MSER Commentary

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As the calendar year wound down at the BSEA, so did the pace of rulings and decisions. For the final quarter of the year, there were only 3 rulings and 5 decision as compared to the 3rd quarter's 5 rulings and 16 decisions. A marked difference! One theme this quarter involves the principle of "stay put," with all three rulings deciding what constituted the student's "stay put" placement during the pendency of the BSEA hearing. Also of note is that 2 of the 5 decisions this quarter resolved disputes about which school district is financially responsible for a student's educational programming. Enjoy this quarter's lightened reading load!

RULINGS

Straight-Forward Ruling That "Stay Put" Placement Is Placement And Services in Last Accepted IEP Rather Than Location of Extended Evaluation Or Proposed, But Unaccepted, IEP

In Re: Taunton P.S. & Solomon, BSEA # 12-1212 (Byrne)

Taunton requested a ruling clarifying Solomon's "stay put" placement during the pendency of the BSEA hearing and Solomon's parents sought an emergency order placing Solomon with a certified ABA specialist from the APEX agency. The hearing officer ruled that Taunton is required to make available the services and placement in the last agreed upon IEP, which called for a substantially separate classroom at the South Coast Collaborative. The "stay put" placement was not the substantially separate classroom at Chamberlain Elementary School where Taunton recently conducted an extended evaluation. The hearing officer noted that the Massachusetts special education regulations explicitly provide that an "extended evaluation" is not a "placement" for "stay put" purposes. Finally, while Taunton had developed an IEP proposing that Solomon attend a substantially separate life skills program at East Taunton Elementary School, this was not Solomon's "stay put" placement since Solomon's parents had not accepted such placement. The hearing officer also denied the parents' request for an emergency order since there was no factual or legal support for such an order and no evidence that Solomon or others were likely to be injured if Solomon returned to his "stay put" placement.

Parents Fail to Convince Hearing Officer That General Education Teacher's Identity Was Essential Element of Last Accepted IEP for "Stay Put" Purposes

In Re: Hampden-Wilbraham RSD, BSEA # 12-1091 (Berman)

Parents filed for hearing seeking a BSEA order requiring Hampden-Wilbraham to place Student at the Curtis Blake School. Parents then filed a Motion related to the issue of "stay put." In support of their Motion, Parents noted that the year before, they had stopped pursuing a BSEA hearing for placement at Curtis Blake because the public school assigned Student to a 4th grade general education teacher who formerly had taught at the Curtis Blake School. The public school also had this same teacher provide two hours a week of 1:1 tutoring to Student. Thus, in parents' view, under the principles of "stay put," Student is entitled to a 5th grade general education teacher who is "Curtis Blake trained" and/or has an in-depth knowledge of specialized instructional programming provided for in Student's IEP. The hearing officer ruled that there was no basis to conclude that the identity of the general education teacher was an essential element of Student's last accepted program and/or implicated the provision of a free appropriate public education.

Hearing Officer Rules That Parent's Acceptance of IEP Placement Page Did Not Change "Stay Put" Placement Given Parent's Subsequent Correspondence Clarifying Position on Placement Proposal

In Re: Taunton Public Schools and Rahul, BSEA # 12-0399 (Byrne)

For the third time this quarter, a BSEA Hearing Officer issued a ruling resolving a dispute about what constitutes "stay put" during the pendency of the BSEA hearing. Here, the last accepted IEP services called for "Rahul" to receive 4 hours a day of 1:1 ABA instruction at the Friedman Middle School and 3 hours a day of home-based or community-based services with the same ABA provider. More recently, Taunton proposed an IEP continuing the provision of the same number of hours of 1:1 ABA services but proposing 6 hours a day of services in a substantially separate classroom at Taunton High School and 1 hour a day of services at home. Rahul's mother rejected the proposed IEP, but she accepted the IEP placement page that indicated that Rahul's placement would be in a substantially separate classroom at Taunton High School. Four days letter, Rahul's mother send an e-mail to Taunton's Special Education Director noting agreement to Rahul attending Taunton High School but disagreement with the proposal to decrease home-based services and to place Rahul in a substantially separate classroom.

Taunton argued that the parent's consent to the substantially separate classroom setting, as indicated on the placement page of the IEP, changed the "stay put" placement. Unfortunately for Taunton, the hearing officer did not see it that way, commenting that Taunton's argument put form over substance. She also noted that the substantially separate classroom did not exist yet and that

placing Rahul in a classroom with other students would disrupt how Rahul had last received services.

This Commentator sees the appeal of Taunton's position that it should have been able to rely upon the parent's unequivocal written consent to the placement page. The parent could have written in caveats when providing her response to the placement page, including clarifying that she was accepting only placement at the high school and not accepting the proposal of a substantially separate classroom. Instead, she accepted the placement page without comment, only to send an e-mail four days later with clarification about her response.

DECISIONS

Difficulty Scheduling Services Proposed in IEP Leads to Order to Place 9th Grade Student at Landmark School

In Re: Andover Public Schools, BSEA # 12-0430 (Figueroa)

Student is a 9th grade female student of average intelligence who has a language-based learning disability ("LBLD") in the areas of reading comprehension, written expression, and math reasoning and concepts. Student began attending school in the Andover Public Schools when she transferred there from a private, non-special education school in January of 8th grade.

Student's mother filed for hearing prior to the start of 9th grade seeking an Order requiring Andover to develop an IEP placing Student at Landmark School. She got her wish! After a three-day hearing, the hearing officer concluded that Andover's IEP was not appropriate, and could not be made appropriate, to meet Student's needs. In the end, scheduling proved to be Andover's undoing. Andover High School apparently has what to this Commentator is a unique block schedule that is driven by the administration of the MCAS exams. For example, because 9th graders take the science MCAS in the spring of 9th grade, AHS students take two semesters of science that year, equal to having completed two science courses in one year. Similarly, since the math MCAS is administered in spring of 10th grade, AHS students take only one semester of math in 9th grade but additional math in 10th grade. So, given this block scheduling, Student, who has a LBLD in reading, written comprehension and math, was afforded no math or English in her schedule from September through January. Literally, as soon as this Commentator read that fact, she thought "case over!"—and it was. While Andover made efforts at the hearing to offer options that would provide the missing math and English work, these options lacked appeal. For instance, one option was to have the Student taking two more core academic classes than any other student would have been taking. The other option would have left Student with significantly reduced opportunities to participate in the mainstream. Neither of these options held any appeal for the hearing officer, resulting in an Order for the Landmark IEP.

This decision had a couple of other noteworthy aspects to it. First, one of Andover's witnesses enthusiastically touted research showing that block scheduling increased special education students' retention of the material being taught. Unfortunately, however, she could not cite to any such research, causing the hearing officer to accord her no credibility on this point. Lesson learned - if you are going to reference research, you best be prepared to speak with some authority about it! Another cringe-worthy moment involved Andover's consultant. Shortly before hearing, Andover's consultant observed Student for a forty-minute class, and even asked Student (and only Student) to read aloud, even though Student's mother had refused to provide consent for the consultant to observe Student. To make matters worse, the consultant initially testified that she had not observed Student. Later she testified that she had observed Student but did not mention it earlier because she was unsure about whether she should have observed Student. Ouch! As a result of this whole observation mess, the hearing officer disregarded the consultant's comments and opinions about the appropriateness of Andover's program for Student. One way Andover could have handled the parents' refusal to allow the observation to occur would have been to seek the intervention of the hearing officer. If, however, that was not successful, Andover then would have had to have foregone the observation of Student but presumably the mother's denial of the opportunity to observe would have weakened the mother's case. In this Commentator's opinion, the consultant also should not have interacted with any student during the observation, especially not the student at issue. Observers should do just that—observe.

Public School Ordered to Send Fragile, School Phobic Student to Private Day School with Peers Displaying Little to No Disruptive, Aggressive or Acting Out Behaviors

In Re: Boston Public Schools, BSEA # 12-1298 (Berman)

Student is a 13-year old 8th grader who is described as having medical problems, cognitive limitations, depression, and anxiety, including school phobia. As far back as 4th grade, student had frequent school absences for medical reasons and severe anxiety. By the time of the hearing, Student had been out of school since early 2010 but had been receiving BPS-provided tutoring at a public library. According to the decision, all parties agreed that Student is an exceptionally fragile, vulnerable child who requires a therapeutic program. The only issue in dispute was whether Boston's McKinley Middle School program was appropriate to meet Student's needs.

Although the hearing officer noted being impressed with the McKinley staff who testified at the hearing, she determined that the McKinley program could not meet Student's needs. Specifically, the unrefuted evidence was that inevitably Student would be in contact with students who display disruptive, aggressive, or acting out behavior, in or out of class or on the bus. From this Commentator's vantage point, this was not a close-call case given this Student's longstanding issues of fragility and school phobia. Moreover, Student's proposed classroom included several students who, according to their IEPs, engage in frequent tantrums, severe verbal and physically aggressive outbursts, and verbal threats when upset. No surprise, then, that the hearing officer ordered Boston to send referral packets to private day schools where the peers display little to no disruptive, aggressive or acting out behaviors in the classroom or in the school as a whole.

School District That Developed IEP for In-District Programming is School District Responsible for Educational Programming for Unilaterally Placed Residential Student

In Re: Lincoln PS, Lincoln-Sudbury RSD, DESE, & Lexington PS[1], BSEA# 11-9766 (Figueroa)

Lincoln filed for hearing seeking to overturn a DESE assignment of school district responsibility that found Lincoln solely financially and programmatically responsible for Student's educational programming. At the time of the BSEA decision, Student was a residential student at the Dr. Franklin Perkins School pursuant to a unilateral placement by Student's mother. Prior to the unilateral placement, Student had attended school in Lincoln pursuant to in-district IEPs. Student's parents are divorced. Student's mother lives in Lincoln and has sole physical custody of Student. Student's father lives in Lexington. Before Student began residing at the residential school, he had lived with his mother in Lincoln and had visited his father on Wednesday nights and alternating weekends. After Student began residing at the residential school, he spent equal amounts of time with both parents whenever he was not at the residential school.

DESE's Local Educational Agency ("LEA") assignment determined which school district would be responsible for Student's unilateral placement as a residential student at Perkins, assuming that a school district ultimately was found obligated to fund such unilateral placement. DESE relied on the school district responsibility regulations that reflect that a student who lives and is educated at a residential school is deemed to reside with the parent who has physical custody of the student, consistent with the SJC's decision in *Walker Home for Children* v. *Town of Franklin*. The hearing officer determined that DESE's conclusion that Lincoln was solely responsible was correct but disagreed with the regulations on which DESE relied. Instead, the hearing officer focused on the fact that the last IEP developed was an in-district IEP for Lincoln Public Schools, where Student was enrolled to attend school and where Student lived with his mother.

In this Commentator's opinion, the determination of responsible LEA was complicated because of the unilateral placement. However, both the hearing officer and the DESE were correct that the responsible school district should be the community where Student was living and attending school prior to going into a residential school living situation.

"Move In" Law Applies When No Actual Move, But Judge Orders Change in Student's Guardian

In Re: Walpole Public Schools & Heidi, BSEA #11-4328 (Oliver)

"Heidi" lives and attends school at a residential special education school. Originally, Heidi had temporary co-guardians, one who resided in Walpole and the other who resided in Westwood. At that time, both communities were jointly programmatically and financially responsible for Heidi's educational programming. More recently, however, a judge removed the co-guardians and appointed a resident of Taunton as Heidi's guardian. Given this change in guardianship, DESE issued an updated LEA assignment finding Taunton immediately programmatically responsible for Heidi's educational programming. However, because of the so-called "move-in" law, DESE determined that the formerly responsible school districts (Walpole and Westwood) continued to be financially responsible for Heidi's educational programming until the start of the next fiscal year, at which time Taunton would assume financial responsibility.

The hearing officer agreed that DESE had acted reasonably in applying the "move in" law to the facts here. First, the hearing officer noted that such an application served the legislative purpose of the "move-in" law, which is to delay imposing the costs of the most expensive special education programs on communities that had no opportunity to budget for such programs. Additionally, the hearing officer cited to various court decisions supporting giving "considerable deference" to an agency's interpretation of its own regulations. ■

1. An attorney in this Commentator's firm represented the Lexington Public Schools in this case.