MSER Commentary Third Quarter 2012

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Introduction

The third quarter of 2012 brought a number of decisions clarifying or amplifying certain procedural issues that practitioners should be aware of. Among these we note in these comments a federal district judge's ruling in the *Georgetown Public School District* case on the applicable statute of limitations because of its importance to the field despite its not being included in MSER's publication. BSEA rulings and decisions concerning procedural issues include: *Danvers*, concerning untimely objections to discovery requests; *Stoneham* in which a hearing officer outlines the considerations around a request to sequester a witness; *Hudson* in which a parent's request for an order that the Team convene before a school year began in a new placement led to a decision describing the limits on the parent's right to insist on a Team meeting; *Brockton* in which a parent's possible confusion over the distinction between requesting and consenting to an evaluation led to delays to the detriment of a DYS charge; and a mixed procedural/substantive decision in *Leominster* focused on what constitutes "stay put" pending a decision on merits.

Cases in which the school districts' delays and procedural violations led to orders for parents' choice of placement and services include: *Amherst* in which the district ignored notices from a charter school that it could not meet the needs of an Amherst student; *Barnstable* in which late proposals for placements from the district plus findings that the placement finally proposed was inappropriate supported an order for an out of state placement. In *Boston*, a district's failure to maintain a computer and its lengthy delays in key steps of the Team process led to an order for extensive evaluations aimed, clearly, at rounding up the parent's case for services. Cases in which parents submitted convincing evidence to overcome the presumption in favor of the less restrictive alternative included: *Walpole,* where the severe needs of an older brain-injured student who was clearly faltering in the district's partial inclusion program amply supported an order for placement at the Ivy Street School; and the anonymously-named *School District* matter in which parents systematically and cooperatively exhausted the district's gradually more intensive programs until the need for an alternative language-based placement was inescapable. In contrast, parents lost their bid for an outside language-based placement in *Marblehead* where they did not try the last proposed program offered by the district which offered more intensive and slower paced instruction.

In several cases parents lost in part because of a lack of cooperation with the procedures within their districts; in most of those cases the district filed the request for hearing. These included: *Falmouth* in which the district sought to overcome a refusal to consent to an FBA and an order for placement in a behavioral classroom; *East Bridgewater*, in which the district asked the BSEA to override the parents' refusal to agree to placement at the Learning Prep School where the student was tutored at home; *Leominster*, in which parents new to the district obstructed the process for putting comparable services in place to those he had received in his prior community; *Sutton* in which the latest round in the battles between parents and district yielded a lengthy decision denying the parents' demand for compensation for certain out of school services and a particular mode of toilet training where the parents were found to have failed to cooperate with school services and otherwise.

Other cases worthy of note include: *Andover* in which it seems to us that concern over possible security issues may have been given undue weight against the required presumption in favor of a more mainstreamed environment where a student's drawings and attitude troubled the staff, despite the absence of immediate safety issues; *Gateway* in which the hearing officer rejected the district's request to join DCF as a necessary party where the student was not in DCF custody; *Lynnfield* in which a student whose IEP urged supports to learn to self-advocate self-advocated unsuccessfully for an IEP as opposed to his current 504 plan; and *Martha's Vineyard* which offers a lucid analysis of the protocols governing a district's responsibility for a student who becomes homeless when no IEP has yet been developed.

A Note for Practitioners re the SOL for Filing Attorneys' Fees Claims

Although federal court decisions are not included in MSER, we want to call the parents' bar's attention to a recent ruling that affects our practice generally. Please be aware that a federal district court judge for Massachusetts has found that the statute of limitations applicable to claims for attorneys' fees filed on behalf of parents who have prevailed at the BSEA is 30 days. *B.D.* v. *Georgetown Pub. Sch. Dist.*, Civ. No. 11-10692-DPW (9/27/12). In that decision, Judge Woodlock rejected the earlier holding of Judge Zobel in which she borrowed the Massachusetts Tort Claims Act's three year statute of limitations to apply to the filing of attorneys' fees claims under IDEA. (See *Anthony F. v Sch.*

Comm. of the City of Medford, No. Civ. A. 04-10610-RWZ, 2005 U.S. Dist. LEXIS 10158, 2005 WL 1262090 (D. Mass. Apr. 22, 2005).) In light of the *Georgetown* decision, and despite Judge Zobel's conflicting more generous ruling, parents' attorneys will need to file any such claims within thirty days henceforth, since they cannot rely on any judge taking a more liberal approach than the most restrictive option espoused by a district court judge when there is a split among the judges in the same district.

This is not a positive development for parents and students, nor does it make sense within the context of post-due process practice where IDEA sets a 90 day statute of limitations for the appeal from a due process decision. In the absence of a specific statute of limitations set within IDEA, the courts have held that a statute of limitations may be borrowed from a state's statute of limitations set in an area that is analogous to IDEA. Judge Zobel had determined that the purposes of IDEA could be well-served with a tort-based limitations period, particularly since the question of fee recovery does not affect the substance of a student's program and delay in its resolution does not delay the provision of services to that student. Judge Woodlock, in contrast, turned to the state's 30-day limit under the Administrative Procedures Act governing requests for judicial review of agency actions. He alluded to the First Circuit's resort to this same APA 30-day limitations period to apply to appeals on the merits from BSEA decisions—a holding that was later effectively nullified when IDEA was amended to make 90 days the applicable period for appeal.

The application of a 30 day limit in the context of a process that gives 60 more days to parties to appeal BSEA decisions on the merits can only sow confusion into the post-BSEA process and likely make the resolution of disputes even more difficult. We hope to see a legislative remedy to this confusion if Judge Woodlock's holding is not reconsidered or reversed on appeal.

Untimely Objections to Discovery Requests Given no Effect

An apparent inconsistency in the BSEA's rules and procedures respecting discovery practice is straightened out in *In Re: Danvers Public Schools*, BSEA # 12-3302, 18 MSER 245 (February 10, 2012, Berman). BSEA Rule VI.B provides for a 30 day period to respond to requests for production of documents and interrogatories unless a shorter or long period is established by the hearing officer. BSEA Rule VI.B.2 goes on to specify that objections to interrogatories are to be filed within the same 30 day deadline. BSEA Rule VI.C, however, imposes a deadline of 10 days following service of a request for discovery to file objections or move for a protective order.

Reasoning that the 10 day Rule helps to expedite the hearing process where IDEA dictates that a final decision be issued no more than 45 days after the BSEA receives a hearing request, with the hearing to be scheduled 35 days after a respondent is served with the hearing request, the hearing officer holds in this case that a party that waits longer than 10 calendar days after service of a discovery request loses the right to object. Practitioners take note!

Turning to the substance of the materials sought in the parents' document production request, the hearing officer then defines the parameters for production of IEPs and related documents for proposed peers to be grouped with the student. She outlines what has become a typical set of boundaries around such production—redaction of certain information that might disclose a particular student's identity; production only to counsel who can in turn only share the information with experts and not with parents; permission to use redacted documents as exhibits at hearing; and return of documents "to counsel" after the record of the proceeding is closed (not clarifying in this decision which counsel is intended). While most of the governing limits outlined are understandable, we would note that at least two fundamental items the hearing officer orders redacted from peer group documents are date of birth and gender. Since documents of this ilk are sought as possibly germane to the issue of a proposed peer group's appropriateness for a student, we would submit that quite often age disparities and genders are material to the suitability of a group for a student. It would also help to clarify to which attorney the order means to have documents returned after the close of the record as that is ambiguous in the ruling as worded. Presumably this means the return by experts who have reviewed the documents to the attorney representing the parents and not to counsel for the school district. It would not make sense to deprive a party of key documents when a case remains undecided and/or while an appeal period applies following a decision.

When Should a Witness Be Sequestered at a Party's Request?

Hearing Officer Crane sets out considerations for ruling on a party's motion to sequester a witness in *Stoneham Public Schools*, BSEA # 13-0160, 18 MSER 269 (September 5, 2012, Crane). As the hearing officer indicates, in many forums sequestration of witnesses is a common and generally accepted practice of long standing, applied typically without questioning the rationale or the particular need in any witness's case. This case, however, seems to establish a presumption for BSEA proceedings that witnesses ought not to be sequestered and a requesting party should be required to convince the hearing officer otherwise. Toward that end this decision outlines a set of criteria for hearing officers to apply case by case. By their nature these criteria place a difficult burden on any party that wishes to have witnesses testify without having heard the testimony of previous witnesses- a wish that we would venture is more commonly held by parents than by school districts.

The hearing officer draws heavily on a Second Circuit decision, *U.S.* v. *Jackson*, 60 F.3d 128, 135 (2d Cir. 1995), for the criteria he describes. To paraphrase, the considerations are:

- Does the expected testimony involve "controverted and material facts;"
- Is the information of a kind that is vulnerable to "tailoring" (which, we would think, is true of any "information" that is essentially an opinion or subjective in nature—i.e., the testimony of virtually every witness in a special education case);

- Whether the subject of the testimony will overlap with the testimony of another witness;
- The order in which witnesses will testify;
- Any potential for bias that might motivate a witness to tailor their testimony (we would suggest that a school employee's wish for comfort in her workplace, for job advancement and security and to honor the culture and preserve the friendliness of her peers might, in many cases, give ruse to a motivation to tailor one's testimony to that of her peers); and
- Whether the witness's presence is essential rather than simply desirable.

The hearing officer found that the parents in this case had not provided any reason for him to be concerned that prejudicial tailoring "would actually occur" without sequestering witnesses. But to place the onus on parents to make specific showings of that kind in order to support a sequestration request seems overly-trusting of the good will and good faith of school districts and their employees, and unfair to parents who typically feel that they are fighting on a steeply slanted playing field. Disputes under IDEA, and especially those disputes that end up having to be tried through hearing do not generally arrive at the BSEA without animosity and distrust. Nor, by that time, is there usually any question in either party's mind about what the other's concerns, proposals and views of the relevant reports and other evidence may be. In that light, where parents often have come to expect district employees to shade their statements and expressions of opinion to uphold the district's interests rather than those of their child, they want a process that is unambiguously fair to lead to the ultimate result. They should not be required to come up with evidence of previous actions or words that might convince a hearing officer that s/he should keep a witness out of the room. Whatever marginal benefit there may be for a hearing officer to having a witness hear another witness's testimony seems to us to be far outweighed by the troubling appearance to a parent of a process that unfairly gives a witness the chance to shape their own testimony to conform to what they hear from another witness, especially when that other witness is a supervisor or fellow employee.

Parent Rebuffed in Bid for a Team Meeting Before a New Placement Begins

The district in the matter of *Hudson Public Schools*, BSEA #13-0513, 18 MSER 324 (September 27, 2012, Figueroa) had been ordered earlier in the year to implement an IEP placing the fifteen year old subject of this case at the Wayside Academy. The student began to participate at Wayside Academy in its summer program. His parent then requested that before the school year began the district convene the Team to update information on his profile and needs and adjust goals and objectives accordingly. Hudson refused because, it argued, there was no new information on which to act, and requested consent from the parent to conduct an evaluation. The parent did not sign the consent form and instead initiated the BSEA action to ask for an order that the Team convene.

The hearing officer ruled for the district, explaining that while the district could convene the Team at any time, it was only *required* to convene the Team under certain conditions: when the three-year evaluation requirement applied; annually to review progress; within ten days of receipt of an independent evaluation; when a district contemplates a change in program or placement (including disciplinary events); and/or within forty-five school working days after receipt of a parent's consent for an initial evaluation. The hearing officer found that none of those conditions existed in this case.

The district did propose convening the Team within two months of the beginning of the school year and asked the parent for consent to advance the three year evaluation of the student to assist the Team in its deliberations. The parent had not consented. To ensure that the process keeps moving for the student, the hearing officer ordered that the Team convene by the end of October whether or not evaluations had been completed.

The protocols around convening Team meetings and consenting or not to requested evaluations are often confusing to parents. This parent understandably believed that the experience the Wayside Academy's staff had gained with her son in their summer program could provide the Team with information on which his IEP profile, goals and objectives could be modified so that he could start the school year in that program with more up to date accurate information in hand, and her request was reasonable on that basis. Whatever the strict legal requirements may be and regardless whether those requirements—as the hearing officer found—gave this district a basis on which to refuse to convene the Team as the parent asked, it is unfortunate that the district chose to deny that request. Given their history at the BSEA these parties have obviously been at odds for some time; why not take the occasion to show good will and begin to heal that relationship at this point rather than simply say no? At the same time, the parent should have been advised (if indeed she sought advice) to consent to the accelerated evaluations requested by the district since she herself argued that the IEP descriptions were stale and unhelpful and that her son's chance for success in this new placement could be improved by bringing the information up to date.

Requests for Evaluation vs. Consents for Evaluations: Confusion Leads to Lost Time

The eighteen year old student in the matter of *Brockton Public Schools*, BSEA # 12-4761, 18 MSER 271 (Figueroa, June 27, 2012), was (is) in the custody of DYS in a secure facility. The student's parent had rejected a proposed IEP and requested certain independent evaluations both orally at two team meetings and in writing. The district acknowledged that the request had been made but argued that the parent's failure to return a signed consent form outlining the specific evaluations the district proposed to complete delayed the completion of those evaluations. The district had also refused to perform an evaluation of the student's daily living skills as part of a transitional services assessment.

This decision required the hearing officer to sort out a confusing history of communications at cross-purposes between the district

and the parent. That history is idiosyncratic and a detailed understanding of the steps that led to a long impasse over what testing should be done by the district or funded as an independent evaluation and when would likely be of little use to a general reader. What does emerge by way of general caution to practitioners is a pattern that clearly was allowed to fester for too long, where clarifying and completing some basic procedural steps might have helped move things along to the benefit of the student.

To that end, the parent should have been counseled to sign consent forms right away despite her mistrust and advised that doing so would not have precluded her from seeking other evaluations. The district had acknowledged her requests for evaluations and then delivered consent forms for her signature. We cannot tell through the filter of this decision whether opportunities were missed by school personnel to guide this parent through the consequences of signing or not signing those forms, but they and/or the advocate may not have done quite enough to clarify the point.

On the other side, the district seems to have lost a step itself by failing to initiate an action at the BSEA within five days after refusing to agree to an evaluation the parent requested of the student's daily living skills.

The technicalities of notice, consent and implementation should not be the cause of long delays in efforts to identify, assess and meet a student's needs. This student—a DYS charge—is obviously in great need of services to be able ultimately to enter the post-high school world with a fighting chance at further education, productive work and a healthy personal life. All parties involved in such a case ought to conspire closely to ensure that his needs are met sooner rather than later. Unfortunately it took over a year and the completion of a BSEA hearing to sort out what, how, when and by whom evaluations must be completed.

We note that the distinction between requesting and/or referring for an evaluation and consenting to an evaluation is by no means self evident to a parent. All too often in our practice we see instances where parents make a request and districts take their time getting consent forms to them. To minimize the delays built in to that sequence, we would suggest that the regulations be modified to require that parents be reminded and/or informed separately and in over-sized bold type that the timelines for completion of evaluations and a Team meeting begin only when the consent form is signed and returned.

How Much Must Be Provided to Satisfy "Stay Put"?—No Bright Line

In Re: Leominster Public Schools, BSEA # 12-7450, 18 MSER 265 (August 21, 2012, Crane), a summer program offered by a collaborative that had included 165 hours of services to students with Spectrum disorders was dropped when only one student would have been enrolled. In its place the collaborative offered a similar program that included only 108 hours of services—a reduction of 57 hours of services over the summer. Parents filed a motion asking for an order treating the full 165 hours of ESY services as "stay put". Leominster argued that the reduced-hours program was substantially similar to the program it had replaced and that the entitlement to have the last agreed-upon service plan continue—the student's "stay put" entitlement—was therefore satisfied.

The hearing officer reviewed the requirements for determining if a change in services constitutes enough of a change to breach a student's stay put rights, pointing out that stay put principles are "neither rigid nor automatic." "The central inquiry," he said, "is the educational impact upon the student as a result of the change of services or settings. As a general rule, the educational impact must be substantial. In considering what level of change has legal significance under stay-put, a number of courts have articulated the standard as 'a fundamental change in, or elimination of, a basic element of the educational program.'" (Footnotes omitted.)

On this basis Leominster was found to have breached the student's stay put rights and was ordered to provide compensatory services to make up for the 57 hours of service that were lost because of the program shift. The hearing officer emphasized that each case turns on its own specific facts and, as his decision clearly implies, not every change that reduces a student's services undermines a student's program substantially enough to undermine his stay put rights.

While many parents would prefer an absolute rule that holds school districts' feet to the stay put fire no matter how minor a change is made in a student's program, some changes will be seen as "*de minimis*" and therefore insufficient to trigger any remedy. This decision is certainly correct to find the loss of more than a third of the student's services over the summer months requires the imposition of a stay put order and compensatory services, but readers are left to wonder where the cutoff point might have been before the loss came to be "*de minimis*." Like most questions that arise under IDEA, one can only apply reasonable and intelligently informed guess-work to gauge the prospects of a request for relief. We would venture that in this case that guess-work should have led to an obvious conclusion and the district should have put its time, money and other resources into solving the problem of the lost services rather than into litigation.

District No-Show Pays the Price

Parents succeeded in having their district ordered to reimburse them for the cost of a unilateral placement in *Amherst Public Schools and Pioneer Valley Performing Arts*, BSEA # 11-6786, 18 MSER 327 (March 5, 2012, Scannell), where the district had failed to comply with the regulations governing placement when a charter school student is found to be in need of an outside placement. The district effectively ignored the notice given by this student's charter school when the charter school team concluded that it could not serve his needs. The district also failed to follow up in any way after the headmaster of the charter school extended himself in efforts to get them to contact the family and provide the support they needed. The parents waited four months and finally made a placement on their own when it was clear that nothing was forthcoming from their district.

In accordance with the regulations (603 CMR 28.10(6)) this student's charter school had notified Amherst that the student may

need an out-of-district placement and invited the district to a team meeting to discuss how to meet his needs. The district did not attend the meeting and took no steps to identify or offer any program or placement for the student before the school year began. The parents made a unilateral placement at a program outside of Massachusetts and sought funding.

The district argued that because the parents made a unilateral placement the provisions requiring the district to participate in a placement meeting convened by the charter school did not apply, citing a letter written by a DESE attorney. The hearing officer found the letter of no value. Noting that the letter was at most an "interpretive rule" and without the force of a regulation or even an advisory opinion, she gave it only the weight it might carry by its power of persuasion. That weight, she said, was zero, as she found the letter to be "vague and ambiguous."

There is nothing in the decision to explain the outright failure of this district to answer the call of the charter school regarding this student's needs. None of the defenses offered by the district referred to any aspect of the student himself or to what might address his needs. The district seems to have turned its back on the student and as a result the ultimate decision practically wrote itself. Fortunately for these parents, as we have noted in reference to other cases in these commentaries, they had the means to arrange for services themselves and go after the district to cover their costs. What happens to those countless families without such means? The answer is obvious and tragic.

District's Missteps and Delays Support an Order for an Out-of-State Placement

Agreement between parents and their school district that a student needed an outside placement was not enough to resolve the dispute described in *Barnstable Public Schools*, BSEA # 11-1387, 18 MSER 334 (September 7, 2012, Berman). The parents in this case sought support for their unilateral placement of their 19 year old son at Franklin Academy in Connecticut—a program concentrating on students with mild Asperger's disorder in the context of high intelligence like the student in this case. Franklin Academy is not special education-approved in its state or in Massachusetts. The district proposed placement at a local program called the Southeast Alternative School ("SAS").

The hearing officer ruled for the parents both because the district was late in presenting its placement proposal in both of the years involved in this hearing and because she found the program not to have the requisite resources to address the needs of a highly intelligent, hopefully college-bound student like the one in this case, while Franklin clearly did. In the first year, she found the parents to have been completely justified in making the placement on their own because SAS had not responded to a referral packet before the school year began and the district did not formally offer the placement until some months into the school year. In the next year, again, the district did not formally propose the SAS placement until October when the student was already underway in his second year at Franklin.

The district was ordered to reimburse the parents for the costs of tuition and related expenses for both years retroactively. While the hearing officer did not find that the student needed an all-waking hours, residential program in order to make effective progress, she had no difficulty ordering full reimbursement since the program was well beyond daily commuting distance. This is clearly the right result and it is heartening that the fact of the school's status as not officially approved for special education services made no difference to the hearing officer.

Procedural Violations, Delays, and a Failure to Maintain the Primary Tool of Access

Boston Public Schools, BSEA # 12-7614, 18 MSER 224 (June 27, 2012, Byrne) paints a troubling picture of neglect, delay and obfuscation by a system that has undermined a student's access to and progress in her education. The student in this case was a fourteen year old 8th grader who is legally blind and who exhibits difficulties in reading mechanics and comprehension (measuring at a 3.5 to 5th grade level), math skills, memory, concentration, focus, self regulation and modulation, and social pragmatics. She needs a laptop for access to all of her education.

The hearing officer found that at the time of the hearing the student's laptop had been out of commission for at least four weeks and that no employee involved with her program had a clue by whom, how or where that critical tool should be repaired or replaced. She found, moreover, that despite repeated reports of behavioral issues that interfered with the student's progress, the district had not performed any behavioral observations or assessments or kept any data, while at the same time asserting that despite the lack of such data that her behaviors were improving. She also found that inexcusable delays had occurred in the delivery of IEPs, thus depriving the parents of the ability to participate meaningfully in the Team process.

The parents had rejected Boston's proposal of a continuation of the student's partial inclusion IEP primarily because of its failure to include the provision of a one-to-one aide as had been recommended by an independent psychologist. Unfortunately, the hearing officer found that there was insufficient evidence in the record on which she could conclude that a one-to-one aide was a critical element necessary to enable the student to make effective progress. She noted that the independent expert recommending this service had not observed the student's program or spoken with the staff working with the student and that in the face of the unrebutted testimony of school employees asserting that the student had made progress without an aide, there was not enough evidence on which she could conclude that an aide was necessary for the student to progress. As to access, however, she noted that she could draw a "reasonable inference that absent the assistance of a paraprofessional [the student] has not been able to participate in the general curriculum at all for a significant period of time," referring, presumably, to the likelihood that an aide could have at least monitored and taken steps to remedy the student's loss of a functioning computer.

The hearing officer ultimately ordered the district to arrange for and fund an independent evaluation to determine whether the

student requires a 1:1 aide to implement her IEP, to ensure her full access to the curriculum and to support her social and behavioral growth. The evaluation was to include a functional vision assessment, a functional behavioral evaluation, psycho-educational and academic assessments, assistive technology assessment, and observations in school and at least one community setting. She also ordered that Boston immediately provide the student with a working laptop computer loaded with all necessary and appropriate software and assistive technology.

The proceeding was held open by the hearing officer pending the completion of the ordered evaluations and the completion of a Team meeting and development of an IEP, with hearing dates to be established early in the school year if, at the end of that process, the parties remained in dispute.

The parent in this case was unrepresented. The only live witnesses were Boston employees, while the parent could only introduce written recommendations by a professional at MGH's Ladders program that had been presented to the Team but effectively ignored. The hearing officer did an excellent job in that context of eliciting as much evidence as she could from Boston's witnesses to discern the facts underlying the student's profile, status and needs. Then, having focused on the missing pieces that might in a fully developed parent's case have stood against the district's assertions of progress, she used the authority of her office to order the development of expert information that would either lead to a new and appropriate IEP or, if the district continued to oppose the parent's requests, enable her to render a decision with a more complete record of information.

It may be that having learned of the callous and inexplicable failure of the student's service providers to ensure that she had continuous use of the computer that is her educational lifeline in the program—a failure that left her without that computer for at least four weeks right up to the time of the hearing—and, in addition, the inexcusable delay of some five months in the delivery of a proposed IEP for the period at issue, the hearing officer was moved to make very sure that this student exited the BSEA process armed with strong and reliable information on which her program could be based. Why the district felt that its actions and failures to act were sufficiently defensible to warrant the time and cost of a full hearing is a sad mystery.

Severity of Need of Brain-injured Student and Exhaustion of Inclusion Options Leads to Order for Specialized Outside Placement

In Re: Walpole Public Schools and Violet, BSEA # 12-3645, 18 MSER 237 (July 18, 2012, Byrne) concerns a 17-year old student struggling severely with the learning, social and behavioral consequences of a prenatal injury to her brain. The student had participated in many years of more or less inclusive programs provided within her district, but now the benefits were disappearing while the challenges were increasing to the point that she was unable to return to school after a holiday break because of the stress of constantly feeling unable to keep up in class and of having no friends or enjoyable activities. Parents sought and won an order for placement at a private school that concentrates in working with brain-injured students, the Ivy Street School.

A series of comprehensive evaluations over the past few years all agreed on the student's complex profile and needs and the hearing officer summarized the recommendations as calling for:

> highly specialized, individually tailored, comprehensive, coordinated instruction within an educational program specifically designed for students with neurological disabilities. She requires full day/full year programming delivered by staff that is trained and experienced in working with students with neurological challenges. Instruction should be explicit, slow-paced, and adapted for Violet's visual needs across all domains: academic, social, practical activity of daily living, behavioral, prevocational, vocational, and community. Themes, content, and techniques of instruction and support should be coordinated and delivered consistently in all settings. Regularly scheduled individual counseling and disability awareness/self advocacy groups are a vital component of an appropriate special education program for Violet.

She found that the district's proposed IEP and program fell critically short in several key respects. It lacked a full year program, offering instead a short summer supplement that was disconnected from the school year plan; there was little or no coordination of services; there was no evidence of teachers having the necessary training or experience to work with complex disabilities like this student's; there was no cohort of peers with similar challenges with whom the student could practice and learn the skills she needs; there was no program of weekly individual counseling, and no peer group counseling. The best that even the district's own psychological expert could say was that as compared to Ivy Street, the district's program was physically closer to home. The hearing officer also alluded more than once to the district's own teachers who repeatedly noted concerns about the student's ability to benefit in her program. The only uncategorical support in the record for the district's program was apparently offered by the district's special education director to whose testimony the hearing officer assigned "little weight due to her lack of personal and professional contact with [the student]."

The BSEA's sharp analysis and its order in favor of placement at Ivy Street comprise a lucid and forthright conclusion to a case whose facts—so clearly lacking in support of the district's placement—raise troubling questions about the lengths to which a community will sometimes go to defend an indefensible program at the expense of a student who is obviously very vulnerable, very impaired, very complex, and in need of sophisticated teaching and an environment and peers that can in themselves contribute to her learning and her emotional and social growth. The principle of inclusion (a principle whose force might sometimes be artificially amplified by the high cost of a particular out-of-district placement) can sometimes blind a system to the genuine harm an inappropriate program and environment can do to a young person. There should have been a quicker and less expensive path to the resolution of this case.

Exhausting the Squares Within the District Leads to an Out-of-District Placement

A textbook case for placement in an outside language-based program can be found in *School District,* BSEA # 12-7316, 18 MSER 284 (July 25, 2012, Crane). (Note that we are not clear why this case was issued without identifying the school district. In prior cases, reasons for anonymity have focused on the sensitive nature of a student's history and the need to protect that student, especially in a small district, from being identified by the surrounding facts; here there does not seem to be any such concern.) A review of this entering-ninth-grade student's record between 2008 and 2012 showed his standardized testing scores declining step by step, his sense of himself as a competent learner weakening to the point of "hopelessness" according to his therapist, and the district persistently offering the same model of partial inclusion services with only minor increments added year after year. His needs called for a fully comprehensive language based teaching approach throughout his school day, as an independent evaluator recommended in his eighth grade year. This was foreshadowed in 2008 in an earlier neuropsychologist's report in which she warned that if her recommendations for pull-out services did not lead to his effective progress, "placement in a separate, language-based program should be considered."

This was a well-developed case over a four year period, in which the parents faithfully tried each of the school district's proposed programs until the record of decline, academically and emotionally, left the hearing officer a clear basis on which to order support for an outside language-based placement. Independent experts did their job dispassionately and well, testing and observations were completed in timely manner, the parents were fortunately able to place their son unilaterally and gave timely notice of their request for district support.

Given the apparent strength of the arguments as reflected in the record, it is not clear on the face of the decision why this dispute could not have been resolved between the parties without calling for the opinion of a hearing officer, but a pragmatic decision was made nonetheless to present the case solely on the documents and thus without the expense of days of hearing with the attendant costs of witness preparation and presentation and the time required for live testimony. The outcome was efficiently achieved in any event, with the exhibits filed on July 6 and a decision issued only 19 days later.

No Available Outside Alternative Plus a Refusal to Try the District's Program Proves Fatal

When a school district offers a more intensive program than it has previously proposed for a student it can be fatal to the parents' argument for a different program if they fail to try the district's proposed program. The parents in *Marblehead Public Schools*, BSEA # 12-3975, 18 MSER 311 (August 31, 2012, Berman) sought an outside language-based program for their eleven year old entering fifth grader with a complex language-based disability. The student had been given increases in services step by step throughout his years in the district and the parents had cooperated with all the suggested increments up to a point, but they balked when Marblehead proposed moving him from one relatively intensive classroom to another that served students who needed even greater amounts of one to one instruction and a slower pace. The parents were concerned about the student being isolated and grouped with inappropriate peers and argued that the teaching approach offered nothing more or different than the one with which he had been making only sporadic and minimal progress.

It is possible, perhaps, that if the student had moved to the district's proposed program, a continued pattern of increasing anxiety and failure to make better progress could have convinced a hearing officer that the time had come to move him to an alternative placement, but as it stood the hearing officer applied the deference that courts have found to be built in to IDEA and ruled for the school district. She pointed to evidence that the student had actually made some progress in his existing program, but had faltered at the pace of teaching and become anxious and disheartened even in that classroom, begging the question whether in a slower-paced classroom he might progress better. One can understand and sympathize with parents who do not wish to make their child a guinea pig for a program that they fear will undermine him emotionally, socially and academically, but in most cases not to try the district's program is a mistake as it proved here.

These parents had not been able to move their child unilaterally to an alternative placement pending the hearing. In fact, the program that they had counted on admitting the student apparently withdrew its invitation to enroll shortly before the hearing, leaving the parents high and dry. Sometimes evidence of better progress within an alternative school, when parents can make a unilateral placement, helps to convince a hearing officer that the service model or other elements of the public school program, by comparison, could not enable the student to progress effectively. This is not to say that moving this student to the alternative school would have changed the outcome in this case, but the alternative school's decision that it could not meet this student's needs may have added to the hearing officer's conviction that he may be well suited for the slower version of the program in which he had already shown some minimal, though faltering progress.

Parent's Refusal to Consent to an FBA and Failure to Participate in Process Leads to Order for FBA and District's Proposed Placement

In Re: Falmouth Public Schools, BSEA # 12-7897, 18 MSER 252 (July 26, 2012, Putney-Yaceshyn) was filed by the school district in an effort to override the parent's lack of consent for a functional behavioral assessment (an "FBA") and to have its proposed IEP for placement in a substantially separate program for children with emotional/behavioral disorders approved by the BSEA. The student was a nine-year old child about to enter third grade, who had been unable consistently to participate in classrooms because of noncompliance, aggressive and unsafe behaviors and adaptive and communication difficulties.

The parent had refused to consent to an FBA and did not want her son to receive special education services for anything other than reading. She also did not participate in the BSEA process. By the

record of this decision, both Falmouth and the BSEA itself took whatever steps they could to ensure that the parent understood her rights to participate and, for whatever reason, she did not.

No witnesses other than district witnesses testified and no documents other than district evaluations and other records were introduced. There was, of course, no way that the hearing officer could have reached any other determination than to accept the evidence that was offered, find a need to complete an FBA and confirm the need for placement in the district's proposed classroom for children with behavioral/emotional disorders.

The decision efficiently describes the obligations of a district and of the BSEA where a parent refuses to consent to an evaluation, including the district's obligation to consider whether the refusal may result in the denial of a FAPE to the student and, if so, to seek an order at the BSEA to set aside the parent's refusal and proceed with the evaluation. 603 CMR 28.07(1)(b).

That the parent did not—perhaps could not for whatever reason—participate in this process forces a hearing officer to make a decision based only on the narrative offered by the school district, reaching to the extent possible for any countervailing evidence there might be. The hearing officer is essentially hamstrung in the absence of a spokesperson for the arguments that might have supported making more efforts in the less restrictive environment of a partial inclusion program before moving a child to the substantially separate alternative. It is clear, reading between the lines, that this parent has had an enormously difficult time engaging in the school's process around her son, has probably felt powerless and distrustful, and has likely also been troubled and confused by her son's behavior, and in the face of it all has adopted a falsely-empowering and simple "hell no" attitude. It is, of course, impossible on the basis of this decision to see the quality and tone of the district's communications with this parent—we have witnessed the unfortunate effects for some parents of a high-handed and arrogant tone that is sometimes taken by administrators who are frustrated with a parent for one or another reason, but have no reason to suspect a problem of that kind in this case. Reasonable and intelligent guidance from an advocate, another trusted professional, a friend or a relative might have helped this parent make wiser, more cooperative decisions at an earlier stage, but as it stands, a decision about her son has now been taken inevitably out of her hands. One hopes that the new placement will benefit her son and, as the hearing officer suggests, that some means— perhaps through a mediator's assistance—can be found to put the relationship between these parties on a more productive track.

District Asks the BSEA to Break a Logjam

The facts found in *East Bridgewater Public Schools*, BSEA # 12-4944, 18 MSER 259 (August 6, 2012, Scannell), left the hearing officer little choice but to uphold the district's proposed IEP and placement. East Bridgewater had initiated the hearing process in January of 2012 in an effort to break what it perceived as a logjam in which the student had been stuck for some time with a home-based program that provided him with only ten hours per week of tutoring. By the time of the hearing in July, the district's proposed placement had changed from a collaborative (which it turned out did not have an available opening) to the Learning Prep School—a private language-based special education school. The parents were unrepresented and brought no expert witnesses to the hearing.

The case concerned a 17 year old student with a central auditory processing disorder, ADHD, and dyslexia, and with a cognitive ability that had stabilized generally within the low average range. The student had spent all but three of his last nine years of education being tutored in his home. In the earlier years this was not for medical reasons but because the parents wished to home-school him for reasons that this decision does not explain. More recently, after three years at the Clearway School, he was educated in his home because his parents believed that he had been bullied there. During the last year, the history reflected several stop-and-go efforts between the parents and the district to explore and agree on an alternative outside placement (while the district continued to maintain for the record that it believed Clearway to be an appropriate placement).

By the time the hearing occurred, the available choices besides Clearway had boiled down to one—the Learning Prep School. The hearing officer had no difficulty finding on the basis of an uncontested record that Learning Prep could provide most or all of the services that had been consistently recommended for the student over the years. She noted that the student had made reasonable progress when he was educated within the structure of the Clearway School and that Learning Prep offers a comparable structure and more. The parents' concerns that Learning Prep's social communications curriculum was unnecessary for the student were given short shrift with the comment that his auditory processing deficits clearly made him a good candidate for such services. That the parents did not wish the student to participate in a work-study program like Learning Prep's was also not persuasive to the hearing officer, who found no evidence that such participation would deny the student a FAPE.

The parents defended against the district's action *pro se*, did not present any evidence to show that Learning Prep's program would not suit their son's needs, and offered no live expert testimony on any point. Taking the decision at face value, the outcome was inevitable, especially in the context of an educational history with so relatively little time outside of the home, an educational profile that cries out for systematic language-based teaching and reinforcement, and a body of law that insists on the least restrictive appropriate environment.

As inevitable as the end result may have turned out to be, however, a full school year was eaten up in the process, during which a student who very obviously needed to be moved as quickly as possible back into a well-structured language-based program and back into the company of classmates with comparable needs, received instead tutoring in his home. Perhaps delays were unavoidable even with both parties doing their best to expedite the process of finding a new placement, but one has to wonder why matters could not have been brought to a conclusion far earlier and whether the BSEA itself could not—seeing a student out of school, parents unrepresented, and the school system as the initi-

ating party—have exerted more pressure on the parties to push matters to a resolution well before the school year had ended.

No Expert Testimony for Parents; No Evidence Regarding Benefits of ABA vs. TEACCH; Hence, No Case

The school district initiated the matter of *In Re: Leominster Public Schools*, BSEA # 11-5123, 18 MSER 233 (July 16, 2012, Berman), to seek the BSEA's blessing on its IEP for the program to be provided at the Darnell School, a private special education school that provides an ABA-based teaching approach for students with autism spectrum disorders. The parents had consented to placement at the Darnell School but had refused to agree to the content of the IEP.

The parents were not represented in the proceeding and offered no expert testimony on their behalf. That and a record that reflects an apparent lack of cooperation in the process sunk any chance they had to convince the hearing officer of their position.

Parents had moved to Leominster from Haverhill where the student's last-agreed IEP had provided for services using the so-called TEACCH methodology, a more eclectic teaching approach than a strictly ABA program and one that is frequently in play as an alternative in controversies between parents and districts over appropriate services. Proponents of each approach include many avid believers who brook no disagreement.

When the parents moved to town, Leominster quickly admitted that they had no substantially separate intensive program to offer that would be comparable to the one described in Haverhill's IEP and set out to identify an alternative. Parents apparently blocked access to records from Haverhill beyond the IEP itself in this process and Leominster's packets to various alternatives were accordingly quite limited. According to findings in this decision, the parents also made it difficult to schedule Team meetings or otherwise proceed through the necessary steps to secure a placement.

In the end, the parents rejected placement at either of two suggested collaborative programs (CAPS and FLACC), but ultimately consented to placement at Darnell while withholding consent to the particulars of the IEP that would support the services there. They also insisted on implementation of the TEACCH-based services outlined in their Haverhill IEP as the student's stay put entitlement.

In effect, the parents put Darnell in the position of working with a student without being able to implement its own type of program for him. Hence, Leominster's effort by means of the BSEA process to align the student's program with the actual types of services Darnell is designed to offer.

The hearing officer noted that on entering Leominster the student was indeed entitled to a "comparable" program to the one outlined in his IEP from the prior district, but she emphasized at the same time that the right to comparability does not amount to an entitlement to "a precise replication of the previous IEP." In this frame, she found that while the Darnell program was clearly not identical to the Haverhill program, "the Darnell program was, in fact comparable to the Haverhill TEACH [sic] program not because it is identical—it is not—but because it is a full-day, full-year, intensive educational program specifically designed to serve children on the autism spectrum."

She also found that the record showed the student making progress despite the program not being able to implement the proposed IEP that was consonant with its services and noted that it is likely that he would make even better progress with that IEP's full implementation. We note that such a conclusion had to be based entirely on the evidence offered by the district and by Darnell, since parents offered no expert testimony to address the question whether the student actually had made progress at Darnell and, if so, whether Darnell's services were actually ABA-based in the absence of consent to that approach or looked more like the TEACCH approach.

Concerning the period between the student's arrival in Leominster and his enrollment at Darnell the hearing officer found that the district had produced insufficient evidence on which she could conclude that either of the two collaborative programs it had proposed would have provided comparable services to those at Haverhill and had thus not carried its burden of proof for that period. However, she concluded that no compensatory services were due to the student on that basis because the record showed that the parents had met Leominster's efforts to convene Team meetings, obtain records and explore alternative programs with an obstreperous lack of cooperation.

Issues in this case might have been more closely argued and the result might have been different—and, frankly, more illuminating—had the parents brought credible experts into the picture able to testify about the student's particular profile and any evidence of his comparative responsiveness to the kinds of approaches alternatively based on ABA or TEACCH methodologies. On the record available to her, this hearing officer could only gauge Darnell's comparability to Haverhill's program based on indices such as the "intensity," the daily/weekly hours of services, the duration through the year of services, and the like. It might be that this student has historically shown a severe resistance to the kind of strict behavioral approach that is embodied in the ABA methodology and a better accessibility in the hands of a TEACCH-based program, but the hearing officer and we readers of the decision will never know. If this hearing officer had been presented with evidence of that kind, the outcome might have been different (though that, in turn, would likely have required a renewal of the search for an appropriate program designed around the TEACCH approach, since Darnell is an ABA program).

Bottom line for parents (as for any case at all): cooperate with the school district in the Team process; engage credible experts and make sure that they develop as much data as possible through testing, observations and other access to alternative programs on which to render their opinions; and don't try to survive a hearing in due process without understanding the key legal and factual issues that will be determined and organizing the evidence to meet those issues head on.

Parties At Loggerheads Over Toilet-training; an Expert that Kept His Distance; The Student Suffers[1]

The district in *Sutton Public Schools*, BSEA # 12-6333, 18 MSER 288 (August 17, 2012, Figueroa), commenced the proceeding to seek approval of its proposed IEPs and placements since the student returned from home schooling to the public school two years prior. The parents and Sutton agreed that providing a FAPE to the student, a 15 year old with apraxia, required special education services including occupational therapy, physical therapy, speech and language, a toileting protocol, vocational opportunities, and transition services.

The parents disputed the appropriateness of the toileting program that the school chose to implement, however, and pointed to evidence of continued toileting accidents at home and in public to demonstrate the district's failure. Because of their disagreement, the parents refused to implement the school's toileting protocol at school and continued to implement their own toileting program during after-school hours.

While the hearing officer agreed that implementation of an effective toileting program was essential, she found that the parents' approach, which emphasized advanced toileting skills (standing, rather than sitting), had "not been successful for Student," and faulted them for failing to implement the school's toileting protocol, which emphasized the student's mastery of more basic toileting skills.

But while the hearing officer found Sutton's program to be appropriate for the student at his current level of toileting success, she noted that his toileting program "should include learning to [master the skills which the parents wished to emphasize] before his toileting goal is fully achieved." In effect, the hearing officer found that the school's chosen protocol met the student at his current level of toileting success but acknowledged that Sutton's job would be incomplete until the student learned the advanced toileting skills that the parents wished for him to master.

The hearing officer also ordered Sutton to "extend toileting services… to after school hours," noting, "[the] Student's needs are what guide his services and what Sutton is ultimately responsible to address. Therefore, the protocol that is implemented must be designed to help Student be successful consistently, across all settings."

Parents should note that a district's responsibility to provide a student with services extends past the end of the school day when, as in this case, the student's needs so require. So while the hearing officer did find that the parents' failure to implement the district's toileting protocol at home hindered the student's toileting success, she nonetheless held the school district responsible for implementation of the program both during and after school.

In addition to finding Sutton's toileting protocol appropriate for the student, the hearing officer also found that the 2011-2012 and 2012-2013 IEPs, with minor modifications, offered the student a FAPE in the LRE. In reaching this decision, the hearing officer stressed that "any program capable of offering [the student] a FAPE must address his needs as he presents today." Thus the hearing officer found that the IEPs offered the student a FAPE since they were developed to address the student's current needs.

But though the hearing officer determined that college preparatory skills, such as reading, did not need to be prioritized to the extent that the parents desired, she did find that the student should continue to receive these kinds of services. Sutton also failed to convince the hearing officer of the student's success under the school's reading program and ordered Sutton to reconsider the appropriateness of the parents' preferred reading program.

However, while the district failed to demonstrate that the student had achieved success in the school's reading program, it persuaded the hearing officer more generally that the student had made meaningful progress under his IEP. The parents agreed that the student had made progress since his return to Sutton, but they attributed this progress to his participation in private, after-school programs that the parents had arranged in order to supplement his public education. Unfortunately for the parents, while the hearing officer conceded it was "possible" that the after-school services contributed to the student's progress, she noted that because "there was no testimony offered by any of the private providers who [had] been providing Student direct services," there was no evidence regarding the extent of their contribution. Thus, the hearing officer deemed the student's progress to be attributable to the Sutton placement and awarded no reimbursement for the costs of supplemental tutoring or other services provided by the parents.

The hearing officer also noted that in light of the frequency with which the student arrived to school late and left early, "Parents have placed themselves in a difficult position to argue that Sutton failed to offer Student a FAPE," since these absences "impeded Student's ability to fully access the program and services specifically designed for him in Sutton."

In light of the lack of evidence regarding the benefits the student derived from the private after-school placements and the fact that the student did not fully participate in Sutton's program due to his frequent absences, the hearing officer denied the parents' request for reimbursement for these private services.

The narrative of this case repeatedly highlights events and communications in which the parents refused or delayed responding to proposed IEPs, reacted with vulgar language toward school personnel at Team meetings, withheld critical information from the district such as the steps they took with an outside agency specializing in autism to assess and provide some services to the

1. We much appreciate the contributions of Northeastern Law Student, Corey Lyons Ouellette, to the commentary we offer on this case; her summary of this lengthy decision allowed for more efficient analysis and her insights provided a helpful matrix for discussion.

student, brought the student late to school, complained about a lack of opportunities to participate with non-disabled peers in extra-curricular events while keeping him from those events for fear of toileting accidents, and generally behaved with unremitting hostility and distrust toward school personnel. While there can be many reasons beyond a parent's control to explain such a posture toward school personnel—often including the behavior of the school personnel toward the parents—parents should note the consequences of a record like this. As the hearing officer pointed out in her discussion of the parents' request for an order to find Sutton to have deprived them of their right to participate in the Team process, the Team process had halted largely because of a parent's inability to control her anger at a meeting and then the parents' refusal to participate in a rescheduled meeting that would have been facilitated by a BSEA mediator. She noted that the federal court has stated that "[I]f parents act unreasonably in the course of [the IEP development] process, they may be barred from reimbursement under the IDEA." *D.B.* v. *Sutton Sch. Dist.*, Civil Action No. 10-10897-FDS (Saylor, J., August 14, 2012) (citing *C. G.* v. *Five Town Cnty. Sch. Dist*., 513 F.3rd 279 (1st Cir. 2008)).

Taking the findings at face value, this decision provokes another caution: As the hearing officer noted, the parents had "placed all their faith on [a certain therapist] and the play therapy he has been providing to Student." They also relied on him to argue that the student was made anxious—and therefore unable to progress effectively—by his experience in the district's program. As the record told the story, however, with the exception of periods during which the student was transitioning into a program, the evidence of increasing anxiety, as well as of increasing toileting accidents, profane language and behavioral incidents, occurred mostly in the office of the therapist testifying to his anxiety. Combined with this therapist's admitted unwillingness to communicate directly with the school's personnel after repeated requests (including a complaint that they not use his cell phone number when they actually reached him one day) and his apparently rather high-handed dismissal of suggestions that he observe the student in his program at the school, the evidence of difficulties in the therapist's office led the hearing officer to comment that if she were to entertain a claim for reimbursement for his services to the student as parents had requested, she would reject the request for a lack of evidence of the benefit to the student of the services.

The critical point to take from the discussion of this therapist's part in the history is that the opinion of an expert who refuses to communicate with school personnel and who draws conclusions about problems with the school's approach to a student while refusing to observe the program will likely be given little or no weight at the BSEA. This therapist protested that there seemed to be so much hostility from the school that communication would have been pointless, but, as the hearing officer noted, whatever hostility there may have been, an expert who wishes to advance the interests of a student and his family needs to rise above that maelstrom and participate as a professional to the extent that circumstances allow. A parent's expert should not, any more than an attorney or advocate, collude with and/or amplify a parent's anger and frustration with a district. Whatever help a professional can bring to solve problems will only be undermined by joining a parent in dysfunctional behavior or by refusing to engage with employees of the agency whose services are in question.

Is Security an Unspoken Element in an LRE Determination?

Although the parents, representing themselves in the case of *Andover Public Schools*, BSEA # 12-7315, 18 MSER 319 (September 11, 2012, Berman), lost their bid to keep their 14 year old son with Asperger's Syndrome in the less restrictive environment of their district's high school against the district's proposal of an outside placement, this case may offer at least comfort to some parents of such students who struggle with their child's excruciating social and behavioral vulnerability in school. Anti-bullying statutes and policies aside and notwithstanding requirements to include social and emotional skill development in the IEPs of students with such profiles, they all too often become isolated, teased and bullied and/or become disciplinary problems themselves, and sporadic efforts to address their communication deficits fail for their inconsistency, the lack of expertise of the providers in their schools, and the unrelenting demands and standards of the adolescent culture around them.

In this case the district, clearly concerned about what they saw as the bizarre and scary cartoons this student drew, his apparent disinterest in those around him, and his sometimes uncooperative behavior, sought to move him to the Gifford School. Of several outside placements to which parents had allowed the district to send exploratory referral information, Gifford was the only one that responded with an invitation to enroll.

Parents protested that the student actually had friends within the public school, was making good grades, and was generally able to modify his behavior in response to clear goals, consistent structure and supportive responses to his disabilities with little or no risk to himself or others. They also argued that the Gifford School was inappropriate for their son, with peers clearly less cognitively able than he and no real expertise in spectrum disorders.

The hearing officer was convinced by the district's psychological evaluator that the student had no interest in engaging in the world of others and that although he could likely continue to make good grades, he was unlikely to make progress in the nonacademic skills that were undermined by his disability. She observed, accordingly: "Student is now fourteen years old; it will be very difficult for him to move towards self-sufficiency if he does not develop more functional social and emotional skills in the near future."

Though the hearing officer cited a well-known behavioral psychologist the parents had employed for an independent evaluation for an opinion that with certain supports the student could make good progress in a regular high school setting, that psychologist, she noted, was not familiar with the district's high school and did not testify. To have any chance to overcome the district's testimony that it could not provide the supports that the

parents' psychologist had outlined, the parents would have had to have their witness observe the high school and show up at the hearing able to articulate specifically how the school could do the job.

The law's requirement for maximum appropriate inclusion strains against the requirement for effective progress in this case. On the surface it does not appear that a rigorous exhaustion of in-school supports and accommodations had occurred by the time this district initiated its action at the BSEA to warrant moving this student against his and his parents' wishes to a more restrictive environment. What may have tipped the balance is the underlying theme of violence and disengagement expressed by the student in drawings and in an essay that caused concern among the school staff. While his negative behaviors involved more non-compliance and troubling creative expression than outright aggression, his attitude seems to have frightened the school into a campaign to send him elsewhere. In the continuing shadow of the 2007 killing of a fellow student in Lincoln-Sudbury by a student with Asperger's Disorder, it seems that concerns for security will be tacitly weighed in the balance against the least restrictive environment mandate.

Despite our misgivings about the unspoken elements underlying this decision, we applaud the willingness of the hearing officer unapologetically to base her conclusion solely on this student's non-academic developmental needs—a direction that districts frequently resist in practice. It is also heartening to see the hearing officer's determination to ensure that the placement that ultimately is secured for this student is actually capable of meeting his needs. She rejected the district's proposal for placement at the Gifford School which, she found, was not appropriate because there was no evidence that the staff had sufficient experience working with students with Asperger's Syndrome or that any comparable peers were enrolled. Whether the parents in this case and their son will reconcile themselves to the outcome will depend on whether a genuinely appropriate placement can be found. The BSEA has done what it can to push the parties toward that result.

BSEA Authority over non-LEA Agencies Still too Limited

In the matter of *Gateway Public Schools,* BSEA # 12-8582, 18 MSER 281 (July 18, 2012, Figueroa), the district requested joinder of the Department of Children and Families ("DCF), arguing that the parents' request for a residential placement for their son could not be considered in the absence of DCF. In prior years Gateway and DCF had cost-shared the student's placement at a residential program when DCF had determined that his and his family's needs could not be addressed without the services of such a placement. The student had been moved to a day program after some time, but now his parents had brought this action to argue that he could not make effective progress in the acquisition of skills without all-waking hour teaching, supports and accommodations. Gateway, looking back to the earlier cost-share arrangement argued that since the student's behavior was acceptable during the school day, any behavioral/emotional difficulties the student may suffer outside of the school day hours were the responsibility of another agency—DCF—to address.

DCF contested the motion and the hearing officer ruled for DCF.

Pursuant to a 2000 amendment to M.G.L. c. 71B, §3, the BSEA was given the authority to join a state agency when "(1) complete relief cannot be granted by the originally named parties or (2) the third party has an interest in the matter and is so situated that the case cannot be disposed of in its absence." BSEA Rule 1J. The governing statute allows the BSEA to order relief from an agency only if the services ordered are consistent with the agency's own rules, regulations and policies.

The hearing officer found that DCF only provides services of the kind in question in this case when the student is actually in DCF's custody or care. Further finding that DCF did not did not have the student in its custody or care (nor had the parents sought to place him voluntarily in its custody or care) and that only a court—not the BSEA—could order DCF to assume custody, she held that the BSEA could not therefore order DCF to provide him with the services at stake in the case.

The efforts that led to statutory amendments giving the BSEA the authority to order a state agency to provide services when needed to ensure FAPE were helpful to a degree, but the discretionary limitations upon those agencies' various service protocols—defined by enabling statutes and/or by the agencies' own self-protective rules -often lead, unfortunately, to the kind of roadblock and delay exhibited in this case. Time is consumed as districts and agencies argue over who should pay for services that are obviously needed, while the case on the merits of a claim waits in the wings. A student with serious behavioral difficulties—"unsafe behaviors" as the hearing officer summed them up—often cannot safely wait. Hence the gap the legislature attempted to fill with its amendments in 2000 continues to exist, albeit with a somewhat smaller opening. Where the real life alternatives for many a behaviorally troubled young person are education, treatment, or jail, we'd better create a more effective service matrix that leaves no gaps among and between responsible agencies. Soon.

Note: While it may be that agencies did not agree in this case that the student needed a residential placement in order to access a FAPE, practitioners should keep in mind the provision found at 34 C.F.R. §300.154(b) indicating that where agencies agree to such a need, but disagree about which agency or agencies should bear the cost, the LEA must fund the service and then pursue the other agency(ies) for reimbursement.

A Student With a 504 Plan "Self-Advocates" Unsuccessfully for an IEP

A nineteen year old student failed to overturn the district's finding that he was ineligible for an IEP in the matter of *In Re: Lynnfield Public Schools*, BSEA # 12-1425, 18 MSER 247 (March 14, 2012**,** Berman). The case assumes and applies a bright line between eligibility for accommodations under a 504

Plan and eligibility for specialized instruction and/or related services under an IEP.

The parties agreed that the student has "one or more disabilities, including Asperger's Disorder, Bipolar Disorder, ADHD, and an unspecified learning disorder." He had been provided with Section 504 Accommodation Plans to help minimize the effects of his disabilities in school, providing for preferential seating, extended time for test-taking, repetition and break-down of information, multi-sensory presentation of information, and the like. (The latest 504 Plan also called for the student to be encouraged to self-advocate and, ironically, he did just that in bringing his complaint to the BSEA.) He had availed himself of some but not all of the accommodations from class to class. His grades were A's and B's; he held a part-time job; he was involved in a student academic club; and he had been accepted for admission to four colleges and had selected one of those for the ensuing fall.

On the face of this decision one has to wonder why the student felt so thoroughly thwarted in his relations with his school that his issues needed to be decided by the BSEA. The hearing officer noted his apparent solid academic success, his growing ability to handle himself socially, and his plans to enroll in college, and, at the same time, she noted the district's apparent inclusion in 504 Plans of everything that various evaluators recommended to help him stay on course. The student explained in testimony that he wanted access to a different academic support class than the one that had been designated for him and he complained that his ability to maintain good grades in math and to succeed in a course on anatomy came at too high a cost in time and effort. He indicated that he had a difficult time understanding multi-step problems. The district responded that he could have everything he wanted under a 504 Plan, but not pursuant to an IEP.

What we cannot discern from the written decision in this matter is what exactly was made available or explained to the student before the dispute reached the BSEA. While the district's special education administrator testified at hearing that he could access a different academic support class than the one he had been assigned to, was that the first time that option was articulated and were there other items that only came to light explicitly at the hearing itself—the record does not make this clear.

The student may have had difficulty, given the nature of his disabilities, understanding the ambiguities that inhere in the distinctions between an entitlement to accommodations that provide for access to education and a right to specialized instruction that is necessary to enable him to make effective progress—this is not an easily explainable distinction for many and especially often for a concrete thinker. The record reflects a poignant discomfort in this student with what he probably felt as an inexplicable inability to thrive in certain areas of learning while other areas came so easily and brilliantly to him. Within that context, sometimes the ambiguities inherent in special education and disability law and the common impression that an IEP offers more effective rights and remedies than a 504 Plan may have given him the hope that a change in service format might resolve the discomfort he felt with his experience of cognitive contradictions in himself. We will never know, but we do wonder whether there couldn't have been a less costly and adversarial means to reach a resolution of this dispute—and one, perhaps, that could have led to a better understanding by this student of his strengths and weaknesses and how to navigate social and academic challenges successfully in spite of the uneven topography of his profile.

Homeless Student; No IEP; Still, the District Must Educate

In Re: Martha's Vineyard Public Schools, # 12-7661, 18 MSER 229 (July 12, 2012, Crane), provides an instructive analysis of a school district's responsibility to educate a student who becomes homeless while in the special education process without an agreed IEP. The case concerns a Martha's Vineyard student for whom an IEP was proposed for his 9th grade year but not accepted when his single parent lost her home and moved to temporary housing in Attleboro. She arranged for the student to enroll in a private high school program in Providence where his brother was already enrolled. There was a dispute over whether the parent had accepted an IEP for the student's 8th grade year; for purposes of his analysis of the question before him, the hearing officer assumed that the IEP had not been accepted and that there was, therefore, no special education placement pending appeals.

The question before the BSEA, presented by the Vineyard's Motion for Summary Judgment, was two-fold: (1) whether without a signed IEP Martha's Vineyard was obligated in any way to provide special education services to the student; and (2) whether the BSEA has jurisdiction to determine Martha's Vineyard's obligation to enroll the student at all since the McKinney-Vento Act providing for homeless students appears to give only the state authority, DESE, the responsibility to make such a determination.

As to the first of those issues, this decision finds that the Vineyard was not relieved of its responsibility to offer FAPE by the parent's failure to accept a proposed IEP once it determined that the student was eligible for special education services. As the hearing officer correctly noted, while the parent's lack of consent may have relieved the district of the obligation to provide the special education services that it had offered in its IEP, that lack of consent in no way relieved the Vineyard of the obligation to propose an appropriate IEP.

Regarding the second issue—the Vineyard's chief argument in its quest to be freed of responsibility to the student—the hearing officer provides a road map through the McKinney-Vento provisions regarding determinations of districts' responsibility for students who become homeless. The question as presented was a narrow one—did the BSEA have jurisdiction over Martha's Vineyard in regard to the student's IEP where the issue whether the Vineyard had any obligation at all toward the student was a question subject to the determination of the DESE under the McKinney-Vento Act. The district relied on provisions of the Act that require any dispute over the final determination by a district that it does not have responsibility for a homeless student to be appealed to and decided by the state agency responsible for implementation and enforcement of the Act—the MA DESE in our case.

The hearing officer in this case found first that Martha's Vineyard had not completed the process within its own system for

making a determination final and therefore ripe to appeal to DESE. In point of fact, the district had failed to take the question to its Superintendent for a final in-district ruling in writing—a step that the hearing officer noted was required before an appeal could be taken to DESE, according to an advisory memorandum issued by DESE, *Homeless Education Advisory* 2003-7.

He went on to note that while McKinney-Vento does not in itself answer the question whether a district must continue to educate a student who has become homeless pending the resolution of a unresolved dispute over his right to continue in its care, a DESE regulation, 603 CMR 28.10(5) does provide an answer. Under that regulation, he indicates: "the school district 'that was programmatically and financially responsible prior to the student becoming homeless shall remain programmatically and financially responsible for a homeless student until the parent(s) … choose to enroll the student in the school district where the shelter or temporary residence is located.' Similarly, paragraph (a) of 603 CMR 28.10(5) provides that a homeless student 'shall be entitled to either continue to attend their school of origin, as defined by McKinney-Vento, or attend school in the city or town where they temporarily reside.'"

McKinney-Vento was enacted in an effort to close the gaps that occur in the education of countless children who suffer homelessness across the country. In keeping with its purposes, there should be no loopholes allowing the inevitable patchwork of possible school districts that may ultimately have programmatic and/or fiscal responsibility for a child bouncing from one temporary home to another to lead to the abandonment—even temporarily—of a child's education. This BSEA decision, and the DESE regulation on which it relies, do their noble part to ensure that such children do not fall through the cracks. Clearly written and compelling in its reasoning, hopefully *Martha's Vineyard* will discourage districts from trying to drop children who have become homeless before another district has clearly taken over responsibility for them.

Conclusion

A hefty number of cases in this quarter were initiated by school districts, a growing trend. Of those cases, there are several matters in which parents either represented themselves or did not show up, some in which parents did not bring experts to testify, or in which experts who did testify had failed to obtain the data that might have aided in assessing the student or the proposed services. Others show a history of antagonism and obstruction by and between parents and school districts made it difficult to drill down to the actual facts of a student's needs and render an accurate appraisal of needs, services and programs. In those situations these decisions show the BSEA hearing officers for the most part diligently going the extra mile to ensure that the parents' positions are well understood and that any available evidence in support of those positions is acknowledged. In one case especially—*Boston*—the hearing officer took the step of ordering new evaluations and holding the record open to ensure that the ultimate result fairly addressed the needs of the student. Given the expense of these cases—and the added complexity of the issues when parents are poor and/or students are homeless and/or various non-educational state agencies have a role—the efforts hearing officers make to ensure a full and fair record should be acknowledged and applauded. In those and other respects participants on all sides should appreciate the benefits we enjoy in this state of a well-experienced due process agency, now housed in its new home at the Division of Administrative Law Appeals. ■