

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

In Re: Whitman Hanson RSD

BSEA No. 2007520-C

RULING ON MOTION TO ORDER COMPLIANCE WITH DECISION

On November 27, 2020, after an evidentiary hearing, the BSEA issued a final decision (*Decision*) in the case that is the subject of this ruling. The relevant portions of the *Decision* are reproduced verbatim, below:

In sum, the IEP and Preschool Academy placement are not appropriate as written and proposed, but can be made appropriate with the addition of a TOD [Teacher of the Deaf] who will be in Student's classroom during all of the time that Student is in the classroom, who would be responsible for providing a significant amount of Student's direct instruction. That said, I note that Student is nearing the end of a critical window to "train his brain" to access sound, and already has—unavoidably—missed opportunities to do so when he was an infant and young toddler...

...Because I have determined that the IEP and placement proposed by Whitman-Hanson can be made appropriate with the addition of a TOD in Student's classroom whenever Student is present, I would normally not reach the issue of the appropriateness of the Clarke School. However, if Whitman-Hanson is unable to provide a TOD consistent with this Decision, I find that the Clarke School would be an appropriate placement for Student...

The Conclusion and Order section of the *Decision* states as follows:

Based on the foregoing, I conclude that the IEP and placement proposed by Whitman-Hanson for the 2020-2021 school year are not appropriate as written but can be made appropriate with the addition of a Teacher of the Deaf, qualified in listening/spoken language, to be responsible for providing the majority of Student's direct instruction. The Teacher of the Deaf shall be available in Student's classroom throughout each school day when Student is present.

On January 18, 2021, Parents filed a *Motion to Order Compliance with Decision*, pursuant to Rule XIV of the BSEA *Hearing Rules*, alleging that the Whitman-Hanson Regional School District (District) failed to fully comply with the above-quoted *Order* because it had not hired a Teacher of the Deaf (TOD) for Student, qualified in listening and spoken language. Instead, as will be discussed in more detail in this *Ruling*, the District has proposed "hybrid models" which, Parents claim, do not satisfy the Order in the *Decision*, but place Student "at needless exposure risk to COVID" and, additionally, require Student to attend to remote instruction provided by both a special education teacher and a TOD, which Student is "unable to do at this time." Parents assert that placement at the Clarke School ("Clarke") is the obvious alternative at this time.

In response to Parents' *Motion*, the District filed an *Opposition* in which it disputed Parents' claims and asserted that its proposal fully complies with the underlying *Decision*. The District further states that it has diligently sought (and, as of the date of the hearing on the *Motion*, was continuing to seek) to recruit a TOD, and that its proposed hybrid models ensure that Student has a TOD qualified in listening/spoken language available to him each day that he attends school.

A hearing on the *Motion* was held remotely¹ on February 10, 2021 at which both parties presented witness testimony, cross-examined the opposing party's witnesses, and submitted exhibits. At the close of the hearing, both parties waived oral or written closing statements. Those present for all or part of the hearing were the following:

Mother	
Dr. Barbara Hecht	Director, Clarke School for Speech and Hearing
Patricia Poirier-Collins	Director, Preschool Academy, Whitman-Hanson RSD
Lauren Mathisen	Director of Student Support Services, Whitman-Hanson RSD
Ginny Brennan	Advocate for Parents
Alisia St. Florian, Esq.	Attorney for Whitman-Hanson
Carol Kusinitz	Court Reporter
Sara Berman	BSEA Hearing Officer
Alina Kantor Nir	BSEA Hearing Officer, Observer

¹ Both parties consented to the hearing being conducted via Zoom.

Issues Presented

The sole issue for this hearing on the *Motion for Compliance* is whether Whitman-Hanson has proposed a program for Student which complies with the Order contained in the Decision dated November 27, 2020.

Summary of the Evidence

1. The entire *Decision* in *In Re: Whitman-Hanson Regional School District*, BSEA No. 2007520 is adopted and incorporated by reference in this *Ruling*.
2. Student turned 4 years old on January 4, 2021. For several months prior to his 4th birthday, he participated in an extended Early Intervention (EI) program at the Clarke School for Hearing and Speech (Clarke) under a special grant. That program terminated on or about Student's 4th birthday, and Student has not attended any preschool program since that date. Student does receive weekly private speech/language therapy funded by Parents. (Mother, Hecht)
3. The *Decision* in this matter was issued on November 27, 2020. Lauren Mathisen, Director of Student Support Services for the District, testified that in early December, 2021, "immediately" after the *Decision* was issued, both she and Patricia Poirier-Collins, Principal of the District's Preschool Academy, began searching for a TOD in order to implement the *Decision*. (Mathisen, Poirier-Collins)
4. Upon beginning their search, Ms. Mathisen and Ms. Poirier-Collins became aware of a national shortage of Teachers of the Deaf, particularly those qualified in listening/spoken language. In light of this shortage, Ms. Mathisen testified that she and Ms. Poirier cast a wide net in an effort to locate an appropriate candidate, reaching out to public school districts, collaboratives, private schools for deaf and hearing-impaired students, graduate programs, and contracting agencies. (Mathisen) While some of the programs that she contacted use ASL rather than a listening/speaking approach, Ms. Mathisen approached them

anyway, hoping that they would be able to refer her to sources of teachers qualified in listening/speaking methodologies.² (Mathisen, Poirier-Collins, S-3)

5. None of the districts or organizations that Ms. Mathisen contacted was able to refer a potential TOD candidate, and several mentioned the shortage of such teachers in Massachusetts.³ In an email dated January 14, 2021 sent to the Head of School at the Boston Public Schools' Horace Mann School for Deaf and Hard of Hearing, Ms. Mathisen wrote, "I have reached out to so many folks and have hit dead ends as these teachers are in an extreme shortage in Mass. right now." (S-3)
6. Ms. Mathisen testified that she was continuing to seek a TOD, and that an interview with a potential candidate from another state was scheduled for the day following the hearing (February 11, 2021). (Mathisen)
7. Meanwhile, beginning on December 7, 2020, Ms. Mathisen and Ms. Poirier-Collins had had several email exchanges and conversations with Katie Jennings, who is the director of mainstream programs at Clarke, and who also is a TOD. In an email of that date, Ms. Mathisen informed Ms. Jennings that the District was seeking a preschool TOD for approximately 12 hours per week. In a reply email, Ms. Jennings stated that Clarke could not staff the full 12 hours but "could potentially do 3." (S-3)
8. Subsequently, Patricia Poirier-Collins took up the communication with Katie Jennings, which took the form of several telephone conversations. Ms. Poirier-Collins testified that Ms. Jennings told her that she would be available to work with Student in person at the Preschool Academy on Wednesdays and Fridays for two hours per day. Additionally, she would be able to work with him remotely on one additional day (Tuesday or Thursday), and a colleague at Clarke would be available for remote instruction on a second day. This arrangement would result in 4 days of coverage per week; there would be no TOD available from Clarke on Mondays. (Poirier-Collins)
9. According to Ms. Poirier-Collins, Ms. Jennings declined to sign a contract to provide the above-described services in the absence of an accepted IEP reflecting same. (Poirier-Collins)

²Ms. Mathisen and her staff reached out to the following schools/agencies: READS Collaborative, Perkins School for the Blind, Horace Mann School for Deaf and Hard of Hearing (Boston Public Schools), Beverly School for the Deaf, The Learning Center for Deaf (TLC), Fontebonne School (a private college in Missouri that certifies Teachers of the Deaf), Duxbury Public Schools, Holliston Public Schools, Silver Lake RSD, Boston University and Lesley University programs for January graduates, contract service agencies, and MA Commission for Deaf and Hard of Hearing. As of the date of the compliance hearing, Ms. Mathisen was still searching for a full-time TOD. (S-3, Mathisen)

³ In a January 7, 2021 email, a representative from TLC noted "the Massachusetts teacher of the deaf (TOD) shortage (which is at crisis levels)." (S-3)

10. The record does not reflect any correspondence memorializing these telephone conversations between Ms. Poirier-Collins and Ms. Jennings. Ms. Poirier-Collins could not recall the date of her most recent conversation with Ms. Jennings and had no knowledge of her availability as of the hearing date. (Poirier-Collins)
11. Dr. Barbara Hecht, Director of the Clarke School, testified that she was not aware of any arrangements that had been made between Ms. Jennings and the District to provide services to Student at the Preschool Academy. (Hecht)
12. On January 19, 2021, the District issued an N-1 form containing the following proposal:

The Whitman-Hanson Preschool is proposing the following plan in full implementation of the BSEA decision.

[Student] will attend the Preschool Academy in WH in person two days per week, remote in-district programming, two days per week, and the Clarke School pre-school program one day per week.

The Preschool Academy is proposing [Student] attend in person on Wednesdays and Fridays for 2.5 hours per day. On Wednesdays, [Student] will receive 120 minutes of TOD and a special education teacher, 30 minutes of speech, and 20 minutes of occupational therapy services. On Tuesdays and Thursdays, [Student] will receive 75 minutes of TOD with a special education teacher and two 30 minute speech sessions. [Student] will have the option to attend one day at the Clarke School preschool program or he can attend the Preschool Academy with a special educator on the fifth day.

[Student] will attend the Clarke School's summer program for the summer of 2021 only. No stay-put attaches to this placement... (S-2, P-4)

13. The N-1 form further provided that "[a]s soon as the District is able to secure a full time TOD who is able to accompany Student during all academic times, following the end of the 2021 school year, the District shall so notify the Parents and convene an IEP Team meeting to propose placement for the Student full time in the in-district program. (S-2, P-4, Poirier Collins)
14. Upon receipt of the District's proposal, Parents consulted with Student's pediatrician and cardiologist, both of whom expressed concern regarding the proposal and urged mitigation of COVID exposure through full time attendance in a "single" school program. (P-2, P-3, P-5, Mother)

15. Specifically, in a “Letter of Medical Necessity” dated January 22, 2021, Student’s pediatrician, Dr. Mary Urquhart, stated that in light of Student’s medical history and diagnoses⁴ and “ineffective mask use,” Student is in a “higher risk category to contract COVID-19.” Dr. Urquhart further stated that it is “medically necessary that he is provided services in one school with a teacher of the deaf.” (P-3) On February 4, 2021, Student’s cardiologist, Dr. Naomi Gauthier, recommended “a single, high quality preschool for children who are hard of hearing or deaf” which can “safely limit or mitigate potential COVID -19 exposure.” (P-2 , P-3, P-5, Mother)
16. Both Whitman-Hanson and Clarke implement COVID-related safety protocols including using a hybrid model of remote and in-person instruction, reducing class and group sizes, distancing, hand-washing, and use of masks. Whitman-Hanson does not require preschoolers to wear masks if they are unable or unwilling to do so but takes other safety precautions if children are not masked. To date, the District has reported no positive COVID-19 tests at the preschool. At Clarke, all children wear masks. (Poirier-Collins, Hecht)
17. Neither Dr. Urquhart nor Dr. Gauthier communicated with representatives of either Whitman-Hanson or Clarke. The record does not reflect that either had received any information about COVID-19 protocols or mitigation practices at either the Preschool Academy or the Clarke School. (Mother)
18. In an email dated January 24, 2021, Parents rejected the District’s proposal.⁵ Specifically, Parents objected to Student’s physical attendance at two different schools because of the possibility of increased COVID exposure, stating that “his pediatrician concurs as she believes [Student] is a high risk due to his diagnoses an ineffective mask use.”⁶ Parents further stated that “[Student] could not possibly attend to two adults in a remote session. He has only in the past months demonstrated productive sessions with his teacher of deaf from Clarke who worked with him until his fourth birthday.” Parents objected to “packing multiple speech sessions in a day” (as proposed in the N1) as he “will not be able to attend long or multiple sessions and the auditory fatigue will certainly degrade his ability to access anything.” (S-4)

⁴ Student’s medical history is detailed in the Decision and will not be repeated here.

⁵ It appears that this N-1 is the product of negotiations between the parties after the *Decision* was issued. Parents’ January 24, 2021 rejection states “we note this information was already shared with us via a proposed agreement and we rejected it. We also note that our advocate filed a formal motion on Monday and prior had emailed the hearing officer regarding the District’s non-compliance with her order and the long period of time services have not occurred since the hearing decision 11/27/20. It is curious that you would then send this N1 knowing our rejection had already been clear.” (S-4, Mother, Mathisen)

⁶ Mother testified that Student refuses to wear a mask because he associates masks with doctors. She has followed the suggestions of her medical providers to support Student’s mask wearing (e.g., reading stories, putting a mask on a stuffed animal), but without success. (Mother)

19. Parents' rejection statement concluded that to comply with the *Decision*, "in the absence of a full-time teacher of the deaf at the pre-school, we believe the district is obligated to place [Student] at Clarke School for the bulk of his academic instruction, be it in person or remote."⁷ (S-4)
20. Dr. Barbara Hecht testified that Clarke could not provide Student with preschool services for one day per week, both because of COVID concerns and because of an increased demand for placements; "holding" a one-day slot for Student would potentially prevent Clarke from filling a full-time slot for another child. She also was uncertain about the availability of full-time slots, since some Clarke teachers had gone on maternity leave and there was at least one new student awaiting placement. (Hecht)
21. Ms. Poirier-Collins testified that the District could be flexible in implementing Student's IEP for 2021. For example, the District could increase the amount of consultation time between the TOD and the special education teacher, could extend Student's time at school during his 4 days at the Preschool Academy, or explore other preschool programs. (Poirier-Collins)
22. Whitman-Hanson has offered to provide walk-in speech/language, OT and PT services pending a ruling on the *Motion for Compliance*, but Parents have not chosen to have Student access them. (Mathisen, Poirier-Collins, Mother)
23. As of the hearing date, the District had not hired a TOD.

DISCUSSION

Rule XV of the BSEA *Hearing Rules* provides the following avenue for relief for a party who believes that BSEA decision is not being implemented:

A party contending that the Hearing Officer's decision is not being implemented may file a motion requesting the BSEA to order compliance with the decision.

The motion shall set out the specific areas of alleged non-compliance. The Hearing Officer may convene a hearing on the motion at which the scope of inquiry will be limited to facts bearing on the issue of compliance, facts of such nature as to excuse

⁷ Parents agreed that Student could attend the Preschool Academy to attend one speech session (with Clarke providing the remaining speech sessions) as well as his 1:1 OT session, although Mother testified that she did not believe Student actually needed the OT and physical therapy (PT) provided in his IEP.

performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief and/or refer the matter to the Legal Office of the Commonwealth of Massachusetts Department of Elementary and Secondary Education for enforcement. *Id.*

After reviewing the evidence produced at the hearing in light of Rule XV, above, I conclude that despite diligent efforts, Whitman-Hanson has not complied with the *Decision* issued in BSEA No. 2007520. My reasoning follows.

First, I construe Parents' COVID-based objections to the District's proposal as a claim that this proposal would effectively deny Student access to the programming required by the *Decision*. According to this argument, Student's inability to access the services proffered by the District because of his medical condition would render the proposal non-compliant. Parents' argument is not persuasive because the record does not establish that the proposed program is inaccessible to Student.

I place little weight on the physicians' letters submitted by Parents alleging that Student requires a "single" full time preschool in order to reduce his risk of COVID exposure. As neither the pediatrician nor the cardiologist testified at the hearing on the *Motion*, there was no opportunity to assess Student's reportedly increased risk or the accommodations or mitigation measures that might be available to reduce such risk and ensure accessibility of the program. Although Mother testified that Student currently refuses to wear a mask, Ms. Poirier-Collins testified credibly that while preschool students are not be required to wear masks if unable to do so, the Academy Preschool follows intensive COVID-related safety protocols and has experienced no positive tests to date. Moreover, at the Clarke School, Student would be required to wear a mask during in-person attendance. (Hecht)

Similarly, I give little weight to Parents' claim that Student cannot participate in the District's "hybrid models" because he would be unable to attend to remote instruction provided by both a TOD and a special education teacher. Both the Preschool Academy and Clarke provide a combination of in-person and remote instruction to students. In any event, the *Decision* addresses neither the particulars of hybrid instruction nor details on how a TOD and special education teacher would coordinate provision of instruction. These issues are not relevant to the question of whether or not the District has complied with that *Decision*.

Instead, Parents' position succeeds because Whitman-Hanson's proposal simply could not be implemented as of the date of the compliance hearing or immediately thereafter. This proposal, as well as the suggested alternatives offered at the hearing by District staff testimony (e.g., extending Student's hours in school) depend on Whitman-Hanson's having secured a TOD, qualified in listening and spoken language, to work with Student for four days per week, and Clarke's ability to provide instruction on the fifth day (assuming that the District could not otherwise secure coverage). Despite

its diligent search, as of the date of the compliance hearing, the District has been unsuccessful in securing TOD coverage for all five days per week. According to Dr. Hecht, Clarke could not provide TOD instruction to Student on the fifth day. And, despite its diligent search and best efforts, as of the date of the compliance hearing, the District has been unsuccessful in securing TOD coverage for all five school days per week.

CONCLUSION AND ORDER

Due to the national shortage of Teachers of the Deaf, particularly those qualified in listening/spoken language, Whitman-Hanson has been unable to fulfill the requirements of the *Decision*, despite diligent efforts to do so. The District may be able to secure an appropriate TOD at some time in the future; meanwhile, however, the *Decision* in this case issued some three months ago and Student, who is 4 years old, has yet to attend any preschool program. In light of his age, his urgent need for appropriate programming as outlined in the *Decision*, and the limited availability of openings at the Clarke School, time is of the essence, and a full-time placement at Clarke is appropriate.

Within ten (10) calendar days of the date of this ruling, Whitman-Hanson RSD shall effectuate a placement for Student in the preschool program at the Clarke School for Hearing and Speech in Canton, MA for the remainder of the 2020-2021 school year including the Clarke School summer program for summer 2021, consistent with the Order contained in the *Decision*.

By the Hearing Officer:

/s/ Sara Berman

Dated: February 24, 2021

Sara Berman