MSER Commentary

Second Quarter 2011

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It was a reasonably active second quarter at the BSEA, with seven rulings and seven decisions. Interestingly, all three decisions regarding unilateral placement disputes involved students who were placed by their parents at the Landmark School in either fourth or fifth grade. The parents prevailed in full in Hingham, the school district prevailed in full in Wellesley, and the school district and the parents had a split decision in Pentucket. This Commentator also was struck by the number of lengthier hearings this quarter, with two hearings lasting five days and one hearing lasting four.

RULINGS

Hearing Officer declines to join DDS, given regulation prohibiting DDS from providing residential support to children younger than 18

In Re: Westborough Public Schoolsl (BSEA #10-7493, Oliver), 17 MSER 75 (2011)

"Hal" is a 13-year-old student who attends a private day school (Mercy Center) pursuant to an Individualized Education Program ("IEP") Westborough Public Schools developed. Hal's parent filed for hearing seeking a residential placement and subsequently sought the joinder of the Department of Developmental Services ("DDS") as a party to the hearing. Although Hal has been a DDS client since 2008, the hearing officer accepted DDS's argument against joinder since DDS regulations allow for the possibility of DDS-provided residential services only when the student has reached age 18. This Commentator agrees with this outcome as the DDS regulations explicitly state that DDS shall not provide residential support to children younger than 18.

Statute of limitations tolled due to alleged failure to provide translated copies of notice of procedural safeguards

In Re: Boston Public Schools (BSEA #11-4676, Crane), 17 MSER 76 (2011)

As a general rule, BSEA hearing officers refuse to entertain motions to reconsider rulings or decisions. This case, however, proved to be the exception to the rule. Initially, the hearing officer dismissed the parent's claims that fell outside of the IDEA's two-year statute of limitations. The parent's attorney then sought reconsideration, arguing that the hearing officer failed to consider allegations in the parent's amended hearing request that supported tolling of the statute of limitations. Specifically, the parent alleged that Boston failed to provide translated copies of the notice of procedural safeguards for the 2005-2006 through 2008-2009 school years.

The IDEA provides limited exceptions to the 2-year statute of limitations. One exception is if the parent was prevented from requesting a due process hearing due to the local educational agency's ("LEA") withholding of certain information from the parent that the IDEA requires be provided. Here, the hearing officer correctly concluded that the IDEA requires LEAs to provide a notice of procedural safeguards to parents at least once a year, consequently Boston's alleged failure to provide such notice in French to the parent tolled the statute of limitations.

Request for substituted consent for evaluations fails due to public school having conducted same evaluations seven months earlier

In Re: Bridgewater Raynham Public Schools (BSEA #11-6444, Figueroa)

Interestingly, Bridgewater Raynham ("BR") filed for hearing seeking substituted consent to re-administer speech-language and psycho-educational evaluations that BR had conducted only seven months earlier. The hearing officer correctly refused to grant such a request, especially as the IDEA has language that appears to prohibit conducting re-evaluations more than once a year unless both the parents and the LEA agree otherwise.

This ruling also addressed the parents' request for a publicly-funded independent educational evaluation ("IEE"). Public school administrators will appreciate the hearing officer's statements that "there is no question" that schools have a right to conduct their own testing and that this school-based testing is a pre-requisite to a parent's right to request a publicly-funded independent educational evaluation ("IEE"). BR's problem here was that BR had conducted its own testing so that when BR received the parents' request for a publicly funded IEE, BR needed either to agree to pay for the evaluation at the rate set by the state or to request a hearing within five school days of receipt of the request. BR did neither but instead asked for additional information about the request, making it unclear whether BR was willing to fund the IEE. The hearing officer ultimately ordered BR to fund the requested evaluation but only at the rate set by the state and only after the parents informed BR of the type of evaluation to be conducted, the background and qualifications of the proposed evaluator, and the evaluator's willingness to abide by the state rates.

Hearing Officer again rules that BSEA must make findings of fact regarding IDEA and section 504 damages claims before parties can proceed to court on such claims

In Re: CBDE Public Schools (BSEA #10-6854, Crane), 17 MSER 107 (2011)

Parents filed for hearing alleging that when Student was 14 she was raped by a CBDE employee, resulting in behavioral and emotional outbursts that should have caused CBDE to propose evaluating student to determine special education eligibility. CBDE eventually did evaluate Student and, after parents filed for a BSEA hearing, placed Student in a residential placement. Par-

ents' hearing request, however, sought not only a residential placement but also monetary damages for CBDE's alleged failure to provide appropriate services and supports.

In February 2011, the hearing officer ruled that Student's parents must exhaust their administrative remedies at the BSEA for IDEA and Section 504 damages claims. The hearing officer ruled that the hearing and fact finding would be limited to what is needed to determine whether rights under IDEA or Section 504 have been violated and, if so, the nature and extent of any educational harm. In April 2011, CBDE renewed its motion to dismiss, this time filing a memorandum in support of its arguments. The hearing officer correctly denied the motion, citing a number of federal court decisions that stand for the proposition that there must be fact-finding at the administrative level before a court can consider the parents' damages claims.

Consistent with wishes of parties, hearing officer assumes jurisdiction over settlement agreement and then dismisses parent's hearing request pursuant to agreement

In Re: Ipswich Public Schools (BSEA #11-7213, Putney-Yaceshyn), 17 MSER 135 (2011)

This ruling is a continuation of the spate of recent rulings on the enforceability of settlement agreements by BSEA hearing officers. In this case, the parties agreed that the BSEA had jurisdiction to resolve their dispute about their settlement agreement, so the hearing officer assumed that the BSEA has such jurisdiction, in order to resolve the dispute. After analyzing the parties' eight-page detailed settlement agreement, the hearing officer concluded that Ipswich had performed all of its obligations under the agreement to date. The hearing officer also determined that the terms of the agreement required dismissal of the parent's hearing request and that the parent, who is herself an attorney, could not distance herself now from the settlement agreement that she helped draft with the assistance of an attorney.

As is stated in this ruling, the BSEA hearing officers continue to disagree about the BSEA's jurisdiction over settlement agreements.

DECISIONS

Leominster's IEP for intensive PDD program provides FAPE even though program provides fewer weeks of services than proposed by former district of residence

In Re: Leominster Public Schools (BSEA #11-5122, Scannell), 17 MSER 83 (2011)

"Sean" is a nine-year-old boy on the autism spectrum who moved with his family to Leominster in spring of 2010. Leominster filed for hearing seeking an Order that its IEP placing Sean at FLLAC Collaborative's intensive pervasive developmental delay program provides Sean with a free appropriate public education ("FAPE"). At hearing, the parents argued that the proposed IEP did not provide FAPE because it did not provide an extended school day and the 6-week summer program was insufficient to prevent substantial regression. Not surprisingly, the parents failed to convince the hearing officer that their position was correct as they did not have any documentary or expert testimonial evidence to support their position. The parents, however, did recoup three weeks of extended school year services reflective of the additional two weeks of summer services and February school vacation week services that had been in the accepted IEP developed by the former district of residence but not provided by Leominster subsequent to Sean's move. However, since the hearing officer concluded that such services are not necessary prospectively, parents' recovery was limited to compensatory services.

First grade METCO student must attend school in Boston in order to have her needs met

In Re: Lincoln Public Schools and Boston Public Schools (BSEA #11-4678, Figueroa), 17 MSER 95 (2011)

Student is a first grade METCO student who resides in Boston and attends school in Lincoln. Lincoln filed for hearing and was successful in obtaining an Order upholding its development of an IEP placing Student in a substantially separate language-based program within the Boston Public Schools. The hearing officer rejected the argument by parents' experts that Student's needs could be met in Lincoln if Lincoln implemented a co-teaching model (regular educator and special educator delivering instruction together) for Student's general education math, science, and social studies classes. The hearing officer noted that this model would wind up being a parallel teaching situation. However, the hearing officer did agree with parents that it would be detrimental to move Student prior to the end of the school year, so she delayed implementation of the IEP for the Boston Public Schools until summer 2011.

This Commentator understands the outcome reached here, given that Student had received daily 1:1 instruction in math and reading and yet, in first grade, was already a year below grade level in math and continuing to struggle with reading. However, this Commentator is troubled by Lincoln staff's apparent testimony about the gap between Student and her typically developing peers widening instead of closing. This Commentator believes that the focus should be on whether Student is making meaningful and effective progress commensurate with her ability, which may well mean that the gap between Student and her peers is widening. Lincoln staff, however, should be commended for their efforts in preparing flow charts regarding Student's behavior and Developmental Reading Assessment (DRA) comparison flow chart, which appear to have been persuasive visual representations of Student's difficulty in accessing the general education curriculum in a meaningful way. Also of note was the hearing officer's discussion about the special education regulation that applies to METCO students and requires that when a METCO student's Team determines that the student may need an out-of-district placement, another meeting is to be scheduled so that representatives of the school district of residence can attend the Team meeting. The hearing officer noted that the regulation envisions two separate Team meetings but that the meetings could be consolidated as long as the parents do not object to the consolidation and the necessary Team members are in attendance. While Boston was at the Team meeting table earlier than envisioned by the regulations, the hearing officer concluded that this non-compliance caused no harm to Student.

Parents are successful in bid for reimbursement for Landmark School for fifth grade and for prospective placement at Landmark

In Re: Hingham Public Schools (BSEA #11-3762, Crane), 17 MSER 111 (2011)

After four days of hearing, Hingham found itself on the losing end at the BSEA, receiving an Order to reimburse parents for Student's unilateral placement at Landmark School for fifth grade and to amend the current IEP to provide for placement at Landmark prospectively. The hearing officer was persuaded most by one of parents' two expert witnesses. This was due largely because this witness previously had supported Hingham's pull-out model of programming but over time became convinced that Student required more restrictive programming such as Student was receiving at Landmark. This Commentator agrees that these circumstances greatly enhance a witness's credibility. Another substantial blow to Hingham was the testimony of Student's 4th grade general educator and special educator that Student appeared exhausted for much of the second half of the school year. One can understand why it would be difficult to order the continuation of similar programming for 5th grade after hearing that a 4th grader, who is uniformly described in positive terms, routinely appeared fatigued in school. In addition, according to the decision, the general education teacher's testimony supported that of Student's mother that Student demonstrated a high level of frustration and low self-esteem from December of fourth grade until the end of the school year.

This Commentator wonders if the outcome here would have been different if Hingham had had a private evaluator to bolster school staff's testimony and to rebut parents' two experts. While certainly school staff members are experts in their own right, none of Hingham's witnesses appeared to challenge either the parents' expert's reliance on grade equivalencies on the Woodcock Reading Mastery Test to prove regression or the assertion that Student should have been expected to demonstrate a year's worth of progress on the Gray Oral Reading Test in a year's time. In addition, parents' two experts undercut the probative value of Hingham's informal testing and progress reports demonstrating progress, without apparent rebuttal from Hingham.

State regulations require written physician's order for use of hip stabilizing belt during feeding, absent parents' consent to use

In Re: Norwood Public Schools (BSEA #11-5444, Crane), 17 MSER 147 (2011)

Student is described as a medically complicated boy who is diagnosed with Pervasive Developmental Disorder, Not Otherwise Specified. At the request of the parties, the hearing officer issued this partial decision following 5 days of hearing in order to resolve the dispute about the appropriateness of using a hip stabilizing belt while feeding Student. The hearing officer agreed with Norwood that the use of the hip stabilizing belt made eating more efficient and safer for Student. However, given state regulations regarding use of mechanical restraints, the hearing officer concluded that, absent the parents' consent, Norwood could proceed with using the hip stabilizing belt only upon receipt of a written order from a physician.

In-district programming found appropriate such that no reimbursement ordered for unilateral placement at Landmark School

In Re: Wellesley Public Schools (BSEA #10-6553 & 10-8510, Scannell), 17 MSER 161 (2011)

In this case, Wellesley took the bull by the horns, filing for hearing and seeking an Order that its proposed IEP for in-district programming was appropriate for "Ian," a fifth grader who had been unilaterally placed at Landmark in fourth grade. Parents then filed counter-claims seeking reimbursement for Landmark for 4th and 5th grade and for private tutoring while Ian had been attending school in Wellesley. After five days at hearing, Wellesley prevailed on all issues in dispute.

Ian's parents contributed to their own downfall, writing to Wellesley in February of third grade to express their excitement with Ian's progress in school academically, personally, and socially only to write to Ian's private tutor a month later requesting that she write a letter articulating why Wellesley needed to pay for Ian to attend Landmark. In the e-mail to the private tutor, Ian's mother wrote that it might be difficult to make a case for an out-of-district placement since Ian had made progress in his program in Wellesley, was thriving in math, and was fully engaged in all of his classes. From this Commentator's perspective, it is distressing that Wellesley needed to expend the time, effort and financial resources to defend its programming when Ian's own parents were so positive about his educational experience in Wellesley.

Other casualties from this hearing were Ian's private tutor and neuropsychologist, both of whom the hearing officer determined were not credible. The private tutor, in particular, had much explaining to do, which she failed to do well since the hearing officer found her testimony "confusing and contradictory." For example, the private tutor testified that she had had concerns about Ian's reading progress dating back to second grade. However, she never expressed any concerns to Wellesley at that time, including at the Team meeting in second grade. To the contrary, she reviewed the IEP developed when Ian was in second grade and advised the parents it "looked good." In the fall of third grade, she wrote to Wellesley staff that she was impressed with Ian's continued reading progress, greater focus and decreased frustration. Moreover, in January of third grade, the private tutor wrote to Wellesley again and characterized Ian's reading progress as being a "significant gain."

Split decision results in order for reimbursement of Landmark School for limited time period

In Re: Pentucket Regional School District[1] (BSEA #11-5530, Scannell), 17 MSER 150 (2011)

"Ben" is a 13-year old boy who, at the time of hearing, was completing the seventh grade at Landmark School, where he has attended school since fifth grade. Prior to going to school at Land-

1. An attorney in this Commentator's firm represented Pentucket at this hearing.

mark, Ben attended a parochial school. Pentucket first found Ben eligible for an IEP when he was in third grade. Ben's parents had accepted Pentucket's proposed IEPs until March of fifth grade, which is when they first requested public funding of Ben's Landmark placement.

The outcome here was split, with the hearing officer ordering reimbursement from April 2009 through the end of the 2009-2010 school year but no reimbursement from August 2010 through April 2011 (grade 7) given the appropriateness of the proffered IEP. The hearing officer determined that the first IEP at issue did not provide FAPE since it did not identify all of Ben's needs (e.g. written expression, slow processing, output deficits) or offer services or accommodations to address such needs. The successor IEP also was lacking, as the hearing officer determined that the IEP goals and benchmarks were vague and ambiguous and that all areas of needs were not included (specifically written expression). However, the most recent IEP covering August 2010 through April 2011 offered Student FAPE as it contained measurable goals in all areas of need and offered more specific and detailed benchmarks and additional accommodations. Ben's parents attempted to rely on their private evaluator's written report for support for Ben's continued placement at Landmark, but given that the private evaluator did not observe Pentucket's proposed program or testify at the hearing, the hearing officer correctly accorded no weight to the evaluator's opinion in the evaluation report. ■