MSER Commentary

Third Quarter 2011

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If this Commentator's count is accurate, the 3rd quarter was especially busy at the BSEA, with 16 decisions after an evidentiary hearing and 5 rulings. This is more than twice the number of decisions 2nd quarter, when there were 7 decisions and 7 rulings. So, the slow-down in the economy has not resulted in a slow-down at the BSEA! The average number of days of hearing per hearing averaged 2¼ days, which, to this Commentator, seems to reflect an efficient system at work.

RULINGS

"Move-in" Law Does Not Apply to Student with IEP for An Unapproved Private Day School

In Re: Wachusett Regional School District (BSEA # 11-6533, Byrne), 17 MSER 295 (2011)

This Motion for Summary Judgment involved a dispute between school districts regarding the timing of the transfer of financial responsibility for a student's special education programming, which was being provided in an unapproved private day school per Student's IEP when the Student moved to a different community. In Massachusetts, the school district where a student resides is responsible for the student's educational programming. As a general rule, if a student moves into a new community, the new community immediately assumes responsibility for the student's educational programming. However, the Massachusetts legislature carved out an exception to that general rule for students who are in approved private day or residential school placements that are funded by their prior districts of residence. This law, the so-called "move-in" law, delays the transfer of financial responsibility to the new district of residence in order to allow the new district of residence some lead time to budget for these more expensive placements. The timing of the transfer of financial responsibility depends on the date of the student's and/or parent's move.

Here, Wachusett, the new district of residence, argued that the "move-in" law applied even though Student was attending an unapproved—not an approved—private day school. According to Wachusett, the former district of residence should not be rewarded for failing to do what it should have done which was to obtain sole source of care approval from the state for Student's placement. The hearing officer, however, sided with DESE and the former district of residence in determining that the "move-in" law did not apply because Student was attending an unapproved, rather than approved, private day school at the time of the move. No doubt this was a bitter pill to swallow for Wachusett, but the hearing officer had no other viable alternative given the clear statutory language of the "move-in" law and the DESE's interpretation of the "move-in" law and its own regulations.

Enforcement of Settlement Agreement Leads to Partial Dismissal of Parents' Hearing Request

In Re: Marlborough Public Schools (BSEA # 11-3650, Figueroa), 17 MSER 201 (2011)

And, so it goes. This ruling is yet one more on the issue of whether the BSEA has jurisdiction to enforce settlement agreements. Here, Hearing Officer Figueroa comes down on the side of enforcing the settlement agreement. As a result, Marlborough succeeds in having the hearing officer dismiss that part of the parents' hearing request that the settlement agreement resolved. In so ruling, the hearing officer noted that both parties voluntarily entered into a settlement agreement at a time both were represented by counsel. Moreover, the settlement agreement language was clear and provided parents with the school of their choice. Now, after the parents have received a year's worth of receiving the benefit of the bargain, the parents are dissatisfied with the private school they choose and seek to revisit the appropriateness of the programming their child received there. Although the parents were precluded from pursuing their past claims, they were able to pursue their claim for prospective relief, which they did and lost.

Hearing Officer Rules Parent's Action on Behalf of Adult Son Can Proceed

In Re: Taunton Public Schools (BSEA # 10-8142, Byrne), 17 MSER 267 (2011)

Taunton filed a Motion to Dismiss a parent's hearing request arguing that the parent lacked the authority to pursue the hearing request since her son is an adult and had not delegated educational decision making to her. However, the ruling reflects that the claim arose while the Student was a minor and the Student had authorized his parent to pursue any legal matters without restriction. Consequently, the hearing officer had no choice but to allow the BSEA hearing to proceed. However, what is most notable about this ruling is the language about the parent's lay advocate. The hearing officer writes that the advocate submitted "impertinent, frivolous and scandalous" material which, if it had been submitted by an attorney, would have led to significant monetary sanctions. Sounds like Taunton and its attorney deserve combat pay for their work on this case! However, all kidding aside, it is distressing that someone can act this poorly at the BSEA with impunity beyond the embarrassment associated with a hearing officer writing such things about you in a ruling available to the public.

DECISIONS

Parent's Refusal to Allow Public School to Implement Fully Proposed IEP Is Contributing Factor to Failed Bid for Placement at Private Day School

In Re: Springfield P.S. (BSEA # 11-0868, Berman), 17 MSER 175 (2011)

Student is a 15-year-old 10th grader attending Putnam Vocational High School. Student has ADHD, emotional and behavioral issues, a significant language-based learning disability and executive functioning weaknesses. Parent contends that Student has not made effective progress in remediating his language-based learning disabilities and should be placed at White Oak School, an approved school for students with language-based learning disabilities. According to parent, if Student's learning disabilities are addressed appropriately, Student's behavior problems would be eliminated or reduced. Springfield contends, however, that Student has made progress and would have made even more if only his parent had allowed Springfield to implement all the services it had proposed for Student.

The hearing officer found for Springfield, emphasizing that the parent had no current evaluation faulting the proposed IEP or placement. To the contrary, an October 2009 evaluation report that the parent relied on actually endorsed Student's placement at Putnam Vocational High School. Another contributing factor to the parent's loss was her refusal to allow the school to implement all of the services the school thought were needed to provide Student with a free appropriate public education. The hearing officer noted that the parent might be correct that the school's proposed services are not the "magic bullet," but no one will know for sure until the services are implemented.

Given the lack of documentary support for the parent's position, this decision appeared to be a "no brainer." To this Commentator, it also seems just that the parent failed in her quest for a more restrictive setting when she has refused to give the school the opportunity to implement, in full, its proposed program. Parent's position would have been infinitely stronger if she had allowed for the full implementation of the proposed IEP. If she had done so, either the program would have been successful or, if not, parent could have argued more compellingly that something different was required. As the hearing officer correctly noted, parent's refusal left room for speculation about the "what ifs."

Manchester-Essex Resorts to BSEA Hearing Process Given Parents Whose Wishes And Actions Often Were Contradictory

In Re: Manchester-Essex R.S.D. and Mia (BSEA # 11-2977, Oliver), 17 MSER 187 (2011)

In this case, Manchester-Essex took the bull by the horns and filed for hearing seeking BSEA approval of its proposed IEP for Mia, a 16-year-old student. Mia received special education services in New York State until her parents moved to Manchester so that Mia could attend the Landmark School. Mia attended Landmark from 5th through 7th grade at her parents' expense. Mia began attending the public school in 8th grade, where she received 3 periods a day of special education services to facilitate her transition from the Landmark School. Over time, Manchester-Essex determined Mia actually needed fewer special education services. Mia wanted a reduction in services and, at times, her parents advocated for a reduction, but Mia's parents never accepted any IEP proposing fewer services. Unfortunately for Mia, her parents' modus operandi often was to say one thing and to do another. For example, Mia's father wrote to Manchester-Essex that he was removing Mia from all support classes so that she could access more electives and specials. However, the next day, Mia's father wrote that he was not removing Mia from special education services only to write later in the same letter that he was removing her from special education immediately because it was making Mia depressed. What was the school to do?! Manchester-Essex decided to offer 3 1-hour sessions of tutoring by an independent tutor to be provided outside of school and filed for a BSEA hearing.

Manchester-Essex did the right thing here, which was to get before a neutral 3rd party, who agreed that Manchester-Essex had acted appropriately at all times in educating Mia. This was no easy task for Manchester-Essex given that the parents' wishes and actions were contradictory and interactions with the district were hostile. In fact, the hearing officer wrote that "Parents either are not listening to/reading what MERSD says/does or Parents do not understand the consequences and manifestations of their actions under state and federal special education law." Mia ended up continuing on in school with little to no special education support services and, according to the hearing officer, did remarkably well. The hearing officer, however, agreed that Manchester-Essex's proposed IEP, which offered one period of special education services a day, provided the support Mia needed "to more fully comprehend and access her regular education courses."

Public School Ordered to Re-Do Section 504 Team Manifestation Determination Where 504 Team Neglected to Consider Recent, Relevant Information

In Re: Barnstable Public Schools (BSEA #11-8743, Scannell), 17 MSER 195 (2011)

Paul is a 15-year-old 9th grader at Barnstable High School who is on a Section 504 Accommodation Plan for his Attention Deficit Hyperactivity Disorder. In the fall of 9th grade, Paul faced felony delinquency charges of indecent assault and battery of a female classmate. The Principal of Barnstable High School suspended Paul under M.G.L. Chapter 71, Section 37H1/2 pending the resolution of those felony charges. Paul's Section 504 Team met to consider whether the conduct that led to the felony charges was a manifestation of his disability. The school-based Team members determined that the conduct was not a manifestation of Paul's disability. Paul's parents disagreed, resulting in this BSEA hearing.

At the hearing, Barnstable faced, and overcame, many procedural challenges brought by the parents. For instance, the parents asserted that Barnstable should have conducted a full, formal re-evaluation of Paul once he faced long-term discipline. The hearing officer correctly ruled that the parents' interpretation of Section 504's requirement to evaluate whenever considering a significant change in placement was incorrect. The "evaluation"

contemplated is simply the Section 504 Team making a determination of whether the misconduct is a manifestation of the student's disability. Barnstable also withstood a challenge involving the school district's disciplinary hearing, with the hearing officer correctly concluding that the BSEA lacks the jurisdiction to rule on whether the school district conducted the disciplinary hearing appropriately.

Unfortunately for Barnstable, its luck did not hold. Paul's parents successfully argued that the 504 Team's manifestation determination was fatally flawed because the 504 Team did not consider all information that was relevant to such a determination. The hearing officer found that the parents had provided Barnstable with a private evaluation in May of Paul's 8th grade year, yet the Section 504 Team never considered this information that clearly was relevant. This Commentator agrees with the hearing officer's determination that the failure to consider this recent evaluation information meant that the Team had failed to consider "all relevant information" as required by Section 504. As a result, the hearing officer ordered Barnstable to re-do the manifestation determination process, paying particular attention to this private evaluation.

More Than Fine Motor Deficits Needed to Qualify for Receipt of Occupational Therapy Services

In Re: Hudson Public Schools (BSEA # 11-6562, Crane), 17 MSER 223 (2011)

Parents filed for hearing against Hudson seeking an order concluding that their 8th grade son requires occupational therapy services. The parties had litigated this issue before, with a different hearing officer determining that no such services were required at that time. As part of this hearing, Parents submitted as evidence an evaluation from Franciscan Hospital for Children finding that Student has fine motor deficits and recommending consultation from an occupational therapist. In declining to order occupational therapy services, the hearing officer explained that the existence of fine motor deficits, by itself, does not mean that a student requires school-based occupational therapy. Rather, the analysis must continue, with occupational therapy services being warranted only if such services are needed "to learn, to benefit from his special education or to gain meaningful access to his education." Hudson's occupational therapist persuaded the hearing officer that Student's needs did not meet this standard, as his fine motor skills are functional in a school setting. The hearing officer also noted that even the Franciscan report concluded that Student "demonstrated functional fine motor skills." Parents did not call the Franciscan evaluator to testify, which significantly reduced the likelihood that they would prevail on the occupational therapy issue.

Parents, however, did convince the Hearing Officer that the IEP goal and benchmark addressing Student's spelling deficits were inappropriate. The parents prevailed on this issue as they had a special educator with 27 years of experience, including ten years in the Wellesley Public Schools, testifying in support of their position. This expert witness testified that Hudson needed to conduct a spelling assessment to identify areas of weakness which Hudson then would need to target during Student's special education instruction. She testified further that the spelling goal and benchmark should be revised and that Student's spelling instruction should be in the context of his written work rather than in isolation.

Physician's Statement Supporting Publicly-Funded Home Tutoring Inadequate

In Re: Leominster Public Schools & Lyle (BSEA # 11-1190, Byrne), 17 MSER 250 (2011)

At the time of hearing, Lyle was a 3rd grader who was on an IEP and receiving services in speech and reading. In spring of 3rd grade, Lyle's parent thought that Lyle was being bullied because of his disability. Lyle's parent filed complaints with the school district, Office for Civil Rights, and the local police department. All entities investigated the parent's allegations and concluded that there was insufficient evidence to support parent's allegations. Parent, thereafter, submitted a form seeking home tutoring. Leominster determined that the completed form did not meet the standard for receipt of publicly funded home tutoring. Leominster sought to communicate with Lyle's health care providers to discuss the home tutoring request, but Lyle's parent refused to consent to the exchange of information. Parent sought to cure the deficiencies with the form with two new letters, both of which Leominster found to be inadequate.

The hearing officer agreed with Leominster, concluding that the original home tutoring request did not indicate that student was confined to home, did not identify a medical reason for the confinement, and did not set forth an expected duration of the confinement. Instead, the original and the two subsequent home tutoring requests were based on the family's perception that Lyle was vulnerable to bullying and that Lyle could return to school after there was a change in school environment. The hearing officer correctly concluded that the reason Lyle was not attending school was that the parent was unhappy with the school environment and program. Consequently, the hearing officer agreed Lyle was not entitled to publicly-funded home tutoring.

Parents' Expert Witnesses Are Casualties in Parents' Quest for Out-of-State Boarding School

In Re: Marlborough Public Schools (BSEA # 11-3650, Figueroa), 17 MSER 201 (2011)

In this case, parents' discontent with a settlement agreement made for strange bedfellows, allying Marlborough with Learning Prep School ("LPS") versus parents and their private evaluators, one of whom had pleaded with LPS to accept Student! How the parties got into this uncomfortable position takes some explaining. The saga began in 2009, when parents' private evaluator, Eileen Antalek, Ed.D., recommended Student attend the Brehm School, a private boarding school in Illinois. Brehm accepted Student in December 2009. However, according to Student's father, their prior attorney advised that no Massachusetts hearing officer would support an out-of-state placement if the student never had tried an in-state private school. Consequently, parents explored in-state schools and, thanks to phone calls by Dr. Raphael Castro, parents' advocate, and parents' then-counsel, LPS agreed to Student participating in a 2-week trial. Based

on the trial period, LPS accepted Student. Marlborough and parents then entered into a settlement agreement requiring Marlborough to fund Student's placement at LP beginning in January 2010 and continuing through the 2011-2012 school year. Student's father also testified that even though LP was their school of choice, they made sure that there was an "out" clause in the agreement which would allow Student to attend school elsewhere. During summer 2010, Parents took Student to Brehm, where Student began attending school in September. At that point, the parents claimed LPS had not provided Student with FAPE such that, among other things, the parents should be reimbursed for their unilateral placement at Brehm. The hearing officer disagreed, concluding that the 4/10 to 4/11 IEP that placed Student at LP pursuant to a settlement agreement provided Student with FAPE.

To this Commentator, the most comment-worthy aspect of this decision is the number of casualties on the parents' side. First, the hearing officer took Dr. Castro to task for supporting Student's placement at LP in 2009—and actually pleading with LP to admit Student—only to support placement at Brehm at hearing. The hearing officer discounted Dr. Castro's opinion given that he "had no specific knowledge of any of the services received by Student there [at Brehm]." Dr. Castro's support of Brehm also was surprising given that he testified it would take at least 2 years to determine if interventions being used with Student were working, yet Student had attended LP for only approximately 5 months. The hearing officer also explicitly stated that the testimony of Dr. Castro's colleague was not reliable. Among her criticisms of this witness's testimony was that she did not have a balanced view of the two programs and some of the information she relied upon was inaccurate. Finally, the hearing officer called out the parents for being disingenuous in claiming that in October 2010, when the Team last met, they would have considered programs other than Brehm. One action that gave away the parents was their detailed accounting of the issues they had with LP for the entire time Student attended school there. In addition, even though Student had been evaluated in 2009 and a settlement agreement was in place, parents arranged for additional evaluations in 2010.

Hearing Officer Concludes Proposed High School Services Driven by Realities At High School Rather Than Student's Needs, Resulting in Order to Provide Extended School Day Programming Or to Locate Or Create Program

In Re: Abington Public Schools (BSEA # 11-5932, Berman), 17 MSER 253 (2011)

Student is a 9th grader with average cognitive ability who has received special education services since she was in 1st grade and who is on an IEP for disabilities in the areas of reading, written language, and math. Pursuant to a settlement agreement, Abington provided Student with small group math and ELA from February 2011 through June 2011. However, for 9th grade, Abington's IEP proposed to return Student to the general education classroom for those services, where a general educator and a special educator would co-teach her classes. Student's parent filed for hearing seeking, among other things, pull-out instruction in math and ELA. Parent's hearing request was consistent with the recommendations of a Children's Hospital evaluation that determined that Student's services needed to be intensified and individualized given that Student was between 3-5 years below grade level in her areas of need, despite her average cognitive ability.

At hearing, Abington's only witness was the Assistant Superintendent for Pupil Personnel Services. This witness was candid that the current pull-out services at the high school would be inappropriate for Student because the peers were too low functioning and the teachers were not certified in the content areas being taught. While the Assistant Superintendent tried to make the case that the co-taught general education classes would meet Student's needs, the Hearing Officer determined that the "inescapable conclusion" was that Abington's proposed IEP was based, in part, on the realities of what exists at the high school. The hearing officer ordered Abington to do whatever was necessary to implement the recommendations in the Children's Hospital report, even it that meant extended day programming or having to locate or create a program. Given the Student's cognitive ability and current functioning despite years of special education services, it is no surprise that the hearing officer would opt for smaller classes in Student's areas of need, especially given the recent evaluation report making such recommendations. The hearing officer did note that no one from the high school testified about the proposed program and how Student's needs would be met. However, even if such testimony had been provided, Abington would have been hard pressed to win this case.

Student's Undisputed Progress After Three Years At Carroll School Leads Hearing Officer to Order More of The Same for High School

In Re: Grafton Public Schools (BSEA # 11-7489, Scannell), 17 MSER 269 (2011)

Grafton and parents started off summer 2011 with a bang—a 3-day hearing to decide where Student would begin his high school career in September. Student is of average cognitive ability and had received special education services from Grafton from 3rd through 5th grades. For grades 6 through 8, Student attended the Carroll School at parents' expense. When Student left Grafton at the end of 5th grade, Student was in a general education classroom with pull-out special education services. According to the decision, Student was reading at a 1st grade equivalent and was exhibiting frustration and anxiety at home. All testimony reflected Student made progress at Carroll School, and parents' private evaluator testified that Student required a similar program in order to meet his academic needs and to avoid social and emotional regression. Parents' private evaluator observed Grafton's proposed program, which called for co-taught classes for all core subjects, and was complimentary of the teachers' skills. However, the evaluator had concerns about the appropriateness of the program's ability to meet all of Student's needs.

The hearing officer was persuaded that Grafton's less restrictive model was inappropriate for Student. Impacting her decision was Student's poor response to the less restrictive model in place at the time Student left the public school. She also was concerned that the Grafton program did not sound as consistent and cohesive as Student needed. In addition, she found Grafton's testimony unclear regarding the extent to which there was repetition, previewing, and reviewing of materials, all of which Student re-

quires. Finally, she was concerned about the effectiveness of a co-teaching model since Student is reading as much as four grade levels below his peers. Consequently, on August 18, 2011, the hearing officer ordered Grafton "to locate an intensive, cohesive, multi-sensory, well-integrated language-based program for Harry, with small class size and appropriate peers, that utilizes language-based teaching in all classes throughout the day, and provides specialized one to one or small group reading and writing several times per week." According to the Order, if Grafton could not locate such a program prior to the start of the 2011–2012 school year, Grafton would be responsible for funding Landmark residential due to the length of the commute associated with traveling between Grafton and Landmark. In this Commentator's opinion, the facts here made it difficult for the public school to prevail. Suffice it to say that the neutral person looking in is unlikely to feel comfortable deviating from programming that is working, especially when the Student is entering high school. Arguably, Grafton only would have had a chance to win this case if Student had been performing much closer to grade level such that Grafton could argue persuasively that such restrictive programming is unnecessary.

Hearing Officer Convinced That Student Requires 45-Day Extended Evaluation in Therapeutic Day Placement But Unwilling to Order Permanent Placement at This Time

In Re: Ludlow Public Schools (BSEA # 11-7933, Berman), 17 MSER 259 (2011)

Ludlow filed for an expedited hearing seeking an Order that Student requires a 45-day extended evaluation of his emotional and behavioral needs in a substantially separate therapeutic day placement. After the hearing began, two new reports became available, which the Team then met to consider. As a result of these reports, Ludlow amended its hearing request and sought an Order for a permanent placement in an out-of-district therapeutic placement. Based on the documentary and testimonial evidence reflecting a pattern of non-compliant and disruptive behavior and periods of Student experiencing difficulty regulating his emotions, it is no surprise that the hearing officer ordered a change to the status quo. However, the hearing officer opted for the original requested relief; that is, an extended evaluation. She correctly noted that there were many question marks about the reason for Student's deterioration such that gaining more information made more sense than making a permanent change in programming. Also, the school district's evaluation was not sufficiently comprehensive to justify ordering a significant and permanent change in placement. Specifically, the evaluator did not review any prior testing, did not observe Student, only reviewed Student's discipline and attendance records, and only spoke with the parent for approximately 3-5 minutes.

Hearing Officer's Order Provides District with Much-Needed Clarity About IEP Services to Be Delivered

In Re: Foxborough Public Schools & Rick (BSEA #11-6535, Oliver), 17 MSER 306 (2011)

This is a case of a mother who is an island unto herself. The Student at issue, Rick, is a 12-year-old 6th grader who has mild Asperger's Syndrome. In the last 5 years, Rick has attended school in 4 separate school districts. Each school district developed multiple IEPs for Rick. Rick's mother responded to each IEP with multi-page partial acceptances and rejections and assertions of placement pending appeals to discrete parts of prior IEPs. The hearing officer clearly saw what Foxborough saw; a "confusing morass" that had become "unworkable." Foxborough, therefore, filed for a BSEA hearing to get a hearing officer's stamp of approval on its IEP so that there was clarity about what Foxborough was to be providing to Rick. The hearing officer explicitly stated that Rick was a "success story" and that the proposed IEP was appropriate. In fact, according to the hearing officer, Rick's mother was alone in her perception of the extent of Rick's disability. Interestingly, however, even Rick's mother acknowledged Rick's great progress this last school year, thanking staff while leaving in the midst of the BSEA hearing. Foxborough did the right thing here and achieved the clarity they required.

Extended Evaluation Appropriate for 17-Year Old Who Has Not Attended School Placement for Last Two Years

In Re: Amherst-Pelham R.S.D. & Brad (BSEA # 10-5067, Oliver), 17 MSER 311 (2011)

Brad is a 17-year-old who attended Amherst-Pelham Regional High School until he suffered an unspecified traumatic incident at the high school at the beginning of 10th grade. Amherst initially approved 3-months of home tutoring but, at the end of the 3 months, Amherst wrote to Brad's psychiatrist that the school district was unable to support home tutoring given that no one had identified what was going on medically that was confining Brad to home. Fast forward 15 months without Brad accessing any alternative placements proposed. At hearing, Amherst defended the school-based Team's most recent proposal to conduct an extended evaluation at Hampshire Educational Collaborative.

The hearing officer agreed with Amherst-Pelham that an extended evaluation was appropriate and necessary. He noted that the school district's intensive inclusion program had not been effective and Brad had not been in a school setting for the last 2 years. With this evaluation, the Team would gain current information about the extent of Brad's disabilities and how they affect his social, emotional and academic functioning. The hearing officer ordered that the extended evaluation occur at Hampshire Educational Collaborative and include a psychiatric evaluation. The order regarding this added area of testing makes sense given a December 2009 recommendation for such testing as well as a 2011 incident in which Brad started a fire at home.

Decision Supports Public Schools' Right to Conduct Evaluations Using Evaluators of Own Choosing

In Re: Concord Public Schools (BSEA # 11-8996, Crane), 17 MSER 296 (2011)

Concord filed for hearing against parents, who, according to the decision, have been to hearing at least twice before. This time Concord filed for hearing seeking to override the parents' refusal to consent to occupational therapy testing of Student, a 6th grader in the Concord Public Schools. Concord had not evaluated Student's occupational therapy needs since 2006 and, based on the most recent IEP progress report, it appeared quite possible

that Student no longer required such services. The hearing officer correctly ordered Concord to conduct the occupational therapy evaluation. In doing so, the hearing officer included strong language about the school district's right to conduct evaluations using evaluators of its own choosing.

Parents also filed their own hearing request seeking eleven sessions of compensatory occupational therapy services. Student's IEP provided that an independent service provider would provide occupational therapy services. When the then-current independent service provider gave notice that they would no longer be delivering the services, Concord quickly notified parents that their in-district registered and licensed occupational therapist was available to provide services until a new independent provider was identified. Parents, however, chose not to have Student access services from the in-district provider. Again, the hearing officer was correct in ruling that Concord owed no compensatory services since their offer of an in-district provider resulted in Concord's substantial compliance with the IEP.

Long-time Teacher of Student Convinces Hearing Officer That Continued Placement in Private Day School Will Meet Student's Needs

In Re: Westborough Public Schools & Hank (BSEA # 10-7493, Oliver), 17 MSER 277 (2011)

Hank is a 13-year-old Student who has Angelman Syndrome, which is a rare genetic disorder that usually is characterized by severe language impairment. Hank has been evaluated extensively and, at the time of hearing, had skills across the board at a 2-year-old level. Hank's mother filed for hearing seeking a residential placement for Hank, who was attending the Mercy Centre, a private day school approved by the Massachusetts Department of Elementary and Secondary Education to provide services to publicly funded students. Hank has attended Mercy Centre for the past four school years.

After a 3-day hearing, Westborough/Mercy Centre convinced the hearing officer that Hank's continued attendance at Mercy Centre would provide Hank with his right to a free appropriate public education. The star witness for Westborough was Hank's teacher at Mercy Centre who, conveniently enough, had taught Hank for four hours a day for virtually the entire four years he had been attending school there. Consequently, the teacher was in the unique position of being able to give a first hand accounting of the progress she had observed Hank making in his four years at Mercy Centre. Bottom line, this testimony would be next to impossible for a parent to overcome. Moreover, the hearing officer clearly was impressed by this witness, writing that she was "exceptionally credible," with "professional competence," "detailed knowledge of Hank," and "obvious commitment to him." Although parents did have an evaluator testify in support of a residential placement, this witness simply was no match for Hank's longtime teacher at Mercy Centre. The hearing officer noted that the parents' evaluator's knowledge was limited to two, two-hour occasions in a testing situation. The evaluator also did not observe Hank at school or at home and had no credentials in the education field. Finally, the hearing officer was very complimentary of Mercy Centre's responsiveness to parents' concerns and Hank's needs.

Time Line for Completing Evaluation Runs from Date School District Receives Written Consent to District's Proposed Evaluation Rather from Date Parent Requests An Evaluation

In Re: Taunton Public Schools and Nelson (BSEA # 10-8142, Byrne), 17 MSER 286 (2011)

Parent filed for hearing arguing that Taunton did not respond appropriately to the parent's request for a transitional services assessment. Parent, unfortunately, was under the impression that all timeframes for conducting the requested evaluation started to run from the date of her written request for the evaluation. The hearing officer determined, however, that state and federal special education laws are clear that the request for an evaluation is merely the start of the evaluation process. Here, once Taunton received the evaluation request, it properly sought the parent's consent for the evaluation Taunton was proposing to conduct. The hearing officer correctly determined that the timeframes for conducting the evaluation start to run from the date the school district receives the parent's written consent to the proposed school district evaluation.

Thoughtful Decision Ordering Continued, But More Intensive, Integrated Programming for 5-Year-Old Autistic Student

In Re: Norwood Public Schools (BSEA # 11-5444, Crane), 17 MSER 228 (2011)

This decision is the culmination of a hotly contest hearing spanning 5 days regarding programming for a 5-year-old boy with multiple disabilities, including autism. In reading this decision, this Commentator was struck by the obvious care the hearing officer took in considering what the Student needed in order to receive a free appropriate public education. Sometimes this meant coming down on the side of parents' experts but, more often than not, coming down on the side of the school district's expert who actually testified to a number of additional services that needed to be added to Norwood's IEP. In one instance, the hearing officer rightly gave no weight to the testimony of two of the parents' experts about services and placement needed to address Student's behaviors in school since they had not talked with school staff. Instead these two experts relied exclusively on the mother's report and student records, leaving them seemingly unaware that Student had made behavioral progress in school.

Norwood prevailed on the major issue in dispute, which was whether their integrated pre-school and then kindergarten programs are/would be appropriate for Student or a substantially separate program was required. Given that all of Norwood's witnesses testified as to the importance of educating Student with typical peers, which was corroborated by one of parents' expert witnesses and Student's physician, this part of the decision was no surprise. The hearing officer did order a number of modifications to Norwood's proposed IEP, but, for the most part, the modifications flowed directly from the testimony of the school district's expert. Norwood also prevailed on the parents' claim for compensatory services, with the hearing officer finding that such services were not warranted. One area where the hearing officer did take Norwood to task was with regard to home services. Norwood's BCBA testified that the behavior support plan was effective at school and at home with people other than Student's

mother. In her opinion, the reason Student demonstrated so many challenging behaviors with his mother was because she was not implementing the behavior plan. Consequently, the BCBA's position was that Norwood need not do anything else; rather it was the mother's responsibility to implement the behavior plan that was effective. The hearing officer did not mince words in writing that this was "unacceptable and a violation of Norwood's FAPE responsibilities." Norwood's expert witness shared the same view as did the hearing officer and testified that he was confident that Norwood could find a way to help Student's mother to address Student's problematic behaviors in the home with additional or different services. So, the lesson here for public schools is to realize that the expectation is to continue to develop creative solutions to problems rather than taking the position that there is nothing more that the public school can do. Obviously this can be easier said than done, but it bears repeating that this is the expectation. ■