

March 27, 2014

**COMMONWEALTH OF MASSACHUSETTS**

*Division of Administrative Law Appeals*

**Bureau of Special Education Appeals**

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**DECISION**

**BSEA # 1309716**

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**BEFORE**

**RAYMOND OLIVER,  
HEARING OFFICER**

**DEBORAH DORFMAN, ATTORNEY FOR PARENTS/STUDENT  
SAMUEL MILLER, ATTORNEY FOR PARENTS/STUDENT  
REGINA TATE, ATTORNEY FOR SPRINGFIELD PUBLIC SCHOOLS**

# COMMONWEALTH OF MASSACHUSETTS

## Division of Administrative Law Appeals

### Bureau of Special Education Appeals

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

BSEA #: 1309716

#### 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<sup>2</sup>; and the regulations promulgated under these statutes.

A hearing in the above-entitled matter was held on January 22, 23, 24, 2014 at Catuogno Court Reporting in Springfield, Massachusetts. The record remained open for receipt of written transcripts and written final arguments until March 7, 2014.

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

Mother	
Stepfather	
Kathleen Collins	Psychologist/Consultant for Parents
Jareth Staine	Mentor
Deborah Dorfman	Attorney for Parents/Student
Samuel Miller	Attorney for Parents/Student
Mary Ann Morris	Executive Director of Student Services, Springfield Public Schools
Patricia Cutler	Director, Middle School Learning Center
Deana Gemme	Case Manager, Middle School Learning Center
Rhonda Jacobs	Principal, Alternative Schools, Springfield Public Schools
Mimi O'Neill	Behavior Specialist, Springfield Public Schools
Rebecca Gonzalez-Flores	School Psychologist, Springfield Public Schools
Anne Scully	Clinician, Springfield Public Schools
Calvin Carter	Teacher, Springfield Public Schools
Lindsay Carvel	Teacher, Springfield Public Schools
Robert Porter	Teacher, Springfield Public Schools
Regina Tate	Attorney for Springfield Public Schools
Deborah Lovejoy	Court Reporter
Raymond Oliver	Hearing Officer, Bureau of Special Education Appeals

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

<sup>2</sup> 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 concur.

The evidence consisted of Parents' Exhibits labeled P-1 through P-45 excluding P-33 and P-34; Springfield Public Schools' Exhibits labeled S-1 through S-100; and approximately 15 hours of oral testimony.

## **STATEMENT OF THE CASE**

Ted is a 15 year old young man who resides with his family in Springfield, Massachusetts. He is currently an 8<sup>th</sup> grade student who attends the Learning Center, a part of the Springfield Public Day Middle School. Ted has attended the Springfield Public Schools (SPS) since first grade. He attended various elementary schools in SPS from grade 1 through grade 4, 2006-2010. During second grade Ted was initially evaluated by SPS (S-1, 2, 3, 4; P-7) but was not found to be eligible for special education services at that time. Ted experienced numerous emotional and behavioral problems during his fourth grade year. During March 2010 SPS performed a psychoeducational evaluation (S-6) and Ted also underwent a private psychological evaluation (P-8; S-8). SPS found him to be eligible for special education and an Individual Education Program (IEP), covering March 2010 to March 2011 (S-7), was proposed by SPS. This plan was accepted by Mother. From February 2010 to December 2010 Ted required numerous hospital emergency room visits and partial hospitalizations for uncontrollable, defiant, destructive, assaultive, and disruptive behaviors. (See P-6, Appendix 3.) In September 2010 (Grade 5) Ted began at SPS' Public Day Elementary School although, as stated above, he spent considerable time in partial hospitalization programs during the fall of 2010 (P-6, Appendix 3). In March 2011, SPS promulgated a new IEP for Ted, covering March 2011 to March 2012 (P-4; S-24), continuing his placement at SPS' Public Day Elementary School. This IEP was accepted by Mother. In September 2011, Ted's sixth grade year, he moved to SPS' Public Day Middle School (PDMS). During the 2011-2012 school year he experienced many behavioral problems resulting in suspensions, and four arrests for disturbing lawful assembly and assaults and batteries on public employees (P-6, Appendix 1) which led to court involvement. In April 2012 SPS proposed a new IEP (P-3), covering April 2012 to April 2013, continuing Ted's placement at SPS' PDMS. This IEP was rejected by Mother. In May 2012, as the result of mediation, Ted was moved to the Learning Center, a more restrictive setting within SPS' PDMS. Mother agreed to this move to the Learning Center (LC) in the hopes that such placement would result in ending Ted's suspensions, arrests, and court involvement/probation. (Refer to testimony, Mother; Collins; Morris; Jacobs.)

Ted attended the LC for 7<sup>th</sup> grade, during the 2012-2013 school year. During September and October 2012 SPS performed updated evaluations/observations (P-10, 16; S-35, 36, 37, 38, 39, 43, 44). In October 2012 SPS proposed a new IEP, continuing Ted's placement in the LC (P-1; S-45). This IEP was accepted by Mother on October 15, 2012. However, on November 26, 2012 Mother rejected this IEP/placement at the LC. On January 22, 2013 the parties went to mediation and signed an Agreement. (See S-49 for specifics.) A functional behavioral assessment (FBA) was performed in April 2013 and a new behavior intervention plan (BIP) was developed in May 2013, which was rejected by Mother in June 2013. (See P-6, 18; S-54, 57, 58, 59, 60.)

On June 20, 2013 Parent filed a hearing request before the BSEA and on July 24, 2013 filed an amended hearing request. Both hearing requests sought relief for Ted and all similarly

situated students in SPS, i.e., a class action. Numerous postponement requests, pre-hearing conference calls, preliminary matters, and extensive discovery and scheduling took place. SPS moved to dismiss all class action claims. By late August 2013 Parents joined with SPS in seeking to dismiss the class action aspects of this appeal and in September both parties submitted proposed rulings regarding the dismissal of all class action claims. On October 15, 2013 the Hearing Officer dismissed Parent's class action claims. (See ruling.) Meanwhile, in October 2013, SPS had proposed a new IEP for Ted covering October 2013 to October 2014, continuing his placement at the LC (S-81).

This appeal was scheduled to be heard on October 22 and 23, 2013. However, on the first day of hearing, the parties reached an interim settlement agreement whereby Ted would attend Parent's requested placement (a Social Emotional Behavioral Supports program located at SPS' Chestnut Accelerated Middle School) for a 45 day extended evaluation beginning on October 30, 2013. The hearing was placed on off-calendar status, but with tentative hearing dates set for January 2014 if the parties could not agree upon Ted's placement after the 45 day extended evaluation (EE). (See S-100 for Interim Settlement Agreement.)

Ted attended the Social Emotional Behavioral Supports (SEBS) placement for the 45 day EE from October 30, 2013 until January 15, 2014. The parties could not reach agreement regarding Ted's prospective placement at the end of the EE and Ted returned to his LC placement. The hearing took place on the dates specified above.

## **ISSUES IN DISPUTE**

1. Do SPS' proposed IEPs for Ted placing him at the LC from October 2012 to October 2013 and October 2013 to October 2014 appropriately address his special education needs so as to provide him with a free and appropriate public education (FAPE) in the least restrictive educational environment (LRE)?
2. If not, does placement in the SEBS program appropriately address Ted's special education needs so as to provide him with FAPE in the LRE?

## **STATEMENT OF POSITIONS**

Parents' position is that SPS' IEPs placing Ted in the LC of SPS' PDMS are inappropriate and too restrictive to address his special education needs so as to provide him with FAPE in the LRE. Parent contends that placement in SPS' SEBS program, with supports, is appropriate to address his special education needs so as to provide him with FAPE in the LRE.

SPS' position is that Ted was and is appropriately placed in SPS' LC of the PDMS and that such placement provides him FAPE in the LRE. SPS contends that placement in SPS' SEBS program would not provide him FAPE in the LRE.

## PROFILE OF STUDENT

Ted has been extensively evaluated over his educational career. He received his first evaluation, a psychoeducational evaluation, by SPS in March 2007 during 2<sup>nd</sup> grade (P-7; S-4). He then received a psychoeducational evaluation by SPS in March 2010 (S-6), as well as a private psychological evaluation by Valley Psychiatric Services, also in March 2010 (P-8; S-8). Ted underwent educational testing by SPS in March 2012 (S-29); a psychological evaluation by SPS in September 2012 (P-10, S-35); and updated educational testing by SPS again in October 2012 (S-43). In October 2013 SPS performed an executive functioning evaluation on Ted (S-84) as well as an occupational therapy assessment (S-85). On January 9, 2014 SPS did an Addendum to the October 2013 evaluation with updated assessments (S-99).

Testing reveals Ted to be a boy of average cognitive potential. All Wechsler Intelligence Scale for Children – Fourth or Fifth Editions (WISC-IV or V) test administrations have placed him within the low average to average range of intellectual functioning, with non-verbal functioning somewhat stronger than verbal, and processing speed a relative weakness but still within the low average range. (See P-7, 8, 10; S-4, 8, 35). Similarly, on all educational achievement testing (Woodcock-Johnson Tests of Achievement – 3<sup>rd</sup> Edition (WJTA-III) and Wechsler Individual Achievement Tests – 2<sup>nd</sup> or 3<sup>rd</sup> Editions (WIAT II or III), Ted's academic achievement scores were either at grade level and/or within the low average to average range. (See P-7, S-4, 6, 29, 43.)

Ted is a boy with significant emotional and behavioral disabilities which interfere with his ability to make educational progress. His first SPS psychoeducational evaluation in 2<sup>nd</sup> grade, performed by Dr. Shirazi, was triggered by behavioral issues in school, in-house suspensions, aggression towards other children and not accepting responsibility for his actions. (See P-7; S-4.) Although there was then a finding of no eligibility, Dr. Shirazi recommended:

If his behavioral difficulties do not subside by the end of the current school year, the team might reconvene and discuss a more restrictive behavioral placement for him for the coming school year. (P-7; S-4, final page).

Psychoeducational testing was again done in March 2010 during Ted's 4<sup>th</sup> grade (S-6). SPS included the Behavior Assessment System of Children – 2<sup>nd</sup> Edition (BASC-II), which is administered via teacher rating scales. Based upon his teacher's responses, the school psychologist reported that Ted's measures of anger and depression fall within the clinically significant range, suggesting a high level of maladjustment; that Ted did not seem to understand the cause and effect relationship, often blaming others for his own problems; that Ted's adaptive skills, social skills and study skills all fell within the at risk range; that Ted was non-compliant with classroom rules; and that his considerable difficulty with emotional regulation appeared to affect his compliance academically. (See S-6 for complete evaluation.)

In March 2010, a private psychological evaluation was performed at Valley Psychiatric Services by Dr. Chapelle (P-8; S-8). Dr. Chapelle found that Ted presented with indications of depressed affect which may be more pervasive and chronic than situational and transient. Dr. Chapelle noted a possible vulnerability for lapsing into poor behavioral judgment calls, possibly

including regressed angry behaviors which may be quite significant in Ted's overall educational profile and which was likely to contribute to problematic interpersonal behaviors. Dr. Chapelle also noted a vulnerability for being confined by his own initial perceptions of some of the ordinary, everyday situations he encountered. Dr. Chapelle's Axis I diagnostic impression was: 1) Adjustment Disorder with Disturbance of Conduct and 2) Attention Deficit Hyperactivity Disorder – Not Otherwise Specified, by record. (See P-8; S-8 for complete evaluation.)

In September 2012 SPS school psychologist Dr. Gonzalez-Flores evaluated Ted (P-10; S-35). The social-emotional assessment utilized was the Achenbach System of Empirically Based Assessment (ASEBA), with rating scales filled out by the teachers and the student. On the LC teachers' scale, Ted's externalizing problems were clinically significant. On Ted's self-report his total competence was critical while his positive qualities were average. Dr. Gonzalez-Flores found that Ted tends to externalize his worries and anxieties, that he had a negative perception of himself, and that his behaviors appear to be oppositional and defiant in nature. (See P-10; S-35 for complete evaluation; testimony, Gonzalez.-Flores.)

In her October 2013 executive functioning assessment (S-84), Dr. Gonzalez-Flores did an updated ASEBA teachers' version and both a teacher and student version of the Behavioral Rating Inventory of Executive Functioning (BRIEF) to examine Ted's behavioral/emotional regulation. On the updated ASEBA (LC teachers) Ted's rule breaking behavior, aggressive behavior, externalizing problems and conduct problems all fell within the critical range. Social problems, thought problems, attentional problems, oppositional-defiant problems, post-traumatic stress problems and obsessive-compulsive problems all fell within the borderline range. On the BRIEF, as perceived by his LC teachers, Ted cannot modulate emotions and behaviors via appropriate inhibitory controls. Additionally, Ted has difficulty initiating, planning, organizing and sustaining future oriented problem solving. On the BRIEF Ted's self-scores agree with his teachers' ratings in terms of his inability to shift activities and mental sets effectively. Dr. Gonzalez-Flores found Ted to be externalizing a significant amount of maladaptive behaviors such as breaking school rules. (See S-84 for complete evaluation; testimony, Gonzalez-Flores.)

In January 2014 Dr. Gonzalez-Flores did a further update of the ASEBA via Ted's three SEBS teachers (who taught him during the EE), as well as a parent assessment. All three of Ted's SEBS teachers found Ted's oppositional-defiant problems and externalizing problems to be in the critical range. Two of his SEBS teachers noted his aggressive behaviors to be in the critical range (the other teacher borderline critical). All three SEBS teachers ranked all other areas as either critical or borderline critical. On the parent version, Mother ranked Ted's externalizing problems, internalizing problems, social performance problems, obsessive-compulsive problems, anxiety problems, and withdrawal/depressed scales to be within the critical range, with all other areas borderline-critical. (See S-99 for complete evaluation; testimony, Gonzalez-Flores.)

## **PARENTS' PROPOSED PROGRAM**

Parents proposes that Ted be educated in the SEBS program at SPS' Chestnut Accelerated Middle School (Chestnut). The Chestnut SEBS program is the SEBS program observed by and recommended by Dr. Collins, Parents' expert. The Chestnut SEBS program is also the placement where Ted had his 45 day EE from October 30, 2013 until January 15, 2014. Chestnut is a large

middle school with over 1,000 students. SEBS students transition between the SEBS classrooms and the general student programs and classes at Chestnut.

SEBS programs are designed for students who exhibit significant and pervasive emotional and behavioral difficulties which affect overall psychological and academic functioning. SEBS students may have an inability to understand, build, and maintain interpersonal relationships; and/or display inappropriate behaviors including the lack of ability to control aggressive or angry impulses; and/or a general pervasive mood of unhappiness, depression, fear and anxiety. SEBS utilizes a small, structured therapeutic environment which provides comprehensive behavior management strategies, social/emotional skills instruction and individualized, ongoing counseling and support to facilitate student achievement. Structured, consistent and systematic approaches to learning are utilized along with clear, well defined expectations. Accommodations include cognitive-behavioral approaches to problem solving, clear expectations and consequences, use of positive reinforcement, use of behavioral contracts, a time out space, use of visuals, and sensory tools for de-escalation. There can be up to 12 students in an SBS classroom, but usually there are 8-10 students per class. The Chestnut SEBS includes three rooms - a classroom, a process room and a CAP room where students can be physically expressive and frustrated and remain safe.

(See P-6, 30; S-78; testimony Collins; Morris; O'Neill.)

## **SCHOOL'S PROPOSED PROGRAM**

SPS' IEPs for October 2012 to October 2013 and October 2013 to October 2014 propose that Ted continue to be educated in the LC of SPDS. All students who attend the SPDS and LC are special education students. SPDS is a separate public day school created by SPS for special education students whose emotional and behavioral disabilities would normally require such students being sent to out-of-district private special education placements because of the severity of their special education needs. The LC is on the upstairs floor of the SPDS and is the most restrictive placement within the SPDS.

The LC program is a partnership between SPS and the private Springdale Educational Center/School Based Services Inc. (SBS). The LC is designed to offer the intensity of therapeutic and behavioral supports and the flexibility around staffing that students get in a private, out-of-district placement, but provided within a public school program. The LC teachers, psychologist, speech language pathologist, occupational therapist and physical therapist are all SPS employees. The LC director, case manager, program coordinator, therapist, and the four interventionists who provide behavioral supports for the students are employed by SBS. All SBS personnel undergo physical restraint and de-escalation training, which includes dealing with students with a trauma history and/or who are sensitive to touch. The staff meets every morning and every afternoon and each LC student in grades 6-8 (currently 16) is discussed daily.

Small classes are provided for all academic subjects. The LC is a highly structured therapeutic environment which provides comprehensive and proactive behavior management strategies, social and emotional skills instruction, and ongoing counseling and support at the point of performance, individualized to the needs of the student in order to facilitate student

achievement. Structured, consistent, and systematic approaches to learning are utilized with clear, well defined expectations and behavior modification programs. Assignments are broken down into manageable pieces. Visual aides and hands on activities are employed. The LC program follows the Massachusetts curriculum/common core with modifications provided to meet the needs of individual students.

At the LC Ted receives all of his academics within the LC classrooms, taught by special education teachers. He receives English/language arts, mathematics and science/social studies for 90 minutes each day. He participates in clinical counseling twice per week as well as a weekly advisory support group. The LC provides a staffed intervention room where students can go to relax and process when necessary. Ted also receives extended school year special education services for 4 hours per day, 4 days per week, for a 5 week period over the summer. Door to door transportation is provided.

(See P-1; S-45, 81; testimony Cutler; Gemme; Morris; Porter.)

## **FINDINGS AND CONCLUSIONS**

It is undisputed by the parties and confirmed by the evidence presented that Ted 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, Parent bears the burden of proof in demonstrating both that SPS' proposed IEPs for October 2012 to October 2013 and October 2013 to October 2014 placing Ted in SPS' LC program, are not appropriate to address his special education needs so as to provide him FAPE in the LRE; and that placement in SPS' SEBS program is appropriate to provide Ted with FAPE in the LRE.

Based upon three full days of testimony, the exhibits introduced into evidence, and a review of the applicable law, I conclude that SPS' proposed IEPs placing Ted in SPS' LC program are appropriate to address his special education needs so as to provide him with FAPE in the LRE. I further conclude that placement of Ted in SPS' SEBS program is not, at this time, appropriate to address his special education needs so as to provide him FAPE in the LRE.

My analysis follows.

The evidence demonstrates, and I so find, that Ted is a student of basically average cognitive abilities and that his academic achievement is commensurate with his intellect. Thus Ted has both the intellectual capacity to learn and the ability to achieve academically in school. However, his significant behavioral and emotional disabilities seriously impact his ability to make educational progress within the school environment.

Parents called three witnesses - Mother, Mr. Staine, Ted's mentor, and Dr. Collins. Mother testified regarding Ted's educational history and why she wants her son to be in a less



restrictive educational placement. Mr. Staine, who holds no degrees, certifications, or licenses, testified regarding his role as a therapeutic mentor to Ted since late August 2013. Mr. Staine and Ted meet once per week for about one hour, they do things together in the community, and they talk about better behaviors at home and at school. Mr. Staine does not work with Ted in school. (Refer to testimony, Mother; Staine.)

Dr. Collins, a licensed clinical psychologist, was Parent's only expert witness.<sup>3</sup> She was, in essence, Parent's entire case with respect to justification for the less restrictive SEBS placement. Dr. Collins performed a document review, including medical records/reports from Ted's partial hospitalizations/emergency room visits and his school records. Dr. Collins also observed Ted in his LC classroom over three days in early September 2013 for several hours each day over different parts of the school day, for a total of about eight hours. Dr. Collins also observed one math class (without Ted in it) at the Chestnut SEBS program for about 1 1/2 hours in late September 2013. Ted is the only student who Dr. Collins has observed in a public school setting over the last year. Finally, Dr. Collins interviewed Mother, Ted, and spoke with Ms. Grimes, Ted's therapist, on the telephone. Based upon the above, Dr. Collins wrote her Case Review Report (P-6) opining that the LC program was too restrictive a placement for Ted and contending that the Chestnut SEBS program would be an appropriate placement. (See P-6 for Dr. Collins full report, recommendations and rationale; refer also to testimony, Collins.)

Dr. Collins holds no educational licensures or certifications. She performed no educational, psychological or neuropsychological evaluations or assessments of Ted. Dr. Collins did not/does not provide any therapy or counseling to Ted, thus has no therapeutic relationship with him. Dr. Collins' conclusions that the LC placement is too restrictive for Ted and that the SEBS placement is appropriate are based entirely upon her review of the work of others who have evaluated, assessed, educated or worked with Ted; her interviews with Mother, Ted and Ms. Grimes; and her school observations, as specified above. Yet, Dr. Collins questioned the diagnoses made by those professionals who had, in fact, evaluated Ted, offering instead, her own diagnosis. (See P-6; testimony, Collins.)

Dr. Collins attributes Ted's difficulties to trauma from a period of homelessness and domestic abuse which occurred during 2009-2010. I do not dispute that such factors could have an effect on Ted and contribute to his overall emotional and behavioral profile. However, Ted's behavioral problems pre-date such events by over two years and significant maladaptive behaviors were already manifesting themselves in 2007 during 2<sup>nd</sup> grade, triggering a psychoeducational evaluation. (See P-7; S-1, 2, 3, 4; **PROFILE OF STUDENT**, above.) Further, my decision cannot be based solely upon the etiology of Ted's behaviors, but rather upon how such behaviors are currently manifested in school, how they affect Ted's ability to make educational progress, and how such behaviors impact the safety of other students and teachers in school.

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<sup>3</sup> Both Mother and Dr. Collins testified that Ted has an outside mental health therapist, Ms. Grimes, who he sees for approximately one hour, two to three times per month. Ms. Grimes has been providing Ted such therapy for the last three years. Parent did not call Ms. Grimes to testify as a witness at this hearing, nor were any written reports or letters by Ms. Grimes submitted as evidence. While I draw no negative inference from the lack of any input from Ms. Grimes, I note that given her continuing therapeutic relationship with Ted over the last three years she may well have been able to offer the hearing officer valuable information.

Based upon her review of the data, Dr. Collins found that Ted had met the goals for following school rules appropriately and used appropriate language more than 75% of the time in March, April and May 2013. This, to Dr. Collins, fulfilled the criteria for a team meeting to discuss transition to a less restrictive setting (P-6; testimony Collins)<sup>4</sup>. However, P-29 and S-61 are school log entries of Ted's behavioral/disciplinary incidents from January 2007 through May 31, 2013. There are 36 behavioral/disciplinary incidents recorded over the 2012-2013 school year, which took place during the time Ted was a 7<sup>th</sup> grade student in the LC. There are 14 behavioral/disciplinary incidents recorded during the March-April-May 2013 time period specified by Dr. Collins. These 14 incidents (as the 36 incidents over the 2012-2013 school year) include Ted physically assaulting school staff, physically assaulting other students, defiance, disruptions, refusals, verbal harassment, swearing/obscenities, leaving classes within the school and actually leaving school grounds. (See P-29/S-61 for bullet descriptions of each behavioral incident recorded. See also P-24, 25, and S-66, 67 for Ted's behavioral records and incident reports.) I do not find such behaviors to be supportive of a move to a less restrictive educational environment such as SEBS. I conclude that such behavioral incidents demonstrate that Ted has not yet internalized, and is not yet able to generalize, behavioral controls.

While all of these behavioral/disciplinary incidents are clearly problematic, I find one to be especially troubling. On March 1, 2013 Ted left his classroom without permission and refused staff direction to stop and return to class. He then walked over and into another classroom and punched a peer in the face with no warning (P-29; S-61). This incident was described by Ms. Gemme, Ted's case manager at the LC, as follows. Ted and another student had previously engaged in verbal sparring between classes which was addressed by staff. Some time later Ted got up, left his classroom, opened the door to another classroom and hit the student (with whom he had previously had the verbal altercation) in the head. (Refer to testimony, Gemme.) Ms. Gemme testified that such behavior indicated that Ted was unable to let go of the prior incident, held onto it, and made a calculated decision to do harm to the other student. (Refer to testimony, Gemme.) I concur. I find that such action went beyond behavioral escalation or an inability to maintain behavioral control in the heat of the moment.

Neither Ms. Gemme nor Mr. Porter, Ted's favorite teacher at the LC for over a year, supported Ted's move from the LC to SEBS because he was not demonstrating the skills necessary to transfer to such lesser restrictive placement. (Refer to testimony, Porter; Gemme.) I give substantial weight to the testimony of these two professionals who have taught and/or interacted with Ted on a daily basis for over a one year period.

Both Mr. Porter and Ms. Gemme testified that Ted did make academic progress over his 7<sup>th</sup> grade year (2012-2013) in the LC and that, overall, there had been some emotional progress as well. Indeed, I note that since Ted has attended the LC the police have not been called, he has not been arrested, there has been no further court involvement, and Ted has come off of probation. (Refer to testimony, Gemme; Mother.) The structure, controls, and containment of the

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<sup>4</sup> For the October 2013 to October 2014 IEP SPS was willing to begin transitioning Ted out of the LC (upstairs) into the PDMS (downstairs) one class at a time so that he would have the support of the LC during this transition, if necessary. (Refer to testimony Morris; Porter; Gemme; Gonzalez-Flores; S-84.)

LC have prevented Ted's behaviors from resulting in further legal difficulties. I note the testimony of Ms. Cutler, LC Director:

He presents with pretty high-level behaviors. What I mean by "high-level," aggressive, harmful behaviors to others, both aggressive physically, sexual comments, and he needs a good bit of stabilization and replacement behaviors and social skills and learning pro-social skills and emotional control and self-management. There is a lot of work that he has to do in order to move to a less restrictive program. Tr. p537.

Based upon the behavioral difficulties still exhibited by Ted within the LC, as referenced above, evidencing an inability to exert behavioral controls, I find that placement in a less restrictive SEBS placement is not appropriate. This finding is reinforced by Ted's 45 day EE in the Chestnut SEBS program and his anxiety regarding possible transition from the LC during September and October 2013 with the scheduled BSEA hearing approaching. Mr. Porter testified:

This year there was a lot more anxiety. There were a lot of other things, kind of, that he was - that he was kind of contending with. Tr. p448-449

I know one of the things that was brought up was his conversations with his lawyers. And moving – and potentially moving away from kind of The Learning Center and not knowing kind of the future... so it was that not knowing kind of what the future definitely came up in the context of the classroom. Tr. p455-456.

And really, the outside influence and the things that he was dealing with outside the classroom, it was weighing down so heavily on him that he would revert to kind of drawing all the time and not necessarily at that place where he could focus. Because he didn't know what was going to happen with his future educationally. He didn't know what was going to happen, what classroom he was going to be in, who he was going to be around. He was a nervous wreck because of all those unknowns. Tr. p469.

(Refer also to testimony, Gemme.)

In October 2013, several days prior to the first scheduled day of hearing, Ted opened the emergency door of the school bus and jumped out while the bus was still moving. On the day after the first scheduled day of hearing (which had resulted in the interim agreement for the EE at Chestnut SEBS to begin on October 30, 2013) Ted got into a physical altercation with another student on the bus which resulted in the student's being injured and bleeding. (Refer testimony, Gemme; Morris; Gonzalez-Flores; Jacobs).

Ted's EE at Chestnut SEBS took place from October 30, 2013 through January 17, 2014. It was not a successful experience. There was significant elopement by Ted from his SEBS program into the general Chestnut school area at least daily from late November 2013 onward and many times there were multiple elopements per day. There was at least one attempt by Ted to elope from the school building and an incident of Ted leaving a group outside of the school and wandering the parking lot. There was verbal aggression towards other students often

including racial/ethnic slurs. There was disruption, defiance, profanity directed at teachers, sexualized language directed towards other students, posturing to hit other students and a therapist, antagonizing other students, and repeated targeting of a vulnerable autistic student on the bus to the extent that Ted was removed from the bus and Mother agreed to transport him. (Refer to testimony, Morris; O'Neill.) Furthermore, based upon her January 2014 updated testing on the ASEBA (S-99), Dr. Gonzalez-Flores was very concerned because there were many more critical areas in Ted's presentation in January 2014 after his EE at SEBS than there had been in her prior evaluations in September 2012 (P-10; S-35) or October 2013 (S-84) when Ted was attending the LC. (See **PROFILE OF STUDENT**, above; testimony, Gonzalez-Flores.)

In summary, Ted's LC teachers did not support a SEBS placement for him when requested by Mother or at any time prior to the EE (testimony, Gemme; Porter). Neither Ted's SEBS teachers, nor Drs. Gonzalez-Flores, Morris, or O'Neill supported Ted continuing at SEBS at the conclusion of his EE (testimony Morris; O'Neill; Gonzalez-Flores). Since 2010 no professional who has evaluated/assessed, taught and/or worked with Ted has supported his placement in a SEBS program.

Parent argues that in her September 2012 evaluation of Ted (P-10; S-35) Dr. Gonzalez-Flores recommended a less restrictive placement. Dr. Gonzalez-Flores' recommendation was:

The Team should look at whether he may be ready for a change from the Learning Program to our less restrictive program at our therapeutic school.  
Emphasis added.

SPS' therapeutic school is the PDMS i.e., downstairs from the LC. Dr. Gonzalez-Flores testified that she never advocated Ted going to a SEBS program. She also testified that when she made the above recommendation she was unaware of Ted's legal issues in the PDMS prior to his move to the LC, but that the Team made her aware of that fact and their belief that at that point in October 2012 Ted was not ready for such a move. (Refer to testimony, Gonzalez-Flores.) As noted in footnote #4, SPS did offer a gradual transition to the PDMS in October 2013.

Dr. Collins testified that she believes that SPS should have done more to help keep Ted at Chestnut SEBS, should have been more prepared for his behaviors, and did not follow her updated recommendations made on December 10, 2013 (P-35; S-91). I find that SPS clearly attempted to make the SEBS EE work for Ted. Supplemental meetings were held. SPS contacted Dr. Collins for her input/assistance as Ted's behaviors deteriorated during the EE. Dr. Morris replaced SEBS behaviorist, Ms. Wynne, with Dr. O'Neill when Dr. Collins had a conflict with Ms. Wynne. (Refer to testimony, Morris; Collins; O'Neill.) SPS did utilize many of Dr. Collins' suggestions/strategies, and found many helpful, but also noted that many of the updated recommendations made by Dr. Collins on December 10, 2013 (P-35; S-91) had been or were already being used with Ted without success. (Refer to testimony, Morris; O'Neill). As LC teacher Mr. Porter testified:

[Ted] is very calculating. He's not – he's very in tune, you could say, with his environment. So to predict when he's going to do something, it's – it would require sorcery. Tr. p490.

In conclusion, the totality of evidence demonstrates and I so find: 1) that Ted was able to make academic progress and some emotional/behavioral progress within the highly structured, supervised, controlled therapeutic environment at the LC during the 2012-2013 school year; and 2) no such progress was made either in September-October 2013 during the period of uncertainty over his placement or during his Chestnut SEBS EE from October 30, 2013 through January 15, 2014.

The vast preponderance of the evidence presented in this matter demonstrates that Ted is not yet emotionally or behaviorally ready for the lesser restrictive environment of the SEBS placement.

**ORDER**

- 1) SPS' IEPs placing Ted in the LC of SPDS are appropriate to address his special education needs so as to provide him with FAPE in the LRE.
- 2) Placement of Ted in SPS' SEBS program is not appropriate to address his special education needs so as to provide him with FAPE in the LRE.

By the Hearing Officer

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Date: \_\_\_\_\_