MSER Commentary First Quarter 2018

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The 1st quarter of 2018 was relatively quiet at the BSEA, with six rulings and one hearing decision. Several of the rulings resulted in dismissal of some or all of parent claims because of jurisdictional issues. If there was an award for the ruling that created the most buzz for the 1st quarter, it would go to *In Re: Duxbury Public Schools*. Here, an advocate requested a protective order related to a subpoena for her records. Hearing Officer Figueroa refused the request to extend work product protection to the advocate's documents, concluding that they were not prepared in anticipation of litigation and therefore were discoverable. Hearing Officer Figueroa also authored the only decision of the quarter (*In Re: Hamilton-Wenham Regional School District*). The decision in favor of the Hamilton-Wenham RSD details the school district's reasonableness and flexibility, resulting in an equally flexible decision by the hearing officer.

RULINGS

Parent's Claims Flowing from Residency Dispute Are Not Ones for Which BSEA Can Grant Relief, Resulting in Dismissal of Hearing Request

In Re: Dep't of Elementary and Secondary Education (DESE) and XiLi, BSEA # 1802999, 24 MSER 14 (Byrne 2018)

A *pro se* parent filed for hearing seeking money damages alleging XiLi suffered an emotional injury due to a residency dispute that DESE knew about but failed to remediate. DESE filed a Motion to Dismiss, which Hearing Officer Byrne granted. In doing so, she noted that while it is unusual to dismiss a *pro se* parent's hearing request, she had no choice since there simply was no viable claim for which the BSEA could grant relief.

The hearing officer began the Ruling by noting that the residency-related actions that form the basis of the parent's hearing request occurred outside of the IDEA's two-year statute of limitations. She next wrote that parent had challenged DESE's residency assignment in Superior Court, resulting in dismissal due to a lack of standing. Hearing Officer Byrne ruled that the BSEA was bound by this determination as a matter of the doctrine of estoppel. In terms of claims not time barred that alleged complicity among DESE, Natick and Framingham in denying XiLi a free, appropriate public education (FAPE), the hearing officer noted that the parent made these same claims in a prior BSEA case against Natick and Framingham Public Schools and lost. She also pointed out that, with limited exception, the primary responsibility for developing or implementing an appropriate special education program for a student falls on the public school not DESE. Moreover, the hearing officer in the prior BSEA case found no denial of FAPE and found for the school districts on all claims, therefore there was no action with which DESE could have been "complicit." Finally, Hearing Officer Byrne ruled that the BSEA's limited jurisdiction does not extend to claims of complicity in participating in a juvenile court proceeding involving XiLi , bullying and harassing on the basis of disability, or maintaining a hostile educational environment. She also noted that the relief sought—money damages and personal legal advice—was not relief the BSEA could award, therefore providing additional support for dismissal.

Parent's Claims Against Private School Dismissed for Estoppel, Statute of Limitations, and Jurisdictional Reasons

In Re: The Gifford School and XiLi, BSEA # 1803736, 24 MSER 18 (Byrne 2018)

XiLi's mother brought her 4th BSEA hearing request in two years, with this one being filed against the Gifford School, the private school that had implemented an IEP that the Natick and Framingham Public Schools had developed. The allegations mirror those made in the prior BSEA hearing requests, with only four claims actually relating to the Gifford School. The Gifford School filed a Motion to Dismiss, which Hearing Officer Byrne granted.

First, the hearing officer was able to weed out the bulk of the allegations because they occurred beyond the two-year statute of limitations. Next, Hearing Officer Byrne wrote that the doctrine of estoppel was a roadblock to various allegations made in this hearing request. Specifically, Hearing Officer Berman already had held a hearing, determining that Natick and Framingham had developed an appropriate IEP for Gifford, Gifford implemented the IEP in full, and there were no violations of substantive or procedural rights. Hearing Officer Byrne also found that the hearing request did not articulate facts to support the claim that Gifford had discriminated against XiLi or the mother on the basis of their disabilities. If there were facts to support claims of disability discrimination under IDEA and/or Section 504, those claims would be barred by the doctrine of estoppel. The hearing officer ruled that if the claims were made under other statutes, they would be beyond the BSEA's jurisdiction as were the parent's claim for disability-based harassment and conspiracy to deny civil rights. Given that there was no viable claim over which BSEA has jurisdiction to award relief, the hearing officer granted the Motion to Dismiss.

Hearing Officer Dismisses Request for Class Certification/Systemic Relief And Monetary Damages As Well As Claims Unrelated to Child's Receipt of A Free, Appropriate Public Education

In Re: Holyoke Public Schools and Jay, BSEA # 1800619, 24 MSER 20 (Oliver 2018)

Jay's mother filed for hearing making a number of allegations, including that Holyoke failed to translate Jay's records into Spanish,

provide all notices in Spanish, and include a qualified Spanish interpreter at all meetings related to Jay. Jay's mother sought relief on behalf of Jay and all similarly situated students in Holyoke and Massachusetts and therefore filed this hearing request against Holyoke and DESE. Holyoke filed a Motion to Dismiss three claims and DESE filed a motion seeking to be dismissed as a party.

First, Hearing Officer Oliver dispensed with the parent's request for certification of a class of similarly situated students, noting that the BSEA's jurisdiction is limited to resolving disputes for individual students. The hearing officer explained that this is why there is nothing in the BSEA's hearing rules about class action hearing requests. Given that the BSEA's jurisdiction is limited to claims brought under state or federal special education laws or Section 504, Hearing Officer Oliver dismissed claims brought under statutes that were unrelated to the provision of a free, appropriate public education to Jay. The Ruling also discusses that the BSEA does not have the authority to award the parent's requested relief (i.e. money damages). In closing, so that there was no room for doubt, Hearing Officer Oliver ruled that the parent had satisfied any administrative exhaustion requirement relative to her non-special education claims. While Hearing Officer Oliver dismissed many claims, he noted that if Jay's mother were to prove the remaining special education violations, she would obtain "significant relief" from the BSEA.

Hearing Officer Rejects Request to Extend Work Product Protection to Advocate's Work After Concluding Work Prepared in Regular Course of Advocacy Rather Than in Anticipation of Litigation

In Re: Duxbury Public Schools, BSEA # 1803977, 24 MSER 23 (Figueroa 2018)

Duxbury served a subpoena on the parents' advocate who then filed a Motion for Protective Order seeking to bar discovery of all documents except her Team meeting notes. The advocate argued that the parents hired an attorney before they hired her, and she understood that all of her work would be protected from discovery since it was done in preparation for hearing. The advocate sought to have all of the responsive documents, except her Team meeting notes, considered protected "work product" pursuant to state and federal rules of civil procedure. The parents' attorney filed a request to join the advocate's motion, including a request for an oral argument on the issue.

According to the Ruling, the parents' attorney had recommended that the parents hire the advocate because the attorney does not get involved in day-to-day issues related to special education advocacy and consultation. The attorney argued that since he recommended that parents hire the advocate and the documents at issue were created in anticipation of litigation, then all communications between the parents and the advocate and between the advocate and attorney were protected. The parents' attorney also argued that the documents were irrelevant and Duxbury did not have a substantial need for the documents.

Hearing Officer Figueroa denied the Motion for Protective Order. The hearing officer began by noting that the advocate had worked with the parents for approximately 14 months before the parents' attorney filed for hearing and there was nothing to support that all of her work was done "in anticipation of litigation." Further, the hearing officer agreed with Duxbury that if the advocate stated to the contrary, then this would be contrary to the IDEA's spirit of cooperation between parents and school districts. Hearing Officer Figueroa also cited to 8th Circuit decisions for the proposition that there is a difference between documents prepared in anticipation of litigation and in the regular course of business. The hearing officer concluded that the advocate's documents were created during the regular course of her advocacy work rather than in anticipation of litigation, observing that the parents already were represented by an attorney who was the one who ultimately filed the BSEA hearing request. She further noted that the advocate is not a representative or employee of the attorney and, during the majority of the time the advocate has been involved, there was no pending litigation or assertion by either party of the intent to file for hearing. Hearing Officer Figueroa noted that even if the work product doctrine could be raised successfully with different facts, with the facts at hand, she was not finding work product coverage.

Hearing Officer Figueroa also ruled that emails between the advocate and attorney were not protected from disclosure. As for the advocate's communications with outside providers/entities such as evaluators, the Department of Developmental Services, and ARC of Greater Plymouth, those communications were discoverable because, by relying on these individuals and their recommendations, the parents waived any protections that existed. In closing, Hearing Officer Figueroa agreed with Duxbury's assertion that it had a substantial need for the requested documents and would suffer undue hardship in obtaining substantially equivalent information.

Those who follow the BSEA closely will remember a different outcome in In Re: Waltham PS & Dorian, BSEA # 1702306, 23 MSER 142; 153; 171 (Reichbach 2017) regarding application of the work product doctrine to an advocate. However, in the *Waltham* case, the hearing officer only extended the work product doctrine to documents created in anticipation of litigation. In this case, Hearing Officer Figueroa found that there was nothing to support that the advocate's work was done in anticipation of litigation. As a result, this Commentator did not read Hearing Officer Figueroa's Ruling as a complete closing of the door on extending the work product doctrine to advocates if given the right set of facts.

DECISIONS

Exceedingly Flexible Public School Not at Fault for Years of Student's FAPE Denial and Receives Equally Flexible Order to Either Implement Proposed IEP In-District or Locate Special Education Program Matching Characteristics Described in Order

Student v. Hamilton-Wenham RSD, BSEA # 1707353, 1804291, 24 MSER 1 (Figueroa 2018)

Student is 13 years old and has been eligible for special education services since the age three. Student has a number of diagnoses including ADHD, language based learning disability, anxiety disorder, and social pragmatic communication disorder. The decision reflects that Student's parents dispute the social pragmatic communication disorder, so Hamilton-Wenham agreed to set it aside. At hearing, the parents argued that Student has been bullied since the 4th grade by peers, teachers, administrators, coaches and parents and during after-school programs, all schools attended (pub-

ic and private), and recreational and summer programs. One of he findings of fact concludes that it appeared that at least two or hree individuals had harassed Student during recreational activ- ties while in Hamilton-Wenham and that other individuals had lone so later.

In May 2015 (4th grade), parents withdrew Student from his pro- gram in Hamilton-Wenham to protect Student from the effects of ullying. Hamilton-Wenham investigated the allegations, offered utoring, and promoted Student to the 5th grade. In the three years ollowing the withdrawal from Hamilton-Wenham, Student at- ended general education schools (e.g. Clark School & St. John's Prep), worked with a private tutor and Hamilton-Wenham tutors all for brief periods), and participated in computer-related sum- mer camp. During this time, Student reportedly experienced fail- ures at Clark School and St. John's Prep and was denied admis- sion at the family's preferred schools (Landmark & Shore Country Day), which the parents blamed on Hamilton-Wenham.

Hearing Officer Figueroa wrote that the parents' fears and con- cerns for Student rendered the parties powerless and in need of BSEA assistance to determine appropriate programming. While both parties agreed that Student had been denied a free, appropri- ate public education since May of 2015, the hearing officer was clear that this was not Hamilton-Wenham's fault. She wrote that Hamilton-Wenham "has attempted to collaborate with Parents in good faith, has offered appropriate IEPs and a myriad of options in its efforts to appropriately place Student." In fact, Hamilton- Wenham offered an IEP that it was willing to implement in any day setting (e.g. full or partial inclusion program in a public school, or a public or private day school). In addition, Hamilton-Wenham identified 14 schools that might consider Student's application.

Public school administrators will take heart in Hearing Officer Figueroa's declaration that "[a] parent's right to meaningful par- ticipation does not equate to micromanagement of a case to the point of stifling every process and impeding determinative deci- sions by those with the knowledge and experience to make them." She concluded that Hamilton-Wenham "would be able to service Student, appropriately address his areas of need, and offer the aca- demic and intellectual challenges that Student needs and craves," with certified staff and the opportunity to establish meaningful friendships. The hearing officer instructed the parents that they needed to take a "leap of faith" and trust that Student would tran- sition back to school successfully despite some bumps in road. The hearing officer's decision reflected that she, too, was flexi- ble as she noted that while placement in a program in Hamilton- Wenham was the least restrictive environment, the parties might still agree to placing Student in a private special education school that addresses Student's expressive language, executive function- ing, reading and writing needs in a bullying-free environment. Her flexibility, however, had its limits, as she explicitly rejected place- ment in a private, general education school.

At the end of the decision, there was a discussion of the parents' attempt to invoke "stay put" rights. The hearing officer concluded that the Student had no such rights, reasoning that the parents re- leased Hamilton-Wenham of "stay put" responsibilities when they withdrew Student from Hamilton-Wenham, placed Student in two general education schools and then home-schooled Student, re- jecting every IEP offered in 2016 and 2017. She instructed that until the parents accepted an IEP in full or in part, Student had no "stay put" rights. In fashioning the Order, the hearing officer ruled that Hamilton-Wenham was to implement its IEP in-district or lo- cate a program that meets the characteristics described in decision. Additionally, she ordered that the Team reconvene in eight weeks to adjust IEP, as needed, which would allow the Team the oppor- tunity to revisit areas of concern that arose during the hearing (e.g. math concerns and amount of speech language services). ■

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