

July 28, 2009

**COMMONWEALTH OF MASSACHUSETTS**  
**BUREAU OF SPECIAL EDUCATION APPEALS**

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***LEE PUBLIC SCHOOLS***

v.

Charlotte

BSEA # 09-4968

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**BEFORE**

LINDSAY BYRNE  
HEARING OFFICER

**COMMONWEALTH OF MASSACHUSETTS  
BUREAU OF SPECIAL EDUCATION APPEALS**

In Re: Lee Public Schools and Charlotte<sup>1</sup>

BSEA #09-4968

**Decision**

This Decision is issued pursuant to M.G.L.c. 71B and 30A, 20 U.S.C. §1401 et. seq., 29 U.S.C. § 794 and the regulations promulgated under these statutes. At issue here is whether the 2008-2009 IEP proposed by the Lee Public Schools is reasonably calculated to ensure a free, appropriate public education to Charlotte. At the hearing on June 8, 2009, the Parties agreed to an interim resolution of the dispute and requested that the BSEA issue a brief Decision solely on the documents pursuant to BSEA Rule XII. The School submitted documents marked S-1 through S-75. The Parent submitted documents marked P-1 through P-28. The hearing record was left open for two weeks to permit the Parties further time to reflect on the agreement and to submit written arguments in support of their respective positions. Neither did so. The record closed on June 22, 2009.

After careful consideration of the written evidence submitted by the Parties, I make the following findings and conclusions:

**FINDINGS OF FACT**

1. Charlotte is a ten year old who has received special education services through the Lee Public Schools since 2006. Charlotte has multiple disabilities, including Smith-Magenis Syndrome, a seizure disorder and significant anxiety, which require a range of specialized educational and therapeutic services. Charlotte functions at a four to six year old level overall (P-22-27; P-7; P-18; P-19; S-3; S-4; S-7; S-21; S-61). School and independent evaluators have consistently recommended that the classroom environment for Charlotte be highly structured, calm and slow paced and that instruction follow a clear, predictable routine with visual models, hands-on activities and frequent repetition. In addition, Charlotte

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<sup>1</sup> “Charlotte” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

needs both individual and small group speech-language therapy, and occupational and physical therapy services in a small group setting (S-12; S-13; S-15).

2. During the 2006-2007 and 2007-2008 school years Charlotte attended an age appropriate mainstream class with an individual aide. In March 2008, Lee proposed a new IEP calling for Charlotte's placement in the substantially separate "Developmental Program" classroom beginning in September 2008 (S-19). The Parent indicated her concern that Charlotte would not be able to comfortably adjust to a new setting and, in particular, to a new individual aide. The Parent did not formally respond to the proposed IEP (S-26, 27).
3. Charlotte entered the 2008-2009 school year under the last accepted IEP which provided for special education services and a 1-1 aide in the mainstream classroom (S-9). Her attendance was erratic (S-59; S-47). The Parent and the School met on September 4, September 5, September 24, October 27, November 3, and November 20, 2008, to discuss the Parent's concerns about the School's recommendations for the substantially separate program for Charlotte (S-46, S-49; S-51; S-54; S-56; S-57; S-58; See also S-40; S-41).
4. At a meeting on November 20, 2008, the Team developed an IEP proposing that Charlotte be placed in the substantially separate developmental classroom for 22 hours each school week. The IEP also provided for individual tutoring for one-half hour daily, speech language therapy twice a week for 30 minute sessions and occupational therapy, physical therapy and adaptive physical education for half-hour sessions each once a week. Charlotte's IEP provided for inclusion in an age appropriate mainstream class for the remaining school time. The proposed IEP also provided for substantially similar educational program for 5 weeks during the summer of 2009. The Parent did not respond formally to the proposed IEP until the date of the hearing.

5. On February 25, 2009, the Parent requested permission from the Superintendent of the Lee Public Schools to home-school Charlotte (P-1). Since that time Charlotte has not attended public school. Lee has offered on several occasions to provide any of the related therapeutic services, and to continue the home-school behavioral consultation services while Charlotte was at home and during the summer of 2009. The Parent did not respond to those offers (S-62; S-63).
6. On June 8, 2009, the Parent acknowledged that the 2008-2009 IEP developed by Lee would, if implemented, provide a free, appropriate public education to Charlotte (S-60). The Parent however declined the educational program and placement identified in the proposed IEP both for the school year and for the summer of 2009. The Parent accepted the type and frequency of the related services, as well as home consultation services from the Behavior Specialist, as outlined on the proposed IEP. The Parent indicated that she intended to home-school Charlotte and would arrange the therapeutic services as part of Charlotte's home schooling schedule (P-28).
7. There are no expert evaluations, assessments or observation data in this record that would support an educational placement for Charlotte other than the developmental program proposed by Lee. There are no recommendations in the record for a type or level or frequency of special education services different than those outlined in the proffered 2008-2009 IEP.

## CONCLUSIONS OF LAW

The clear preponderance of the evidence supports the finding that the 2008-2009 IEP developed by the Team at their meeting on November 20, 2008, is reasonably calculated to provide a free, appropriate public education to Charlotte. The educational and therapeutic services outlined in the IEP reflect the recommendations of the teachers and therapists who have worked with Charlotte in the educational setting for several years (compare S-28, S-15, S-13, S-12, S-61, and S-60). The IEP also provides for newly

developed services, e.g. behavioral consultation in the home, that are responsive to the concerns of the family and of Charlotte's medical team (S-49, S-46, S-44, S-43, S-25). The proposed placement in a substantially separate classroom meets the recommendations of independent evaluators, as well as the school-based teams (S-7; S-3; S-4; P-7; P-18; P-19). There is no information to the contrary in this record and nothing that would support an alternate finding. I am satisfied, upon thorough and independent review of all the documents submitted by the parties, that the Lee Public Schools has fully discharged its substantive and procedural obligations to offer a free appropriate public education to Charlotte at this time.

#### ORDER

The November 2008 – November 2009 Individualized Education Plan proposed by Lee Public Schools is reasonably calculated to ensure a free, appropriate public education to Charlotte.

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July 28, 2009

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Lindsay Byrne, Hearing Officer

**COMMONWEALTH OF MASSACHUSETTS  
BUREAU OF SPECIAL EDUCATION APPEALS**

**EFFECT OF BUREAU DECISION AND RIGHTS OF APPEAL**

**Effect of the Decision**

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Accordingly, the Bureau cannot permit motions to reconsider or to re-open a Bureau decision once it is issued. Bureau decisions are final decisions subject only to judicial review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. Rather, a party seeking to stay the decision of the Bureau must obtain such stay from the court having jurisdiction over the party's appeal.

Under the provisions of 20 U.S.C. s. 1415(j), "unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement," during the pendency of any judicial appeal of the Bureau decision, unless the child is seeking initial admission to a public school, in which case "with the consent of the parents, the child shall be placed in the public school program". Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington, v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child's placement during the pendency of judicial proceedings must seek a preliminary injunction ordering such a change in placement from the court having jurisdiction over the appeal. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1st Cir. 1983).

**Compliance**

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau of Special Education Appeals contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the facts on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the

Legal Office of the Department of Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

### **Rights of Appeal**

Any party aggrieved by a decision of the Bureau of Special Education Appeals may file a complaint in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review of the Bureau decision. 20 U.S.C. s. 1415(i)(2).

An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

### **Confidentiality**

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove School District v. Pulitzer Publishing Company*, 898 F.2d 1371 (8th Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

### **Record of the Hearing**

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to federal law, upon receipt of a written request from any party, the Bureau of Special Education Appeals will arrange for and provide a certified written transcription of the entire proceedings by a certified court reporter, free of charge.