MSER Commentary First Quarter 2013

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The first quarter of 2013 at the BSEA was noteworthy for the large number of rulings issued (nine). Many of the rulings responded to school districts' efforts to dismiss some of parents' claims. The rulings served to narrow the focus of hearings to issues that are appropriately within the BSEA's jurisdiction. Two of the rulings reflect the ongoing difference of opinion among hearing officers regarding the BSEA's jurisdiction to interpret private settlement agreements (*In Re: Pentucket*, 19 MSER 84 (2013) and *In Re: Worcester*, 19 MSER 68 (2013)). One ruling joining the Department of Mental Health (DMH) as a party is of note because the student at issue was not yet a DMH client, although her application to become a client was pending (*In Re: Lexington*, 19 MSER 18 (2013)). Public school administrators will want to review *In Re: Medford*, 19 MSER 35 (2013) and *In Re: Chicopee*, 19 MSER 1 (2013) in which public school teachers were persuasive about their respective public school's capacity to serve appropriately the students involved. *In Re: ABC*, 19 MSER 71 (2013) is a decision public schools will want to have in hand given the decision's primer about a public school's right to conduct a three-year re-evaluation. Finally, *In Re: Newton*, 19 MSER 12 (2013), provides a cautionary tale about responding appropriately to a parent's request for a publicly funded independent educational evaluation.

RULINGS

Public School Largely Successful in Streamlining BSEA Hearing to More Traditional Issues. However, Hearing Officer Decides to Engage in Fact-Finding on Allegation of Improper Assistance with MCAS and Other Evaluations

In Re: Maple School District, BSEA # 12-7653, 19 MSER 64 (2013) (Figueroa)

Maple School District sought to dismiss certain claims made by parents. Maple was largely successful, except for Maple's attempt to limit the hearing based on the 2-year statute of limitations generally applicable to IDEA claims. Specifically, the hearing officer ruled that parents could proceed with their claims about improper assistance on MCAS and other evaluations beyond the 2-year statute of limitations if the parents can establish, as they allege, that Maple withheld required information or otherwise prevented them from filing for hearing in a timely manner. Further, the hearing officer ruled that she would engage in fact-finding on parents' Section 1983 claims involving improper assistance during evaluations and/or MCAS testing since the Section 1983 claims seem to arise out of an IDEA violation. However, the hearing officer dismissed with prejudice the parents' claim against Maple under MGL ch. 69, s. 1 and Article 114 of the Massachusetts Constitution since neither confers a private right of action. The hearing officer also dismissed with prejudice the parents' claims alleging fraud or conspiracy under 18 USC ss. 1341 and 1343, finding that no federal or Massachusetts law gives the BSEA authority to hear such allegations. Finally, the hearing officer denied the parents' motion to sequester witnesses, stating that the BSEA does not sequester witnesses unless there is a compelling reason to do so.

BSEA Hearing Officer Rules That BSEA Lacks Authority to Enforce Private Settlement Agreement Entered Into after BSEA Settlement Conference

In Re: Worcester Public Schools, BSEA # 1302473, 19 MSER 68 (2013) (Putney-Yaceshyn)

Parents filed for a hearing alleging that Worcester failed to comply with the terms of a settlement agreement entered into after a settlement conference conducted by the BSEA's Director. Worcester filed a Motion to Dismiss, arguing that the BSEA lacks jurisdiction to address what is, in essence, a contract claim. Hearing Officer Putney-Yaceshyn agreed with Worcester, concluding that the BSEA lacks the authority to enforce the terms of the parties' private settlement agreement. The hearing officer dismissed the parents' hearing request and informed the parents that they may seek enforcement of the settlement agreement in a court with relevant jurisdiction.

After Reviewing Parties' Private Settlement Agreement, Hearing Officer Concludes That Unambiguous Language Requires Parent to Withdraw BSEA Hearing Request

In Re: Pentucket Regional School District,[1] BSEA # 12-8636, 19 MSER 84 (2013) (Figueroa)

Parent filed for a BSEA hearing in May 2012 regarding her daughter, who, at the time, was two months shy of her 18th birthday. In December 2012, Pentucket and parent entered into a settlement agreement that provided that the parent would immediately dismiss this BSEA hearing request without prejudice. Parent then moved to amend, rather than withdraw, her hearing request, prompting Pentucket to file a Motion to Dismiss. Hearing Officer Figueroa reviewed the parties' settlement agreement and concluded that the language was unambiguous that the parent had agreed to withdraw this hearing request. As a result, the hearing officer granted Pentucket's Motion to Dismiss.

Department of Mental Health (DMH) Joined As A Party Even Though DMH Had Not Determined Yet If Student Is Eligible for DMH Services

In Re: Lexington Public Schools,[2] BSEA # 1305048, 19 MSER 18 (2013) (Figueroa)

Parents filed for an expedited hearing seeking a BSEA Order placing student in a residential placement. Lexington filed a Mo-

1. This Commentator's colleague represented Pentucket in this matter.

2. This Commentator's colleague represented Lexington in this matter.

tion to Join the Department of Children and Families (DCF) and the Department of Mental Health (DMH). Hearing Officer Figueroa denied the Motion to Join DCF given that the only connection with DCF was a 51A filed against the family for not pursuing a residential placement for Student. Lexington also argued that DMH should be joined given that placement in a residential treatment facility was being recommended for non-educational reasons (e.g. Student's ongoing substance abuse issues, family conflict, and clinical mental health needs). At the time of the Motion, Student was not yet a DMH client, although her application was pending. Hearing Officer Figueroa decided to join DMH, noting that Lexington only needed to prove in a preliminary way that the district would be able to present evidence at hearing that might result in DMH being responsible for providing some services. In this Commentator's opinion, what makes this Ruling particularly noteworthy is that DMH was joined as a party even though DMH had not determined yet if Student is eligible for DMH services.

DECISIONS FOLLOWING EVIDENTIARY HEARING

"Impressive" Special Educator Persuades Hearing Officer That 6th Grader's Academic, Social and Emotional Needs Can Be Met in In-District Language-Based Program, Resulting in Order Supporting Student's Transition from Learning Prep to Medford

In Re: Medford Public Schools, BSEA # 13-0006, 19 MSER 35 (2012) (Figueroa)

This case involves a 6th grade student who is described as having ADHD, a receptive/expressive language disorder, a reading and written language disorder, and generalized anxiety disorder. Parents unilaterally placed Student at Learning Prep in 4th grade. Medford funded Student's placement at Learning Prep for 4th and 5th grades as part of a settlement agreement. In spring of 5th grade, Student's IEP Team met to discuss programming for the upcoming school year. Medford developed an IEP proposing that Student return to Medford for 6th grade, which parents rejected. Student began 6th grade at Learning Prep. In the meantime, Medford moved-up Student's 3-year re-evaluation and reconvened Student's Team in late September to consider the evaluation results. At the Team meeting, Medford developed a new IEP that continued to propose Student's placement in a substantially separate classroom in Medford for all core subjects (ELA, math, science, social studies, and reading); speech language services 3x48 minutes/week, and counseling 2x48 minutes/week. Student's parents continued to reject Medford's proposed IEP and filed for a BSEA hearing to resolve the dispute.

After a 3-day hearing, the hearing officer determined that Medford's original IEP for 6th grade, with minor modifications, was reasonably calculated to provide Student with a free appropriate public education (FAPE) in the least restrictive environment. Also, the IEP developed in September of 6th grade was found to provide FAPE as written. Hearing Officer Figueroa was persuaded that "lesson construction, student composition, organization, and methodologies" at Learning Prep were similar to the Medford program. In addition, Medford's language-based program comported with the recommendations parents' private evaluator made. Perhaps most importantly, however, was that the hearing officer was impressed by Medford's substantially separate classroom teacher, other staff, and proposed program. The hearing officer offered effusive praise for Medford's substantially separate teacher, noting that her

> expertise, knowledge, compassion and capability became evident during her credible and compelling testimony. In short, she was impressive and persuasive that she is able to provide appropriate special education instruction and programming to Student.

Case over!

The one wild card that could have derailed Medford was Student's anxiety disorder. According to the hearing officer, Student's social and emotional needs currently are Student's most vulnerable area. However, the hearing officer did not think that Student needed to stay at Learning Prep in order to solidify her coping skills. Instead, the hearing officer viewed Student as having progressed at Learning Prep to the point where she is prepared to transition back to Medford. The hearing officer also agreed with Medford that the "more natural environment" that Medford offers would be especially helpful for developing Student's social skills. Hearing Officer Figueroa ordered Medford to collaborate with Student's parents, Learning Prep staff, and Student's psychiatrist to ease her transition. Moreover, she ordered Student's IEP Team to reconvene to address Student's transition and establish a protocol for providing "in-the-moment" supports.

Parents' case relied heavily on their private neuropsychologist, who had evaluated Student 4 times since she initially tested Student in 2009. Parents' neuropsychologist testified that Medford had proposed inappropriate programming for Student since 2009. However, this witness only observed Medford's programming in 2009 and then again in 2012. For the intervening years, this witness relied on the observations of someone else, which likely undercut her credibility. Perhaps more damaging, though, was that this witness testified that she had helped develop a "successful" language-based program in Ayer yet was unable to distinguish between what she characterized as the inappropriate Medford program and the self-described successful Ayer program. The hearing officer also stated explicitly that another of the parents' witnesses did not add any support to the parents' case. This witness never evaluated Student, hadn't met with Student formally in over a year, and did not observe the currently proposed Medford program. Making matters worse, in an apparent effort to explain away the potential shortcomings in her testimony, this witness stated that "children [do] not change all that much in two years." Not a wise statement, especially as the hearing officer found that the student here had made progress in two years, including social and emotionally.

IEP Proposing All Co-Taught Academic Classes for 8th Grader Provides FAPE, as 7th and 8th Grade Teachers Testify Student Is Performing Solidly in Average Range of All Peers with Co-Taught Programming

In Re: Chicopee Public Schools, BSEA # 1300380, 19 MSER 1 (2013) (Crane)

Through the BSEA hearing process, Student's mother sought placement of her 8th grade daughter at the White Oak School, an approved private day school for publicly funded students.

Chicopee defended its in-district IEP proposing an inclusion program, with all academic classes co-taught by general education and special education teachers, for Student who presents with learning and executive functioning deficits.

Hearing Officer Crane found Chicopee's 8th grade IEP appropriate, albeit with a minor modification regarding check-ins. The hearing officer noted that Student's programming for 7th grade was substantially similar to that proposed for 8th grade. Thus, the hearing officer noted that Student's performance in 7th grade would be one indicator of the appropriateness of the 8th grade IEP. According to Student's 7th grade teachers, Student was working at grade level in writing, reading comprehension and math. Moreover, these teachers testified that Student performed solidly in the average range of the peers in her classes, including both the general education and special education students. There also was testimony regarding the 1:1 pull-out ELA instruction Chicopee had begun providing Student mid-way through 7th grade, at parent request. Student's special educator testified that not only was this pull-out unnecessary but also was contraindicated. Student resented being pulled-out, resulting in decreased effort. As of November of 8th grade, Student's teachers testified that Student was making substantial progress in all academic areas in classes of 23 students, 7-8 of whom, like her, are students with special education needs. Chicopee's consulting psychologist also offered testimony regarding formal testing over time, noting that only one test, the GORT-4, had been repeated. She testified persuasively that comparing Student's scores on the GORT over time reflected Student's substantial educational progress.

Although the parent had an expert who had evaluated and observed Student at various times, this expert did not testify at the BSEA hearing. According to the BSEA decision, the hearing officer explicitly informed the parent of the importance of having this witness testify. Subsequently, the parent added this expert to her witness list and planned to have her testify by phone. However, for unknown reasons, the expert did not testify. Without that testimony, the hearing officer noted that he had difficulty understanding the bases for this expert's criticisms of Chicopee's most recently proposed IEP. Hearing Officer Crane then proceeded to critique the expert's evaluation report. For example, he noted that the expert found that Student made insufficient progress due to instruction that was isolated, fragmented, or not sustained over time yet did not state in what ways this was true. Hearing Officer Crane also was critical of the expert's conclusion about where student's needs would "best" be met since the legal standard does not require Chicopee to provide what is "best" for Student. Additionally, the hearing officer noted that he was persuaded by the Chicopee witnesses that Student's current program satisfies many, it not all, of the requirements the expert set out in her report in terms of an appropriate language-based classroom.

This decision is no surprise to this Commentator as the parent did not call anyone other than herself and her daughter to support their contention that Student needed to be educated in a private school in order to have her needs met. In most cases, such testimony will not carry the day, as neither is an expert in educational programming. However, even if the parent had bolstered her case with an expert witness, she likely still would not have prevailed as Chicopee's 7th and 8th grade teachers certainly painted a picture of a student who is thriving in an inclusion setting.

Newton Ordered to Fully Fund $4,500 Independent Evaluation Where Newton Failed to Either Agree to Pay for Evaluation at State Rates or File for Hearing to Establish That Newton's Evaluations Were Comprehensive And Appropriate

In Re: Newton Public Schools, BSEA # 1300077, 19 MSER 12 (2013) (Berman)

Newton conducted an initial evaluation of Student consisting of the WISC-IV, WRAML, WIAT-III and rating scales related to executive functioning and social emotional status. Parent subsequently requested a publicly funded neuropsychological evaluation. Approximately one month later, Newton offered to have a different in-district evaluator do more testing. Parent rejected this proposal and moved forward with an independent educational evaluation (IEE) conducted by an evaluator of her own choosing. Parent later filed for hearing seeking an order requiring Newton to reimburse her for the independent neuropsychological evaluation she had obtained of her daughter.

Hearing Officer Berman determined that Newton's offer to do more school-based testing, while perhaps reasonable, did not absolve Newton of the obligation to respond within 5 school working days of the request by either agreeing to fund the IEE at state rates or filing for hearing to establish that Newton's own testing was comprehensive and appropriate. Additionally, Newton failed to inform the parent that Massachusetts has a sliding fee mechanism that provides funding of IEEs based on family income levels. Newton also neglected to inform the parent that the state caps the rates public entities pay for different evaluations. Since Newton's missteps resulted in the parent not knowing the requirements and limitations associated with a publicly funded IEE, the hearing officer ordered Newton to pay the entire $4,500 charged for the independent neuropsychological evaluation.

Hearing Officer Agrees That Extended Evaluation at Collaborative Provides FAPE in LRE for 12-Year Old Who Has A Lengthy Disciplinary Record And Has Not Attended A Formal School Program for An Extended Time Period

In Re: Grafton Public Schools, BSEA # 1304180, 19 MSER 21 (2013) (Figueroa)

Student is a 12-year old boy with diagnoses of ADHD and Oppositional Defiant Disorder. Before moving to Grafton, Student was the subject of many disciplinary consequences between 2010 and 2012. Student moved into Grafton at the beginning of the 2012-2013 school year with an accepted IEP for tutoring services. Through no fault of Grafton, the tutoring proved to be inconsistent. Moreover, Grafton knew that Student needed a more formal school program to meet Student's needs.

Student's father initially had reservations about Grafton receiving information about Student from his prior school district, in part, because he disagreed with a psychological evaluation of his son. This psychological evaluation found that Student's cognitive and academic abilities fall within the borderline and low average range and that Student's behavior is indicative of a devel-

oping psychopathy. Grafton conducted its own evaluation that yielded similar cognitive and academic scores in the context of a student putting forth questionable effort. Grafton convened a Team meeting where Grafton considered, but rejected, the father's proposal that Student be re-integrated into a general education 7th grade program. Instead, Grafton proposed that Student attend the Grow School, a therapeutic collaborative day program, given the length of time Student had been out of school, Student's disciplinary history, and the lack of current information about his academic, social, and emotional needs. In addition, given concerns about Student's safety and the safety of others, Grafton believed it needed additional information prior to proposing that Student participate in a general education program.

Student and his father toured the Grow School program, but father remained concerned about Student attending school there. Given those concerns, Grafton proposed that the Grow School serve as the setting for an extended evaluation for Student rather than an outright IEP placement. In this way, Grow staff could assess Student's current needs in a small, therapeutic setting and could gauge Student's readiness to attend a less restrictive educational program. Given these facts, the hearing officer correctly agreed that Grafton's offer of an extended evaluation at the Grow School was appropriate to provide Student with FAPE in the least restrictive environment.

Decision Provides Primer on Public School's Right to Conduct 3-Year Re-Evaluation

In Re: ABC Public Schools,[3] 19 MSER 71 (2013) (Crane)

Student is a 13-year old 6th grader diagnosed with Pervasive Developmental Disorder and a co-occurring intellectual disability. ABC Public Schools and Parents had a settlement agreement that provided that ABC would continue to pay for Student's educational placement at XYZ private school through September 2013. According to the settlement agreement, if, for any reason, Student no longer attended XYZ private school through September 2013, ABC Public Schools had the right to evaluate Student and develop an IEP.

ABC Public Schools filed for hearing seeking to override the parents' refusal to consent to Student's 3-year re-evaluation. While the hearing request was pending, XYZ private school indicated that XYZ was looking to terminate Student's placement there. Subsequently, the parents stated that they did not intend to have Student return to school at XYZ private school.

After a one-day hearing, the hearing officer concluded that ABC Public Schools has the right to conduct a 3-year re-evaluation consisting of a psychological evaluation (including cognitive testing) and a functional behavioral assessment (FBA) as well as a functional assessment if the evaluator who conducted the FBA recommended that a functional assessment be completed. The decision emphasizes that the case law is clear that a public school has the right to conduct its own evaluations, using evaluators of its own choosing, unless the parents want to forfeit their right for their child to receive special education services. Hearing Officer Crane noted that the parents could not force ABC Public Schools to rely on the parents' private evaluations or on the evaluations done by the XYZ private school. Further, the hearing officer explained that the "parents cannot control the evaluations that ABC Public Schools reasonably identifies as necessary to determine its proposed services and placement." Finally, Hearing Officer Crane made it clear that the evaluator chosen by ABC Public Schools may exercise his professional judgment "to determine the design of the evaluation and how the evaluation is to be conducted - for example, the test instruments to be used, the location of the evaluation, and the persons who may be present during the evaluation."

Parents filed a counterclaim seeking for ABC Public Schools to be ordered to conduct an educational assessment and physical therapy assessment of Student. Hearing Officer Crane ordered ABC Public Schools to complete an educational assessment since ABC's Out-of-District Supervisor testified that such an evaluation was needed in order to determine Student's educational services and placement. However, Hearing Officer Crane did not order that ABC Public Schools complete a physical therapy evaluation of Student since one had been conducted by XYZ private school in 2011 and there was no evidence that Student needed a current evaluation in this area.

DECISIONS BASED ONLY ON SUBMISSION OF DOCUMENTS

Public School's Written Notice to Parent Regarding Refusal to Provide Child with Laptop And FM System Satisfied Obligation to Provide "Prior Written Notice" Where Parent Failed to Establish That She Did Not Use Written Language to Communicate

In Re: Triton Regional School District, 19 MSER 80 (2013) (Putney-Yaceshyn)

This case presented an unusual issue for hearing; that is, did Triton provide the parent with prior written notice of the district's refusal to provide her child with a laptop computer and FM system when it provided the parent with written notice rather than the audio notice parent requested to accommodate her asserted disability? The IDEA requires that "prior written notice" be written in language that is understandable to the general public and "provided in the native language of the parent or other mode of communication used by the parent" if the parent's mode of communication is not written language. The hearing officer determined that the parent did not meet her burden of establishing that the parent does not, or is unable to, utilize written language to communicate. The hearing officer concluded that the parent clearly understood that Triton had refused her request for a laptop and FM system for her child. Also, in concluding that the parent failed to demonstrate that she is unable to read and understand the content of Triton's written notice, the hearing officer noted that parent had engaged successfully in written email communication with Triton's attorney at least 70 times. ■

3. Colleagues of this Commentator represented ABC Public Schools in this hearing.