MSER Commentary First Quarter 2019

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Introduction

During the first quarter of 2019, the BSEA issued thirteen rulings and a single decision covering a wide variety of issues. Topics included disputes regarding placements and the placement process, independent educational evaluations ("IEEs"), joinder of state agencies and other districts, disputes involving program schools (school choice and METCO), motions for recusal of the hearing officer, and parental access to student records.

Parties filing motions to dismiss or motions for summary judgment were unsuccessful in all but two instances (*Montachusett* and *Boston*), and both of this quarter's motions for recusal of the hearing officer were also denied (*Montachusett* and *Baystate*). All three motions to join an additional state agency or school district were granted (*Newton*, *New Bedford*, and *Nashoba*). The single decision this quarter concerned a parent's unsuccessful bid for reimbursement for a unilateral placement at the Carroll School (*Maynard*). As always, the BSEA Hearing Officers have provided parents, schools, and practitioners with helpful guidance on familiar and novel issues.

Cases Concerning Placements and the Placement Process

In *Mansfield Public Schools and Jaclyn*, BSEA #1803315, 25 MSER 1 (January 8, 2019), Mansfield had evaluated the student a number of times and refused to find the student eligible for special education despite diagnoses of Specific Learning Disability in Reading, a Disorder of Written Expression, ADHD, and Anxiety Disorder. With notice to Mansfield, the parents placed the student unilaterally at the Hamilton Program at the Wheeler School for the 2016-2017 school year. The parents filed for hearing in October 2018, requesting reimbursement for the student's placement for the 2016-2017 and 2017-2018 school years. The District asserted that it had correctly determined that the student was making effective progress and was therefore ineligible for special education, and that the parents' request for reimbursement should be denied. The district filed a motion to dismiss asserting that the district had offered the parents' the relief they requested, rendering their claims moot. It is unclear from the ruling what the district had offered to the parents, but Hearing Officer Amy Reichbach denied Mansfield's motion to dismiss, finding that the parents had alleged facts that, if true, could justify reimbursement for their unilateral placement. The district further filed a Statement of Counterclaims for attorneys' fees and substitute consent for an initial special education evaluation. The Hearing Officer confirmed that only a district court (and not the BSEA) could make an award of attorneys' fees, and that such an award was appropriate only if the parents' request for hearing had been presented "for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." The Hearing Officer further noted that the district was unable to seek substitute consent for an initial evaluation, only for an evaluation of an already-eligible student. The Hearing Officer did suggest that the parents' refusal to consent to an initial evaluation meant that the district was not "required to consider the child as eligible for services" and that the parents' refusal may operate as a bar to reimbursement in a subsequent hearing on the merits of the case.

The student in *Quincy Public Schools*, BSEA #1904761, 25 MSER 5 (January 29, 2019) was a seventeen-year-old student with multiple disabilities and challenges that included uncontrolled behaviors, and had been discharged in September 2018 from Becket Family Services at Mount Prospect Academy in New Hampshire, where he attended pursuant to a Quincy IEP. Quincy and parent agreed that the student continued to require residential placement and Quincy sent packets to potential programs, many of which rejected student. By December 3, 2018, when the parent filed the hearing request, the student had not yet been placed and his emotional state and behavior deteriorated both in school (a temporary day placement) and at home. Quincy filed a motion to dismiss, alleging that the BSEA had no jurisdiction to order Quincy to do anything but what it had been doing—attempting to locate a residential school for the student—and that the parent had therefore failed to state a claim upon which relief could be granted. Responding, the parent agreed that the student was difficult to place but argued that Quincy had not demonstrated diligence in its search for a placement for the student. Hearing Officer Rosa Figueroa denied Quincy's motion to dismiss on the grounds that the parent had raised the possibility of a viable claim in asserting that Quincy had not been diligent in its search. Therefore, the matter could not be dismissed without a hearing.

It is encouraging that Hearing Officer Figueroa disagreed with Quincy that simply sending out packets satisfied Quincy's duty to locate an appropriate residential placement for the student. While there are indeed some students who are extraordinarily hard to place, either due to profile, age, placement availability, or other factors, those students are not well-served when the process is allowed to drag on without oversight.

Carroll School Placement Case

The sole decision this quarter was *Maynard Public Schools*, BSEA #1900813, 25 MSER 22 (February 27, 2019). The parties agreed that the student had average to above average cognitive abilities, average untimed reading comprehension abilities, and

weak reading fluency skills. The student had attended a Spanish-immersion program in the Maynard Public Schools from kindergarten through fifth grade before attending the Carroll School for sixth grade (2018-2019). He received Title I reading services in early elementary school and was found eligible for special education during his third grade year after an outside evaluation evidenced dyslexia. Maynard subsequently provided the student with Orton-Gillingham services but the student continued to struggle with reading fluency and with homework. The district increased the student's services during fourth grade and fifth grade to include daily pullout literacy supports. Parents generally accepted the services in the IEPs but rejected the sufficiency and appropriateness of the IEPs because they did not adequately address the student's needs, stating their belief that he required language-based teaching across the school day. However, it does not appear that any evaluator had recommended a substantially separate language-based program at the time the parents made this assertion. Teachers unanimously agreed that the student was making good progress in all areas except for reading fluency.

The student participated in a neuropsychological evaluation with Anita Pliner, Ph.D., J.D. in January 2018. She concluded that the student had dyslexia and a mild weakness in metacognitive executive functioning skills. She expressed particular concern with the student's self-esteem. Dr. Pliner recommended that the student participate in a "full integrative school day program" with language-based support in all main academic subject areas, daily 1:1 Orton-Gillingham tutoring, and other supports. Dr. Pliner did not observe the student in school, did not seek input from Maynard, and did not opine on whether the student was making effective progress. Diane Locatelli Stephens, Ph.D., observed the student in his fifth grade program in May 2018 and concluded that Maynard's program was not appropriate for the student because it did not match the recommendations of his outside evaluators.

Maynard proposed an IEP for the student's sixth-grade year (2018-2019) that included pullout reading, writing, and self-advocacy services. In addition, the district's Spanish immersion program ended after fifth grade, so the student would be receiving English-language instruction throughout the day. The parents rejected the IEP and provided notice that the student would attend Carroll.

The district subsequently hired Roberta Green, Ph.D., to review the student's records and to consult with the district about building a substantially separate language-based program. She never tested the student. Dr. Green agreed that the student was a dysfluent reader but felt that his scores showed progress over time and that the student's scores did not support the need for a full language-based program. Instead, she supported the provision of specialized instruction for fluency and writing mechanics.

Dr. Stephens observed the student at Carroll and concluded that the program was appropriate for him, though the Hearing Officer noted that Dr. Stephens did not know whether the teachers were special education certified or what their backgrounds were, the ages or profiles of the students grouped with the student, or whether the student had an IEP at Carroll. Melissa Orkin, Ph.D. ran the student's summer program at Tufts and, though she did not recommend a language-based classroom for the student in her report, she testified at hearing that the student required a language-based classroom to make effective progress. No one from the Carroll School testified at the hearing.

Hearing Officer Catherine Putney-Yaceshyn was not persuaded that the student required placement in a substantially separate language-based classroom. The parents' experts focused their testimony on whether the student would be able to meet future academic demands and did not focus on his *current* needs. The Hearing Officer was persuaded by Maynard staff and Dr. Green, who testified that the inclusion setting with pull-out supports was appropriate for the student and that he had been making good progress in that setting, and held that Maynard's 2018-2019 IEP was reasonably calculated to provide the student with a FAPE. Furthermore, the Hearing Officer stated that even if she had found Maynard's program lacking, the parents had not met their burden of proving that the Carroll School was appropriate—they had not provided any evidence about the Carrol School's program other than testimony by Dr. Stephens regarding her observation, which would not have been sufficient for the Hearing Officer to determine that the program was appropriate.

The parents lost in *Maynard* in part due to many case weaknesses that we have discussed in these commentaries time and time again: Experts who do not consult with school district personnel, experts whose written recommendations do not match their testimony, and insufficient evidence of the appropriateness of the parents' chosen program. As in many other cases, the district's witnesses presented as knowledgeable and forthcoming about the student's weaknesses and had a plan in place to address them and the Hearing Officer therefore found them more credible than the parents' experts.

Disputes Involving Independent Educational Evaluations

Both federal and state education law provide that when parents of a child with a disability disagree with an initial or re-evaluation completed or obtained by their school district, they may request an independent educational evaluation ("IEE") at public expense. *See* 34 CFR 300.5032; 603 CMR 28.04(5). Within five school days of receiving the parents' request, a school district must either agree to pay for the independent evaluation or file a hearing request with the BSEA seeking an order that the district's own evaluation was comprehensive and appropriate. Massachusetts law allocates cost for IEEs between parent and district depending on the family's income, and there are certain evaluators who accept the state-approved rates for IEEs, which are generally lower than what evaluators charge for similar assessments that parents obtain privately.

Lowell Public Schools and Larry, BSEA #1905981, 25 MSER 34 (March 11, 2019), concerned parents who had requested IEEs in the fall of 2017, with a follow-up request in January of 2018, but Lowell failed to respond to the parents request. The parents subsequently arranged for evaluations at their own expense and filed a hearing request seeking reimbursement for speech-language and neuropsychological evaluations, for the cost of the evaluators' attendance at a Team meeting, and attorney's fees and costs. Lowell filed a Motion to Dismiss, admitting that the Parents did request independent evaluations in the fall of 2017 and January of 2018,

that Lowell rejected these requests, and that Lowell did not file an action at the BSEA within five days. However, Lowell asserted that the parents' requests for funding were part of an ongoing effort to reach a settlement and did not trigger its legal obligations around IEEs. Consequently, Lowell argued that the hearing request should have been dismissed for failure to state a claim upon which the BSEA could grant relief. Parents replied with a Motion for Summary Decision, arguing that Lowell's Motion corroborated the parents' attempts to seek funding from Lowell and that there was therefore no genuine issue of material fact. Hearing Officer Amy Reichbach denied both the Motion to Dismiss and the Motion for Summary Decision. If the parents had requested publicly-funded IEEs and Lowell had failed to respond, the parents could plausibly be entitled to relief, so Lowell's Motion to Dismiss was denied. In response to the parents' Motion for Summary Decision, Lowell argued that the communications about the evaluations were part of a settlement discussion and did not constitute a request for an IEE that triggered their statutory duty to respond within five school days. Hearing Officer Reichbach denied the parents' Motion because the context surrounding the parents' requests was relevant and that a genuine issue of material fact remained for hearing.

In *Whitman-Hanson Regional School District and Mark*, BSEA #1908079, 25 MSER 41 (March 22, 2019), the district had filed for hearing seeking an order that its most recently proposed IEP was appropriate to provide the student with FAPE and that it was not required to fund an IEE at a rate that exceeded the state-approved rate. The student had been found eligible for special education in the spring of 2018 and subsequently diagnosed with Autism. The parent partially rejected the IEP and the student began struggling with school refusal. The Team proposed a change in placement to the Pilgrim Area Collaborative, which the parent accepted verbally and which the student began attending during January 2019. Thereafter, the parent informed the district that the student would not be returning to the Pilgrim Area Collaborative and the student's attendance ceased. During the period of time that the student was not attending school, Whitman-Hanson sent or sought to send packets to additional special education schools, offered tutoring, offered online courses, and convened the Team to amend the IEP on a number of occasions. The parent filed a Motion to Dismiss, stating that she had withdrawn her request for an IEE and that the district's hearing request was "bogus" and calculated to "force [her] into submission." Hearing Officer Amy Reichbach found that the district had asserted allegations plausibly suggesting and entitlement to relief, insofar as the district was arguing that its proposed IEP was appropriate for the student. Hearing Officer Reichbach did state that the parent's motion to dismiss would be granted in part if the evidence showed that she had in fact withdrawn her request for an IEE.

Motions to Dismiss and Motions for Summary Judgment or Decision can be useful tools during litigation at the BSEA, but it is critical to know the standards that apply to each in order to avoid expending significant time, energy, and resources filing a motion that is sure to be dismissed. It is further worth noting that a BSEA hearing officer will likely err on the side of caution and deny dismissal in close cases, since a party who believes a case or claim was improperly dismissed has the right to appeal that decision in court, and a court is likely to remand the issue for factfinding, putting the parties right back where they would have been had the hearing officer denied the motion in the first place.

Joining State Agencies to BSEA Proceedings

This quarter's rulings included three joinder motions, which will be discussed in turn. The BSEA Hearing Rules provide for involuntary joinder of a party to a BSEA proceeding when complete relief cannot be granted among existing parties or when the proposed party has an interest in the matter and is so situated that the dispute cannot be disposed of in its absence. Factors to be considered are as follows:

> (1) the risk of prejudice to the present parties in the absence of the proposed party;
>
> (2) the range of alternatives for fashioning relief;
>
> (3) the inadequacy of a judgment entered in the proposed party's absence; and
>
> (4) the existence of an alternative form to resolve the issues.

If joinder is appropriate, the BSEA has jurisdiction to order an agency to provide services that a student requires to access his or her education but cannot order an agency to provide any services that would contravene the agency's own regulations.

The parents of a sixteen-year-old student filed for hearing in *Newton Public Schools and Khalil*, BSEA #1901552, 25 MSER 3 (January 8, 2019), seeking a determination that IEPs proposed by Newton for the 2017-2018 and 2018-2019 school years failed to provide their son with a FAPE and requesting reimbursement for placements at Shortridge Academy in New Hampshire and the Winchendon School in Massachusetts. The parents in this case were divorced and shared joint legal and physical custody over the student. The student's mother lived in Newton and the student's father lived in Medford. Both parents and representatives from both Newton and Medford had attended and participated in Team meetings that were conducted by the Newton Public Schools.

Newton filed a motion to join the Medford Public Schools to the BSEA proceeding, asserting that Medford would be fiscally responsible for fifty percent of the cost of any outside placement approved by the BSEA and that its participation in the hearing was therefore necessary. Medford opposed joinder, stating that the student had never "lived" in Medford and that its limited involvement did not expose it to financial responsibility. Although the parties agreed to submit a request that the Department of Elementary and Secondary Education ("DESE") determine whether one or both districts were responsible, DESE declined to make such an assignment until the BSEA had considered the merits of the case. Hearing Officer Lindsay Byrne allowed the joinder motion because the father and mother shared legal and educational decision-making authority, both Medford and Newton had been aware of the student's out-of-state placements, and that it was possible that the parents could demonstrate at a hearing that Newton's IEPs were inadequate and that Medford could be deemed fiscally responsible for half of the placement costs. Therefore, joinder was appropriate and necessary.

New Bedford had found a seventeen-year-old student with Reactive Attachment Disorder and Borderline Personality Disorder ineligible for special education. The student's parents filed for hearing against the district (*New Bedford Public Schools and Kayden*, BSEA #1904571, 25 MSER 7 (January 31, 2019)) challenging the district's determination that the student was ineligible for special education and requesting placement in a therapeutic residential school placement. DCF had temporary custody of the student at the time and the student had been in a number of out-of-home placements provided by DCF, including at Stevens during the period of the initial special education evaluation. After New Bedford found the student ineligible for special education, DCF notified the parents that it would no longer fund the student's placement at Stevens and requested that the student move to a group home and attend the New Bedford Public Schools. In response to the parents' hearing request, New Bedford filed a motion to join DCF to the proceedings. Because DCF had custody of the student, and because the remedy requested (residential placement) would not contravene the agency's rules, regulations, and policies if so ordered, the joinder motion was allowed.

In *Nashoba Regional School District and Nalini*, BSEA #1906261, 25 MSER 32 (March 11, 2019), the parents had filed for hearing against the district requesting, among other relief, prospective placement in a residential therapeutic school program. The district agreed that the student required an out-of-home placement but filed a motion to join the Department of Mental Health, arguing that the student did not require residential services for educational reasons and that DMH should therefore be responsible for providing such services. The student had been a DMH client in the past and her eligibility was pending at the time of the joinder motion. Over the objection of DMH, which argued that the eligibility process needed to conclude before joinder would be proper, Hearing Officer Lindsay Byrne allowed the joinder motion. She noted that the student's gap in services with DMH was due to her attendance at therapeutic programs outside the state which had triggered the cessation of DMH services, and the student was otherwise well-known to DMH. The risk of prejudice to DMH was therefore seen as minimal in comparison to the risk of prejudice to the parents and/or Nashoba if DMH were not joined because "The services, programs, personnel and expertise uniquely within the control of DMH are potentially a necessary addition to, and, it could be reasonably argued, may well permit Nalini to assess and access the free, appropriate public education to which she is entitled."

Program Schools

Massachusetts law groups schools attended pursuant to the METCO program, schools attended pursuant to the school choice program, charter schools, virtual schools, and vocational schools under the "program schools" label, and specific regulations apply to disputes about programming at these schools.

The student in *Peabody Public Schools and Molly*, BSEA #1905404, 25 MSER 9 (January 31, 2019) attended the Peabody Public Schools through the Commonwealth's School Choice Program. The School Choice Program places responsibility for transportation with the family and the student's IEP did not include any transportation services. The parent requested that Peabody provide the student with the opportunity to ride the regular school bus on an established Peabody Public Schools bus route, arguing that the social and peer environment on the school bus would help her address the social-emotional goals set out on her IEP. The parent did not request any specialized transportation services. Peabody filed a motion to dismiss, asserting that School Choice parents were responsible for transportation and that the student was not eligible for disability-related transportation. Hearing Officer Lindsay Byrne denied Peabody's motion to dismiss on the grounds that the parent was alleging that the district's failure to provide the student with transportation was a denial of FAPE, which implicated BSEA jurisdiction.

The student in *Lincoln-Sudbury Regional School District and Boston Public Schools*, BSEA #1905403, 25 MSER 12 (February 7, 2019) was a Boston resident who attended Lincoln-Sudbury Regional High School as a METCO student until the IEP Team determined that she required placement at the LABBB Collaborative. Lincoln-Sudbury issued an IEP and placement page for LABBB, which the student's guardian accepted in full. Boston objected to funding LABBB and instead proposed that the student attend the McKinley School in Boston. Lincoln-Sudbury and the guardian filed a joint hearing request requesting that the BSEA order Boston Public Schools to fund the student's placement at LABBB, and a motion for summary judgment asserting that there were no issues of material fact and that, as a matter of law, BPS was required to implement student's accepted IEP by funding her placement and transportation for LABBB.

Boston argued that Lincoln-Sudbury had not adequately included Boston in the process, in violation of 603 CMR 28.10(6) and that Boston did not have to fund LABBB because it had offered the student an appropriate in-district placement at the McKinley School in Boston. Lincoln-Sudbury and the guardian argued that the Team process had complied with the relevant regulations, that Boston had been sufficiently included throughout, and that the Team had considered McKinley but was not required to adopt it as the proposed placement. Hearing Officer Sara Berman issued an interim order that the student's stay put placement was LABBB (not Lincoln-Sudbury High School, as Boston had argued) but that Lincoln-Sudbury was required to fund and arrange for her attendance there, pending a hearing on which district was fiscally responsible. Hearing Officer Berman further denied the Motion for Summary Judgment, finding that there was a genuine issue of material fact: whether Boston had been sufficiently included in the process of developing the LABBB IEP.

There are often disputes regarding students at program schools who may require out-of-district placements; districts often end up feeling aggrieved that they have fiscal responsibility but do not hold ultimate decision-making power to propose a preferred placement. Program schools, which have programmatic responsibility, may have an incentive to ally with a parent or guardian to place a student in a more intensive setting. Hearing Officer Berman's decision to place fiscal responsibility on Lincoln-Sudbury for the LABBB placement pending a hearing seems to shift these familiar motivations while ensuring that the student got what she needed while the funding was being worked out.

Recusal Motions Fail

This quarter, we saw two recusal motions, one in *Baystate Academy Public Charter School and Leland*, BSEA #1812372, 25 MSER 10 (February 7, 2019) and one in *Montachusett Regional Vocational Technical School*, BSEA #1904777, 25 MSER 17 (January 17, 2019). When faced with a recusal motion, a hearing officer must balance the need for parties and the public to have confidence in the hearing officer's expertise and impartiality with the need for efficiency, fairness, and responsiveness as well as the risk of disruption and delay by parties who may be unhappy with a particular hearing officer. Four factors assist the hearing officer in balancing these competing interests: professional qualifications, objective factors (e.g., professional, familial, financial, or personal ties with a litigant), subjective factors (e.g., personal or political prejudice), and whether there is the appearance of impartiality (e.g., due to extrajudicial statements) that may reasonably lead the public to question the hearing officer's judgment. Further, "Facts or circumstances gleaned from participation in the current, or a previous, proceeding involving the same parties or subject matter, or objections to prior rulings in the current matter that may be unsatisfactory to the party seeking recusal, do not constitute a proper foundation for disqualification." *Baystate*, 25 MSER at 11 (citing 28 U.S.C. 455; *Boston's Children First*, 244 F.3d 164 (1st Cir. 2001)).

In *Baystate*, the parent had requested an independent educational evaluation ("IEE") but there were a number of delays in the proceedings. The parent wrote a letter to the Director of the BSEA that was treated as a motion for recusal, citing the delay and a concern that the Hearing Officer did not understand her interpreter. Hearing Officer Sara Berman examined the parent's request as well as her own capacity to conduct the hearing fairly and determined that recusal was not necessary. Hearing Officer Berman expressed sympathy for the parent's concern that the dispute should have been resolved more quickly, but noted that the Parent herself requested three postponements, acquiesced in two additional postponements sought by the school, and failed to timely respond to BSEA Orders.

In *Montachusett*, the parent filed a motion seeking recusal of the Hearing Officer, alleging that the Hearing Officer had been unfair to her during the hearing process. Hearing Officer Lindsay Byrne examined the record and the parent's objections, and found no reason for recusal.

Filing a motion to recuse is a risky decision because unless a party has clear grounds for the request, the hearing officer will likely consider the recusal motion and deny it. Although the hearing officers are true professionals and exhibit a high degree of integrity, one does wonder if filing a recusal motion without sufficient support might make a hearing officer see a party as less trustworthy, less reasonable, or less persuasive on the merits of the case.

Access to Records

A district is required to provide a parent with access a student's records pursuant to both federal law (FERPA, 20 USC § 1232 et seq. and corresponding regulations at 34 CFR Part 99) and state law (MGL c. 71 § 34H and corresponding regulations at 603 CMR 23.01). Parents of special education students are entitled to view and/or to receive copies of their children's complete educational records, and access to such records is a fundamental procedural protection under both federal and state special education law. Even a non-custodial parent is eligible to obtain access to the student record subject to a few exceptions, including the existence of a temporary or permanent protective order unless the order (or a subsequent modification) specifically allows access to the information contained in the student record. Hearing Officer Sara Berman considered two situations this quarter concerning records access.

The parent in *Montachusett*, discussed above, was subject to an abuse prevention order that directed her to refrain from contacting the student and to stay away from Monty Tech. The abuse prevention order did not contain any language specifically allowing the mother to access the student's records, as required by state regulations. Although Monty Tech had been providing the mother with some of the student's education records, Monty Tech subsequently received documentation of the abuse prevention order and stopped sharing records with the mother first due to the order and then after the student turned eighteen and chose to retain his decision-making authority. Mother argued that because the abuse prevention order did not specifically prohibit her from accessing the student's educational records, that Monty Tech was required to provide her with access. There was also a question of whether the parental right to review a student's special education file superseded state law in this regard. Hearing Officer Berman ultimately agreed with Monty Tech that because the abuse prevention order did not specifically allow access to the student record, that mother was not entitled to student's education records as a matter of law, despite the student's special education status. Hearing Officer Berman granted Monty Tech's Motion for Summary Judgment and concluded that the District and/or Probate courts, not the BSEA, would need to address the mother's restriction of access to her son's records; that the BSEA could not order a new Team meeting as mother had requested because the student retained educational decision-making authority and would have to consent to her participation in a meeting; that the District and/or Probate Court would need to modify the abuse prevention order if the mother wished to physically attend any school meetings at Monty Tech; and that the BSEA had no authority to order monetary damages to mother as she had requested.

The parents of the special education student in *Boston Public Schools*, BSEA #1900241, 25 MSER 37 (March 15, 2019) filed for hearing due to the failure of the Boston Public Schools to provide them with the student's complete record in a timely fashion. The parents requested a complete copy of the student's educational record on July 14, 2017. Boston provided the parent with portions of the student's records on various dates over the course of the ensuing nineteen months, including a package delivered on November 9, 2018 with an affidavit from district personnel certifying that the package, together with the previously provided records, constituted the complete student record. Boston argued that the case should be dismissed as moot. The parents argued that Boston had not in fact delivered the complete record and that Boston's claim of mootness failed because this was a situation that was "capable of repetition yet evading review" over the remaining years of the student's special education eligibility. In the reported

ruling, Hearing Officer Berman considered the parents' Motion for Summary Judgment on whether Boston failed to provide the student's educational record (1) within the timeframe required by federal and state special education law and (2) in its entirety. Hearing Officer Berman granted the parent's Motion as to the district's failure to provide the complete student record within the ten-day timeline specified in 603 CMR 23.07(2) or the forty-five-day timeline specified in 34 CFR 300.613. However, she concluded that there was a dispute of material fact as to whether Boston had provided the parent with the student's complete educational record as of November 2018. Hearing Officer Berman further concluded that she did not have the authority to grant the systemic relief that the parents sought to cure deficiencies in Boston's record-keeping and production system. ■

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The first quarter at the BSEA continues to reflect a pattern of many rulings (13) and few decisions following an evidentiary hearing (1). Public school administrators will be pleased with the one decision in *In Re: Maynard Public Schools.* In this case, public school teachers helped establish that a student entering the 6th grade could have had his needs met within a public school setting, which meant parents were fully responsible for the costs associated with their unilateral placement of their child at the Carroll School. The many rulings this quarter cover a range of issues. One of the more unusual ones arose in *In Re: Peabody Public Schools and Molly*. In this case, the hearing officer ruled that she was unable to dismiss a *pro se* parent's request for an Order requiring Peabody, the school choice receiving district, provide Molly with transportation on one of its established, general education transportation routes. The ruling in *In Re: Lincoln-Sudbury RSD and Boston Public Schools* describes the all-to-familiar dilemma that can arise when a student attends a program school that no longer can meet the student's needs, but the parents believe the district of residence does not have appropriate programming, either. Here the Metco receiving school district wrote an IEP calling for placement at LABBB Collaborative which parents accepted but Boston Public Schools refused to fund since Boston believed its public day school could have met the student's needs. The hearing officer ruled that the dispute required a hearing to resolve complex disputes of material facts; stay tuned for a decision on the merits! Finally, the ruling in *Nashoba Regional School District* joining the Department of Mental Health as a party to a dispute about residential programming is noteworthy for the hearing officer's pronouncement that DMH may be the key to LRE (i.e. Least Restrictive Environment); true and catchy at the same time. As always, there is a lot for everyone to learn by reading about the disputes going forward at the BSEA!

RULINGS

Parents' Request for Tuition Reimbursement for Unilateral Placement Survives Motion to Dismiss Even Though Parents Appear to Have Refused Consent to Conduct Initial Evaluation

In Re: Mansfield Public Schools and Jaclyn, BSEA # 1803315, 25 MSER 1 (Reichbach 2019)

Parents filed for hearing seeking reimbursement for their unilateral placement of Jaclyn at the Wheeler School in Providence, Rhode Island. According to Parents, Jaclyn has diagnoses of specific learning disabilities in reading and writing, ADHD, and anxiety disorder. Mansfield held multiple Team meetings to consider Parents' private evaluations and, at all times, concluded that Jaclyn was not eligible for an Individualized Education Program (IEP) due to her effective progress without any specialized instruction or related services.

Mansfield filed a Motion to Dismiss or, in the alternative, a Statement of Counterclaims. Hearing Officer Reichbach summarily rejected the idea that this hearing request must be dismissed because, according to Mansfield, it had offered the relief Parents had requested. From the information contained in the Ruling, this Commentator did not follow Mansfield's argument on this point since, according to the Ruling, the parties had positions that were diametrically opposed. Specifically, Parents alleged Jaclyn is eligible for an IEP and Mansfield is required to reimburse them for Wheeler School; Mansfield contended Jaclyn is not eligible for an IEP and Mansfield owes Parents nothing. In any event, the hearing officer concluded that whether Mansfield offered the requested relief might be relevant to the relief awarded but did not translate into dismissal of the hearing request.

Mansfield also made counterclaims, the first of which was seeking attorneys' fees from Parents. Presumably Mansfield made this claim to signal to Parents that Mansfield thought Parents' hearing request was so frivolous that Parents were running the risk that a court would order Parents to reimburse Mansfield for its attorney's fees. Hearing Officer Reichbach noted, however, that the BSEA is not authorized to award attorneys' fees. Mansfield also sought an Order for substitute consent so that Mansfield could conduct its proposed evaluations. Hearing Officer Reichbach correctly ruled that in Massachusetts, a public school cannot file for hearing seeking substitute consent for an initial evaluation to determine eligibility for an IEP. The hearing officer wrapped up the Ruling by letting Mansfield know that it did have recourse available to it. Namely, if the facts at hearing reveal that Parents refused to allow Mansfield to conduct an initial evaluation, Mansfield would not have been required to consider Jaclyn as eligible for services, and this would serve as a bar to the Parents' requested relief.

Where Student Lived with Each Parent at Times Prior to Residential Placements, Both Districts Were Necessary Parties

In Re: Newton Public Schools and Khalil, BSEA # 1901552, 25 MSER 3 (Byrne 2019)

Khalil's divorced parents filed for hearing against Newton Public Schools seeking reimbursement for their unilateral residential placement of Khalil at two schools, Shortridge School in New Hampshire and Winchendon School, neither of which is approved by MA Department of Elementary and Secondary Education (DESE) to provide services to publicly funded students. For some unspecified reason, the parents did not file for hearing against

both parents' districts of residence—Newton and Medford—even though the parents have joint legal and physical custody and, according to the Ruling, Khalil lived at times with each parent immediately prior to going to a residential school or treatment center.

Newton filed a Motion to Join Medford Public Schools asserting that a BSEA order for an out-of-district placement would result in joint financial responsibility for Newton and Medford. Medford opposed joinder arguing that Khalil never "lived" in Medford. The school districts did request an LEA Assignment from DESE to assist with this dispute, but DESE refused to make an assignment, contending that it needed the BSEA to make its determinations before DESE could make an assignment.

Hearing Officer Byrne began her analysis noting that "[e]very joinder determination is unique and highly fact dependent." She also commented that it is unusual to have a joinder dispute between school districts reach the BSEA where, as here, "the residential history of the student and parents is known and is not particularly complicated." Hearing Officer Byrne then went on to rule correctly that Medford is a necessary party for substantive and procedural reasons since it is possible that Medford could be responsible for half of the cost of the disputed placements. This outcome ensures the efficient use of all parties' resources and avoids the risk of prejudice if this hearing went forward without Medford's participation.

Parent's Hearing Request Survives Motion to Dismiss Where Parties Struggling to Identify Residential Placement to Implement IEP and MA DESE Might Need to Be Joined at Some Point Given Its Role as Ultimate Guarantor of A Free, Appropriate Public Education

In Re: Quincy Public Schools, BSEA #1904761, 25 MSER 5 (Figueroa 2019)

Student is a 17-year old who all agree requires a residential placement in order to meet his special education needs. Parent filed for hearing because Student has been without a residential placement for almost three months after a New Hampshire residential placement discharged him. Quincy filed a Motion to Dismiss, arguing that there was no controversy since the school district was working hard to identify a residential school that would accept Student. Additionally, while searching for an appropriate residential school, Student was attending Seaport Academy as a day student.

Hearing Officer Figueroa understandably refused to grant Quincy's dismissal request. Although Quincy claimed to be diligently searching for a residential placement, Parent had a different perspective. Given that Student was without a residential placement despite having an IEP for such a placement, the hearing officer concluded that Parent could receive some form of relief under the IDEA, including the possible joinder of DESE since DESE is "the ultimate guarantor of provision of a free, appropriate public education to eligible students."

DCF, Which Has Temporary Custody of Student, Is A Necessary Party in Dispute about Student's Need for Residential Programming

In Re: New Bedford Public Schools and Kayden, BSEA # 1904571, 25 MSER 7 (Reichbach 2019)

Kayden is a 17-year old diagnosed with Reactive Attachment Disorder and Borderline Personality Disorder who is in the temporary custody of the Department of Children and Families (DCF). Kayden's adoptive parents and DCF requested that New Bedford evaluate to determine Kayden's eligibility for an IEP. While Kayden was being evaluated, DCF placed him at Stevens Treatment Center. New Bedford evaluated and held a Team meeting, at which time the school-based Team concluded that Kayden was not eligible for an IEP. Subsequently, DCF informed all parties that DCF would no longer fund Kayden's placement at Stevens. DCF requested instead that Stevens move Kayden to a group home level of care and that Kayden attend the New Bedford Public Schools. Shortly thereafter, Kayden's parents filed for hearing against New Bedford seeking a residential placement.

New Bedford filed a motion to join DCF as a party to the BSEA proceeding. Hearing Officer Reichbach joined DCF since she could not know at this early stage of the process whether New Bedford, alone, would be able to provide Kayden with all the relief to which he is entitled. Also, DCF's own regulations allow DCF to share in the cost of residential placements for children within its care or custody as well as home services. Consequently, the hearing officer determined that DCF was a necessary party to this matter and ordered DCF's joinder.

Pro Se Parent's Request for IEP Requiring Transportation on Established General Education Transportation Route of School Choice School District Survives Motion to Dismiss

In Re: Peabody Public Schools and Molly, BSEA # 1905404, 25 MSER 9 (Byrne 2019)

Molly is a 3rd grade student with ADHD and depression who attends the Peabody Public Schools as a school choice student. For the 2017-2018 school year, Molly's parent accepted a full inclusion IEP that did not include transportation. The following year, Molly's parent requested that the IEP include transportation service, but the school-based Team refused to do so.

Under the school choice law, as a general rule, parents are responsible for providing transportation between their residence and the school choice school. However, if a student's IEP reflects that the student requires specialized transportation services, then the student must receive transportation services that the district of residence is responsible for funding. Here, Molly's parent argued Molly must be transported on an established Peabody Public Schools' general education transportation route in order to meet the IEP's social-emotional goals. Parent was not requesting specialized transportation.

Hearing Officer Byrne began her analysis by noting that dismissal of hearing requests based on pleadings is disfavored, especially when a *pro se* parent filed the hearing request. Not surprisingly, then, the hearing officer denied Peabody's motion to dismiss since the hearing request implicates BSEA jurisdiction with its claim of a FAPE denial due to the school-based Team's refusal to provide transportation services. According to the parent, transportation is required as an integral part of a comprehensive special education program or in order to access the mainstream environment so that Molly can practice and generalize skills targeted in her IEP.

"Complex Factual Issues" Require Evidentiary Hearing in Dispute between Public Schools about Funding IEP Proposing Collaborative Placement Where District of Residence Contends Its Public Day School Could Have Met Student's Needs

In Re: Lincoln-Sudbury RSD and Boston Public Schools, BSEA #1905403, 25 MSER 12 (Berman 2019)

Hearing Officer Sara Berman declined to grant Lincoln-Sudbury's motion for summary judgment in this case that asks the question, which school district is responsible for funding an out-of- district placement for a METCO student? In the present case, a student participating in the METCO program was found in need of a more therapeutic setting than Lincoln-Sudbury could offer. Lincoln-Sudbury alerted the Boston Public Schools (BPS), the district of residence, and began the process of selecting a new school. Lincoln-Sudbury considered a BPS program at McKinley School as well as collaborative and private day school options. After exploring options, the parent expressed her belief that LABBB Collaborative would best meet Student's needs. Lincoln-Sudbury then developed an IEP for LABBB Collaborative that the family accepted immediately. Boston, however, maintained its position that the school district's McKinley program could meet Student's needs, consequently Boston was not willing to fund the LABBB placement.

The decision as to which school district is financially and programmatically responsible will have to wait, however, as Hearing Officer Berman found that there were material questions of fact regarding when IEPs were shared with BPS and if BPS had a fair opportunity to describe how their program could meet the student's needs. This case highlights a common problem when students attend program schools and do not believe that the schools in their district of residence are able to meet their needs. When these students require more intensive service than can be provided by these program schools, the next steps in terms of placement can prove confusing and ripe for conflict, as was the case here. Stay tuned.

Mother No Longer Has Right to Access Son's Student Records or Participate in IEP Process as There Is Abuse Prevention Order Restricting Mother's Contact with Son That Does Not Specifically Allow Her Access to Student Record Information

In Re: Montachusett Regional Vocational Technical School,[1] BSEA # 1904777, 25 MSER 19 (Berman 2019)

Montachusett Regional Vocational Technical School (Monty Tech) filed a Motion to Dismiss a mother's hearing request arguing that since September 2017 there has been an abuse prevention order that strips mother of her right to have access to her son's student records or to participate in IEP Team meetings. Monty Tech amended its Motion to Dismiss on January 11, 2019 to reflect that the student had turned 18 on that date and had decided to retain all educational decision-making authority rather than share or delegate it to either of his parents. Student's mother opposed the Motion to Dismiss, contending that the abuse prevention order did not explicitly bar her from having access to her son's records or from participating in Team meetings by phone when her son was not in the room. According to the mother, she had exercised her rights regarding records and the Team process until mid-October 2018, when Monty Tech allegedly stopped providing her with access to Student records in retaliation for her filing a complaint with DESE's Problem Resolution System.

Hearing Officer Berman began tackling the issue at hand by citing to the laws governing a non-custodial parent's access rights to her child's records. First, according to the federal Family Educational Rights and Privacy Act (FERPA) and its implementing regulations, all parents may view their child's student records unless "there is a court order, State statute, or legally binding document …that *specifically revokes these rights*." 34 CFR Part 99.4 (emphasis supplied). Next, the hearing officer examined the Massachusetts statute that governs a non-custodial parent's access rights to her child's student records, MGL c. 71, s. 34H. Section 34H provides that a parent who does not have physical custody of her child is eligible to access the child's records unless the parent's access to the child is prohibited by a protective order except if the order "*specifically allows access to the information*."

Applying the law to the facts here, the hearing officer noted that while a November 2016 divorce decree explicitly allowed the mother access to her child's student records, an abuse prevention order that most recently had been extended in October 2018 ordered the mother to stay away from her son unless he initiated the contact and to stay away from Monty Tech. Hearing Officer Berman ruled that Section 34H and state regulations "state unequivocally that the very existence of a protective order may bar access to student records unless that order explicitly states otherwise."

Next, the hearing officer considered if the outcome would be different because Student receives special education services. According to the regulations implementing the IDEA, a school district may presume a parent has authority to review her child's records unless the school district is aware that the parent does not have this authority as a matter of state law. Looking again, then, to state law, Hearing Officer Berman cited to Section 34H and 603 CMR 23.07(5)(a)(3) which lead to the conclusion that mother lacks the authority to review Student's records regardless of the fact that he is a special education student. While the mother argued that the abuse prevention order was not intended to restrict her access to her child's student records, Hearing Officer Berman correctly ruled that "[a]s a matter of law, Monty Tech cannot be found in violation of applicable law for relying on the official, unmodified orders from the District Court." As is reflected in the Ruling, nothing prevents the mother from going back to the District Court to get clarity about the extent of the order. Unless and until the mother does this, the mother is not entitled to her son's educational records. In addition, the hearing officer noted that since Student is now 18 and has decided that he, alone, is his educational decision-maker, the only way his mother can participate in future Team meetings is if Student consents to her participation. Hearing Officer Berman also states that if the mother seeks to physically attend a Team meeting, the mother would need not

1. This Commentator's colleague, Colby Brunt, represented the school in responding to the parent's hearing request.

only the permission of her son but also permission of the District Court and/or Probate Court.

Hearing Officer Recognizes that DMH Services And Programs May Be The Key to Student Being Able to Access A Less Restrictive Educational Placement

In Re: Nashoba Regional School District and Nalini, BSEA # 1906261, 25 MSER 32 (Byrne 2019)

Nalini's parents filed for hearing seeking a residential placement for their 14-year old daughter. Nashoba filed a Motion to Join the Department of Mental Health (DMH). Parents did not oppose the Motion, but DMH did, arguing that the BSEA is unable to join DMH until the agency has formally determined Nalini's eligibility for DMH services and has completed the service planning process. Hearing Officer Byrne properly found this argument unpersuasive since DMH previously had determined Nalini was eligible services and DMH provided services except during those times when Nalini was out-of-state receiving treatment and services related to her mental health needs. Additionally, there had not been any new information or a change in Nalini's circumstances that would indicate that Nalini no longer needed DMH mental health inventions and supports.

Nashoba and Parents contended that Nalini requires intensely therapeutic, residential supports without which Nalini would be unable to access Nashoba's proposed therapeutic day school. Hearing Officer Byrne noted that DMH services "would be an indispensable 'addition' to the special education day program proposed by Nashoba…" In addition, the hearing officer determined there was very little risk of prejudice to DMH by requiring DMH to be a party in this BSEA hearing. Alternatively, "the risk of prejudice to the positions of the School and Parents in the absence of DMH are real and significant as DMH holds the key to the LRE." She concluded by stating that "[t]he services, programs, personnel and expertise uniquely within the control of DMH are potentially a necessary addition to, and it could be reasonably argued, may well permit Nalini to assess and access the free, appropriate public education to which she is entitled."

Factual Dispute About Whether Email between Attorneys Was Request for Publicly Funded Independent Educational Evaluations or Counteroffer in Settlement Negotiations Jettisons Both Parties' Effort to Obtain A Summary Decision

In Re: Lowell Public Schools and Larry, BSEA # 1905981, 25 MSER 34 (Reichbach 2019)

Parents filed for hearing asserting that Lowell Public Schools had violated its legal obligations regarding funding independent educational evaluations (IEEs) of Larry. Parents argue that they requested public funding for an independent neuropsychological that Lowell offered to fund under certain conditions. They also requested funding of a psycholinguistic evaluation that Lowell declined to fund. Subsequently, Parents' attorney emailed Lowell's attorney with a subject line that referenced "IEE funding" and inquired about Lowell's willingness to fund a speech-language evaluation by a particular named individual and a neuropsychological by one of two named evaluators. Parents contend that Lowell did not respond to these requests, so Parents went forward with both evaluations, for which they seek reimbursement ($3,200 for ICCD neuropsychological and $2,600 for speech-language evaluation by Architects for Learning). Lowell views the email as part of the parties' ongoing efforts to settle a dispute rather than a request that required Lowell to either agree to fund the requested IEEs or file for a BSEA hearing. Hearing Officer Reichbach properly determined that there is a genuine dispute over a material fact such that she would need more information before she could issue a determination.

Much Ado about … Student Records?

In Re: Boston Public Schools, BSEA # 1900241, 25 MSER 37 (Berman 2019)

This ruling from Sara Berman answers two questions about student records. Does the BSEA have jurisdiction to hear disputes about student records? Answer- yes. Can the BSEA order systemic change within the Boston Public Schools (BPS) as a remedy? Answer—no.

In this case, the parents allege that BPS failed to provide a full copy of the student record, and the information that it did produce was not produced in accordance with federal timelines. They also allege that the failure to provide the record negatively impacted their ability to fully participate in the Team process and understand their child's progress. BPS responded that although the full record was not provided in accordance with state and federal timelines, ultimately the record was provided in full, making the issue is moot. BPS also argued that the BSEA does not have jurisdiction to hear disputes about student records. Finally, BPS argued that "systemic relief" was outside of the scope of BSEA. Both parties filed motions for summary judgment, both of which were partially granted.

Hearing Officer Berman's ruling reinforces that access to the student record is an important procedural protection under the IDEA. Thus, even though there generally is no private right of action under the Family Educational Rights and Privacy Act (FERPA), where a parent is denied timely access to student records, their child's access to FAPE may be impacted and relief may be available via a private right of action under the IDEA before the BSEA. This ruling emphasizes the importance of complying with student records requirements in special education cases. Hearing Officer Berman granted summary judgment for parents on the issue of timely access to the student record. However, BPS, too, was partially successful on its Motion for Summary Judgment. In keeping with BSEA precedent, Hearing Officer Berman ruled that the BSEA has authority to order relief for only the individuals involved in the hearing and thus is unable to order systemic relief. The case did not fully resolve, however, because there remains a dispute of material fact as to whether or not the full record was provided to the parents that can be resolved only after a hearing on the merits.

DECISIONS

Parents Fail in Bid for Carroll School Placement

In Re: Maynard Public Schools, BSEA # 1900813, 25 MSER 22 (Putney-Yaceshyn 2019)

The student at the center of this dispute is diagnosed with dyslexia, including significant issues in reading fluency. Maynard Public Schools proposed to educate Student in an inclusion setting with pull out services to address the reading fluency concerns. The parents, however, believed that their son required an out-of-district

placement at the Carroll School. Consequently, the parents unilaterally placed Student at the Carroll School at the beginning of 6th grade. This hearing soon followed. After a two-day hearing, Hearing Officer Putney-Yaceshyn determined that Maynard's IEP for the 2018-2019 school year was reasonably calculated to provide Student with a free and appropriate public education.

In reading this case, there are a couple of aspects of the case that should please school districts and the attorneys who represent them. First, the decision recognizes that teachers bring valuable expertise and insight to the hearing process. Despite the fact that the parents had multiple consultants and evaluators (3 in total!) testifying in support of parents' decision to unilaterally place their child at Carroll School, as well as multiple reports from private evaluators, the hearing officer was persuaded by his teachers that inclusion was appropriate for him. She wrote,

> "Those most familiar with Student, the teachers who have worked directly with him, are unanimous in their opinions that he should be educated using the inclusion setting with a pull out model to address his areas of need."

She then dove more deeply into the credible testimony of the teachers, who should be given much credit for their efforts to teach the student and collect data. Second, the hearing officer made an additional finding that the evidence was insufficient to warrant reimbursement for the Carroll School placement even if Maynard had failed in its efforts to defend its IEP. The basis for this finding was that Parents introduced little to no evidence about the qualifications of the Carroll School staff, the appropriateness of the peers, the program's curriculum, or services or supports the student was receiving. This decision serves as a reminder that parents and their representatives must put on evidence that the unilateral placement was appropriate to meet the child's needs, even if the program is well-known, like the Carroll School, because the hearing officer must have evidence to support her decision. ■