MSER Commentary

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The 4th Quarter at the BSEA came to a relatively quiet close, with only one decision following an evidentiary hearing and seven rulings. Those watching for BESA trends will notice that rulings continue to be on the rise. Two rulings focused on BSEA jurisdiction, with Hearing Officer Reichbach finding no jurisdiction over race-based discrimination claims but jurisdiction over a claim for English Language Learner Services purportedly needed to receive a free, appropriate public education (*In Re: Worcester Public Schools & Fernando*). Hearing Officer Byrne ruled once again that the BSEA lacks jurisdiction to consider or enforce privately negotiated settlement agreements, citing to several of her current colleagues who have ruled similarly. (*In Re: Wellesley Public Schools*) Another ruling of interest came in *In Re: Taunton Public Schools & Adam* in which Hearing Officer Reichbach applied a three-year statute of limitations to non-FAPE Section 504 disability-based discrimination claims. Disputes about "stay put" continue at the BSEA, with Hearing Officer Berman ruling that a 6th grader should remain at the school he has attended since he was three years old while his parents, who are separated, and the public schools go to hearing over the proposed IEP that the student's father accepted but has yet to be implemented. (*In Re: Concord & Natick Public Schools*) The lone decision is comment-worthy primarily for the disparity between parents' perception that the public schools caused their child severe and pervasive emotional injury for which they planned to pursue monetary damages and Hearing Officer Berman's decision that was very complimentary of the public schools' and Gifford School's actions which included making "considerable effort to include Parents in the decision-making process" and being "notably thoughtful and responsive to concerns raised by Parents and Student." (*In Re: Natick & Framingham Public Schools*)

RULINGS

Race-Based Discrimination Claims Dismissed But Claim for English Language Learner Services Purportedly Needed to Receive FAPE Survive Motion to Dismiss

In Re: Worcester Public Schools & Fernando, BSEA # 1800970, 23 MSER 183 (Reichbach 2017)

Fernando is an 18 year old who moved in or about March 2017 from Puerto Rico to Worcester with an Individualized Education Program (IEP). Fernando, whose primary language is Spanish, argued that Worcester violated Title VI and the Equal Educational Opportunity Act of 1974 (EEOA) and that these race-based discrimination claims were inextricably linked to his claim of a denial of a free appropriate public education. Worcester responded by filing a motion to dismiss, contending that the BSEA lacked the jurisdiction to address these claims. In analyzing the dispute, the hearing officer cited to the U.S. Supreme Court's decision in *Fry* v. *Napoleon Community Schools*, writing that "whether the BSEA must hold a hearing at which a hearing officer develops a factual record and applies her expertise to the issues before her (in that context, in order to enable the plaintiffs to exhaust their claims before proceeding to court) turns on whether 'the gravamen of [the] complaint charges, and seeks relief for, the denial of FAPE.'" The hearing officer concluded that the Title VI and EEOA claims were not properly before the BSEA because the facts to support those claims are not logically connected to a denial of FAPE. On the other hand, Fernando's claim for services to address overlapping special education and English language learner (ELL) needs was too complex to tease out at this juncture whether or not a particular service is needed to receive FAPE, thus the ELL claim survived the motion to dismiss.

Parent's Non-Compliance with BSEA Orders Proves to Be Her Undoing, Leading to the Dismissal of Her Claims

In Re: Waltham Public Schools & Dorian, BSEA 1702306, 23 MSER 187 (Reichbach 2017)

Just when this Commentator thought there could not possibly be another Ruling involving Waltham and Dorian, there it was! In the 3rd Quarter, Hearing Officer issued numerous orders resolving discovery disputes between the parties. In accordance with a prior Order, Waltham filed a Motion for Summary Judgment. Parent, who now was *pro se* but had had an advocate representing her and Dorian, requested an additional day to respond to the motion. The hearing officer granted the extension, but the parent did not file a response by the new deadline. In addition, this Ruling reflects that the hearing officer had issued an Order that parent had to file her witness list and exhibits on or before a date certain otherwise parent would not be able to submit a document unless admitting it did not prejudice either party. Parent never submitted any documents as exhibits despite deadlines and several extensions. As a result, Hearing Officer Reichbach was required to enforce her Order barring the parent from submitting documents into evidence or offering testimony about such documents.

In its Motion to Dismiss, Waltham argued that the parent would be unable to prevail at hearing because parent would have to rely on Waltham's evidence to prove her case. At hearing, parent would need to establish that Waltham's IEPs from June 2016 through June 2017 failed to provide FAPE and parent's chosen school provided FAPE. Given that the parent did not respond to Waltham's Motion for Summary Judgment, the parent has not established that there is a genuine issue for hearing. Moreover, since Dorian's parent is unable to present documents, and testimony based on those documents, "she will be unable to produce 'significantly probative' evidence in her favor." The hearing officer allowed the

Motion for Summary Judgment and cancelled the scheduled hearing date.

Hearing Officer Remains Firm That BSEA Hearing Officers Lack Jurisdiction to Consider or Enforce Privately Negotiated Settlement Agreements

In Re: Wellesley Public Schools, BSEA # 1800903, 23 MSER 191 (Byrne 2017)

The parties entered into a settlement agreement in which Wellesley gave the parents funds in exchange for their agreement to assume responsibility for Student's educational programming through the 2017-2018 school year. Parents now allege Wellesley has breached the settlement agreement and seek for the BSEA to order compensation, damages, and attorney fees for the asserted breach. Wellesley responded by filing a Motion to Dismiss, arguing that the BSEA does have jurisdiction to resolve the dispute and that the parents are not required to exhaust their administrative remedies at the BSEA before filing a breach of contract action in court.

As is no surprise given Hearing Officer Byrne's prior rulings, the hearing officer dismissed the parents' BSEA hearing request. She began her ruling noting that she last ruled on this issue in 2010 and determined that the BSEA did not have jurisdiction to consider or enforce privately negotiated settlement agreements. She noted that since that time there had been no change in the special education laws, jurisprudence, or her analysis. First, Hearing Officer Byrne reflects that the IDEA instructs parties who have issues about the implementation of agreements reached through mediation or resolution sessions to go to court for relief. She contends that if Congress or the Massachusetts legislature intended for the BSEA to have jurisdiction over reviewing or enforcing settlement agreements, they would have been explicit about it. Hearing Officer Byrne also cites to rulings by three of her current colleagues who also have issued rulings since 2010 refusing to enforce privately negotiated settlement agreements. Finally, the hearing officer noted that given that the BSEA does not have the authority to consider this dispute, the parties may go directly to court. She notes that the focus of the parents' hearing request is that Wellesley breached the settlement agreement not that Student has suffered an educational injury. Moreover, even if the parents had attempted to make that claim, Hearing Officer Byrne noted that it would not be convincing since pursuant to the settlement agreement the parents took responsibility for Student's educational programming in exchange for the receipt of public funds.

Hearing Officer Applies Three-Year Statute of Limitations to Non-FAPE Section 504 Disability-Based Discrimination Claims

In Re: Taunton Public Schools & Adam, BSEA # 1708888, 23 MSER 194 (Reichbach 2017)

Adam's mother filed for an expedited hearing on April 19, 2017, with most of the hearing request focused on Adam's alleged misconduct and Taunton's failure to conduct a timely manifestation determination meeting related to his school-based discipline. A three-day expedited hearing followed, which resulted in a decision in Adam's favor. The initial hearing request also raised the issue of whether Adam was receiving FAPE up to and including the date of the alleged misconduct. At a pre-hearing conference held on September 26, 2017, the parent submitted an amended hearing request. Taunton responded to the amended hearing request by filing a Motion to Dismiss any new claims that arose before September 26, 2015 arguing that those claims are barred by the two-year statute of limitations. Taunton also sought to dismiss any allegations that are not new and arose prior to April 19, 2015, the date of the initial hearing request, due to the statute of limitations. In addition, Taunton argued that the hearing officer must dismiss any allegations through February 28, 2016 because the IEPs were fully accepted up through that date and must dismiss the hearing request because the request was vague.

Hearing Officer Reichbach summarily disposed of the argument that the hearing request must be dismissed in its entirety, noting that she had to take the allegations in the hearing request as true, and based on the allegations, it is plausible that Adam is entitled to relief. As for the statute of limitations, Hearing Officer Reichbach noted that the IDEA imposes a two-year statute of limitations with two exceptions and courts and the BSEA have applied this two-year time frame to FAPE claims brought pursuant to Section 504 given the intertwinement of IDEA and 504. Hearing Officer Reichbach imposed this two-year statute of limitations to parent's FAPE claims because parent provided no information to support a claim that one of the exceptions to the general timeframe applied here. Taunton sought to further limit the time period the parent could pursue relief for, arguing that the IEPs were fully accepted through their expiration date. The hearing officer explained that it would be a factual issue at hearing about whether the IEPs were fully accepted and, even if they were, parent could still pursue a claim that the accepted IEPs were not implemented as written.

The meatiest of the issues for the hearing officer was the length of the statute of limitation to apply to the non-FAPE, Section 504 discrimination claims. These claims included that Taunton discriminated against Adam by involving other entities such as DCF, the police and/or the courts; by comments made by staff; and imposing disproportionately severe punishment. In considering this issue, the hearing officer noted that in 1999, former hearing officer William Crane held that the three-year statute of limitations generally applicable to civil rights actions in Massachusetts should apply to non-FAPE Section 504 claims. Taunton argued that Chapter 151B, which imposes a 300-day statute of limitations for filing a complaint of discrimination in employment or housing at the Massachusetts Commission Against Discrimination, is analogous to Section 504 and this shorter statute of limitations is the one that the BSEA should borrow. Hearing Officer Reichbach was not convinced, and instead borrowed the three-year statute of limitations found in MGL Chapter 260, Section 5B which she noted "applies more generally to violations of any law intended for the protection of civil rights, including discrimination on the basis of disability."

Parents' Effort to Avoid Hearing to Resolve Request for Home Tutoring and to Determine Need for Substituted Consent for Three-Year Re-Evaluation Fails

In Re: Weston Public Schools & Griffin, BSEA # 1804286, 23 MSER 207 (Reichbach 2017)

Weston filed for hearing seeking an Order that the home/hospital form that Griffin's parents submitted is invalid. Additionally, Weston requested that the hearing officer provide substituted consent to conduct Griffin's three-year re-evaluation and place Griffin in an in-district language-based program pending the resolution

of the parties' dispute. At the time of the ruling (December 2017), Griffin was a 2nd grader. During the 2016-2017 school year, Griffin attended an in-district program in Weston. In the spring of 1st grade, the school-based Team members proposed that Griffin be placed in the district's language-based program that is housed in a different elementary school than Griffin was attending. During the summer of 2017, Griffin attended Carroll School followed by Friends Academy until late October 2017, all at parent expense. Parents then submitted a home/hospital form that Griffin's psychiatrist signed that reflected that Griffin required ongoing clinical evaluation after having experienced multiple failed school experiences with unpredictable escalation in his ability to self-regulate. According to Weston, it requested parent permission to speak with Carroll School, Friends Academy, and health care providers, but parents refused. Griffin's three-year re-evaluation due date also was approaching, but when Weston sought consent to test, his parents refused. Weston also tried to get the parents to allow Griffin to attend an in-district program for a partial or a full day, but the parents continued to keep him home. While Weston believed that the home/hospital form was invalid, Weston stated in its hearing request that if would provide home tutoring as well as the related services in Griffin's last IEP while the BSEA resolved the dispute.

Parents responded that Griffin was undergoing a psychological evaluation at home due to his dysregulation in a school setting. Although the parents were having Griffin evaluated privately, they argued that Weston evaluating Griffin right now would be inappropriate. In response to Weston's hearing request, Griffin's parents filed paperwork that the hearing officer found unclear as it seemed as though parents were filing both a motion to dismiss as well as a motion for summary judgment.

In considering a Motion to Dismiss, the hearing officer stated that the party opposing dismissal must have made factual allegations that are "plausibly suggesting" an entitlement to relief. The factual allegations have to rise above the speculative level, with the hearing officer assuming all allegations in the complaint are true, even if the allegations are "doubtful in fact." With this as the standard, the hearing officer had no difficulty concluding that Weston survives a Motion to Dismiss as it is plausible that Weston is entitled to relief. To survive a motion for summary judgment, the hearing officer wrote that the adverse party must demonstrate that there is a dispute of material fact that must be resolved at hearing. Hearing Officer Reichbach concluded that Parents' motion only helped make the case that there was a need for a hearing since they argued that Weston's hearing request omitted relevant facts and painted an inaccurate picture of Griffin's situation. In addition, the parents disputed many of the facts in Weston's hearing request, thus sealing the deal that the parties needed a hearing to resolve disputes of material fact.

"Stay-Put" Placement is School Student Attended Since He Was Three, Not Collaborative Program Placement Accepted By One Parent for the Upcoming School Year

In Re: Concord & Natick Public Schools, BSEA # 1800182, 23 MSER 210 (Berman 2017)

Student is a rising 6th grader who has been educated at a state-approved private special education day school since he was three years old. Student's parents are separated, live in two different school districts, and have joint legal custody of Student. For the 2017-2018 school year, Concord and Natick public schools proposed placing Student in a collaborative program. Student's father accepted the collaborative placement while Student's mother rejected it and filed for a BSEA hearing in July 2017. Student's mother also filed a motion requesting that Student remain in his current placement as a matter of "stay put" rather than switching placements in September 2017. Both public schools and the father opposed the mother's request, arguing that the public schools were required to implement the proposed IEP as long as one parent with the requisite authority accepted the IEP.

In analyzing the "stay put" issue, Hearing Officer Berman explained that this procedural protection is intended to minimize the disruptions in a child's educational programming while parties are resolving disputes. She noted that the analysis is "highly individualized and fact-intensive." According to the hearing officer, two of the guiding principles in determining the "stay put" placement relevant here include determining the placement that is "actually functioning at the time the dispute first arises" and examining the impact of the proposed change on the child.

Given that Student here has attended the same school since the age of three and now is a rising 6th grader, it is easy to understand why Hearing Officer Berman determined that keeping Student in this same placement is necessary during a due process hearing. If Student's mother wins at hearing, then Student will continue to attend the school he has attended for his entire educational career. If, on the other hand, Student's mother loses at hearing, the Hearing Officer can help to facilitate a planned, supportive transition to the new program.

This Ruling makes sense in the context of a pending hearing request. However, in Massachusetts, the right to "stay put" is triggered any time there is a dispute, even if there is no hearing request pending. Query how a public school should respond when one parent with legal custody accepts a proposed IEP while another parent with legal custody rejects it, but no one is proceeding to hearing. This Commentator's understanding is that DESE's Legal Office's long-standing guidance to public schools has been that they may rely on the consent of one parent to proceed with the implementation of an IEP if the parent has lawful authority to give consent. This Ruling has this Commentator wondering if DESE's guidance took Massachusetts' expanded concept of "stay put" into consideration. This scenario definitely is a quagmire for public schools since the public school has to consider a parent's right to immediate implementation of an accepted IEP as well as the right to "stay put."

DECISIONS

Public Schools Made Considerable Efforts to Involve Parents in Team Process and Provided FAPE to Student At All Times While Student Attended Private Day School

In Re: Natick & Framingham Public Schools, BSEA # 1707648, 23 MSER 199 (Berman 2017)

Student is a 9th grader who is eligible for an IEP due to an emotional disability. According to the decision, Student resides with her father in Natick but spends a good deal of time with her mother in Framingham. In March 2016, Student began attending the

Gifford School pursuant to a settlement agreement with Natick. In August 2016, DESE determined that Natick and Framingham were jointly programmatically and fiscally responsible for Student's educational programming given that Student had an IEP for a private day school and her parents lived in two different school districts. Student continued to attend Gifford through March 2017. However, for the remainder of the 2016-2017 school year, Student's mother home schooled her and, beginning as of September 2017, Student attended a private, general education school at parent expense.

In March 2017, Parents filed for hearing against both school districts alleging criminal and tortious activities that impeded the parents' participation in IEP Team process, deprived Student of FAPE and civil rights, and caused her pervasive and severe emotional injury for which the parents intended to pursue monetary damages. After a two-day hearing, Hearing Officer Berman concluded that both school districts fulfilled their obligations to evaluate, convene Team meetings, and issue IEPs in a timely manner. In fact, Parents' claim about being denied the right to participate in the Team process appeared to be particularly specious as the decision reflects that the school districts invited the parents to multiple Team meetings to consider their concerns and even went so far as to call them at the beginning of each meeting to solicit their input, yet the parents refused to attend any Team meeting in which Framingham participated. Hearing Officer Berman concluded that the school districts made "considerable effort to include Parents in the decision-making process." Also, while there was a four-month delay between Natick proposing possible locations for an extended evaluation and Student starting the evaluation at Gifford, the hearing officer noted that "[a]ny and all delays are attributable to the parents." Specifically, Natick proposed several possible locations, all of which parents found objectionable. Moreover, despite the fact that there was not a proper physician's statement supporting the provision of tutoring, Natick provided it. Hearing Officer Berman also found that Student made effective progress while attending Gifford, noting that she "made substantial gains in her ability to manage anxiety, self-advocate, form meaningful relationships with adults and peers, engage in grade-level academics, and participate in extracurricular activities." The hearing officer also recognized that Gifford and both public schools "were notably thoughtful and responsive to concerns raised by Parents and Student," as they would meet and develop plans to address those concerns even as the parents were refusing to attend such meetings.

Finally, the hearing officer wrote that "[i]t is axiomatic that parents may not challenge the appropriateness of an expired previously-accepted IEP that is not rejected while in effect." As a result, the parents tried to argue that they constructively rejected the IEP from March and May 2017 when Student did not attend Gifford and instead was being home-schooled. The hearing officer rejected this argument noting that parents never withdrew from Gifford and, in fact, made several attempts to have Student return to school there. Hearing Officer Berman wrote that the indicia of constructive rejection does not exist here such as filing for a due process hearing, unilaterally placing Student at a different school, or withdrawing consent for some or all of the IEP services. Instead, parents did not reject an IEP until June 2017.■