MSER Commentary

First Quarter 2015

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The activity at the BSEA for the 1st Quarter was light, with three decisions following an evidentiary hearing and eight rulings. To this Commentator, the most noteworthy of the decisions was *In Re: Tewksbury Public Schools*, 21 MSER 29, where the hearing officer noted that the parents cited no legal authority that would allow a BSEA hearing officer to order a public school to fund an adult group home. Most of the rulings dealt with quirky issues (e.g. over-reaching subpoenas, emergency motion for independent neuropsychological evaluation, motion to substitute parent consent to release referral packets). The ruling in *In Re: Wellesley Public Schools and Vic*, however, is an important read for those working for public schools. This ruling, which is consistent with standard BSEA practice, orders Wellesley to produce redacted Individualized Education Programs (IEPs) and Behavior Intervention Plans (BIPs) for all peers in the proposed program at issue. These redacted IEPs and BIPs are provided to the parents' attorney, who then may share them only with the parents' expert witnesses.

RULINGS

Public School Must Produce Copies of Redacted IEPs and BIPs of Non-Party Students for Review by Parents' Attorney and Experts

In Re: Wellesley Public Schools & Vic, BSEA # 1503712, 21 MSER 39 (Oliver 2015)

Hearing Officer Oliver issued a written ruling resolving a discovery dispute between Wellesley and Vic's parents. According to the Ruling, the hearing officer denied parents' discovery requests with the exception of the requests for redacted IEPs and behavior intervention plans (BIPs) for those students with whom Vic would be grouped in Wellesley's proposed program for the 2014-2015 school year and for specialized instructional materials that Wellesley would be using in instructing Vic and his special education peers.

The Ruling reflects that the parents contend that the appropriateness of the proposed peer group is an essential part of their BSEA hearing request. Hearing Officer Oliver determined that the IEPs and BIPs of Vic's proposed peers are not protected from release by federal or state laws protecting the confidentiality of student records since Wellesley would be redacting the documents of identifying information. At a minimum, the ordered cleansing was to include the "name of the child, name(s) of parent(s) or other family members, address, date and place of birth, gender, race/ethnicity, any language(s) other than English that are spoken by student and/or parents, and any student number(s) assigned to such student(s)." In order to ensure further the confidentiality of the students who are not party to the hearing, the Ruling specified that the only recipients of the documents could be the parent's attorney and parents' experts (through the parents' attorney). In this Commentator's experience, this Ruling is reflective of the standard practice at the BSEA.

Full Compliance with Order to Reimburse Parents for Private School Tuition and Related Expenses Requires Public School to Reimburse for Non-Tuition Expenses If Needed for Student to Access Placement and Are Reasonable in Nature and Amount

In Re: Barnstable Public Schools, BSEA # 11-1387C, 21 MSER 18 (Berman 2015)

Parents filed for hearing arguing that Barnstable had not complied fully with a BSEA decision requiring Barnstable to reimburse Parents "for their out-of-pocket tuition and related expenditures for Student's placement at Franklin Academy for the 2010-2011 and 2011-2012 school years." As of the compliance hearing request, Barnstable had reimbursed Parents in excess of $155,000 in tuition alone. Parents claimed that Barnstable needed to reimburse them an additional $76,000+ for non-tuition expenses.

Hearing Officer Berman's Ruling articulates that the standard for reimbursement of non-tuition expenses is whether the expenses were necessary to ensure Student's access to his educational program or necessary for him to benefit from his educational program. In addition, the expenses must have been incurred and have been reasonable in nature and amount. Here, the expenses that did not meet this standard include intersession trips to the Grand Canyon and Hawaii; parent lodging and meals associated with non-mandatory parent training and counseling sessions and attendance at graduation; expenses associated with a non-mandatory field trip to New York to see a play; dormitory furnishings and household items; costs associated with BSEA hearing (e.g. travel, parking, meals); expenses associated with Student's private counseling, most of which predated Student's placement at Franklin Academy; interest in excess of $50,000 especially as Parents did not actually incur any interest charges (e.g. interest on a loan).

Hearing Officer Berman did order Barnstable to reimburse Parents in the amount of $4,715 for a travel experience that may have been mandatory ($464); a data plan needed for laptop computer required by Franklin Academy as well as software and small accessories ($1196); and travel costs for Student's transportation during school vacation breaks ($3055). While Barnstable did not dispute its obligation to reimburse for Student's transportation during school vacations, Barnstable's estimate of transportation expenses was lower than what the hearing

officer calculated. Upon payment of $4,715, Barnstable will have complied in full with the original BSEA decision.

DECISIONS

Boston's Horace Mann School for the Deaf Provided and Can Continue to Provide Appropriate Educational Programming for Student with Cochlear Implant

In Re: Boston Public Schools, BSEA # 1503083, 1401653, 21 MSER 1 (Figueroa 2015)

Student is a six-year-old boy who developed profound deafness as an infant and as a toddler, underwent cochlear implant surgery. For the first two and a half years of Student's public school education, Student attended Boston's Horace Mann School for the Deaf, a public day school. While there, a big bone of contention was the parent's desire for Student to be educated using only oral language, with no instruction in American Sign Language (ASL). The parent's preference ran counter to all recommendations, including Boston's own recommendations and those from evaluators of the parent's own choosing. The parent, however, was undeterred, and Boston acceded to her strong preference regarding teaching methodology although not obligated to do so.

In dealing with Student's mother, Boston also had to contend with the parent's stated preference that her child not be educated with children who had disabilities other than deafness because "she found it unfair that he would be exposed to them given that Student only had a hearing impairment." Student's mother also was not shy about sharing her preference for a private school education for her children. Other bumps in the road for the parties included a disagreement about retention in kindergarten, with Boston for it and the mother against. The parent also was distrustful of school staff. On one occasion, when it took Boston 20 minutes to locate her son when she came unannounced to pick him up, the parent filed a 51A due to concern that her son may have been molested during this 20 minute window. The parent, however, produced no evidence of molestation, and the Department of Children and Families did not substantiate the parent's report. At another point, the parent had an argument with the vice principal and a secretary, so the mother stopped sending her son to school.

With these facts, this Commentator was not surprised to read that Boston had offered to settle this case by funding the parent's placement of choice at READS Collaborative in exchange for a release of all claims, including claims for compensatory services. The parent, however, refused to release compensatory claims. Boston then withdrew its offer to fund READS Collaborative, and a three-day hearing soon followed. In reading the decision, it appears that Boston had allowed Student to be placed at READS Collaborative before the parties signed the settlement agreement resulting in Boston having to fund READS Collaborative as a matter of "stay put" during the pendency of this BSEA hearing.

Knowing the solid reputation of the programming available at the Horace Mann School for the Deaf coupled with the description of this parent's preferences and behavior, this Commentator also was not surprised to read Hearing Officer Figueroa's conclusion that Boston's IEPs provided FAPE for the two years in question. She found that the progress Student made in Boston was effective, especially in light of the challenges Boston faced in delivering services to Student. These challenges included parent-caused interruptions in service delivery and Student's delayed language acquisition due to deference to parent's preferred teaching methodology. The hearing officer also noted that parent's preference for spoken English and aversion to ASL meant that when Student was at home, he had little to no access to language or communication. Also negatively impacting Student's language development was a five-month time period when his language processor was lost, which meant that Student had no access to sound during that time. As far as overall programming and services, the hearing officer noted that the reality is that the program and services at the Horace Mann School for the Deaf and READS Collaborative were "largely duplicative" of one another. Consequently, there was no need for Student to receive services outside of his home district of Boston.

Interestingly, the decision reflects that at READS, ASL is taught (voice-off) during part of the day while spoken English is used during other parts of the day. As readers know in reading this Commentary, the parent wanted nothing to do with ASL when Student attended school in Boston. However, once Student began attending school at READS where there was ASL instruction, the parent suddenly embraced ASL. In fact, the parent expressed her excitement at being able to better communicate with her son using some signs. While this sudden about-face is frustrating since Boston could have delivered ASL and spoken English instruction to Student just as READS is doing, the silver lining is that Student's brief experience at READS appears to have opened the mother's eyes to the benefit of ASL for her son.

Hearing Officer Rejects Parents' Request That Public School Fund Group Home

In Re: Tewksbury Public Schools, BSEA # 1402344, 21 MSER 29 (Putney-Yaceshyn 2015)

Student is 19-year-old young man with a Pervasive Developmental Disorder, intellectual impairment, and Type 1 diabetes. In the spring of 2014, Student was attending LABBB Collaborative's program housed at Arlington High School. Student's Team met at that time and proposed that Student attend a residential program. Tewksbury sent out referral packets, with the Devereux School in Rutland, MA being the only school to accept Student. Tewksbury proposed placing Student residentially at Devereux. Student's parents, however, sought for Student to continue at the LABBB placement while residing in an adult group home close his home that they envisioned Tewksbury funding.

At the hearing, Parents presented no evidence to establish that Devereux's day placement was inappropriate for Student. Hearing Officer Putney-Yaceshyn also noted that Devereux's residential program is approved by the Commonwealth as a provider of publicly-funded special education services. She also cited attributes of Devereux which appeared particularly appropriate for Student such as (1) scheduled activities after school until students go to bed, (2) ABA program model, (3) opportunities to practice social skills and to receive instruction regarding hygiene

and chores, (4) case managers and clinical staff on site at all times, and (5) well-trained, credentialed staff. Consequently, the hearing officer concluded that a residential placement at Devereux was reasonably calculated to provide Student with a free, appropriate public education in the least restrictive environment.

In an effort to help the parties move forward, the hearing officer gave the parents some guidance about the pitfalls in their position. First, she noted that the parents did not cite to any legal authority that would permit a BSEA hearing officer to order a public school to fund a residence in an adult group home that admittedly was not an educational placement. Second, if the parents are correct that Student's educational needs are met in full in the LABBB program, then Tewksbury would not be obligated to fund any residential services. Hearing Officer Putney-Yaceshyn emphasized Student's need for a residential education program due to his slow, incremental progress over the years; his need for instruction and reinforcement in activities of daily living (e.g. hygiene, cooking, chores); and his inability to control his behavior outside of school. Finally, public funds cannot be used to fund a non-educational residential placement where, as here, an approved residential school accepted Student's application and a hearing officer has found the school appropriate for Student.

Four-Day Hearing over Inclusion Programming Versus Residential Programming Ends in Decision Holding That In-District IEP Addresses All Areas of Need

In Re: Richmond Consolidated School District, BSEA # 1410881, 21 MSER 40 (Scannell 2015)

Mark is a 14-year-old student diagnosed with Asperger's Syndrome, Obsessive Compulsive Disorder (OCD), Generalized Anxiety Disorder, Attention Deficit Hyperactivity Disorder, Sensory Processing Disorder, and a math disorder. Mark began attending the Richmond Consolidated School District (RCS) when he was in 1st grade. Mark was on a 504 Plan prior to being found eligible for an IEP in September 2012.

Mark's parents fully accepted Mark's initial IEP that proposed full inclusion in a general education classroom with no more than 12 students, occupational therapy services, and social skills services with the school adjustment counselor (SAC). In the fall of 2011/winter of 2012, Mark engaged in inappropriate behavior and/or language with peers and school staff on several occasions. RCS recommended a risk assessment. The Team met to consider the risk assessment but did not propose any changes to the IEP. However, consistent with the evaluator's recommendations, the school adjustment counselor spoke with Mark's outside therapist about using common language and RCS re-educated staff about Autism Spectrum Disorder and Asperger's Syndrome. In winter and spring of 2013, Mark's math and homeroom teacher reported that Mark was struggling after returning from winter break (e.g. being inattentive and needing more assistance). By parent report, Mark's OCD and anxiety were increasing at home with some assaultive behaviors. In May 2013, Mark was hospitalized for 10 days for increased anxiety and OCD symptoms. Pursuant to a note from Mark's treating psychiatrist, RCS provided home tutoring for the remainder of the school year.

During summer 2013, Mark's parents placed Mark at a wilderness program in North Carolina. For the 2013-14 school year, Mark's parents unilaterally placed Mark as a residential student at the Hillside School in Marlborough, MA. In April 2014, Hillside was expressing concern about Mark's placement there due to inconsistent class attendance and attention difficulty. Parents removed Mark from Hillside, and RCS provided home tutoring for the remainder of the school year.

In June 2014, RCS developed an IEP proposing occupational therapy, services with the school adjustment counselor, pullout math instruction with a special educator, group social skills work, services with a behaviorist to address anxiety, extended school year services, and accommodations. RCS proposed placement in a full inclusion program, where Mark would have the same teachers as the prior year. Mark's parents rejected the services and placement, informing RCS of their intent to unilaterally place Mark as a residential student at the Middlebridge School in Rhode Island. RCS then conducted a transition assessment, occupational therapy assessment, and math evaluation and convened the Team twice, making minor changes to the proposed IEP.

Hearing Officer Scannell concluded that the parents had not met their burden of proving that RCS's proposed IEP was inappropriate. The hearing officer was impressed with how cooperative and flexible RCS was in developing the proposed IEP, noting that the testimony and documents revealed a caring staff. In addition, testimony from RCS staff, his grades, and his MCAS scores reflected that Mark had been making effective progress when he was in school at RCS. Hearing Officer Scannell explicitly stated that Mark's difficulties after winter break with staying focused, consistently remaining in class, and being hospitalized did not translate into a need for a residential placement. While the evaluator who evaluated Mark during the wilderness program recommended a residential placement, the hearing officer correctly determined that this recommendation "lacks support and credibility." The evaluator did not testify at the hearing, evaluated Mark only once, never spoke with RCS staff, never received or requested information about RCS's program, never observed Mark in a school setting, and never reviewed the proposed IEP. While parents had their private evaluators testify about their transition assessment/vocational evaluation, the hearing officer correctly gave these evaluators and their report zero weight since the first time RCS saw their report was when they got the parents' binder of exhibits. IEPs are based on information available to the Team at the time of the development of the IEP. The parents cannot withhold information from the Team and then try to use that same information to establish that the proposed IEP is inappropriate. The hearing officer concluded her decision by "encouraging" RCS to conduct a more comprehensive transition assessment and Mark's Team to consider wrap around services (e.g. after school services). ■