MSER Commentary

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Activity at the BSEA seemed light for the second quarter, with six rulings and five decisions following evidentiary hearings. The rulings will maintain reader's interest as they tackle a number of diverse issues (e.g. joinder of social service agencies, timeliness of appeal of DESE assignment, and concern about issue-splitting resulting in multiple BSEA hearings). As for the five decisions, this Commentator would urge those who work for, or with, public schools to be sure to read the decision in *In Re: Natick PS & Jolene*. This Commentator's hope is that other public schools will learn lessons from the BSEA Hearing Officer's brutal critique of Natick's programming decisions for this seven-year old student.

RULINGS

DMH Dismissed as a Party Where Student Not a DMH Client and No Application Seeking DMH Eligibility and Services Was Pending

In Re: Stoughton PS, DDS & DMH, BSEA # 1406800, 20 MSER 73 (Crane 2014)

Parent filed for an expedited hearing against the Stoughton Public Schools, the Department of Mental Health (DMH), and the Department of Developmental Services seeking a residential placement for her son, a 13-year old with an IQ of 46 and a number of other deficits. DMH filed a motion to be dismissed as a party since Student was not a DMH client and there was no application currently pending seeking a determination of DMH eligibility. BSEA rules allow hearing officers to order social service agencies to provide services but only in accordance with an individual agency's regulations. Since DMH's own regulations allow DMH to provide services only to individuals DMH deems eligible for its services—and Student's eligibility for DMH services was not pending—Hearing Officer Crane had no choice but to allow DMH to exit this case at this time.

Parents Ordered to Provide More Definite Statement Supporting All Allegations or Run Risk of Dismissal of Some or All of Claims

In Re: New Bedford Public Schools, BSEA # 1405888, 20 MSER 75 (Figueroa 2014)

Student was a regular education student until he sustained a Level 3 concussion while playing kickball in December 2011. Student has been on a Section 504 plan at all times since March 2012. Even though Section 504 does not require public schools to obtain parental consent prior to implementing Section 504 plans, New Bedford did so. Parents accepted all proposed 504 plans until February 2014, at which time the parents did not respond to the proposed plan. New Bedford filed a partial motion to dismiss seeking dismissal of all claims questioning the appropriateness of the Section 504 plans. According to New Bedford, parents should be precluded from challenging fully-accepted Section 504 plans that have expired, similar to the case law regarding accepted, expired IEPs. New Bedford also filed a motion for a more definite statement of the issues for hearing.

Hearing Officer Figueroa issued a very detailed order requiring the parents to provide a more definite statement supporting all of their allegations otherwise they risk dismissal of some or all of their claims. The hearing officer deferred ruling on the partial motion to dismiss until she received this more definite statement, noting that the parents' hearing request "offers absolutely none of the specificity that would allow New Bedford or this Hearing Officer to ascertain which claims are viable." This Commentator appreciates Hearing Officer Figueroa holding the parents' feet to the fire because the only way the public school can analyze a claim and, as appropriate, prepare a defense, is to have a clear understanding of what is being claimed. The hearing officer also determined that the parents' claims are all Section 504 claims, so the statute of limitations is three years, rather than the two-year statute of limitations applicable to IDEA claims.

Hearing Officer Dismissed Denial of FAPE Claims Associated with Two Expired, but Fully-Accepted and Implemented IEPs

In Re: Marblehead PS and Isabel, BSEA # 1406301, 20 MSER 79 (Byrne 2014)

Isabel has been on Individualized Education Programs since 2006. Isabel's parent fully accepted IEPs for the 2011-2012 and 2012-2013 school years and does not argue that Marblehead failed to implement these IEPs. Consequently, when Isabel's parent filed for hearing arguing, *inter alia*, that the 2011-2012 and 2012-2013 IEPs did not provide Isabel with a free appropriate public education (FAPE), Marblehead understandably filed for partial summary judgment. Consistent with court and BSEA precedent, Hearing Officer Byrne correctly ruled that the parent cannot now challenge the 2011-2012 and 2012-2013 IEPs since they were fully-accepted at the time, and parent never alleged a failure to implement or to provide FAPE during the lifetime of those IEPs. This ruling serves as a reminder that if everyone is in agreement about an IEP at the time the IEP is in effect, the parent cannot look back in hindsight and argue that the IEP was deficient.

ment, finding that the parents gave Sudbury timely notice that they would have to seek an alternative placement given Sudbury's proposal of in-district, day programming. As reflected in the ruling, the IDEA requires parents to provide written notice or oral notice at an IEP Team meeting regarding their intention to unilaterally place at a private school and seek public school funding. However, Hearing Officer Oliver correctly notes that the IDEA provides that failure to provide the requisite notice means that reimbursement "*may* be reduced or denied." (emphasis added). Finally, the hearing officer needed to rule as he did that both school districts remain potentially responsible for the 2012-13 school year (9th grade) since there were disputes of material fact about whether Sudbury provided Lincoln-Sudbury with notice that Student was an incoming 9th grader for the 2012-13 school year. In addition, parents did not give Lincoln-Sudbury any notice about Student for the 2012-2013 school year, so, even if Lincoln-Sudbury is determined to potentially be responsible for the 2012-2013 school year, any reimbursement parents might recoup could be reduced as a result.

DECISIONS

Hearing Officer "Splits The Baby," Agreeing with Public School that Extended Evaluation Is Needed and with Parents That Evaluation Can Be Done In-District

In Re: Mapletown PS,[2] BSEA # 1406097, 20 MSER 84 (Berman 2014)

Mapletown filed for an expedited hearing, arguing that a 4th grader diagnosed with Pervasive Developmental Delay required a 40-day extended evaluation at a collaborative in order to determine what services and placement are necessary to receive a free appropriate public education. Parents agree that Student should undergo an extended evaluation but believe that Mapletown can do the evaluation in one of two less restrictive, in-district programs.

Hearing Officer Berman agreed with Mapletown that a 40-day evaluation was required given Student's difficulty with behavioral outbursts, social demands, and work production demands. However, the hearing officer was not persuaded that Mapletown was unable to conduct the evaluation in one of its two in-district programs. She noted that Student's educational career, to date, has been in full inclusion settings. Also, both in-district programs address two of Student's main areas of need, social skills and emotional self-regulation. Hearing Officer Berman noted that representatives of both programs could observe Student, which would eliminate Mapletown's concern that each program's orientation would influence their perspective of Student. Finally, Hearing Officer Berman noted that at one time Mapletown had considered that either or both of its in-district programs were appropriate for Student, but observation of those programs got derailed once Mapletown thought Student was headed to a collaborative. While Mapletown's psychologist testified that neither program could address Student's behavioral issues, Hearing Officer Berman noted that she would need more evidence from Mapletown to be convinced, such as testimony from representatives from Mapletown's two in-district programs. Ultimately, this decision underscores that it can be difficult for a public school to persuade a hearing officer to order a more restrictive educational setting when parents are willing to try an alternate and less restrictive setting that has never been tried before.

History Repeats Itself, with Boston Convincing Same BSEA Hearing Officer Six Years Later That Its In-District Programming Is Sufficient to Meet Student's Needs

In Re: Boston PS, BSEA # 1407862, 20 MSER 90 (Crane 2014)

Boston and this parent went to hearing in 2008 and again in 2014, with Boston prevailing both times. In 2008, Hearing Officer Crane determined that Student was making progress commensurate with his ability with his in-district programming. At that time, Hearing Officer Crane also expressed his disappointment that Student's mother had kept her severely disabled son at home without services for two months despite this progress and Student's love of school.

In the intervening years since the 2008 hearing, Boston and the parent reached agreements about Student's educational programming, with Boston placing Student in private schools through November 2013. At parent's request, Student attended Perkins School for the Blind for one school year and then Kids Are People, a private inclusion school, for three full school years. In November 2013, parent requested that Student attend school at Boston's Harbor Middle School, an inclusion school, and Boston acquiesced. Given that Student had not attended school in Boston in several years, Boston proposed to conduct nine evaluations while Student attended school at Harbor. Parent consented to the nine evaluations, and requested two others, which Boston agreed to conduct. Student began attending Harbor in mid-December 2013 and, in mid-March 2014, parent accepted the proposed IEP in part. Unfortunately, though, Student's attendance at Harbor has been less than stellar, with 31 unexcused absences and 36 unexcused tardies out of 78 school days. In the month before the BSEA hearing, Student attended school only four days.

At the 2014 hearing, Boston sought Hearing Officer Crane's stamp of approval on an IEP proposing Student's continued placement at Harbor Middle School. Hearing Officer Crane noted that the extent of Student's absences and tardies made it difficult to assess the likely progress Student would make if he accessed the IEP services, as proposed. Consequently, the hearing officer relied on the evaluation recommendations and the testimony of Boston's witnesses in determining that the proposed IEP was appropriate. Hearing Officer Crane made what he characterized as "modest" changes in the IEP, one of which was to reflect the use of a 1:1 aide in the service delivery grid. Hearing Officer Crane also agreed that changes should be made to the IEP consistent with the testimony from Boston's witnesses that half of the ABA services should be delivered in the general education

2. A colleague of this Commentator represented Mapletown in this matter.

Parent's Pro Se Status Factors into Ruling That Parent May Litigate Claim that He Could Have Litigated As Part of Prior BSEA Hearing

In Re: McAuliffe Regional Charter PS,[1] BSEA # 1404110, 20 MSER 81 (Figueroa 2014)

Parent filed his fourth BSEA hearing request, this time seeking a BSEA Order requiring McAuliffe to revise its Annual Report for the 2012-2013 school year, to follow certain procedures regarding student records and its Special Education Parent Advisory Council (SEPAC), and to reimburse parent for an independent speech language evaluation and eight speech and language sessions. McAuliffe filed a motion to dismiss parent's hearing request. Hearing Officer Figueroa easily jettisoned the parent's claims regarding the Annual Report, SEPAC, and student and/or public records, finding that these claims are outside of the BSEA's jurisdiction. The hearing officer directed the parent instead to the MA DESE's charter school office. Next, Hearing Officer Figueroa concluded that the issue about reimbursement for the evaluation was resolved since McAuliffe had offered to reimburse parent $460 for it. The final claim for the hearing officer to tackle was the claim seeking reimbursement for speech language sessions. McAuliffe argued for dismissal since parent raised this issue before with DESE's Office of Program Quality Assurance (PQA) and the Office for Civil Rights (OCR) and, when he filed his prior BSEA hearing requests against McAuliffe, he could have included it, as it dated back to winter 2012. Hearing Officer Figueroa did not dismiss this claim, noting that raising the same issues before PQA and OCR did not bar parent from pursuing the same issue before the BSEA. Also, especially as the parent had proceeded to hearing against McAuliffe without an attorney, the hearing officer concluded that he might not have understood the advantages to filing for hearing on all issues at once. However, in order to avoid yet another hearing request, the hearing officer explicitly explained to the parent that he now had the opportunity to add any and all issues about student's education to the instant hearing request. One take-away lesson from this case for public schools is that when dealing with "frequent flyers" at the BSEA, consider seeking an order from the hearing officer requiring the parent to bring all issues at once, in an effort to avoid having a parent issue-split and request multiple hearings.

DESE's Response to Request for Reconsideration of School District Assignment Is "Most Recent Notification of Assignment" for Purposes of Determining Timeliness of Appeal of Assignment

In Re: Worcester PS & DESE and Medway PS, BSEA # 1404967, 20 MSER 97 (Byrne 2014)

Worcester filed a BSEA hearing request challenging DESE's assignment of school district responsibility for Student. Medway filed a motion to dismiss, arguing that Worcester had missed the filing deadline requiring that such appeals be made within 60 days of the "most recent notification of assignment." In terms of timing, DESE issued a Second Amended Assignment of School District Responsibility on 11/4/2013. On 11/20/2013, Worcester sent an email to DESE requesting an amended assignment, asserting that responsibility should be shared between Worcester and Medway, the two school districts where Student's parents reside. On 11/27/2013, DESE wrote back to Worcester that the 11/4/2013 determination remained unchanged.

From this Commentator's perspective, Medway had no choice but to file this motion. First, in reading this ruling, it appears that Worcester did not offer any new information in its 11/20 correspondence with DESE. If Worcester had presented new information which DESE determined did not impact its determination, then there would be no question that the final communication from DESE would have been the "most recent notification of assignment." Moreover, if Medway was successful with its timeliness argument, then Worcester would have had no recourse for avoiding being solely responsible for Student's educational programming. However, once DESE weighed in with the BSEA that DESE historically has construed the phrase "more recent notification of assignment" broadly and certainly as including amended or affirmed assignments following requests for reconsideration of assignments, Hearing Officer Byrne was left with little choice but to defer to DESE's interpretation of its own regulations. Consequently, Worcester's appeal is timely and is allowed to proceed.

Parents' Claims for Retroactive Reimbursement Survive Summary Dismissal Attempt on Grounds of Failure to Provide Required Notice of Unilateral Placement

In Re: Sudbury PS & Lincoln-Sudbury RSD, BSEA # 1403509, 20 MSER 99 (Oliver 2014)

Parents filed a BSEA hearing request against Sudbury and Lincoln-Sudbury seeking retroactive reimbursement for their unilateral placement of their daughter at a residential school for 8th and 9th grade (2011-12 and 2012-13 school years). In May 2011, when Student was a regular education student on a 504 plan, parents placed Student in a 60-day therapeutic wilderness program. On 6/21/2011, Sudbury convened an IEP Team meeting, found Student eligible for an IEP, and proposed placement in a substantially separate classroom at its middle school. The paperwork reflects that the parents made it clear at the 6/21/2011 Team meeting that they wanted a residential placement and would be rejecting the IEP and placement for failure to propose a residential program with extended school year services. Parents placed Student at a residential school on 8/22/2011. They also accepted Sudbury's proposed IEP but rejected placement and the failure to propose extended school year services. Both school districts filed motions for summary judgment for the two school years at issue.

As should have been the case, Lincoln-Sudbury's motion for summary decision was granted for the 2011-12 school year, when Student was an 8th grader, since Lincoln-Sudbury's responsibility begins once students are 9th graders. Sudbury also sought dismissal arguing that parents had failed to provide the IDEA-required notice of unilateral placement prior to placing Student residentially. Hearing Officer Oliver rejected this argu-

1. A colleague of this Commentator represented McAuliffe in this matter.

that sign was Jolene's primary mode of communication) led the hearing officer to conclude that "Natick offered what was available rather than thoughtfully considering and planning for Jolene's individual learning needs." Finally, the hearing officer discussed the longstanding dispute between the parties regarding providing Jolene with a "signing environment." She noted that despite recommendations from multiple outside evaluators for a "signing environment," Natick did not agree to provide Jolene with a 1:1 aide who could sign until the start of the 2012-13 school year. And, even then, Natick failed to deliver on its promise!

On the other hand, Hearing Officer Byrne determined that RCS had all of the key elements critical to Jolene making progress; that is, it is a year-round signing environment with an ABA-based approach to instruction. Consequently the hearing officer ordered Natick to reimburse parents for all expenses they incurred in unilaterally placing Jolene at RCS in July 2013. She also ordered Natick to conduct independent evaluations that assess Jolene's current functioning in the areas of physical therapy, occupational therapy, and speech therapy so that there can be a determination about the "appropriate approach, level and frequency and setting of interventions in those areas, if necessary." Finally, the hearing officer ordered Natick to conduct an independent evaluation of Jolene's home-based ABA programming needs to determine whether Jolene needs additional services at home to meet her needs. ■

classroom and one of the three speech language sessions should occur in the general education classroom.

Parents Fail in Bid to Have 17-Year Old Autistic Son Placed in Inclusion Setting But Changes Required to Proposed Substantially Separate In-District Program

In Re: Boston PS, BSEA # 1308779, 20 MSER 102 (Berman 2014)

Parents filed for hearing arguing that Boston has failed to provide their 17-year old autistic son with FAPE since spring 2011. Parents contend that, at that time, they had to remove their son from his full inclusion program, and, since then, their son has had only some Boston provided home-based tutoring and ABA instruction. Initially, parents' hearing request sought home-based instruction with ancillary services. Later, parents amended their hearing request and sought Student's return to the full inclusion setting at Harbor School, with increased BCBA oversight, travel training, and a transition assessment by Easter Seals. In addition, parents sought compensatory services for Boston's alleged failure to provide agreed-upon related services and ABA services.

At hearing, Boston defended its 2/2014 to 2/2015 IEP proposing Student's placement in a substantially separate classroom at the Boston Community Leadership Academy (BCLA). The proposed program would place Student in a classroom with a maximum class size of nine students, with a special educator and two paraprofessionals and a dedicated 1:1 paraprofessional trained in ABA and overseen by a BCBA, as well as related services (occupational therapy, speech therapy, home-based ABA services, travel training), home and school consultation by a BCBA, and extended school year programming.

Hearing Officer Berman noted that the parents did not appear to have major objections to the proposed IEP's goals, benchmarks and services but instead disagreed about setting. Parents asserted Student had made progress in his last school placement, which was an inclusion placement. The hearing officer, however, emphasized that Student now is 17 years old and needs to make much progress with "functional communication, self-regulation, community, and vocational skills" in order to make meaningful progress towards "self-determination and independence." Also, Hearing Officer Berman noted that while technically Student previously was educated in an inclusion setting, in reality, Student was primarily educated by himself rather than with a group of peers. Finally, the hearing officer observed that all evaluators recommend Student have specialized, individualized, ABA-based programming. However, just when readers think Boston will prevail, Hearing Officer Berman articulates shortcomings with Boston's proposed program. She begins by noting that the BCLA program is not specifically designed for students with autism or modeled on ABA principles. Next, she lists a number of aspects of the proposed program about which Boston neglected to provide information.

All was not lost, though, for Boston! Hearing Officer Berman determined that the proposed program "might become appropriate" if the BCLA program were to incorporate ABA principles, BCBA oversight and ABA training to all relevant staff and to provide explicit home-based and community-based instruction. Boston was given until the start of the 2014-2015 school year to modify the BCLA program consistent with the decision. If Boston is unable to meet this deadline, it must locate or create a public or private program that can implement the proposed IEP as well as the recommendations in the parents' private evaluator's report from 2011. Finally, parents got no compensatory services, as Boston was found to be "highly responsive" to parents' concerns, and delays in services were due to parents' refusals to sign a general liability waiver or emergency protocols.

Hearing Officer Points to Numerous, Serious Concerns about Public School's Programming for Student before Ordering Reimbursement for Private School

In Re: Natick PS & Jolene, BSEA # 1400521, 20 MSER 112 (Byrne 2014)

Jolene is a seven-year old with "complex medical and developmental needs including autism spectrum disorder, a communication disorder..., significant global developmental delays, and fine and gross motor weaknesses." Hearing Officer Byrne took issue with the services Natick provided Jolene from age three through June 2013, when Jolene's parents rejected Natick's proposed in-district placement and instead unilaterally placed Jolene at Realizing Children's Strengths. The hearing officer determined that the type and level of services Natick provided/offered over these years "ran counter to nearly every evaluation her Teams considered." Moreover, Hearing Officer Byrne concluded that Natick was unable "to link any notable progress to any service it provided."

Public schools should be aware that Hearing Officer Byrne was critical of Natick's evaluations because they did not make any individualized services recommendations. Moreover, Natick's service providers recommended Natick's ACCESS program for Jolene for the 2013-14 school year without "any meaningful assessment of the appropriateness" of this program for Jolene (e.g. did the program have the key components Jolene needed such as a signing environment and a classroom based on ABA principles?) Also, the hearing officer found that Natick's "wait and see" attitude for service delivery did not ensure the "smooth and effective" transition from early intervention services to public school provided special education services. Hearing Officer Byrne was particularly underwhelmed with this attitude given what Natick knew about the severity of Jolene's needs, the intensity of Jolene's early intervention services, and the research about the level of services needed by this population of students. Also, the hearing officer determined that Natick's BCBA offered a random number of hours of ABA discrete trials that bore no connection to her own evaluation or any other evaluation of Jolene. The hearing officer highlighted that "another example of systematic inattention" to Jolene's needs was Natick's response to the recommendation for full year services. She noted that despite there being no contrary recommendation to this full year recommendation, for summers 2010-2012, Natick offered only four to six weeks of services during school vacations lasting 10 to 11 weeks. This offer of services providing "significantly reduced special education time ...and related service time [other than speech language therapy]" with providers who were unfamiliar with Jolene and did not sign (despite identifying in 2012