

March 8, 2017

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

DECISION

BSEA # 1610565

BEFORE

**RAYMOND OLIVER
HEARING OFFICER**

**PARENT, PRO SE
ALISIA ST. FLORIAN, ATTORNEY FOR SHREWSBURY PUBLIC SCHOOLS**

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

In re: Leah¹

BSEA #: 1610565

DECISION

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

A hearing in the above-entitled matter was held on November 15 and 16, 2016 and January 4, 2017 at Catuogno Court Reporting in Worcester, Massachusetts. The evidence consisted of Parent Exhibits labelled P-1 through P-254 (with numerous exclusions as referenced in the written transcript); Shrewsbury Public Schools' Exhibits labelled S-1 through S-45; and approximately 9½ hours of oral testimony. The record remained open for receipt of written final arguments until February 13, 2017.

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

Mother

Student

Sister

Margaret Belsito

Meghan Bartlett

Ann Jones

Kristin Minio

Elliott Nerland

Melissa McGuire

Alisia St. Florian

Deborah Lovejoy

Darlene Coppola

Raymond Oliver

Director of Special Education, Shrewsbury Public Schools

Out of District Coordinator, Shrewsbury Public Schools

Principal, Oak Hill Middle School

School Adjustment Counselor, Oak Hill Middle School

Former Clinical Coordinator / Board Certified Behavior Analyst,
Shrewsbury Public Schools

Former Special Education Director, Shrewsbury Public Schools
(via telephone)

Attorney for Shrewsbury Public Schools

Court Reporter

Court Stenographer

Hearing Officer, Bureau of Special Education Appeals

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

STATEMENT OF THE CASE

Leah is a 15 year old young lady who resides with her family in Shrewsbury, Massachusetts. She is currently a 9th grade student who has attended the Manville School, a private day school program for students with emotional disabilities, in Boston, Massachusetts since May 2015. Leah's out of district placement at Manville School (Manville) is funded by the Shrewsbury Public Schools (SPS).

Leah had spent her educational career within SPS until her May 5, 2015 placement at Manville. She had been a special education student with an Individual Education Program (IEP) since first grade. Leah spent her 5th and 6th grade years at Sherwood Middle School (Sherwood) where she experienced issues with bullying during her 6th grade year. She transferred to the Oak Hill Middle School (Oak) for her 7th grade year, academic 2014-2015. (See testimony, Mother; P-27; S-36.) The fully accepted IEP in place at that time, covering the period April 2014 through November 2014, provided in part for a 5½ week, four day per week, three hour per day ESY program. (See S-10.)

Leah experienced some transition issues upon her placement at Oak. Leah's schedule was arranged so that students who were named or involved in bullying incidents at Sherwood were not in any of her classes or on her school team at Oak. A student who was a friend of Leah's was specifically placed on her school team, then placed into classes with Leah although said friend had not initially been scheduled into any classes with Leah. (Testimony, Mother; Minio; S-38.)

In October 2014 Leah was placed in a partial hospitalization program at Arbor Hospital in Worcester due to school refusal behaviors and suicidal ideation, and was out of school for a period of 2-3 weeks during this time. She returned to Oak but on November 6, 2014, engaged in cutting behaviors and sent a photo of this to Mother. A behavior support plan was written by SPS and accommodations were made, including allowing Leah breaks from classes, partial school days, and early releases when necessary to be picked up by Mother or Sister. No further such incidents occurred at Oak. (See testimony, Mother; Leah; Nerland; Minio; Jones; S-37, 39.) An October 2014 to October 2015 IEP was written after her return from her partial hospitalization at Arbor (S-8). This IEP was rejected.

On December 10, 2014, Mother and Sister were in the car in the school parking lot around lunchtime to pick Leah up for a doctor's appointment. Leah was not in the car but waiting in the office to be dismissed. Students were released from Oak to be outside for a short period after lunch. Students gathered around Mother's car and either a football was thrown at the car or a student was shoved into the car after which the students scattered. Mother went into the Oak office very angry. The principal, who was on inside lunch duty, was called. Students were evacuated from the office. Mother was yelling and screaming. The principal could not get Mother to calm down so she was asked to leave/escorted from the office. Mother stated that Oak was unsafe and Leah would never return to school there. A no-trespass order was issued against Mother. The principal later reached out to Mother to meet on several occasions but Mother chose not to meet and Leah never returned to Oak after this incident. (See testimony, Mother; Sister; Leah; Jones; Minio; P-135, 137.)

Leah's pediatrician sent a note to SPS on December 12, 2014 stating that he had seen Leah and that she "need[s] coordination with all involved." (P-146.) After getting a release, Principal Jones spoke with Leah's pediatrician on December 19, 2014 and documented the conversation (also

P-146.) The pediatrician noted that Leah's parents had a difficult divorce and she was experiencing stress; that there were some difficult family dynamic issues; and that there was no obvious medical issue that was emergent. He also noted that he had not intended to sign Leah out of school, but to open up a conversation between the school and Leah's counselor; and that he didn't realize his note could be interpreted as a medical excuse for not attending school indefinitely. (See P-146.) On January 30, 2015 Leah's psychiatrist signed a physician's statement authorizing temporary home/hospital placement until March 31, 2015 (P-147). SPS began providing Leah four hours of individual tutoring per week from early February through late April 2015. Leah began at Manville on May 5, 2015 and remains at Manville to date under an accepted IEP (S-2). No education issues have been raised regarding the accepted Manville placement from May 2015 to the present time. (See testimony, Mother; Leah; Jones; Bartlett.)

On June 8, 2016 Mother filed a 45 page Request for Hearing before the BSEA which was challenged by SPS because many claims were beyond the Statute of Limitations, many statutes were cited that are not within the authority of the BSEA, and no relief was sought other than findings of law. On June 13, 2016, the hearing officer originally assigned to the instant case ordered Parent to file an amended Hearing Request containing: 1) a brief, simple statement of the nature of the disagreement between Parent and SPS; 2) a brief, simple summary of facts upon which the disagreement was based; and 3) a clear statement of the relief Parent sought from the BSEA. On June 29, 2016 Parent filed an Amended Hearing Request and a re-calculated Notice of Hearing was sent to the parties. SPS filed its response on July 5, 2016. A conference call was held on July 19, 2016 and the parties agreed to a pre-hearing conference which was held on August 17, 2016. On August 26, 2016 hearing dates were scheduled for November 15 and 16, 2016. On the day before hearing, November 14, 2016, this case was administratively reassigned to Hearing Officer Raymond Oliver who presided over the matter on the scheduled dates of November 15 and 16, 2016 and an additional final date of January 4, 2017.

ISSUES IN DISPUTE

1. Did SPS fail to provide Leah a free and appropriate public education from June 8, 2014 until her placement at Manville on May 5, 2015?
2. If so, is SPS responsible for providing compensatory services for Leah from June 8, 2014 until her placement at Manville on May 5, 2015?²
3. Is SPS responsible for providing compensatory educational services and/or prospective educational services to Leah during her commute from Shrewsbury to Manville in Boston and Manville to Shrewsbury?

² Pursuant to 20 U.S.C. § 1415 (f)(C) the statute of limitations is two years from the date parent or agency knew or should have known about the alleged action that forms the basis of the complaint. Therefore, Parent can potentially reach back two years from the date she filed her hearing request on June 8, 2016 to June 8, 2014. Parent sought to reach back three years to June 8, 2013 to which SPS objected. The Hearing Officer heard Parent's offer of proof regarding why the Statute of Limitations should be tolled for one additional year. However, Parent's offer of proof did not meet either of the statute's two conditions (20 U.S.C. § (f)(D) i or ii) by which the reach back time period could be tolled beyond the established statutory term of two years. Therefore, any potential recovery for compensatory services can reach back only to June 8, 2014.

4. What was Mother's request for evaluations and is SPS responsible for not implementing such evaluation?

STATEMENT OF POSITIONS

Parent's position is that SPS did not provide Leah with FAPE from June 8, 2014 until her placement at Manville on May 5, 2015. Parent also contends that SPS failed to perform evaluations that she requested for Leah during the 2014-2015 school year. Parent seeks unspecified compensatory services from SPS for the above-cited time period. Parent also seeks unspecified compensatory and prospective special education/related services for Leah during her commute time from Shrewsbury to Manville in Boston and from Manville back to Shrewsbury.

SPS' position is that it provided FAPE for Leah during the 2014 summer and during the 2014-2015 school year until her placement by SPS at Manville on May 5, 2015. SPS contends that there was confusion regarding what "evaluations" Parent was actually requesting and whether SPS was required to notify the BSEA or whether Parent was required to request a BSEA hearing. Finally SPS contends that SPS, Parent, and Leah all agree that Leah has been appropriately placed at Manville since May 5, 2015 and, therefore, SPS has no responsibility to provide any educational or related services to Leah during her commute to and from Manville and Shrewsbury.

PROFILE OF STUDENT

The most recent three year re-evaluation of Leah conducted by SPS took place from September to November 2013, or approximately one year prior to the time period at issue in this hearing.³ On the Wechsler Intelligence Scale for Children – 4th Edition (WISC-IV) she achieved the following scores: Verbal Comprehension 99 (Average); Perceptual Reasoning 94 (Average); Working Memory 86 (Low Average); Processing Speed 80 (Low Average); Full Scale IQ 88 (Low Average). (See S-31 for full psychological evaluation results.)

Leah's speech-language re-evaluation, based upon a test battery of standard, well established speech and language assessments, found that she presented with average receptive language, expressive language, and vocabulary skills. While good improvement was noted from prior speech-language testing, mild word find issues and expressive language organization issue were noted, supporting continued speech-language therapy in these areas. (See S-32 for complete speech-language evaluation results.)

On the Wechsler Individual Achievement Tests – 3rd edition (WIAT-III) Leah's total reading score was 83 and basic reading score 73, both below average. However, both her reading comprehension and reading fluency scores were average, at 96. Her written expression was 81 (below average) and her mathematics was 89 (average). On the oral language component of the WIAT-III all language subtest areas – listening comprehension, receptive vocabulary, oral expression, expressive vocabulary, oral word fluency and overall comprehension – were found to be

³ Leah's 2016 re-evaluation took place at Manville via the Judge Baker Children's Center in October-November 2016. (See P-249, 250, 251 and 252 for psychological, educational, reading and writing and speech-language evaluations.)

in the average range, with only sentence repetition to be below average. (See S-34 for complete educational/academic evaluation results.)

Her October 2014 IEP (written after her return from her partial hospitalization at Arbor) notes that Leah was being medically treated for Attention Deficit Hyperactivity Disorder (ADHD) and depression, taking medication for each condition. (See S-8 and S-9.) On the January 30, 2015 Physician's Statement for Temporary Home/Hospital Education (P-147), Leah's psychiatrist diagnosed her with Depressive Disorder, Not Otherwise Specified (NOS). On February 4, 2015 Leah's Youville therapist (a private therapist who provided services to Leah within SPS), diagnosed her with Post-Traumatic Stress Disorder (PTSD) and Depressive Disorder, NOS (P-152).

FINDINGS AND CONCLUSIONS

It is undisputed by the parties and confirmed by the evidence presented that Leah is a student with special education needs as defined under state and federal statutes and regulations. The fundamental issues presented in this matter 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, Parent bears the burden of proof in demonstrating that: 1) SPS did not provide Leah FAPE from June 8, 2014 until her placement at Manville on May 5, 2015 and owes her compensatory services for such period; 2) SPS owes Leah compensatory and prospective services for the time period of her daily commute to/from Manville; and 3) SPS is responsible for not evaluating Leah in 2014.

Based upon three days of oral testimony, the written exhibits introduced into evidence, and a review of the applicable law, I conclude that: 1) SPS did provide FAPE to Leah from June 8, 2014 until her placement at Manville on May 5, 2015, consistent with the limitations placed upon them by Parent's actions; 2) SPS is not responsible for providing Leah with educational or related services during her commute to/from Manville; and 3) the issue of evaluations is moot.

My analysis follows.

I.

During the summer of 2014 SPS offered Leah Extended School Year (ESY) services pursuant to the IEP covering the period April 11, 2014 to November 25, 2014, which was accepted by Mother on May 12, 2014 (S-10). SPS proposed that Leah receive 5½ weeks of ESY programming (four days per week for three hours each day, with reading three times per week for 40 minutes each session or specific reading services for 2 hours per week). Leah, however, never accessed either the ESY summer school or the ESY reading tutorials during the 2014 summer, nor was there any correspondence from Parent regarding the ESY program during that time. (See P-73; S-28.)

Further, Parent's May 12, 2014 full acceptance of the April 11, 2014 to November 25, 2014 IEP (S-10) was never rescinded. It is well settled law that once an accepted IEP has expired (absent rescission of the acceptance during the life of the IEP), a parent cannot reach back and seek

compensatory relief on the theory that the IEP was inappropriate. (See *Chris A. v Stow Public Schools*, 16 EHLR 1304 (MA1990), affirmed on appeal *Amann v. Stow School System* 982 F 2d 644 at 651. See also *Burlington v Department of Education* 471 U.S. 359 at 373 (1985); *Amherst-Pelham Regional School District v Department of Education* 376 Mass 480 at 483 (1978); *Manchester School District v Christopher B.* 19 IDELR 143 (DNH); In re: *Marblehead Public Schools* 7 MSER 176 at 180 (2002); In re: *Ross* 14 MSER 290 (2008); In re: *Cal* 22 MSER 233 at 237 (2016).

Based upon the above analysis under Section I, I find that Parent has no cause of action against SPS from June 8, 2014 through November 25, 2014. Therefore, no compensatory educational services can be ordered for such time period.

I am also unable to find, based upon the record before me, that SPS owes any compensatory services from December 10, 2014 until Leah's placement at Manville on May 5, 2015. While it is true that Leah was not in school during this time period, such situation was entirely of Parent's own making and volition. The December 10, 2014 car incident which precipitated Parent's refusal to send Leah to Oak because it was "not safe" involved Parent and Sister (who is an adult and no longer in SPS). Leah was not even in the car at the time of the incident.⁴ Parent presented no evidence that the car incident was directed against Leah or that any of the students present for the incident even knew who was in the car. Leah's special education placement at Oak remained available to her from December 10, 2014 until her placement at Manville on May 5, 2015. Parent simply chose not to access it.

Despite Mother's unilateral action in refusing to send Leah to Oak after December 10, 2014, once the required physician's statement for home placement was received from Leah's psychiatrist on January 30, 2015, SPS commenced providing Leah with tutoring in early February 2015, continuing until late April 2015 (even though the physician's statement indicated Leah could return to school on March 31, 2015) (P-147). Mother testified that this tutoring did not address all of the issues on Leah's IEP. When a student is receiving home/hospital services it is typically the case that the student's physical or medical condition is such that reduced educational services are warranted. Indeed, Leah's psychiatrist wrote on his statement for home services that Leah's health during this period would affect the provision of full educational services noting that "Patient may have mildly decreased concentration due to her mental illness." (See P-147.) Furthermore, it is unrealistic to expect that a full school program can be replicated in the context of home/hospital services.

Given my finding, above, that Parent is not entitled to any compensatory relief for the period June 8, 2014 through November 25, 2014 when an accepted IEP was in effect; and given my finding that Leah is not entitled to any compensatory services from December 10, 2014 until her placement at Manville on May 5, 2015; the only potential time period for a claim of compensatory services is between November 25, 2014 to December 10, 2014. I take administrative notice of the fact that in November 2014 Thanksgiving fell on Thursday, November 27 and that most school systems are closed on the Friday after Thanksgiving (which in 2014 would be November 28). Thus, in 2014, there would only be a potential of 8 days – November 26, December 1 to 5 and December 8 to 9 – upon which to premise a claim for compensatory relief. Given that under stay-put, Leah was entitled to the continuation of the same services she received under her last agreed upon IEP, I

⁴ Unfortunately Leah was waiting in the Oak office to be picked up and witnessed Mother angrily coming into Oak and yelling at school personnel. (See testimony, Mother; Jones; Leah; Minio.)

conclude that the continuation of such stay-put IEP services for 8 days would not have deprived her of FAPE.

II.

Parent also contends that SPS should provide both compensatory and prospective special education/related services during Leah's commute to/from Manville to/from Shrewsbury to make up for time wasted on the long commute.

Parent allowed and SPS sent referrals to two out-of-districts private special education placements – Manville and Chamberlain School (Chamberlain). Leah was accepted at both placements. Parent and Leah visited both placements. Chamberlain is located in Middleborough, MA. Manville is located in Boston, MA. Both are approximately the same distance from Shrewsbury, but Chamberlain is more highway driving (Route 495) while Manville is both highway driving (Mass Pike) and city driving during rush hour traffic. It takes Leah approximately 1 ¼ - 1 ¾ hours to commute to and from Manville. SPS preferred a Chamberlain placement for Leah, but Parent and Leah wanted Manville. Leah wrote a letter to SPS describing her visits to Chamberlain and Manville and articulating her specific reasons for wanting to attend Manville. SPS then placed Leah at Manville pursuant to her and Parent's wishes. (See testimony, Mother; Leah; Bartlett, McGuire; Minio; P-204, 209, 213 to 220, S-3, 4, 5, 35, 45.)

603 CMR 28.06 (8)(a) provides that a school shall not permit a student to be transported in a manner that requires the student to remain in the vehicle for more than one hour each way except with the approval of the team. Emphasis added. Under the facts of this case, I find that all parties have consented to this time extension for Leah to be able to attend Manville. Manville was Leah's and Parent's choice, and they specifically advocated for such placement over Chamberlain, despite the time issue. SPS assented, proposed Manville, Parent accepted the original Manville placement and has also accepted a subsequent IEP providing for Leah's placement at Manville from October 2015 to October 2016 (See testimony, Mother; Leah; Bartlett; McGuire; S-2, 5.) When specifically questioned at the hearing as to whether they wanted SPS to locate a closer placement both Leah and Mother testified that they want Leah to remain at Manville (testimony, Mother; Leah). By the above actions, Parent continues to constructively accept the one hour plus commute time.

Parent has presented no educational justification or expert testimony for SPS to provide special education/related services during Leah's commuting time. The Manville progress reports (S-22, 23, 24, 25, 26), the Manville Summer Program Report for 2015 (S-16), and the recent three year re-evaluation of performed by Judge Baker/Manville (P-249, 250, 251, 252, 254), all demonstrate that Leah is making academic, emotional and social progress at Manville. In short, the Manville placement is clearly providing her FAPE.⁵

III.

On November 6, 2014 Mother wrote an e-mail to then SPS special education director Melissa McGuire requesting, among other things, an independent evaluation for Leah. On November 7, 2014, Ms. McGuire responded to Mother dealing with issues raised in Mother's

⁵ Nothing prevents Leah from reading, doing homework, or working on a laptop or notebook during her commute time.

November 6 correspondence. Regarding Mother's request for an independent evaluation, Ms. McGuire e-mailed:

I need to understand what type of evaluation you are requesting so I can better respond to your request. I have five days to respond or file with the bureau of special education appeals for a ruling on the need for the district to complete an independent evaluation at the district's expense...

She had a re-evaluation in 2013 and her next one is due in October of 2016. What specifically would you be looking for with a revaluation so I can assist you?

On November 7, 2014, Mother e-mailed Ms. McGuire:

I am displeased with the Shrewsbury Public School system and its ability to meet [Leah's] educational, social, and emotional needs at this time. Therefore, I am requesting that [Leah] have 45 day educational assessment in the SOAR (Short Term Option for Assessment and Recommendation) program at the Assabet Valley Collaborative at the school district's expense.

(All of the above quotes are from P-103.)

On November 10, 2014 Ms. McGuire responded to Mother via e-mail noting that:

A 45 day placement is not an Independent Educational Evaluation but an out of district placement that the Team would need to decide if it's an appropriate option... (See P-107.)

Parentally requested independent evaluations are governed by 603 CMR 28.04(5). Pursuant to 603 CMR 28.04(5)(d) the school shall either agree to fund Parent's request for an independent evaluation or within five school days request a hearing before the BSEA to show that the school's evaluation was comprehensive and appropriate. Conversely, 45 day extended evaluations are governed by 603 CMR 28.05(2)(b) which provides that if the Team finds the evaluative information insufficient to develop an IEP, the Team, with parental consent, may agree to an extended evaluation period not to exceed eight school weeks.

Based upon Mother's November 7, 2014 e-mail to Ms. McGuire (cited above), I conclude that Mother was requesting an eight week extended evaluation at a program within the Assabet Valley Collaborative (28.05(2)(b)) and not an independent evaluation (28.04(5)). Therefore, the five day requirement that a school request a BSEA hearing to contest a parent's request for an independent evaluation is not applicable in the instant situation. Further, in this case the Team had just promulgated a new IEP for Leah covering October 24, 2014 to October 23, 2015 which was rejected by Parent on November 21, 2014. (See S-8.) S-8 is a comprehensive, highly detailed IEP which does not reflect that the Team found the then existing evaluative information insufficient to develop an IEP. Mother certainly had the right to request a BSEA hearing regarding the appropriateness of this IEP and to advocate for an extended evaluation or an alternative/out-of-district placement during some or all of the time period covered by that IEP (October 2014 to October 2015). However, she did not request a BSEA hearing until June 8, 2016, seeking compensatory services. (See Section I, above.)

During the course of the 2014-2015 school year, SPS: 1) had a number of informal meetings with Mother at the beginning of the school year (September 3, 11, 29, and October 21, 2014) as Leah was acclimating to Oak; 2) had four formal Team meetings (October 24, 2014, January 16, 2015, March 16, 2015 and April 28, 2015); and 3) promulgated three IEPs/placements for Leah (covering October 24, 2014 to October 23, 2015, March 16, 2015 to October 23, 2015, and May 5, 2015 to October 23, 2015), the last of which placed Leah at Manville and was accepted by Parent on April 28, 2015. (See S-3, 4, 7, 8, 9; testimony Mother; Bartlett; McGuire; Minio; Nerland; Jones.) Mother requested an extended evaluation in November 2014⁶. By the January 16, 2015 team meeting, the team was already discussing the possibility of an out of district placement for Leah. By the March 16, 2015 team meeting, referrals were being made to Manville and Chamberlain. By the April 28, 2015 team meeting SPS had agreed to, and Mother had accepted, Leah's placement at Manville, which began a week later.

Given the above chronology and given Mother's unilateral action in refusing to allow Leah to attend Oak/SPS after December 10, 2014, I find that SPS's actions, cited above, resulted in Leah's placement at Manville in a concise period of time without the necessity of an extended evaluation and/or a lengthy BSEA hearing to determine placement. All parties agree that Leah's Manville placement has been a real success academically, socially and emotionally, and that she is clearly receiving FAPE at Manville. (See also S-22, 23, 24, 25, 26.) I further note that rather than having its own personnel perform Leah's October 2016 three year evaluation as is its right, SPS opted to secure the evaluation at Judge Baker/Manville. (See P-249, 250, 251, 252, 253, 254.) In summary, I find that Leah has been appropriately placed by SPS and that her evaluations have been completed by independent evaluators at Judge Baker/Manville. Therefore, I find that the issue regarding Leah's evaluation, extended or independent, has been rendered moot.

ORDER

- 1) SPS provided FAPE to Leah from June 8, 2014 until her placement at Manville on May 5, 2015, consistent with the limitations placed upon the district by Parent's actions.
- 2) SPS is not responsible for providing Leah with special education or related services during her commute to and from Manville.
- 3) This issue concerning evaluations for is now moot.

By the Hearing Officer,

Dated: March 8, 2017

⁶ On November 10, 2014 Leah's private Youville therapist reported to Oak adjustment counselor Minio that there was possible emotional/verbal abuse from Father and "the family is in crisis and due to that has a way of receiving and transmitting information at the moment that isn't always accurate." (See P-104 for complete text of e-mail.)