MSER Commentary First Quarter 2014

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The first quarter of 2014 started out reasonably active at the BSEA, with Hearing Officers writing seven rulings and seven decisions. Several of the rulings are especially noteworthy. In *In Re: Springfield School District*, Hearing Officer Crane ruled that the BSEA's jurisdiction does not encompass claims under the Americans with Disabilities Act. In a ruling sure to be popular with public schools, Hearing Officer Figueroa ruled in *In Re: Milford Public Schools* that public schools are not required to evaluate students when they are out-of-state. Instead, the evaluation timeframe is "suspended" until the parents make the student available in Massachusetts. Also, in a ruling on an issue of first impression, Hearing Officer Figueroa found in *In Re: Billerica PS* that a student attending a Recovery High School has no right to publicly provided or funded transportation services unless the student's IEP requires transportation as a related service. Administrators and attorneys working for public schools also will want to be sure to read two decisions requiring public schools to place students in residential educational settings. (*In Re: Agawam PS* & *In Re: Weymouth PS*)

RULINGS

Public School Fails to Convince Hearing Officer that Mediation Agreement Precludes Parents From Seeking Reimbursement for Unilateral Placement

In Re: Wayland School District, BSEA # 1403324, 20 MSER 23 (Crane 2014)

Parents filed for a BSEA hearing seeking for Wayland to reimburse them for the costs associated with their unilateral placement of their daughter at the Proctor School in Andover, New Hampshire. Wayland filed a motion to dismiss, arguing that a mediation agreement between the parties precluded the parents from seeking the relief sought. The mediation agreement provided that: (1) Wayland would send a referral packet to TEC School and, if TEC accepted Student, Wayland would fund Student's placement at TEC for three school years; (2) Parents agreed to visit TEC School with student so TEC could determine if TEC could meet Student's needs; and (3) If Student was not accepted at TEC, the parties would return to mediation to discuss Student's placement further. Parents and Student went to observe TEC as promised but decided that TEC was not appropriate to meet Student's needs. As noted above, parents then placed Student at the Proctor School.

Wayland argued that parents had no choice but to send Student to TEC if TEC accepted her; that the mediation agreement implicitly resolved all issues prior to the date of the mediation agreement; and that Wayland's only obligation under state and federal special education laws was to fund Student's placement at TEC. Hearing Officer Crane analyzed the mediation agreement, noting that while there is uncertainty about a BSEA hearing officer's authority to enforce mediation agreements, he noted case law that finds that it is an error to ignore such agreements. Hearing Officer Crane correctly determined that a parents' waiver of rights under the IDEA must be "clear and specific" and "knowing." In this case, the mediation agreement did not state that Wayland's offer to fund TEC satisfied all of Wayland's obligations under state and federal laws. Also, the agreement did not address the contingency that occurred here; that is, that TEC would accept Student but parents would determine TEC is inappropriate. Finally, there was no language to support that the agreement resolved all claims against Wayland, including prospective claims.

BSEA Jurisdiction Does Not Extend to Claims under the Americans with Disabilities Act

In Re: Springfield School District, BSEA # 1404388, 20 MSER 37 (Crane 2014)

Springfield filed for hearing against Student, and Student returned the favor by filing counterclaims under the Americans with Disabilities Act (ADA). Springfield filed a partial motion to dismiss, arguing that the BSEA does not have jurisdiction over ADA claims, and Hearing Officer Crane agreed. First, the hearing officer noted that the BSEA expressly has jurisdiction over IDEA and Section 504 claims but not ADA claims. Also, he explained that while Section 504 and ADA are similar statutes, the reality is that they are different statutes with, in some instances, different requirements. As a result, BSEA hearing officers are not experts in ADA law. Hearing Officer Crane also rejected the notion that the BSEA has jurisdiction over any matter related to Student's "educational placement," finding that this would give the BSEA far-reaching jurisdiction over claims such as gender discrimination or violations of building codes. Finally the hearing officer dispensed with the argument that the exhaustion requirement requires the BSEA to make findings of fact on the Student's ADA claims, noting that exhaustion is required when the claims have a basis in the IDEA.

Hearing Officer Rules That Neither IDEA Nor State Special Education Law Requires Public School to Evaluate Student Out-of-State; Suspends Evaluation Timeframe Until Parents Make Student Available for Testing

In Re: Milford Public Schools, BSEA # 1405530, 20 MSER 56 (Figueroa 2014)

Parents filed a hearing request relating to their son who currently is a 17-year old regular education student attending Grand River Academy in Ohio. Milford filed a motion to dismiss the parents' hearing request without prejudice. Milford argued that the hearing request was premature because Milford had been proposing since December 2012 to evaluate Student, but Student had been unavailable for testing since that time.

In a great decision for public schools, Hearing Officer Figueroa agreed with Milton that the case was not ripe for hearing. At all times since receiving parents' consent for testing, Milford has been ready, willing, and able to conduct the proposed testing (albeit when Student is available in Massachusetts during regular school days). Thankfully, Hearing Officer Figueroa ruled that nothing in the IDEA or state special education law requires a public school to conduct an evaluation of a student out-of-state. Rather, she found that the process is "suspended" until parents make Student available for testing by Milford. While Milford had hoped to conduct its proposed evaluations as part of a 45-day extended evaluation at a therapeutic program that is part of the Bi-County Collaborative, Hearing Officer Figueroa encouraged Milford to conduct its proposed evaluation outside of the 45-day context. The hearing officer dismissed the parents' hearing request without prejudice.

In Ruling on Issue of First Impression, Hearing Officer Finds Public School Not Obligated to Transport Student to Recovery High School Since Transportation Is Not Related Service on IEP

In Re: Billerica PS, BSEA # 1403000, 20 MSER 68 (Figueroa 2014)

This ruling is one of first impression regarding a public school's responsibility to transport a resident student to a Recovery High School. Recovery High Schools are products of state statute and are general education high school programs that provide services to both regular and special education students who have been diagnosed with a substance abuse disorder or dependency. According to the decision, by statute, the school district of residence pays a Recovery High School the "state average foundation budget per pupil" for resident students attending a Recovery High School (RHS). The statute imposes no other requirements on the school district of residence.

The state's Special Education Director, Marcia Mittnacht, testified at the motion hearing that she was unaware of any mandate to provide transportation for RHS students, unless transportation is a related service on an IEP. In this case, Student's most recent IEP places Student at Billerica High School and does not propose transportation as a related service. Given the current state of the law, Hearing Officer Figueroa had no choice but to agree with Billerica that the statute addressing Recovery High Schools is silent about school districts having to provide or otherwise reimburse an RHS for transportation. Hearing Officer Figueroa held that this is a regular education issue that is outside of BSEA's jurisdiction. However, the Hearing Officer took this ruling as an opportunity to voice her sentiments that "[w]hile the creation of RHS throughout Massachusetts is commendable, the lack of guidance and oversight regarding how to get an already fragile population to the RHS is regrettable."

In Light of Prior BSEA Order Giving Public School Substituted Consent to Send Referral Packets to Five Schools for Extended Evaluation, Public School Has Right to Select Location for Evaluation without Need for Further Hearing

In Re: King Philip RSD and Ken, BSEA # 1400255, 20 MSER 72 (Oliver 2014)

At an earlier two-day hearing, Hearing Officer Oliver agreed with King Philip that Ken required an extended evaluation that should occur in a therapeutic educational setting outside of King Philip. The order listed five schools to which King Philip could submit referral packets regarding Ken. To date, Ken's parents have refused to participate in the intake interviews these schools have scheduled. In addition, Ken's parents have taken the position that King Philip must request another hearing before placing Ken at one of these five schools for the extended evaluation. Given the disagreement between the parties, King Philip filed a motion seeking clarification of the prior BSEA order. Hearing Officer Oliver ruled that King Philip has the right to select where its extended evaluation is going to occur, just as King Philip has the right to choose its own evaluators for an evaluation. Hearing Officer Oliver noted the probability that Ken's parents would not comply with any BSEA order and that King Philip would have to go to Superior Court for enforcement purposes.

DECISIONS

Student's Behavioral Deficits Inextricably Intertwined with Learning Needs Such That Only Way to Meet Student's Most Pressing Educational Need (i.e. Behavioral Needs) Is with Residential Placement

In Re: Agawam PS, BSEA # 1403554, 20 MSER 1 (Crane 2014)

Student is an 11-year old who is severely autistic, has a substantial intellectual disorder, and is non-verbal. For the last seven years, Student has been a day student at the May Center, with extended day services (480 hours/year of tutors) and one hour/week home consultation. Although all parties, including the parents, agreed that the May Center has been an excellent program for Student, Student's parents sought a residential placement due to worsening school behavior along with undisputed extreme, unsafe behaviors at home and in the community, requiring constant supervision. At the time of the hearing, Student was in a locked psychiatric unit at Hampstead Hospital, where he had been for the last two months. Prior to hearing, the parents had Student evaluated, resulting in a recommendation for a residential school. Agawam's school-based Team members disagreed with this placement recommendation but did propose a different day school, River Street School. River Street School offered extended day services that were closely integrated with the school program, guaranteeing consistency from morning until early evening (i.e. 7 pm Mondays-Thursdays and 5 pm Fridays). In addition, River Street School is in session for more days than the May Center. However, given the at-school extended day program, Agawam was proposing to eliminate the 480 hours/year of home tutoring while maintaining the one hour/week of home consultation and adding a half-hour of home consultation by a Board Certified Behavior Analyst.

Hearing Officer Crane found that Student had made "miniscule" progress at the May Center with regard to communication and daily living skills but acknowledged that this does not warrant a residential placement. He also noted that neither the parents' nor Agawam's experts could say, with certainty, what Student's learning potential is. Without knowing this, Hearing Officer Crane wrote that it would be difficult to assess if Student's miniscule progress fails to satisfy the free appropriate education standard, keeping in mind that Student could be expected to do marginally better in the River Street program. Next, Hearing Offi-

cer Crane recognized the need to "proceed cautiously" before ordering a residential placement since there are potential negative implications of such placements. Consequently, Hearing Officer Crane concluded that if all he had to consider was Student's communication and functional skills, he would agree that River Street School should be tried before moving to a residential placement.

However, the more pressing issue for Student was his aberrant behavior at school, home and in the community. Parents' expert described significant behavioral deterioration over the past seven years with Student engaging in self-injurious behavior, aggressive behavior, destructive behavior, eating inedible objects, bolting, and smearing feces. Hearing Officer Crane determined that the parents were credible and persuasive that Student's behaviors at home and in the community were extremely dangerous for Student and others and that the parents were unable to guarantee their son's safety at home. Moreover, the elimination of the home-based tutors had left the parents without a valuable resource. Ultimately, Hearing Officer Crane concluded that Agawam's proposal would not allow Student's behavior at home and in the community to be addressed safely, effectively or appropriately. He noted that there was basically no dispute that if Student returned home under the current circumstances, he would likely cause serious harm to himself or others, possibly prompting a re-hospitalization. Hearing Officer Crane explicitly considered whether Student's behavioral difficulties at home are separate and distinct from Student's education such that a residential placement should not be Agawam's responsibility. The hearing officer did not have to look any further than IEP goal #1, which focused on reducing problematic behaviors, to see that Agawam did not dispute its obligation to address Student's behavior at school, in the home, and in the community. Hearing Officer Crane concluded that Student's behavioral deficits are inextricably intertwined with his learning needs and that the only way to meet Student's most pressing educational need (i.e. behavioral needs) is to provide a round-the-clock residential placement.

Non-compliance with BSEA Order a Result of Parents' Lack of Cooperation with Placement Process; Selection of Religious, Non-Special Education School Not Appropriate for Student's Needs

In Re: Andover PS, BSEA # 1402762, 20 MSER 16 (Berman 2014)

This hearing was an outgrowth of an earlier BSEA decision by Hearing Officer Berman. In September 2013, Hearing Officer Berman issued an Order agreeing with Andover that Student's needs could not be met at Andover High School but finding that Andover had not sustained its burden of proving that its proposed placement at Gifford School would meet his needs. The hearing officer issued an order that Andover "locate or create" an educational placement that met certain criteria. Andover then sought consent from the parents to send referral packets to 12 public and private day schools that potentially could meet the requirements of the decision. Unfortunately, the parents only consented to a packet going to one of the 12 schools, with that one school rejecting Student's application.

While the parties were waiting for Hearing Officer Berman's decision in 2013, Andover informed the parents that Student could begin the 2013-14 school year at Andover High School (with certain stipulations that parents found unacceptable), Gifford, or North Shore Consortium. Instead, parents opted to place Student at a private, religious school at their own expense. Parents filed for yet another BSEA hearing, arguing that Andover had not complied with the first BSEA decision and requesting an order that Andover reimburse them for the costs associated with their placement of Student at the religious private school.

During the two-day 2014 hearing, the parents asserted that Student was doing extremely well at the private school and "does not need any special education." Student was taking a full academic course load of college prep or honors classes, and all of his quarter and final grades were in the 90s. Parents had received no social, emotional or behavioral complaints from the private school. There was testimony that parents offered to provide Andover with information about Andrew's performance at the private school but refused direct contact between Andover and the private school. When Andover contacted the parents about participating in an IEP Team meeting to develop a successor IEP, the parents responded that they did not wish to participate in the meeting because Student did not need an IEP. Andover held an annual review IEP Team meeting without the parents and proposed a 3/1/13 to 2/28/14 IEP for Gifford.

Hearing Officer Berman correctly concluded that Andover complied with the first BSEA decision as best it could and parents' non-cooperation was responsible for any non-compliance. Also, the parents' refusal to allow Andover to directly contact the private school undercut their efforts to get public funding. The hearing officer also analyzed the parents' entitlement to relief using the standard "self-help" analysis. Hearing Officer Berman correctly concluded that even if the parents were successful in establishing that Andover's proposed placement failed to provide FAPE, there was not the evidentiary support to establish that the school that the parents had selected was appropriate to meet Student's needs.

Public School Orderd to Conduct Extended Evaluation of Student in Residential Setting to Determine What Setting Student Requires to Receive FAPE and What Services Are Needed to Ensure His Safety During The Night

In Re: Weymouth PS,[1] BSEA # 1400689, 20 MSER 25 (Putney-Yaceshyn 2014)

Parents sought a residential program for their 10-year old son who has autism, an intellectual disability, disordered sleep, and disruptive behaviors. Weymouth defended its in-district IEP that included 10 hours a week of home services.

Hearing Officer Putney-Yacheshyn determined that Weymouth's IEP failed to provide FAPE primarily because "it does not adequately address the issue of Student's sleep disruption and nocturnal wandering" which admittedly was viewed as a "significant safety issue" by a number of school and parent witnesses.

1. A colleague of this Commentator represented Weymouth in this case.

The hearing officer noted that not only did Student's sleep issues constitute a significant safety issue but they also impacted Student's readiness to learn the next day. She was critical of Weymouth's failure to assess Student's needs in this area and whether this sleep issue was behavioral or medical, noting that if it was behavioral, Weymouth must provide services. The hearing officer also noted several "crucial omissions" in the IEP including the failure to detail the consultation services a private provider intended to provide to Student's program. For example, the IEP was silent about this provider consulting to the home program in addition to the school program and did not detail the number of hours of this consultation. Also, this private provider testified that the appropriateness of the proposed IEP was largely dependent on its implementation, yet the provider did not articulate how he would ensure the implementation of the IEP - only that he would do it. The hearing officer also was looking for more concrete information about staff training (e.g. the number of hours of training, specific skills targeted). Hearing Officer Putney-Yaceshyn noted that while all agreed carryover from school to home was critical to the IEP being effective, the IEP did not specify who was responsible for ensuring the carryover or the consistency of programming.

Hearing Officer Putney-Yaceshyn wrote that theoretically Weymouth could modify its IEP to address its shortcomings. However, she found that it was unclear if those modifications could be made quickly enough in light of the fact that "Student is at significant risk of harming himself every time he awakens in the night." She criticized Weymouth for not conducting a functional behavioral assessment or requesting that a BCBA observe the nighttime routine or overnight hours. While the hearing officer clearly agreed with parents that there were safety issues that were Weymouth's problem, she determined that parents' case was deficient since parents only called medical experts and no educational experts as witnesses. She also noted that the parents failed to put on any information about their residential school of choice—Higashi—and its appropriateness for Student. Hearing Officer Putney-Yaceshyn wrote that she was not persuaded by Weymouth's private consultant that Student did not require a residential setting given that he testified that he recommended residential placements when a student's behaviors are a danger to the student or others, which she found was the case here. Given the dilemma her determinations presented, the hearing officer concluded that the only appropriate resolution was to order an extended evaluation in a residential setting to determine what setting Student requires to receive a FAPE and what services are needed to ensure Student's safety if, and when, he wakes up during the night. Included in the order was a requirement that the parties return to the BSEA to determine the appropriateness of the IEP resulting from the extended evaluation.

Undoubtedly this decision's expansive view of what constitutes education will have its supporters and detractors. Also, one can debate whether it is faster to try to locate a residential placement willing to do an extended evaluation or to have Weymouth remedy the programming shortcomings identified by the hearing officer. In reading this decision, though, this Commentator was left with the impression that the hearing officer was convinced Student requires a residential placement beyond an extended evaluation to receive FAPE but was unable to order such a placement given the flaws with the parents' case presentation.

Unusual Fact Pattern Leads to Determination Upholding DESE Assignment of School District Responsibility for Student's Educational Programming

In Re: Randolph PS v. *MA DESE & Boston Public Schools*, BSEA # 1402607, 20 MSER 39 (Oliver 2014)

Randolph appealed a DESE Assignment determining that Randolph, where Student was living with her mother, was solely programmatically and fiscally responsible for Student's educational programming. Randolph thought it had a chance of prevailing because in 2006, Student's grandmother, who lives in Boston, was appointed Student's legal guardian when Student's mother was missing and presumed dead. While the facts are unusual, the fact remains that Student was living in Randolph with her mother. Thus, since school district responsibility flows from a student's residence, Hearing Officer Oliver correctly ruled in favor of DESE and Boston that Randolph should be solely responsible for Student's programming.

Public School Ordered to Reimburse Parents for Living and Transportation Expenses Incurred While It Located Appropriate Placement for Student

In Re: Quincy Public Schools, BSEA # 1403404, 20 MSER 42 (Crane 2014)

By this Commentator's count, this decision was round four between Quincy and the parents. In November 2012, Hearing Officer Crane issued a decision following an evidentiary hearing. At that time, he held that neither Quincy's proposed placement at Reads Collaborative nor Student's "stay put" day placement at the Clarke School for the Deaf were appropriate, and could not be made appropriate, to meet Student's needs. Consequently, Hearing Officer Crane ordered Quincy to "locate or create" an appropriate program for the student, detailing the essential components of an appropriate program. Fast forward to 2014 when the parties participated in a four-day hearing regarding (1) whether Quincy had complied with the November 2012 decision and, if not, what relief, if any should be awarded; and (2) whether Quincy's IEP placing Student in the Marshfield Public Schools for the 2013-2014 school year was appropriate.

In one sense, this 2014 hearing process was successful because before the end of the hearing, the parties informally resolved the dispute about Student's current placement and IEP. Parents' compensatory claims were deemed waived since their attorney did not address the issue in his closing argument. Consequently, the only claim remaining was whether the parents were entitled to reimbursement of their expenses incurred while Student continued to attend the "stay put" day placement at Clarke School. Hearing Officer Crane found that the parents did not fully cooperate with Quincy's efforts to locate a program since they refused to explore six state-approved, language-based private school programs. If parents had fully cooperated with the referral process, Student could have started at a new program on March 1, 2013, at the earliest, and, at the latest, by the start of the 2013-14

school year. Consequently, Hearing Officer Crane decided to reimburse parents for certain expenses through the end of April 2013.

Parents presented evidence of their living expenses (hotel and food) and transportation expenses (between Quincy and Northampton). Hearing Officer Crane approved reimbursement of hotel expenses approaching $11,000 for the time period of September 2012 through April 2013. The hearing officer denied reimbursement for food since the parents would have had food expenditures regardless of where they were living. The hearing officer allowed parents to recoup in excess of $1,000 in gas expenses and $108 in tolls. All told, Quincy had to reimburse parents just shy of $6,000 since the Clarke School had given the parents a $6,000 stipend to offset their living expenses for the 2012-2013 school year, which helped defray Quincy's liability.

At the conclusion of his decision, Hearing Officer Crane noted that "Quincy has acted with considerable effort, reasonableness and even magnanimity towards resolving what has been an extremely challenging task of finding an appropriate educational program for Student." He also recognized the Marshfield Public School and its Special Education Director for allowing Student to attend its program and working with the parents to get an accepted IEP during the midst of a BSEA hearing where Marshfield had to defend itself and its programming for a student who did not even reside in Marshfield. Hearing Officer Crane correctly noted that if it were not for Marshfield voluntarily taking this on, Student's only option may have been home schooling.

Public School Convinces Hearing Officer That Student Had Not Internalized Behavioral Controls And Was Not Ready to Move to Less Restrictive Setting

In Re: Springfield PS & Ted, BSEA # 1309716, 20 MSER 62 (Oliver 2014)

Ted is a 15-year old 8th grader who currently attends Springfield's Learning Center (LC), which is the most restrictive setting within the Springfield Public Schools. Ted is of average cognitive ability and earns scores on standardized academic testing commensurate with ability. Ted, however, has behavioral and emotional disabilities that negatively impact his ability to make effective progress in school. Parents filed for hearing arguing that the proposed IEPs for 10/2012 to 10/2013 and 10/2013 to 10/2014 continuing to place Ted at the LC are too restrictive and that instead Ted should attend Springfield's less restrictive Social Emotional Behavioral Supports (SEBS) program.

Hearing Officer Oliver agreed with Springfield that Ted was not ready emotionally or behaviorally to move to a less restrictive educational setting. Ted had had 36 disciplinary incidents during the 2012-2013 school year. From March to May 2013, he had had 14 disciplinary incidents including "physically assaulting school staff, physically assaulting other students, defiance, disruptions, refusals, verbal harassment, swearing/obscenities, leaving classes within the school, and actually leaving school grounds." Hearing Officer Oliver noted that he was especially troubled by one incident in March 2013. On this day, Ted could not let go being upset with a peer. Ted had left class without permission, disobeyed staff directions to stop, entered another classroom, and punched this peer in the face. Not the picture of the model student or a student demonstrating progress warranting a less restrictive setting! In fact, not even Ted's favorite teacher was recommending a move from the LC to the SEBS because Ted had not demonstrated that he had internalized behavioral controls. Also, Hearing Officer Oliver found that the testimony supported that Ted did not make academic or emotional progress from September 2013 through October 2013, when there was uncertainty about his educational placement, or from October 2013 through January 2014, when Ted participated in an extended evaluation at SEBS. Based on the facts set forth in this decision, Ted's parents were hard-pressed to convince a hearing officer that Ted should move to a less restrictive educational setting where he presumably would have more interaction with the general population at the middle school. ■