MSER Commentary Fourth Quarter 2012

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The 4th quarter at the BSEA was relatively slow, with BSEA hearing officers issuing only 4 rulings and 3 decisions. Public school administrators will be pleased to read that the Department of Developmental Services was joined as a party to a hearing request seeking a residential placement (*In Re: Nauset RSD*). Another ruling of interest is *In Re: Springfield Public Schools & Xylia* in which the hearing officer determined that exhaustion of administrative remedies at the BSEA was not necessary since parent's tort claim of negligent supervision did not allege any IDEA or Section 504 violations. The 3 decisions following an evidentiary hearing covered widely diverging issues. The decision in *In Re: Hudson Public Schools* analyzed a parent's contention that she was prevented from participating meaningfully in her son's Team meeting process since Hudson insisted on sending out a referral packet to only one private school. In *In Re: Quincy Public Schools*, the BSEA hearing officer engaged in a thoughtful analysis of the necessary components of an appropriate program for a student who has a language-based learning disability and a significant hearing loss. Finally, *In Re: Stoneham Public Schools* involves the more traditional dispute over the appropriate placement of a student with significant language-based needs.

RULINGS

Elimination of Aural-Oral Residential Program Leaves Hearing Officer with Little Choice But to Determine Aural-Oral Day School Program Constitutes "Stay Put" Placement

In Re: Quincy Public Schools, BSEA # 1302133, 18 MSER 339 (Crane)

Student is a 13-year old 6th grader who was a residential student at the Clarke School for the Deaf during the 2011-2012 school year pursuant to an accepted IEP. Student's need for a residential IEP was due solely to the driving distance between Student's home in Quincy and the Clarke School in Northampton. Beginning as of the 2012-2013 school year, the Clarke School eliminated its residential aural/oral program. Student's parents filed for hearing seeking an Order requiring Quincy to pay the Clarke School day tuition as well as to assume the costs associated with Student and her mother living in the Northampton community so that Student could continue to attend the Clarke School.

This ruling addressed the preliminary issue of what should be deemed Student's "stay put" placement pending the resolution of the parties' dispute. Quincy's proposal that READS Collaborative be the "stay put" placement fell from consideration given Quincy's indication that READS may not be appropriate for Student. With limited viable options available, the hearing officer correctly concluded that the Clarke School day program was comparable to Student's previous residential program. Fortunately for Quincy, the hearing officer declined to order payment of the parent's living expenses since he thought he needed much more information to rule on this issue (e.g. the nature and scope of requested living expenses, legal briefs regarding BSEA authority to order such relief).

Dep't of Developmental Services Joined As Party in BSEA Hearing And Put on Notice That Hearing Officer Believes BSEA Has Authority to Order DDS to Provide Specific Residential Services Depending on Fact Pattern

In Re: Nauset RSD, BSEA # 1300562, 18 MSER 342 (Crane)

Parents filed for hearing seeking a residential placement for their 19-year old son who has significant global delays. Parents are divorced, with Student's mother living in California and Student's father living in Brewster. Student is a client of the Department of Developmental Services (DDS), receiving coordination services, services of a personal care attendant, and respite services. Of note is that Student's father has serious medical needs and soon may become unable to care for his son. If that should happen, DDS already has committed to funding Student's residence in Sandwich.

Nauset filed a motion to join DDS as a party to the BSEA hearing. Given the unique situation with Student's father, the hearing officer opted to join DDS. The hearing officer noted that it was possible that he would determine that Student's needs could be met at a day school while, at the same time, the father was unable to care for his son at home. Thus, it was within the realm of possibility that he would need to rule that DDS must provide residential or other services so that Student could access or otherwise benefit from the Nauset-provided educational services. The hearing officer took his analysis one step farther, noting that arguably the BSEA has the authority to order a specific placement, if, for instance, specific residential services were the only way DDS could fulfill its responsibility to Student. Finally, the hearing officer cited to the DDS regulations that provide that "in no case shall the Department provide residential supports to ...individuals ages 18 through 21 year of age and eligible for or receiving services from a local educational authority." The hearing officer did not see this language as an impediment to joinder, noting that Student does not receive residential services from an local educational agency (LEA) and has not yet been determined eligible to receive residential services from an LEA.

Public School's Motion for Summary Judgment Fails Since Public School Disputed Most of Material Facts in Parents' Hearing Request

In Re: Norwell Public Schools & Zoltan, BSEA #13-00068; 18 MSER 364 (Byrne)

Zoltan's parents filed for hearing seeking a determination that Norwell failed to provide a free, appropriate public education to

Zoltan for the last two school years, thus entitling them to reimbursement for their unilateral school placements and compensatory education. Norwell filed a motion seeking dismissal of the hearing request without the need for a hearing. Unfortunately for Norwell, the hearing officer determined that there were disputes of material fact that prevented her from dispensing with the case without a hearing. This ruling serves as a reminder that it can be difficult to prevail on a Motion for Summary Judgment. According to the ruling, Norwell disputed most of the material facts set forth in the parents' hearing request, making summary judgment inappropriate.

Hearing Officer Rules Exhaustion at BSEA Unnecessary Where Claim for Negligent Supervision Does Not Allege Violation of IDEA or Section 504

In Re: Springfield Public Schools & Xylia, BSEA # 12-0781; 18 MSER 373 (Byrne)

Xylia is a 15-year old student with global developmental delays. Student filed for a hearing seeking for the BSEA to develop a factual record which then could be submitted to federal district court in the parent's quest for money damages for physical and emotional injuries allegedly due to a Springfield teacher's negligent supervision. According to the parent's BSEA hearing request, Student was sexually assaulted by a classmate at school. The following school year, Springfield placed these two students in the same classroom, and the offending student subsequently raped Student twice at school.

This ruling analyzes the ever-evolving case law in this Circuit on the issue of whether certain claims must be exhausted at the BSEA before they can be pursued in federal district court. The hearing officer writes that there appears to be a 3-pronged inquiry about whether exhaustion at the BSEA is a pre-requisite to pursing relief in federal court. Specifically, she describes the 3-prongs as:

> First, is the event(s) giving rise to the student's claim "related" to the student's status as a student with disabilities, or to the discharge of the school's obligations under the IDEA, Section 504 and/or MGL c. 71B?
>
> Second, is the relief the student is seeking available in a claim rooted in the IDEA, Section 504 and/or MGL c. 71B? And
>
> Third, does this administrative due process agency have a particular expertise in assessing and determining the factual basis of the student's claim so as to develop a useful administrative record for a judicial review?

In this case, the hearing request is clear that the parent is seeking damages for the common law tort of negligence and is not alleging any violation of the IDEA or Section 504. In addition, the negligence claim has no connection with Xylia's status as a student with disabilities. Given that there are no IDEA or 504 related issues, the Hearing Officer correctly determined that exhaustion of administrative remedies was not required and dismissed the parent's hearing request. In so ruling, the hearing officer also noted that few special education hearing officers have experience with personal injury claims and calculating financial damages. In addition, the BSEA routinely admits hearsay evidence, which she opined might render the record developed at the BSEA less useful to a federal court. Finally, the hearing officer expressed concern that the alleged perpetrator is a non-party, minor with disabilities who is facing criminal proceedings in juvenile court.

DECISIONS

Public School's Decision to Send Out Only One Referral Packet to Private School, Over Parent's Objection, Withstands Scrutiny

In Re: Hudson Public Schools, BSEA # 12-5963; 18 MSER 345 (Berman)

Student is an almost 15-year old boy who is of at least average intelligence but who has emotional, behavioral and learning difficulties. Student had attended Merrimac Special Education Collaborative (MSEC) pursuant to an Individualized Education Program developed by Hudson. In February 2012, Student was involved in a disciplinary incident at MSEC yet refused to acknowledge his involvement. Consequently, MSEC would not readmit Student. Hudson quickly reconvened Student's Team and decided to send out only one referral packet to Wayside Academy. Wayside Academy had accepted Student previously and Student's mother actually had suggested that Hudson send her son to Wayside rather than returning him to MSEC. Although Student's mother expressly was interested in Wayside, she requested that Hudson also simultaneously send out packets to Dearborn Academy and Devereux. Hudson refused to do so at the Team meeting. However, Hudson later made two settlement offers to send out additional referral packets, albeit with certain unspecified conditions, both of which the mother declined. Wayside accepted Student, with a start date of approximately one week after the Team meeting. Student's mother, however, refused to send her son to school there, so he received tutoring from Hudson while the parties went to 3-day hearing.

Student's mother filed for the BSEA hearing arguing that she had been denied her right to participate meaningfully in the Team meeting process since Hudson refused to send out more than one referral packet to private schools. A side issue was her contention that Hudson's IEP has an inadequate transition plan. Hearing Officer Berman determined that Student's mother failed to meet her burden of proof on both issues. On the placement issue, the hearing officer determined that a public school satisfies its obligations under the IDEA by offering an educational placement that is reasonably calculated to meet the student's needs. She also dispensed with the contention about not meaningfully participating by stating that the parent attended Team meetings and was in regular contact with Hudson and MSEC employees. Moreover, Hudson consistently gave serious consideration to her input, which is what is required by law. As for the transition plan, the hearing officer noted that it contained input from the mother and the student, was geared to Student's goals, and could be adjusted in future IEPs.

In this Commentator's opinion, it was risky for the Hudson Team to send out only one referral packet, especially over the parent's objection. The Massachusetts special education regulations pro-

vide that the Team determines the location where services are to be provided and the school district and parent investigate placement options. Not surprisingly, sending out only one packet over the parent's objection left the parent feeling that she was not part of the process, when she very much is. As a consequence of this seemingly avoidable stand-off, the parent refused to send her son to the proposed day school, further delaying his receipt of appropriate educational services. One can only wonder if the parent would have acted differently if multiple packets had been sent out, yet the school-based Team proposed Wayside Academy. Even if she had, Hudson's position would have been strengthened by having followed a more typical placement process.

Public School Ordered to Locate or Create Language-Based Program for Hearing Students That Can Accommodate Needs of Student with Significant Hearing Loss

In Re: Quincy Public Schools, BSEA # 1302133; 18 MSER 352 (Crane)

Student is a 13-year old 6th grader who has bilateral, sensorineural hearing loss. Student relies on her residual hearing, using binaural hearing aids and an FM system for amplification at school. She is an aural/oral student, meaning that she is a listener and a talker, and does not use sign language to communicate. In addition to having a significant hearing loss, Student has deficits in expressive and receptive language and has language-based learning difficulties.

Student's educational history has been an interesting one. During the 2006-2007 school year, when Student was 7-years old, the parties went to a BSEA hearing because Quincy was unable to implement an accepted IEP due to its inability to fill a teacher of the deaf position. For the next four years, Student attended Learning Prep School. For the final three years, Quincy funded Learning Prep and provided transportation pursuant to a settlement agreement that obligated the parents to ensure that Learning Prep properly accommodated Student's hearing loss. For the 2011-2012 school year, Quincy developed an IEP for Learning Prep. Student's parents rejected the IEP and filed for hearing. The parties entered into another settlement agreement, with this agreement providing that Student would attend the Clarke School for the Deaf in Northampton, Massachusetts as a residential student given the distance between Quincy and Northampton. At the end of the 2011-2012 school year, Clarke School eliminated its residential program. Parents again filed for a BSEA hearing, this time seeking an Order that Quincy continue to fund Student's placement at Clarke School for the 2012-2013 school year as a day school student and pay for Student's mother's living expenses in the Northampton area so that Student could continue to attend Clarke School. In a separate ruling, Hearing Officer Crane determined that attending Clarke School as a day school student was the appropriate "stay put" placement for Student but declined to order Quincy to reimburse the parent for her living expenses.

Shortly before the hearing began, the parents provided Quincy with a copy of an evaluation that Terrell Clark, a pediatric psychologist from Children's Hospital, had conducted six months earlier. Dr. Clark, who had been evaluating Student since she was 2 years old, was concerned because Student's formal test scores basically were identical to scores achieved when she tested Student 15 months earlier. Dr. Clark also expressed concern in the evaluation report that Student was shutting down when there was the potential that Student would be unable to complete a task successfully. Dr. Clark's report understandably made Quincy concerned about the appropriateness of the Clarke School for Student. Several days before the BSEA hearing, Quincy held a Team meeting to consider Dr. Clark's report. As a result of the Team meeting, Quincy issued an IEP that proposed placing Student at READS Collaborative's Deaf and Hard-of-Hearing Program. At the hearing, however, READS Collaborative acknowledged that the school had not yet had an opportunity to determine whether their program could meet Student's needs.

The hearing officer's decision began by explaining that, although Quincy had filed for a BSEA hearing seeking a determination that its proposed IEP is appropriate, the burden of proof that the IEP is inappropriate and Clarke School is appropriate falls on the parents since the parents (not Quincy) are challenging the proposed IEP. Next, the hearing officer highlighted that all parties agreed that the appropriate educational program for Student would be one that addresses both her hearing deficits and her language-based learning disabilities simultaneously in an integrated manner. The hearing officer then focused on the fact that the parents' expert witness, Dr. Clark, testified that Student's lack of progress in reading, spelling, and math computation over a 15-month time period was "alarming." He also noted that Dr. Clark testified that the shutting down behavior she saw was due to the years of frustration and failure in school.

Clearly determined to avoid yet another inappropriate placement, Hearing Officer Crane embarked on a thoughtful analysis of the critical components of an appropriate program for Student. The first component is that the program be aural/oral. In this Commentator's opinion, given that the IDEA requires a Team to consider the parents' and student's preference regarding mode of communication, the hearing officer correctly agreed with Dr. Clark that it would be inappropriate to place Student in a program that uses sign language for instruction. Student does not know how to sign and does not want to communicate using sign language. Dr. Clark testified that having an interpreter translate American Sign Language (ASL) instruction into spoken English would mean Student would not be receiving instruction directly from the teacher. Arguably more important, however, is that there would be peers in such a program who would use ASL to communicate, thus effectively excluding Student from conversations. In the proposed READS Collaborative program, half of the academic instruction is provided via ASL and a significant number of students communicate only via sign. READS Collaborative envisioned that an interpreter would translate ASL instruction into spoken English until Student learned ASL. Hearing Officer Crane correctly determined that the READS program, which could not be changed, was inappropriate as it is not an aural/oral program. The 2nd necessary component is that the educational program accommodate effectively Student's hearing loss. Finally, the 3rd component is that all academic instruction be taught within a language-based classroom. While the Clarke School meets components 1 and 2, the Clarke School apparently

made no bones about the fact that they do not, and would not, provide language-based instruction, thus making Clarke School inappropriate for Student as well. In fact, the hearing officer wrote that Clarke School "has little, if any, ability to provide special education services." The Hearing Officer found that Student received no special education instruction the entire time Student attended the Clarke School, resulting in no measureable progress in reading, spelling and math. Although the parents tried to rebut the evaluation and testimony of their own expert and prove meaningful progress at Clarke School, they did not offer witnesses or documentary evidence that the hearing officer found compelling.

The Hearing Officer noted that the unrebutted testimony of Dr. Clark was that Student could be educated appropriately in a language-based program for hearing students with learning disabilities as long as accommodations were made for Student's hearing disability. Consequently, given that the Clarke School is the only school for deaf and hard-of-hearing children in Massachusetts that is aural/oral and there are no such residential programs in the United States, the hearing officer ordered Quincy to locate or create a language-based program for hearing students which then can provide the accommodations needed due to Student's hearing loss. The hearing officer next offered advice in the event parents disagreed with the appropriateness of a Quincy-identified program, suggesting that the parties agree to have Dr. Clark evaluate the proposed program. This certainly is good advice which, if heeded, should eliminate the need for another BSEA hearing.

In-District IEP, with Tweaking, Deemed Appropriate to Meet Needs of 3rd Grader with Substantial and Multiple Language Deficits

In Re: Stoneham Public Schools[1], BSEA # 1300160; 18 MSER 365 (Crane)

Student is a 9-year old 3rd grader who is described as having substantial and multiple language deficits, in the context of average non-verbal cognitive ability. Student's parents filed for hearing seeking placement at the Learning Prep School and reimbursement of the costs associated with their unilateral placement of Student in the Tufts summer reading program for summer 2012. Stoneham defended its IEP that proposed that Student be educated in a substantially separate language-based classroom where a special educator would teach all core academic subjects. The IEP also proposed daily Wilson reading and work with a speech language pathologist.

Given that the IEP proposed for the 2012-2013 school year was similar to the IEP for the prior school year, the hearing officer examined Student's progress during the 2011-2012 school year. The hearing officer determined Student made substantial progress in math and reading. However, the hearing officer determined that Student needed additional work on developing his phonological processing skills and writing skills. Parents' expert witness testified about the amount of instruction she deemed necessary in these areas, however, the hearing officer was persuaded that additional services in the amount recommended by Stoneham's special educator and expert witness were sufficient to allow Student to make meaningful progress. Consequently, the hearing officer determined that Stoneham's IEP would be appropriate to meet Student's needs with the addition of 15-minutes/day of sound segmentation work, two more periods a week of written language instruction (resulting in daily half hour written language instruction), and 15 more minutes/week of consultation between the special educator and speech language pathologist. The hearing officer also noted that, with the additional services in the IEP, Stoneham's IEP would provide nearly 12 hours/week of language instruction which appeared to meet the parents' expert witness's recommendations of 2-3 hours/day of intensive, language arts instruction. In terms of extended school year (ESY) programming, the parents did not present any evidence about the inappropriateness of Stoneham's ESY services or the appropriateness of their unilateral placement, consequently the parents did not obtain any ESY reimbursement. ■

1. This Commentator represented the Stoneham Public Schools in this hearing.