

THE COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
Bureau of Special Education Appeals

In Re: Wallis¹

&

BSEA # 1502427

Lincoln-Sudbury Regional School District

RULING ON PARENTS' MOTION FOR POSTPONEMENT AND
SCHOOL'S MOTION TO DISMISS

This matter comes before the Hearing Officer on routine requests made in highly unusual circumstances which merit further discussion. All facts recited below appear in the administrative record and are either uncontested or are set out as articulated by the Parents and construed in the light most favorable to resist dismissal.

RELEVANT PROCEDURAL HISTORY

1. The Parents requested a BSEA Hearing on September 22, 2014. The Hearing was scheduled to take place on October 27, 2014 before Hearing Officer Rosa Figueroa. During a conference call held on October 14, 2014 the Parties agreed to postpone the Hearing. On October 27, 2014 the BSEA issued an Order scheduling the Hearing for February 25, 26, and 27, 2015. (Administrative Record)
2. On November 9, 2014 the Hearing Officer issued an Order outlining the issues to be decided at Hearing. The Parents withdrew three of those issues on November 20, 2014. The Hearing Officer granted the Motion of Lincoln Sudbury Regional School District (hereinafter "School") to Dismiss an additional and overlapping four issues on January 14, 2015.

¹ "Wallis" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

The remaining issues to be resolved at Hearing are:

1) Whether Lincoln-Sudbury complied with Student's physician's medical instructions regarding reentry to school following her concussion during the 2012-2013 school year?

2) Whether Lincoln-Sudbury failed to comply with the requirements under the IDEA and/or Section 504 "child find" provisions (that is, whether Lincoln-Sudbury knew or should have known of Student's continuing medical issues, physical or mental impairment)?

3) Whether Student's medical issues substantially limited Student's ability to learn (a major life activity)?

4) Whether Lincoln-Sudbury denied Student access to the curriculum of each of her classes during the 2012-2013 school year?

5) Whether Student failed to make effective progress in her classes during the 2012-2013 school year?

6) Whether Student was eligible to receive accommodations under a Section 504 plan as a result of a concussion suffered on or about September 30, 2012?

7) Whether Parents are entitled to reimbursement for their unilateral placement of Student at Lawrence Academy for her junior and senior years inclusive of transportation?

8) Whether Parents are entitled to reimbursement for provision of the 2013 math summer tutoring for Student?
(Administrative Record)

3. On February 18, 2015 the Hearing Officer granted the Parents' request to postpone the February 2015 Hearing dates. On March 13, 2015 the Hearing was rescheduled to April 7, 8, and 9, 2015. (Administrative Record)

4. On March 22, 2015 the Parents requested a postponement of the April Hearing dates. The School opposed further postponements. On April 3, 2015 the Hearing Officer denied the Parents' request to postpone the April 7 and 8 Hearing dates. The Hearing Officer granted the Parents' request to postpone the April 9th date due to a conflict with a medical appointment and directed the Parties to be available on either of the following dates: April 10, 13 or 14, 2015, to conclude the Hearing. (Administrative Record)

5. On March 25, 2015 the Parents filed a Motion to Recuse Hearing Officer Figueroa. The School opposed the Motion. On April 3, 2015 Hearing Officer Figueroa denied the Parents' Motion for Recusal but recommended administrative reassignment of the matter. In accordance with the Hearing Officer's recommendation BSEA# 15-02427 was reassigned to Hearing Officer Lindsay Byrne on April 3, 2015. (Administrative Record)

6. The School submitted its proposed exhibits and witness list on March 31, 2015 in accordance with 20 U.S.C. §1415(f)(2), 34 CFR § 300.512, and BSEA Rule IX. The Parents submitted a witness list on April 3, 2015, fewer than five days before the scheduled hearing. The Parents did not submit any proposed documentary evidence. (Administrative Record)

7. The Hearing was scheduled to begin on April 7, 2015 at 10:00 am. That morning, at 7:56 a.m. the BSEA received a fax from the Parents Requesting Postponement of the Hearing and indicating that they would not be attending the Hearing. The Parents' April 7, 2015 request offered no new or alternative grounds to those advanced in support of their previous, partially unsuccessful, postponement request. (Administrative Record)

8. On April 7, 2015 at 10:00 a.m. the School's attorney, the School's Special Education Director, and a witness subpoenaed by the Parents were present and ready to begin the Hearing. The Hearing Officer convened the Hearing at approximately 10:45 in order to give the Parents ample time to arrive. The Hearing Officer attempted to contact the Parents at two telephone numbers listed in the administrative record. Messages were left at each number. The Hearing Officer then addressed the outstanding Motions (discussed further below), reviewed the School's submissions for objectionable material, and finding none, added the School's documents to the official record of the Hearing, and suspended the Hearing until November 17, 2015. (Administrative Record)

FACTUAL BACKGROUND

This dispute centers on the actions of the Parties following a school sports-related injury Wallis incurred in September 2012. While the Parties differ in the interpretation of various events and conversations the facts pertinent to a basic understanding of the issues raised by the Parents are neither in dispute nor complicated. Most of the facts recited below are taken directly from the Parents' Hearing Request and subsequent submissions. All are assumed to be true for the purpose of this Ruling.

1. During the 2012-2013 school year Wallis was a 10th grade regular education student at Lincoln-Sudbury Regional High School.
2. On September 29, 2012 Wallis sustained a serious head and facial injury during a field hockey game at the School. She was diagnosed with a concussion on October 5, 2012. The Parents immediately notified the School by email of the diagnosis and of the medical advice to remain out of school pending resolution of her symptoms. Wallis had a medically excused absence from school between September 30 and October 15, 2012. She returned to her regular courses at school on October 15, 2012.
3. Upon her re-entry the School did not refer Wallis for a special education evaluation. The School did not convene a 504 Team. The Parents did not request that either of these actions be taken.
4. Wallis received grades of incomplete in 6 subject areas at the close of the first quarter of the 2012-2013 term.

5. Wallis requested additional time to complete assignments and make up tests in some of her courses due to her extended absence and ongoing symptoms. In response teachers made a variety of informal adjustments to the regular coursework demands and assessments. The School met with Wallis and her Parents on several occasions to discuss the teachers' responses to Wallis' requests.
6. At the end of the 2nd quarter Wallis had cleared 4 of the 6 incomplete grades.
7. Between January and June 2013 the Parents assert that they made multiple requests for a Section 504 Plan for Wallis. The School did not conduct an evaluation or develop a 504 Plan
8. The final grades for Wallis for the 2012-2013 school year included: A- in English; B in Spanish 3; B- in Accelerated Biology; B in AP American History, and Incomplete in Intensive Algebra.
9. The Parents arranged for private math tutoring during the summer 2013.
10. On September 3, 2013 the Parents notified the School of their intent to enroll Wallis in the Lawrence Academy, a private regular education college preparatory school, and to seek public funding for that placement.
11. Wallis began attending Lawrence Academy on September 9, 2013 and has remained enrolled there throughout the course of this Appeal. It is expected that she will graduate from Lawrence Academy at the conclusion of the 2014-2015 academic year.

DISCUSSION

Against this background comes the instant issue: what is the proper BSEA response to the Parents' April 7, 2015 Request to Postpone the April 7, 2015 Hearing and their failure to attend the Hearing? The School argues first, that the Parents' postponement request must be DENIED as it offers no new grounds to support a postponement that had previously been explicitly denied. Even if the Parents thought they might receive a different response from a different Hearing Officer they offered no explanation of exigent circumstances to warrant granting a postponement on the morning of the Hearing when the opposing Party is ready to proceed. Second, the School argues, that by failing to appear at the Hearing, coupled with the failure to submit exhibits in advance of the Hearing as required, the Parents have indicated an intent to abandon their claims. The School therefore seeks immediate dismissal of all the Parents' claims.

At the outset of the Hearing, having reviewed the extensive file, and having considered the Parents' request for postponement of this Hearing in that context, I could find no reasonable support for the Parents' request. They had made their postponement arguments to the previous Hearing Officer. Their request was denied. The Parents merely repeated their arguments to the succeeding Hearing Officer, perhaps hoping for different result. There is, however, no basis to disturb the previous ruling. The Parents were aware of the dates selected for Hearing. They

were aware that their request to reschedule the Hearing dates had been granted only for the date of April 9, 2015. They had subpoenaed witnesses to testify on their behalf on April 7, 2015. The issues for resolution involve actions occurring two to three years ago. The Parties have had ample time to prepare for Hearing. There is no new information being developed. There simply was no rational reason to revisit the previous denial of the Parents' postponement request nor to delay the Hearing. Therefore the Parents' April 7, 2105 Request to Postpone the Hearing was, and is DENIED.

When a Party fails to attend a Hearing, or fails to conform to BSEA rules, or fails to comply with BSEA Orders, or otherwise indicates an intent not to proceed with a claim, the BSEA may dismiss the Appeal. 801 CMR 1.01(g); 603 CMR 28.08(5)(c) ; BSEA Rules VVII and X(B). That is the result the School urges. There are, however, other, less draconian, options that may more appropriately address the circumstances here.

This is not a case where the Parent is disadvantaged by limited English skills, limited information, or disability. On the contrary a review of the voluminous submissions indicates the Parents are competent in all areas pertinent to the substance and process of this Appeal. They have demonstrated familiarity with the governing statutes, regulations and rules. They have mounted a vigorous and consistent advocacy of their original position. This leads me to conclude that their absence from the scheduled Hearing was deliberate defiance of the BSEA Order denying, in part, their postponement request, with the intention of forcing the BSEA to reschedule on their terms. Noncompliance with BSEA Orders should not be ignored. I am mindful, though, that the Parents are pro se. There is nothing in this record to indicate that they have been explicitly advised of the potential consequences of their actions.² I further note that the Parents' request for relief is entirely retroactive. Any declaratory or compensatory remedy would not affect Wallis' soon-to-be- completed high school education.³ Nor, as the requested compensatory relief is time bracketed by Wallis' impending exit from high school, has there been a showing of likelihood of significant fiscal or logistical harm to the School that would flow from a delayed decision in this matter.

After careful consideration I find that the following measures will reasonably balance the interests of the BSEA in maintaining order and efficient case management⁴ in the face of a Party's dilatory tactics with the interests both Parties have in reasonably speedy resolution of this Appeal:

1. The Hearing is suspended and will reconvene on November 17,18, 19 and 20, 2015 at 10:00 am at the Lincoln-Sudbury Regional High School.
2. The documentary record is closed. The School entered its exhibits on time. The Parents did not. No late submissions will be accepted.

² See e.g.. *In Re: Taunton Public Schools*, 17 MSER 51 (Byrne 2011)

³ I do note that were the Parents to secure one of the components of their requested relief, a declaration that Wallis is a student with a disability, her applications to post-high school institutions of higher education would have to reflect that fact.

⁴ See e.g. M.R.C.P. 41(b)(2); M.R.C.P. 37; *Griffith v. Griffith*, 24 Mass. App. Ct. 943 (1987); *Int'l Fid. Ins. Co. v. Wilson*, 387 Mass. 841, 847 (1983); 92 Mass. Law Review 4, p.167 (April 2010).

3. As the Hearing is in a state of suspended animation no further communications between the Parties or the BSEA is necessary. In particular, the issues for resolution may not be amended. Discovery is closed. The Parties need not respond to any additional requests for information or action. The BSEA will not accept or act upon any substantive Motions until the next scheduled Hearing date.

4. Should the Parents fail to attend the scheduled Hearing in November 2015 this matter will either be dismissed with prejudice, or will proceed to Decision solely on the School's presentation of evidence, at the School's election.

ORDER

The School's Motion to Dismiss for Failure to Prosecute is DENIED.

The Parents' April 7, 2015 Request to Postpone the April 7, 2015 Hearing was DENIED on that date. The Hearing was convened briefly, suspended and continued.

The Hearing will proceed in accordance with the directions set out above and will reconvene on November 17, 2015.

By the Hearing Officer

Lindsay Byrne
Dated: April 17, 2015