

February 24, 2020

**COMMONWEALTH OF MASSACHUSETTS**

*Division of Administrative Law Appeals*

**Bureau of Special Education Appeals**

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**DECISION**

**BSEA # 2004165**

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**BEFORE**

**RAYMOND OLIVER  
HEARING OFFICER**

**MARY ELLEN SOWYRDA AND VINEESHA SOW,  
ATTORNEYS FOR SWAMPSCOTT PUBLIC SCHOOLS**

**JOSHUA VARON AND LUCY WALL, ATTORNEYS FOR  
MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**

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

**Swampscott Public Schools v. Massachusetts Department of Elementary and Secondary Education  
BSEA #2004165**

**DECISION**

This decision is rendered pursuant to M.G.L. Chapters 30A and 71B; 20 U.S.C. §1400 et seq; and the regulations promulgated under these statutes.

A hearing in the above-entitled matter was held on December 16, 2019 at the Bureau of Special Education Appeals (BSEA) in Malden, Massachusetts. The record remained open for the receipt of written transcripts and written final arguments until February 3, 2020.

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

Martha Raymond	Assistant Superintendent of Student Services, Swampscott Public Schools (SPS)
Mona Blumstein Parent	Out-of-District Coordinator, SPS
Shannon Arthur (via telephone)	Board Certified Behavioral Analyst, Hopeful Journeys
Jill Larson (via telephone)	Executive Director/Director of Operations, Hopeful Journeys
Jacqueline Brown (via telephone)	Financial Compliance Director, Operational Services Division (OSD), Executive Office of Administration and Finance, Commonwealth of Massachusetts
Elena DeMelin	Program Supervisor for Reimbursements of Circuit Breaker Special Education Reimbursement Program, Massachusetts Department of Elementary and Secondary Education (DESE)
Nina Marchese	Director, Office of Approved Special Education Schools, DESE
Mary Ellen Sowyrda	Attorney, SPS
Vineesha Sow	Attorney, SPS
Joshua Varon	Attorney, DESE
Lucy Wall	Attorney, DESE
Alexander Loos	Registered Court Reporter
Raymond Oliver	Hearing Officer, BSEA

The evidence consisted of SPS Exhibits labeled S-1 to S-14; DESE Exhibits labeled DESE-1 to DESE-10; and approximately 5 hours of oral testimony.

## **STATEMENT OF THE CASE**

The essential dispute in the instant case is not between the parents and the public school district, the more typical issue presented in BSEA matters, but rather between the public school district (herein SPS) and the DESE.

In the summer of 2017, SPS placed Student, an eleven year old boy on the autism spectrum, at Hopeful Journeys, a DESE approved private special education school. At a team meeting in April 2019 the team determined that Student required an extended day program in order to receive a free and appropriate public education (FAPE). From the outset, Hopeful Journeys indicated that it could provide the necessary extended day services. However, while Hopeful Journeys is a DESE approved private special education day school operating between 8 a.m. to 2 p.m., its extended day component, a separate entity, is not a DESE approved program. SPS requested that Hopeful Journeys apply to DESE to have its extended day services component approved, but Hopeful Journeys refused to do so.

Pursuant to a February 28, 2019 DESE Advisory, public funds may not be spent on unapproved programs. SPS approached DESE and was apprised of the necessary procedures to be followed for approval, including an application from Hopeful Journeys for such approval. SPS then brought this case before the BSEA (testimony Raymond; Blumstein; Arthur; Larson; Brown; DeMelin; Marchese; S-13, 14; DESE – 1, 2, 3, 4, 5, 6).

## **ISSUES IN DISPUTE**

- I. Is the February 28, 2019 DESE Advisory (S-1B) applicable to the instant case?
- II. Is SPS entitled to full OSD circuit breaker reimbursement for Hopeful Journeys' extended day component, as if it was a DESE approved program?
- III. Should the BSEA approve SPS' placement of Student in Hopeful Journeys' extended day program/services, despite its lack of DESE approval?

## **STATEMENT OF POSITIONS**

SPS' position is that: 1) Student requires placement in Hopeful Journeys' extended day program in order to receive FAPE; 2) the BSEA should approve Student's placement in Hopeful Journeys' extended day program despite DESE's lack of approval of said program and Hopeful Journey's refusal to apply to DESE for such approval; 3) SPS should then be entitled to full OSD circuit breaker reimbursement for Hopeful Journeys' extended day program as if it were a DESE approved program.

DESE's position is that: 1) This matter concerns school finance and not Student's access to FAPE; 2) Student is receiving and will continue to receive the services called for in his individualized education program (IEP); 3) Student's extended day services have been and remain eligible for appropriate DESE (as opposed to OSD) circuit breaker reimbursement.

## **FINDINGS AND CONCLUSIONS**

It is undisputed by the parties and confirmed by the evidence presented that Student is a child with special education needs as defined under state and federal statutes and regulations. (See S-1, 2, 3, 4,

5, 6, 7, 8, 9, 10; testimony, Raymond; Blumstein; Arthur; Mother.) DESE does not dispute or contest Student's special education needs or placement at Hopeful Journeys. The fundamental issues in dispute in this appeal are listed under **ISSUES IN DISPUTE**, above.

Pursuant to *Schaffer v. Weast* 126 S. Ct 528 (2005), the United States Supreme Court has placed the burden of proof in special education administrative hearings upon the party seeking relief. Therefore, in the instant case, SPS bears the burden of proof in demonstrating that its position is correct.

Based upon the exhibits introduced into evidence, the approximately five hours of oral testimony presented, and a review of the applicable law, I conclude that: 1) given the facts of the instant case, the February 28, 2019 DESE Advisory does not here apply; 2) the BSEA will not "approve" Hopeful Journeys' unapproved extended day school services; and 3) SPS is, in fact, receiving appropriate circuit breaker reimbursement.

My analysis follows.

## **ISSUES I and II**

Although SPS continually referred to Hopeful Journeys' unapproved extended day component as an extended day school program and a continuation of its approved day school program, I find that Hopeful Journeys' extended day component is not an extended day school program, but rather supplemental extended day services (testimony, Arthur; Larson; Brown). I further find that the extended day component at Hopeful Journeys does not provide the same quality of special education programming and services as its DESE approved day school program.

Hopeful Journeys (HJ) operates a DESE approved, OSD approved, private special education day school program from 8 a.m. to 2 p.m. (DESE – 1, 2). HJ then offers extended day services of 1-2 hours per day, depending upon the needs of the student. These extended day services consist of one to one applied behavioral analysis (ABA) therapy, provided on-site at HJ by bachelor degree level therapists, supervised by a masters level ABA certified therapist/BCBA (testimony, Arthur; Larson). Such services are a separate and distinct entity from the DESE/OSD approved HJ private school day program (testimony, Larson). In fact, HJ has refused to even apply to DESE for such approval for its extended day component.

OSD cannot approve a program or service that is not DESE approved, which is why SPS' appeal for OSD approval of its placement of Student in HJ's extended day program was denied (testimony, Larson; Marchese; DeMelin; Brown; DESE-3). Therefore the extended day services here under consideration are not subject to reimbursement at OSD circuit breaker rates.

On February 28, 2019, DESE Associate Commissioner John (Jay) Sullivan issued a DESE Advisory regarding changes to the Special Education Circuit Breaker Program. (See S-1B). This advisory addressed: 1) OSD Approvals for Unapproved Programs; and 2) OSD Approval for Individual Services provided under Approved Programs. The relevant parts this Advisory provide:

### **OSD Approvals – Unapproved Programs**

In order to claim a program which is not on OSD’s approved program listing, districts must submit a Notification of Intent to Seek Approval for Individual Student Program (a/k/a “Form 28M/3”) to DESE’s Office of Approved Special Education School (“OASES”, formerly known as PQA). OASES reviews all Form 28M/3’s and clearly states the following language in their review documents:

“...students may not be placed in unapproved private programs nor may public funds be used for the payment of tuition costs or other expenses prior to the Executive Office of Administration and Finance, Operational Services Division’s authorization of a price for a particular student in a particular unapproved program. The Department may deny authorization for pricing if the proposed placement is not made in compliance with the state regulations regarding special education.”

**OSD approvals must be received in order for such programs to be reimbursable under Circuit Breaker.** We strongly recommend that you review the status of your claims now to ensure that OSD approvals are received timely. Form 28M/3 is available on DESE’s website.<sup>1</sup>

### **OSD Approvals – Individual Services provided under Approved Programs**

Districts who have students in OSD approved programs who also receive individual services from aides, therapists and other providers from the same approved school may receive reimbursement under Circuit Breaker for the costs of these services. An Individual Price Authorization (“IPA”) must be filed in order to seek reimbursement...

Neither of the above provisions applies to the facts of the instant case. First, HJ has refused to even seek approval for its extended day component, and the extended day services are not a “program”(testimony, Larson; Arthur). Next, the Individual Services provided under Approved Programs similarly does not apply to the facts of this case because this provision refers to individual services provided “from the same approved school”. In the instant case it is uncontested that Student’s extended day ABA services are not provided under an approved program, but rather in an unapproved, separate extended day component.<sup>2</sup>

For the reasons discussed above, I find that the February 2019 DESE Advisory is not applicable given the facts presented by the instant case.

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<sup>1</sup> OSD’s Approvals - Unapproved Programs and use of DESE Form 28M/3 is the new terminology for what was previously referred to as submitting a sole source of care approval (testimony, DeMelin).

<sup>2</sup> Again, this is why SPS’ appeal for OSD approval for an individual price authorization was denied. (testimony, Brown; DESE-3).

### ISSUE III

SPS' dispute here is essentially with HJ, not DESE. HJ determined that Student required extended day services and that HJ could provide such extended day services. SPS then requested an evaluation. HJ performed Student's evaluation. The team then met and decided, based upon HJ's determination and evaluation, that Student should receive extended day services at HJ. HJ then wrote the IEP calling for extended day services at HJ. At some later point HJ informed SPS that HJ's extended services were not part of its approved day school program. SPS requested that HJ apply to DESE for approval of its extended day services. HJ refused to do so. Without DESE approval OSD cannot approve HJ's extended day services and, therefore SPS cannot receive OSD circuit breaker funding (testimony, Raymond; Blumstein; Larson; DeMelin; Marchese).

HJ's refusal to apply for DESE approval of its extended day services is apparently due to the fact that HJ's staffing levels in the extended day component would not meet DESE standards. There is no special education teacher in the extended day component, only bachelor's level ABA therapists, supervised for one out of ten hours by a certified BCBA (testimony, Larson). Further, HJ does not wish to seek approval from the town in which it is located (testimony, Larson; Raymond). Finally, all extended day staff are volunteers and HJ wishes to keep the extended day component separate so that the extended day staff can have "second jobs" (testimony, Larson).

A ruling in favor of SPS' position would effectively open the door to an end run around appropriate DESE regulation of private special education schools and programs, enabling approval of programs and/or services that fail to meet DESE's educational standards. While the BSEA has, in the past, overridden DESE's denial of program approval and ordered sole service of care approval, said matters involved rare, and/or unique individual circumstances; such is not the situation in this case. Here, the services are additional ABA services, a standard service provided to children on the autism spectrum. (Indeed, as Ms. Larson has testified, HJ currently has eight other students in a situation identical to Student's, that is, receiving ABA therapy services in its unapproved extended day component.)<sup>3</sup>

Although SPS is not receiving full OSD circuit breaker reimbursement, DESE has, in fact, agreed to provide DESE circuit breaker reimbursement to SPS for the after school ABA therapy pursuant to its supplemental reimbursement process (testimony, DeMelin; Marchese). SPS objects to this remedy, taking issue with the forms DESE requires SPS to file and the fact that the DESE circuit breaker reimbursement formula is lower than that of OSD (testimony, Raymond, Blumstein). I conclude that given HJ's refusal to seek DESE approval, thereby eliminating the possibility of OSD circuit breaker reimbursement, DESE has done all that it is able to do to provide SPS with some form of circuit breaker reimbursement.

By the Hearing Officer,

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Raymond Oliver

Dated: February 24, 2020

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<sup>3</sup> During the final quarter of the 2019 school year 10 other school districts, in addition to SPS, had 13 students attending HJs' unapproved extended day services component. (DESE-4; testimony, DeMelin)