Nancy Nevils, Esq.
Stoneman, Chandler & Miller, LLP

The 3rd quarter at the BSEA proved to be quite active, with 5 rulings and 13 decisions, according to this Commentator's count. Parents won in 5 cases and public schools won in 8. However, decisions in parents' favor tended to involve meatier issues such as placement disputes, than did some of the decisions decided in favor of the public school. In terms of trends, there is an uptick in parent requests for witnesses to be sequestered in BSEA hearings. In two cases this quarter, *In Re: Stoneham* and *In Re: Walpole & Violet*, the hearing officers denied such requests. Another interesting theme involves public schools (*In Re: Amherst* and *In Re: Barnstable*) that inexplicably were slow to propose placements, costing them dearly. As one would expect, the number of days at hearing depended on the complexity of the issues in dispute. Discrete issues took only one day of hearing, while cases that involved placement disputes tended to last three days.

RULINGS

Massachusetts Special Education Regulations Regarding School District Responsibility for Homeless Students Prevents Dismissal of Hearing Request

In Re: Martha's Vineyard Public Schools, BSEA # 12-7661 (Crane), 18 MSER 229

During Student's 8th grade year, Martha's Vineyard found Student eligible for an IEP. Student's mother contended that she accepted that initial IEP, however, there is no record of the parent ever providing written consent to the IEP. As 8th grade was ending, Martha's Vineyard convened Student's Team and developed an IEP proposing Student's placement at Martha's Vineyard High School for 9th grade.

During the summer before 9th grade, Student's mother met with the Martha's Vineyard Special Education Director. At the meeting, the parent verbally rejected the most recently proposed IEP and placement and requested funding for her son to attend School One, a private school in Providence, Rhode Island. Martha's Vineyard declined the parent's request. Student's mother moved forward with placing her son at School One for 9th grade. During the fall of Student's 9th grade year, Student's mother lost her housing on Martha's Vineyard. Student's mother left Martha's Vineyard, moving four times before obtaining temporary housing in Attleboro. During the school week, Student lived with his brother in Providence and, at all other times, lived with his mother.

When the school year began and Student did not report for 9th grade, the Martha's Vineyard School District disenrolled Student and wrote to the parent to that effect. In April of Student's 9th grade year, the mother's attorney filed for a BSEA hearing seeking reimbursement for, and prospective placement at, School One. In May, Martha's Vineyard's attorney wrote to the DESE's Office for the Education of Homeless Students and requested a determination of whether Student has a right to continued enrollment in Martha's Vineyard. The school district's attorney noted the impracticality of Student continuing to attend school on Martha's Vineyard given his current living situation. As of the date of the BSEA ruling, DESE had not issued any ruling in response to the school district attorney's letter. DESE's position was that the parent must appeal Martha's Vineyard's decision before the matter is properly before DESE.

Given this procedural posture, Martha's Vineyard filed a Motion for Summary Judgment, arguing that the BSEA must defer to DESE's homelessness office regarding whether Martha's Vineyard continues to have any responsibility for Student's education. Hearing Officer Crane disagreed, noting that Martha's Vineyard had not complied with DESE's dispute resolution process established to resolve disputes regarding homelessness issues. Specifically, Martha's Vineyard's Superintendent of Schools, to date, had not issued a written decision reflecting the district's determination not to allow Student to continue to be enrolled as a student in Martha's Vineyard. Moreover, the Hearing Officer correctly concluded that it was unclear when, or even if, the DESE dispute resolution process would be completed given the apparent stalemate in that process. In any event, until such dispute resolution process is completed, the hearing officer concluded that Martha's Vineyard continues to be responsible for Student's educational programming. The Hearing Officer noted that the IDEA provides that the state educational agency is responsible for ensuring the provision of a free appropriate public education to a homeless child with a disability who moves into a new school district within the same state. The Massachusetts special education regulations reflect DESE's determination of school district responsibility for homeless students and, pursuant to 603 CMR 28.10(5), the school district that was programmatically and fiscally responsible for student before the student became homeless (i.e. Martha's Vineyard) remains the responsible school district until the parent chooses to enroll the student in the school district where the student and parent are residing temporarily. Given the denial of the Motion, which this Commentator agrees was appropriate, the case continued on track for the scheduled 3-day hearing on the merits of the parent's hearing request.

Motion for Protective Order Related to Discovery Requests Must Be Filed within 10-Days of Receipt of Discovery Requests

In Re: Danvers Public Schools, BSEA # 12-3302 (Berman), 18 MSER 245

Parents' attorney served requests for production of documents and interrogatories on the attorney for the Danvers Public

Schools. Approximately 30 days thereafter, the school district's attorney filed a Motion for a Protective Order. Parents' attorney objected to the Motion on timeliness grounds.

The hearing officer agreed with Parents' attorney on the timeliness issue, noting that the BSEA Hearing Rules provide a 10-day timeframe for objecting to discovery requests. However, the hearing officer did note apparent inconsistencies between the 10-day limit and other language in the BSEA Hearing Rules. Ultimately, however, the hearing officer concluded that the 10-day time limit applied, especially given the need for discovery disputes to be resolved expeditiously to avoid delaying hearings. In ruling that Danvers must provide all of the documents and answers to interrogatories, as requested, the hearing officer did set forth a procedure for reducing the risk of compromising student privacy in responding to the discovery requests.

Given Lack of Time to Locate or Create Summer Program That Satisfied "Stay Put" Obligation, Public School Ordered to Continue with Offered Summer Services That Team Must Supplement Prior to Start of 2012-2013 School Year

In Re: Leominster Public Schools, BSEA # 12-7450 (Crane), 18 MSER 265

This ruling addresses the issue of Student's "stay put" placement for summer 2012. At the time of the motion hearing, Student, a 10-year old with an autism spectrum disorder, was preparing to enter 5th grade. One year earlier, the parties had gone to a BSEA hearing, with the hearing officer determining that the public school's proffer of placement at FLLAC was appropriate to meet Student's needs. Unfortunately, however, right as summer was beginning, FLLAC had to inform Student's parents that no other students had enrolled in the summer program that was Student's "stay put" summer program. Consequently, Leominster proposed that Student participate in FLLAC's summer program for students with autism spectrum disorders (ASD). The ASD summer program, however, provided Student with 57 fewer instructional hours than his "stay put" summer program. Student began attending the ASD summer program while Student's parents sought a BSEA Order for a different collaborative program or a private special education school.

Readers looking for a good summary of the parameters of "stay put" will want to read this ruling. The hearing officer notes that the central issue regarding whether or not the public school is maintaining the status quo is whether the proposed change to services or placement involves a "fundamental change" in a basic element of the student's educational program. While much about the ASD summer program was identical to the "stay put" summer program, including the same teacher, speech language pathologist, and Board Certified Behavior Analyst, the hearing officer concluded that a 57-hour decrease in instructional hours over a 6-week summer program is more than *de minimis*. As a result, the hearing officer ruled that Student's "stay put" IEP could not be implemented in the proposed ASD program. However, given that there was insufficient time for Leominster to locate or create a summer program that would satisfy "stay put," the hearing officer determined that Leominster must continue to provide the summer services through the ASD program and then, prior to the start of the 2012-2013 school year, Student's Team should explore what additional services are to be provided and a timeline for service delivery.

Motion to Sequester Witnesses Denied In Light of General Concern About Possible Tailoring of Testimony

In Re: Stoneham Public Schools[1], BSEA # 1300160 (Crane); 18 MSER 269

Students' parents filed a motion to sequester all witnesses due to a general concern that witnesses may tailor or otherwise alter their testimony. In denying this motion, the hearing officer remarked that the BSEA hearing rules, the state special education regulations, and the Adjudicatory Rules of Practice and Procedure do not address whether (or when) witnesses must (or may) be sequestered. The hearing officer noted, however, that the state special education regulations give BSEA hearing officers the authority to take those steps that are necessary "to conduct a fair hearing," which, in some instances, may require sequestration of witnesses. Here, however, the hearing officer determined that the parents' offering a "general possibility" of tailoring of testimony was insufficient for him to conclude that sequestration was necessary to ensure a fair hearing. The hearing officer also agreed with Stoneham that allowing Stoneham witnesses to hear and respond to the concerns articulated by the parents' witnesses ultimately would assist the hearing officer in determining appropriate educational programming for Student.

This Commentator notes a big uptick in requests for sequestration of witnesses at the BSEA. Last quarter, Hearing Officer Crane allowed sequestration in the CBDE case. His ruling in CBDE is distinguishable from the Stoneham ruling as the CBDE case involved high stakes money damages and testimony of an unusually private nature given that a CBDE staff member had raped the Student at issue. In this quarter's cases, Hearing Officer Byrne also grappled with a Motion to Sequester in *In Re: Walpole & Violet*. Just as happened with *In Re: Stoneham*, the hearing officer denied the motion, concluding that there was no compelling reason or anything unique about the case that would require deviating from the BSEA's standard practice not to sequester witnesses.

Department of Children And Families (DCF) Not Joined As Party in Hearing Regarding Need for Residential Placement, Where Student Not in DCF Care or Custody

In Re: Gateway P.S. & Emmet K., BSEA # 12-8582 (Figueroa); 18 MSER 281

Emmet's parents filed for hearing seeking a publicly-funded residential placement for their 14-year old son. Gateway filed a Motion to Join the Department of Children and Families (DCF) as a party to the hearing. Supporting Gateway's Joinder Motion was that Emmet and his family had been DCF clients since spring of

1. This Commentator represented Stoneham in this matter.

2009. Additionally, DCF and Gateway cost-shared a residential placement for Emmet for the 2009-2010 and 2010-2011 school years. On the other hand, Emmet was not in DCF care or custody at the time of the motion hearing and DCF regulations prevent DCF from providing a residential placement for a child who is not in DCF care or custody.

In a ruling that had the potential for going either way, the Hearing Officer opted to deny the Motion, determining that joining DCF was not necessary for Emmet to get full relief through the BSEA hearing process. In so ruling, the Hearing Officer implicitly rejected Gateway's argument that DCF may be found responsible for providing services, short of residential services, to enable Emmet to continue to access his educational program in the Gateway Public Schools.

DECISIONS BASED ON DOCUMENTS ONLY

Placement Dispute Submitted for Decision Based on Documents Only, Resulting in BSEA Order for Landmark School

In Re: School District, BSEA # BSEA # 12-7316 (Crane); 18 MSER 284

In this Commentator's opinion, this decision is comment-worthy primarily because of the intrigue created by the parties' decision to resolve a placement dispute by only submitting documents to the hearing officer and agreeing to waive closing arguments. Student is a 14-year old boy with average cognitive ability who has diagnoses of a language-based learning disability, dyslexia, reading disorder, disorder of written expression, math disorder, and ADHD. Student has received special education services from School District from 2nd grade through the beginning of 8th grade, at which time Student's parents unilaterally placed him at the Landmark School.

In reading the decision, one wonders why School District decided to fight what appeared from the outset to be a losing battle. First, Student's formal standardized test scores in a number of different areas were on the decline over time. Moreover, there were no current evaluations or other written reports to contradict the findings and recommendations of parents' private evaluator who recommended that Student be placed in a language-based learning disabilities classroom. In addition, Student's emotional well-being was suffering, with Student becoming school phobic. School District's only hope would have been to propose an IEP and placement that matched the recommendations of parents' private evaluator, which School District did not do.

Public School Is Not Obligated to Reconvene Team in Response to Parent Request Where There Is No Reasonable Or Useful Purpose in Reconvening Team

In Re: Hudson Public Schools, BSEA # 1300513 (Figueroa); 18 MSER 324

The parties in this case just had finished a BSEA hearing with Hearing Officer Sara Berman in July 2012 that resulted in an order authorizing Hudson to implement its IEP and transition plan for Student at Wayside Academy. Subsequent to the BSEA decision, Parent requested that Student's Team at Wayside reconvene before the school year began. Hudson declined to do so, proposing instead to move-up Student's 3-year re-evaluation and then convene Student's Team after Student had been in the Wayside Academy's school year program for 6 weeks. Parent filed for hearing given Hudson's refusal to convene the Team in the time frame requested.

Although the parent filed the hearing request and agreed to submit the issue in dispute for a decision by the hearing officer on documents only, the parent did not file any arguments or documents in support of her hearing request. The hearing officer considered the information before her and correctly found in Hudson's favor. In analyzing the issue, the hearing officer wrote that nothing in the state or federal regulations mandates the reconvening of a Team anytime a parent desires if there is no reasonable or useful purpose served in doing so. The hearing officer noted that Hudson's proposal to advance the 3-year re-evaluation and reconvene Student's Team at the end of October was reasonable and ordered that Hudson reconvene the Team by a date certain, even if the 3-year re-evaluation had not been completed yet.

DECISIONS FOLLOWING EVIDENTIARY HEARING

Hearing Officer Refuses to Award Compensatory Services Where Parents Impeded The Placement Process

In Re: Leominster P.S., BSEA # 11-5123 (Berman), 18 MSER 233

Student is a 14-year old boy with Pervasive Developmental Disorder and a seizure disorder. In May 2010, Student moved with his parents from Haverhill to Leominster, bringing with him a fully accepted IEP and accepted placement in a substantially separate public school program for students on the autism spectrum. According to the hearing officer, Leominster made "great efforts" to get Student started in a comparable program as soon as possible, initially exploring two collaborative programs. At a Team meeting in August 2010, Leominster offered placement at either a collaborative program or the Darnell School, a private day school approved by the state to provide services to publicly funded students. Parents accepted the Darnell School placement but rejected the rest of the proposed IEP. Student actually began attending the Darnell School in mid-October 2010. Parents argued that, during the pendency of the dispute about Student's educational programming, Leominster should have been implementing the Haverhill IEP in the Darnell School placement.

Leominster filed for hearing seeking an Order finding that its proposed IEP offered Student a free appropriate public education (FAPE) and that it was not obligated to implement the Haverhill IEP as a matter of "stay put." The hearing officer made fast work of determining that the proposed IEP offered Student FAPE, noting that the IEP addressed all areas of need, offered 1:1 instruction for the majority of the school day, and used methodologies, including applied behavioral analysis, designed for students on the autism spectrum. The hearing officer also emphasized that the staff of the placement parents had accepted had developed the proposed IEP.

The hearing officer also analyzed the "stay put" issue, noting that Student's parents had a right to receive IEP services in a "comparable" setting to Haverhill's program but not to a "precise repli-

cation of the previous IEP." However, given that the hearing officer lacked information about the collaborative programs Leominster originally proposed for Student, the hearing officer was forced to find that Leominster had not met its burden of proving that its proposed collaborative programs were comparable to Student's Haverhill program. This finding, by itself, does not translate to an automatic award of compensatory services. In weighing the equities here, the hearing officer observed that the parents had acted so as to impede Leominster's ability immediately to provide Student with services in a comparable program to his last accepted placement. For example, the parents refused to allow Haverhill to release records to Leominster, refused to participate in some Team meetings, and stated that they intended to home-school Student. Consequently, the hearing officer correctly concluded that the parents were not entitled to the equitable remedy of compensatory services, given their actions.

After Agreeing to 14-Years of Public School Programming for Their Daughter Who Has Significant Disabilities Due to A Perinatal Stroke, Parents Obtain BSEA Order for Private Day School Placement at School Serving Brain-Injured Students

In Re: Walpole PS & Violet, BSEA # 12-3645 (Byrne); 18 MSER 237

Violet is a 17-year old who, due to a perinatal left hemisphere stroke, has complex partial seizures, a right field visual deficit and difficulties with visual spatial skills, processing speed, working memory, executive function skills, attention, physical stamina, and peer relations. Violet's parents filed for hearing seeking a BSEA Order for the Ivy Street School, a state approved full day, full year program serving students with brain injuries. Given Violet's significant, unique needs and her parents' agreement to public school programming for the last 14 years, Walpole was hard-pressed to prevail. And prevail, it did not.

Walpole tried mightily to salvage this case, arranging for their private consultant to evaluate Violet, developing an IEP for a "hybrid" in-district program, and developing a plan for Violet's re-entry to Walpole High School after Violet had been out of school for approximately 4 months. Walpole's efforts, however, fell short. The hearing officer was critical of the Walpole IEP for failing to propose a full year program and offering, instead, an "unconnected 4-5 week summer component." She also took issue with the IEP's description of the hybrid program as being "integrated," noting that there was no evidence that an individual, or team of individuals, would coordinate Violet's services "to ensure the consistency of approach and theme that Violet needs in order to learn effectively." In fact, the hearing officer seemed skeptical that this coordination would occur given that the "primary support team" that met 4 times to develop Violet's re-entry plan never met again once Violet re-entered the high school. Moreover, even though the primary support team developed behavioral data sheets related to Violet's return to school, no one completed the sheets. Finally, the hearing officer was troubled that none of Violet's proposed service providers had had any training regarding instructing children like Violet who have brain injuries and/or visual impairments. While, in this Commentator's opinion, Walpole could have strengthened its proposal by agreeing to have a private expert in educating students with brain injuries and/or visual impairments consult with Violet's Team regarding her programming, this likely would have been deemed to be too little, too late.

Hearing Officer Agrees With Finding of No Eligibility for IEP Where Student Is Making Effective Progress with Minimal Accommodations Provided Pursuant to 504 Plan

In Re: Lynnfield Public Schools, BSEA # 12-1425 (Berman); 18 MSER 247

A 19-year old senior at Lynnfield High School filed for hearing challenging Lynnfield's determination that he was not eligible for an IEP. Student has diagnoses of bipolar disorder (not otherwise specified), Asperger's Disorder, a "rule out" diagnosis of ADHD, and a learning disorder (not otherwise specified). For grades 9 and 10, Student attended a private, regular education high school. The majority of Student's grades at the private school were As and Bs, with an occasional C, with many of his classes being designated "Honors" or "Accelerated." Student's weakest subject areas were math and science courses. In 11th grade, Student enrolled at Lynnfield High School and had a course load that included Honors English and Advanced Placement US History II as well as college prep Advanced Algebra, Chemistry, Latin 2, and Personal and Business Law. In the fall of 11th grade, Student requested a special education evaluation due to his difficulty focusing on schoolwork despite medication and private counseling.

Lynnfield's cognitive testing of Student revealed that Student has much better developed verbal skills while his BASC-2 responses reflected Student's struggles with anxiety, depression and attention. Lynnfield also administered achievement testing. In math, Student earned scores in the "average" range but grade equivalencies ranged from grades 7.7 to 10.8. In February of 11th grade, Student's Team convened to consider the evaluation results. At the time of the Team meeting, Student's 1st term grades were all As and Bs. The school-based Team members determined that Student was not eligible for an IEP. Three months later, Lynnfield developed a Section 504 Accommodation Plan for Student. Lynnfield implemented the 504 Plan for the remainder of 11th grade, with Student choosing to access some, but not all, accommodations. Student's final grades for 11th grade were A- in college prep Latin-2, B+ in Business and Personal Law, B in Honors English and AP History, B- in college prep Advanced Algebra and college prep Chemistry, resulting in a grade point average of 3.26.

At the beginning of 12th grade, Lynnfield revised Student's 504 Plan to offer Student access to the Student Support Program during his study period. In October of 12th grade, Student underwent a private neuropsychological evaluation. Again, the math academic achievement scores all fell in the "average" range, with grade equivalencies ranging from early 8th grade to grade 11.7. The private evaluator made recommendations, noting that if the public school could not provide the recommendations on a 504 Plan, then the school should provide them on an IEP. In January, Student's 504 Team met to consider this evaluation report and revised the 504 plan to incorporate all of the evaluator's recommendations, except for remedial math instruction. The case went to hearing shortly thereafter, at which time Student had earned

the following 1st quarter grades: A in AP English, A- in Honors World Studies, college prep Topics in Advanced Algebra, and college prep Latin Prose, B in psychology and anatomy. These grades translated into a 3.83 grade point average and "High Honors" honor roll status. Lynnfield staff testified that Student earned these grades without having really tried the accommodations in the revised 504 Plan.

The hearing officer agreed with Lynnfield that, although Student has a disability, he does not qualify for an Individualized Education Program. The hearing officer noted that Student had "progressed effectively in the general education program" with minimal accommodations provided pursuant to a Section 504, including in courses that are more difficult for Student (e.g. math and science classes). Further, the hearing officer noted that there was no evidence that Student needed "specialized instruction" to make such progress. The hearing officer wrote that, "That Student has strengths and weaknesses, and does better in some courses than others, does not give rise to a need for specialized instruction where, as here, he has made 'documented gains in the acquisition of knowledge and skills' within the general education curriculum, even in his weakest areas."

Public School Ends Year-Long Search for Mutually Agreed Upon Private Day School Placement by Obtaining BSEA Order Supporting IEP Developed for Learning Prep School

In Re: East Bridgewater P.S., BSEA # 12-4944 (Scannell); 18 MSER 259

At the time of hearing, Cody was 17-years old and had been out of school for a year, receiving 10 hours a week of tutoring provided by East Bridgewater while parents and the public school tried in vain to resolve their placement dispute. Cody has diagnoses of central auditory processing disorder, attention deficit disorder, and a language based learning disability (dyslexia). Cody had attended public school for kindergarten through 2nd grade, was home-schooled from 3rd through 7th grades, and then attended the Clearway School, a private school approved to provide services to publicly funded students, for grades 8 through 10. All was well until June of Cody's 10th grade year, which is when Cody's mother contacted Clearway and the public school to report her concern that Cody was being bullied. After meetings and discussions regarding these concerns, Cody's parents informed East Bridgewater that Cody would not be returning to Clearway School. This marked the beginning of a year long odyssey to find a mutually agreeable educational placement for Cody. At different points, East Bridgewater proposed possible placement at South Shore Educational Collaborative, the Chamberlain School, and the Learning Prep School, all of which Cody's parents rejected. In an effort to end the placement stalemate, East Bridgewater filed for hearing seeking an Order that its proposed IEP and placement for Learning Prep would meet Cody's needs.

Given this fact pattern and knowing that the only individuals at the hearing on Cody's behalf were Cody, his relatives, and a family friend, it is no surprise that East Bridgewater got its requested relief. The hearing officer recognized the difficulty Cody and his parents must have had transitioning Cody to a structured school program after Cody had been educated at home for 6 of the last 9 years. However, the hearing officer determined that the evidence supports that Cody made effective progress while at the Clearway School and that Cody would be able to continue to make such effective progress while at Learning Prep. At the hearing, Cody's mother testified that she did not want Cody to participate in Learning Prep's work study program and did not believe that Cody required a math goal. The hearing officer noted that neither of these items is needed to ensure that Cody receives a free appropriate public education (FAPE). However, the hearing officer's sentiment was different about the parents' concern regarding Cody's participation in social skills training, noting that Cody would require this due to his difficulty with social interactions. Presumably these comments by the hearing officer reflect her effort to get Cody's parents to place Cody at Learning Prep, with the understanding that he could access some, but not all, proposed services without impacting his right to FAPE.

Public School Fails to File for BSEA Hearing After Refusing to Fund Requested Evaluation, Resulting in BSEA Order to Fund The Requested Evaluation

In Re: Brockton Public Schools, BSEA # 12-4761 (Figueroa); 18 MSER 271

Student is an 18-year old young man who is committed to the custody of the Department of Youth Services (DYS) until he turns 21 years old. Student originally was in a DYS secure treatment facility but, as of the hearing date, DYS had placed Student at the Eagleton School, where Brockton arranged for Student to be educated. All issues in this dispute are evaluation-related. Of particular interest to this Commentator was the Parent's request that Brockton conduct an independent living skills evaluation of Student. According to Parent, while Student was in DYS custody, Student did not brush his teeth or shower daily, did not know how to cook, and did not maintain his living area properly. Brockton refused to conduct the requested evaluation, contending that the evaluation was unrelated to Student's disability and his educational programming. The hearing officer considered both positions before determining that Brockton should have filed for hearing within 5 school working days of receipt of the evaluation request if Brockton did not wish to conduct the requested evaluation. Since Brockton did not do that, the Hearing Officer ordered Brockton to fund an independent functional living skills evaluation (including a home and school observation). This decision puts public schools on notice that it is insufficient to simply refuse to conduct a requested evaluation. Instead, the public school must proceed to the BSEA to avoid being responsible for conducting or funding the requested evaluation.

District of Residence's Failure to Propose Placement for Former Charter School Student Results in Reimbursement Order for Costs Associated with Private School Placement

In Re: Amherst Public Schools et al., BSEA # 11-6786 (Scannell); 18 MSER 327

This case is one of those that leave this Commentator scratching her head wondering what the public school was thinking, including why they went to a 6-day hearing over the dispute. However, with that said, this Commentator knows that there can be much more than meets the eye in these BSEA disputes. The student

here is called Miles. Miles is a 15-year old boy who spent the first 18 months of his life in a Romanian orphanage before being adopted. Miles has hydrocephalus which is treated with shunts. Due to his neurological impairment, Miles has difficulty with attention, working memory, executive function skills, impulsivity, modulating his behavior and psychomotor output.

Much of Miles's early schooling consisted of home-schooling, alternating with periods of public schooling in Amherst. In 7th grade, Miles's parents enrolled Miles in Pioneer Valley Performing Arts Charter School (PVPA). By spring of 7th grade, both PVPA and Miles's parents were questioning whether Miles needed a different placement. On April 28, 2010, PVPA invited Amherst to participate in a Team meeting to discuss placement options for Miles. Amherst did not attend the Team meeting. PVPA followed up in writing several times to Amherst making it clear that PVPA could not meet Miles's needs and that Amherst needed to work with the parents to explore possible Amherst placements. PVPA's efforts fell flat, and it wasn't until Miles's parents requested that Amherst fund Miles's tuition, room and board at Linden Hill that Amherst responded. As the new school year was about to begin, Amherst participated in a Team meeting that resulted in a revised IEP for Miles but still no placement proposal. Shortly thereafter, Amherst held yet another Team meeting but inexplicably still did not decide on a placement to propose for Miles. Subsequently both PVPA and Amherst observed Miles at Linden Hill and then reconvened Miles's Team at the end of October. Although Amherst stated at the meeting that they could meet Miles's needs, no one proposed any specific placement. PVPA concluded the meeting by stating that PVPA was recommending placement at Linden Hill and issuing an IEP placement page to that effect. Parents accepted the placement, but Amherst refused to pay for Linden Hall. In the spring of 2011, Miles's parents continued to inquire about possible appropriate programs in Amherst, but Amherst did not make any specific recommendations.

Not surprisingly, the Hearing Officer agreed that Miles's parents were forced to take self-help measures, which involved placing Miles at Linden Hill. The Hearing Officer concluded that PVPA had done as it is required to do under the special education regulations governing charter schools' responsibility for special education students' programming (603 CMR 28.10). That is, once Miles's Team at PVPA concluded that Miles might need an out-of-district placement, PVPA invited Amherst to the Team meeting. Amherst, as the district of residence, ultimately is financially responsible for Miles's education if PVPA cannot meet Miles's needs. Consequently it was critical for Amherst to attend Miles's Team meetings and play an active role in determining where to place Miles. For reasons we will never know, Amherst missed multiple opportunities to identify an in-district program for Miles. If Amherst had done that, it is possible Miles's parents would have opted to place Miles there rather than at Linden Hill. In the alternative, even if Miles's parents had moved forward with Linden Hill, the outcome at hearing likely would have been completely different if Amherst had proposed an in-district program that parents had refused to try.

The Hearing Officer ordered Amherst to reimburse Miles's parents for tuition and transportation associated with Miles's placement at Linden Hill for the 2010-2011 school year. In addition, she ordered Amherst to reimburse for an additional 6-weeks into the subsequent school year since there was a 6-week lapse in developing a successor IEP, which was a denial of FAPE. Finally, Amherst also was ordered to provide Miles with 5-weeks of compensatory services for summer 2009. Although the IEP in effect at that time reflected that Miles required summer services, the IEP did not delineate what those summer services would be. The Hearing Officer concluded that this, too, was a denial of FAPE that warranted the award of compensatory services.

Responsive Public School Gets Approval for Its Proposed In-District IEP, But Only for Trial Period And with Ordered Next Steps

In Re: Marblehead Public Schools, BSEA #12-3975 (Berman); 18 MSER 311

This case involves a unique student and an equally unique outcome. Student is an 11-year old boy who was finishing the 4th grade when the case went to hearing. Part of what makes this student unique is that there is no consensus about what his disability is. The good news, though, is that all agreed that the "label" is not as important as understanding what Student's needs are and how to address those needs appropriately. Student is described as having a complex and global learning disability that includes a communication disorder and visual spatial learning disabilities. Historically Student also has had intermittent hearing loss but, more recently, had surgery that seems to have successfully corrected his hearing loss.

In reading the decision, it appears that Marblehead did many things right, and was rewarded accordingly. As Student's needs evolved and new information was presented to the Team, the Team considered that information and adjusted its IEP proposals. Marblehead increased services, changed services, and proposed changes in program location. In short, Marblehead was responsive. In fact, Marblehead adopted many of the recommendations of the parents' own private evaluator. At the hearing, Marblehead defended an IEP proposing a combination of Student's continued placement in an Academic Skills classroom with proposed placement with a 1:1 tutor in the PACE classroom for ELA and math. The IEP also proposed individual work on phonemic awareness using the LiPS program, continued participation in the Academic Skills classroom for social studies, and participation in an inclusion science class along with students from the Academic Skills classroom. Parents tried, but failed, to establish that the PACE classroom would be inappropriate for Student because of the peers. In analyzing this argument, the hearing officer noted that the parents' evaluator testified that Student should be grouped with peers with similar communication disorders rather than with peers with primary diagnoses on the autism spectrum. However, the hearing officer reflected that the evaluator did not testify at the hearing that the peers she observed would inappropriate for Student. The parents also claimed that the proposed program was not "language-based," as recommended. The hearing officer dispensed with this claim, writing that there was no evidence that the proposed program lacked the elements of a

"language-based program," as defined by the parents' evaluator. However, given the parents' concern about Student getting "stuck" in an inappropriate program, the hearing officer ordered that the IEP and placement in the PACE program be implemented on a trial basis for 8-weeks. During the trial period, the Team must work with a doctoral level expert in complex communication disorders and in designing programs for such students. The Team also must collect objective data about progress and rate of progress. At the end of the trial period, the Team must consider the data collected and determine whether to amend or modify the IEP. Certainly this was a unique outcome for a unique student that hopefully will result in the parties getting back on the same page.

Public School Wins Requested Relief of Therapeutic Day School But Now Faces Challenging Task of Locating or Creating Appropriate Program

In Re: Andover Public Schools, BSEA #12-7315 (Berman); 18 MSER 319

Andover filed for hearing seeking an Order that Student must be educated at the Gifford School, a private therapeutic day school, in order to provide Student with a free, appropriate public education. Student is a 14-year old boy with Asperger's Syndrome and a penchant for creating elaborate comic books. Student spends a tremendous amount of time, including in class, drawing his cartoons and does not appreciate being told to stop. Over the years, Student has said, written, and drawn things that other students and teachers have found disturbing and/or threatening. For example, in winter of 8th grade, Student was suspended for writing an essay about conflicts he had had with former teachers and his plans for proving the teachers wrong. Shortly thereafter, he was overheard discussing a "surprise type of action to alter the school." Andover arranged for its consulting psychiatrist to conduct a risk assessment of Student. While the psychiatrist found Student was a "low risk" of self harm or harm to others, he noted that for the past 3 years he had been concerned about Student's isolation in Student's own fantasy life and Student's disengagement with the rest of the world. The psychiatrist concluded that Student requires a small educational environment where Student could learn to trust others and therapeutic interventions are infused throughout the day.

In reading the decision, this Commentator thought Andover might lose the case given the testimony of the parents' private Board Certified Behavior Analyst (BCBA), who did a functional behavioral assessment (FBA) before the end of Student's 8th grade year. As a result of the FBA and record review, the private BCBA made recommendations Andover never had implemented. The private BCBA found that Student could function in a public school setting, but recommended a data-driven FBA, a behavior intervention plan based on the FBA, BCBA consultation to staff, Student, and Parents, counseling, a social pragmatics program, and an academic tutor. However, as is often the case, it can be difficult to grasp all of the nuances of a case simply by reading a decision. Clearly, here the Hearing Officer believed that there was ample evidence that Student needed to be in a more restrictive program than Andover High School. However, the hearing officer was not convinced that Gifford could meet Student's needs. Consequently, the hearing officer ordered Andover to locate or create a placement for highly intelligent students with Asperger's Syndrome.

Public School's Delay in Proposing Placement Proves Costly, Resulting in Order to Reimburse Parents for 2 Years of Expenses At Private Residential School

In Re: Barnstable Public Schools, BSEA # 11-1387 (Berman); 18 MSER 335

At the time of the hearing, Student was a 19-year old young man with Asperger's Syndrome whose plan was to attend college at the start of the 2012-2013 school year. The issue at hearing was whether Barnstable had proposed appropriate IEPs for Student's 11th and 12th grade years and, if not, whether his parents should be reimbursed for their unilateral placement of Student at Franklin Academy in Connecticut. Student's high school career started out on a bumpy path. In 9th grade, Student entered Cape Cod Tech but was involved in some incidents that led to several criminal charges. Cape Cod Tech did not expel Student, but Student was tutored for a portion of his 9th grade year. In October of 10th grade, Student enrolled at Barnstable High School. However, by agreement between Barnstable and the parents, Student received home tutoring through June of 10th grade, along with accommodations pursuant to a 504 Accommodation Plan.

In March of 10th grade, Barnstable considered parents' privately obtained neuropsychological evaluation and found Student eligible for an IEP based on diagnoses of Asperger's Syndrome, ADHD, and specific learning disabilities in reading and written expression. Inexplicably, however, although Barnstable sent parents a draft IEP 4 times between April and October, Barnstable never sent a placement page. Sound familiar? (It should—see *In Re: Amherst*). During this April to October timeframe, there was communication about possible placements between the attorneys for the parents and Barnstable. In fact, in June of 10th grade, the parents' attorney requested that Barnstable fund Student's placement at Franklin Academy. In the summer before 11th grade, Barnstable sent referral packets to Franklin Academy and Southeast Alternative School (SAS), a DESE approved private day school in Hyannis, MA. In early September, Parents unilaterally placed Student at Franklin Academy. Around this same timeframe, SAS verbally informed Barnstable that Student was an appropriate candidate for their school. In October, Barnstable held a Team meeting and developed an IEP, purportedly for SAS although no formal placement proposal for SAS was made to parents. For the following school year (gr. 12), Barnstable convened a Team meeting in early September but did not issue an IEP until October. By that time, Student was attending Franklin Academy for year 2.

The decision to award parents' reimbursement for Student's first year at Franklin Academy appeared to be an easy one for the hearing officer. Barnstable wrote a very incomplete IEP and failed to propose a placement in a timely manner. The hearing officer was equally unimpressed with Barnstable's efforts in year two, noting that Barnstable did not issue an IEP until October. The hearing officer also wrote that, even if the parents were well aware that Barnstable's intention was to propose placement at

SAS, SAS was not appropriate to meet Student's needs. Specifically, the hearing officer concluded that SAS was incapable of providing the high-level math and science coursework Student was capable of performing. For the time periods at issue, SAS teachers were not certified in the content areas being taught and offered only limited advanced courses. By comparison, Franklin Academy is designed to serve students with Asperger's Syndrome and offers the level of academic rigor that Student requires. Although Student did not require a residential placement to meet his needs, the hearing officer ordered Barnstable to reimburse parents for all out-of-pocket tuition and related expenses for Franklin Academy since the parents should not be faulted for Barnstable's failure to propose an appropriate day school within commuting distance.

In-District Program Deemed Appropriate But Public School Ordered to Provide Extended Day Services to Address Student's Toileting Skills

In Re: Sutton Public Schools, BSEA #12-6333 (Figueroa); 18 MSER 288

Student is a 15-year old boy who, as an infant, suffered seizures that resulted in apraxia. Student's parents and Sutton have been to BSEA hearings multiple times. This time, Sutton filed for a hearing seeking an Order affirming that its proposed IEP is adequate. Sutton successfully argued that the school district did not bear the burden of persuasion since Sutton preemptively was looking for the BSEA to determine that the proposed IEP is appropriate. The parents, who dispute the adequacy of the proposed IEP and who are looking to change the status quo, bear the burden of persuasion even though they did not initiate the hearing.

Ultimately, the hearing officer concluded that Student was making meaningful progress in Sutton's in-district program, commensurate with his ability. Much of the hearing focused on Student's toileting program, so the hearing officer devoted special attention to this issue. Sutton had a BCBA develop a toileting protocol that Sutton had found quite successful in school. Student, however, displayed toileting difficulties at home, presumably in large part because his parents did not agree with the protocol. One issue the parents had with the toileting protocol was that Student was to sit for all toileting needs. Parents, however, wanted their son to stand while voiding, consistent with cultural norms. Sutton's BCBA did not recommend this for Student because Student's toileting routine needed to be as consistent as possible and because Student's disability made standing while voiding difficult. The hearing officer agreed with Sutton that learning independence with toileting skills outweighed parents' preference for the logistics of the toileting routine. The decision reflects that once Student successfully performs all of his voids in the bathroom, then Sutton can work on teaching Student when to sit or stand. This, however, was not the end of the analysis about the toileting issue. Given that the parents were unlikely to support and implement a toileting protocol with which they disagreed, Sutton was ordered to provide toileting services after school hours, which is when Student has his bowel movements.

The other noteworthy aspect of this decision was a much-needed hearing officer critique of Student's private play therapist. To this Commentator, it seemed that at every turn, this therapist looked to blame all problems on Sutton. For example, he wrote to the parents that Student's "anxiety and apprehension" during therapy had increased dramatically since Student returned to Sutton. However, the therapist never observed Student in his program in Sutton and had limited communication with Sutton staff as he did not think such communication would advance his work with Student. If, however, the therapist had been open to communication with Sutton, perhaps he would have realized that Student was not demonstrating signs of anxiety in school. The therapist also testified that Student called him an expletive during a therapy session, curiously opining that Student had learned the foul language in Sutton.

Thankfully, the hearing officer completely disagreed with the parents and the private therapist that the Sutton program, including the toileting protocol, was causing Student to be anxious. Instead, the hearing officer determined that the evidence supported that Student's stress was the result of his therapy sessions with the private therapist. The hearing officer noted that the only time Student had aggressed against another and had attempted to destroy property had been in the therapist's office. She also reflected that Student had had more toileting accidents in the last year in the therapist's office than in his Sutton program. The therapist also had had to restrain Student, something that Sutton had not had to do. Sutton also had not heard Student use foul language in school, but the therapist clearly had. Finally, Student was reluctant to go to therapy and, once there, was resistant to the therapy. ■