

June 7, 2013

**COMMONWEALTH OF MASSACHUSETTS**

*Division of Administrative Law Appeals*

**Bureau of Special Education Appeals**

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**DECISION**

**BSEA # 13-02922**

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**BEFORE**

**RAYMOND OLIVER  
HEARING OFFICER**

**MICHAEL TURNER, ATTORNEY FOR PARENTS  
TAMI FAY, ATTORNEY FOR WESTPORT PUBLIC SCHOOLS**

# COMMONWEALTH OF MASSACHUSETTS

## Division of Administrative Law Appeals

### Bureau of Special Education Appeals

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

BSEA # 1302922

#### 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 February 6 and 7 and March 1 and 4, 2013 at the offices of Murphy, Hesse, Toomey & Lehane in Quincy, Massachusetts. The record was left open for receipt of final written arguments, post- hearing motions, responses thereto, and oral argument/hearing/rulings on said post- hearing motions until May 13, 2013.

Those in attendance for all or part of the hearing were (\* indicates testimony via speakerphone):

Student	
Mother	
Father	
John Conboy	Psychologist
Colin Brody*	Teacher, Middlebridge School
John Kauffman*	Head of School, Middlebridge
Daniel Leventhal*	Academic Dean, Middlebridge
Laurie Kauffman*	Academic Coordinator / Social Pragmatics Teacher, Middlebridge
Michael Turner	Attorney for Parents
Ann Marie Dargon	Ast. Superintendent / Dir. of Curriculum, Westport Community Schools
Ann Harkin	Director of Special Education, Westport
Claire Santos	Special Education Supervisor, Westport
Ann Holt	School Psychologist, Westport
Christine Morrissette	Occupational Therapist, Westport
Alec Ciminello	Principal, Westport Middle School
Sheri Teague	School Adjustment Counselor, Westport Middle School
Nicole Dias	Language Arts Teacher, Westport Middle School
Cheryl Tutalo*	Principal, Westport High School
Christina Borges	Special Education Teacher, Westport High School
Tami Fay	Attorney for Westport
Jane Williamson	Court Stenographer
Raymond Oliver	Hearing Officer, Bureau of Special Education Appeals

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

The evidence consisted of Parents' Exhibits labeled P-1 through P-27; Westport Community Schools' Exhibits labeled S-1 through S-33; and approximately 17 hours of oral testimony.

## **STATEMENT OF THE CASE**

Jed is a 16 year old boy. Jed's family resides in Westport, MA. Since September 2011 Jed has attended and resided at Middlebridge School in Narragansett, Rhode Island.

Jed attended public schools in Westport, MA, which are known as Westport Community Schools (WCS) through 8<sup>th</sup> grade until June 2011. He was a regular education student until 6<sup>th</sup> grade although he did receive a 504 Accommodation Plan during 5<sup>th</sup> grade. (See testimony, Mother; S-32.) During 6<sup>th</sup> grade, for the first time, Jed was placed on an Individual Education Program (IEP) and began to receive special education services. (Testimony, Mother). Jed's IEP for February 2010 to February 2011, covering 7<sup>th</sup> into 8<sup>th</sup> grades (P-10; S-24) and Jed's IEP for January 2011 to January 2012, covering 8<sup>th</sup> into 9<sup>th</sup> grade (P-11; S-14) were each accepted by Parents. Both of these IEPs provided essentially full inclusion placements with minimal special education services delivered within the regular education classroom. However, both IEPs provided for Jed to have a 1:1 aide for all of his academic classes to help keep him on task, focused, organized, and to assist him with note-taking. (See P-10,11; S-14, 24; testimony, Mother, Diaz.)

Jed had a particularly difficult and stressful 8<sup>th</sup> grade year academically, emotionally and socially (testimony, Mother; Father; Jed; Conboy). During the course of 8<sup>th</sup> grade Jed was assigned four (4) different aides for varying time periods (testimony, Mother; Father; Diaz; Harkin). He received his WCS 3 year re-evaluation in December 2010. (See P-3, 8; S-21, 22.) Jed also received a private neuropsychological evaluation in February 2011. (See P-2; S-20.) As a result of the neuropsychological evaluation, WCS then performed a speech-language evaluation (P-4; S-17); an occupational evaluation (P-5; S-18); and a learning disabilities evaluation (P-6; S-19). On May 13, 2011 WCS held a team meeting to consider the results of the private neuropsychological evaluation and the WCS speech-language, occupational and learning disabilities evaluations, and prepared an Amendment to the January 2011 – January 2012 IEP which provided additional services (S-11). Meanwhile, Parents had been investigating private placements<sup>2</sup> and, in a letter dated May 8, 2011, notified WCS of their intent to enroll Jed at Middlebridge School (MB) and to hold WCS responsible for such placement. This letter was received by WCS on May 16, 2011 (P-9). Parents never responded to the May 2011 IEP Amendment (S-11) so Jed finished the 2010-2011 school year under his last accepted January 2011 to January 2012 IEP (P-11; S-14).

In September 2011 Jed began attending MB as a residential student. On October 12, 2011 a resolution meeting was held and WCS proposed a new IEP covering October 12, 2011 to October 12, 2012 (P-12; S-7). Parents never responded to this IEP (S-10). On October 12, 2011, WCS also requested to re-evaluate Jed (S-8) but Parents never responded to this request (S-6). On October 25, 2011, WCS observed Jed at his MB Placement and spoke with some MB staff.

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<sup>2</sup> Parents also applied to Landmark and St. Andrews but Jed was not accepted by either school.

(See S-9; testimony, Harkin; Dargon; Borges.) On February 2, 2012, a new team meeting was held and WCS proposed a new IEP covering January 26, 2012 to January 26, 2013 (S-4). Again Parents did not respond. One year later, on January 18, 2013, another team meeting was held and WPS proposed the current IEP covering January 26, 2013 to January 26, 2014 (P-22; S-2). Again there was no Parental response.

Parents originally filed for a BSEA hearing on September 24, 2011 but this appeal was withdrawn by Parents in September 2012 shortly before the hearing. (See BSEA #12-2293.) Parents filed the instant appeal, BSEA #13-02922, on October 14, 2012. Numerous conference calls were held, discovery took place and settlement of the case was attempted without success. The hearing took place as noted above.

## **ISSUES IN DISPUTE**

- 1) Do any or all of WCS' proposed IEPs covering the time period since Jed has been unilaterally enrolled at MB (September 2011) through January 2014 appropriately address Jed's special education needs so as to provide him with a free and appropriate public education (FAPE) in the least restrictive educational environment?
- 2) If not, does Jed require placement at MB as a residential student in order to receive FAPE in the least restrictive educational environment?

## **STATEMENT OF POSITIONS**

Parents' position is that all WCS IEPs' proposed for Jed have been inappropriate to address his special education needs so as to provide him FAPE in the least restrictive educational environment. Parents contend that Jed's special education needs require his placement at MB as a residential student.

WCS' position is that all accepted/expired IEPs are not at issue in this appeal. WPS contends that all IEPs/amendments proposed since Jed has been unilaterally placed at MB are appropriate to address his special education needs so as to provide him with FAPE in the least restrictive educational environment. WCS contends that Jed's placement at MB is both inappropriate and too restrictive to address his special education needs so as to provide him with FAPE in the least restrictive educational environment.

## **PROFILE OF STUDENT**

Jed is a boy with multiple disabilities. He has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD); Obsessive Compulsive Disorder (OCD); Tourette's Syndrome (TS); Learning Disability Not Otherwise Specified (LD/NOS); and anxiety. (See P-2, 8; S-20,21,32; testimony, Holt; Conboy; Mother.) Manifestations of his ADHD include inability to attend to task and lack of focus, impacting upon working memory and processing speed. Manifestations of the OCD and TS include irrational fears and phobias, facial tics, grimaces, head bobbing, rapid eye blinking, and picking at insect bites and scabs until they bleed and/or become infected. (See testimony, Holt; Conboy; Mother; Father.) Jed has been / is on multiple medications for these conditions including Mediate for the ADHD; Risperdal for the OCD; and

Zolof for the anxiety/depressive issues. He has recently started taking Intuniv for the TS. (See testimony, Mother; Conboy.)

Jed received a psychoeducational evaluation from Nina Pinnock, Ph.D., BCBA of St. Anne's Hospital in January 2008 (S-32) where he was administered the Wechsler Intelligence Scale for Children – 4<sup>th</sup> Edition (WISC-IV) and the Woodcock-Johnson Tests of Achievement – 3<sup>rd</sup> Edition (WJ-III). Nearly three years later in December 2010, WCS Psychologist Ann Holt also administered the WISC-IV (P-8; S-21; testimony, Holt) while WCS' Andrea Medeiros, M. Ed, administered the WJ-III (P-3; S-22). A comparison of the WISC-IV Intelligence Test and WJ-III Achievement Tests administered in January 2008 and December 2010 is set out below:

WISC-IV Subtest Areas	January 2008		December 2010	
	Composite	Percentile	Composite	Percentile
Verbal Comprehension	100	50	99	47
Perceptual Reasoning	141	99	117	87
Working Memory	107	68	80	9
Processing Speed	80	9	73	4
Full Scale IQ	113	81	92	30

WJ-III January 2008 Jed 10y 8m old at a 5.5 grade level:

Test Cluster	Age Equivalent	Percentile	Grade Equivalent
Oral Language	9-1	31	3.7
Broad Reading	10-3	44	4.8
Broad Math	10-5	46	4.9
Broad Written Language	10-1	42	4.9
Math Calculation Skills	9-6	26	4.0
Written Expression	10-6	47	5.0
Academic Skills	10-4	47	5.0
Academic Fluency	9-4	24	3.9
Academic Apps	11-9	68	6.4
Letter-Word Ident.	11-4	60	5.6
Reading Fluency	9-6	30	4.1
Story Recall	8-2	22	2.6
Understanding Directions	9-7	39	4.2
Calculation	10-1	39	4.5
Math Fluency	8-4	6	2.9
Spelling	9-5	38	4.7
Writing Fluency	9-8	28	4.2
Passage Comprehension	10-3	47	5.1
Applied Problems	11-11	72	6.4
Writing Samples	15-3	84	9.9

WJ-III December 2010 Jed 13y 7m old at a 8.3 grade level

Test Cluster	Age Equivalent	Percentile	Grade Equivalent
Oral Language	8-8	10	3.2
Broad Reading	10-11	23	5.5
Broad Math	10-8	15	5.1
Broad Written Language	10-5	19	5.1
Math Calculation Skills	9-10	5	4.3
Written Expression	9-4	6	3.9
Academic Skills	11-11	32	6.2
Academic Fluency	9-9	7	4.3
Academic Apps	10-10	21	5.4
Letter-Word Ident.	12-4	39	6.7
Reading Fluency	10-3	16	4.8
Story Recall	6-11	4	1.5
Understanding Directions	9-7	21	4.2
Calculations	10-5	13	4.9
Math Fluency	8-8	1	3.3
Spelling	13-11	53	7.7
Writing Comprehension	10-3	25	5.1
Passage Comprehension	11-11	34	6.4
Writing Samples	8-8	5	3.0

On February 1, 2011, Neuropsychologist and Clinical Psychologist Dr. Karen Holler administered a neuropsychological evaluation to Jed (P-2; S-20). Her report noted:

In summary, main issues identified in the current assessment included: 1) a Learning Disability NOS with poor academic fluency and math, 2) deficits in bilateral dexterity, 3) problems with verbal learning and memory, 4) executive deficits consistent with severe ADHD, and 5) a complex social/emotional presentation consistent with a history of OCD and Tourette's.

Based upon the results of the independent neuropsychological evaluation, WCS performed a speech and language evaluation on Jed on May 5, 2011 (P-4; S-17). In her summary and recommendations' the WCS speech-language pathologist noted, in pertinent part:

[Jed] demonstrates weakness in his auditory processing skills when faced with complex strings of auditory information which appear due to his attentional deficits....Although testing revealed [Jed's] pragmatic language skills are within normal limits, he does present with weakness in understanding and use of abstract language. Given [Jed's] diagnosis of ADHD, OCD and Tourette's, he may not consistently utilize these skills

within natural contexts to interact socially with peers....Direct speech therapy services are not recommended at this time as [Jed] is demonstrating age-appropriate language development. He may benefit from school-based support such as accommodations for attention deficits (see recommendations below) and social skills group.

The additional recommendations included auditory information being paired with visual/written supports, directions being broken down, frequent comprehension checks, additional time to process and produce information, face to face communication with alertness cues, and the promotion of self-monitoring, self-advocacy and organizational skills. (See P-4; S-17.)

On May 3 and 10, 2011 Jed underwent an occupational therapy evaluation (P-4; S-17). The occupational therapist noted, in pertinent part:

[Jed] presented with diminished dexterity in timed tasks, decreased in hand manipulation skills, poor pencil prehension and diminished consistency with hand dominance for dexterity tasks... Motor planning is a part of hand written expression and requires processing speed. Processing speed is also a noted area of weakness for [Jed]. Keyboarding also requires a level of motor planning and dexterity which will require extended practice to be a useful tool for [Jed] in the future.

Recommendations included:

Direct occupational therapy services are not recommended at this point in time for remediation as [Jed] has basic functional skills....His needs in regards to the demands of his academics and scheduling are judged to be better met through modifications, and accommodations rather than a pullout service. Additional assistive technology supports are recommended to assist with diminished dexterity, processing speed as well as mental endurance for written expression and participation. It is recommended that [Jed] participate in a keyboarding program to increase fluency and speed.

(See P-5; S-18; testimony Morrissette.)

The team meeting which proposed the IEP Amendment (S-11) as a result of Parents' independent neuropsychological evaluation and WCS' subsequent speech-language and occupational therapy evaluations occurred on May 13, 2011. On same date, WCS school psychologist Holt, who had performed Jed's educational evaluation in December 2010 (P-3; S-22), documented, for the first time, that WCS found that Jed met the eligibility criteria for a Specific Learning Disability for which he required special education services. (See P-6; S-19.)

## **PARENTS' PROPOSED PROGRAM**

Parents propose that Jed has been and is appropriately placed at MB in Narragansett, Rhode Island for both the 2011-2012 and 2012-2013 school years.

MB is an independent, ungraded, co-educational boarding and day high school program for students with a variety of learning differences who have average to above average cognitive potential and who do not present with a primary emotional or behavioral disorder. Students are complicated learners who have experienced difficulty learning in a traditional classroom setting. MB works with students diagnosed with dyslexia, non-verbal learning disability, executive functioning issues, receptive/expressive language problems, written expression difficulties, ADD/ADHD, and auditory processing issues. Students may present with deficits in working memory and processing speed. It is not uncommon for MB students to be diagnosed with generalized anxiety, OCD or Tourette's. Many MB students enroll after having experienced school failure, bullying and negative teacher relationships which often lead to low self-esteem, a sense of learned helplessness, lack of motivation and trust, and a host of academic deficiencies.

MB provides a language based, multi-sensory learning environment. Classroom instruction, activities and assignments are designed to incorporate visual, auditory, and kinesthetic processes. Class size is small ranging from 2-6 students with peers who share similar learning profiles. In addition to academic classes in English/language arts, mathematics, science, and social studies, each student receives a 40 minutes daily 1:1 tutorial with a remedial language specialist to remediate area of language deficits and to work on individual remedial programs. All students also receive a 30 minute daily language skills lab where students work on individual tutorial assignments designed to reinforce areas of remediation emphasized within the 1:1 tutorial setting. Every student also participates in a daily social pragmatics class designed to work on pragmatic language, interpersonal skills and social dynamics. Students work to learn to communicate more effectively; follow directions; listening skills and completion of tasks; resolving conflicts; managing anxieties and frustrations; self-advocacy; maintaining organization of their daily routines; and establishing and maintaining friendships.

MB's residential program complements its academic program and provides programming for weekday afternoons (after school), evenings and weekends. The residential component teaches social, emotional and independent learning skills necessary for students to become self-assured, self-aware and active members of their community.

MB is not a c.766 approved special education day or residential school nor is it a sole source of care special education school. MB is approved by the state of Rhode Island as a private school. All of Jed's academic teachers have bachelor's level degrees in the subject areas that they teach and all except his social studies teacher have Rhode Island teacher certification. None has special education teacher certification.

(Refer to testimony, Leventhal; Brody; J. Kauffman; L. Kauffman; see P-15, 16, 17, 18, 21, 24; 2-9, 25.)

## **SCHOOL'S PROPOSED PROGRAMS**

As noted in **STATEMENT OF THE CASE**, above, Jed's last accepted IEP covered 1/11 to 1/12 (mid 8<sup>th</sup> to mid 9<sup>th</sup> grade) and provided for a full inclusion placement with the

services of 1:1 aide for academic classes (P-11; S-14). The May 13, 2011 Amendment (S-11) to the above IEP, written in consideration of the results of Jed's February 2011 neuropsychological evaluation of (P-2; S-22) and the WCS speech-language, occupational and learning disabilities evaluations of early May 2011 (P-4, 5, 6; S-17, 18, 19), added a written language goal, use of a keyboard for written assignments, an occupational therapy consultation, and access to the school adjustment counselor on an as needed basis for support when Jed was feeling anxious, (Refer also to testimony, Holt; Morrissette; Teague; Harkin.) The IEP Amendment (S-11) noted:

The team determined that [Jed's] language based disability can be addressed in a general education class at the Westport High School. The team is proposing that [Jed] attend the language based program in the fall of 2011. (S-11, p.12).

The Amendment further confirms that WCS continued to propose a full inclusion (regular education) placement for Jed in that no special education or related services are provided in other settings (C grid) of the IEP Amendment. (See S-11.)

The 10/12/11 to 10/12/12 IEP (P-12; S-7) proposed as a result of the resolution meeting on 10/12/12; the 1/26/12 to 1/26/13 IEP (S-4) proposed as a result of a 2/12/12 team meeting (S-5); and the 1/26/13 to 1/26/14 IEP (P-22; S-2) proposed as a result of a 1/18/13 team meeting (S-3), all propose that Jed attend WCS' Language Based Learning Program (LBLP) at Westport High School (WHS). The LBLP began in WCS for the 2010-2011 school year. LBLP teachers receive training from the outreach program of Landmark School (LM), a c.766 certified private day and residential school program located in Prides Crossing, MA. Representatives from LM's outreach program come to WCS and provide instruction, discussion and modeling of language based strategies and activities. Some LBLP teachers have visited LM on two occasions to observe English and math classes to see how instruction at LM takes place using these LBL strategies. There has also been a three day summer institute provided by LM outreach to WCS staff in Westport at the high school, middle school and elementary school levels. LM outreach personnel have also observed LBLP classes in WCS. The LBLP started in grades 7-8-9 in the initial year (2010-2011) but the long range plan is to extend the LBLP down to the third grade level and throughout high school. As students go through the LBLP, strategies are scaffolded and responsibility is returned to the students so there is less support as students continue in the LBLP. In 9<sup>th</sup> grade there is full support (described below) and in 10<sup>th</sup> grade less support. Currently the LBLP runs through 10<sup>th</sup> grade.

The LBLP is a regular education initiative designed for students who have been identified to fit a certain profile i.e., students with average to above average intelligence who can access subject matter content but have difficulties with executive functioning and sometimes memory issues. LBLP classes are co-taught by the regular education subject matter teacher and a special education teacher. Class size is 14-16 students. Students are hand selected for the LBLP. There are regular education students chosen to serve as model students. There are regular education students who might have some weakness in organization, processing or other language based issue. There are some students on 504 plans who do not require special education services but need some accommodations which fit in with the LBLP structure. Finally, there are special education students with executive functioning issues who are on IEPs. For example, in the 9<sup>th</sup> grade English and science LBLP classes this year there were 15 students-two special education

students on IEPs, three students on 504 accommodation Plans, three regular education students with some language weaknesses, and seven model regular education students. All teachers in the LBLP have requested said program as their classroom assignment.

A block schedule is utilized at WHS. Classes are only a semester rather than year-long ,but each class meets for a double period (84 minutes) each day during that one semester. Students take only four classes per semester. In 9<sup>th</sup> grade the LBLP students take two LBLP classes each semester. During the fall semester LBLP students take English and history with both classes focusing on reading and writing in the classroom. During the spring semester LBLP students take math and science. While the regular education subject matter teachers change, there is continuity with the special education teachers. The special education teacher who co-taught the 9<sup>th</sup> grade English class during the fall semester co-teaches the science class during the spring semester. Likewise the special education teacher who co-taught 9<sup>th</sup> grade history during the fall semester co-teaches the math class during the spring semester. This procedure allows the LBLP students to have the same two special education teachers for the entire 9<sup>th</sup> grade year to ensure consistency reinforce the LBL strategies.

In 10<sup>th</sup> grade the LBLP co-taught classes (i.e., with both a regular education and special education teacher) consists of English during the fall semester and math during the spring semester. Science and social studies are no longer are LBLP co-taught classes. Currently the LBLP runs through grade 10. There will be training to extend the LBLP classes into 11<sup>th</sup> and 12<sup>th</sup> grades at least in English.

The special education service delivery grids on the IEPs covering Jed's placement at WHS all provide the following direct special education services: Grid B- special education teacher in Jed's proposed LBLP classes and a paraprofessional (aide) in his elective (non LBLP class). Grid C services include an Academic Support Class daily for 84 minutes with a special education teacher and/or paraprofessional; and counseling with the School Adjustment Counselor for 30 minutes once per week.

(Refer to testimony Borgas; Tutalo; Dargon; Harkin; see P-11, 12, 22; S-2,4,7,11,14.)

## **FINDINGS AND CONCLUSIONS**

It is undisputed by the parties and confirmed by the evidence presented that Jed 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, Parents bear the burden of proof in demonstrating both that WCS' proposed IEPs are not appropriate to address Jed's special education needs so as to provide him with FAPE in the least restrictive educational environment; and that placement of Jed at MB is appropriate to provide him with FAPE in the least restrictive educational environment.

Based upon four days of oral testimony, the extensive exhibits introduced into evidence, and a review of the applicable law, I conclude that none of the proposed WCS IEPs at issue in this case (as specified below) are appropriate to address Jed's special education needs so as to provide him with FAPE in the least restrictive educational environment. Pursuant to *Carter By & Through Carter v. Florence County School District Four*, 950 F. 2d 156 (4<sup>th</sup> Cir 1991) affirmed 510 U.S. 7 (1993) (hereinafter *Florence County*), I conclude that Parents' placement of Jed at MB for the 2011-2012 and 2012-2013 school years was/is appropriate to address Jed's special education needs so as to provide him FAPE.

My analysis follows.

## **PROCEDURAL ISSUE – SCOPE OF REVIEW**

Pursuant to 20 U.S.C. §1415(b)(6)(B) prescribing a two year statute of limitations, claims regarding Jed's educational programs could reach back to October 2010. While Parents claims essentially relate to the time period commencing with Jed's unilateral placement at MB, there is also a claim for unspecified compensatory educational services. However, Jed's 1/10 to 1/11 IEP (P-10; S-24) was accepted by Parents and expired as an accepted IEP. Similarly, Jed's 1/26/11 to 1/26/12 IEP (P-11; S-14) was accepted by Parents and the acceptance was never rescinded. However, I consider Parents' notification to WCS in May 2011 of their intent to enroll Jed at MB and to hold WCS responsible for such placement (P-9), perfected by Jed's actual enrollment at MB in September 2011 (testimony Parents) to be a constructive rejection of Jed's 1/26/11 to 1/26/12 IEP, effective September 2011. Both courts and BSEA have repeatedly held that Hearing Officers are precluded from revisiting/re-opening accepted IEPs that have expired where parents have participated in the development of the IEP; parents have received notice of their options for rejection of an IEP and proceeding to a due process hearing; parents have chosen to accept the IEP; and parents have never rejected the IEP during its term. See *Chris A. v. Stow Public Schools*, 16 EHRLR 1304 (MA 1990), *aff'd. sub nom. 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 (DNH); *In re: Marblehead Public Schools*, 7 MSER 176 at 180 (SEA Mass 2002); *In re: Fairhaven Public Schools*, 12 MSER 95 (SEA Mass 2006); *In re: Hopkinton Public Schools*, 13 MSER 234 (2007).

Therefore, since no IEP for Jed was effectively rejected until September 2011, claims for any parental reimbursement/compensatory educational services prior to September 2011 are extinguished and reimbursement/compensatory educational service claims will be considered only from September 2011 forward.

I find that Jed has a complex constellation of multiple disabilities and that the combined effect of his ADHD, OCD, TS, LD/NOS and anxiety have a serious and critical impact upon his ability to learn. (See **PROFILE OF STUDENT**, above; testimony Conboy; Mother; Father; Holt; P-2, S-20.) As Dr. Holler succinctly summarized in her neuropsychological evaluation, Jed clearly has a learning disability with poor academic fluency and math, problems with verbal learning and memory, executive deficits consistent with severe ADHD, and a complex

social/emotional presentation consistent with a history of OCD and Tourette's Syndrome. (See **PROFILE OF STUDENT**, above; P-2; S-20.)

I find that the WISC-IV intelligence scores and WJ-III achievement scores from January 2008 when Jed was 10 years, 8 months and at a 5.5 grade level (before becoming a special education student in WCS), compared to the WISC-IV intelligence scores and WJ-III achievement scores nearly 3 years later in December 2010 when Jed was 13 years, 7 months old and at an 8.3 grade level (after Jed had been on an IEP in WCS for nearly 3 years) to be highly significant and quite disturbing. On the WISC-IV while Jed's verbal comprehension scores remained the same, his perceptual reasoning scores dropped 24 points, his working memory scores dropped 7 points, and his full scale IQ dropped 21 points. On the WJ-III achievement tests Jed went from approximately 1 year below both age level and grade levels in mid-5<sup>th</sup> grade to approximately 3 ½ years below age level and 3-4 years below grade level in mid 8<sup>th</sup> grade. (See **PROFILE OF STUDENT**, above; P-3, 8; S-21, 33, 23.) Thus, after 3 years of special education services in WCS, Jed had not only not made progress according to these standardized/normed/validated testing instruments, but he had fallen 2 years further behind than he had been before receiving special education services in WCS.<sup>3</sup>

Based upon the above, I conclude that Jed clearly was not making effective progress in WCS, in fact, the WJ-III achievement test scores reflect Jed's regression. As of the middle of grade 8, Jed was performing generally, at a 5<sup>th</sup> grade level. I conclude that WCS was not providing Jed with FAPE. I also find it particularly troublesome that although WCS' own cognitive and achievement testing in December 2010 documented Jed's IQ and achievement test scores to be sharply dropping (P-3, 8; S-21, 22), it required a private, independent evaluation (P-2; S-20) before WCS even documented that Jed had a Specific Learning Disability (P-6; S-19).

I further find, as discussed below, that WCS' proposed WHS IEPs, offering the LBLP were/are inappropriate to address Jed's special education needs so as to provide him with FAPE. This finding is made in light of Jed's multiple disabilities, their significant impact upon his ability to learn and the degree of dysfunction/level at which Jed was functioning during 8<sup>th</sup> grade after three years of special education programming in WCS.

First, Jed's LD/NOS, OCD, TS, anxiety and severe ADHD affect far more than his executive functioning ability and memory, which are the areas which the LBLP is designed to address. (Refer to testimony Conboy; Brody; Leventhal; L. Kauffman; see P-2; S-20.)

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<sup>3</sup> Similarly, at Westport Middle School Jed's grades from 6<sup>th</sup> through 8<sup>th</sup> grade demonstrated a downward spiral. Jed's grade 6 English/language arts grade for the year was 88, in grade 7 it was 83 and in grade 8 it was 66. In math Jed's grade for the year in 6<sup>th</sup> grade was 85, in 7<sup>th</sup> grade was a 90 and in 8<sup>th</sup> grade was a 69. It is noted that both Jed's English/language arts grades and math grades were modified grades to begin with. In social studies Jed's grades for the year went from a 91 in 6<sup>th</sup> and 7<sup>th</sup> grades to a 70 in 8<sup>th</sup> grade. In science Jed's grades for the year were 84 in 6<sup>th</sup> grade, 83 in 7<sup>th</sup> grade and 80 in 8<sup>th</sup> grade. (See P-14; S-23 testimony, Dias.)

Further, Ms. Harkins, Dr. Dargan, Ms. Tutalo, and Ms. Borges all specifically testified that the LBLP is not a special education program and it is not under the auspices or control of the special education department.

WCS special education director Ms. Harkin testified at Volume IV page 175 as follows:

Q: What is the basis for providing children the language based classroom at the high school?

A: The language-based classroom is not a special education classroom. I'm not involved in assigning students to classrooms.

Q: Who is?

A: It was previously testified that the principal and the guidance office make these decisions based upon information they have.

Q: So it's not a team decision?

A: I don't know whether they call that a team or not. But it's not a special education decision.

Emphasis added.

Later, at Volume IV page 181 Ms. Harkin testified as follows:

Q: So who from the high school regular education department initiated this?

A: I'd have to check to see. I don't know that there was anyone from the—I need to look at the attendance sheet. But that could have been—see we wouldn't decide that program in terms of an IEP placement, because it's a regular education program.

Emphasis added.

I note that while the May 2011 IEP Amendment (S-11) makes reference to possible placement in the LBLP in high school for Jed, the first time LBLP was actually offered to Jed was the October 2011 IEP as the result of a resolution meeting (P-12; S-7) which was after Jed had already been unilaterally placed at MB.

Finally, while the regular education LBLP consisted of four of Jed's academic classes during 9<sup>th</sup> grade- English, math, social studies and science-it would only encompass two of Jed's academic classes-English and math-during his 10<sup>th</sup> grade year. The most recent IEP proposed by WCS (P-22; S-2) extends to 1/26/14 or approximately halfway into Jed's 11<sup>th</sup> grade year and the LBLP currently extends only through 10<sup>th</sup> grade. While WCS testimony indicated the LBLP would be extended into 11<sup>th</sup> grade, the most specificity regarding 11<sup>th</sup> grade was that the LBLP would be in English and maybe some math classes (testimony, Tutalo). WCS witnesses testified to other services which Jed could access including a summer program at Bristol Community College, a homework club, Project Action and an after-school social skills club which meets once weekly. (Refer to testimony, Tutalo; Dargan.) However, these are all regular education programs and services open to any WCS student (testimony, Tutalo).

In summary, the only actual special education services offered in any of the proposed WHS IEPs for Jed were/are the one double period of academic support daily, counseling once per week for ½ hour and an aide for support in regular education elective classes for ½ hour per

class (See P-12, 22; S-2, 4, 7.) Again, I find such a level of special education services to be inadequate and inappropriate to provide Jed FAPE given his multiple disabilities, their impact upon his ability to learn, his advanced grade level and the 3-4 year grade level deficit.

For all of the reasons specified above, I conclude that WCS' proposed IEPs for Jed while he would have been at WHS for his 9<sup>th</sup> and 10<sup>th</sup> grade years, were/are inappropriate to address his special education needs so as to provide him FAPE.

The MB program which Jed has attended for all of his 9<sup>th</sup> grade year (2011-2012) and his current 10<sup>th</sup> grade year (2012-2013) has been described under **PARENTS' PROPOSED PROGRAM**, above. MB witnesses all testified to the good progress which they perceive Jed has made over the time period he has attended MB. (Refer to testimony, Brody; L. Kauffman; Leventhal; J. Kauffman.) Jed's MB Academic (Progress) Reports from January 2012 (P-18), June 2012 (P-17) and January 2013 (P-16) also document the progress he has made in his MB classes. Parents have testified how Jed presented during his 8<sup>th</sup> grade year at Westport Middle School and the positive changes which they have seen since his he has been at MB. (Refer to testimony, Mother, Father.) I certainly consider all of this positive evidence. In addition, I place substantial weight on testing done by MB and the testimony of Jed's psychologist, Dr. Conboy.

MB administered the Woodcock Reading Mastery Test-Revised (WRMT-R) to Jed in March 2011 while he was still in 8<sup>th</sup> grade at Westport Middle School and again in May 2012 after he had attended MB for nearly one year. The results of that testing are set out below. (See P-2.) (Note: Grade Equivalent is GE. Age Equivalent is AE. Percentile is PR.)

Subtest Area	March 2011	May 2012
Word Identification	GE 5.3 AE 9-11 PR 29%	GE 7.8 AE 12-6 PR 33%
Word Attack	GE 5.1 AE 9-11 PR 29%	GE 7.5 AE 13-1 PR 41%
Word Comprehension	GE .6.1 AE 11-6 PR 26%	GE 9.2 AE 15-1 PR 50%
Passage Comprehension	GE 5.3 AE 10-7 PR 19%	GE 6.4 AE 11-8 PR 26%
Total Reading	GE 5.4 AE 11-0 PR 23%	GE 7.6 AE 12-9 PR 35%

Similarly MB administered the WJ-III achievement test in the area of math in September 2011 when Jed began at MB and in May 2012 after almost one academic year there. The grade equivalent scores are set out below. (See also P-25.)

Subtest Area	Sept. 2011 GE	May 2012 GE
Calculation	11.2	13.0
Math Fluency	1.7	2.2
Applied Problems	7.9	10.6
Quantitative Concepts	9.9	13.0
Broad Math	6.6	7.9

I note that the WRMT-R, like the WJ-III, is a standardized, normed, validated testing instrument of individual reading ability.

I find that the WRMT-R reading scores and the W J-III math scores illustrate that Jed had made demonstrable progress after one year at MB. Jed's overall reading scores have advanced approximately 2 grade levels and 2 years in age level with his percentiles going up 12%. Similarly, Jed's overall math scores have advanced approximately 2 grade levels. These scores stand in stark contrast to the regression reflected by test scores when Jed was at WCS.

Dr. John Conboy is a licensed clinical psychologist who is a professor of psychology at the University of Massachusetts, Dartmouth and is also in private practice in Fall River. His primary interest in private practice is ADHD. He has been Jed's psychologist since February 2007, seeing him approximately twice per month until Jed began his residential placement at MB. Since then Dr. Conboy has seen Jed approximately 5-6 times. Dr. Conboy testified that approximately 70% of his private practice is ADHD, has been for decades and that Jed:

is, without much doubt in my mind, one of the most severely affected kids I've seen. And I've seen lots of kids with ADHD. He has very ,very significant symptoms.

Volume II page 160.

Dr. Conboy further testified that Jed has both vocal and motor tics due to his TS as well as very significant skin-picking due to his OCD/TS, typically having 2-4 lesions in a variety of places on his skin at any given time.

Dr. Conboy testified that Jed began to decline academically in 7<sup>th</sup> grade which continued through 8<sup>th</sup> grade along with a decline in his social functioning. Dr. Conboy testified that during Jed's 8<sup>th</sup> grade year at Westport Middle School he was frustrated with school, with his teachers, with his relationships with other students and that he experienced clear sadness. This witness stated that Jed did not want to go to school anymore, and if he could have, he would have avoided school. Dr. Conboy testified:

[Jed] was failing. We were losing [Jed]. [Jed] is this sweet, delightful kid. He's a playful kid. He's immature. He's easy to connect to. And he was becoming sullen. He was becoming sad. He was moving in a direction that made me worry about his future.

Volume II page 174.

Dr. Conboy also testified that by 8<sup>th</sup> grade Jed's phobias included fear of inoculations, fear of taking a shower, fear of the dark, and fear of the woods in back of home.

Dr. Conboy testified that over the first year Jed was at MB there was an absolutely dramatic and delightful change in Jed's functioning. Dr. Conboy stated:

By October of the first year he was in the new school, I could not find evidence for OCD. I could not find evidence for phobias. The ADHD continued and the Tourette's continued. And I expect they will, not matter who's with him and who's working with him. But the OCD disappeared, the phobias disappeared. I mean, gone.

Volume II pages 176-177.

Dr. Conboy testified that with regard to MB, Jed has told him:

Well, he loves it. He's having a good time. He enjoys himself. He feels like he fits in. He feels like he's succeeding academically. I thought the idea of leaving home and going away for a kid who had such significant anxiety difficulties was really going to be a problem. But he did fine, really well, and quickly adapted.

Volume II page 179.

Dr. Conboy was later asked:

Q: Based upon your background and experience and what you have seen of [Jed] over the last number of years and what you're seeing of [Jed] now, how would you assess his progress in the last 18 months?

A: The area that I can specifically comment about is his emotional functioning and I call his emotional functioning nothing less than a dramatic improvement. It's dramatic. I didn't anticipate it. It's really wonderful to see.

Volume II pages 156-187.

I found Dr. Conboy to be a particularly credible witness. He has no connection to either WCS or MB. He made no recommendations regarding Jed's academic functioning. He confined his testimony to his area of expertise and his work with/observations of Jed's ADHD, emotional

issues and emotional functioning. His testimony was clear, candid, and objective. I further note that this witness specifically testified that Jed did not require a residential placement.

Based upon the foregoing, I conclude that Jed has made significant progress both academically and emotionally since his placement at MB. Therefore, I conclude that MB provides Jed FAPE.

In *Florence County, supra*, the U.S. Supreme Court specifically addressed the question of whether a court may order reimbursement for parents who unilaterally withdraw their child from a public school that provides an inappropriate education under the IDEA and put the child in a private school that provides an education that is otherwise proper under the IDEA but does not meet all of the requirements of 20 U.S.C. §1401(a)(18). The Supreme Court held that parents are not barred from such reimbursement because such statutory requirements cannot be read to apply to parental placements. The Supreme Court held that parents are entitled to reimbursement if a court concludes both that the public placement violated the IDEA and that the parents' school placement was proper. Such is the exact situation in the instant case.

Dr. Conboy testified that Jed does not require a residential placement, and, based upon the entirety of the record, I concur. I find that while MB's residential program offers Jed additional benefits which may enhance his educational experience, he does not require MB's residential component in order to receive FAPE.

However, a residential component may be ordered, albeit for non-educational reasons, if the distance between the student's home and day placement would require that the student remain in the vehicle for more than an hour each way:

The district shall not permit any eligible 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. The Team shall document such determination on the IEP. 603 CMR 28.06(8)(a)

Emphasis added.

Father testified that to drive from home in Westport, MA to MB in Narragansett Rhode Island takes from 1 ½ to 2 hours, depending upon the traffic, because one has to go through either Providence or Newport, Rhode Island. (Refer to testimony, Father.) I take administrative notice of MapQuest which provides three different routes of 40, 43 or 56 miles in distance, but lists the times for each route at 1 hour 14 minutes, 1 hour 15 minutes and 1 hour 16 minutes respectively. Thus, Father's estimate does not substantially differ with MapQuest. Even if Jed were to receive door to door transportation with no stops for other students, the travel time to be transported from home to MB would exceed the one hour maximum allowed pursuant to 603 CMR 28.06(8)(a). Therefore, for Jed to be able to attend MB, he must attend as a residential student.

**ORDER**

- 1) WCS' proposed IEPs for Jed's 9<sup>th</sup> and 10<sup>th</sup> grade school years are inappropriate to address his special education needs so as to provide him FAPE in the least restrictive education environment.
- 2) MB was and is an appropriate program to address Jed's special education needs so as to provide him FAPE.
- 3) Given the time/distance to commute to/from home/MB Jed must be residentially placed.
- 4) WCS is responsible for the costs of Jed's residential placement at MB for the 2011-2012 and 2012-2013 school years.

By the Hearing Officer,

\_\_\_\_\_

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