MSER Commentary

First Quarter 2012

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For this Commentator, the theme of the 1st quarter of 2012 was that there was no overarching theme in the decisions and rulings from the BSEA. This quarter, however, was an active one, with the BSEA hearing officers writing 10 decisions following due process hearings, 5 decisions based only on written submissions, 1 compliance decision, and 2 rulings. Due process hearings continue to average approximately 2+ days.

DECISIONS

Public School Ordered to Supplement Private Day School Placement with Residential Component Offering Round-the-Clock Access to Treatment Team Skilled in Dialectical Behavior Therapy

In Re: School District, BSEA #12-0132 (Crane), 18 MSER 1 (2012)

This case involved a 16-year old girl who, by self report, suffered emotional, verbal, and physical abuse by her mother for most of her life and was sexually abused by another female for 5 years. Student has diagnoses of post traumatic stress disorder, eating disorder, ADHD, borderline personality disorder, major depression & learning disorder (NOS). The decision describes Student as having a "relatively well-controlled exterior" while struggling for years with suicidal ideation, self-harm, dissociative episodes, nightmares, emotional outbursts, and hypervigilance.

The unnamed public school here defended its Individualized Education Program (IEP) proposing Student's placement at the Arlington School, a private day school approved by the state to provide services to publicly funded students. Student's father sought an Order that the Arlington School day placement be supplemented by a residential component at the Mill Street Lodge which, like the Arlington School, is located on the grounds of McLean Hospital. Mill Street Lodge is an extremely small (5 girls) residential therapeutic program for adolescent girls. At Mill Street Lodge, providers rely on dialectical behavioral therapy (DBT) for therapeutic intervention. According to the decision, there were letters written by Student's providers asserting that DBT has been the only therapeutic intervention to have been effective in addressing Student's emotional and behavioral difficulties and, without access to DBT round-the-clock, Student likely would deteriorate rapidly, thus negatively impacting her ability to access her education.

By agreement of the parties, the Hearing Officer resolved this dispute based only on the written documents submitted by the parties. After reviewing the documents, the hearing officer concluded that Student's emotional and behavioral difficulties have a direct and substantial impact on her ability to access an educational environment and to learn. Consequently, Student's father won the residential relief he sought.

In reading this decision, this Commentator was curious about whether there is a back-story about why the parties sought BSEA intervention to resolve this dispute. One reason for my piqued curiosity is the decision to forego a due process hearing and to rely solely on the documents. Given Student's level of emotional need, evidence of admission to the Arlington School being conditioned on residence at Mill Street Lodge, and the seeming lack of evidence rebutting the need for residential placement, the unnamed school was waging an uphill battle. Did the public school want to float an argument that it was not responsible for the psychiatric/medical treatment provided at Mill Street Lodge without investing the time and cost associated with a due process hearing? Or, was there some need for a hearing decision? Only the parties, and maybe the hearing officer, know for sure.

Also of note to this Commentator was that for more than 2 years, Student experienced significant emotional difficulties, yet the public school failed to refer Student for an evaluation to determine eligibility for special education and related services. Student was engaging in cutting behaviors, having "black outs" at home and school, earning declining grades, experiencing worsening peer relations, ceasing her school attendance, all of which resulted in two psychiatric hospitalizations. However, Student was evaluated only after her father made the referral for an evaluation. Suffice it to say that there appear to have been many red flags that should have alerted the public school of the need for an evaluation long before the school actually did one.

Public School Ordered to Fund Residential Program for 21-Year Old in Order to Control Out-of-School Behavior and Teach Independent Living/Self-Care Skills

In Re: King Philip R.S.D., BSEA #12-0783 (Crane), 18 MSER 20 (2012)

Student is a 21 year old woman diagnosed with autism and significant cognitive limitations. For the last 8+ years, Student has attended a substantially separate day program at South Coast Educational Collaborative. Parents sought an ABA-based residential program.

The decision describes Student's behavior in school and during school-supervised community activities as improving to such an extent that this was no longer an area of concern addressed in Student's IEP. Unfortunately, however, the same cannot be said of Student's behavior at home and on family trips in the community. Student's behavior in these settings had regressed substantially in the past year and is described as "extreme and sometimes dangerous." For example, Student frequently engages in head-banging (once banging her head through a window), picking/gnawing at her fingers, aggressive behavior (e.g. hitting, scratching, pushing), and yelling and screaming at home. She has picked up knives in the home, hit the school bus driver, wandered

away from her home several times a week, and bolted down the street while in the community (she wears a tracking bracelet at school). Student's mother testified that she is afraid to be home alone with Student and is unable to safely take Student into the community alone.

The hearing officer noted that King Philip's obligation to fund residential programming depends on whether Student's social, emotional and behavioral deficits at home and in the community can be separated appropriately from the learning process. Here, the hearing officer concluded they are not segregable, finding that Student requires 24-hour a day consistent, coordinated response and intervention to bring her home and community based behaviors under control. While King Philip had proposed 1 ½ hours/week of behavioral consultation to the mother in the home, this was deemed to be too little to be effective. King Philip previously had implemented home-based services for several 6-month stints, only to have Student's mother terminate the services because she found them unhelpful. Presumably because of this and the request for residential services, King Philip questioned the mother's motivation level to address Student's aberrant behavior. Of note, this questioning fell flat with the hearing officer. Adding further support for the hearing officer's decision was the testimony of the parents' two expert witnesses who persuaded the hearing officer that Student's extremely limited progress with academic, social and functional skills was not commensurate with her potential. While King Philip's school psychologist testified that Student's current academic skills are consistent with her cognitive profile, which includes a full scale IQ of 48 but with a verbal comprehension score of 63, the hearing officer found the parents' experts "far more persuasive" than the school psychologist given their more extensive expertise, experience, and comprehensive understanding of Student. Finally, the hearing officer reasoned that residential programming was required because Student needed to learn self-care and other independent living skills (e.g. showering) in the environment where she actually would use the skill. And, if that weren't enough, the hearing officer faulted King Philip for failing to conduct age-appropriate transitional assessments related to Student's independent living skills, noting that it is impossible for King Philip to understand Student's needs or to propose appropriate services without such assessments.

This decision provides several "take away" lessons for public schools. First, King Philip needed a psychologist to testify who possessed more expertise and experience as well as knowledge of Student than its school psychologist possessed. Through no fault of her own, the school psychologist only recently had earned her degrees, was in her first year at King Philip, and had not evaluated Student. At this point in her career, she simply was no match for the parents' experts. Second, as King Philip learned here, it can be difficult to persuade a hearing officer that the blame for a lack of effective progress should be placed at the parents' feet. The message from the hearing officer here was loud and clear. If the parent finds that the home-based services are ineffective for her, then it is incumbent upon the public school to propose additional or different services in an effort to make the services more effective. Also, where, as here, the parents had maintained their daughter in their home through age 21, King Philip was hard-pressed to convince the hearing officer that the parent lacked motivation to address her daughter's behaviors because she wanted her in a residential setting. Finally, while it was a real success for King Philip to have brought Student's behavior under control at school and at school activities in the community, if Student is unable to generalize those skills to other settings and with other individuals, then a BSEA hearing officer is likely to find that the public school must do more to address such skills.

LEA Assignment Dispute Touches Upon Several School District Responsibility Regulations

In Re: Fitchburg PS, Narragansett RSD & DESE, BSEA #12-3434 (Crane), 18 MSER 31 (2012)

This decision resolved a dispute between two public schools regarding which was financially responsible for Student's educational programming. As is typical for these assignment cases, the facts change rapidly, so close attention is required!

Student here is in the custody of the Department of Children and Families (DCF). The only relevant parent is Student's mother, who lives in Narragansett. DCF briefly placed Student in foster homes in Gardner and then Fitchburg. DCF placed Student in two different foster homes in Fitchburg before placing Student in a STARR program, also in Fitchburg. Student then enrolled in the Fitchburg Public Schools. Fitchburg wrote an IEP for a private day school, which Student's mother accepted in full. A little over one month later, specifically on 4/20/11, DCF placed Student in a group home located within the Wachusett RSD.

The hearing officer concluded that Fitchburg - not Narragansett where the mother resides - was financially responsible for Student's educational programming through 6/30/12. In this Commentator's opinion, the hearing officer got it right. As a general rule, pursuant to the Massachusetts special education regulations, if a student lives in a foster home, the town where the foster home is located is responsible for the student's education. When Student moved to the STARR program, Student was deemed to be homeless consistent with DESE policy. So, again, referring to our state special education regulations, if a student becomes homeless, the school district that had been programmatically and fiscally responsible for the student prior to the student becoming homeless continues to be responsible until the parent or state agency with care or custody enrolls the student in the school district where the temporary housing is located. However, once DCF placed Student in a group home, by regulation, responsibility reverted to mother's residence, except that fiscal responsibility was delayed due to the "move-in" law. Simple, right?!

Of note here was Fitchburg's attempt to characterize Student's foster home placements as temporary homeless placements so that Narragansett would remain the responsible school district. Other public schools can learn from Fitchburg's effort, which fell short. Fitchburg tried to establish that the Fitchburg foster home placements were really temporary homeless placements by relying solely on the short length of Student's stay in each foster home. According to this hearing officer, more evidence is re-

quired to find that a foster home placement actually was intended to be, and has the indicia of, temporary, homeless housing.

Hearing Officer Orders Extended Evaluation at BICO Collaborative over Objection of 16-Year Old Student and Guardian/Grandmother

In Re: King Philip RSD, BSEA # 12-2427 (Crane), 18 MSER 35 (2012).

Student is a 16-year old boy with ADHD, seizure disorder, and substantial social pragmatic deficits. King Philip sought a BSEA Order supporting its proposal of an extended evaluation of Student at BICO Collaborative.

Student began the 9th grade at King Philip High School. Soon thereafter, Student's grandmother/guardian grew unhappy with the high school staff's efforts to process Student's difficult peer social interactions with Student. Student's grandmother believed that, instead, the school simply should mete out appropriate consequences. By mid-November, Student's grandmother was so dissatisfied that she had arranged for Student's transfer to a vocational high school. The vocational school apparently was no better in the grandmother's eyes as Student only attended the vocational school for approximately 6 weeks. Student re-enrolled as a student at King Philip High School in January 2011. Upon his return, King Philip staff found Student more emotional, more disruptive, and continuing to struggle with peer interactions that made peers feel uncomfortable. By April 2011, school staff reported that Student was not making progress commensurate with his potential. In May 2011, Student began missing school due to seizures. By the end of May, Student was no longer attending school. Fast forward to the BSEA hearing in mid-December 2011 and Student had not attended school at all for 10th grade, although King Philip was offering home tutoring.

With this fact pattern, the Hearing Officer was left with little choice but to agree that an extended evaluation was necessary to ensure Student received his right to a free appropriate public education (FAPE). Student was struggling academically, socially, and physically and had been out-of-school since May 2011. The Hearing Officer correctly concluded that King Philip needed the combination of comprehensive formal testing and daily observation over a period of time in a contained environment to have the information the Team needs to develop an appropriate IEP.

Proactive Side Agreement about Summer Services Not Memorialized in IEP or Discussed at Team Meeting Does Not Impact "Stay Put" Obligations for Following Summer

In Re: Ipswich Public Schools & Tallulah, BSEA #11-9243 (Byrne), 18 MSER 40 (2012)

This hearing involved a dispute over whether Ipswich was obligated to reimburse parent for tutoring Tallulah received during summer 2011 at the Commonwealth Learning Center (CLC). Tallulah's last accepted Individualized Education Program (IEP) proposed in-district summer tutoring. When Ipswich learned it would have difficulty providing these services during summer 2010 due to personnel reasons, Ipswich sent parent two letters offering to pay for up to 15 50-minute tutoring sessions at Commonwealth Learning Center and to reimburse parent for transportation. Tallulah's mother orally accepted the offer. There was no Team meeting or IEP amendment.

At the hearing, Tallulah's mother testified that she believed Tallulah had "stay put" rights to summer services at CLC because Ipswich had funded those services the prior summer. The hearing officer disagreed, noting that Ipswich merely had been proactive in arranging for comparable programming with a provider acceptable to the parent when Ipswich had personnel shortages. She reasoned that "stay put" attaches to the type and level of special education and program, not a specific physical location. Here, the IEP was not amended to reflect a change in tutoring location or personnel. Also, the parent acknowledged that the summer tutoring provided by Ipswich and CLC were similar in content, personnel, and frequency. Consequently, Ipswich was deemed to have discharged its "stay put" obligations properly during the summer of 2011 by offering tutoring with in-district personnel, consistent with the last accepted IEP.

Public School Survives Bid for Private School Placement in Case Where Evaluator from Children's Hospital Was No Match for Public School Providers Who Had Worked with Student for 4 ½ Years

In Re: Northampton PS & Ned, BSEA #12-0250 (Oliver), 18 MSER 57 (2012)

Ned's parents sought an Order placing their 5th grade son at the Curtis Blake School. Northampton defended its IEP proposing general education science and social studies; reading, writing & English/language arts in its Learning Disabilities Program; math in the resource room; and speech language services, occupational therapy services, and social skills group work.

The parents' entire case relied on an educational and psychological evaluation conducted at Children's Hospital. Unfortunately for Ned's parents, the Children's Hospital psychologist/evaluator did not impress the hearing officer. The hearing officer clearly was not pleased that the evaluator's recommendation for a small, language-based, full day/full year program was based solely on the Children's Hospital evaluation, the educational portion of which a different evaluator conducted. Also, the evaluator lost points for not observing Ned's current school programming, not speaking with any of Ned's Northampton service providers, and not attending any Team meetings regarding Ned. To make matters worse, the evaluator acknowledged that she never had observed a public school program in Massachusetts and did not think she had reviewed the IEP amendment Northampton had written after considering the Children's Hospital evaluation. And, if that weren't enough, the hearing officer honed in on the evaluator's repeated testimony about Ned's "regular education setting," noting that Ned was spending, at most, one hour a day in the regular education setting for academic work.

Contrast parent's expert witness with Northampton's special education teacher, speech language pathologist, and school adjustment counselor. All of these Northampton witnesses had the good fortune of having provided services to Ned for the last 4 ½ years and evaluated him multiple times over that same period. They had a wealth of knowledge about Ned that they were able to share with the hearing officer to establish that Ned had been

making effective progress in all areas of need. Given this lopsided expert witness match-up, the holding that Northampton's IEP provided FAPE came as no big surprise.

Public School Must Locate or Create Public or Private Program for "Functionally Illiterate" 7th Grader of At Least Average Intelligence

In Re: Pembroke PS, BSEA #12-0507 (Berman), 18 MSER 73 (2012)

Parents here went for broke and sought an Order for an unapproved, out-of-state residential program for their 7th grade son who is of at least average intelligence and has a significant language based learning disability. At the 3-day hearing, Pembroke defended its in-district IEP proposing supported general education science, social studies, and math classes and pull-out English/language arts, Wilson reading, learning center support, and weekly counseling.

Parent's private evaluator concluded that Student is functionally illiterate and is at risk for remaining functionally illiterate unless he receives a much higher level of remedial instruction than Pembroke proposed. She testified that functional literacy is somewhere above a 6th grade reading level and, according to her testing, Student is reading at the mid to late 2nd grade level after 6 years of schooling. She testified that, at this rate, Student would not attain a 6th grade reading level by the time Ned is out of school. Along the same vein, Ned's parent testified that Ned cannot read a menu or a street sign and cannot write down a simple phone message.

The hearing officer agreed with the parents' expert witness, finding that Ned is not likely to have the basic reading and writing skills he will need to succeed academically and live independently when his special education eligibility ends, given the current trajectory. She reflected that, after almost 7 years of special education services, Ned, who is of at least average intelligence, cannot read much past the 3rd grade. The hearing officer also noted that Pembroke's witnesses were unable to objectively and reliably quantify Ned's reading and writing progress. Consequently, the hearing officer ordered Pembroke to locate or create a public or private language-based program designed to meet the needs of children like Ned and that could provide a minimum of daily, individual Orton-Gillingham tutoring and corresponding writing instruction. ■