MSER Commentary

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The activity level at the BSEA for the 3rd Quarter, at least as reflected in rulings and decisions, kept pace with the 2nd Quarter, with BSEA hearing officer issuing 5 rulings and 5 decisions this quarter as compared to 6 rulings and 5 decisions in the 2nd Quarter. One ruling of note is Hearing Officer Oliver's Ruling in *In Re: Georgetown Public Schools & Landmark School* that "stay put" for a student expelled from Landmark School is the student's educational program as described in the last accepted Individualized Education Program but not Landmark specifically. The decision in *In Re: Acton Public Schools and Acton Boxborough Regional School* also is sure to create a buzz in the world of special education for holding that Student's program must provide "access to a reasonable aggregate of similar peers" with whom Student "could develop meaningful friendships."

RULINGS

DMH Joined As Necessary Party in Dispute about Need for Residential Placement

In Re: Belmont Public Schools, Massachusetts Department of Mental Health (DMH) and Malini, BSEA # 1408679, 20 MSER 127 (Byrne, 2014)

Malini is a 9th grader who is eligible for an Individualized Education Program (IEP) due to an emotional disability and for DMH services. Malini has been psychiatrically hospitalized a minimum of five times since 5th grade. At the time of the Ruling, Malini had been in a psychiatric hospital for a little over two weeks. Malini's last accepted IEP proposes her placement at Germaine Lawrence as a day school student. At an IEP Team meeting shortly before Malini's latest hospitalization, Malini's mother requested an IEP for a residential special education program. Belmont expressed interest in wanting to explore "extended services" from DMH to maintain student's programming at a day school. At the Team meeting, DMH's representative stated that DMH did not provide residential services for children other than temporary group home placements.

Belmont filed a Motion to Join DMH as a necessary party to this BSEA hearing, and Hearing Officer Byrne agreed. Weighing in Belmont's favor was the "clear nexus" between Malini and DMH and the need for the BSEA to quickly and efficiently resolve the dispute about Malini's needs before her discharge from the hospital. The hearing officer also noted that Malini's "clinical needs" were beyond what a day school program could address. According to the hearing officer, DMH has services that either could support a day school program or, in the alternative, is responsible for providing residential services to meet Malini's clinical needs.

Motion to Join DMH and DDS Denied Where DMH Previously Found Student Ineligible and Student Never Applied To Be DDS Client

In Re: Fall River, BSEA # 1406929, 20 MSER 128 (Oliver, 2014)

Student is a 10th grader with a cognitive impairment and Pervasive Developmental Disorder (PDD). At the time of the Ruling, Student was residing at the Merrimack Center, which is a Behaviorally Intensive Residential Treatment Program at Tewksbury Hospital that DMH was funding as an "exception" since Student did not meet DMH eligibility criteria.

Hearing Officer Oliver made short work of the Motion to Join the Department of Developmental Services since Student's family never had applied for DDS services. Moreover, even if DDS were joined as a party, the hearing officer could not order DDS to place Student residentially since DDS's own regulations prohibit the agency from providing residential services to students under the age of 18. The hearing officer noted that the issue of joinder of DMH was more complicated given DMH's current involvement. However, in this Commentator's opinion, Hearing Officer Oliver correctly denied the Motion to Join DMH since DMH previously had found that Student did not meet DMH's regulatory criteria for DMH eligibility due to his cognitive ability and diagnosis of PDD. The family could have challenged this determination but never had. Bottom line is DMH's good deed of stepping up to the plate in an emergency to protect society from Student when DMH had no responsibility to do so should not be used against the agency later.

IDEA's Statute of Limitations Tolled Due to Alleged Failure to Provide Parent's Rights Brochure At Time of Initial Request for Special Education Evaluation

In Re: Newton Public Schools, BSEA # 1408637, 20 MSER 165 (Figueroa, 2014)

Parent filed for hearing seeking an out-of-district placement, compensatory damages for denial of special education services, and reimbursement for a neuropsychological evaluation and the services of an advocate. Newton filed a Motion for Partial Dismissal arguing that many of the parent's claims were time-barred by the IDEA's two-year statute of limitations. However, Newton's argument failed at this early stage in the litigation since the hearing officer had to accept as true that Newton had failed to give the parent her notice of procedural safeguards at the time of the initial request for an evaluation, as IDEA requires. Consequently, this ruling allowed the parent to pursue relief during the two-month window predating the usual two-year statute of limitations solely because Newton allegedly provided parent with the notice of procedural safeguards at the initial eligibility meet-

ing rather than at the time of the initial referral for a special education evaluation. Newton also sought dismissal of claims that alleged that Newton committed procedural errors in processing a request for a publicly-funded Independent Educational Evaluation (IEE) since the parties previously participated in a BSEA hearing that resolved this issue. Hearing Officer Figueroa agreed with Newton that the parent could not relitigate claims related to this IEE. The hearing officer actually sounded amenable to precluding even more claims, but did not since both parties acknowledged that, by agreement of the parties, the parent had not pursued all issues set forth in the parent's previous BSEA hearing request. Since only parent's claim seeking reimbursement for an IEE resulted in a BSEA decision, Hearing Officer Figueroa understandably issued a narrowly tailored ruling on the preclusion issue. Finally, the hearing officer dismissed the parent's claim seeking reimbursement for the costs of a private evaluation and an educational advocate's services, citing a United States Supreme Court precedent for the principle that the IDEA's attorney's fee provision does not extend to services rendered by experts.

In Case of First Impression Involving Private School Termination of Student for Disciplinary Reasons, Hearing Officer Rules "Stay Put" Is Educational Program Described in Last Accepted IEP But Not Specific Private School

In Re: Georgetown Public Schools and Landmark School, BSEA #1408733, 20 MSER 169 (Oliver, 2014)

When Student was a junior at Landmark School, he tested positive for marijuana. Landmark imposed a five-day suspension and warned that a second offense would mean expulsion. In the spring of that same school year, Student was caught with a vile of urine up his sleeve during a drug screening at Landmark. Landmark convened a meeting of its Standards Committee, with Georgetown participating by phone, and determined that this was Student's second violation of his Abstinence Contract with Landmark and that Student's behavior was not a manifestation of his disability. Landmark expelled Student but ultimately agreed Student could complete his junior year there.

Student's parents filed for hearing against Georgetown and Landmark and then filed a Motion for Stay Put at Landmark and a Motion for Summary Decision. The Ruling reflects that Student had attended Landmark School in recent years pursuant to a settlement agreement with Georgetown. In addition, when Student enrolled at Landmark, Student and his parents executed Landmark's Abstinence Contract that details Landmark's prohibition of students being in possession, or under the influence, of drugs, alcohol, and/or illicit substances. Both Student and parents signed the Abstinence Contract, which authorized Landmark to conduct urinalysis and/or a Breathalyzer of Student.

Hearing Officer Oliver began his analysis of the "stay put" motion by noting that BSEA administrative decisions are merely instructive to other hearing officers, not binding. He then proceeded to rule that Student's placement pending appeals is the educational program described in his last accepted Individualized Education Program but not specifically the Landmark School, citing as support prior BSEA decisions, a 4th Circuit decision, and the Massachusetts regulations for state approved private special education schools. Hearing Officer Oliver emphasized that the state regulations regarding terminating publicly-funded students from a private school would serve no purpose if, as parents argued, an assertion of "stay put" rights served to bar termination from a particular private school. In addition, the hearing officer found that the parents waived any right to stay put at Landmark given their acceptance of language in the settlement agreement, Abstinence Contract, and Landmark's student handbook.

Hearing Officer Oliver next tackled the parents' arguments for a summary decision, all of which contended that Landmark could not take the various actions that it took (e.g. forcing Student to submit drug screens, forcing drug screens in response to protected expression) because, according to the parents, Georgetown could not have taken such action. The hearing officer disagreed since Landmark, unlike Georgetown, is a private actor. The ruling includes consideration of the four tests the United States Supreme Court has articulated for determining when a private entity's actions may constitute state action, with the hearing officer easily concluding there was no "state action."

DECISIONS

Inexplicable Decision Not to Send 2nd Grader to School for five Months Undercuts Parent's Effort to Argue Previously Acceptable Public School Program Now Inappropriate; Unilateral Placement at Out-of-State Day School Warranted

In Re: Fall River Public Schools and Lionel, BSEA # 1406696, 20 MSER 151 (Byrne, 2014)

Lionel is an eight-year-old boy with developmental delays, autism spectrum disorder, and ADHD. Lionel attended the Fall River Public Schools pursuant to accepted IEPs from the middle of kindergarten through the beginning of 2nd grade. Towards the end of 2nd grade, Lionel's parents unilaterally placed him at a day school approved by Rhode Island.

The decision describes the Fall River Team as being responsive, having multiple IEP Team meetings and adjusting Lionel's IEP in response to parents' private evaluations. In July 2013, which was the summer before 2nd grade, parents' private evaluator evaluated Lionel and found that he had improved in all areas of functioning. At the beginning of the 2013-2014 school year, Lionel participated in general education ELA and math classes, with the support of a 1:1 paraprofessional. Lionel was in a substantially separate class for other subjects. In mid-September 2013, Lionel's lead teacher in the substantially separate class resigned, but Fall River arranged for substitute coverage until early February 2014, when Fall River hired a permanent special educator to head up its ASD classroom. This educator has a dual Masters degree in special education and applied behavioral analysis, has a license as a speech-language therapy assistant, and is certified to Level II in American Sign Language. Is there anything she can't do?! Very impressive credentials, indeed.

In reading the decision, the parents came across as reasonable until December 2013, when they stopped sending Lionel to

school. The parents kept Lionel out of school for more than five months, claiming that he was too sick or anxious to attend school, yet there was no evidence introduced at hearing that the parents ever took Lionel to a health care practitioner to explore these concerns. Although the parents never rejected the proposed IEP and instead unilaterally placed Lionel in May of 2nd grade, the mother testified about being dissatisfied with Fall River because its program, in her view, did not have a qualified teacher and Lionel was not making progress. However, the parent never shared her concerns about Lionel's progress with Fall River and knew nothing about the qualifications of Lionel's current educators. Hearing Officer Byrne concluded that the 2013-2014 IEP, which parent had accepted, was appropriate to meet Lionel's needs, noting that at a November 2013 IEP Team meeting, all evidence was that Lionel was making meaningful educational progress and was not being impacted negatively by the long term substitute. According to the decision, Fall River incorporated the recommendations from a private evaluation into Lionel's IEP. This, coupled with Fall River's "fully qualified, dynamic and knowledgeable professionals," spelled the end to parent's quest for a publicly-funded private school.

Hearing Officer Orders Reimbursement for Unilateral Placement of 3rd Grader at Carroll School And Return of Student to Public School for Upcoming School Year If Public School Creates a Language-Based Program with Similar Peers

In Re: Greenwood Public Schools, BSEA # 1403564, 20 MSER 130 (Figueroa, 2014)

Student is a nine-year-old boy who has been diagnosed with a communication disorder, a reading disorder, learning disabilities (NOS), and ADHD. Student attended the Greenwood Public Schools from kindergarten through 2nd grade, with the parents unilaterally placing Student at the Carroll School for 3rd grade. Although Student's verbal comprehension on the WISC-IV was 121 (superior range), Student's scores on standardized measures of academic skills were markedly lower than one would expect. In fact, parent's private evaluator evaluated Student as he was starting 3rd grade, and he already was performing one and a half to two and a half years below his same age peers in reading, written expression and spelling and one year below in math computation.

In March of 2nd grade, Student's IEP Team met to consider the results of parents' private evaluation that recommended placement in a language-based program. According to the parent, at the Team meeting, Greenwood's Director of Special Education said Greenwood could meet Student's needs in an inclusion setting and Greenwood did not have a language-based program for 3rd graders. The hearing officer noted that certainly Greenwood should have known by this March Team meeting that Student needed a language-based program rather than language-based interventions delivered in a general education setting with additional pull-out services. Consequently, the hearing officer agreed that the parents' self-help in placing at the Carroll School was warranted, resulting in an Order to reimburse parents for Carroll placement for the 2013-2014 school year, including reasonable transportation expenses. However, Hearing Officer Figueroa believed that Greenwood, with its "excellent staff," could create a language-based program with similar peers in-district. If Greenwood were able to create such a program that was consistent with the recommendations of the parents' private evaluator, then the Hearing Officer Ordered that Student should return to Greenwood for the 2014-2015 school year. If, however, Greenwood did not, or could not, develop such a program, then Greenwood must continue Student's placement at Carroll School or other language-based program.

To this Commentator, the Order to reimburse for Carroll School was not surprising given the wide discrepancy between Student's IQ and his scores on standardized testing. Greenwood's expert witness was of no help, with the hearing officer finding her testimony unreliable. The expert did herself no favors by raving about Greenwood's "exemplary" service providers and program while struggling to say anything positive about Carroll School. The hearing officer also was troubled by the potential financial interest the expert had in the Greenwood program since the expert, through her private company, developed the Greenwood program and uses the Greenwood program as a model to other school districts with whom she consults. While the hearing officer agreed that Greenwood offers "solid inclusion programs," she did not agree with Greenwood's expert that use of language-based interventions and differentiated instruction in the mainstream means that an inclusion setting can serve almost all students, including Student.

There were two other unique issues that arose in this case. One was that when Student was in 2nd grade, Greenwood had grouped Student in a small group literacy group with a developmentally delayed Student with a full-scale IQ of approximately 50 as compared to Student's verbal IQ of approximately 117 (average to above average range). Parents understandably expressed concern about the appropriateness of this grouping, which Greenwood defended, with the teacher testifying that the two students' skill sets were at a similar level and Student was able to shine and become more self-confident working with this other student. Let's just say that is a tough sell! Interestingly, the issue about this student with the 50 IQ showed up again when parent's expert wanted to observe the program Greenwood had proposed for Student for 3rd grade. On the day of the scheduled observation in November 2013, following a conversation with Greenwood's Director of Special Education, the Team Chairperson offered to have the expert observe "another option" for Student. This other option was Ms. Oravec's Learning Center Program. At the hearing, Greenwood argued that Ms. Oravec's classroom was the one Greenwood was proposing in September 2013. The hearing officer found this argument "disingenuous and not supported by the credible evidence," noting that even if this had been intended, this was not made clear to the parents until the hearing. It goes without saying that it is unhelpful if the hearing officer concludes that a party is not being forthright with the facts.

Educators' Solid Understanding of Student's Needs Supports Appropriateness of Past and Proposed IEPs

In Re: Boston Public Schools, BSEA # 1400688, 20 MSER 157 (Putney-Yaceshyn, 2014)

Student is a 12-year-old boy with diagnoses of ADHD (combined type), visual impairment, learning disorder (NOS), and vi-

sual processing disorder. Student's mother filed for hearing, raising issues about the appropriateness of implemented IEPs for the last two years and proposed for the 2014-2015 school year and seeking placement at the Learning Prep School. According to the decision, this *pro se* parent was "organized and respectful" in her case presentation, but she was unable to sustain her burden of persuasion. The parent had had a private evaluator conduct a neuropsychological evaluation of Student and a different evaluator conduct an observation of two of Student's classes, but neither testified. Without either of these evaluators testifying, Student's mother was "up the creek without a paddle."

The first IEP at issue covered 4/2012 to 4/2013, spanning 4th and 5th grade. Student's mother was unable to prove the IEP covering the end of 4th grade was inappropriate because she had rejected Boston's proposal to change Student's placement earlier that year. Student's teacher had questioned the appropriateness of Student's placement since his academic skills were stronger than the rest of his class. However, when the parent rejected a mid-year change in placement, the teacher individualized and modified Student's reading and math instruction, resulting in progress. There was limited information about Student's 5th grade placement at a different school, Gardner Pilot School, but the little there was reportedly reflected Student progress. The second IEP ran from 4/2013 to 4/2014 and proposed an increase in services and a move from inclusion to a substantially separate setting. Two of Student's special educators testified about the effective progress that they observed Student making with the services provided. Hearing Officer Putney-Yaceshyn found these educators "particularly credible" because they "were able to explain Student's needs, strengths, and weaknesses with specificity, and to provide detailed testimony as to how they addressed his needs within their classrooms." Although Student admittedly was performing below grade level and had not reached IEP benchmarks, the parent failed to establish that this translated into a lack of effective progress commensurate with his potential. Boston's IEP for the 2014-2015 school year arguably was even stronger than the prior year, proposing more services in a classroom with fewer students who would be at a higher ability level than a second learning disabilities class. The hearing officer deemed this IEP appropriate, with the addition of counseling and consultation at the beginning of the school year between a teacher of the visually impaired and each academic teacher to clarify when they should provide student with large print materials.

Student's Hospitalization Immediately Prior to Going to Live at Residential School Does Not Prevent DESE from Determining that Student Actually Lived with Mother Before His Residential Placement

In Re: Worcester Public Schools, Medway Public Schools & DESE, BSEA # 1404967, 20 MSER 176 (Byrne, 2014)

Nolan is a 14-year-old student with special education needs who is in the custody of the Department of Children and Families (DCF) pursuant to a Child Requiring Assistance petition. Before September 2013, Nolan always had lived with his mother. In September 2013, DCF arranged for Nolan to live in an out-of-state residential, special education school. At that time, Nolan's mother was living in Worcester, and Nolan had an Individualized Education Program for an in-district special education program.

In response to a request from DCF, DESE issued an LEA assignment determining that Worcester had sole financial and programmatic responsibility for Nolan because he actually resided with his mother immediately prior to going into a residential school living situation. Hearing Officer Byrne correctly upheld DESE's determination and, in doing so, agreed that Nolan's hospitalization immediately before going to live at a residential school did not change the fact that Nolan continued to be deemed to reside with his mother while hospitalized. She also correctly held that the fact that Nolan never lived in Worcester was not controlling since Nolan is deemed to reside with his mother who did live in Worcester. As noted in this BSEA decision, DESE's LEA assignment here is consistent with DESE's previous practice, special education regulations regarding residency, and court decisions.

Determination of Lack of Social and Emotional Progress and Need for Program with "Reasonable Aggregate of Similar Peers" with Whom Student "Could Develop Meaningful Friendships" Results in Retroactive Reimbursement for Unilateral Placement and Prospective Placement at Private School

In Re: Acton Public Schools and Acton Boxborough Regional School, BSEA # 1405736, 20 MSER 179 (Figueroa, 2014)[1]

Student is a 14-year old with diagnoses of Autism Spectrum Disorder who is described as presenting with "anxiety, attention, processing and executive functioning and control deficits as well as significant learning related deficits and variable delays in cognitive functioning." Student attended the Acton Public Schools from kindergarten through 6th grade. However, when it came time for junior high school, Student's parents unilaterally placed Student at Learning Prep School. At hearing, Acton-Boxborough defended their in-district Individualized Education Programs for 7th and 8th grades that proposed supported general education science and social studies classes; daily math, English and academic support with Student's special educator who had worked with him for many years; speech/language services; extended day services; and, effective November of 7th grade, counseling services.

After four-days of hearing, Hearing Officer Figueroa determined that Acton was appropriately meeting Student's academic needs but not his social and emotional needs. In terms of academics, she noted that the parents' expert testified that Student had made meaningful academic progress in some areas, and, in fact, had progressed in some areas beyond his expectations given Student's cognitive ability. The hearing officer credited the testimony of Student's special educator regarding Student's effective academic progress and the appropriateness of the proposed programming from an academic standpoint. However, the social/emotional piece proved to be the school district's undoing, resulting in a BSEA Order to reimburse parents for the costs as-

1. This Commentator represented the school districts at this hearing.

sociated with their unilateral placement at Learning Prep and to continue Student's placement there until January 13, 2015, when his IEP expired.

In discussing the social domain, the hearing officer noted Student's undisputed social deficits and agreed with the parents that development of friendships should have been part of Student's social/emotional goals. She found two of parents' witnesses persuasive that achieving a friendship should occur in a more natural environment that provides Student with "natural opportunities to practice his skills across settings." The hearing officer cited the testimony of the parents' expert witness that Learning Prep had the "sizeable aggregation" needed for Student's social development. Also, according to the decision, the objectives for the IEP's social goal remained the same for 6th and 7th grade as well as 8th grade, which the hearing officer noted was evidence that Student was not making social progress. The hearing officer also held that there was not an appropriate peer group for Student in 7th and 8th grades. According to the decision, the school district contended that there were approximately nine students who would be socially appropriate peers. Parents argued that Student had received services previously with four of the nine students and, for the most part, none of the remaining five students would have been in Student's academic classes. According to the parents, this indicated that the remaining five peers were not appropriate peer matches for Student. The hearing officer also cited testimony from the parent's expert witness that the proposed cohort consisted of inappropriate peer matches because of the large differential in IQ scores and differing interests from Student's. The hearing officer also noted that the parents' expert witness knew some of the other students in the proposed cohort and believed them to be inappropriate peers for Student. As for the emotional domain, the hearing officer found that Student had issues related to "anxiety, frustration and lack of understanding of social behaviors" that the school district did not address in the IEP until after Student was unilaterally placed at Learning Prep.

In summing up her decision, Hearing Officer Figueroa noted that, for the time periods at issue, "Student required a program that offered him access to a reasonable aggregate of similar peers with whom he could develop a meaningful friendship." However, the hearing officer held out hope that it soon would be appropriate for Student to return to a less restrictive setting, noting that in the fall of 2015, Student would be entering high school when "programmatic options and aggregate of peers may drastically change."

Since this Commentator represented Acton-Boxborough at this hearing, I will try to temper my commentary about this decision. First, this is good opportunity to remind readers that BSEA decisions are written by attorneys who, as they should be, are writing decisions designed to be persuasive and to withstand the possible scrutiny of a judge on appeal. This Commentator, however, will note concern about the hearing officer's support for the proposition that a public school is responsible for ensuring that a student with special education needs makes at least "one true friend." To this Commentator, this proposition goes beyond what is, and should be, required for a public school to satisfy its obligation to provide a free, appropriate public education. Equally troubling is the apparent acceptance of testimony from the parents' expert that Student did not have an appropriate peer group for junior high school because of the differential in some IQ scores and differing interests from Student's. Query whether Student's special educator who had worked with Student for three years and had worked with the proposed peer group for an entire school year was in a better position to weigh in on this issue. Finally, the statement in the decision that Student required a program with "a reasonable aggregate of similar peers with whom he could develop meaningful friendships" is problematic not only for the "meaningful friendships" language but also for running counter to the IDEA's strong presumption that students with special education needs should be educated with their non-disabled peers to the maximum extent appropriate. ■