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INTRODUCTION

This quarter's eighteen decisions (including three issued in 2011 but not commented upon previously) are an interesting mix to start the new year. Perhaps most notable are two cases, *Agawam Public Schools*, BSEA #12-1714, 18 MSER 68 (2012), and *King Philip,* BSEA #12-0783, 18 MSER 20 (2012) which underscore the principle that the district must provide for what is necessary for FAPE, even if that encompasses travel for parents to visit their child's residential program or services that would assist a young adult transition to a group home setting and supported employment. There are three decisions on challenges to DESE's assignment of school district responsibility, including one which provides a cautionary tale to parents whose divorce agreements or temporary orders do not reflect the realities of their custody arrangements. Two of these matters were decided, pursuant to BSEA Hearing Rule XII, solely on the basis of documents and all three decided without evidentiary hearings. Several decisions reiterate the "no harm, no foul" view of certain procedural violations, no matter how egregious the violation. As always, the decisions provide insight into why a side prevails in the "battle of the experts" There is an interesting "stay-put" aspect to the decision in *Agawam Public Schools*, BSEA #12-1714, 18 MSER 68 (2012). There is only one "joinder" decision, where DMH was joined in *Whitman-Hanson*, BSEA #12-3366, 18 MSER 43 (2012) to allow full relief to be ordered. The applicability of the statute of limitations for IDEA based claims as well as the enforceability of a resolution agreement are addressed in *Brookline Public Schools*, BSEA # 12-3430, 18 MSER 53 (2012) .

Assignment of School District Responsibility

In *Fitchburg Public Schools, Narragansett Regional School District, and Massachusetts DESE*, BSEA #12-3434, 18 MSER 31 (2012), the assignment of school district responsibility turned on whether and when the student was considered "homeless." At all relevant times, the student was under the custody of the Massachusetts Department of Children and Families ("DCF") and the mother resided in Baldwinville (within the Narragansett Regional School District). From 2002 until September 27, 2010 the student lived with his mother, but thereafter in a series of foster homes. On February 27, 2011, DCF placed the student in a Stabilization, Assessment and Rapid Reintegration/Reunification ("STARR") Program at the Horizon House in Fitchburg and he was enrolled in the Fitchburg Public Schools. Fitchburg found him eligible for special education and placed him in a private placement, the McGrath School, where he continued through the time of the hearing. On April 20, 2011, DCF moved the student to a group home in Rutland, which is within the Wachusett Regional School District ("Wachusett"). DESE responded to DCF's request for clarification of school district responsibility by determining that: (1) because the student was residing in a group home within the Wachusett, Wachusett was programmatically responsible for the student; (2) on the basis of the "move-in law", Fitchburg was financially responsible through June 30, 2012; and, (3) Narragansett would become financially responsible as of July 1, 2012.

Fitchburg challenged the determination, claiming that because the mother resided in the Narragansett Regional School District ("Narragansett"), Narragansett was financially responsible at all times.

The federal McKinney-Vento Homeless Act, 42 USC § 11431 addresses the educational rights of homeless students. DESE advisories on McKinney-Vento policies and procedures include one (Homeless Education Advisory 2004-9) that provides that students in DCF custody or care who are placed into temporary, transitional or emergency living placements awaiting foster care placement are considered homeless. An addendum to the advisory provides that STARR programs are considered temporary, transitional, or emergency housing under McKinney-Vento. Therefore, by attending a STARR program, the student was considered homeless. DESE regulations provide that the school district responsible *before* the student became homeless remains responsible. Fitchburg's argument that those regulations are unreasonable because student stayed longer in the STARR program than foster homes failed because the student's status could not turn on length of stay in a program or home. Fitchburg also sought to have the districts of the foster homes share the responsibility, arguing that they too were temporary, emergency housing. The hearing officer found this argument lacking also, refusing to wade into a determination as to which foster homes, if any, were meant to be only temporary, emergency housing for the student.

The hearing officer upheld the assignment of programmatic responsibility of Fitchburg. The hearing officer also affirmed and commented on the undisputed portion of the assignment and affirmed the financial responsibility under 603 CMR 28.10(4)(b) of parent's district when student lives in a group home - in this case mother resided within Narragansett. However, the "move-in

law" (MGL 71B, §5) provides that when a student moves to a new school district on or after July 1 of a fiscal year, the former school district remains financially responsible until the end of the fiscal year.

Northampton Public Schools and Massachusetts DESE and Boston Public Schools, BSEA #11-7992, 18 MSER 105 (2012) also involved a question of homelessness and placement in a STARR program and was decided on written submissions. The mother was incarcerated and the student was in the permanent custody of DCF and considered homeless as he moved through various DCF placements. The question raised was whether his brief stay in a Boston foster home and related attendance at a Boston Public School program terminated his homeless status and transferred programmatic and fiscal responsibility to Boston or whether the student's "district of origin," Northampton, retained fiscal responsibility.

Issues surrounding the district's responsibility for this student were previously addressed *Northamption Public Schools v. Greenfield Public Schools and DESE*, BSEA #10-1393 where the hearing officer found that Northampton, as the district within which the mother last resided before becoming homeless, was responsible for student's educational programming. In January 2011, DCF placed the student in a foster home in Boston, where he stayed until March 30, 2011. He attended the McKinley School in Boston, a substantially-separate public day school from February 14, 2011 through June 2011. During his time at the McKinley, Boston never evaluated him, convened a TEAM meeting, or issued any IEP. On March 30, 2011, DCF placed the student in a STARR residence in Natick.

DESE issued its Assignment of School District Responsibility, finding that Northampton was fiscally and programmatically responsible for the student's education. Applying the same relevant regulations relied upon in the above *Fitchburg* decision, the hearing officer found that it was clear that the Boston foster home placement was temporary and he remained homeless awaiting placement while he was in Boston. Therefore, Northampton remained fiscally responsible for the student.

The last assignment of school district responsibility case from this quarter, *Lincoln-Sudbury Regional School District, DESE and Lexington School District*, BSEA #12-3149, 18 MSER 108 (2011) involved the issue of school district responsibility for a student with divorced parents living in separate towns. DESE had assigned sole responsibility to Lincoln-Sudbury, the mother's district. Lincoln-Sudbury challenged the assignment, saying it should be shared with Lexington.

The student had attended the residential program at Dr. Franklin Perkins School ("Perkins') in Lancaster, Massachusetts since June 29, 2010. Prior to that, student was a day student in the Lincoln Public Schools. The mother had sole physical custody and had sole education decision making pursuant to the parents' divorce agreement. The student was unilaterally placed at Perkins for the 2010-2011 school year and subsequently the district agreed write the IEP for Perkins. Prior to that, he lived with his mother four days per week and alternating weekends, and with his father the rest of the time. While at Perkins, he spent alternating weekends with each of his parents and similarly alternated weekday overnight stays with each parent, essentially spending equal time with each of his parents.

Lincoln-Sudbury sought to rely on 603 CMR 28.10(2)(a), which provides that if a student of divorced parents living in separate districts lives with both parents, and the student's IEP calls for a residential placement, the districts will share equally the cost of that placement. However, 603 CMR 28.10(8)(c)5 provides: "if the parents are divorced or separated and one parent has sole physical custody, then the school district where the student resided with the parent or the school district of the parent who has sole physical custody shall be responsible and shall remain responsible in the event the student goes into the care or custody of a state agency."

Here, Lincoln-Sudbury's argument failed because at the time the district provided the IEP for Perkins, the mother had sole physical custody of the student, and Lincoln-Sudbury therefore had sole fiscal responsibility.

While this dispute was exclusively between school districts over the funding for an established residential placement, parents and their advocates should take heed of it. Parents seeking district funding for an expensive residential or day program will have an easier time of it when the cost of such a placement will be shared by two districts. Therefore, divorce agreements or temporary orders should reflect the reality of the situation. In this case, while there may be very good reasons why the temporary orders did not reflect the true custody arrangement of the parties, that documentation would have prevented parents appealing to both towns to fund the Perkins placement if placement were an issue.

District Fails in Challenging Residency

The custody arrangement of separated parents was questioned by the district in *Agawam Public Schools*, BSEA# 12-2829, 18 MSER 45 (2012). The student was placed at Forman School in Connecticut under an accepted IEP. Parents separated and the father relocated to Georgia with student's younger brother. Parents tried unsuccessfully to sell their home and eventually took it off the market. The mother worked as a flight attendant for an airline whose home base was in Atlanta. Consequently, and as is typical in her profession, she maintained an Atlanta "crash pad," an apartment that she shared with numerous flight attendants. Agawam challenged parents' residency.

In a case of "seller beware," a school district employee accompanied by a woman who had known Agawam's superintendent "since the fourth grade and (with whom she has) maintained a romantic relationship for the past five years" masqueraded as potential buyers and toured the family home in Agawam. They testified at hearing that they found the home to be "non-livable," which they defined as, at a minimum, lacking two televisions and one computer. Agawam sought to buttress their case with the hearsay testimony about the opinion of a "neighbor," who turned out to be an estranged family member with whom the parents had not spoken in a year and additionally weak evidence. The mother and her witnesses successfully rebutted this "evidence" with util-

ity and other bills, saying she owned only a laptop, copies of her travel schedule, bank activity in Agawam and testimony of others. Adding to the absurdity of this action by Agawam was the fact that the period in dispute was six weeks, since Agawam had no evidence to question residency after that time period.

District is Obligated to Provide What The Student Needs, Even if It Is Addressing Behavior at Home and the Community, or Transportation of Parents to the Program

Those with experience in special education law clearly understand that FAPE extends beyond reading, writing and arithmetic and can include a wide array of services addressing a student's development in areas other than academics. Two cases this quarter further illustrate this principle.

Agawam Public Schools[1], BSEA #12-1714, 18 MSER 68 (2012) was a follow-up to an earlier BSEA decision arising out of parents' request for a stay put order when the school where their daughter was attending, Bromley Brook School in Vermont, shuttered its doors. The BSEA ordered Agawam to reimburse the parents for their "self-help" placement of the student at a comparable residential program, Talisman Academy in North Carolina. Agawam had reimbursed parents for the tuition of Talisman but refused to reimburse for costs of transporting student *and parents* between Agawam and Talisman. Talisman Academy is a year round therapeutic boarding school. Its program description provides: "Due to our core areas of growth for our students, each break and parent weekend is designed to provide our families and students, the opportunity to transfer their learned skill sets by practicing specific goals within the home environment….The long breaks are great opportunities for students to practice what they have been learning and for parents to work on holding higher or more realistic expectations for their children." There was no contrary evidence submitted that these parent weekends and student trips home were not crucial to Talisman Academy's program.

Agawam was ordered to reimburse parents for these expenses for two reasons. First, since Agawam had traditionally provided student's transportation to and from various residential programs, this service was part of the stay-put rights that transferred to Talisman, even though it was located at a much greater distance than her previous programs. Second, the out-of-pocket expense were clearly associated with the provision of necessary and beneficial educational services to the student. Therefore, reimbursement and future funding of the transportation was required because it was a "related service" necessary for the student to benefit from her special education program. 34 CFR 300.139(b); 603 CMR 28.05.

King Philip, BSEA #12-0783, 18 MSER 20 (2012), involved the appropriate transition program for a twenty-one year old woman with autism, significant cognitive limitations and a number of medical difficulties. Student had attended the Bridge Program, a substantially-separate day program within the South Coast Collaborative, for nine years. King Philip proposed continuing her placement in the Bridge Program, touting the progress she had made in the year. The parents sought placement in an intensive residential program to prepare her for transition beyond school.

King Philip introduced evidence that the student's behavior at school, manifested in slapping, limited tolerance for work and biting, had improved. However, the hearing officer noted that *behavior at school* was not an area of current concern and therefore not relevant to the appropriateness of her future program.

The student had also made progress in academic and non-academic areas. However, the hearing officer noted that these gains had been "exceedingly limited, particularly when one considers the time period over which the gains have been made."

The two crucial inquiries in this case were: (1) the student's capacity to learn; and, (2) the skills she needed to transition beyond school.

The student had not acquired any adult independent living skills, such as dressing herself, showering, brush her teeth, or using a toilet. She exhibited aberrant behavior at home and during community outings with her family. Her behavior in home and on family trips had regressed during the past year. At home she was frequently self-injurious and aggressive towards her mother and strangers. Mother had become afraid of being alone with the student.

King Philip responded that student had limited cognitive abilities and therefore could not be expected to achieve more. However, parents' experts met this issue head-on and testified convincingly that a student with her profile would have likely made substantially more progress and be at a substantially higher level with respect to both academic skills and functional abilities. Parents' experts were credited by virtue of their more extensive experience and expertise as well as by their more detailed and comprehensive knowledge of the student.

King Philip also was unsuccessful in casting the home issue as one simply of safety of the mother, and therefore, not their responsibility. This position was untenable for several reasons. First, King Philip's proposed IEP provided for services in the home to address independent living skills and social/emotional skills. Second, it was axiomatic that the ability to generalize skills is fundamental to transition because transition skills can only be useful if they can actually be applied where student will be living and working after secondary school. If the student cannot use the skills within the home and community, what's the point of them? Even if the student was bound for residential living such as a group home and supported employment or recreation in the community, she would still need to acquire these skills to successfully transition to that situation. Third, King Philip sought to blame the mother as unmotivated to address the student's behavior and therefore, maintained that it was her fault that the student had not acquired them. The hearing officer found

1. The family in this matter was represented by commentator's firm, Kotin, Crabtree & Strong.

it inconceivable that the mother would not avail herself of any help she could get in addressing these behaviors.

The hearing officer ordered King Philip to find and fund an appropriate residential program. It would be insufficient to train the mother how to respond to her daughter. Instead she needed intensive services across all environments to both bring her behaviors under control and make effective progress towards her independent living skills.

DMH Invited to Join the Party

The district in *Whitman-Hanson School District*, BSEA #12-3366, 18 MSER 43 (2012) sought to join DMH to the proceedings, brought by the parents against the district to obtain a residential placement. The student was "stuck" in a locked Intensive Residential Treatment Center because DMH and Whitman-Hanson disagreed as to whether the student requires residential services for educational reasons and who should fund any required residential placement. While acknowledging that it was rare to ultimately order a state agency to provide services, *See Lowell Public Schools and Massachusetts Department of Children and Families*, BSEA #12-1912 (2011) and *Medford Public Schools*, BSEA #01-3941, 7 MSER 75 (2001), here it was appropriate. DMH had already provided intensive DMH services and the hearing officer did not want to risk the possibility that the student might not be able to access services ordered from Whitman-Hanson without services from DMH.

Stay-Put Does Not Arise from District Paying for Substitute Private Services

Ipswich Public Schools, BSEA #11-9243, 18 MSER 40 (2012) involved an unusual stay-put issue. The 2009-2010 IEP provided for summer tutoring. When Ipswich became aware in spring 2010 that it could not provide this service to the student, it offered to fund fifteen fifty-minute tutoring sessions at Commonwealth Learning Center ("CLC"). This was not part of a team meeting or an IEP. The parent accepted this substitute. The subsequent IEP called for tutoring in the summer. Parent rejected this portion of the IEP and asserted stay-put rights of tutoring from CLC. A new IEP was offered in March 2011 that found student ineligible for extended year services. The parents did not respond to this IEP and it was therefore deemed rejected. Ipswich offered, in writing to the parents, to provide tutoring for student at the high school and offered a schedule for that tutoring.

The hearing officer held that there was no "stay-put" right to tutoring from CLC. The funding of CLC tutoring in summer 2010 was as a proactive measure by Ipswich in response to an anticipated personnel shortage. It was not part of any IEP or team meeting. The physical location of the tutoring could not support the establishment of stay-put because "stay-put" attaches to the type and level of special education services and program, and not to a specific physical location.

District Ordered to Reimburse for Unilateral Residential Placement

In Re: School District, BSEA #12-0132, 18 MSER 1 (2012), involved a claim by parent for reimbursement and funding of a residential placement. Pursuant to BSEA Hearing Rule XII, the matter was decided solely on the basis of documents.

The student had chronic PTSD, an eating disorder, ADHD, borderline personality disorder, major depression, and a learning disorder. The student exhibited substantial emotional and behavioral difficulties for several years and had two psychiatric hospitalizations. She also refused to go to school for a period in eleventh grade. In spite of this and the parent's request, the district had failed to evaluate her for eligibility for special education. In summer 2011, the student began attending the Arlington School pursuant to a partially-accepted IEP. The Arlington School is a private, therapeutic day program located on the grounds of McLean Hospital. Parent unilaterally placed student at Mill Street Lodge ("Mill Street"), a residential program also on the grounds of McLean Hospital.

The student demonstrated success while hospitalized and using Dialectical Behavioral Therapy ("DBT"). Clinicians working with the student concluded that without residential treatment from a team proficient in DBT, student would rapidly deteriorate leading to hospitalization and negatively impacted her ability to progress in school. It was clear to the hearing officer that her emotional and behavioral difficulties had a direct and substantial impact upon her ability to access an educational environment. The student had a well-established track record of improvement in DBT residential settings and rapidly decompensating when such services were removed. The consistent opinions of those working directly with student were "unrebutted, credible and persuasive." Her effective and meaningful progress in her short stay at Mill Street helped establish the appropriateness of that placement. As such, the district was ordered to reimburse the parent for student's placement at Mill Street and to prospectively place her there.

While *Brockton Public Schools, Department of Youth Services and Department of Elementary and Secondary Education*, BSEA #11-3408, 18 MSER 7 (2012), was pending, the parent had two other hearing requests before the BSEA. The disputes centered around the appropriate educational services for a student in the custody of Massachusetts Department of Youth Services ("DYS"). The matter was unusual in that both Brockton Public Schools and DYS shared responsibility for educating the student, an eighteen-year-old man residing in the Westboro Secure Treatment facility ("Westboro") at the time of the hearing. He carried numerous diagnoses, including bipolar disorder, PTSD, ADHD, Generalized Anxiety Disorder, Learning Disorder, Trauma History and Academic Problems. Brockton was assigned school district responsibility based upon the mother's residence. In somewhat of a scattershot approach to the dispute, the parent's claims essentially boiled down to the parties failing to provide an appropriate education to the student.

One significant dispute was related to the student being placed on "program restriction" at Westboro; whereby student receives consequence for serious offenses. The hearing officer deemed program restrictions to be part of Westboro's overall behavior modification plan and not an educational practice even though the student missed a significant amount of school as a result of

program restriction. The hearing officer also noted the effectiveness of the multiple program restrictions meted out to student, noting that his behavior, attitude and work output improved.

Parent alleged that DYS impermissibly blocked Brockton from providing FAPE. The hearing officer noted that IDEA does not limit the ability of law enforcement agencies and courts to determine the setting for services for students committed for criminal behavior. The hearing officer failed to apply the extensive substantive and procedural safeguards accorded students with special needs when facing disciplinary actions. Instead, the hearing officer took note of the legitimate safety concerns and stated that student was not deprived of educational services while on program restrictions because he could still hear the class while in the hallway and he was given the opportunity to keep up with the classwork.

The parent also challenged the qualifications of those providing services to the student. This claim failed given the combination of the typical deference given to school districts about personnel decisions as well as the fact that the parent did not produce evidence that particular qualifications were required. The last claims included challenges to the development and substance of Brockton's IEP. These challenges fell short because the evidence supported Brockton's position that parent was accorded the opportunity to participate in drafting the IEP and the services provided were appropriate and effective.

Forty-Five Day Placement Required to Accurately Assess the Needs of Student

In *King Philip Regional School District*, BSEA #12-2427, 18 MSER 35 (2012), the district sought a forty-five day extended evaluation of the student. Student's grandmother opposed the evaluation, stating that King Philip had nothing to offer the student and she would be homeschooling her son. The sixteen-year-old student had ADHD, a seizure disorder, social pragmatic deficits and relative weaknesses in oral language skills and processing speed. He had been educated for years primarily in substantially-separate classrooms. His freshman and sophomore year IEPs placed him in the Transitions Program at King Philip Regional High School, a program designed for students with autism spectrum disorders or communication disorders.

Student demonstrated difficulties keeping up with the academics and in social interaction with peers. His grandmother transferred him into the Tri-County Vocational High School. After only six weeks, she transferred him back. Upon his return, he demonstrated more difficulties. He starting missing school in May 2011 because of seizures. The TEAM reduced his hours and offered home tutoring, but the grandmother did not respond to this offer. They proposed a forty-five day extended evaluation at BICO or South Shore Collaboratives. The student stopped attending school altogether after May 31, 2011 and had not returned to school as of the date of the hearing, December 14, 2011. The grandmother left the hearing before its completion and did not call any witnesses.

The hearing officer was convinced that a forty-five day extended evaluation was necessary to understand the nature and extent of the student's educational deficits and how they could be addressed. King Philip had not seen the student in class for seven months and simply conducting some evaluations of the student would not be sufficient. He required not only comprehensive, formal testing but also daily observations of student and his social and behavioral interactions.

A Motion To Dismiss Narrows the Disputed Issues on Statute of Limitations and the Applicability of a Previous Resolution Agreement

Brookline Public Schools and Earl, BSEA # 12-3430, 18 MSER 53 (2012) was a decision on Brookline's partial motion to dismiss centering around the terms of a resolution agreement. The parents unilaterally placed student as a residential student at Eagle Hill school in September 2009. Eagle Hill is a non-approved private special education school. The parents filed a hearing request on July 30, 2010 but executed an agreement during their August 6, 2010 resolution meeting. The Resolution Agreement provided that Brookline write an IEP for the day placement at Eagle Hill for the 2010-2011 school year, fund the day tuition there and reimburse the parents for transporting student to and from Eagle Hill on weekends and holidays. The parents agreed to assume all the other costs associated with student's placement at Eagle Hill. The parents thereafter withdrew their hearing request, stating that "the parties have executed a Resolution Agreement regarding the 2010-2011 school year."

In their November 21, 2011 hearing request, the parents sought reimbursement for both the day and residential costs of Earl's Eagle Hill placement for the 2009-2010 school year, and reimbursement for the *residential* costs of student's 2010-2011 Eagle Hill placement. Brookline moved to dismiss parents' claims for the 2009-2010 school year on statute of limitations grounds and dismiss the 2010-2011 claims because they were barred by the resolution agreement.

Concerning the statute of limitations, Brookline referenced the two year statute of limitations provided for in 20 USC §1415(f)(3)(C): "A parent or agency shall request an impartial due process hearing within 2 years of the date parent or agency knew or should have known about the alleged action that forms the basis of the complaint. " The only two exceptions to this statute of limitations, 20 USC §1415(f)(3)(D), are if the school district misrepresented or withheld information - neither present here. The hearing officer dismissed the parents' argument about Brookline's continuing wrong of refusing to offer placement accorded an additional grounds for tolling the statute of limitations. While such continuing representation or treatment has been held to extend the statute of limitations in professional misconduct cases, the hearing officer refused to apply this to IDEA based claims. Therefore, the statute of limitations clearly barred parents' claim for reimbursement before November 21, 2009.

However, Brookline sought to expand the statute of limitations to include all claims for the 2009-2010 school year, reasoning that parents should be foreclosed from recovering for a time period that falls within the two-year statute of limitations. The hearing officer found no authority to shrink the IDEA's mandated two-year statute of limitations.

Concerning the claim for the residential cost of student's placement for the 2010-2011 school year, the hearing officer first acknowledged, citing *Masconomet Regional School District*, 16 MSER 408 (2010), that he had the authority to interpret and enforce resolution agreements. In this one, there was clearly a "quid pro quo" whereby parents received the benefit of the day tuition for the 2011-2012 school year in exchange for relinquishing their claim for residential funding.

Day Placement Cases Illustrate the Need for Well-Founded Expert Opinions

Northampton Public Schools, BSEA #12-0250, 18 MSER 57 (2012) involved an eleven year old who had been "extensively evaluated." He had been diagnosed with ADHD, learning disorder, apraxia and cognitive disorder. Northampton offered placement in its Bridge Street School's Learning Disabilities Program ("LDP"). The parents sought placement in the Curtis Blake School, a private special education program for students with language based learning disabilities located in Springfield.

Student was evaluated by Children's Hospital in April 2011 and the hearing officer found that parents' entire case for placement at Curtis Blake rested on this evaluation. However, as an opinion for establishing the necessity of the Curtis Blake placement, it was fatally flawed. The evaluator had not observed the LDP program, had not observed student in school, nor spoken with any of his classroom teachers. Furthermore, the student was found to have made measurable and strong progress putting him at or within a grade level in many areas. Longstanding therapists and teachers helped establish that student had "most definitely made educational progress." In addition, his teachers gave numerous examples of how the student benefitted from being in mainstream classes. Therefore, Northampton's program was held to provide FAPE.

The hearing officer in *Greenfield Public Schools*, BSEA #12-1305, 18 MSER 63 (2012) upheld the district's proposed program, but also ordered the district to modify it to make it comply with FAPE. Student was a fourteen-year-old boy diagnosed with ADHD, OCD, dysgraphia, executive functioning difficulties and memory deficits. He had attended the Hampshire Educational Collaborative ("HEC") since 2008. It was undisputed that he progressed well in the HEC programs. Greenfield proposed that student attend the Transitions Program at Greenfield High School but his guardians sought to continue him at HEC. The school district filed the hearing request seeking a determination that its IEP, providing for placement at the Transitions Program, provided FAPE.

The hearing officer noted that the profiles of the students in the Transitions Program were quite similar to the student and the students at HEC. There was persuasive testimony about quality of the Transitions Program and how it could be tailored to meet the student's needs. In contrast, the student's guardians testified that he should remain at HEC because he had done well there. There was no evidence that the Transitions Program was inappropriate or inadequate.

The fact that the student did so well at HEC convinced the hearing officer that the proposed IEP was inadequate in its then current form. The IEP needed to be amended to include a comprehensive transition plan.

Outside Placement Ordered, But Not The One Chosen by Parents

The parents in *Pembroke Public Schools*, BSEA #12-0507, 18 MSER 73 (2012) sought placement as a residential student at Kildonan School ("Kildonan") in New York state. The thirteen year old seventh grade student had average intellectual ability but significant language-based learning disabilities affecting his performance in reading, writing, spelling and math. He also experienced problems with anxiety and coping with stress. Parents' independent neuropsychologist opined that the student was essentially a non-reader. Kildonan is a specialized day and boarding school for children with at least average intellectual ability and dyslexia. The parents maintained that there was no appropriate day program with reasonable commuting distance from Pembroke. While Pembroke's IEP offered a "plethora" of services and accommodations, the student had not acquired the basic reading and writing skills that he needed to succeed academically and live independently. In addition, he was unlikely to acquire these under the current program and with his current trajectory. The hearing officer relied on unrefuted testimony that student had not acquired functional reading skills, such as being able to read a menu or a street sign, or write a simple phone message. However, while the parents met their burden that student's proposed IEP and program was inappropriate, they failed to demonstrate that student required placement in an unapproved, out of state, residential program. While parents may not have been able to locate an appropriate program, it did not mean that such a program could not be located by the district with its greater resources.

Therefore, Pembroke was ordered to locate or create a "public or private educational placement for Student that is a fully-integrated language-based program designed to meet the needs of children with at least average intelligence who have severe dyslexia, and are several years behind their grade level in basic reading and writing skills."

Brookline Public Schools[2], BSEA #12-4227, 18 MSER 86 (2012) involved a dispute over whether the residential programs proposed by Brookline were appropriate or whether Brookline needed to fund the residential program preferred by the parent. Parent also complained that several procedural violations by Brookline undercut the validity of Brookline's position.

The eleven-year-old student had been given numerous diagnoses through the years, including PDD, Non-Verbal Learning Disorder, ADHD, PTSD, Oppositional Defiance Disorder, Mood Disorder and Borderline Personality Disorder. She had several psy-

2. The parents in *Brookline* were represented by the commentator's firm, Kotin Crabtree & Strong

chiatric hospitalizations and had been placed as a day student at the Manville School and Pathways, both private day programs.

There was no dispute between the parties that student currently required a residential placement. The dispute centered around what program. Brookline offered placement in the Knight Children's Center ("KCC") or alternatively in St. Ann's Home. Parent sought placement at Walden Street School ("Walden").

Two well-worn principles were reiterated in this case. The first is that to establish a case for placement in a program not proposed by the school district, the focus is mainly on the appropriateness of what the district is offering. Second, such cases often come down to a battle of the experts.

The hearing officer discredited parent's expert because of inaccuracies in his testimony about the features of KCC, such as the peers the student would interact with and the availability of community activities. He also based his opinion of the program on his interview with the program director as opposed to an observation of the program. The hearing officer was also critical of the expert's short history with the student and the fact that he had not spoken with any of the student's current or past teachers.

KCC was found to be an appropriate placement for student based on the availability of a step down program for the student, as well as the program's expertise of working with similar students. While not required to address the appropriateness of St. Ann's or Walden, the hearing officer did. She found that there was insufficient evidence that St. Ann's, offered by Brookline in what the hearing officer deemed to be a laudable and "desperate attempt" to satisfy the parent, would not be adequate. Regarding Walden, the hearing officer found that the student would not have intellectually age appropriate peers.

The hearing officer dismissed several procedural violations by Brookline. In response to parent's criticism that the KCC and St. Ann's placement were not discussed in a team meeting, the hearing officer opined that the parent had disengaged from the team process anyway, and would only consider the Walden placement. In response to parent's complaint that student's referral packet had been sent to KCC without parent's consent, the hearing officer noted that the packet was redacted and reflected good intentions on Brookline's part. Parent also complained that Brookline's offer of two distinct programs on the placement page was a procedural violation. The practical impact of this is problematic for parents where they are trying to evaluate the district's proposal. The hearing officer brushed this aside by saying the programs were similar and parent could have sought a continuance to have the opportunity to evaluate both programs. Doing so in this case would delay the parent from getting the appropriate placement for her daughter who was in serious need.

It should be noted that the hearing officer took pains to note in some detail things that cast the mother in a bad light but that should have been irrelevant to her decision about the central issue of the case—the nature of the student's needs and the appropriateness of alternative programs/placements for that student. The negative things included the fact that the parent was unable to attend the entire hearing, the parent seemed disengaged from the team process because she would only consider Walden as a placement, and that the parent threatened Manville and Brookline with the involvement of her lawyer. Parents should therefore be cautious about what impression a hearing officer might form from matters that are not seemingly relevant to the substance of the dispute with the school district.

District Held to Have Complied with a Prior Order

Hudson Public Schools, BSEA 311-6562c, 18 MSER 82 (2012) addressed whether Hudson had complied with the hearing officer's earlier decision. The earlier decision ordered Hudson to assess the student's spelling deficits and provide appropriate programming as well as goals and benchmarks relating to spelling. At hearing the parents agreed that Hudson's spelling assessment satisfied Hudson's obligation, seemingly resolving this issue in Hudson's favor. However, during closing argument, parents raised an objection to the assessment. Since the objection was to a statement in the evaluator's testimony that the services should be driven by the assessment, the hearing officer found nothing to undercut the appropriateness of the assessment. Concerning the implementation of the recommendations, Hudson provided the programming and goals called for in the assessment and, therefore, the remaining challenges to Hudson's compliance failed. ■

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