

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

IN RE: HALSEY¹

&

BSEA #1605042

LENOX PUBLIC SCHOOLS

DECISION

This decision is issued pursuant to M.G.L. c.71B and 30A, 20 U.S.C. §1401 *et seq.* and 29 U.S.C. §794 and the regulations promulgated under those statutes. A Hearing was held on June 8, 2016 at Lenox Town Hall, Lenox, MA. Those present for all or part of the proceedings were:

Paul Mays	Special Education Teacher, Lenox Public Schools
Shannon Gamberoni	Special Education Unit Leader, Lenox Public Schools
Donna Webber	School Adjustment Counselor, Lenox Public Schools
Ashley Scherber	Teacher, Lenox Public Schools
Ellen Ferris	Director of Student Services, Lenox Public Schools
Stephen Tournas-Hardt	Psychotherapist
Ms. "H"	Parent
Regina Williams Tate	Attorney
Ann Bohan	Court Reporter
Lindsay Byrne	Hearing Officer

The Parent presented *pro se* at all times during the Hearing process. The School had attorney representation. The official record of the Hearing consists of documents submitted by the School marked S-1 through S-26; and approximately 40 minutes of recorded oral argument. The Parent did not submit any exhibits. No testimony was presented.

¹ "Halsey" and Ms. "H" are pseudonyms chosen by the Hearing Officer to protect the privacy of the family in documents available to the public.

PROCEDURAL HISTORY

The Parent requested a Hearing at the BSEA on January 20, 2016. The Parent asserted that the 2015-2016 IEP developed by Lenox in November 2015 is not appropriate for Halsey and that he requires a specialized out-of-district placement in order to safely receive the free appropriate public education to which he is entitled. The School responded with a cross-request for Hearing seeking a BSEA determination that the November 2015-2016 full inclusion Individualized Education Program it had developed for Halsey was reasonably calculated to ensure that he received a free appropriate public education.

The matter was assigned to Hearing Officer Reichbach and set for Hearing on February 19, 2016. After several postponements and conference calls the Hearing was rescheduled to June 7, 8 and 9, 2016. On May 2, 2016 the School submitted an Amended Cross Request for Hearing, asserting that Halsey had not attended school since April 15, 2016 and seeking BSEA approval of the School's decision to decline the Parent's request for home tutoring. The School also sought the Parent's consent, or in the alternative the BSEA's substitute consent, to conduct a comprehensive re-evaluation of Halsey. On May 3, 2016 the matter was reassigned to Hearing Officer Byrne and the Hearing was rescheduled to June 8, 9, and 10, 2016.

On May 27, 2016 the Parent requested a postponement of the Hearing seeking additional time to secure representation, seeking a publicly funded Independent Educational Evaluation (hereinafter "IEE"), and seeking home tutoring services "retroactive from the first day of school absence". The School opposed the postponement request pointing out that Halsey had not engaged in any educational services for 6 weeks, that the Parent's entitlement to an IEE was in dispute, and that the Parent had had many months to arrange legal representation. The School also requested that the additional issue of the Parent's entitlement to a publicly funded IEE be added to the Hearing.

The Hearing Officer issued an Order on May 27, 2016 retaining the scheduled Hearing dates for the issues requiring immediate resolution: Whether Halsey is entitled to receive home tutoring and, whether Halsey is entitled to a publicly funded IEE. Determination of the substantive issue of the appropriateness of the 2015-2016 IEP, the issue both parties originally presented for resolution, was postponed.

On June 6, 2016, the BSEA received the Parent's withdrawal of her Request for Hearing. The School did not withdraw its requests and indicated its readiness to proceed with the Hearing on the assigned dates. The BSEA alerted the Parties that the Hearing would proceed in accordance with the May 27, 2016 Order.

On June 8, 2016 the Hearing Officer conducted a prehearing conference in an attempt to clarify the issues and determine the Student's educational status. The prehearing conference resulted in the following:

1. The School's objection to the postponement of the Hearing on the substantive issue of the appropriateness of the 2015-2016 IEP was overruled. While the School's cross-request for a determination of that issue survives the Parent's withdrawal of her request for an identical determination, that matter is not sufficiently urgent at this time, nor is a postponement sufficiently inconvenient to the School, to override the Parent's request for additional time to secure representation. The Hearing on this issue will be held on October 6 and 7, 2016.²
2. The Parent signed consent to the comprehensive evaluation proposed by Lenox on May 2, 2016. The School agreed to conduct all components of the re-evaluation, except the home assessment, in a neutral location and before the start of the next academic year.
3. The Parent withdrew her request for a publicly funded IEE.
4. The Parties agreed that the Parent's request that Halsey be tutored at home is the sole issue remaining for immediate resolution.

ISSUE

Whether Halsey is entitled to receive home tutoring services due to a disability-based confinement to home pursuant to 603 CMR 28.03 (c) and 603 CMR 28.04 (4)?

SUMMARY OF THE FACTS³

1. Halsey is a nine year old 4th grade student who was found eligible for special education services by the Lenox Public Schools in September 2014. He received special education services through the school choice program at the Lee Public Schools during the 2014-2015 school year. Halsey returned to Lenox in October 2015. Lenox implemented the IEP developed by Lee and accepted by the Parent pending development of its own IEP at a Team meeting on November 10, 2015. The Parent rejected the 2015-2016 IEP proposed by Lenox. (S-16)
2. The IEPs developed by Lee and Lenox indicate the presence of a neurological disability that affects Halsey's social functioning. Educational interventions and placement focus on improvement of social and behavioral skills. Evaluations uniformly report that Halsey's average academic achievement is consistent with his average cognitive potential. (S-1, S-2, S-3, S-4, S-10, S-12, S-16)

² See: BSEA Order, May 27, 2016.

³ All facts are gleaned from the documents submitted by the School.

3. Halsey attended the 4th grade in Lenox pursuant to the last accepted IEP developed by Lee Public School until April 2016. He has not returned to school since April 25, 2016.

4. On April 28, 2016 the Parent submitted a note excusing Halsey's absence from school. The note was signed by Halsey's health care provider, a nurse practitioner:

[Halsey] has been under my care since [0/0/14]. My professional recommendation is that it is not in [his] best interest to attend school at this time. My expectation is that [Halsey's] absence will be more than 2 weeks to have an effective treatment plan in place.

(S-17. S-18)

5. On May 2, 2016 Lenox replied to the Parent acknowledging receipt of the absence note from Dr. Drohan.⁴ The Director of Student Services, Ellen Farris, wrote that when a student is absent for more than 2 weeks for medical reasons, the school provides alternate educational services. She pointed out 603 CMR 28.03 (3) (c) which governs provision of educational services to home bound students. She alerted the Parent that the note covering Halsey's ongoing absence from school did not meet the criteria for provision of in-home tutoring because: 1.) it was not signed by an MD; 2.) it gave no medical diagnosis requiring confinement to home; 3.) it lacked a statement indicating how the student's medical diagnosis affected Halsey's ability to participate in his education. (S-20)

6. On May 13, 2016 the Parent submitted a second absence note. This note was signed both by Dr. Drohan and by Dr. Yamini M.D.. It reads, in pertinent part:

[Halsey] has been under my care since [0/0/2014]. [Halsey] is diagnosed with Childhood Onset Schizophrenia. He presents with complex psychiatric and behavioral needs which require specific psychiatric, as well as behavior and education interventions.

The prognosis of this disorder is usually poor, however, intensive medication intervention and a highly specialized educational approach is in [Halsey]'s best interest short and long-term.

⁴ The Parties agree that the "Dr." in this case is not an "MD" .

Due to the complexity of [Halsey]'s needs, the standard education system may in fact be harmful to him. Until [Halsey] is psychiatrically stable, he will not be able to attend school for an undetermined length of time.

(S-22)

7. The School declined to provide home bound instruction to Halsey based on the May 13, 2016 physician note.

LEGAL FRAMEWORK

When a student is too ill or injured to attend school the local public school district is required to offer the student alternate instruction in the hospital setting, or in the student's home. The purpose of home-bound or hospital-based instruction is to maintain the student's educational progress consistent with the constraints of the student's medical condition, to provide the special education and related services outlined in a student's IEP to the extent possible, and to promote normalization.

The regulations that govern provision of home tutoring services are:

Upon receipt of a physician's written order verifying that any student enrolled in a public school or placed by the public school in a private setting must remain at home or in a hospital on a day or overnight basis, or any combination of both, for medical reasons and for a period of not less than fourteen school days in any school year, the principal shall arrange for provision of educational services at a frequency to allow the student to continue his or her educational program, as long as such services do not interfere with the medical needs of the student. The principal shall coordinate such services with the Administrator of Special Education for eligible students. Such educational services shall not be considered special education services unless the student has been determined eligible for such services, and the services include services on the student's IEP.

603 CMR 28.03 (3) (c)

and

If in the opinion of the student's physician, an eligible student is likely to remain at home, in a hospital, or in a pediatric nursing home for medical reasons and for more than 60 days in any school year, the Administrator of Special Education shall, without undue delay, convene a Team to consider evaluation needs and, if appropriate, to amend the existing IEP or develop a new IEP suited to the student's unique circumstances.

FINDINGS AND CONCLUSIONS

After careful consideration of the limited facts pertinent to resolution of this issue, and the arguments of both parties, it is my determination that the necessary prerequisites for provision of publicly funded home tutoring services have been met and that Halsey is entitled to receive home-bound instruction at this time. My reasoning follows:

Public Schools must carefully balance their charge to ensure that compulsory attendance laws are observed and their equal obligation to ensure that appropriate educational services are offered and delivered to each resident student. Medically authorized home bound instruction is not intended to be an aid to students whose parents choose a home education for cultural, political, family, educational or religious reasons. Nor is it intended to serve as an “alternate placement” when a parent disagrees with the special education program available through the public school. It is intended to ensure that a student whose unique health status limits participation in a school-based program of instruction actually receives as equivalent a substitute educational program as possible for the duration of the limiting condition. The parameters of any student’s health limitation are unique, variable and often unpredictable. Lacking medical expertise and authority to diagnose and treat an individual student, the public school must rely on the student’s own health care provider to supply the information necessary for the school to sift legitimate home-instruction requests from illegitimate ones, and to guide the development of a home tutoring plan that is responsive both to the student’s health concerns and to demonstrated educational needs.

To carry out this important and sensitive task a school may, and often must, advise a student’s health care team of the regulatory and educational criteria required to support an effective, medically necessary program of home instruction. Neither a parent nor a health care provider can be presumed to know the regulations that govern school attendance obligations or publicly funded home instruction. To fulfill its own mission a school therefore may create conforming forms for use in this type of situation, may seek parental consent to make additional inquiries of supervising health care providers, or may require production of additional medical information that will address the regulatory criteria and guide the school’s alternate education planning team. These additional measures may not, however unduly delay the delivery of appropriate educational services to the health compromised student

Here the Parent provided two notes in support of her request for a medically excused absence and for home tutoring. (¶ 4 and 6 supra.) The School objected to both notes and

⁵ See also: Question and Answer Guide on the Implementation of Educational Services in the Home or Hospital, Department of Elementary and Secondary Education. 2/2005. www.doe.mass.edu/pqa/ta/hhep_qa.html.

declined the parent’s request for home tutoring. The April 2016 note presented by the Parent does not address the regulatory criteria required to support a request for home instruction such as a medical diagnosis and a description of how the student’s health condition affects the delivery of education services in the school and in the home. Lenox properly rejected the April 2016 note proffered by the Parent on that basis. Further, Lenox properly advised the Parent of the elements necessary to support a home tutoring request. (See ¶5)

The School also argued that the note submitted on April 28, 2016 lacked the necessary authority for a medical excuse and home tutoring request because it had been signed by a psychiatric nurse practitioner instead of a physician as required by 603 CMR 28.03 (3) (c) . While the language of that regulation does clearly limit health status verification to a physician, the health care and statutory landscape has changed significantly since the pertinent special education regulations were last reviewed in 2011⁶.

In 2012 the Massachusetts General Court amended the statute governing the scope of authority of Nurse Practitioners to permit the acceptance of a Nurse Practitioner’s signature as an equivalent substitute for the signature of a physician required by any health care-related Massachusetts law or regulation. M.G.L. c. 112 § 801 provides, in pertinent part:

When a law or rule requires a signature, certification, stamp, verification, affidavit or endorsement by a physician, when relating to physical or mental health, that requirement may be fulfilled by a nurse practitioner under Section 80B.⁷

The verifying authority required under 603 CMR 28.03(3)(c) has thus been expanded by statutory operation to include nurse practitioners. As a result, Lenox could not properly decline to accept the nurse practitioner’s medical excuse for Halsey’s absence on the basis of lack of authority.

The May 2016 note submitted by the Parent, while far short of ideal, met the minimum requirements for home instruction outlined in 603 CMR 28.03(3)(c). It provided a medical diagnosis, an expected duration, and a statement that Halsey would, as a result of that condition, be unable to attend school and needed specialized educational interventions. Once those regulatory criteria have been met it is the school’s responsibility to seek the clarifying or supplementary information necessary to develop a home instruction program that addresses, as

⁶ The special education regulations were amended in April 2014. The Amendments made technical changes, clarified certain parental rights and added 603 CMR 53.01-14. The Amendments did not change the language or substance of 603 CMR 28.03(3)(c).

⁷ See also: “Nurse Practitioner Signatory Authority for Death Certificates.”, Memo of the Department of Public Health, Executive Office of Human Services, June 13, 2013.

far as possible, the student's health and learning needs. Lenox did not do that. Nor did it make timely arrangements to provide the necessary home instruction to Halsey from the date of receipt of the PNP/Physician order to the date of this Decision. I find, therefore that Lenox did not fulfill its obligation under 603 CMR 28.03(3)(c) to provide home tutoring services to Halsey for a period of at least six weeks. I further find that Halsey is entitled to receive a substantially equivalent substitute of six weeks of home instruction to be delivered during the summer 2016 as appropriate remedial action for this procedural violation.

The School asserted that, as Halsey's IEP does not include extended year services, it may not provide home instruction to him during the summer 2016. In this instance summer tutoring is not an ESY service. Given the finding that Lenox improperly declined to accept the Parent's May 13, 2016 request for medically authorized home tutoring, an award of compensatory education is appropriate. Compensatory education is an equitable remedy for a significant deprivation of an educational benefit to which a student has an entitlement. Awards of compensatory education are designed to return the student to the position or condition she or he would have occupied had the regulatory violation not occurred. *Florence County School District Four v. Carter*, 510 U.S. 7 (1993); *Reid v. District of Columbia*, 401 F.3d 516 (D.C.Cir. 2005). Here, provision of six weeks of academic tutoring over the summer months should help Halsey remain academically current with his age and grade peers and promote reintegration as soon as medically indicated.

ORDER

Lenox Public Schools properly declined to accept the April 28, 2016 absence note as it did not meet the regulatory criteria necessary to support a request for home tutoring. 603 CMR 28.03(3)(c). Lenox Public Schools improperly declined to accept the Parent's subsequent request for home instruction on the basis of vagueness. As a remedy for this procedural violation Lenox shall provide six weeks of home-based academic instruction to Halsey during the summer 2016.

By the Hearing Officer

Lindsay Byrne
Dated: June 22, 2016