

November 9, 2016

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

DECISION

BSEA # 1702629

BEFORE

**RAYMOND OLIVER
HEARING OFFICER**

**REGINA WILLIAMS TATE, ATTORNEY FOR SPRINGFIELD PUBLIC SCHOOLS
DEBORAH DORFMAN AND ANNA KRIEGER, ATTORNEYS FOR PARENTS**

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

In re: Cal¹

BSEA #: 1702629

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. §794²; and the regulations promulgated under these statutes.

A hearing in the above-entitled matter was held on October 19-20, 2016 at Catuogno Court Reporting in Springfield. The record remained open for written final arguments until October 26, 2016.

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

Martha Von Mering	Executive Officer of Special Education and Related Services, Springfield Public Schools (SPS)
Jennifer Baribeau	Special Education Supervisor – Middle School, SPS
Beth Danforth	Evaluation Team Leader, Kiley Middle School, SPS
Ashleigh Malinowski	Behavior Specialist, SPS
Lynda Austin	Behavior Specialist, SPS
Gina Gelineau	School Adjustment Counselor, Springfield Public Day Middle School, SPS
Regina Williams Tate	Attorney for SPS
Father	
Mother	
Deborah Dorfman	Attorney for Parents / Student
Anna Krieger	Attorney for Parents / Student
Santina Scialoa-Douglas	Attorney for Parents / Student
Lisa Regensburger	Court Reporter
Raymond Oliver	Hearing Officer, Bureau of Special Education Appeals

The evidence consisted of Springfield Public Schools' Exhibits labeled S-1 through S-67; Parents' Exhibits labeled P-1 through P-2; and approximately 6½ hours of oral testimony.

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

² Parent argues that the BSEA also has jurisdiction under the Americans with Disabilities Act (ADA). This issue was considered by Hearing Officer Crane in another Springfield case involving the same counsel as this case. He concluded that the BSEA does not have jurisdiction over the ADA. (See BSEA #1404388, Crane, H.O. 2/26/14.) I concurred in BSEA #1309716 (3/27/14) in another Springfield case involving the same counsel. Now the same counsel in yet a third Springfield case reargued this issue. The answer remains the same now as the prior two cases – the BSEA does not have jurisdiction over the ADA.

STATEMENT / HISTORY OF THE CASE

Cal is a 12 year old boy who resides with his family in Springfield, Massachusetts. He is currently repeating the 6th (during the 2016-2017 school year) because he failed all of his 6th grade academic subjects during the 2015-2016 school year. Cal has attended the Springfield Public Schools (SPS) from kindergarten to the present time. He was found eligible for special education services during kindergarten due to fine motor issues and an individualized education program (IEP) was developed. Cal received occupational therapy and reading intervention during kindergarten and 1st grade. (See S-1).

During 2nd grade (2011-2012) Cal experienced behavioral issues resulting in three suspensions (1 in October and 2 in February). Cal received private counseling services and was overseen by a psychiatrist (Dr. Fanton). SPS did a re-evaluation and a functional behavioral assessment (FBA) which resulted in a behavioral intervention plan (BIP). The team recommended a substantially separate special education program for Cal and such IEP / Placement was accepted by Father. (See S-1, 2, 3, 4, 5, 6, 7, 8, 9). In November 2012, per Dr. Fanton's request, Cal underwent a neuropsychological evaluation performed by Dr. Elin (S-10).

Cal was in a substantially separate special education program within a SPS elementary school for all of his 3rd (2012-2013) and 4th (2013 – 2014) grade years. Within such an environment he made progress in his IEP goals with his reading level increasing by 2 grade levels (S-8, 11, 12, 13, 14, 15, 16, 17).

During his 5th grade (2014-2015) Cal's behaviors escalated. Another FBA was done with a new Behavior Intervention Plan (BIP) in late October 2014 (S-22, 23, 24). However, after an assaultive episode in school in December 2014 Cal was admitted to the Baystate Medical Center Partial Hospitalization Program (Baystate) in Springfield. Cal experienced difficulties participating in the hospital's group therapy and in the classroom, provoking staff and testing limits. Baystate recommended a crisis evaluation and treatment at a hospital with a higher level of care, but Parent took him home after 8 days. (See S-1, S-26).

Cal's behavioral problems continued at school with disciplinary issues including assaults and disruptive behaviors. SPS then requested and Parent agreed to an extended evaluation (EE) at SPS' public day elementary school, beginning in March 2015. Academic testing revealed that many of Cal's academic skills had improved with gains in reading and math. During this EE, Cal continued to progress in reading, writing and math, participated in class, and maintained appropriate behaviors. Parent consented to Cal completing the 5th grade year in this program at SPS' public day elementary school. (See S-34, 36, 37, 38, 39, 40). Because Parent objected to Cal going to SPS' public day middle school for 6th grade, SPS wrote an IEP for Cal's 6th grade placement in Kiely Middle School's Social and Emotional Behavioral Supports (SEBS) program (S-41).

During the 2015-2016 school year Cal's disciplinary issues re-emerged and escalated (See S-47, 49, 52 and 60 for behavioral data and disciplinary logs). Three separate manifestation determination meetings due to disciplinary incidents were held in January, February and April 2016 (S-42, 44, 51). SPS proposed a new IEP covering March 2016 to March 2017, placing Cal in a substantially separate program

at SPS' Public Day Middle School (PDMS). Father accepted the substantially separate program and services of the proposed IEP but rejected the physical placement at SPS' PDMS (S-1, 62). In late April 2016 SPS requested an EE at SPS' PDMS which was rejected by Father (S-56). Cal failed all of his academic subjects (English/language arts, math, science and social studies) for the 2015-2016 school year at the Kiely Middle School SEBS program (S-57).

In July 2016 Parent requested a hearing before the BSEA and this Hearing Officer was assigned to the case (BSEA #1700181). SPS filed its response in August. During a pre-hearing conference call in August 2016 the parties agreed to hearing dates of September 26 and 28, 2016. During the conference call the Hearing Officer had advised Father that he had the right to be represented by an attorney or lay advocate in the due process proceeding, but Father stated that he would be representing Cal's position himself. On the first day of hearing, September 26, 2016, when the Hearing Officer was presenting his opening statement and referenced Parent's election to represent himself, Father stated that he now desired counsel. Given that Father had previously stated he would be advocating for Cal, that this was the agreed upon first day of hearing, and numerous witnesses were now present, the Hearing Officer refused to postpone the hearing, but offered Father the opportunity to withdraw his hearing request so that he could seek counsel, also advising that Father should move quickly since SPS could also file a hearing request. Father withdrew his request for hearing in BSEA #1700181 without prejudice (See transcript, BSEA #1700181).

On September 26, 2016, Cal was attending Balliet Middle School pursuant to a short term Interim Alternative Educational Setting (IAES) placement due to disciplinary infractions. While Father did not want Cal to attend SPS' PDMS, he also did not want Cal to return to the Kiely SEBS program where he had experienced numerous problems. Father expressed a desire that Cal remain at Balliet Middle School. Later on September 26, 2016, SPS proposed a new N-1 and Evaluation Consent Form (S-65) which would allow Cal to continue at Balliet Middle School on a full time basis (not the IAES) if Parents would waive all C grid/substantially separate special education services and Parent would agree to have Cal undergo a risk assessment. Father accepted both the Balliet Middle School placement and the risk assessment on September 26, 2016 (testimony Von Mering; Austin; Mother; S-65).

The following day, September 27, 2016, SPS filed for an expedited hearing before the BSEA (S-62). Expedited status was granted by the Director of the BSEA and the case was assigned to the same Hearing Officer originally assigned to BSEA # 1700181. An initial hearing date was scheduled for October 12, 2016. On an October 5, 2016 conference call, Father stated that he was still attempting to obtain counsel. On October 7, 2016 Parents' counsel entered a notice of appearance and requested a two week postponement which was opposed by SPS. On October 11, 2016, a 2nd request for postponement was filed by Parents attorney due to extenuating circumstances, a conference call took place that same day, the parties agreed to a brief postponement and the case was scheduled for and took place on October 19-20, 2016.

ISSUES IN DISPUTE

- 1) Does SPS' currently proposed IEP for Cal, placing him at SPS' PDMS appropriately address his special education needs so as provide him with a free and appropriate public education (FAPE) in the least restrictive educational environment (LRE)?
- 2) If not, does placement in SPS' Balliet Middle School, where Cal is currently attending, appropriately address his special education needs so as to provide him with a FAPE in the LRE?

STATEMENT OF POSITIONS

SPS' position is that its currently proposed IEP, placing Cal in SPS' PDMS is the appropriate placement to address his special education needs so as to provide him FAPE in the LRE. SPS contends that placement of Cal in SPS' Balliet Middle School does not provide him FAPE in the LRE.

Parents' position is that placement of Cal in SPS' PDMS is inappropriate and too restrictive to address his special education needs. Parents contend that placement at Balliet Middle School is appropriate to provide Cal FAPE in the LRE.

PROFILE OF STUDENT

In 2012 Psychiatrist John Fanton diagnosed Cal with Attention Deficit / Hyperactivity Disorder (ADHD) and Mood Disorder, Not Otherwise Specified (Mood Disorder, NOS). There is an immediate family history of attention problems, anxiety and mood disorder (S-4).

School Psychologist Dr. Zara Chiarizia performed a psychological evaluation of Cal in March 2012 (S-4). On the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) Cal achieved a Verbal Comprehension IQ of 95 (Average); a Perceptual Reasoning IQ of 71 (Extremely Low to Borderline); a Working Memory of 83 (Low Average) and a Processing Speed of 85 (Low Average). On the Achenbach Child Behavior Checklist, Cal's Thought Problems, Attention Problems and Rule Breaking Behaviors were judged to be in the Borderline range by Cal's teacher but in the Clinical range by Father. Both teacher and Father placed Cal's Aggressive Behaviors and his Externalizing Problems within the Clinical range. (See S-4 for complete psychological evaluations.)

Dr. Fanton referred Cal for a neuropsychological evaluation which was performed by Neuropsychologist Mark Elin in November 2012 (S-10). On the Wechsler Abbreviated Scale of Intelligence (WASI) Cal received a Verbal IQ of 88; a Performance IQ of 76; and a Full Scale IQ of 80. Dr. Elin diagnosed Cal with a Cognitive Disorder, NOS; ADHD; Adjustment Disorder; Specific Learning Disability in mathematics; and underlying visual spatial, constructional and processing speed deficits. Dr. Elin noted, in closing:

[Cal] is challenged in many levels in terms of his brain behavior and relationships which have affected multiple domains of functioning. This can contribute to acting out, potential frustration tolerance weakness, depression, anxiety and feeling disconnected and isolated from others. I believe all of these areas need to be discussed within a psychological setting. (See S-10 for complete neuropsychological evaluation.)

In December 2014 Dr. Fanton referred Cal to Baystate's Partial Hospitalization Program (S-26). The Reason for Hospitalization states:

To address escalating issues of oppositional and defiant behaviors, endangering peers, and work avoidance at school.

The report goes on to state:

According to father [Cal] is "totally out of control", has a lot of anger, walks out of class up and down the hall, and teachers have to chase him. He's not following directions, "only does what he wants," can't be redirected. He's disrespectful to everyone, yells, swears, punches walls, kicks things. [Cal] has been assaultive at school including purposely hitting a boy in the face with a basketball. When this SW asked [Cal] how he felt when the boy started crying [Cal] responded that he was happy because he doesn't like him. Father reports that the behaviors are happening every day, that he refuses to do schoolwork and that Cal only had one good day over the last few weeks. Father states that [Cal] bullies other kids at school. He exhibits "mood swings" switching to anger or anxiety quickly. At home Father reports that [Cal] has been exhibiting the same behaviors and thinks "everything is a big joke" even when people are getting hurt (S-26 p1)...

He had great difficulty participating in groups and in the classroom on most days. He needed frequent redirection and typically ignored or refused prompts and limits. His energy and efforts were often focused on testing limits and provoking staff. [Cal] became disruptive and aggressive on several occasions – specifically when a limit was required. Overall [Cal] made limited progress on recent goals. He did not identify triggers or practice strategies to improve compliance and/or cope with frustration and anxiety (S-26 p2).

Cal's medications were revamped while he was at Baystate and he was discharged on the following medications: Lithium, Abilify, Clonidine and Dextroamphetamine. Mother testified that the Lithium is prescribed for Cal's mood disorder, the Abilify for his anxiety, the Clonidine for his sleep disorder and the Dextroamphetamine for his ADHD. Mother testified that Cal currently remains on these medications. (See S-26; testimony, Mother.)

On an updated school psychological evaluation performed in March 2015 (S-54) Cal's WISC-IV scores were low average for verbal comprehension (87) and extremely low in perceptual reasoning (69), working memory (62) and processing speed (65). Achievement testing placed Cal below average in reading, writing and math. On the Achenbach, Cal's teachers placed both his Internalizing Problems and Externalizing Problems within the clinical range with Anxiety/Depression, Attention Problems and Aggressive Behaviors within the borderline range. Cal himself placed all of the above areas within the average range. (See S-54 for complete psychological evaluation.)

SCHOOL'S PROPOSED PROGRAM

SPS proposes placing Cal in its PDMS program which is a physically separate special education school for students whose primary disabilities are emotional, behavioral, and social. It is a therapeutically based program which employs a behavioral methodology and effective behavioral strategies. The PDMS

is a small program with fewer than 60 students in grades 6-7-8, three classes per grade, and a maximum of 8 students per class. Currently for the 6th grade there are only two classes with 5 students in one class and 4 in the other. The 3rd 6th grade is vacant but a teacher is assigned to it. There is one clinical staff member, a school adjustment counselor (SAC) per grade level. There is a guidance counselor. There are also two behavioral interventionists and a teacher of department who serve as first responders for implementing interventions for inappropriate student behaviors such as bolting or aggression. Clinical group therapy occurs once weekly per class. Individual therapy/counseling is provided on an as needed basis/as frequently or as long as necessary for emotional dysregulation or crisis intervention. The SACs consult with outside therapists of students (if parents have provided consent) so that school and home can be on the same page and provide consistent reinforcement.

The PDMS is designed to be a small, quiet, less stimulating environment and everything is very structured and systematic to help students feel safe in their school environment. The PDMS utilizes the regular SPS grade level curriculum, but small classes allow academic differentiation and extra academic support (designed to reduce student anxiety around academics and reduce academic gaps) which allow students to be more comfortable and better able to access the curriculum. Behavioral expectations are the same throughout the PDMS, thus providing predictability and consistency. Positive behavioral interventions are utilized. A point system is employed schoolwide. Hands-on restraints are a last resort, employed by appropriately trained staff.

(Refer to testimony, Gelineau; Von Mering; Austin; Danforth; S-1, 62.)

PARENTS' PROPOSED PROGRAM

Parents propose that Cal remain at Balliet Middle School (Balliet). Balliet is one of eight alternative programs within SPS. Balliet is designed for students who are overage and/or repeating grades and present with social maladjustment or a conduct disorder. Some students are general education students while some are special education students.

Balliet is a full inclusion school. There are no substantially separate special education classes; no pull out direct special education services in a special education classroom or resource room; and no classes co-taught by a general education teacher and special education teacher. Cal's teacher is not a certified special education teacher. At Balliet the special education teacher does not provide any direct special education instruction but consults with the general education teachers who provide all services.

Balliet is not a therapeutic special education placement. No students there (except Cal) require grid C services pursuant to their accepted IEP. Indeed, this alternative program is not a special education program and does not fall under the auspices or control of SPS's special education department.

(Refer to testimony Von Mering; Austin; Danforth.)

FINDINGS AND CONCLUSIONS

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

Pursuant to *Schaffer v. Weast* 126 S. Ct. 528 (2005) the United States Supreme Court has placed the burden of proof in special education administrative hearings upon the party seeking relief. Therefore, in the instant case, SPS bears the burden of proof in demonstrating that its proposed placement of Cal in SPS's PDMS is the appropriate placement in which to address his special education needs so as to provide him FAPE in the LRE; and that placement of Cal at Balliet is not appropriate to address Cal's special education needs so as to provide him FAPE in the LRE.

Based upon 1½ days of oral testimony, the exhibits introduced into evidence and a review of the applicable law, I conclude that SPS' proposed placement of Cal in its PDMS is appropriate to address his special education needs within the least restrictive educational environment. I further conclude that Cal's current placement at Balliet clearly does not provide him FAPE and does not implement his agreed upon IEP.

My analysis follows.

Cal is a boy of low average intelligence who has significant emotional, behavioral and social disabilities. He is diagnosed with and is on medications for a mood disorder, adjustment disorder, anxiety and ADHD. He has been in a substantially separate special education program since 3rd grade which was successful for him in 3rd and 4th grades. During 5th grade (2014-2015) he had an extremely unsuccessful year except for the period from March 2015 through June 2015 when he attended an EE (additionally extended to the end of the 5th grade school year) at SPS' public day elementary school (PDES). (See **STATEMENT OF THE CASE; PROFILE OF STUDENT**, above.) At the PDES Cal made both academic and behavioral progress, with no behavioral incidents reported. (Refer to testimony, Malinowski; S-36, 37, 38, 39, 40, 40A.)

Sixth grade necessitated a move from elementary to middle school. Given his success at the PDES, SPS wanted Cal to attend 6th grade at its PDMS, but because of Father's opposition placed Cal at Kiely Middle School's SEBS program. 6th grade was totally unsuccessful for Cal behaviorally, emotionally and academically. During the 2015-2016 school year SPS again proposed placing Cal at the PDMS which was rejected by Father. SPS then proposed an 8 week EE at PDMS which would have allowed Cal to attend the PDMS for 8 weeks with a return to Kiely/SEBS if Father was dissatisfied. This proposal was also rejected by Father. Cal failed all of his 6th grade academic subjects in the Kiely SEBS program. (See **STATEMENT OF THE CASE**, above). Cal's disciplinary log for the 2015-2016 school year lists 30 behavioral incidents, beginning the school year with incidents of defiance, disruptive conduct and leaving class, escalating in April 2016 to incidents of battery against fellow students both male and female (see S-52 for complete disciplinary log).

Cal began the 2016-2017 school year on August 29, 2016. On August 30, 2016 he was cited for defiance. On September 2, 2016 Cal threw a desk in the classroom, walked out of the classroom at Kiely Middle School, sat in the middle of the driveway, refused to move, and refused to respond to the school police officer so that the police officer had to stop traffic as cars came toward the school. Cal refused to move until his Father and Uncle arrived and took him home. On September 6, 2016 Cal threw objects at his teacher, swore at him, threatened to break windows, told the teacher he would bring a gun and shoot

him and that he would bring a gun to school and shoot up the school. (See S-60 for these disciplinary incidents.) These incidents led to Cal's initial placement at Balliet under an IAES.

This is an extremely troubling case. Cal is failing all academics. His behaviors and emotional dysregulation are escalating to disturbing levels where he is putting peers, teachers and himself in danger. His IQ scores deteriorated between 2012 and 2015, even in his strongest area of verbal processing (see S-4, 10, 54). His achievement scores are now all below grade level. Most disturbing are his Achenbach ratings. In 2012 SPS and Father perceived many of the same behavioral concerns (S-4). On the updated Achenbach in 2015, SPS continued to see many of these behavioral issues, however Cal perceived his behavioral /emotional issues to be average. Thus, at age 12, entering adolescence, Cal neither perceives that his emotional issues are significant nor that his behaviors are highly inappropriate.

I find that SPS has proceeded in a logical and consistent manner beginning Cal with inclusionary special education services, then pull-out special education services in early elementary school and intensifying to a substantially separate special education program for grades 3-5 (until the 4 month EE at PDES). When Father refused the PDMS for 6th grade SPS deferred and offered the Kiely/SEBS program, its most restrictive therapeutic special education placement within a large school setting. Only when the Kiely/SEBS placement was a complete failure for Cal did SPS formally propose PDMS, and proceed to a BSEA hearing (after Father withdrew his hearing request) with its proposed PDMS placement for Cal.

As stated above, based upon the vast preponderance of the evidence presented, I conclude that SPS' PDMS is appropriate to address Cal's special education needs so as to provide him with FAPE in the LRE. (See **SCHOOL'S PROPOSED PROGRAM**, above; refer to testimony Gelineau; Malinowski; Austin; Danforth; Von Mering.) SPS' PDMS provides Cal with a completely separate, therapeutically based, small special education program and placement. Such a small therapeutic school, with small classes, appropriately certified special education teachers and clinicians, structured, consistent school wide behavioral programming and reduced stimulation can address Cal's impulsive and aggressive behaviors, better focus his attention, and more intensively and comprehensively address his academic and behavioral concerns.

Given that Cal's only academic and behavioral success during the 5th and 6th grades has been at SPS' PDES (from March-June 2015), and given that the PDMS is simply a continuation of the PDES into the middle school (testimony, Von Mering), I conclude that placement at the PDMS offers Cal a substantial likelihood of success.

I specifically note that in Cal's last accepted IEP (S-1, 62) Father accepted all of the special education services contained therein but rejected the specific PDMS placement. Mother testified that Parents accepted this IEP to assure that Cal would continue to receive his special education services (testimony, Mother). Therefore, SPS and Parents agree that Cal requires these therapeutic, substantially separate special education services ("C Grid" services) to appropriately address his special education needs. Indeed, I take administrative notice of the fact that in the prior hearing brought by Father BSEA # 1700181, (withdrawn on September 26, 2016, the 1st day of hearing) the issue was Father's desire to have SPS place Cal in a private day special education school rather than the PDMS. SPS' Expedited Hearing Request in this case again focuses on SPS' PDMS versus an out-of-district private day school placement.

Yet in defending this case, Parents' position is that Cal should be educated in Balliet's alternative education program (See **PARENTS' PROPOSED PROGRAM**, above).

Parents' position in this hearing is totally contradictory to their prior position. Rather than seeking a more restrictive private day school special education placement to implement the SPS/Parent agreed upon IEP calling for intensive therapeutic special education services, Parents now argue that Cal should be educated in a setting that is less restrictive and has fewer special education services than any prior placement he has had in SPS. The Balliet placement is a total inclusion general education placement, with both general education and special education students, offering no direct special education services provided by a special education teacher in any setting and offering no therapeutic services of any kind, services which Parents specifically wanted to and did preserve for Cal by accepting SPS' most recent IEP (S-1, 62). The Balliet program is not even operated under the auspice and/or control of SPS' special education department. The inappropriateness of such a program is even more compelling when considered in the context of Cal's worsening acting out behaviors, emotional dysregulation and academic dysfunction. Parents have presented no educational or clinical evidence to support their position. No educational professional or clinical professional has either testified or submitted any evaluation or assessment which is supportive of Parents' position. I find absolutely no basis or justification to support Parents' position that the Balliet placement provides Cal FAPE.

Mother testified that Cal is doing well at Balliet. Cal has been at Balliet from September 28, 2016 to October 20, 2016, a total of 16 school days. On his 1st day of Balliet, September 28, 2016, Cal was verbally abusive towards staff and made threats to "shoot up" and "burn the school down" which escalated into physical aggression until he had to be physically restrained (S-63, 67; testimony, Austin). On October 5, 2016 Cal punched the wall, went to the school nurse, and was dismissed to Father (S-63). On October 13, 2016 Cal refused to do his work in class, became agitated, went to the Take a Break (TAB) room, made threats to bring a weapon to school and shoot people, left the school and walked home (testimony Von Mering; Austin). On October 19, 2016, the 1st day of this hearing, Cal did not want to go to school, Father physically escorted Cal to and into Balliet, Cal was combative, overturned a desk, threatened to hurt staff, punched the wall, Dad became physically imposing with Cal but he continued to punch the wall and wanted to get out of school, so Dad eventually escorted him out of school and took him home (testimony, Von Mering; Austin). Cal was absent from Balliet for a number of days for legitimate reasons but refused to go on at least 2 occasions (testimony, Mother; Von Mering; Austin). Cal was in school on the 2nd day of the hearing. Thus, of the possible 16 school days from September 28 to the 2nd day of hearing, Cal attended Balliet for 8 days. Based upon the above, I do not find that Cal has had a successful experience at Balliet to date this year.

Mother testified that SPS did not provide services/failed to implement Cal's recent IEPs. However all prior SPS IEPs for Cal were/have been accepted by Father and have now expired. It is well settled law that Parents cannot reopen and litigate IEPs that they have accepted and have expired as accepted IEPs. See *Chris A. v. Stow Public Schools*, 16 EHLR 1304 (MA 1990), affirmed on appeal, *Amann v. Stow School System*, 982 F. 2d 644 at 651 (1992). 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 at 147 (DNH); *In Re*;

Marblehead Public Schools, 7 MSER 176 at 180 (SEA Mass. 2002); *In Re: Ross* 14 MSER 290 (2008). Further, Mother's testimony on this point can be given very little weight since she has not attended an IEP meeting, not met with SPS staff regarding Cal, or observed Cal in any of his educational placements for the last 4 years.³

In their closing brief Parents' attorneys criticized various SPS witnesses on the basis that they did not know Cal or that some of their testimony was hearsay. Hearsay is permitted in administrative hearings. It is true that Ms. Gelineau and Ms. Von Mering have never met Cal. However, the primary function of their testimony was to explain SPS' PDMS placement (testimony Gelineau; Von Mering) or to explain the various options in SPS and how Cal's current placement at Balliet came about (testimony, Von Mering). Regarding the other SPS witnesses, Ms. Austin has known Cal for many years and worked with him this past summer and during the current school year at Balliet (testimony, Austin). Ms. Danforth was Cal's ETL all of the 2015-2016 school years at Kiely/SEBS and testified regarding his experiences there (testimony, Danforth). Ms. Malinowski specifically observed Cal on 4 separate occasions during his March-June 2015 EE at the PDES and testified regarding the appropriateness of the PDES for Cal, the progress he made and the behavioral success he experienced there (testimony, Malinowski). Therefore these 3 SPS witnesses have directly observed Cal's functioning in school. In contrast, the only witness for Parents was Mother. Given that she has not observed Cal in any SPS placement, met with any SPS personnel or attended any team meetings for Cal over the last 4 years, the preponderance of her testimony was hearsay and is weighed accordingly.

Father is the at home parent. It is Father who attends Cal's team meetings, manifestation determination/disciplinary meetings and who meets and interacts with SPS personnel regarding all of Cal's school issues. It was Father who was quoted at the Baystate school hospitalization placement (S-26) and who responded to the initial Achenbach Scales (S-4). Father initiated the prior hearing request, was initially going to represent Cal's position himself and testify at the original hearing. Yet Father was not even called as a witness at this hearing, despite the Hearing Officer's several inquiries regarding whether Father was going to be called as a witness on Cal's behalf. Based upon the exhibits introduced into evidence, Father was clearly in the best position to testify regarding Cal's issues, his observations of Cal in school and SPS' responses thereto.⁴

³ Mother testified that she works to support the family, is unable to attend school meetings and that Father is the family caretaker/school contact person at home (testimony, Mother). I certainly understand her situation but must weigh her testimony accordingly.

⁴ While I draw no negative inferences from Father's failure to testify, his lack of his testimony at this hearing is curious.

ORDER

I. SPS' proposed placement of Cal at the PDMS is appropriate to address his special education needs so as to provide him FAPE, and does so in the least restrictive educational environment consistent with Cal's needs.

II. Cal's current placement at Balliet is not appropriate to address his special education needs, does not implement his agreed upon IEP, and does not provide him FAPE.

By the Hearing Officer,

Dated: November 9, 2016