

## MSER Commentary

Fourth Quarter 2023

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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 programming. 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 placements, 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 12<sup>th</sup> 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. ■