disregard the schools' custodial and tutelary responsibility for children."<sup>20</sup> The Court has also upheld random drug testing of students participating in extracurricular activities, finding that such a policy "effectively serves the School District's interest in protecting the safety and health of its students."<sup>21</sup> Parents' argument appears to be that outside of these contexts, individualized suspicion is required in order for students to be tested for drugs, and that LM's random drug testing program exceeds what is constitutionally permitted. This argument misses a key requirement of the analysis: the Fourth Amendment prohibits only state action,<sup>22</sup> and, as such, searches by private individuals or entities are beyond its reach unless a state action argument can be made.

For the reasons set forth above, LM's random drug testing program does not constitute state action under the exclusive public function, entanglement, or joint action tests. For LM's drug testing program to be considered state action pursuant to the coercion test, the state must have played a role in it.<sup>23</sup> The facts in this case do not suggest that GPS or any other governmental official or organization coerced or encouraged LM to drug test students randomly. LM's drug testing of Student, therefore, does not comprise state action under this test. For these reasons the search conducted by LM through its random drug screening policy is beyond the reach of the Fourth Amendment.

### Freedom of expression

Even if LM could drug test students randomly, Parents argue, the school may not select students based upon their exercise of freedom of expression, as they allege LM did when it tested Student after an administrator had observed him with a marijuana leaf design on his cellular phone case. They cite M.G.L. c. 71 § 82 in support of this contention. Yet this law, by its own terms, applies only to students attending public schools.<sup>24</sup> To the extent Parents base their argument in federal law, the First Amendment – like the Fourth Amendment – applies only to state action. For the reasons described above, LM's drug testing policy and its implementation do not involve state action under the exclusive public function, entanglement, or joint action tests. For LM's act of selecting Student to be drug tested, possibly in connection with his cellular phone case, to be

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<sup>18</sup> 515 U.S. 646, 664-65 (1995).

<sup>19</sup> *Id.* at 658, 660.

<sup>20</sup> *Id.* at 656; *see Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 830 (2002) ("A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety").

<sup>21</sup> *Board of Educ. Of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. at 838.

<sup>22</sup> *See, e.g., id.* at 828 ("Searches by public school officials, such as the collection of urine samples, implicate Fourth Amendment interests.")

<sup>23</sup> *Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 84 F. 3d at 494.

<sup>24</sup> "The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school." Mass. Gen. L. c. 71 § 82 (emphasis added).

considered state action the state must have played a role in it.<sup>25</sup> The facts in this case do not suggest that GPS or any other governmental official or organization coerced or encouraged LM to drug test Student because of the design on his cellular phone case. LM's drug testing of Student, therefore, does not comprise state action under this test. It is therefore beyond the reach of both M.G.L. c. 71 § 82 and the First Amendment.

### Drug laws

Finally, Parents argue that Massachusetts law prohibits governmental bodies from imposing a penalty or sanction for a positive drug screen for marijuana, other than as specified in Mass. Gen. L. c. 93C, § 32L. Even if this were true, as a private school LM would not be bound by the Massachusetts Controlled Substances Act, which by its own terms applies only to the Commonwealth, its political subdivisions, and "their respective agencies, authorities or instrumentalities."<sup>26</sup> For the reasons explained above, LM is not a government agency. Moreover it is not suggested that GPS or any other governmental official or organization coerced or encouraged LM to impose the sanction of expulsion on Student for his positive drug screen. Therefore LM's expulsion of Student for positive drug screens does not comprise state action and is beyond the reach of Mass. Gen. L. c. 93C, § 32L.

### Termination

At the crux of all these arguments is Parents' contention that LM's decision to expel Student for reasons he could not be expelled from GPS is impermissible.<sup>27</sup> Because, as discussed above, LM is a private actor there is no basis for the assertion that LM could not employ its random drug testing program, select Student for a drug screen, and expel him from school for testing positive for marijuana, simply because GPS might not be able to do these things.

The only other basis in law advanced by the Parents to support their argument that LM cannot enforce a policy or take other actions that would not be permitted in a public school is a broad reading of a subsection of IDEA that focuses on state eligibility. Parents suggest that the following language supports this contention: for "[c]hildren placed in, or referred to, private schools by public agencies . . . the State Educational Agency shall determine whether such schools and facilities meet standards that apply to State educational agencies and local educational agencies and that children so served have all the rights the children would have if served by such agencies."<sup>28</sup> This provision quoted by Parents is part of the IDEA and can reasonably be understood to refer specifically to rights under the IDEA. Yet in the SA the Parents specifically waived any and all rights which might accrue to them under 20 U.S.C. §§

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<sup>25</sup> *Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 84 F. 3d at 494.

<sup>26</sup> See Mass. Gen. L. c. 93C, § 32L.

<sup>27</sup> I have not engaged in an analysis of whether GPS could have taken the actions LM took, because this was not the question before me. However, assuming without deciding that GPS could not have engaged in LM's course of action, for reasons I have explained throughout this Decision that determination would not be controlling.

<sup>28</sup> 20 U.S.C. § 1412 (10)(B)(ii). Parents also argue that 34 C.F.R. § 300.146(c) prevents private schools from maintaining policies different from those of public schools, because the regulation provides that any child with a disability placed in or referred to private school by a public agency "[h]as all the rights of a child without a disability who is served by a public agency." For the reasons described in the paragraph containing this footnote, this argument is unpersuasive.

1400 *et seq.*; they cannot now argue that these rights have been preserved. To the extent Parents argue that this provision applies even more broadly to rights beyond those provided in the IDEA, their proposed construction would prevent private schools from maintaining any policies different from those of the public schools. This proposition cannot stand.<sup>29</sup> Moreover I note that LM and its policies have been, and remain, fully approved by the Massachusetts Department of Elementary and Secondary Education.

**ORDERS:**

1. Parents' Motion for Stay Put at Landmark is **DENIED**.
2. Landmark's Motion for Summary Judgment is **GRANTED**.
3. Parents' Motion for Summary Decision is **DENIED**.

By the Hearing Officer,

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Raymond Oliver

Dated: August 27, 2014

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<sup>29</sup> Such an interpretation would render superfluous provisions such as 603 C.M.R. 28.09(11), which requires that approved special education schools maintain and inform parents and students of policies and procedures, and 28.09(12), which specifies certain student protections that must be observed by these schools..