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Moving Along: Resolving LEA Assignment Appeals

The BSEA issued 12 decisions during the fourth quarter, consisting primarily of rulings made on motions during BSEA cases, three of which were related to the same matter. Of the three substantive hearing decisions, two were related to FAPE claims, while the third decision was based on written submissions and concerned a residency matter and application of the "Move-In Law."

In *In Re North Andover Public Schools* v. *DESE and Bedford Public Schools* 29 MSER 348 (Berman, October 6, 2023), Hearing Officer Sara Berman upheld DESE's LEA assignment after reviewing a complicated timeline and set of facts.

In this case, Hearing Officer Berman issued a decision based on the parties' written submissions, pursuant to Rule XI of the Hearing Rules for Special Education Appeals, which also constituted her ruling on New Bedford's Motion for Summary Judgment. BSEA Hearing Rule XI: *Decision Without a Hearing* allows for a party to request a decision without a due process hearing, and if all parties agree to a decision based solely on written material, the hearing officer will determine the case based on those written submissions. This decision has the "same force and effect as any other BSEA decision." This process is one rarely used by litigants, and this case is a reminder that it can be a useful tool to resolve certain contested matters.

The issue at dispute was whether DESE had correctly applied 603 CMR 28.10(8) and the "Move-In Law" found at MGL c. 71B, §5. In this case, DESE had assigned financial responsibility to the North Andover Public Schools ("North Andover") from August 2022 through June 30, 2023 where North Andover placed Student in residential placement in April 2019, and Student's Parent subsequently moved from North Andover to Virginia.

Student began as a residential student at the Evergreen Center in Milford, MA in April 2019. Student's signed IEP for the time period March 3, 2022 - March 3, 2023 identified his placement as a private, out-of-district residential school. On July 30, 2022, Student turned 18 years old and became his own guardian. Parent reportedly moved from North Andover to Virginia on an undetermined date in August 2022. On January 10, 2023, the Probate and Family Court for Worcester County appointed three co-guardians for Student—one who resides in Bedford, MA and two who reside out of state. Following this appointment, the Bedford guardian enrolled Student in the Bedford Public Schools ("Bedford"). In February 2023, Evergreen filed a request for LEA assignment as North Andover had ceased payment for Student after August 2022 when North Andover learned of Parent's move.

The DESE LEA assignment issued in May 2023 determined that programmatic responsibility was assigned to Bedford and financial responsibility continued to be assigned to North Andover through June 30, 2023. DESE determined that as of July 1, 2023, financial responsibility would shift to Bedford "as this is where the student's legal guardian resides."

North Andover appealed, arguing that the BSEA has ruled that no Massachusetts school district is responsible to fund special education when a student moves out of state, and the Move-In Law does not apply in situations where a Parent moves out of state. Notably, the out-of-state Virginia district was dismissed as a party early in the case and North Andover declined to name an alternative district that it deemed responsible for Student's special education from August 2022 through June 30, 2023. In contrast, DESE argued that it is entitled to substantial deference and the Move-In Law "allows temporary assignment of financial responsibility on factors other than residency in order to support school districts' ability to budget for student needs." Bedford argued that at the time of Parent's move, Student was an adult and his own legal guardian, thus North Andover was the responsible district for the time at issue since it was the district of Student's residence prior to his entry into a residential placement.

In conducting her analysis, Hearing Officer Berman found that DESE exceeded its authority, as, under the current set of facts, DESE was only allowed to issue a temporary assignment of school district responsibility consistent with 603 CMR 28.10(7), which reads in pertinent part:

> **Temporary Assignments**. The Department reserves the right to assign temporary responsibility in cases where the student is not receiving services or when lack of assignment threatens a student's placement or program. Such temporary assignment shall be made based on the information available to the Department. The temporary district shall have all the rights and responsibilities assigned to districts under 603 CMR 28.00...[and]... may bill and shall be eligible to receive payment...from the district assigned responsibility for that period of time for which a temporary district was identified.

Despite finding that DESE exceeded its authority, Hearing Officer Berman concluded that DESE's determination of North

Andover's financial responsibility for the time period at issue was proper. In making this determination, Hearing Officer Berman relied on the fact that Student, via Parent, was a resident of North Andover from April 2019 until he reached the age of majority on July 30, 2022. When Student turned 18, he acquired the right to make all decisions in relation to his special education and between July 30, 2022 and January 10, 2023, Student was his own guardian. The Hearing Officer found that the Parent's move to Virginia in August 2022 did not impact the LEA Assignment, and she noted that Student did not establish his own residency, either in Massachusetts or Virginia, nor did he delegate or agree to share educational decision-making rights. In contrast to BSEA case law cited by North Andover as precedent, Student in this matter was an adult at the time of Parent's move, so Parent's out-of-state residency could not be similarly assigned to Student.

Hearing Officer Berman determined that no specific regulations cover the time period from August 2022 through January 2023 when Student was his own guardian and had no established residence. In her analysis, the Hearing Officer considered two possibilities for residency: 1) Student is a resident of North Andover as that is where he lived before reaching age of majority or 2) Student's residential placement is considered an "institution" such that 603 CMR 28.10(8)(c)(6) would apply (i.e. if the parent or guardian resides in an institutional setting, "the school district where the parent(s) or legal guardian lived prior to entering the institutional setting shall be responsible.").

Ultimately, Hearing Officer Berman determined that no regulations "fit" in assigning responsibility to North Andover for Student's special education during the time period in question that would "effectuate the purpose of the regulations, that is, to ensure that Student continued to receive services without interruption." Nevertheless, the Hearing Officer concluded that North Andover was financially responsible for Student's placement from August 2022 until January 2023.

For the time period January 2023 (when Bedford guardian was appointed) moving forward, the Hearing Officer determined that the Move-In Law would apply. MGL c. 71B, §5 provides that:

> ...[I]f a child with a disability for whom a school committee currently provides or arranges for the provision of special education in an approved private day or residential school placement, ... or his parent or guardian moves to a different school district on or after July 1 of any fiscal year, such school committee of the former community of residence shall pay the approved budgeted costs, including necessary transportation costs, of such day or residential placement...of such child for the balance of such fiscal year; provided, however, that if such move occurs between April 1 and June 30, such school committee of the former community of residence shall pay such costs for the balance of the fiscal year in which the move occurred as well as for the subsequent fiscal year. The school committee of the new community of residence shall assume all responsibilities for reviewing the child's progress, monitoring the effectiveness of the placement, and reevaluating the child's needs from the date of new residence...

Accordingly, the Hearing Officer found that Student was considered to have "moved" to Bedford in January 2023 upon the appointment of his court appointed guardian. Thus, North Andover was found to be responsible for the costs of Student's residential program until June 30, 2023.

This case highlights that in the event of regulation ambiguity regarding residency, the BSEA will interpret the regulations and Move-In Law in a manner that is "consistent with the IDEA's mandate to ensure that all eligible students within the state receive the special education services to which they are entitled" and will interpret difficult residency cases in a manner based on the "intent" of the law, which seeks to provide school districts with the ability to budget for special education student needs.

PRACTICE TIPS:

When students in out-of-district programs turn 18, districts should ensure that the age of majority paperwork is completed and inquire as to guardianship arrangements.

Districts should include detailed language in settlement agreements stating that parents/guardians will inform the district in a timely manner if they move from their current residence.

Districts should monitor students in their out-of-district programs and ensure that neither they nor their parents/guardians have moved from the district.

Parties in dispute should consider utilizing the Rule XI Decision Without Hearing process as a cost-effective way to resolve programmatic/fiscal responsibility disputes. ■

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INTRODUCTION

The final quarter was relatively quiet for the BSEA, bringing a total of eleven rulings and three decisions. Unfortunately for parents, they were unsuccessful in all three decisions. Two of those cases, *Belmont Public Schools* and *City on a Hill Charter Public School and Boston Public Schools*, considered the appropriateness of Individualized Educational Programs ("IEPs") proposed by program schools, calling for their respective student's placements within substantially separate therapeutic programs that could not be implemented by the program schools. The remaining decision, *Westfield Public Schools*, discussed in detail within this commentary, considered the appropriateness of a proposed kindergarten program. The rulings, as always, addressed a number of issues, including the ripeness and timeliness of claims, discovery, compliance, scope of relief, and assignment of school district responsibility. We continue to note the troubling trend of private schools' attempted terminations of their students. Two such matters, *American School for the Deaf* and *Boston Public Schools and the Children's Center for Communication Beverly School for the Deaf*, are further discussed herein.

Although outside the bounds of BSEA-rendered decisions this quarter, the United States District Court for the District of Massachusetts issued a corrected Memorandum and Order in *G.S.* v. *Westfield Public Schools and Bureau of Special Education Appeals*, C.A. No. 3:22-cv-10267-IT, 2023 U.S. Dist. LEXIS 182662 (D. Mass., February 1, 2024). The *G.S.* Court overturned a decision of the BSEA, *In Re: Westfield Public Schools and Massachusetts Department of Mental Health*, BSEA No. 2200773, 28 MSER 8 (Putney-Yaceshyn, January 28, 2022). Concluding that the BSEA hearing officer erred in determining that Westfield's proposal for a day program had been appropriate to meet the student's needs, the Court remanded the case for Westfield's reconsideration of whether the student instead required an integrated residential program.

FISCAL YEAR 2023 BSEA STATISTICS

Before commenting on this quarter's decisions, we offer an overview of the BSEA statistics for Fiscal Year 2023.

The number of rejected IEPs continued to rise after a dip during Covid-19:

Rejected IEPs:

FY 23 - 12,560

FY 22 - 11,830

FY 21 - 11,331

FY 20 - 9,442

FY 19 - 11,979

FY 18 - 11,900

FY 17 - 11,400

The number of hearing requests stabilized over the last few pre-Covid-19 years at around 500, but **FY 20** saw a precipitous drop in the number of hearing requests with a further decrease in **FY 21.** While last fiscal year saw an increase in the number of hearing request, it still remained well below pre-pandemic levels.

FY 23 - 391

FY22 - 381

FY 21 - 320

FY 20 - 379

FY 19 - 483

FY 18 - 481

FY 17 - 495

Matters going through full hearings resulting in written decisions were consistently around 50 per year until they declined significantly after **FY 13**. Up until this year, **FY 18** yielded the lowest number of full hearings to date (13) since the early days of the BSEA. However, there were only 12 full hearings in **FY 23**. This was attributable to two factors. First, and most significantly, was the number of matters going to settlement conferences and the effectiveness of BSEA Director Reece Erlichman in getting those matters resolved. Second, was the use of pre-trial motions to resolve matters completely or position them for resolution. Settlement conferences were held in 43 of the cases that were filed for hearing in **FY 23** (as compared to 48 in **FY 22** cases), of which 39 were resolved the day of the settlement conference. Although the number of hearing requests filed in **FY 23** was slightly higher than **FY 22**, the number of matters going to full hearings with written decisions was lower:

FY 23 - 12

FY 22 - 14

FY 21 - 24

FY 20 - 19

FY 19 - 19

FY 18 - 13

FY 17 - 22

Of the 12 decisions noted above, Parents *fully prevailed* in 4. Parents had counsel in 1 and were represented by an advocate in 3. The district was represented by counsel in 3 of these. The School Districts *fully prevailed* in 6. Parents had counsel in 3, an advocate in 1 and were *pro se* in 2. The district was represented in all 6. In the 2 cases of mixed relief, parents were *pro se* and the school district was represented by counsel.

The BSEA conducted 204 facilitated IEP Team meetings, a significant increase from the 186 conducted in **FY 22**. Forty-nine requests for facilitated IEP Team meetings were denied due to lack of staffing.

BSEA mediators conducted 721 mediations in **FY 23**, a marked increase from the 581 mediations in **FY 22**. There were 1,236 requests for mediations, further proof that more resources need to be devoted to the BSEA.

PARENTS LOSE BID FOR AN ADDITIONAL YEAR OF PRESCHOOL

In Re: Westfield Public Schools, BSEA No. 2401035, 29 MSER 399 (Mitchell, December 2, 2023) considered the appropriateness of a full inclusion kindergarten program for a five-year-old student, who had been receiving early intervention services due to her communication and social-emotional delays within an inclusive preschool program. The parents initiated the action, seeking the student's retention within the preschool program, on the basis that the proposed kindergarten program would not offer the student a free appropriate public education ("FAPE"). While the parents lodged significant objection to the kindergarten placement itself, they did not challenge the substance of the student's IEP, such as its goals, accommodations, or services. There also appeared to be little (if any) dispute about the nature and extent of the student's disabilities or her documented progress over the two school years that she attended the preschool program. Instead, the parents' claim centered on the student's unreadiness to handle a six-hour-long kindergarten school day, in connection with her communication deficits and social-emotional immaturity.

In support of their position, the parents marshalled the support of the student's private occupational therapist, private speech-language pathologist, and pediatrician. All three experts wrote letters recommending the student's retention in preschool, based on their work with and/or treatment of the student outside of school. Notably, however, none of the parents' experts had observed the student within her preschool program, participated in IEP meetings, spoke with school personnel, or reviewed her IEP. In contrast, the district relied on the expertise of the student's preschool teacher, who taught her for the two years she attended the preschool program, as well as the preschool's educational team leader and school psychologist, who had evaluated the student two years prior but whose ongoing involvement with her was not entirely clear from the record. Both district personnel supported the student's promotion to kindergarten.

Whereas decisions about a student's promotion or retention are typically outside the scope of the BSEA's jurisdiction, disputes about a FAPE that have a "direct impact" upon such decisions, like the one at issue in this case, are proper for the BSEA's consideration. Giving substantial weight to the opinions of the district's witnesses, the hearing officer determined that the student had made progress or was partially proficient on all of her IEP goals contained in her two preschool IEPs. While sympathetic to the parents' concerns about the student's promotion to kindergarten, the hearing officer reasoned that the opinions of the student's private providers were mere speculation about how the student may respond to kindergarten, rather than identifying any specific deficiency in her proposed goals, accommodations, or services in connection with the kindergarten placement. Thus, the hearing officer endorsed the appropriateness of the kindergarten program, concluding that the student did not require continued placement within her preschool program. Notwithstanding the hearing officer's decision, the parents were not mandated to send the student to kindergarten since she was not yet of compulsory school age; she would not turn six until the following calendar year.

In the ordinary course, where there is a dispute about placement, a student is entitled to stay-put to the programming within their previous IEP while the dispute is pending. We wonder to what extent the parents in this case attempted to invoke stay-put to the preschool program, particularly in light of the fact that the parents initiated their case in August, a hearing occurred in November, and the decision issued in December - all while the student went without educational programing. While we acknowledge the hearing officer's passing citation to a recent New Jersey administrative decision in which it was determined that grade promotion did not constitute a change in placement that would give rise to stay-put in that matter, we think this legal issue would have been ripe for litigation before the BSEA. Additionally, an invocation of stay-put might have had the practical effect of forcing the district to initiate the case, thereby shifting the burden of proof from the parents to the district, and potentially afforded the student some additional time within the preschool program while the dispute was pending.

TWO OTHER SUCCESSFUL ASSERTIONS OF STAY-PUT BY PARENTS AGAINST PRIVATE SCHOOLS SEEKING TO TERMINATE STUDENT

Boston Public Schools and the Children's Center for Communication Beverly School for the Deaf, 29 MSER 381, BSEA# 2403627 (Berman, November 15, 2023) involved another in a recent spate of cases where the private school has sought to terminate a student who did not have another placement and the parent moved for a stay-put order. Two distinguishing aspects of this case were that the student was very young (seven years old) and he was not a behavioral problem. The student had multiple disabilities and medical issues stemming from a genetic disorder, which significantly impaired his hearing, vision, motor, communication, and adaptive skills. Specifically, Student's conditions included history of failure to thrive, submucosal cleft palate, congenital heart abnormalities, a tethered spinal cord, congenital foot defects, obstructive sleep apnea, congestive heart failure, profound hearing loss, visual impairment, and global developmental delays. He had a central line and ostomy bag and used a wheel-

chair for mobility. Student's primary language was American Sign Language (ASL). Boston sent referral packets to several out-of-district day pl acements, including Perkins School for the Blind, the Learning Center for the Deaf, Kennedy Day School, the Campus School at Boston College, and the Children's Center for Communication Beverly School for the Deaf ("CCCBSD"). Perkins and the Learning Center rejected Student because they could not accommodate his complex medical presentation, and neither Kennedy Day nor the Campus School could meet his communication needs. Only CCCBSD was able to meet both his medical and communication needs.

The student began attending CCCBSD pursuant to an IEP in or about March 2023.

In or about August 2023, Student's medical providers determined that the student required placement of a tracheostomy tube to treat severe sleep apnea and congestive heart failure. The tracheostomy would only be used during sleep, because the student could breathe without it when awake. Parents notified CCCBSD and Boston of this development.

In response to CCCBSD's concerns about the student's safety, parents' counsel provided letters from the student's medical providers stating that the tracheostomy tube would be plugged in during the day so that the student would be breathing through his "upper airway." As such, according to providers, the procedure "will not impact [Student's] safety in the school setting." Also, even if the tube became dislodged, the situation would be "non-critical" because the student would continue to be able to breathe until the tube could be replaced, "non-emergently," either by an on-site nurse, or at the doctor's office or hospital.

On October 6, 2023, the CCCBSD Director informed parents that CCCBSD would be convening a meeting to discuss "emergency termination" of the student's placement and other placement options. The student's last day at CCCBSD would be October 20, 2023. The stated reason for the termination was: "[I]t is CCCBSD's policy that we do not enroll students who have a tracheostomy due to the level of training and care that is necessary if the trach site were to become compromised."

The student underwent the successful surgery. At the time of the ruling on the motion for stay-put, the student was recuperating at home and CCCBSD had not convened a termination meeting. Despite searching, no successor placement had been identified.

Several recent BSEA decisions have held definitively that stay-put provisions and principles apply to publicly funded students at private schools. *In Re: Devereux Advanced Behavioral Health and Northbridge Public Schools*, BSEA No. 2212001, 28 MSER 204 (Putney-Yaceshyn, Aug. 9, 2022); *Student and Quincy Public Schools and the League School,* BSEA# 2202940, 27 MSER 464 (Mitchell, November 18, 2021); *Chelmsford Public Schools and Swansea Wood School,* BSEA# 2203132, 27 MSER 491 (Kantor Nir, December 2, 2021). This is true even when the private placement seeks to terminate the student for extremely assaultive behaviors.

Consistent with all of these recent cases, the hearing officer ordered stay-put at CCCBSD because there was no alternative available for the student, even if it had properly followed termination procedures. As hearing officer Catherine Putney-Yaceshyn stated "if the IDEA's stay put provisions are to have any meaning, the BSEA cannot issue a decision finding that Student does not have any placement in which to remain during the pendency of this matter." *Framingham Public Schools & Student* v. *Guild for Human Services and the Department of Developmental Services*, BSEA No. 18-08824 (Putney-Yaceshyn,, 2018). *See also, Falmouth/Cotting*, and *North Middlesex/Perkins*, *supra*; *Student and Quincy Public Schools* v. *League School of Greater Boston*, BSEA No. 2202940 (Mitchell, 2021), ("in situations where a student would be left without an appropriate alternate placement, the BSEA has determined that a private school may have stay-put obligations beyond those set forth in the State regulations…'").

If this student's enrollment at CCCBSD was terminated, he would have no educational placement. Since such a scenario is impermissible under federal and state law, CCCBSD was found to be his stay-put placement.

American School for the Deaf, 29 MSER 409, BSEA# 2405677 (Kantor Nir, December 28, 2023) involved a motion to dismiss and motion to join to determine the appropriate parties in this BSEA action. The student involved was an eighteen-year-old 12th grader, medically complex young woman with Cystic Fibrosis, renal failure, legal blindness, intellectual disability, hearing loss and mood disorder. She required regular dialysis, breathing treatments and medication. Her mother had guardianship and resided in Lowell, the responsible district.

Through a cost-share between Lowell and the Massachusetts Department of Children and Families ("DCF"), the student had been attending the American School For The Deaf ("ASD") as a residential student since February 2021. The student received dialysis treatments offsite. She was exhibiting challenging behaviors, including elopement and medication refusal, and had not made much progress on her IEP goals and objectives.

In April 2023, ASD notified Lowell and DCF that the student would be discharged. They cited the student's non-compliance with medical treatment and medications as the reason why the student would not be safe in the program. The parent, DCF and Lowell agreed that she should move on, but the search for a different placement had been unsuccessful. DCF requested a short-term extension of its contract with ASD. The extension, executed by ASD on August 8, 2023, stated, in relevant part: "Contract performance shall terminate as of December 31, 2023, with no new obligations being incurred after this date unless the Contract is properly amended." ASD agreed to this final extension of the contract with DCF, through December 31, 2023, with the understanding that the Student would leave on or before December 15, 2023, the last day before the winter break. ASD agreed to add a one-to-one nursing service that had previously been in the student's IEP. ASD refused to further change the planned discharge date.

On December 11, 2023, Parent filed a *Request for Accelerated Hearing* against ASD seeking a finding that the student should remain enrolled at ASD until Lowell and DCF were able to secure

an appropriate placement. ASD filed a motion to dismiss and, in the alternative, a motion to join Lowell. ASD claimed that it had no contractual obligation with the parent or student and therefore there could be no BSEA action against it by the parent. Lowell had such an obligation through the IEP and if the hearing request was not dismissed, Lowell should be joined.

The hearing officer found that Lowell must be joined as a necessary party since "complete relief" could not be granted without Lowell, and if ASD was found to be the student's stay put placement, Lowell would be responsible for supporting said placement both fiscally and programmatically.

Concerning ASD and stay-put, ASD asserted that the BSEA could not order ASD to reinstate its contract with DCF, whose involvement with, and legal obligation to, the student was independent of either Lowell or ASD. However, the hearing officer held that ASD had an obligation to work with DCF to maintain the student's placement pursuant to 603 CMR 18.05(7)11, which reinforces the student's stay-put entitlement by obligating a private program to "make a commitment **to the public school district or appropriate human service agency** that it will try every available means to maintain the student's placement until the local Administrator of Special Education or officials of the appropriate human service agency have had sufficient time to search for an alternative placement" (emphasis added). As such, a hearing officer has jurisdiction to order both a public school district *and* a human service agency, such as DCF, to maintain a student placed at an approved private special education program, and, similarly, the hearing officer can determine whether a private school placement failed to "try every available means to maintain the student's placement until the local Administrator of Special Education or officials of the appropriate human service agency have had sufficient time to search for an alternative placement."

The hearing officer, *sua sponte* (on her own) joined DCF as a necessary party, denied ASD's motion to dismiss and ordered stay-put at ASD. ■