

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
SPECIAL EDUCATION APPEALS**

Student v. Westborough Public Schools

BSEA # 1708273

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC § 1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 USC § 794), the state special education law (MGL ch. 71B), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under these statutes.

PROCEDURAL HISTORY

Parent filed a request for hearing on March 31, 2017. The matter was initially assigned expedited status¹ because Parent's hearing request stated that Student did not have a current placement. The hearing was scheduled for April 18, 2017. Westborough objected to the granting of expedited status, alleging that Student had an available placement, but Parent had unilaterally removed Student from the placement. On April 12, 2017, Parent requested that the hearing be moved from the expedited to the regular hearing track stating that after her Resolution Meeting with Westborough on April 10, 2017, she wished to continue a dialogue with the district and hoped to reach an agreement. On April 13, 2017, an Amended Notice of Hearing issued with a hearing date of May 16, 2017. There was a telephone conference call on May 4, 2017, during which the Parties reported Student had not been accepted to any of the placements to which the district had sent referrals. The Parties' joint request to postpone the May 18, 2017 hearing was allowed to provide additional time to identify an available placement for Student. The hearing was rescheduled for June 18, 2017. There was a conference call on June 7, 2017. The Parties' joint request to postpone the June 18 hearing was allowed to provide additional time to identify a placement and the hearing was scheduled for June 27, 2017. The hearing was again postponed by agreement of the Parties and scheduled for August 29 and 30, 2017. The Parties convened before the hearing officer on August 29, but the hearing was postponed by agreement of the Parties due to unavailability of witnesses for in person testimony and a lack of clarity regarding the issues to be heard². Additionally, Parent had accepted a new placement for Student and the only remaining issue to be heard involved compensatory services. The hearing was rescheduled for October 17 and 18, 2017. On September 11, 2017, Parent sought permission to add an additional issue to those to be decided at the hearing. Westborough filed its objection on September 21, 2017, and the request was denied on October 6, 2017. The hearing was held on October 17, and 18 and November 15, 2017 at the offices of Catuogno Court Reporting in Worcester, MA. The Parties wished to make oral closing arguments, but requested a

¹The expedited status was based upon the BSEA Hearing Rules, which provide a more liberal standard for granting expedited status than the federal law and regulations.

²The hearing officer conducted a pre-hearing conference on that day to ensure that Parent understood the hearing procedure and the issues to be determined at the hearing.

postponement of the closing of the record to allow them time to review the transcripts of the hearing prior to making their oral arguments. The Parties agreed that oral closing arguments would be held on December 20, 2017 at the administrative offices of the Westborough Public Schools. Oral argument was heard on December 20, 2017 and the record closed at that time. ■

Those present for all or part of the hearing were:

Mother	
Father	
Student	
Mayya Kane	Parent's Speech Language Pathologist
Mr. X ³	Teacher, Blackacre School ⁴ , (hereafter, Blackacre)
Mr. Y ⁵	Program Director, Blackacre
Ms. B ⁶	Nurse, Blackacre
Joshua Krell	Attorney, Blackacre
Sherrie Stevens	Director of Student Services, Westborough Public Schools
Karen Bunton	Out of District Coordinator, Westborough Public Schools
Matthew MacAvoy	Attorney, Westborough Public Schools
Darlene Coppola	Court Reporter
Brenda Ginisi	Court Reporter
Catherine Putney-Yaceshyn	Hearing Officer

The official record of this hearing consists of Parent's exhibits marked P-1 – P-13, P-15 – P-21, P-23 –P-38, P-40-P-43, and P-45-P-49 and Westborough's exhibits marked S-1 through S-23 and S-25- S-26 and approximately ten hours of recorded oral testimony. ■

ISSUES

1. Whether Student is entitled to compensatory services for the time period after which Parent removed him from Blackacre, on or about February 15, 2017, until the time Student was accepted at another placement.
2. If so, to what services is Student entitled?

³Mr. X is a pseudonym chosen by the hearing officer due to the allowance of the Non-Party's Motion to Conceal Name in the Final Decision. The Ruling appears at the end of the Decision.

⁴Blackacre is a pseudonym chosen by the hearing officer due to the allowance of the Non-Party's Motion to Conceal Name in the Final Decision. by the hearing officer pursuant a Motion addressed below.

⁵Mr. Y is a pseudonym chosen by the hearing officer due to the allowance of the Non-Party's Motion to Conceal Name in the Final Decision.

⁶Ms. B is a pseudonym chosen by the hearing officer due to the allowance of the Non-Party's Motion to Conceal Name in the Final Decision.

SUMMARY OF THE EVIDENCE

1. The student (hereinafter, “Student”) is a 10 year old student within the Westborough Public Schools. He has been diagnosed with autism, receptive language disorder, verbal apraxia, epilepsy, ataxia, and Attention Deficit Hyperactivity Disorder. He is minimally verbal. He is staffed 1:1 and participates in discrete trial teaching and incidental learning across his day. He has high sensory needs and can “exhibit aggressions, loud vocalizations and unsafe pursuit of interest items.” His prior placement (written by the state in which he formerly resided) utilized a total communication approach whereby Student used verbal approximations of 1-3 utterances, PECS, picture symbols, facial expressions, vocalizations, sign language approximations and gestures to communicate his wants and needs. Student’s cognitive functioning has been assessed using the Stanford Binet Intelligence Scales, Fifth Edition. He did not demonstrate any verbal communication during testing and thus was only able to complete the nonverbal portions of the assessment. His nonverbal IQ score was within the moderately impaired or delayed range, which may not be an accurate representation of Student’s cognitive abilities due to his diagnosis of autism. Student has been described as highly distractible and exhibiting maladaptive behaviors in the form of aggression, bolting, flopping and loud vocalizations. He has little to no safety awareness. (P-1, S-4)
2. Student’s mother (hereinafter, “Mother”) presented at the Westborough special education office in May 2016, before Student moved to Massachusetts, and spoke to Karen Bunton, Special Education Coordinator for the Westborough Public Schools. Mother provided some records from Student’s prior school. Ms. Bunton noted that Student’s needs were significant and he had previously been enrolled in a private day placement. Student’s previous IEP included a summer program that ran from July 7, 2016 through August 19, 2016. His regular school year services were to commence on September 7, 2016. (P-3, P-33, S-1, S-2) Ms. Bunton sent out the first three referrals on June 28, 2017, before Student’s July 5, 2016 registration in the district, because she recognized that Student’s needs were extensive and wanted to secure a placement as quickly as possible. (Bunton, P-4) Student was not accepted at any placement that had an opening. Ms. Bunton became aware of another potential placement, Blackacre, an approved private special education school. Mother initially said the placement was not appropriate, but she later agreed to take a tour, on which Ms. Bunton accompanied her on July 18, 2016. Student was accepted. Mother signed consent on July 25 for the placement and Student began attending on July 26, 2017⁷.

⁷About 7 days after Student began attending the program Mother presented at the special education administrative offices on a Monday and reported that the previous Friday the van driver who came to pick up Student had smelled of alcohol. Ms. Bunton called the transportation company, but they could not confirm Mother’s report, as she had waited several days to report her complaint. On another date, Student’s transportation was late due to a system wide electrical failure and Mother presented at the special education administrative offices complaining that the transportation was unsafe and unreliable. (Bunton)

3. Mr. Z⁸, BCBA, conducted a functional behavior assessment (fba) of Student between August 16 and September 19, 2016. He noted that Student was in Mr. X's ABA-based classroom, was staffed 1:1 and participated in DTT, incidental learning, and structured activities throughout the day. The recommendations in the report included a highly structured classroom and school environment with 1:1 instruction from an experienced ABA-trained instructor. The fba addressed the following behaviors: noncompliance, loud vocals, aggression, flopping, personal space intrusion, and self-injurious behavior. (P-16, S-6)
4. The Team convened at Blackacre on September 21, 2016⁹ to develop Student's Massachusetts IEP and conduct his annual review. Ms. Bunton noted that the Blackacre staff was incredibly well prepared for the meeting. She thought they had engaged in a thoughtful process around the development of the goals and brought a great deal of data that supported the goals they were proposing. (Bunton) Mother raised concerns about the speech language pathologist's experience with apraxia, the frequency of discrete trial training, and a desire to increase communication between home and school. The Team discussed goals of increasing Student's ability to communicate functionally, increasing his independent living skills and utilizing communication to reduce behaviors. (S-3)
5. The Team proposed an IEP which contained goals in the following areas: social behavior, English language arts, mathematics, science, adaptive daily living skills, functional communication, receptive language, expressive language, basic concepts, fine motor, and physical therapy. (S-4) The A grid contained a behavioral consult 1 x 30 minutes per week, a speech language consult 1 x 15 minutes per week, an occupational therapy consult 1 x 15 minutes per week and a parent support meeting with Blackacre staff 1 x 60 minutes per month. The C grid contained direct services as follows: special education instruction with the special education teacher 5 x 360 minutes per week; 1:1 ABA support with an ABA instructor 5 x 360 minutes per week; speech therapy with the speech language pathologist/assistant 5 x 30 minutes per week; occupational therapy with the occupational therapist/assistant 3 x 30 minutes per week, and physical therapy with a physical therapist 2 x 30 minutes per week. It was recommended that Student attend the full year program at Blackacre to provide him with the intensive instruction he required to further develop his academic and social abilities and to assist in mitigating his targeted maladaptive behaviors. Speech and language therapy and occupational therapy were also recommended to continue year round. Transportation was to be provided with a 1:1 monitor. (S-4) The IEP was forwarded to Mother on October 4, 2016¹⁰. (Bunton, S-4, P-1)
6. Blackacre's progress notes for the period from July 26 through October 26, 2016 indicate that Student was making significant progress with his behavioral goals and objectives. His aggression, duration of non-compliance, tantrums, bolting and self-injurious behaviors had

⁸Mr. Z is a pseudonym chosen by the hearing officer due to the allowance of the Non-Party's Motion to Conceal Name in the Final Decision.

⁹The meeting was originally scheduled for September 13, but Mother cancelled the meeting because she did not want Ms. Bunton to attend and wanted additional time to obtain legal representation. (Bunton)

all decreased and continued to trend downward. His academic progress was noted to be more difficult to assess, as Mother had not permitted Student to use any form of communication device throughout the school day and staff was relying on Student's verbal approximations which were difficult to understand. (S-11, P-32)

7. On or around November 21, 2016, Mother rejected pages 2-5 of the IEP (the Narrative Description of School District Proposal that contained a description of Mother's oppositional manner throughout the meeting and a chronology of the steps the district had taken since Student arrived in the district¹¹.) She accepted all of the services and goals and consented to Student's placement in a private day school, noting that her acceptance was "until [Student] was offered placement at the Crossroads Center for Children." (P-1, S-4)¹²
8. Mr. X¹³, Student's teacher, explained that between July and November Student was making progress in his social interactions and his maladaptive behaviors were decreasing. Student was a very happy child who was excited to see staff and peers each day. Toward the end of November, there was an uptick in Student's behaviors at school. He exhibited non-compliance, loud vocalizations, aggression, and biting his hands. Mr. X, believed that the combination of a recent ear infection and a disruption of his regular routine could be

10[□]During cross examination Mother was shown an e-mail Ms. Bunton sent her dated October 4, 2016 that stated, "Please see attached IEP based on the team discussion. Once the district receives the signed and accepted IEP, Blackacre can begin implementing goals." (Mother, Bunton)

11[□]Mother wrote that the pages "contain false accusations and intentionally inaccurate statements." (P-1, S-4)

12[□]The response page contains a note written in what Ms. Bunton identified as Mother's handwriting that states the IEP was received on November 14, 2016, "45 days after the meeting...Unacceptable!!!" Ms. Bunton testified that after she provided Mother with the IEP, Mother emailed her back and asked why the IEP was not written in her native language. Ms. Bunton reminded her that the home language survey she completed upon registering Student school indicated English as her native language. Mother then forwarded Ms. Bunton an edited version of her home language survey indicating that her home language was her native language. Westborough then had the IEP translated and e-mailed it to Parent in her native language on November 2, 2016. (Bunton) In a February 16, 2017 e-mail to Westborough Mother stated that she was not in need of the interpretation services the district has offered and provided. She stated that she wishes to revise her Home Language Survey to reflect her desire to have communications resume in English. During the February 28, 2017 Team meeting, Mother was presented with a new Home Language Survey and declined the use of the provided interpreter. (S-17) Mother did not request that the BSEA provide her with translation or interpreter services. (Mother)

13[□]Mr. X has a master's degree in special education and is a board certified behavioral analyst. In addition to having worked with autistic children who present with severe behaviors for many years, he has an autistic child. (Mr. X)

causing the increase in Student's maladaptive behaviors. Student had recently begun arriving late to school twice per week because he was attending private speech language therapy sessions during school hours. (Mr. X) Student's school day was from 8:30 until 3:00. (Mr. X) On the days he attended outside therapy he was arriving at school at approximately 10:30. (Mr. Y, Mother, Father) Arriving late could have a significant impact on Student's day, because for students with profiles like Student, continuity and consistency are very important. (Mr. Y) Any time you interrupt the routine of a student with autism, it may create difficulty for the student. (Mr. X)

9. Student's progress notes for the period from November 29, 2016 through February 21, 2017, indicate that Student made significant improvement with his speech intelligibility and ability to interact with his peers appropriately. The report indicated that Student's use of verbal approximations made it difficult to accurately assess some skill sets, thus, academic progress "may be termed limited or slow." Further, Student was late for school twenty-one days ("approximately 45 percent of attended school days.") during the time period assessed by the progress report. During his last ten days of attendance, he was late for school nine times. "His late arrival, disruption of routine, and missed instructional time may have adversely affected his academic performance and behavioral presentation." The report stated that Student exhibited a recent increase in aggressive and self-injurious behavior which may have resulted from a combination of an ear infection along with the disruption of his regular routine and may have been connected to the increase in his maladaptive behaviors. The report noted that Student averaged 9.9 aggressions, 2.4 bolts, 6.6 loud vocalizations, and 1.8 flops per day. He averaged one minute and forty seconds of independent on task behavior per day. (P-34, S-12)
10. In December 2016, Parent provided Westborough with a privately obtained speech and language evaluation conducted by Marnie Millington, dated October 2016. The Team convened to review the evaluation on December 16, 2016. (S-7, Bunton) Ms. Bunton described the report as being "excellent" and an appropriate representation of Student's needs. The Team agreed to accept the recommendations set forth in the evaluation, specifically the addition of a speech generating device for Student. (The Team agreed to purchase an iPad, case, and the recommended Speak for Yourself application for Student's immediate use.) The Blackacre speech language therapist consulted extensively with Ms. Millington and Parent to determine appropriate goals. The IEP Amendment proposed a speech consultation with the speech language pathologist and assistant 1 x 30 minutes per week and direct services in speech therapy 4 x 30 minutes per week with the speech language pathologist and assistant. It also proposed amended communication goals to reflect Ms. Millington and Parent's input as well as the use of the speech generating device. (S-7, Bunton)
11. Blackacre drafted Behavior Management Guidelines which were last updated in January 2017. They were signed by Mr. A¹⁴, BCBA, LABA on February 3, 2017. The guidelines identified reinforcers and successful activities/programs. The report further listed

¹⁴Mr. A is a pseudonym chosen by the hearing officer due to the allowance of the Non-Party's Motion to Conceal Name in the Final Decision.

behaviors targeted for increase and general management strategies to use throughout the day. The guidelines listed strategies to reduce the likelihood of antecedent behaviors, identified antecedent behaviors that may precede a behavioral outburst and management strategies for antecedent behaviors. Student's guidelines listed (and defined) his challenging behaviors as follows: non-compliance, aggression, environmental destruction, bolting, self-injurious behavior, tantrum, flopping, loud vocals, and teeth grinding. The guidelines included a behavior management plan which listed each challenging behavior along with a "therapist behavior" which outlined how therapists should respond to Student's demonstration of one of the challenging behaviors. (S-10) Mr. Y¹⁵, the program director at Blackacre explained that the guidelines are modified several times throughout the school year. (Mr. Y)

12. Mother testified that in mid-December and January Student started coming home with marks on his legs and arm and then on his hands. On January 27, when Student got off the bus, he had a band aid on his hand and when Mother removed it she saw marks on his hand. (Mother, Father) She called Blackacre and nobody answered the phone. She called back on Monday and spoke to Mr. Y who informed her that Student had been biting himself at school. Mother was concerned that she was not provided with any written incident reports, and only heard about Student's self-injurious behaviors over the phone. She also believed Mr. Y had not addressed her concerns during their conversation. She was further concerned that on February 2, Student's home log showed that he had spent time in the calm room and she was not provided with an incident report. (Mother)
13. Student spent some time in Blackacre's calm room because he was presenting as an imminent danger to himself or others and staff thought it was necessary to keep Student safe. The calm room is an approximately 6 x 6 space with a light, HVAC and sprinkler system. It has a solid-core door with a spring-loaded hinge so the door can never be locked. The door would swing open when a staff member was not holding it. There is a plexi-glass window about one and a half feet long and four to five inches wide¹⁶. A child is always observed through the door if it is necessary to close the door. When a student is endangering himself or others staff has a choice of physically restraining him or using calming techniques such as the time-out room also known as the calm room. Blackacre staff defines imminent danger as ongoing and excessive aggression toward staff, climbing on objects, throwing materials and requiring staff to continually redirect for an extended period of time. Student was placed in the calm room for a combination of continuous aggression coupled with other behaviors such as crawling on things, climbing on things and objects. Mr. Y and Mr. X informed mother by telephone on multiple occasions about incidents in school. The calm room was never used as a means of discipline, but to keep Student and others safe. (Mr. Y, Mr. X) The only reason a child is ever brought to the

¹⁵Mr. Y has a doctorate in education and child studies and an educational specialist degree in behavior analysis. His undergraduate degree is in psychology and rehabilitation. He has been working with students diagnosed with autism and behavioral disorders since 1989. He trained at New England Center for Children and the May Institute. (Mr. Y)

¹⁶Mother testified that there was no window in the door. (Mother)

calm room is because he is presenting an imminent danger to himself or others. It is appropriate to use the calm room if it is required to keep a Student safe. (Mr. Y)

14. At times the calm room door was closed when Student was in it to prevent him from being aggressive to staff or continuing with a high intensity behavioral episode. (Mr. Y) Staff remained outside the door observing him at all times. Student was never isolated in the calm room, but was under observation at all times. If the door was closed, staff would continue to use verbal redirections through the door such as telling Student “have calm body, safe hands.” (Mr. X) It is safe for a student who has self-injurious behaviors in his repertoire to be in a room without padded walls if he is not engaging in self-injurious behavior. Student did not hit his head on the wall. When Student was in the calm room he was sometimes standing, sometimes sitting and sometimes lying on the floor. Mr. Y observed that it would take Student several minutes before he would calm down and be responsive to teacher instructions. As soon he was calm, the door was opened if it had been closed. When Mr. Y observed Student in the calm room he observed him engaging in loud vocalizations and leaning against the door and grabbing the walls. He does not recall him ever hitting the walls. (Mr. Y)
15. Mr. Y explained that the use of the calm room is not a “standard intervention” in response to a child’s behavior. It would not be appropriate to include the use of the calm room in a behavior plan because it is not used a standard response to a child’s behavior. (Mr. Y) Student was never restrained at Blackacre. He was able to leave the calm room at any time that he able to remain calm for thirty seconds. (Mr. Y, Mr. X)
16. Mr. Y was unable to say whether Student got bruises in the calm room or during the behaviors that precipitated his visits to the calm room. He did not see any correlation between the calm room use and Student’s increase in biting behavior. Student was biting, mouthing, and engaging in other behaviors before staff started using the calm room in early February. He thought that many of Student’s bruises were caused by biting, falling to the ground, and a number of other behaviors Student engaged in. Mr. Y explained that the school nurse reviews any child who has a significant behavioral incident and documents that and then calls the Parent. Blackacre staff often spoke to Parent. (Mr. Y)
17. Mr. A also drafted Student’s Calm Room Procedure, dated February 3, 2017. The document states that the procedure was written due to a recent increase in Student’s aggression to ensure the safety of Student and those working with him. The procedure indicates that when Student becomes aggressive, staff should “model safe hands/quiet voice or gesture to visuals while providing minimal attention.” If Student continued to “engage in multiple non-redirectable aggressions for 1m or his aggression poses imminent danger of serious physical harm to self or others prompt [Student] to the calm room and stand near the doorway while providing minimal attention.” Once Student was in the calm room, if his aggression posed “imminent danger of serious physical harm to self or others, or if he engage[d] in multiple non-redirectable aggressions for 1 minute, staff should exit the room and close the calm room door.” Staff would then prompt Student every minute by “modeling safe hands.” Staff would open the door if he was able to remain safe for 30 seconds. The procedure contained the following criteria for exiting the calm room. “If at

any point Student complies and is able to remain safe for 30s, or longer, present him with a compliance task... If he is able to complete the task safely have [him] complete a short academic task... at his desk. Student would then be provided with social praise for correct responses and be permitted to take a break following five correct responses. (S-10)

18. Mr. X was concerned that there could be a medical component to Student's increased maladaptive behaviors and spoke to Mr. Y about discussing this with Mother. In Student's home log, dated February 3, 2017, Mr. X wrote, "I would suggest a medical evaluation for [Student]. He has a sudden and significant increase in aggressive behavior. Additionally he is biting staff and objects. It would be prudent to rule out any medical issues. Any questions please call." (S-9, P-5) Mr. X explained that in behavior analysis it is necessary to rule out medical conditions when assessing behavior. Mother reacted angrily in response to his suggestion that Student have a medical evaluation. (Mr. X) She said it was not necessary and was not the problem. (Mr. Y)
19. Mother rejected the IEP Amendment proposing amended speech and language goals and services on February 7, 2017. (S-7) Ms. Bunton emailed Mother to confirm whether she was also rejecting Student's use of the iPad and Speak for Yourself application and Mother affirmed to her that she was rejecting it¹⁷. (Bunton, S-17)
20. On February 10, 2017, Mother emailed Ms. Bunton a picture depicting Student's hand with a bruise¹⁸. Ms. Bunton told Mother she would follow up with Blackacre and get back to her. She then emailed the photo to Blackacre and spoke to Mr. Y. Mr. Y responded that it was plausible that the marks on his hands could be related to Student's self-injurious behaviors, specifically his biting behavior. He stated that because he did not know when the photograph was taken he could not review the correlating behavioral data to determine whether Student had engaged in behaviors on the date that the bruising occurred. (Bunton) The e-mail did not contain any allegation that Student had suffered a broken tooth at school. (P-9)
21. Ms. B, Blackacre's school nurse, has assessed Student after he has been in the calm room at the request of staff. She noted that if a child has been in the calm room and staff observes any injuries or self-injurious behavior they would ask her to assess a student. She usually assesses the full body, including legs and arms unless the staff directs her to a specific area to check. She also noted that staff may ask her to assess new bruises they notice even if they did not witness an incident at school and do not believe the bruise was obtained at school. (Ms. B)

Her January 30, 2017 note indicates she was asked to assess Student's skin due to noticeable bruising that indicates a possible fall or injury over the weekend. She noted

¹⁷ Maya Kane, a private speech language therapist who provides services to Student testified that using a speech generating device for communication in school would be appropriate for Student. She also testified that Student loves using his iPad communication device and will use it to communicate things his voice cannot communicate. (Kane)

¹⁸ Mother testified that she had taken the photograph on January 27, 2017. (Mother, Bunton)

bruising to hands, arms and a scratch on the midline of the back in addition to slight bruising to the anterior right leg. She noted an assessment was filled out and filed. The assessment form indicates Student was seen at 9:00 a.m. (P-41, S-8)

Her notes indicate she had assessed Student on 2/1/17 after a behavior that included self-injury. She noted bite marks on both hands, his right knee, and right forearm. She cleaned his skin well, noted no open areas and state that no bandages were required. (P-41, S-8)

On February 2, 2017, Ms. B's notes indicate that she did a skin assessment of Student at the end of the day. She noted new teeth marks on his hands and new bruises (from biting) on his left forearm. There were additional marks on his knees from biting. She cleaned his skin well and noted there were no open areas and no bandages needed. (Ms. B, P-41, S-8)

Ms. B's February 8 note indicates she spoke with Mother and staff about Mother's request that Student be provided with additional fluids in school each day. There is an entry at 2:45 indicating she assessed Student after a behavior and observed no open areas and no new bruises. She gave him Gatorade and recalled that he did not wince or indicate that he was in any pain. She did not observe any broken tooth during her assessment of Student. (P-41, S-8, Ms. B)

Ms. B's February 14, 2017 note indicates that Mother told Mr. Y that Student had broken his tooth on February 8, 2017 during a behavior. Her note states that she assessed him on 2/8 and sat with him while he drank his drink without wincing or complaining of pain or crying. She further noted that she met with Mother and Student that day and Mother made no mention of broken teeth or injuries. (P-41, S-8, Ms. B)

22. Mother testified that on February 14, 2017¹⁹ she met with Mr. Y and observed the calm room. She described it as being the size of a closet with hard walls and a hard floor. She stated that there were no windows, there was a solid door with no window, and there was no video camera inside. She testified that it was "not knowable" whether Student was calmed or agitated while in the room nor whether he was alone or supervised. While speaking to Mr. Y she mentioned that she would like to come to observe Student at Blackacre some time. (Mother)
23. Mother sent Mr. Y a letter dated February 14, 2017 following her meeting with him. She informed him that he was required to send her a written incident report when Student "comes home from school with unexplained injuries." She stated that she was concerned by staff reports over the past few weeks that Student was being aggressive toward staff and himself as that was atypical behavior for him²⁰. She stated that after observing Student's school environment she thought phones and other communication devices should be eliminated from the classroom to decrease sensory overstimulation. She thought

¹⁹Mr. Y testified that this meeting took place on February 13. (Mr. Y)

²⁰Student's IEP from his prior school district states that he "exhibits highly aggressive behavior toward adults students, and sometimes himself." (P-3, S-2)

Student should be taught coping skills. Finally, she requested an assurance that Student would never be placed in the calm room and stated that she had asked Westborough to find another placement for Student as soon as possible. (P-10)

24. On February 15, 2017, Mother entered Blackacre after having brought Student to private speech therapy, accompanied him into the classroom, sat down at the teacher's chair, opened her laptop and stated she would be observing for the day. (Mother, S-16) Mr. Y was informed that Mother was in Student's classroom and had not checked in with any school staff. (Mr. Y) He went to Student's classroom, allowed Mother to continue watching a behavioral incident involving Student flopping and then asked her to come speak to him in his office so he could understand her purpose for entering the classroom unannounced. (S-16) She informed Mr. Y that she was going to observe Student's program all day. Mr. Y told her that was not appropriate and that they would have to schedule something. Mother became very upset and stated it was an "Open Door" school. (Mr. Y, S-16) She had already been in the classroom for approximately forty-five minutes before Mr. Y arrived and he told her she could stay for one more hour, because that was how long he would be available to accompany her. Mother said that was not good enough. She said she was going to stay all day and she became loud and belligerent. (Mr. Y, Mr. X) Because Mother was being loud and belligerent, Mr.Y asked her to leave the classroom, as it was inappropriate for the students (there were 5-6 students including Student and other staff in the classroom) to witness her behavior. (Mr. Y) Mother became even more agitated when Mr.Y asked her to leave the room and she initially refused. Mr.Y then told her she would not be permitted to observe that day. (Mr.Y)

Mother, Mr.Y, Mr. X, and Student went to the library to continue discussing Mother's wish to observe and her concerns. They again discussed Mother's concern regarding Student's chipped tooth. Mr.Y told her, as he had when they met on February 13, about their procedures for safety and the nurse's review and that Student had been checked by the nurse following several tantrums the previous Friday and she had noted only two small red marks on his hand that appeared to be from mouthing/biting his hand. He explained there was no incident report regarding Student's chipped tooth because it did not appear to have occurred within the school setting. (S-16, Mr.Y) Mother then stated that she receives no communication from Student's teacher and he never responds to her. She did not respond to Mr. X when he asked her to identify an instance when he not responded to a request for communication. (S-16) Mother grew further upset and aggressive. She continued to insist that she would stay and observe for the day and demanded a note from Mr.Y stating that he would not let her observe that day. (See S-13) She said the school was unsafe and she was taking Student and leaving. She proceeded to leave the building with Student and stated that she would not bring him back. Mr.Y did not terminate Student's placement or tell Mother that Student could not come back. (Mr.Y)

25. Blackacre has an open door policy to allow parents to come in and visit their child for lunch, for example, as opposed to an observation that would include time for asking the teacher questions and observing for an extended time. (Mr.Y)

26. Mother came to Ms. Bunton's office on February 15, 2017 and informed her that she had lost trust in Blackacre. She made non-specific allegations regarding Blackacre and stated she would not return Student there. Ms. Bunton asked Mother to write her a list of her specific concerns about Blackacre and to reconsider removing Student from his program. (Bunton)
27. Mother wrote a letter to the Westborough Public Schools, dated February 15, 2017, outlining her perception of the events of February 14 and her concerns regarding Student's placement at Blackacre. In her letter she alleged that Mr.Y refused to allow her to observe her child, yelled at her, and told her in an agitated manner that she was not allowed to be there unless she scheduled an appointment. She further alleged that he told her Student would have to find a new placement. Her letter stated that her child was not able to explain what was happening at school, so her observation was essential. She stated that Student arrives home from school with unexplained injuries such as multiple bruises and a broken tooth, without any incident reports.

Mother described her concerns with Blackacre as follows²¹. She reported that recently when she picked up Student from the classroom she noticed that his water bottle was almost full. One of Student's aides told her that he does not drink much water at school. She contacted the school nurse to discuss having Student drink more water at school.²² She pointed to Student's recent home logs and stated that they show Student is not receiving educational benefit. She stated that Blackacre is not able to meet Student's psychological and sensorial needs "that resulted in psychological trauma." She noted that she spoke to Mr.Y by phone and discussed Student's behaviors and met with him on February 14. She reported that she views the use of the calm room as punishment for Student's sensory processing disorder. She also complained of the presence of phones and electronic devices (because of "sensory input") in Student's classroom and stated that Mr.Y told her the items would remain in the classroom. She stated that she had only received one incomplete progress report from Blackacre. She reiterated her February 13, 2017 request that the district begin the referral process and requested an interim placement within the district and stated she may consider "transitional home services." (P-12, S-14)

28. Mr.Y provided Westborough a response to Mother's letter dated February 17, 2017. He noted that Mother was denied an extended observation of Student because of her inability to communicate with the administration and her belligerent demeanor. However, she was specifically told she would be permitted to observe until 12:30 p.m. accompanied by Mr. Y. Mother was never told that she would not be permitted to observe her child, but she was not permitted to do so on that date because of her behavior. He noted that Student is given full and free access to his water bottle at school. Blackacre never received any doctor's orders with respect to Student drinking fluids at school. Therefore, staff allowed him to decline drinks when he chose. He acknowledged that Blackacre staff was aware that Student is pre-occupied with electronic devices and have been working to get him

²¹Some of the items in her letter are beyond the scope of the hearing, and thus, are not addressed. (S-12)

²²See testimony of Ms. B below.

accustomed to devices being around him. Within the classroom he has learned to manage not having access to other children's tablets. Staff has Walkie Talkies for instant communication with one another and Mother was informed they would not be removed. (S-16)

29. The following week was school vacation week. The Team convened on February 28, 2017 and reviewed Mother's concerns and Blackacre's response. The Team determined there was no basis for Mother's allegations and no evidence that Student had been mistreated while at Blackacre. Ms. Bunton believed that Mother was very upset about not being permitted to observe the entire day at Blackacre on February 15, 2017 and by her perceived negative interaction with Mr. Y on that date, and made her decision to remove Student based upon that interaction. The Team believed that Blackacre remained a safe and appropriate placement for Student, but agreed to seek an alternative placement due to Mother's claim that she had lost trust in Blackacre. Westborough continued to make Blackacre available for Student, including continuing to fund his 1:1 assistant, while it sought an alternate placement. Ms. Bunton contacted 19 schools regarding potential placements for Student. (S-19, Bunton) By early May, Westborough had not found an available placement for Student. Despite the fact that it continued to make Student's prior placement available to him it began providing services to Student via Pride Star. From mid-May until July 7, Student was transported to Pride Star and received related services from 9:00 a.m until 2:00 p.m. daily. The placement was discontinued on July 7, when Pride Star was unable to continue to provide staffing. Student then began attending Autism Behavioral Services until he began attending the LABBB Collaborative. (Bunton)
30. Mother testified that the calm room was not safe for a student with self-injurious behaviors who had epilepsy²³. She also stated that it was unsafe for Student to have been at Blackacre without a seizure care plan or any medications requested from Student's doctor. She clarified that she was not alleging that Student was being abused at Blackacre, her complaint was that Blackacre staff placed Student in an unsafe environment (the calm room) and refused to change the environment and refused to discuss it with her. She also objected to the use of the calm room because it was not part of Student's behavior plan. (Mother)
31. Student did not have a health care plan at Blackacre. Ms. B explained that students' health care plans are provided by physicians and submitted to the school by the physician or parents. She stated that Blackacre parents brought the plans to the school. She noted that she did not have authorization to speak to any of Student's medical providers. Student did not have any medication, including medication for seizures, at school for the same reason. Parent never provided any prescription medication to Blackacre²⁴. Ms. B did not have any seizure plan for Student from a physician. (Ms. B)

²³ Her letter to Mr. Y of 2/14/17 did not include any concerns pertaining to Student's epilepsy making the calm room unsafe. (P-10)

²⁴ P-41 contains a Prescription Medication Consent Form with Blackacre's letterhead with Student's name. A handwritten note on the top says, "*Does not take medication at school."

32. Kerrie McFeeter²⁵, NP, wrote a letter addressed to “To Whom it May Concern” dated April 10, 2017²⁶. The letter stated, “The calm room, as described by mom, does not seem to offer any measure of calming. It sounds unsafe for someone with self-injuring behaviors and epilepsy. I think other tools need to be implemented to help [Student] de-escalate, calm, and be re-directed so he can remain in the classroom where learning is taking place.” She concluded by stating that if Blackacre could not provide student with a safe learning environment, home services should be provided until a safer alternative can be provided. (P-15)
33. Student remained out of a school placement²⁷ and Blackacre remained available to Student until he was accepted to and Mother consented to placement at LABBB.
34. Student was terminated from LABBB on or around October 16, 2017 due to staff concerns about Student’s significant aggressive behaviors. (Bunton)

FINDINGS AND CONCLUSION:

Student is an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act (IDEA)²⁸ and the state special education statute.²⁹ As such, he is entitled to a free appropriate public education (FAPE). Neither his status nor his entitlement is in dispute.

The IDEA was enacted “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education, employment and independent living.”³⁰ FAPE must be provided in the least restrictive environment. Least restrictive environment means that, “to the maximum extent appropriate, children with disabilities are educated with children who are not disabled, and special classes, separate schooling or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”³¹

25[]] Mother testified that Ms. McFeeter is Student’s primary care provider. (Mother)

26[]] Student’s last day at Blackacre was February 15, 2017. (Mother, Mr. Y, Mr. X, Bunton)

27[]] Student was receiving the aforementioned services from Pride Star and Autism Behavioral Services until the Friday before his LABB placement began. (Bunton)

28[]] 20 USC 1400 *et seq.*

29[]] MGL c. 71B.

30[]] 20 USC 1400(d)(1)(A). See also 20 USC 1412(a)(1)(A); *Mr. I ex. Rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007)

31[]] 20 USC 1412(a)(5). See also 20 USC 1400(d)(1)(A); 20 USC 1412(a)(1)(A); MGL c. 71B; 34 CFR 300.114(a)(2)(i); 603 CMR 28.06(2)(c)

Student's right to a FAPE is assured through the development and implementation of an individualized education program ("IEP").³² An IEP must be custom-tailored to address a student's "unique" educational needs in a way reasonably calculated to enable him to receive educational benefits.³³ For an IEP to provide a FAPE, it must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."³⁴ A student is not entitled to the maximum educational benefit possible.³⁵ Similarly, the educational services need not be, "the only appropriate choice, or the choice of certain selected experts, or the child's parents' first choice, or even the best choice."³⁶ The IDEA further requires that special education and related services be designed to result in progress that is "effective."³⁷ Further, a student's level of progress must be judged with respect to the educational potential of the child.³⁸

Massachusetts special education regulations provide that specially designed instruction and related services described within the IEP must be sufficient to "enable the student to progress effectively in the content areas of the general curriculum."³⁹ Massachusetts also requires that the special education services be designed to develop a student's educational potential.⁴⁰

An IEP is a snapshot, therefore the IEP must take into account what was, and was not objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.⁴¹ An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was promulgated.⁴² The critical inquiry is whether a proposed IEP is adequate and appropriate for a particular child at a given point in time.⁴³

The burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 534, 537 (2005) In this

32 ²⁰ USC 1414(d)(1)(A)(i)(I)-(III); *Honig v. Doe*, 484 U.S. 305 (1988); *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982)

33 ¹ *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083 (1st Cir.1993)

34 ¹ *Andrew F. v. Douglas County. Sch. Dist.*, 580 U.S. __ (2017)

35 ¹ *Rowley*, 458 U.S. at 197

36 ¹ *G.D. Westmoreland Sch. Dist.*, 930 F.2d 942 (1st Cir. 1991)

37 ²⁰ USC 1400(d)(4); *North Reading School Committee v. Bureau of Special Education Appeals*, 480 F. Supp.2d 479 (D.Mass. 2007)(the educational program must be reasonably calculated to provide effective results and demonstrable improvement in the various educational and personal skills identified as "special needs")

38 ¹ *Lessard v. Wilton Lyndeborough Cooperative School District*, 518 F.3d 18 (1st Cir. 2008)

39 ¹ 603 CMR 28.05(4)(b)

40 ¹ MGL c.71B; 603 CMR 28.01(3)

41 ¹ *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990)

42 ¹ *Id.*

43 ¹ *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083 (1st Cir. 1993)

case, Parent is the party seeking relief, and as such has the burden of persuading the hearing officer of its position.

With the foregoing legal framework in mind, I turn to the issues before me. The first issue is whether Student is entitled to compensatory services for the time period between Parent's removing him from Blackacre, on or about February 15, 2017, and when Student was accepted at an alternate placement at the beginning of 2017-2018 school year.

Compensatory relief is an equitable, discretionary remedy available to eligible students when the public school has failed to meet its obligations under the IDEA either because there was an interruption in services or because the IEP was so inappropriate that the student would have been denied a FAPE. If the school district's misfeasance or nonfeasance impacts a student's substantive rights, then that student is entitled to compensatory services. See *Phil v. Mass. Dept. of Educ.*, 9 F.3d 184, 188 (1st Cir. 1993); *G. v. Ft. Bragg Dependent Schs.*, 343 F.3d 295, 309 (4th Cir., 2003); *C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 290 (1st Cir. 2008). However, if the loss of services or educational opportunities is due to parental conduct, no compensation is warranted. *C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 290 (1st Cir. 2008).

Initially, Mother claimed that she removed Student from Blackacre because Student was coming home from school with "unexplained injuries" and Blackacre was not providing written incident reports. (P-10) Additionally, she claimed the calm room was unsafe and being used as a punishment for Student's disability related behaviors and without her consent. In her 2/15/17 letter to Westborough she further noted that she was concerned that Student was not being provided with enough liquid to drink while at school and she found that to be a safety issue. Finally, she noted that the presence of electronic devices in the classroom was inappropriate for Student and Mr. Y refused to remove them.

With respect to Mother's claims that Student came home with unexplained bruises, she stated that she did not receive written reports from Blackacre staff. Her letter to Mr. Y, dated February 14, 2017, states that Blackacre is required to provide a written incident report to her when Student comes home with "unexplained injuries," but does not cite any authority for her claim. Notably, she does not claim that she was not notified via telephone when Student came home with bruises or had increased behaviors at school, and Mr. Y and Mr. X credibly testified that she was. Additionally, did not submit any reports from doctors or other medical providers supporting her claims that Student came home with injuries or suffered "psychological trauma." Similarly, she did not provide any medical or dental notes with respect to the broken tooth she alleged Student suffered at school. Mother has failed to meet her burden in showing that Student received unexplained injuries or suffered "psychological trauma" while at Blackacre.

Mother raised concerns regarding the calm room use at Blackacre. First, she alleged that the calm room was used as means to punish Student for conduct that was a result of his disabilities. This argument was countered by Mr. Y's and Mr. X's credible testimony that the calm room was never used as a punishment, but as an intervention to keep Student safe and to avoid restraint. Additionally, they both explained that it was only used in situations in which Student's behavior posed imminent danger of serious physical harm to himself or others. (See testimony of Mr. Y and Mr. X.) Both witnesses stated that use of the calm room is not a strategy that would be included in a student's behavior management guidelines. (Calm room use does not appear in Student's behavior management guidelines.) In fact, a document entitled [Student's initials] Calm Room Procedure and dated February 3, 2017, the day after calm room use was first noted

in Student's home log, explained the procedure that would be utilized if Student were to require time in the calm room. (See S-10) Mother further objected to the use of the calm room because she thought the lack of padding on the walls made it inappropriate to use with a student who engages in self-injurious behavior⁴⁴. Both Mr. Y and Mr. X were persuasive in their testimony that it was safe to use the calm room for students who engage in self-injurious behavior, so long as they are not engaged in said behavior while in the room. They testified that students are continuously monitored while in the calm room with a staff person being present in the room or standing outside the door watching the student through the window and speaking to the student. Mother did not counter their testimony. Mother further claimed that the calm room did not provide any calming measures. However, although she is Student's Mother and knows him better than any of the Blackacre staff, she does not have clinical expertise in the best practices for providing behavioral interventions for students like Student. Both Mr. Y and Mr. X have extensive experience in providing behavioral supports to students whose needs are similar to Student and thus, I rely upon their opinions regarding the calm room use.

An advisory issued by the Department of Elementary and Secondary Education, dated July 31, 2015, provides guidance concerning the difference between the prohibited practice of seclusion and the approved use of time-out as a behavioral support strategy as set forth in amendments to 603 CMR 46.00, *Prevention of Physical Restraint and Requirements if Used*, effective January 1, 2016. The advisory cites to 603 CMR 46.02 which defines a

time-out as: A behavioral support strategy ... in which a student temporarily separates from the learning activity or the classroom, either by choice or by direction from staff, for the purpose of calming. During time-out, a student must be continuously observed by a staff member. Staff shall be with the student or immediately available to the student at all times. The space used for time-out must be clean, safe, sanitary, and appropriate for the purpose of calming. Time-out shall cease as soon as the student has calmed.

The advisory explains that use of an exclusionary time out is permitted and should only be used when "the student is displaying behaviors which present, or potentially present, an unsafe or overly disruptive situation in the classroom." It notes that exclusionary time-out should not be used as a method of punishment for noncompliance or for behavior that is no longer occurring. The advisory further notes

Unless it poses a safety risk, a staff member must be physically present with the student who is in an **exclusionary** time-out setting. If it is not safe for the staff member to be present with the student, the student may be left in the time-out setting with the door closed. However, in order to ensure that the student is receiving appropriate support, a school counselor or other behavioral support professional must be immediately available outside of the time-out setting where the individual can continuously observe and communicate with the student as appropriate to determine when the student has calmed. Students must never be locked in a room. For students displaying self-injurious behavior, a staff member must be physically present in the same setting with the student.

⁴⁴ During the hearing she also raised the issue of Student having epilepsy as a reason why the calm room was inappropriate for Student. However, none of the exhibits from the time period during which Mother decided to remove Student from Blackacre raised the issue of Student's epilepsy. (P-10, P-12)

Exclusionary time-out must end when the student has calmed. (See DESE Technical Advisory SPED 2016-1.)

The testimony of Mr. Y and Mr. X demonstrated their familiarity and compliance with the DESE's administrative advisory. Mother did not provide any evidence to show that Blackacre's use of the calm room was out of compliance with the advisory or unsafe to Student. Although Mother sought to demonstrate that the calm room at Blackacre was not appropriately calming, she did not provide any reliable support for that position. The only evidence she submitted in support of her position, aside from her opinion and Father's opinion (which was not persuasive on this point due to their lack of expertise in providing behavioral interventions) was a letter submitted by Kerrie McFeeter, a nurse practitioner who provides Student's primary care. Ms. McFeeter's letter was not persuasive for multiple reasons. First, she did not have any first-hand knowledge of the calm room at Blackacre and noted that her opinion was based upon the "the calm room, as described by mom." Ms. McFeeter's letter does not indicate that she has any expertise in providing behavioral supports or regarding the requirements of calm rooms. She did not testify at hearing and was not subject to cross-examination regarding her opinion. For the aforementioned reasons, I did not credit the opinion of Ms. McFeeter with respect to the appropriateness of the calm room.

With respect to Mother's stated concern that Student was not being provided sufficient fluids by staff during the day, there is no medical documentation to support her contention. The record contains no report from any medical provider stating that Student required more fluids than he was having while at school. There was also no medical or clinical report stating that Student's uptick in behaviors was a result of dehydration as Mother surmised. Despite there being no medical basis to believe Student required additional fluids during the day, Ms. B, the nurse, communicated Mother's concern to the staff and followed up with her. Her nursing logs indicate that she encouraged Student to sip additional fluids and asked staff to do the same at Mother's request.

Similarly, the record contains no medical or clinical support for Mother's claim that it was inappropriate for electronic devices to be present in Student's classroom. Therefore, I find it was appropriate for Blackacre staff to continue to have electronic devices in Student's classroom.

With respect to the witnesses' differing versions of the events of February 15, 2017 which precipitated Mother's removal of Student from school, I found the Blackacre staff's testimony to be more credible than Mother's. I take administrative notice of the fact that Mother's conduct throughout the hearing was similar to her conduct as described by both Westborough and Blackacre staff in their interactions with her on February 15 and in prior instances. During the hearing she presented as extremely argumentative with opposing counsel, witnesses and the hearing officer. She would often repeat a question after the hearing officer sustained an objection and told her she could not ask a question, sometimes more than once. It was necessary for the hearing officer to stop the hearing on more than one occasion because Mother would not stop arguing with the hearing officer. Mother's behavior throughout the hearing can be described as belligerent, argumentative and defiant. She continuously argued with the hearing officer regarding the relevancy of questions. She cursed more than once in response to rulings or testimony with which she did not agree. Based upon the credible testimony of Mr. Y and Mr. X and her aforementioned conduct throughout the hearing, I find it credible that Mother did enter Student's classroom, refuse to step outside to speak with Mr. Y and presented in a belligerent and aggressive manner. Additionally, I did not find her testimony to be credible as I did not find

her to be an accurate reporter. While questioning witnesses she often mischaracterized their prior testimony. Additionally, as described above, she insisted that she received the IEP drafted at the 9/20/16 team meeting on November 14, 2016, even though her claim was credibly rebutted with testimony and reference to an e-mail. When her testimony conflicted with that of another witness, I was thus not able to rely on Mother's account.

During the hearing Mother raised the issue of the school nurse not having any emergency seizure medication for Student. She did not submit any evidence that Student has been prescribed emergency seizure medication. She did not present any recommendations from a medical professional that Student requires a seizure care plan or that Student's medical needs were not being met. It is also notable that her concerns regarding the seizure care plan and Student not having access to emergency medications were not raised in her February 15, 2017 letter to Westborough outlining her concerns about Blackacre.

I did not rely upon Father's testimony regarding Mother's safety concerns at Blackacre. He never observed Student at Blackacre, never attended Team meetings, and never directly raised any concerns to Blackacre staff (other than having some conversations with Mr. Y while delivering subpoenas related to the BSEA hearing after Student had stopped attending Blackacre). Further, he did not state that he personally observed the calm room at Blackacre.

Based upon the foregoing, I find no basis for determining that either Westborough or Blackacre fell short in meeting their IDEA obligations to Student. Westborough began sending referrals for Student's placement before he even registered in the district. Although Mother sought to argue that Student missed several weeks of services upon enrolling in the district, the record shows that he missed a small number of days which were made up by the fact that the Blackacre program provided a full year program in contrast to Student's out of state IEP which provided a shorter summer program. (See ¶ 2 above which states that Student's previous IEP included a summer program that ran from July 7, 2016 through August 19, 2016. His regular school year services were to commence on September 7, 2016.) Although, despite diligent efforts, the earliest Westborough was able to obtain an acceptance and placement for Student was July 26, 2016, his out-of-state IEP would have only provided services until August 19, 2016, leaving Student without services between August 19 and the September 7, 2016 beginning of the new school year, Blackacre provided uninterrupted services. Further, after Mother removed Student from Blackacre Westborough continued to fund the program and a one-to-one assistant so that Student could return to the program at any time. In addition to continuing to fund Student's last accepted program, Westborough agreed to send out referral packets to other schools and sent referrals to no less than 19 programs. While continuing to send referrals and to make Student's prior placement available, Westborough provided additional services and transportation to both the Pride Star program and Autism Behavior Services.

The record is clear that Westborough met its obligations to Student under the IDEA and there is no basis for awarding Student compensatory education.

Non-Party Motion to Conceal Name in Final Decision

On November 27, 2017, counsel for the private school Student attended during the time period relevant to this hearing filed a motion seeking to conceal or redact its name from the final decision. In support of its motion, it states that as a non-party entity, it lacks the ability to defend itself against allegations contained in the Hearing Request. Thus, it would be unfair to the non-

party entity to include its name in the final decision, particularly if the hearing officer finds in favor of the complainant.

Westborough assented to the motion stating that inclusion of the name of the private school would inappropriately tarnish the reputation of the school. It noted that even if the hearing officer finds in favor of the district, internet searches regarding the school by potential applicants and public school districts would likely result in the identification of the BSEA decision which could unfairly impact and damage the reputation of the private school based solely upon any recitation of Parent's allegations. Westborough suggested that the private school be referred to by the use of a pseudonym selected by the hearing officer.

Parent opposed the motion claiming that the hearing was public, the school received public funding, and thus, the public had a right to know the identity. She claimed it could "disadvantage other citizens of the Commonwealth should they have need for due process hearings of their own." She further stated that the private school participants were not just witnesses because their attorney was present and because through their testimony they had the opportunity to refute any allegations made concerning them. Additionally, she stated that if she were to file an appeal of the decision, the court would need access to the identities of the private school and witnesses. Finally, Mother argued that the private school witnesses claimed to have "done nothing wrong" on the record and thus, there is no reason to conceal their identities.

The BSEA routinely uses pseudonyms to protect the privacy of students/parents in documents available to the public and I am aware of no legal authority preventing it from doing the same with respect to a non-party entity and witnesses. In this case, a non-party entity, namely a private school, has requested that its name be concealed, as it did not have the opportunity to defend itself or to cross-examine witnesses due to its non-party status. Contrary to Mother's assertion, BSEA are not public hearings.

I am allowing the Non-Party's Motion to Conceal Name in the Final Decision⁴⁵. I am not persuaded by Mother's argument that the public has a right to know the identity of the non-party, especially, because upon review of the entire record and upon drafting the decision, I have not found evidence to support Mother's allegations with respect to the non-party. Additionally, as a non-party, the entity did not have the ability to present testimony or engage in cross examination of witnesses. Although the non-party's attorney was present for part of the hearing, he was there as an observer only, and not able to present or cross-examine witnesses. Neither party will be prejudiced by the identity of the non-party's entity being concealed in the decision. Prior to publication and dissemination of the decision, the name of the non-party will be changed to a pseudonym as will the names of employees of the non-party who testified at the hearing. If Mother chooses to appeal the decision in this matter, any reviewing court will receive the complete record which includes the transcripts which identify the non-party and witnesses by name.

ORDER

⁴⁵The hearing officer made the *sua sponte* decision that in addition to providing a pseudonym for the non-party entity, it would be necessary to provide pseudonyms for the staff people identified by the decision. Otherwise, an internet search of any of the witnesses would reveal the name of the non-party entity.

Based upon the foregoing, I find that Student is not entitled to compensatory services for the period from February 15, 2017, when Mother removed him from Blackacre, until September 2017 when Mother accepted a placement for Student at LABBB.

By the Hearing Officer,

Catherine M. Putney-Yaceshyn
Dated: January 29, 2018