MSER Commentary

Fourth Quarter 2014

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The fourth Quarter at the BSEA saw an uptick in the number of rulings, with hearing officers issuing nine rulings as compared to the second and third quarters when they issued six and five respectively. The number of decisions following evidentiary hearings remained constant, with five decisions for the third quarter in a row.

There were two rulings in the fourth quarter in which the hearing officers determined that there was no need to exhaust administrative remedies at the BSEA on tort claims that were not IDEA-based. There was one substantive ruling of particular note in *In Re: King Philip and Daniel* in which the hearing officer held that the public school should have looked at the student's IEP status at the time misconduct occurred, not the time discipline was imposed, to determine if there was a need to conduct a manifestation determination meeting. King Philip's failure to hold a manifestation determination meeting caused the hearing officer to order King Philip to expunge an expulsion pursuant to Section 37H1/2 from the student's record. Public schools also need to be aware of the *In Re: Abington Public Schools* decision in which the hearing officer held that Abington's practice of making administrative determinations as to which out-of-district placements will implement IEPs is contrary to law since these are decisions that must be made through the Team metting process. Another interesting decision is *In Re: Tewksbury & Lee* in which the hearing officer held that Massachusetts law prohibited him from ordering the public school to provide special education services at a parochial school. Instead, he supported Tewksbury's offer to provide services at a neutral site as close as possible to the parochial school either before or after school while also noting that Tewksbury, at its option, could choose to use federal funds to provide services at the parochial school.

RULINGS

Given Legal Complexities in Case Involving Section 504 and IDEA Claims, Hearing Officer Denies Public School's Motion to Dismiss

In Re: Masconomet Regional School District and Paloma, BSEA # 1408394, 20 MSER 215 (Byrne 2014)

Student filed for a BSEA hearing seeking compensatory relief for alleged violations of state and federal special education laws and Section 504. During the 2010-2011 school year, Student was a 9th grader at Masconomet, which found her ineligible for an IEP but eligible for a 504 Plan. In 10th grade, Student's anxiety increased, resulting in faltering grades and attendance. According to Student, she also was bullied throughout the school year. Student went to Masconomet's summer school during summer 2012 school year and earned passing grades for the two courses she had failed during the school year. The following school year (2012-2013) Student attended school in Hamilton-Wenham as a school choice student. Hamilton-Wenham developed a Section 504 plan but removed her from the school's rolls in May 2013 due to non-attendance. Student's family moved out-of-state in July 2013 but returned to Massachusetts in July 2014.

Masconomet filed a Motion to Dismiss on statute of limitations and jurisdictional grounds, which Student opposed. The hearing officer noted that the pleadings raised "intriguing and challenging legal issues" including whether to use a three-year statute of limitations on Section 504 claims while using a two-year statute of limitations on IDEA claims arising out of the same facts. Quite understandably, Hearing Officer Byrne determined that the factual record was not sufficiently developed yet for her to tackle such complex legal issues. Consequently, she ruled that Student had made it over the "low bar" required for her claim to survive a motion to dismiss.

Hearing Officer Upholds Assignment of Sole Responsibility to One School District Where There Was No Evidence Student Actually Resided with Both Parents Living in Different Communities.

In Re: Amesbury Public Schools, BSEA # 1406933, 20 MSER 218 (Byrne 2014)[1]

This Ruling resolves a dispute regarding DESE's assignment of sole fiscal and programmatic school district responsibility to Amesbury. Student attends an out-of-district public day school pursuant to an IEP Amesbury developed. Student's parents are divorced, with her mother living in Amesbury and father living in Bedford.

As is reflected in the Ruling, school district responsibility for providing special education services is based on where a student actually resides. Amesbury asserted that Student resides with both of her parents such that both school districts should be responsible for Student's educational programming. The hearing officer ruled that Amesbury presented no evidence that Student actually lived with both parents. In fact, when Amesbury requested DESE assign a responsible school district, it submitted paperwork stating that Student "lives ... with her mother." Amesbury also submitted an undated, unsigned, and uncertified "parenting agreement," to show that Student lived with her father. Hearing Officer Byrne commented that "at best" the language in this document "could be read to cover a visitation arrangement." She stated that even if this document had been

1. This Commentator represented Bedford Public Schools in this matter.

current and reliable, it would have been insufficient to establish where Student actually resides. Hearing Officer Byrne noted that the determination of where a student "actually lives" is "highly individualized and fact dependent, taking in factors such as where the child sleeps, gets ready for school, does homework, participates in community activities, attends family, religious, cultural and civic events, etc." Given that there was no evidence to indicate Student is living, or ever had lived, with her father, the hearing officer ruled that DESE's assignment of sole responsibility to Amesbury is correct.

Concept of "Stay Put" Applies to Social Service Agency's Provision of Group Home for Student But Hearing Officer Refuses to Intrude on DMH's Determination as to Student's Specific Residential Placement

In Re: Quincy Public Schools, Department of Mental Health (DMH) and Rosalee, BSEA # 1502243, 20 MSER 229 (Byrne 2014)

Roasalee is a 14-year old who is eligible for an Individualized Education Program (IEP) and is a long-time DMH client. During the 2013-2014 school year, Rosalee attended school at Granite Academy pursuant to an accepted IEP and lived at Granite House funded by DMH. Granite Academy is a private therapeutic day school program approved by the Commonwealth to provide services to publicly funded students and Granite House is a DMH contracted group home that has no relationship with Granite Academy.

In July 2014, Granite House suddenly discharged Rosalee. DMH placed her at a STARR program in Plymouth for one month and then at the Community Intervention Program in Arlington. Rosalee's parents filed for a BSEA hearing and filed a Motion for Stay Put seeking an Order that DMH place Rosalee in a program that most closely resembles Granite House.

Hearing Officer Byrne determined that the legal requirement to maintain the last accepted educational program during a dispute extends to public agencies like DMH which are providing "additional services" that allow the special education student to access the special education program proposed by the public school. However, the hearing officer properly refused to intrude on DMH's responsibility to determine which program most closely resembles Granite House, noting that DMH has an internal appeal process that might provide a forum for the parents to raise their concerns about DMH's placement determination. As a result, the hearing officer merely incorporated into her Ruling DMH's written assurance to maintain Rosalee in a group residence appropriate to her clinical needs pending the resolution of the BSEA dispute or unless otherwise directed.

No Need to Exhaust Administrative Remedies at BSEA When Claims for Relief Are Not IDEA-Based

In Re: Winthrop Public Schools and Beatrice and Charlie,[2] BSEA # 1502412 & 1502413, 20 MSER 232 (Reichbach 2014) [Hearing Officer Sara Berman issued a similar ruling in *In Re: Georgetown Public Schools*, BSEA # 1405352 (Berman 2014)]

The parent of Beatrice and the parent of Charlie filed two separate BSEA hearing requests against Winthrop seeking monetary damages as a result of the harm their children allegedly suffered due to Winthrop's negligent and intentional actions and inactions related to a teacher who allegedly had abused and neglected the children, both of whom are on IEPs. Both parents were explicit that they were making no claims under the Individuals with Disabilities Education Act (IDEA) or Section 504.

Winthrop filed a Motion to Dismiss, arguing that the BSEA does not have jurisdiction over these tort claims seeking monetary damages since the claims are not IDEA-based. The hearing officer agreed, citing to 1st Circuit precedent and subsequent BSEA rulings that conclude that exhaustion of the IDEA's administrative process is not required when the claims for relief are not IDEA-based. The hearing officer correctly notes that the BSEA hearing officers do not have special expertise about the claims being made and that requiring full adjudication by the BSEA would impede rather than promote the goals of the exhaustion requirement.

School Should Have Looked at Student's IEP Status at Time Misconduct Occurred, Not Time Discipline Imposed, to Determine Need to Conduct Manifestation Determination Meeting

In Re: King Philip Regional School District & Daniel, BSEA # 1504287, 20 MSER 271 (Reichbach 2014)

Daniel was charged with a felony delinquency complaint regarding an incident that occurred in September 2012. In May 2013, Daniel received a suspended sentence with probation until he turned 18 years old. At the time the felony delinquency complaint issued and the suspended sentence was imposed, Daniel was a student on an IEP.

In October 2014, Daniel withdrew from school and revoked his consent for special education. Several weeks later, Daniel's attorney wrote to the school district that Daniel wanted to re-enroll in the district and to retract his withdrawal of consent for special education. Shortly thereafter, Daniel received notice that he was expelled from school pursuant to MGL Chapter 71, Section 37H1/2. Section 37H1/2 authorizes a principal to expel a student who is adjudicated delinquent or admits guilt in court regarding a felony delinquency complaint if the principal determines the student's continued presence in school would have a substantial detrimental effect on the school's general welfare.

Daniel filed for an expedited BSEA hearing, arguing that King Philip had denied him his right to a free appropriate public education by expelling him without first conducting a manifestation determination meeting to consider whether the misconduct that brought Section 37H1/2 into play was a manifestation of his disability. Hearing Officer Reichbach correctly determined that the school district should have conducted a manifestation determination because the misconduct, the resulting felony delinquency

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

charge, and the admission of guilt all occurred at times when Daniel was a student on an IEP. The hearing officer ordered that King Philip expunge the expulsion from Daniel's record and return him to school immediately. She further advised that if King Philip chose to impose further discipline that resulted in a change in placement based on behavior that occurred while Daniel was identified as a child with a disability, King Philip first would need to conduct a manifestation determination meeting.

In his cross motion for summary judgment, Daniel also argued that he remained eligible for special education services and King Philip immediately must provide him with an appropriate special education program, ideally returning him to his last special education placement as a day student at Bay Cove Academy. Hearing Officer Reichbach disagreed, correctly explaining that when Daniel and his parent revoked consent for the receipt of special education services, Daniel became a general education student. Thus, Daniel has a right to attend the school district's high school as a general education student, and given Daniel's request to be evaluated, the district must evaluate to determine eligibility for special education services.

DECISIONS

With Modifications to IEP, In-District Placement Provides FAPE For 19-Year Old

In Re: Concord-Carlisle Regional School District, BSEA # 1407063, 20 MSER 205 (Putney-Yaceshyn 2014)

Student is 19 years old and has an intellectual impairment, ADHD, and language and developmental delays. Student attended Concord-Carlisle's Pathways Program for grades 9-12. The IEP at issue continues to propose that Student participate in the Pathways Program, but her parents seek an Order requiring placement at LABBB Collaborative.

Hearing Officer Putney-Yaceshyn held that the Concord-Carlisle IEP, with a couple of modifications, was reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment. First, the hearing officer noted that the parents' one expert witness did not testify that the IEP was inappropriate. In fact, the expert had not reviewed the IEP and testified that she was unable to make any conclusions about its appropriateness. A word of advice to both parents and school districts from this Commentator is that their respective experts need to have reviewed the IEPs at issue, even if the expert believes she is unable to comment on its appropriateness. The hearing officer also discounted the expert's testimony that Student's program should consist of at least three days/week of vocational training and two days/week of independent skill development and social skills training since the expert could not articulate a reason for her opinion. Similarly, the hearing officer was not persuaded by the expert's opinion that it was problematic that Student was the only female in Concord-Carlisle's post-graduate program given that the basis for her opinion was that adolescent boys are different than adolescent girls.

According to the hearing officer, the parents sought to establish that the IEP was inappropriate because some of the IEP goals and objectives remained static over time. This argument did not carry the day since Concord-Carlisle staff testified persuasively that Student was demonstrating progress in these areas in terms of her independence and confidence. Parents also raised concerns about Student's vocational services, concerns which Hearing Officer Putney-Yaceshyn clearly did not share as she explicitly stated that Concord-Carlisle's program satisfied the IDEA's requirements about "transition services." She noted that Concord-Carlisle was providing Student with vocational education via supported employment at an in-district pre-school, which is an area of interest for Student. The hearing officer noted that the evidence at hearing reflected that Student enjoyed this work experience and was doing well there. In addition, Concord-Carlisle had a job coach accompany Student to three job sites on Wednesdays. The IEP also provided instruction regarding independent living through her life skills class.

Concord-Carlisle, however, did not walk away from hearing completely unscathed, as Hearing Officer Putney-Yaceshyn ordered IEP modifications. One modification was that Concord-Carlisle must provide Student with opportunities to practice social skills in a natural setting with a peer group larger than the six peers in the post-graduate program. The hearing officer recognized that this might require Student to participate in an existing social program out-of-district. To this Commentator, this modification seems to require the IEP to provide maximum feasible benefit rather than the more tempered standard of an appropriate program. However, with that said, this Commentator appreciates that the hearing officer merely ordered supplementation of the public school program rather than using this deficiency as a basis to find the entire program inappropriate. The hearing officer also ordered Concord-Carlisle to modify the IEP to include transportation/travel training within Student's community.

Decision Holds That State Law Prohibits Hearing Officer from Ordering Public School to Deliver IEP Services at Parochial School

In Re: Tewksbury Public Schools & Lee, BSEA # 1404036, 20 MSER 220 (Oliver 2014)

Lee is an 11th grader who attends a parochial school that his parents fund. The parties agree on eligibility for special education services and the services needed. So, what's the issue? The issue is that Lee's parents want services delivered at Lee's parochial school rather than at a neutral site Tewksbury offered.

Given that the parents continually stated that they wanted services provided at the parochial school, Hearing Officer Oliver noted on the record that he had advised that Massachusetts law prohibits him from ordering Tewksbury to provide services at the parochial school. Consequently, it should have been no surprise to the parties when he denied the parents their wish for an Order requiring Tewksbury to deliver services at the parochial school. Instead the hearing officer ordered what Tewksbury already had offered to do, which was to provide speech therapy and assistive technology services at a neutral site as close as possible to the parochial school before or after school. However, the Order reflects that Tewksbury, at its option, could use federal funds to provide services at the parochial school.

Parents also had compensatory claims because they previously had accepted proposed services that Tewksbury never provided. Tewksbury had no reason for not providing the services, resulting in an Order to reimburse the parents for co-pays for cognitive behavioral therapy and speech language therapy and for Kurzweil 3000 and Dragon Naturally Speaking computer software. The hearing officer also wrote into the compensatory services order that Tewksbury must provide reading services, social skill services, and/or academic services, all of which are proposed in the current IEP, if the parents change their minds and decide they want Lee to receive such services.

Decision Holds That It Is Contrary to Law for Placement Decisions to Be Made Administratively, Outside of IEP Team Meeting Process

In Re: Abington Public Schools, BSEA # 1407763 & 1502743, 20 MSER 237 (Figueroa 2014)

Student is a 15-year old 8th grader diagnosed with Autism/PDD-NOS, anxiety disorder, and ADHD. Student's parents are divorced, with very strained communication. In November 2013, Student's IEP Team met and developed an IEP proposing a partial inclusion placement for the rest of 8th grade and placement at Abington High School for 9th grade. Student's mother accepted the proposed program and placement, but only through 8th grade. At a January 10, 2014 IEP Team meeting, Student's mother discussed her concerns about the high school proposal and her plan to observe at the League School later that day. The IEP Team decided that the local vocational school would not be appropriate for Student and, given mom's concerns about the high school, the Team would meet again to discuss placement. One week later, five school staff members on Student's IEP Team visited the League School to assess the appropriateness of this program for Student. Student's middle school teacher testified that Abington staff left the tour of League with positive feelings about the program and the possibility of Student attending school there beginning in July 2014.

Student's IEP Team met again on January 21, 2014 to discuss Student's placement and the mother's visit to the League School. Student's father was supposed to attend, but had to cancel shortly before the meeting began due to car trouble. The meeting, however, went forward as scheduled. Student's mother and three school staff left the meeting under the impression that the Team had agreed that Student would attend the League School for high school. Two staff members did not believe that there had been a placement determination for the League School made at the meeting.

Abington contacted an out-of-district consultant who never had attended any of Student's IEP Team meetings. The out-of-district consultant did not believe the League School was appropriate for Student because she thought Student had higher abilities than other League students. Instead, she encouraged the parents to consider South Shore Educational Collaborative (SSEC). As directed by the out-of-district coordinator, Abington issued an IEP placement page for SSEC. As luck would have it, the mother rejected the placement and the father accepted it.

On April 17, 2014, Student's mother filed for a BSEA hearing regarding placement. A couple of weeks later, Student began attending school at SSEC. The parties participated in a BSEA pre-hearing conference, after which Abington issued a second placement page that proposed placement at the League School. Student's mother accepted this placement days later. During the pendency of the hearing, Student continued to attend SSEC, and Abington continued to offer both placements.

Hearing Officer Figueroa concluded that Abington was obligated to have offered Student placement at the League School given the Team determination on January 21, 2014. She did not mince words in writing that "Abington's practice of making administrative determinations regarding out-of-district placements is contrary to law." She noted that this administratively determined placement outside of the IEP Team process was a significant procedural violation that significantly limited the mother's right to participate in the decision-making process and disregarded the Team decision on January 21, 2014. Hearing Officer Figueroa noted that both the IDEA and state special education laws and regulations are clear that an IEP Team determines a student's program and placement, not a single individual or school administrators. Since placement at SSEC was the result of a "procedurally tainted process," Hearing Officer Figueroa ordered Abington to place Student at the League School for the remainder of the IEP period and continuing through the 2014-2015 school year.

This decision should serve as a wake-up call to public schools that placement determinations must be made by the IEP Team. If the school staff and the parents disagree about placement at the IEP Team meeting, then the school district issues its proposal, which the parents may reject. As demonstrated by this decision, if there is a likelihood that the parents and school staff are on different pages about placement, then the dialogue about placement options must occur at an IEP Team meeting.

Public School Prevails in Methodology Dispute Where Public School Seeks to Work with Student on All Communication Methods While Parent Wants to Work Exclusively on Speech Development

In Re: East Longmeadow Public Schools & Taylor, BSEA #1500165, 20 MSER 254 (Byrne 2014)

Taylor is a nine-year old diagnosed with Autism Spectrum Disorder, Attention Deficit Hyperactivity Disorder, cerebral palsy, verbal dyspraxia and apraxia, a severe communication disability, and global developmental delays. The parties agree that communication is Taylor's area of greatest need. East Longmeadow describes Taylor as a total communicator who communicates using signs, gestures, vocalizations, word approximations, picture symbols, and a communication device.

The crux of the dispute between the parties is a methodology dispute. Taylor's parent wants Taylor to talk and seeks the exclusive development of that mode of communication at the Speech Academy in Connecticut where she unilaterally placed Taylor. At the Speech Academy, apparently the school's exclusive focus is on speech development. Taylor does not use his communication device and does not have it with him during the 1 ½ hour

one-way commute to the Speech Academy. On the other hand, East Longmeadow's goal is for Taylor to be a functional communicator and offers support for Taylor to develop various modes of communication, including the mother's preferred mode of vocalization.

Hearing Officer Byrne concluded that the "weighty preponderance of credible evidence" is that East Longmeadow's 2014- 2015 IEP for an in-district placement satisfies its obligation to propose an IEP reasonably calculated to ensure that Tayler receives a free, appropriate public education in the least restrictive environment. There apparently was plenty of evidence of progress in all areas targeted by the 2013-2014 IEP, including testimony from providers about progress they observed, contemporaneous data collected by paraprofessionals, and results from evaluations conducted during the 2013-2014 school year. The hearing officer pointed out that there were no credible, expert recommendations for different services than what East Longmeadow proposed when the IEP Team developed the summer 2014 and 2014-2015 school year IEP. Since then, the Director of the Speech Academy administered one standardized test, from which she made a number of recommendations, including that the IEP propose a daily two hour speech language therapy session. East Longmeadow did not incorporate this recommendation in the IEP because school staff testified that Taylor did not have the attention span and interest to participate in a therapy session of that length. Hearing Officer Byrne noted that Taylor is not participating in speech language sessions of that length at the Speech Academy. She concluded her decision by aptly commenting that:

> Parents are, of course, free to choose and to try any form of education, or any specific non-harmful methodology they sincerely believe will provide a significant educational benefit to their child. Absent proof of the failure of a different appropriate choice chosen by the school, however, parents are not entitled to public funding of that choice.

Hearing Officer Agrees with Public School That Nine-Year-Old Student Requires More Restrictive In-District Programming to Meet His Needs

In Re: Malden Public Schools, BSEA # 1409290 & 1500006, 20 MSER 262 (Berman 2014)

Student is a nine-year-old boy diagnosed with Autism Spectrum Disorder (ASD) and ADHD. Malden filed for hearing seeking hearing officer approval of its 2014-2015 IEP. This IEP proposed changing Student's placement from a co-taught inclusion classroom to a primarily self-contained program for students with ASD and related disabilities. In this program, Student would have a small class size, high staff-to-student ratio, language-based instruction, and social thinking taught throughout the day.

Parent and Malden agreed that Student had functioned well in an inclusion 1st grade, with a 1:1 aide and pull-out support for ELA, math, social skills, occupational therapy, and speech language therapy. Consequently, for the 2013-2014 school year, the parties agreed to Student's placement in a co-taught 2nd grade, with a 1:1 aide, with pull-out occupational therapy, speech therapy, and counseling. In December of 2nd grade, Malden had Student's annual review Team meeting and surprised the mother by recommending a change in placement due to a lack of progress. The parent partially rejected the IEP and rejected the proposed placement, resulting in Student remaining in the co-taught general education classroom for the remainder of the school year. Student failed to meet the requirements for promotion to 3rd grade, so the school decided Student would need to repeat 2nd grade during the 2014-2015 school year.

In the fall of 2014, Student returned with his 1:1 aide for his second year of his co-taught 2nd grade classroom. School staff were concerned that Student was participating in activities only 25% of the school day despite intervention by teachers and his 1:1 aide. Malden conducted an educational assessment in September 2014 that reflected inconsistent academic progress. The evaluator wrote in the report that Student had been "struggling" in the co-taught classroom. For example, he often said "Pass" when asked a question and could not participate in partner discussions with peers. Malden conducted additional academic assessments that revealed minimal progress since fall of 2013, except for math calculations. One of the district's BCBA's observed Student in class and concluded that he had difficulty participating in language-based tasks and was highly prompt dependent from adults to perform tasks. Malden also had one of its Ph.D. level school psychologists conduct cognitive testing of Student. She supported Malden's proposed change in placement due to Student's difficulty with attention, language comprehension and use, social pragmatics, "theory of mind," and reported difficulty in the co-taught classroom despite much support and scaffolding.

Parent had two expert witnesses testify on her behalf. The first was a Ph.D. psychologist from MGH who recommended a "partial inclusion" program where Student would be in general education with the support of a 1:1 aide for some instruction (e.g. math and specials) and pull-out instruction in areas of weaknesses (e.g. reading comprehension). Malden took the position that this private evaluator's recommendation actually supported the program Malden was proposing. Parent also had a licensed psychologist and certified teacher from MGH's Lurie Center observe Student in his program and conduct some assessments. Parent's observer concluded that the observation supported that Student could be educated appropriately in an inclusion setting using a language-based, multi-sensory approach, an incentive system to reduce prompt dependency, and other modifications. Malden's BCBA co-observer disagreed, however. Malden's BCBA testified that Student did not really understand what was being taught and instead was relying on the aide to supply answers that he was unable to generate on his own.

Hearing Officer Berman agreed with Malden that Student was not making effective progress commensurate with his ability in his current co-taught general education classroom. Rather, his severe difficulties with understanding and using language, combined with his attention issues, prevented him from making meaningful progress in a fast-paced classroom with 20+ 2nd graders. She noted that the reinforcement plan suggested by parent's observer and one of Malden's BCBAs could not be imple-

mented in the current classroom due to the classroom's size, pace and activity level. Hearing Officer Berman agreed with Malden that the proposed placement had all of the elements recommended by witnesses for both sides (e.g. small, non-distracting environment, multisensory language-based instruction, embedded social language teaching, flexible opportunities for inclusion). However, given the many years of inclusion experiences Student has had, the hearing officer encouraged the parties to assess how Student was doing at the end of the school year even though the IEP at issue expires in October 2015. ■