MSER Commentary Second Quarter 2013

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The 2nd Quarter of the year was relatively active at the BSEA, with hearing officers issuing 7 decisions following full evidentiary hearings and 4 rulings. To this Commentator, there was no significant theme to this quarter's activity other than the fact that many of the decisions had unique facts. My top three picks of what to be sure to read begin with the ruling in *In Re: Mansfield* in which the hearing officer allows the parents' expert to observe the child's educational program for one, full continuous day. Next I recommend *In Re: Christa McAuliffe Regional Charter P.S.* where dueling experts argued about progress as evidenced by grade equivalencies versus standard scores on standardized tests, with standard scores carrying the day. Last, but certainly not least, a "must read" for public school staff is the decision about transition services in *In Re: Quincy*. This decision in favor of the public school serves as a reminder that a student may still need to develop many skills but that does not then mean that the public school failed to provide appropriate transition services.

RULINGS

Parents' Expert Must Have Opportunity to Observe Child's Educational Programming for One Full, Continuous Day to Allow Expert to See If Child's Emotional Presentation or Anxiety Changes over Length of The Day

In Re: Mansfield Public Schools, BSEA # 1307030, 19 MSER 100 (2013) (Crane)

The parents filed a Motion to Compel the Mansfield Public Schools to allow their expert to observe their child's educational programming for one full, continuous day. The parents explained that the reason for their request was to enable their expert to observe whether their son was exhibiting social skill deficits and any resulting anxiety over the course of a single school day. Mansfield did not oppose an observation of the student's entire educational program but wanted the observation to occur over more than one day to accommodate the schedules of those who would be accompanying the expert during the observation.

Effective 1/8/2009, the Massachusetts Legislature amended the state special education statute to ensure that parents and their designees have a timely opportunity to observe their child's current and proposed educational program, including academic and non-academic program components. The observation law explicitly states that the law's purpose is "to insure that parents can participate fully and effectively with school personnel in the consideration and development of appropriate educational programs for their child." According to the observation law, a school district can restrict an observation only as necessary (1) to ensure the safety of children in a program, (2) to ensure the integrity of the program while under observation, or (3) to protect children in the program from disclosure by an observer of confidential and personally identifiable information obtained during an observation. With all of this as a backdrop, to this Commentator, Hearing Officer Crane had no choice but to rule as he did and allow the parents' expert to observe for one full, continuous day.

Parents' Decision to Name the Department of Mental Health (DMH) Directly As A Party to BSEA Hearing Withstands DMH's Opposition

In Re: Concord-Carlisle School District, BSEA # 1307146, 19 MSER 104 (2013) (Crane)

The parents of a 16-year-old girl diagnosed with major depressive disorder, anxiety disorder, and eating disorder filed for hearing against the Department of Mental Health (DMH) and Concord-Carlisle seeking retroactive reimbursement and prospective placement at the New Haven School in Utah. Prior to the hearing request, Concord-Carlisle had proposed an in-district special education program for this student. In addition, DMH had found the student eligible for services and even had discussed possibly entering into a cost-sharing agreement of a residential placement with Concord-Carlisle. Unfortunately, the parties did not agree on what would be an appropriate, long-term placement for the student, so her parents moved forward with unilateral placing their daughter in Utah.

This ruling addresses DMH's Motion to Dismiss DMH from the BSEA proceeding. First, DMH took issue with the fact that the parents filed for hearing directly against the school district and DMH. DMH's perspective is that the only appropriate way for DMH to become a party to a BSEA hearing is through a joinder motion. The hearing officer disagreed, stating that BSEA practice has been to allow the moving party to name any opposing party, including a state agency like DMH. Second, DMH argued that any dispute with the parents regarding DMH-provided services is more properly addressed through DMH's own administrative process rather than through the BSEA. Again, the hearing officer had a different perspective. Hearing Officer Crane noted that the state special education statute allowing for the joinder of human service agencies to BSEA hearings is intended to ensure that the BSEA is able not only to resolve disputes about a student's special education services but also to determine what additional services a human service agency must provide in order for the student to have access to, and benefit from, special education services. The hearing officer dispensed with DMH's final argument that the BSEA first should resolve the dispute about school district responsibility before involving DMH. Hearing Officer Crane disagreed and ordered that DMH be a party to the hearing, concluding that "the only vehicle for ensuring that appropriate, coordinated and consistent services are provided by DMH and Concord-Carlisle is for DMH to be a party to the in-

stant dispute." This Commentator agrees with this ruling, otherwise the statute that authorizes the joinder of human services agencies becomes meaningless.

Recusal Of Hearing Officer Unwarranted But Case to Be Re-Assigned Given Unique Situation Presented

In Re: Norton Public Schools, BSEA # 1306264, 19 MSER 134 (2013) (Byrne)

Parents in two different BSEA matters involving the same school district, two different students, and the same advocate filed identical motions seeking for Hearing Officer Byrne to recuse herself from hearing their cases. In this ruling, Hearing Officer Byrne thoroughly analyzes the issue of recusal before determining that there is no merit to recusal request. However, the Hearing Officer was swayed by the advocate's argument that each set of parents deserves a fresh perspective from a hearing officer who is not impacted by the facts in a different – yet similar – contemporaneous case. Consequently, the hearing officer determined that the unusual situation here warranted administrative reassignment of this case to a different hearing officer. Given the unique circumstances here, this Commentator believes that the hearing officer made the right call.

DECISIONS

Student's Declining IQ Scores, Achievement Test Scores and Grades Equals Reimbursement Order for 2 Years of Residential Programming

In Re: Westport Community Schools and Jed, BSEA # 1302922, 19 MSER 106 (2013) (Oliver)

Jed is a 16-year-old boy diagnosed with Attention Deficit Hyperactivity Disorder, Obsessive Compulsive Disorder (OCD), Tourette's Syndrome, Learning Disability Not Otherwise Specified, and anxiety. Jed was first identified as being eligible for an Individualized Education Program (IEP) when he was in the 6th grade. Jed attended the Westport Community Schools through June 2011, when Jed was in 8th grade. In September 2011, Jed's parents unilaterally placed Jed as a residential student at Middlebridge in Narragansett, Rhode Island. Middlebridge is described as an independent, co-educational high school for students of average to above average cognitive ability who have struggled in traditional classroom settings. Middlebridge is not approved by Massachusetts to provide services to publicly funded students but is approved by Rhode Island as a private school.

The parents' hearing request included a claim for unspecified compensatory educational services. Hearing Officer Oliver cited to a number of court and BSEA decisions standing for the proposition that parents cannot revisit IEPs that they accepted and that have since expired where parents (1) participated in the development of such IEPs, (2) received notice of their right to reject IEPs and proceed to a due process hearing, and (3) choose to accept the IEPs and never reject the IEPs during the time period covered by the IEPs. In this case, the parent had not formally rejected the IEP on the table at the time of their unilateral placement. The hearing officer decided, however, that the parents constructively rejected the IEP in September 2011 when parents gave notice of their intention to unilaterally place Jed at Middlebridge and to seek public funding for such placement.

After 4 days of hearing, the hearing officer concluded that Jed's parents acted appropriately in unilaterally placing Jed residentially beginning as of 9th grade. The hearing officer was bowled over by a comparison of standardized test results (e.g. WISC-IV and WJ-III) over time, which he described as being "highly significant and quite disturbing." More specifically, the hearing officer noted that two of the IQ index scores had decreased by 7 and 24 points, with the full scale IQ decreasing by 21 points. Achievement testing was no better, with the hearing officer determining that the testing showed regression. The hearing officer concluded that, after receiving three years of special education services from Westport, Jed's achievement testing showed him to be 2 years farther behind than before he had begun receiving services. To make matters worse, the hearing officer pointed out that Jed's grades had been on a downward spiral from 6th to 8th grade, especially in math and English (which already were modified grades) as well as social studies. The hearing officer explicitly stated that he was particularly troubled that Westford's own IQ and achievement testing in December 2010 showed sharply declining scores, yet Westford did not find Jed had a learning disability until the parent obtained an independent evaluation.

Unfortunately for Westford, Hearing Officer Oliver also was underwhelmed with the proposed programming for Jed. For 9th grade, Westport proposed that Jed attend the school district's Language-Based Learning Program (LBLP). The LBLP is a regular education initiative in which LBLP teachers receive training from an outreach program of the Landmark School. The LBLP program is for students with average to above average cognitive ability who have difficulties with executive functioning and memory. A regular educator and special educator co-teach all core academic classes in 9th grade with a class size of 14-16 students. By way of example, there was testimony that for the 2012-2013 school year, the 9th grade English and science classes in the LBLP had 15 students, ten (10) regular education students, seven (7) of whom were model students, two (2) students on IEPs, and three (3) students on 504 plans. By design, the LBLP provides less support to 10th graders, with only English and math being co-taught. Also, at the time of the hearing, this regular education initiative only ran through 10th grade, with unspecific extension plans for 11th and 12 grades. To this Commentator, Westford's proposal for relatively small, co-taught classes for 9th grade sounded promising. However, Hearing Officer Oliver was troubled that the LBLP is not special education services, commenting that Jed, with his multiple disabilities, needed more specialized services especially given that he was in 9th grade and was approximately 3-4 years below grade level. Good points, indeed. In this Commentator's opinion, certainly Westford's "one-size fits all" program, with an automatic decrease in instructional support in 10th grade and a to-be-determined program for 11th grade was not helpful.

But that's not the end! Hearing Officer Oliver also discussed Jed's performance since attending Middlebridge. Unlike earlier

standardized testing, standardized testing done over time at Middlebridge (WRMT-R and WIII achievement in math) reflected that Jed had made demonstrable progress. Jed's treating psychologist, who had no connection to Westport or Middlebridge, testified that Jed had a "dramatic and delightful change in functioning, with his OCD and phobias not in evidence" since attending Middlebridge. Given this evidence, it is understandable the hearing officer ruled in the parents' favor. Although the hearing officer acknowledged that Jed did not need a residential school to receive a free, appropriate public education (FAPE), the driving distance in excess of one hour one-way sealed the deal for an award of reimbursement for a residential program.

Student's Health And Safety Deemed At Risk Given Her Eating Food off Floor Or from The Garbage Once To Twice Daily

In Re: Boston Public Schools, BSEA # 1308609, 19 MSER 115 (2013) (Crane)

Student is a 10-year-old girl who has diagnoses of autism spectrum disorder, global developmental delays (including moderate intellectual deficit) and Rett Syndrome. Student currently attends a substantially separate classroom taught by a special educator who has a Master's degree in education (severe disabilities) and has been a Board Certified Behavior Analyst since October 2012. There are six students in Student's classroom along with the lead teacher, two classroom aides, and two aides assigned to work with specific students. Student's mother filed for an expedited hearing contending that her daughter's health and safety are in jeopardy because Boston is allowing her daughter to eat food off the floor and from the garbage.

The evidence at the expedited portion of the hearing revealed that Student was having behavioral difficulties dating back to the fall of 2012 despite 2:1 adult support at different times during the school day. One of Student's problematic behaviors is food stealing, and Student, who is 5 feet tall and 200 pounds, will leave any area at any time to get food. At the beginning of April 2013, Boston added a 1:1 aide, resulting in greater compliance. However, Student continued to demonstrate inappropriate behavior on average once every 2-3 minutes throughout the day, leaving the hearing officer with no choice but to find that Student was not receiving FAPE. In terms of food steals, data reflected only marginal improvement, with approximately 7 food steals a day. Typically 1-2 times a day, Student grabs food from the floor or from the garbage and eats it. Boston staff no longer attempt to take food away from Student once she gets it since taking it away proved to be a challenge and actually resulted in additional problem behaviors such as tantrums and flopping to the floor.

Boston argued at the hearing that its incremental approach of adding a 1:1, adjusting Student's behavior plan, and having an ABA consultation was a sufficient response to Student's issues. Hearing Officer Crane emphatically disagreed, writing that it is "completely unacceptable to allow this situation to continue." Hearing Officer Crane emphasized that this issue is an urgent and complex one such that Boston needs to immediately bring "whatever expert consultants, staff and program resources it may have available to assist with these processes." Although the hearing officer determined that Student's health and safety are at risk, he was unconvinced that the only option is an out-of-district school. Boston was ordered to locate and create whatever needs to be put in place so that Student's health and safety no longer are at risk, with a hearing scheduled at the end of the summer on all remaining hearing issues.

Given Unique Facts of Case, School District Not Responsible for Transportation Reimbursement for Majority of Student's Visits to Home from DYS-Cost Shared Residential Placement

In Re: Brockton Public Schools, BSEA # 13-01082, 19 MSER 121 (2013) (Figueroa)

Fourth time wasn't a charm for this BSEA parent/Student frequent flyer. Student is a 19-year-old Brockton resident who is committed to the Department of Youth Services (DYS) until his 21st birthday. In October 2011, Student began living and attending school at the Eagleton School as part of an agreement between Student's parent and DYS. In order to leave his DYS facility to go to Eagleton, Student had to sign a Grant of Conditional Liberties (GCL) that provided, among other things, that Student must comply with all Eagleton School rules. Also in October 2011, Brockton agreed to cost-share the residential with DYS, with Brockton funding the day portion of Student's Eagleton placement. Brockton later issued an IEP amendment that reflected the cost-share agreement and that specifically excluded the provision of transportation services. In May 2012, Eagleton terminated Student for assaulting another student multiple times and asked DYS to pick up Student immediately for his violation of the GCL. Brockton responded by sending out referral packets to other private day schools and arranged for Student to attend Southeast Alternative School for the remainder of the school year. Student went "on the run" in August 2012 and, by the time of the BSEA hearing in the winter of 2012/2013, Student was committed to the Plymouth House of Corrections.

Of the five claims addressed in the hearing decision, the most meritorious claim is that Brockton should reimburse Parent almost $4,000 in transportation expenses associated with the approximately 25 times Student left Eagleton for home visits. Hearing Officer Figueroa agreed with Brockton that the school district was not legally responsible to provide transportation given the unusual circumstances here; that is, that Brockton only agreed to cost-share the day portion of the Eagleton placement after DYS and parent had made the placement and the follow-up IEP did not include the provision of transportation. Additionally, Brockton had no control over the decisions to grant home visits or the frequency of home visits and the home visits were unconnected to Student's education. Brockton, however, did offer to reimburse the parent for 3 home visits that occurred over school vacations, which is reflected in the decision's order.

Hearing Officer Encourages Public School to Take Whatever Steps Are Necessary to Ensure Student's Receipt of FAPE Even If That Means Getting Other Agencies Or Court Involved

In Re: Mercy Centre & Brockton Public Schools, BSEA # 1304173, 19 MSER 142 (2013) (Putney-Yaceshyn)

Student is an 11-year-old autistic boy whose last educational placement was as a day student at the Mercy Centre, a private special education school approved by the state to provide ser-

vices to publicly funded students. Approximately one year after Student began at Mercy Centre, Mercy Centre sought an emergency termination of Student's placement. According to Mercy Centre, Student's decline began after his mother chose not to have her son participate in the school's summer program. When Student returned to school in September 2012, his aggressive behaviors were more regular and more intense. In December 2012, Mercy Centre suspended Student for 4 days to give the staff time to determine whether there was anything that could be done to ensure Student's safety as well as that of others. Ultimately, Mercy Centre concluded that the school no longer could meet Students needs, noting that Student had injured staff six times seriously enough to warrant documentation and three times significantly enough to warrant immediate medical attention. Similarly, Student had attempted to be aggressive toward his peers six times, once resulting in the peer needing immediate medical attention. Parent filed for hearing seeking for Mercy Centre to readmit her son. However, at the hearing, she testified she no longer wanted placement at Mercy Centre.

The hearing officer concluded that there was "ample evidence" that Student presented a clear and present threat to the health and safety of himself and others, even when staffed with a 2:1 ratio. Hearing Officer Putney-Yaceshyn also agreed with Mercy Centre that there would have been an unreasonable risk of harm if Mercy Centre had complied with the state private school regulations that require a private school to delay termination of a student for up to 2 calendar weeks if requested to do so by the funding public school. She found that Mercy Centre and Brockton had taken all reasonable steps to identify an appropriate placement and provide interim services. However, because Student's parent refused to cooperate and communicate, Student had been without services for the 6 months since the termination and the BSEA hearing. Since this was the parent's fault, the hearing officer did not order compensatory services. Instead, she encouraged Brockton to take whatever steps are needed to ensure that Student receives FAPE, even if that means involving other agencies or the court system.

Two Years after The Fact, Charter School Successfully Defends Inclusion Math Programming for 7th Grade Special Education Student with Intellectual Disability

In Re: Christa McAuliffe Regional Charter PS,[1] BSEA # 1300761, 19 MSER 137 (2013) (Crane)

The father of 9th grader attending a private special education school filed for a BSEA hearing challenging the appropriateness of his daughter's 7th grade math instruction at the Christa McAuliffe Regional Charter Public School. Parent's hearing request originally included a number of other claims against McAuliffe. A different hearing officer, however, ruled in favor of the charter school's motion for summary judgment, leaving behind only one viable claim. Student is described as having "a substantial intellectual disability, with a full scale IQ of 62." Student began her schooling in the Natick Public Schools, where she attended school through the 5th grade and was educated primarily in a substantially separate program. Student's father wanted his daughter to be educated in an inclusion setting and, with the assistance of an educational consultant, decided to enroll his daughter at McAuliffe beginning in 6th grade. McAuliffe's IEP for 6th grade proposed that Student participate in all mainstream classes, with special education support in the Learning Center for English/language arts and math. Student's father fully accepted this IEP. Student's father never accepted the proposed IEP for 7th grade and, in fact, eventually fully rejected the proposed IEP. Consequently, throughout Student's 7th grade year, McAuliffe staff implemented Student's 6th grade "stay put" IEP, including IEP goals and objectives. During 7th grade, Student's father paid privately for a 1:1 tutor to accompany Student in all of her math classes. In December of that year, the parent's educational consultant observed Student's math class and was concerned that some of the material was too difficult for Student. There was no evidence at the hearing that anyone shared this concern with McAuliffe. Student continued to attend school at McAuliffe for 8th grade before moving on to a private special education school for 9th grade.

In analyzing the appropriateness of Student's 7th grade math instruction, Hearing Officer Crane began by reciting the First Circuit's reminder that an IEP must not be " judged exclusively in hindsight" and "must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated." At the hearing, Student's regular educator and special educator testified that Student had made substantial progress in some, but not all, areas covered in her 7th grade math class and that IEP progress reports reflected that Student continued to make progress in math throughout the school year. In contrast, the father's educational consultant testified that his testing in 6th grade and 8th grade reflected that Student did not make appreciable progress and that the KeyMath showed that Student made only ½ a year's progress in 2 years' time according to the test's grade equivalencies. McAuliffe did not allow this testimony to go unchallenged and had their own private psychologist consultant explain that the test manuals themselves warn evaluators to be cautious about relying on grade equivalent test scores. She testified further that this was particularly true for students, like the one here, who had test scores on the edge of the Bell curve. McAuliffe's expert, who the hearing officer found credible and persuasive, testified that the fact that all subtest standard scores remained the same over two years (except one that substantially improved) means that Student actually made substantially the same amount of progress in math during this two year period as did her same age peers. Based on the testimony of McAuliffe's witnesses, the hearing officer found that Student made substantial progress in some, but not all, areas of 7th grade math. Given Student's 62 IQ and weakness in perceptual reasoning, Hearing Officer Crane concluded that Student's math progress was "meaningful and appropriate" when viewed in the context of her learning potential.

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1. An attorney in this Commentator's firm represented the charter school at this BSEA hearing.

The hearing decision also takes issue with the parent's educational consultant for testifying that Student should have been placed in a substantially separate math class for 7th grade. Hearing Officer Crane properly addressed this opinion bluntly, writing that the father and the educational consultant arrived at their opinions about an appropriate math setting in hindsight. In fact, the educational consultant testified that, although he knew math was Student's weakest area and that she might struggle, he thought inclusion was worth a try. The father also testified that at the time the IEP Team wrote the IEP for 7th grade as well as during his daughter's 7th grade year, he thought Student should be in a mainstream math class. Why then sue the public school after the fact?! The hearing officer concluded that it was reasonable for the IEP Team to propose inclusion math for 7th grade knowing that the parent was paying for a private tutor in the class and the special educator would be working with Student in the Learning Center. Hearing Officer Crane also addressed the parent's procedural concern that no regular education teacher was at a Team meeting in October of 7th grade. The hearing officer found that even though this was a violation of the IDEA, this had no impact on the IEP's content and did not prejudice the parent or Student since the math placement decision had been made in June of 6th grade at an IEP Team meeting where a regular education teacher was present.

Parents Fail in Bid for Residential Placement for Adult Son with Rare, Profound Disability

In Re: Nauset RSD & Massachusetts Department of Developmental Services, BSEA # 1300562, 19 MSER 152 (2013) (Crane)

Student is 20 years old and lives with his father in Brewster. Student has profound, multiple disabilities including significant global delays related to diagnoses of (1) partial unbalanced translocation syndrome of the 7th and 9th chromosome and (2) dysplastic corpus callosum. Since entering high school in 2008, Student has attended Nauset's Life Skills Program, which is a substantially separate program within the high school. Student's parents filed for hearing seeking an order for a residential placement.

Student's principal disability (i.e. partial unbalanced translocation syndrome) is a very unusual disability. None of the witnesses could point to relevant literature about the disability or had experience observing, evaluating or working with a person with this disability other than the student at issue. Student is non-verbal and has profoundly compromised communication, mobility and self-help skills. Student's progress is so painstakingly slow that typically Student would not make any demonstrable gains in a single school year. While parents' only expert testified that Student was capable of making substantially more progress than he currently demonstrates, her opinion was premised on her conclusion that Student is capable of understanding language at a 24-month level. However, Hearing Officer Crane found that the weight of the testimony, including apparently that of Student's father, was that it is not clear if Student consistently understands the meaning of even a single word. He concluded that Student's receptive language is the equivalent of a 9-month to 12-month old infant. Parents' own expert testified that if Student's receptive language ability is "significantly lower" than the 24-months she thought was the case, then Student would have trouble making sense of what a teacher was trying to teach. The hearing officer also sided with the school's experts in determining that it would be unreasonable to expect Student to progress at a faster pace even with substantially more intensive services. Finally, the hearing officer concluded that the testimony of the parents' own expert did not support the need for a residential placement since all she said was that Student required services beyond a standard 6-hour school day. Nauset had offered home-based services, but the father had declined them.

Parents' last ditch effort was to poke holes in Nauset's transition planning but this, too, fell short. Hearing Officer Crane concluded that there was no substantive violation of the school district's obligation to provide transition planning and services. Student is eligible for services from the Massachusetts Department of Developmental Services, which likely will place Student in a group home and provide him with a day program. According to the hearing officer, it is undisputed that the current placement is working on the skills Student will need in this adult setting.

In closing, the hearing officer found that the hearing highlighted the need for Student's educational assistant to receive more training and supervision. The order requires that the educational assistant receive 2 more months of training and supervision, the specifics of which are to be determined by the IEP Team. After that, Nauset is required to have an expert observe the educational assistant to determine if more training and supervision is required. Finally, the hearing officer ordered that the IEP be amended to reflect the level of consultation the speech language pathologist testified she actually provides, which is 45 minutes/week.

Public School Successfully Passes Baton to Adult Human Service Agency for 22 Year Old Who Received Appropriate Transition Services Yet Still Has Many Areas in Need of Development

In Re: Quincy Public Schools, BSEA # 1301349, 19 MSER 166 (2013) (Berman)

Student is 22 years of age and has autism and an intellectual disability. Parents filed for hearing arguing that Quincy had failed to provide appropriate transition services during the two years predating the hearing request and continuing through Student's 22nd birthday. For the time period in question, Student was placed at the South Coast Educational Collaborative's Vocational Training Center (VTC), which was the placement parents located for Student. The hearing decision reflects that the VTC is a "well-established specialized setting designed to assist young adults with disabilities through the transition process." That description alone should clue in readers to the outcome of this decision! The hearing officer found that VCT did initial and ongoing assessments of Student using formal and informal measures throughout the time period at issue. Hearing Officer Berman also determined that VTC provided Student with opportunities and instruction in developing basic skills needed to be employed. Finally, although the parents were displeased with the amount and intensity of computer instruction provided, the hearing officer found that it was adequate and did not lead to the denial of FAPE. She concluded her decision by noting that Student still needs to develop his skills in a number of areas, but Quincy did

what it was required to do, which was to help smooth the transition to post-high school life. The hearing officer concluded her decision by encouraging the Massachusetts Rehabilitation Commission, the lead agency for Student's adult services, to be responsive to Student's needs and Parent's advocacy efforts. ■