

MSER Commentary

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INTRODUCTION

The second quarter of 2015 brings a total of three BSEA decisions and ten rulings. Only one of the decisions (*Newton Public Schools*) concerned a traditional dispute over a student's eligibility for special education and the appropriateness of the student's overall program and placement. The other two concerned transportation (*Acton-Boxborough Regional School District*) and interpretation of a settlement agreement (*Pentucket Regional School District*). The rulings address such varied issues as:

- stay-put (*Norton Public Schools* and *Agawam Public Schools*);
- standing (*Clinton Public Schools*);
- joinder (*Whitman-Hanson Public Schools* and second rulings in *Clinton* and *Norton*);
- discovery (*Grafton Public Schools*);
- a request for postponement of a hearing (*Lincoln-Sudbury Regional School District*); and
- motions for recusal of a hearing officer (*Old Rochester Regional School District* and *Ludlow Public Schools*).

This Commentary will focus on the decisions and on the first four categories of rulings listed above.

Pro se parent fails to carry the day in dispute over eligibility and placement

Newton Public Schools, BSEA #1408637, 21 MSER 104 (Figuroa, 6/5/15), concerned an 11-year-old sixth-grader diagnosed with a specific learning disability (dyslexia), ADHD, anxiety, and depression. The parent first sought to have her found eligible for special education in 2012. At a Team meeting held in May 2012, Newton found her ineligible. In September 2012, Newton placed her on a Section 504 plan. In April 2013, Newton found the student eligible on the basis of ADHD and anxiety. Although a developmental pediatrician had also diagnosed dyslexia, the district seems not to have agreed that she had a specific learning disability until September 2013.

Newton developed IEPs for the periods from April 2013 through April 2015 (fifth and sixth grades) providing the student with co-taught regular education classes and some pullout services. The parent rejected or partially rejected each of these IEPs. In December 2014, the parent began advocating for a change in placement to Newton's district-wide learning disabilities pro-

gram ("DWLDP"). Newton contended that that program was not appropriate for the student.

At hearing, the *pro se* parent asserted that Newton had deprived the student of FAPE by: (1) committing various procedural violations in connection with its 2012 evaluation and eligibility determination; (2) failing to find the student eligible for special education in May 2012, instead of waiting until April 2013; and (3) failing to provide the student with appropriate IEPs and an appropriate placement from April 2013 to April 2015.¹ The parent sought compensatory education in the form of placement in a specialized out-of-district program such as the Carroll School or the Landmark School. The district prevailed on all issues.

The hearing officer first considered the alleged procedural violations. She found that the district had committed some, but not all, of the violations that the parent asserted. Specifically, the hearing officer found that Newton:

- failed to provide the parent with copies of the procedural safeguards in a timely manner;
- failed to provide all of Newton's evaluation reports at least two days before the initial Team meeting;
- failed to complete the Educational Assessment Parts A and B, and thus failed to provide it to the parent, until after that Team meeting; and
- failed to complete a math assessment within the time required by the regulations.

The hearing officer concluded, however, that none of these violations "rose to the level of a deprivation of a FAPE," 21 MSER at 123, under the criteria set forth in 20 U.S.C. §1415(f)(3)(E)(ii). That statute permits a hearing officer to grant relief for a procedural violation only if the violation "impeded the child's right to a [FAPE]," "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE]," or "caused a deprivation of educational benefits."

Parents, especially those who proceed *pro se*, often find it difficult to understand how a district may commit a string of violations and suffer no consequences for its sloppiness (or, at worst, its deliberate indifference to parents' rights). This case serves as a reminder that parents should almost never place all of their eggs in the procedural basket. Hearing officers will frequently conclude, as in this case, that a procedural violation - or even a

1. The student's 2015-2016 IEP was not at issue in this proceeding.

number of them - failed to constitute the type of serious deprivation required in order to grant relief under §1415(f)(3)(E)(ii). Parents must be prepared to demonstrate grave consequences from a district's procedural violation(s) in order to have any hope of success on a procedural claim.

Turning to the eligibility dispute, the hearing officer found no basis on which to conclude that the district should have found the student eligible before April 2013. The parent and her educational advocate (a family friend and former school principal) attempted to argue that Teams convened in May 2012 and September 2012 ignored information that would have rendered the student eligible earlier. The hearing officer found, however, that on each occasion the Team considered all relevant information that was then available, and that such information supported the conclusion that the student, although diagnosed with ADHD and executive functioning problems, was making effective progress and did not require specially-designed instruction.

The hearing officer pointed out that, as of September 2012, the student's independent neuropsychologist had not diagnosed the student with a specific learning disability. The neuropsychologist also then believed that the student was benefiting from participation in a co-taught classroom as a regular education student.

The hearing officer rejected the contrary opinions of the parent's educational advocate, finding that individual less than credible because she "lacked special education training and experience and is not certified in any area of special education." 21 MSER at 125. The hearing officer "[did] not credit her as an expert and [found] her opinions to be jaded by her personal relationship with Parent and Student." *Id.* at 127.

Hearing officers have warned on a number of occasions that when one individual attempts to serve both as advocate and as expert in the same case, that person's opinions will receive little or no weight. Here, the problem was compounded by the advocate's apparent lack of qualifications to serve as an expert in the field of special education at all. The parent, by adducing this witness's testimony, may have weakened her case or at the very least diverted attention from the testimony of other, more credible witnesses.

Lastly, the hearing officer considered whether Newton's proposed IEPs provided the student with FAPE. The hearing officer framed the issue as "whether Student was making meaningful effective progress in light of the totality of the circumstances in Student's life during the [relevant] time periods." 21 MSER at 127. Based on "objective testing conducted by Newton, MCAS results, the evaluations conducted by [two independent neuropsychologists at different times] (neither of whom recommended out-of-district placement for Student), progress reports, classroom observations and teacher reports," the hearing officer concluded that the student had made effective progress during the two years at issue, and thus that Newton's proposed IEPs and placements were appropriate. *Id.*

On the one hand, this conclusion is not surprising: without a recommendation for an out-of-district program from an independ-

ent neuropsychologist, the parent was unlikely to obtain an order requiring such a placement. On the other hand, the student's neuropsychologist and her therapist (both of whom the hearing officer found credible) recommended moving the student to a more specialized in-district setting, the DWLDP. Why did the hearing officer not order some relief? We think that the answer lies largely in the hearing officer's view of the "totality of the circumstances in Student's life," 21 MSER at 127, particularly regarding the sources of stress and anxiety in her life. The apparent responsiveness of the district to the parent's concerns seems also to have played a part.

As a major argument for lack of effective progress, the parent pointed to the student's anxiety, asserting that the student's emotional condition had deteriorated over the course of her fifth and sixth grade years due to stress from a school program that did not meet the student's academic needs. The student's therapist/psychologist testified to the student's emotional decline, attributing it to her school placement. The student's neuropsychologist, too, stated that by December 2014 that the student "appeared to be a different child," 21 MSER at 121, and that the neuropsychologist was "concerned that academic demands were taking an emotional toll on her." *Id.* The student's pediatrician and developmental pediatrician, on the other hand, opined that her anxiety "was caused by more than just school." *Id.* at 129.

Although the hearing officer found all four of these witnesses credible, she seems to have given more weight to the testimony of the two physicians, without explaining why she rejected the opinions of the therapist and neuropsychologist as to the cause of the student's anxiety. This is particularly noteworthy given that the two psychological experts might be expected to have more expertise in the field of anxiety (and in the case of the treating therapist, to have greater familiarity with the student's emotional state) than the two medical doctors. It is possible that the *pro se* parent did not have the ability to elicit her witnesses' opinions clearly, or that cross-examination muddled the waters and the parent did not clarify on redirect. In any event, the parent failed to carry her burden of proof on this issue.

What were the other factors to which the hearing officer pointed as causes of the student's anxiety? Among the "totality of the circumstances" that the hearing officer described, 21 MSER at 127, 129, were:

- the student's participation in competitive gymnastics;
- a hand injury in late 2014, which "caused a serious set-back to [the student's] competitive gymnastic expectations," 21 MSER at 128;
- the time demands of gymnastics and another extracurricular activity (choir);
- two brief trials of ADHD medications that caused undesirable side effects;
- the fact that the student had a new sibling; and
- the fact that the student "was very much aware of the dispute surrounding her educational placement." *Id.* at 129.

The hearing officer evidently concluded that these factors outweighed any role that the student's school placement may have played in her emotional decline.

Parents may well feel chagrined that their children's participation in extracurricular activities such as sports and music—activities that are often the chief source of confidence and self-esteem for students who struggle academically—will be used to defeat their educational claims in this way. Parents may also deem it unfair that their own advocacy efforts (or their inability to conceal those efforts from their children) will similarly backfire. Parents and their representatives must be prepared, however, for this type of “kitchen sink” defense by districts. In a case such as this, each independent expert must be prepared to address each possible cause of emotional distress in the student's life, to identify which increased the student's stress and which did not, and to explain as precisely as possible the role that the student's educational program played in her emotional decline. Otherwise, a “totality of the circumstances” approach can easily lead to speculation and unfounded assumptions about extraneous matters, allowing the focus to shift away from the school program.

We note as a final matter that the hearing officer was impressed by what she viewed as responsiveness and flexibility on the district's part. She stated with approval that “as information was brought for discussion to the Team in 2013, 2014 and 2015, such information was seriously considered, and at every step of the way resulted in increased services to Student.” 21 MSER at 127. *See also id.* at 129 (“Newton persuasively argued that it addressed Student's issues as they unfolded, holding numerous Team meetings and consistently increasing the level of support offered Student”). Although it is commendable when districts respond to information “brought” to them, districts too often place the burden on parents to come forward with such information, instead of taking a proactive role themselves when students are struggling. Moreover, the incremental approach, involving multiple Team meetings and small improvements in services via numerous IEP amendments, can wear parents down. In this case, for example, it took three Team meetings, a Section 504 plan, an independent neuropsychological evaluation, and a report from a developmental pediatrician before the student was even found eligible for special education, and one more meeting before the district agreed that she had a specific learning disability. Many less-determined parents might have given up before reaching that point.

Transportation: a related service is key to ensure access to student's program

Transportation problems frequently bedevil special education parents and students, but it is rare to find transportation the focus of a decision as we do in *Acton-Boxborough Regional School District*, BSEA #1503957, 21 MSER 73 (Byrne, 4/10/15). The parent and district agreed that the transportation by a third-party

vendor had been “problematic,” *id.* at 74, as the vendor had “unilaterally and precipitously imposed conditions of service that prevented timely transport of [the student], and at times any transport of [the student], to his educational placement.” *Id.* at 73.² This placed the parent in the difficult position of having to transport the student herself, let him miss school, or have him arrive late to school, as he did on a number of occasions.

The sole issue for decision³ was whether the district had failed to provide the related service of transportation, so as to deny the student access to a FAPE during the 2014-2015 school year. The district asserted in its defense that it had attempted to work with the transportation company and the parent to solve the problems and that it had offered the parent mileage reimbursement. The hearing officer found that that was not good enough.

The hearing officer began with the proposition that transportation “is a ‘related service’ when it is necessary to assist a student with a disability to benefit from special education.” 21 MSER at 74 (citing 20 U.S.C. § 1401(26), 34 C.F.R. § 300.34). Thus, she stated, a district “is responsible for providing transportation to a student with a disability at a time, in a manner, and with the equipment and personnel necessary to ensure the student receives all the special education services outlined in the IEP.” *Id.* (citing 603 CMR 28.05(5)(b), 28.06(8)). Applying these principles, she concluded that Acton-Boxborough had failed in its obligations “to ensure seamless access to all of the special education services set out in [the student's] IEP.” *Id.*

The hearing officer noted that the district had known of the transportation issues since the first month of the school year, yet failed to solve the problems until nearly four months later when it hired a nursing service to provide bus monitoring. The hearing officer pointed out that the district had received new information about the student's transportation requirements in the form of physicians' notes, yet it failed to convene the Team to discuss that information. It also failed to “evaluate [the student] or his transportation environment to determine whether developing a plan to address the behavioral concerns raised by [the vendor] could avoid the diminishment of special education programming [the student] was then experiencing,” 21 MSER at 74, and failed to address the parent's request to change the transportation plan in his IEP from “regular” to “special” transportation.

While the district's reimbursement of the parent's mileage was “a start,” 21 MSER at 74, the district was required to do more than pay the parent for expenses she should not have had to incur in the first place. The hearing officer ordered the district to:

- change the student's IEP to reflect his need for “special transportation”;
- conduct a functional behavioral assessment (“FBA”) focusing on transportation;

2. The student had exhibited behaviors on the van (removal of clothing and reflux/vomiting) that led the vendor first to refuse to transport him, then to provide afternoon service only, then to provide morning service with a one-hour delay, and then to require a monitor.

3. The matter was submitted for decision without a hearing, pursuant to BSEA Rule XII.

- convene the Team to consider all available transportation-related information, including the FBA results, the parent's and vendor's concerns, and the medical information; and
- develop an appropriate transportation plan (including a backup plan) for the student in order to ensure full implementation of his IEP.

This decision is a heartening one for parents and their representatives. Too often, districts fail to accord transportation the importance it deserves as a related service. Transportation is just as significant as other related services, such as occupational, physical, and speech therapy—if not more so, when it is the one service that provides the student with access to all the others. This case stands for the proposition that school districts may not simply shrug, or wring their hands, or blame the vendor when transportation problems occur. A transportation problem should not become the parent's problem, as it so often does. Ultimately, it must be the district's responsibility to do whatever is necessary to make transportation work so that the student has access to his or her education, whether that requires the district to provide a monitor, or develop a behavioral plan, or change vendors, or take some other measure. In addition, when transportation problems cause a student to miss more than a *de minimis* amount of school, compensatory educational services may be ordered.⁴

Round III in ongoing litigation: hearing officer interprets settlement agreement, considers relation back of amendment and statute of limitations

The decision in *Pentucket Regional School District*, BSEA #12-8636R, 21 MSER 87 (Figueroa, 5/21/15), represents the latest chapter in litigation that has spanned three full years, and is not over yet. The parent filed a *pro se* hearing request in May 2012, when the student was 17, seeking reimbursement for an independent educational evaluation (“IEE”) and raising various FAPE-related claims. The student turned 18, and thus became legally an adult, in July 2012. The hearing officer bifurcated the case, separating the IEE reimbursement claim from the others. In November 2012, the parent and student wrote to the BSEA, asking that the student's name be added to the hearing request and stating that the parent would act as the student's advocate.

In December 2012 the parent and district entered into a settlement agreement which included provisions that the parent would dismiss the IEE claim with prejudice and would “dismiss without prejudice her BSEA case involving [the student].” The student was not a party to this agreement, nor did she participate in settlement negotiations. A month later, the parent attempted to amend the hearing request. The district moved to dismiss, arguing that the parent, by entering into the settlement, had committed to dismiss the entire case. The parent and student argued that the settlement agreement operated only to dismiss the parent's IEE claim and not the student's FAPE claims. The hearing officer, interpreting the “plain language of agreement,” dismissed the entire case (the parent's claims with prejudice and the stu-

dent's claims without prejudice). *Pentucket Reg'l High Sch.*, BSEA #12-8636, 19 MSER 84 (Figueroa, 3/11/13).

The parent and student appealed to federal district court, where Judge Douglas P. Woodlock affirmed the dismissal of the parent's claims and remanded as to the student's claims. *Michelle K. v. Pentucket Reg'l Sch. Dist.*, Civil Action No. 13-11414-DPW, 2015 U.S. Dist. LEXIS 5513 (D. Mass. 1/16/15). The judge found that the language of the settlement agreement was not clear-cut regarding the latter. He instructed the hearing officer on remand to develop the administrative record, including possible parol evidence, to determine what the parent understood and meant when she agreed to “dismiss her case.”

The judge also instructed the hearing officer to consider an issue that the parties apparently had not raised: whether the parent's December 2012 amendment request should have been treated as the adult student's hearing request, relating back to and incorporating her mother's original hearing request. He stated that “[r]efusal to treat this letter as notice of request for a hearing—and instead to require [the student] to re-file a duplicative hearing request—may reflect an elevation of form over substance in the BSEA decision.” *Id.* at *27-*28.

Lastly, the judge provided the parties with guidance as to the statute of limitations (which it does not appear that any party had raised). He stated that the running of the two-year statute of limitations, 20 U.S.C. § 1415(f)(3)(C), was tolled until the student reached the age of majority, and that therefore all of her BSEA claims were timely.

On remand, the hearing officer bifurcated the case. This quarter's decision considers the issues as to interpretation of the settlement agreement, relation back, and statute of limitations. The substantive FAPE issues remain to be addressed at a later date.

With regard to the settlement agreement, the district's former attorney testified that the parent was “savvier than the typical pro-se Parent,” 21 MSER at 97, had consulted with an experienced Massachusetts special education attorney, and understood that the settlement agreement “was intended to resolve all of Parent's claims and dismiss BSEA #12-8636 without prejudice to any other claim that could be asserted by Student.” *Id.* There was no contrary evidence, as neither the parent nor the student attended the hearing or submitted any evidence.⁵

The hearing officer, finding the attorney's testimony credible, seemed to agree that the parties intended the student's claims be dismissed without prejudice. This would mean that the hearing officer's original disposition of the case was correct. The hearing officer believed that the district court required a different result, however. She went on to state that “[i]n light of the District Court's finding that requiring Student to re-file a claim was equivalent to holding ‘form over substance,’” the original BSEA proceeding “could only be dismissed as to Parent, not Student,”

4. The student in this case missed a total of ten hours of school. It does not appear that the parent sought compensatory relief.

5. They absented themselves, the hearing officer stated, because they believe that only the federal court has jurisdiction over these issues, and not the BSEA. The student's father, who was not a party to either the BSEA or the federal court proceeding, did testify.

meaning that the agreement “had no effect on Student’s claims,” and “therefore, Parent was correct that Student’s case . . . had survived.” 21 MSER at 98. Given the hearing officer’s interpretation⁶ of the district court’s opinion, one wonders why an evidentiary hearing was necessary at all.

The hearing officer also considered the issue as to relation back, which does not appear to have been contested. She found that the parent’s November 2012 letter and December 2012 amendment operated to “preserve [the student’s claims] back to the original date of filing as the Parties had intended in their Settlement Agreement.” 21 MSER at 98. The reference to the settlement agreement is somewhat puzzling, as the hearing officer’s discussion of the evidence appears to conclude that the settlement agreement embodied an intent not to preserve the student’s claims but to dismiss them (albeit without prejudice). In any event, the result is consistent with the district court’s exhortation regarding form and substance.

The last issue that the hearing officer considered was whether the statute of limitations should be tolled to permit the student to assert child find and procedural violations occurring as far back as 2002. The hearing officer did not acknowledge the district court’s statement that the running of IDEA’s statute of limitations was tolled during the student’s minority, which would appear to be law of the case. Instead, she examined the two statutory exceptions to the statute of limitations: “specific misrepresentations by the [district] that it had resolved the problem forming the basis of the complaint,” and the district’s “withholding of information from the parent that was required under [20 U.S.C. §§ 1411 *et seq.*] to be provided to the parent.” 20 U.S.C. § 1415(f)(3)(D).

The hearing officer found that neither exception applied. As to the first, the hearing officer concluded that the record, which included testimony from the district’s current and former special education directors and its high school principal, “does not support a finding that Student presented with a disability that required special education services in elementary, middle, or through the beginning of high school.” *Id.* at 99. Thus, there was nothing to misrepresent, and “no relevant information was ever concealed from [the parents] by Pentucket.” *Id.* The second exception did not apply because, the hearing officer found, the district had provided information about procedural safeguards and parental rights to the parent consistently and on multiple occasions.

It would seem that the hearing officer could have stopped after finding that neither of the statutory tolling exceptions applied, since in the absence of tolling any child-find claims would be time-barred. Nevertheless, the hearing officer went on to decide the time-barred claims, stating that the “evidence is convincing

that Pentucket did not violate the Child Find requirements between 2002 and 2011.” 21 MSER at 100.

Remaining to be decided in the second part of this bifurcated matter are the student’s challenge to the district’s 2011 finding of ineligibility and her case for reimbursement of Landmark College tuition. Doubtless these will be the subjects of a future decision and future commentary.

Stay-put: private school not required to continue its role in public school program

Two rulings this quarter concerned stay-put. In both, the parents sought to compel the continued provision of services by a private special education program. The parents failed in the first case, *Norton Public Schools*, BSEA #1504277, #1504282 (Putney-Yaceshyn and Reichbach, 4/8/15),⁷ but succeeded in the second, *Agawam Public Schools*, BSEA #1504488, 21 MSER 81 (Berman, 4/28/15, discussed below). The difference in result appears to be due mainly to the differing roles of the private schools in the two cases, which caused the private school to be deemed the student’s “current educational placement” pursuant to 20 U.S.C. § 1415(j) in *Agawam* but not did not require the private school’s continued involvement in *Norton*.

The students in *Norton* attended a substantially separate in-district program. The district contracted with a private approved special education school, Amego, Inc., to provide numerous services to that program, including related services and consultation; oversight of the development and implementation of IEPs for the students in a substantially separate classroom; parent liaison services; and parent consultation and training. The contract between Norton and Amego stated that the classroom would be “treated by the district as an out of district placement.” 21 MSER at 70.

About halfway through the second year of this arrangement, Amego notified Norton that it intended to terminate its relationship with the district, due to “the deteriorating relationship with the parents and advocate of the students.” 21 MSER at 70. The parents of two students filed requests for expedited hearing. They also moved for stay-put orders compelling Amego to continue providing the students with all services detailed in Amego’s contract with the district and/or in the students’ IEPs during the pendency of the proceedings. Norton supported the parents’ stay-put motions; Amego opposed them.

The hearing officers concluded that a change in providers would not violate stay-put. Their analysis turned on identification of the students’ “then-current educational placement,” within the meaning of 20 U.S.C. § 1415(j). The hearing officers reasoned that not every change in a student’s program violates stay-put. They emphasized that in this case the program model and location would remain the same: the students attended and would

6. We note that the district court only suggested that requiring re-filing might be equivalent to holding form over substance, and did not hold that it was.

7. In *Norton*, two hearing officers issued a joint decision in two separate cases involving two separate students. Although the cases had not been formally consolidated, the same advocate represented both families and by consent of the parties joint conference calls had taken place to address common legal and factual issues.

continue to attend an in-district program at a local elementary school. The students' current educational placement was an in-district "substantially separate classroom program operated by contractors," despite the language in the contract between Norton and Amego deeming it an out-of-district placement. 21 MSER at 72 n.20.

The hearing officers acknowledged that though the program's location would not change, there would be "a potential change in service providers." 21 MSER at 71. The hearing officers found that this was not enough to constitute a change in the students' placement, however, because "Norton (as the LEA) remained ultimately responsible for the delivery of Students' services." *Id.* at 72. The hearing officers explained that, on termination of its contractual relationship with Norton, Amego ceased to have any obligation to the students, but Norton's responsibility continued: Norton remained obliged to provide the educational services specified in the students' IEPs, using either its own staff or another contractor. The hearing officers' discussion implies that those services must be not only comparable, but nearly identical to those provided by Amego: the district is required to "*replicate the 'the educational program contemplated by the student[s]' original assignment[s], without diluting the quality of their education.*" *Id.* (footnote omitted; emphasis supplied). The hearing officers also cautioned Norton that the students must receive "uninterrupted services pursuant to their IEPs." *Id.* at 72.

For all of these reasons, the hearing officers granted the parents' stay-put motions to the extent that the motions sought to prevent Norton from changing the students' placements during the pendency of the proceedings. The hearing officers denied the motions to the extent that the parents sought to require continued services from Amego.

The hearing officers emphasized that the inquiry regarding stay-put must be "individualized and 'fact intensive.'" 21 MSER at 71. Had the parents been able to show that Amego possessed some unique form of expertise that could not be duplicated elsewhere, or some unique relationship with the students that would have been highly detrimental to disrupt, then possibly the parents would have had a chance of succeeding on their motions. (See, e.g., the *Agawam* case discussed below.) As it was, however, the parents could not or did not argue that Amego's involvement was so critical to the program that a change of providers would in effect constitute a change in the placement. Of course, a similar argument would still be available to the parents on a motion for compliance with the hearing officers' stay-put order, in the event that Amego's replacement fails to maintain "the quality of [the students'] education."

Stay-put requires student's continued enrollment in private school

There are some factual similarities between *Norton* (discussed above) and *Agawam Public Schools*, BSEA #1504488, 21 MSER 81 (Berman, 4/28/15). In *Agawam*, too, a provider sought to terminate services due to dissatisfaction with parents.

Agawam concerned a residential student who had attended Melmark New England ("MNE") for approximately a year. By all accounts, the student was doing well there. MNE sought to terminate the student on the grounds that his parents were uncooperative, failing or refusing to comply with various MNE policies (regarding home visits, parent training, and so on) that had been disclosed to them prior to the student's enrollment. The parents moved for a stay-put order. In this case, unlike *Norton*, the district sided with the private provider.

The hearing officer found that MNE constituted the student's stay-put placement. She viewed previous BSEA cases that addressed the issue of termination of private school enrollment as falling into two categories: "school specific" cases where the hearing officer determined that 'stay put' applied to a particular approved private school, and 'comparability' cases, where 'stay put' requirements could be fulfilled by providing the student with services that were 'comparable' to those he or she had been receiving, albeit in a different location." 21 MSER at 85.⁸ Following *Northampton Public Schools & Lolani*, BSEA #04-0359, 9 MSER 397 (Byrne, 2003), she placed this case squarely into the first category.

The hearing officer based her conclusion on "the fundamental purpose of 'stay put' . . . , which is to ensure stability for the *student* regardless of conflicts between and among the adults." 21 MSER at 85 (emphasis in original). She was highly cognizant of the benefit that the student had been deriving from MNE's program. As she stated:

If one steps back from the reams of affidavits, pleadings, and documents, what emerges here is a picture of a young boy with a complex, pervasive constellation of disabilities who is making progress in a highly specialized educational program. According to testimony and documents submitted by MNE, Student is one of the "easier" students to work with at MNE, and has been deriving educational benefit from the services provided. Student is doing well despite a very difficult relationship between Parents and MNE staff. . . .

This is precisely the type of situation contemplated by the 'stay put' mandate. Student's needs are intense, pervasive and complex. He is functioning well in his current setting despite the storm of controversy surrounding him. There is no emergency involving the student.

Id.

The hearing officer therefore found this situation distinguishable from cases such as *Georgetown Public Schools and Landmark School*, BSEA #1408733 (Oliver, 2014), which involved termination based on student misconduct. This case presented the opposite situation: instead of experiencing difficulties in the program, the student was thriving.

The hearing officer briefly considered whether moving the student to another residential program (the "comparability" ap-

8. She believed that *Norton*, discussed above, "does not fit precisely in either category." 21 MSER at 85 n.4.

proach) would satisfy stay-put. In the circumstances of this case, she concluded that it would not. In light of the student's complex needs, she stated, "the very fact of a move to a different—even if similar—residential placement would be likely to 'have a significant effect on [Student's] learning experience,'" 21 MSER at 85 (quoting *DeLeon v. Susquehanna Cty. Sch. Dist.*, 747 F.2d 149, 154 (3d Cir. 1984)), constituting "a major disruption in his educational program." 21 MSER at 85 n.5. She therefore ruled that stay-put required continuation of the student's placement at MNE pending a full hearing on the merits.

The hearing officer acknowledged that two state regulations, 603 CMR 28.09(12) and 18.05(7)(c), "appear to contemplate the right of private special education programs to terminate publicly funded students." 21 MSER at 85. She concluded that these regulations do not "immuniz[e] private schools from federal 'stay put' requirements, however." *Id.* Clearly this is correct. The state is free to provide greater protection to students than IDEA does, but it may not provide less. See, e.g., *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 201 (1982). We note also that, by statute and regulation, students placed by districts in private special education programs must receive the same rights that they would have if served directly by their districts, which include stay-put rights. 20 U.S.C. § 1412(a)(10)(B)(ii); 34 C.F.R. § 300.146(c); 603 CMR 28.06(2)(f)(1), (3)(c), (3)(f)(4).

We believe that the hearing officer in this case appropriately kept the focus on the student and his needs, not allowing herself to be distracted by the squabbles between the adults. She did warn the parents, at the end of her discussion, that "a collaborative working relationship between MNE and Parents" was "necessary for student to achieve FAPE at MNE," and that the absence of such a relationship "could lead to a conclusion, after a hearing on the merits that he needs to be placed elsewhere." 21 MSER at 86. We note in passing that many disputes between parents and public school districts are characterized by less-than-collaborative working relationships, and yet the parties' inability to work together is rarely taken into account when hearing officers determine FAPE. We suggest that the standard elucidated by the hearing officer in this dispute between parents and private school should also apply to such cases.

Grandparents have standing to pursue reimbursement claim

Clinton Public Schools, BSEA #1505232, 21 MSER 64 (Reichbach, 4/6/15), involved a district's challenge to grandparents' standing to file a BSEA hearing request. In 2013, the student's mother, who lived in Clinton, had executed a caregiver authorization affidavit pursuant to M.G.L. c. 201F, designating the student's grandparents as the student's caregivers. The student resided in West Springfield with the grandparents. For the 2014-2015 school year, the grandparents unilaterally placed the student in a private special education program and filed a hearing

request seeking reimbursement from West Springfield. That district sought to join Clinton, which acknowledged that it was financially responsible (based on the mother's residence) and agreed to be joined.⁹ Clinton then moved to dismiss, contending (1) that the grandparents lacked standing because the mother was representing the student in the BSEA proceeding, and (2) that the mother lacked standing to pursue a reimbursement claim because she had not paid for the private school program. Because the hearing officer found that the grandparents did have standing, she did not reach the second argument.

The caregiver authorization affidavit, by its terms, gave the grandparents authority "to exercise concurrently the rights and responsibilities . . . that [the parent] possess[es] relative to the education of" the student. 21 MSER at 65-66. The hearing officer interpreted that affidavit in light of the "plain language" of the governing statute, *id.* at 66, which allows a parent-authorized caregiver "to exercise certain concurrent parental rights and responsibilities relative to a designated minor's education and health care, as described in section 3." M.G.L. c. 201F, § 2. The plain language of the latter section, in turn, allows a caregiver to "make educational decisions on behalf of the minor and in all other ways stand in for the [parent] with respect to federal, state, and district educational policy, including . . . representing the minor in . . . special education or other educational matters. . . ." *Id.* § 3.

Clinton argued that the statutory phrase "stand in" meant that the parent had to be absent in order for the grandparents to exercise the parent's rights. In this case, the mother was involved with the student and supported the grandparents' hearing request; therefore, the district argued, the grandparents lacked authority to proceed on the student's behalf. The grandparents disagreed, emphasizing the statute's use of the term "concurrent."

The hearing officer had no trouble concluding that M.G.L. c. 201F, § 3 provides "explicit authorization for a caregiver to represent a designated minor in special education matters," and that, "[i]nterpreted within the context of [§ 2], this is one of the 'concurrent parental rights and responsibilities' that a designated caregiver may exercise." 21 MSER at 66. The hearing officer therefore concluded that the grandparents had standing and the case could proceed.

This case illustrates the lengths to which districts will sometimes go to try to defeat special education claims. Here, the language of the caregiver authorization affidavit and the language of the statute were both quite clear, and yet the grandparents were forced to defend against a motion to dismiss. This case also serves as a reminder regarding the availability and usefulness of caregiver authorization affidavits. When children are living with relatives, parents should consider executing such affidavits so that the relatives may exercise the child's educational rights, as the grandparents did in this case.

9. Clinton subsequently sought to join the father's district of residence, the Wachusett Regional School District. That motion is the subject of another ruling, discussed below.

Joinder, consolidation, and dismissal: who are the proper parties?

This quarter brings three joinder-related cases: *Clinton Public Schools*, BSEA #1505232, 21 MSER 67 (Reichbach, 4/7/15); *Norton Public Schools*, BSEA #1504277, #1504282, 21 MSER 75 (Putney-Yaceshyn and Reichbach, 4/15/15), and *Whitman-Hanson Regional School District*, BSEA #1506955 (Reichbach, 6/3/15). In *Clinton*, one school district sought to join another, based on an assignment of responsibility by the DESE. In *Norton*, a private entity sought to consolidate two students' cases and to dismiss itself as a party. In *Whitman-Hanson*, a district of residence sought to dismiss itself from a proceeding brought by a vocational school student. The hearing officers in the latter two cases stated that the motions to dismiss would be governed by the rule relating to joinder, BSEA Rule I(J). Joinder was allowed in *Clinton*; dismissals were allowed in *Norton* and *Whitman-Hanson*. Partial consolidation was also ordered in *Norton*.

The facts of *Clinton* are discussed in the comment on Clinton's motion to dismiss (above). Clinton, where the student's mother lived, had joined the proceeding after the DESE had issued an Assignment of School District Responsibility determining Clinton financially responsible and West Springfield (where the student lived with her grandparents) programmatically responsible for the student's education. After the student's father was discovered to be living within the Wachusett Regional School District, DESE updated the Assignment, stating that financial responsibility was to be shared between Clinton and Wachusett. Clinton then moved to join Wachusett as a party to the grandparents' case for reimbursement of the costs of a unilateral placement. Wachusett took the position that it did not have enough information to oppose or assent to joinder.

Joinder is permitted "where complete relief cannot be granted among those who are already parties, or if the party being joined has an interest relating to the subject matter of the case and is so situated that the case cannot be disposed of in its absence." BSEA Rule I(J). The rule directs the hearing officer to consider four factors in determining joinder: the risk of prejudice to those already parties in the absence of the proposed party; the range of alternatives for relief; the inadequacy of a judgment entered in the proposed party's absence; and the existence of an alternate forum.

The hearing officer found that, because Wachusett was responsible for half the cost of the student's education, Wachusett had an interest in the subject matter of the case and was so situated that the case could not be disposed of in its absence. The hearing officer also determined that there was a risk of prejudice to Clinton if Wachusett were not joined, since Clinton would then be the only party whom the BSEA could order to reimburse the grandparents. Not surprisingly, the hearing officer ordered Wachusett to be joined.

The facts of *Norton* are set forth in the comment regarding the parents' stay-put motion (above). Amego, the private service

provider, moved to consolidate the two students' cases and to dismiss itself as a party. Although the BSEA Rules do not provide for consolidation, the hearing officers were willing to entertain the motion, looking to Rule 42(a) of the Federal Rules of Civil Procedure and 801 CMR 1.02(9) for guidance. (The federal rule allows consolidation where there are common questions of law or fact; the state adjudicatory rule permits group hearings where there are identical issues of fact.) Amego sought consolidation on grounds of administrative efficiency. Both sets of parents opposed consolidation, as did the district. They argued that although the students were being educated in the same classroom, their needs were different; the compensatory services owed to each might be different; the services and placement that they required prospectively might be different; and each set of parents would need to present "confidential, sensitive information" about their child at hearing. 21 MSER at 76. The hearing officers ordered that the cases be consolidated "only insofar as they involve common questions of law and fact." *Id.* This meant that they would be consolidated for purposes of pre-hearing proceedings and rulings, but would be tried separately. This result seems to strike a reasonable balance between the competing concerns of efficiency and privacy.

Turning to Amego's motion to dismiss, the hearing officers quoted from their ruling on the parents' stay-put motions (discussed above), which found Norton ultimately responsible for the students' programs. Under the same principles, if the hearing officers were to determine at hearing that services were owed to the students, Norton would be required to provide those services. "It appears, therefore," the hearing officers concluded, "that in Amego's absence there will be no impediment to a grant of complete, adequate relief among the other parties." 21 MSER at 77. Any dispute between Norton and Amego as to contractual violations, they stated, could be resolved in court. This result flows logically from the hearing officers' ruling on stay-put, and leaves each potentially adverse set of parties with a forum in which they may pursue their claims against each other.

The last of the joinder cases, *Whitman-Hanson*, holds special interest for parents of program school students (except for school choice students) and their representatives. The student in that case lived in the Whitman-Hanson Regional School District ("WHRSD") but attended the South Shore Vocational Technical High School. His parents filed a hearing request against both South Shore and WHRSD, alleging that his transition services were inadequate and that he required placement in a private out-of-district program as a result. South Shore asserted that its IEP was appropriate. WHRSD moved to dismiss, arguing that no relief could be granted against it because South Shore had not taken the steps necessary to transfer responsibility from a vocational school to a district of residence under 603 CMR 28.10(6)(a).

Under that regulation, four of the five types of program schools (vocational, charter, and virtual schools and schools attended pursuant to the Metco program)¹⁰ are both programmatically and

10. [See next page.]

financially responsible for an enrolled student unless the program school determines that the student may need an out-of-district placement, notifies the district of residence of that fact, and invites the district of residence to participate in a placement team meeting. If the Team determines that the student requires an out-of-district placement and the parents accept an IEP for such a placement, “programmatic and financial responsibility shall return to the school district where the student resides.” 603 CMR 28.10(6)(a)(3). The regulation is not entirely clear as to whether either type of responsibility shifts if the parents reject the out-of-district placement or if there is a dispute about the need for one. Here, however, the hearing officer did not need to deal with an ambiguous situation. As she noted, South Shore had “consistently argued that it does not believe that [the student] requires an out-of-district placement.” 21 MSER at 103. As a result, South Shore had not taken any of the steps outlined in the regulation, and WHRSD was neither programmatic nor financially responsible for the student. Thus, the hearing officer found, WHRSD was not a necessary party to the case. She rejected South Shore’s argument that WHRSD should remain in the case on the chance that “a Hearing Officer could determine that an out-of-district placement is required, thus triggering [WHRSD’s] responsibilities under 603 CMR 28.10(6).” *Id.* at 102. Contingent responsibility was not enough to make WHRSD a necessary party at that point.

So whom should parents of students at vocational school, charter school, virtual school, or Metco name as parties, when filing hearing requests to obtain placement in an out-of-district program and/or reimbursement for such a program? Obviously, they should name the program school. If, as in this case, the program school has steadfastly maintained that the student does not need an out-of-district program, then the program school is the only necessary party. Parents need not file against the district of residence, even though that district may be financially liable if they succeed. If, however, the program school has taken any of the steps specified in 603 CMR 28.10(a)(6)(a), indicating its agreement with the parents that the student may need an out-of-district placement (or if it is not clear whether the program school has done so), then parents are well-advised to name the district of residence too.

Discovery ruling contains wealth of information about various types of document requests

Several commonly-encountered types of discovery requests, along with some less usual, were at issue in *Grafton Public Schools*, BSEA #1506275, 21 MSER 131 (Reichbach, 6/12/15). The case, filed by the district, concerned a dispute over the continued eligibility of a seven-year-old second grade student. The parents served a request for production of documents and tangible things. The district objected to producing many of the documents and filed a motion for a protective order, which the hearing

officer allowed in part and denied in part. Among the principles that emerge from the hearing officer’s discussion are the following:

- *Relevant time frame.* IDEA’s two-year statute of limitations does not restrict the scope of discovery. The district argued that it should not be required to produce documents created before the limitations date. The hearing officer rejected this simplistic approach. Following the principles set forth in Fed. R. Civ. P. 26(b)(1) and Mass. R. Civ. P. 26(b)(1), she found that “historic documents from outside the two year window may still be reasonably calculated to lead to admissible evidence.” 21 MSER at 132 n.4.
 - *Notes of district staff and contractors.* This is an issue that arises frequently: parents observe district staff members or contractors taking copious notes at Team meetings, for example, and the parents request those notes in discovery. Often, the district responds that those notes are not discoverable because they are in the private files of the individual teachers, not in the student’s record, and therefore they are not records “maintained by the district.” The hearing officer pointed to the fact that FERPA exempts from inspection and review “records of instructional, supervisory, and administrative personnel and educational personnel . . . which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute.” 20 U.S.C. § 1232g(a)(4)(B)(i).¹¹ Thus, she ruled, the district was not required to produce notes maintained by individual staff members or contractors. We do not think that FERPA should be read to limit the scope of the parents’ discovery, however, where the documents relate only to the student in question and would not disclose identifiable information about any other students.
- The hearing officer also observed that requiring the district to acquire and produce such documents would be unduly burdensome and expensive, although why this would be so is not clear. Parents can obtain these “private” documents by serving the individual teachers or contractors with subpoena *duces tecum*. That would seem to be more burdensome to the teachers than just having the district gather the documents from the teachers via e-mail.
- *Test protocols and score sheets.* This issue, too, arises frequently. The parents sought production of standardized testing protocols and score sheets used in the district’s evaluations. The district argued that it could not release those materials because they were copyrighted. The hearing officer rejected the argument as to score sheets. She found that the parents “have at a minimum the right to inspect and review those test records containing information that personally identifies [the student], such as his score sheets, in accordance with FERPA.” 21 MSER at 133. She pointed out that under FERPA, parents also have the right to request an

10. “Program school” is defined to encompass charter, vocational, and virtual schools and schools attended under the Metco and school choice programs. 603 CMR 28.02(16). With regard to district responsibility, the first four types of program schools are covered by 603 CMR 28.10(6)(a); school choice schools are treated differently under 603 CMR 28.10(6)(b).

11. The Massachusetts Student Record Regulation contains a similar provision, 603 CMR 23.04.

explanation and interpretation of the student's record. Thus, she held, parents also "have a limited right to view the answer booklet if it becomes necessary during the course of an 'explanation and interpretation' of [the student's answer sheets]." *Id.* (citing Letter to Rep. Bill Shuster, August 7, 2007 (OSEP) (available at <http://www2.ed.gov/policy/speced/guid/idea/letters/2007-3/index.html>)). Quoting OSEP's guidance, the hearing officer stated that the explanation and interpretation could involve the school's "showing the parent the test question booklet, reading the questions to the parent, or providing an interpretation for the responses in some other adequate manner that would inform the parent." *Id.* n.11. The request for explanation and interpretation is an avenue that we do not observe parents using frequently, but that is worth considering more often. Because it arises under FERPA, it may be used at any time, not only when a hearing request is pending.

The hearing officer went on to state that the test protocols themselves were not discoverable in the circumstances of the case because she viewed them as irrelevant to the question of the student's eligibility for services. She did not explain why they were not relevant. It would seem that, if the district's determination of ineligibility was based in whole or in part on standardized test results, the test protocols would be relevant, especially because some test protocols involve subjective judgments by the examiner as to the student's degree of hesitation, speed of response, and so on. Moreover, as recognized by the National Association of School Psychologists ("NASP"), it is generally permissible to release test protocols to a qualified professional on a parent's request. See, e.g., NASP Principles for Professional Ethics (2010) (available at <http://www.nasponline.org/standards/ethics/ethical-conduct-professional-practices.aspx>), p. 9, Standard II.5.1. Requesting release of test protocols to an independent neuropsychologist or similar professional thus give parents an alternate avenue to obtain this information.

- *Lesson plans, syllabi, and individualized trimester assessments.* The parents sought copies of lesson plans and syllabi for kindergarten, first grade, and second grade, arguing that these documents were relevant to show whether the student was making effective progress. The hearing officer granted the district's motion for a protective order as to such documents, finding them irrelevant. "[The student's] effective progress . . . is not at issue in this case; the only question presently before me . . . is whether [he] is eligible for continued services," she stated. 21 MSER at 133. We think that the hearing officer interpreted the criteria for relevance too narrowly. Since eligibility depends in part on whether the student, by virtue of a disability, "is unable to progress effectively in the general education program without specially designed instruction," 603 CMR 28.02(9), the issue of effective progress would seem to be highly relevant. (We note that the hearing officer herself, in discussing a later request, stated that "[i]nformation regarding [the student's] academic and IEP progress . . . may be probative of his continued eligibility for services." 21 MSER at 135.) The

hearing officer's real reason for granting the protective order as to this category of documents seems to have been that lesson plans and syllabi, which are necessarily generic, would not be "probative of [the student's eligibility for special education services on an individual basis]." *Id.* at 133.

The hearing officer cited a second reason for granting a protective order as to lesson plans and syllabi: she found that allowing discovery of these documents would create an undue burden on the district. She did not consider whether a more tailored request (for instance, one year's worth of documents instead of three) would have been permissible, nor do the parents appear to have argued that point.¹²

The hearing office denied the request for a protective order insofar as the parents sought individualized trimester assessments that were part of the student's record.

- *Teachers' gradebooks.* The parents sought production of documents containing information as to the factors that determined the student's final grades. The hearing officer allowed the parents to obtain this information to the extent that it appeared "in existing documents, such as a syllabus, that are in the District's possession." 21 MSER at 134. "To the extent that this information might be contained in a teacher's gradebook," however, the hearing officer found that "the countervailing privacy concerns are overwhelming." *Id.* As she stated, FERPA forbids disclosure of a document containing other students' names, and the district was not required to generate a new document that would contain only the student's information. She also viewed it as too burdensome to require the district to redact other students' information. We don't understand this finding, since it would seem quite easy, for example, when photocopying the document to use two sheets of paper to mask all information above and below the line in the gradebook relating to the student. However, if parents are looking for disability-related factors that went into determining the student's grades, such as modified curriculum, homework forgiveness, different grading system for the student (many BSEA cases have held that grades alone are not enough to tell the complete story), it may be easier for the parents to obtain this information by means of an interrogatory.
- *Costs of the student's special education services.* The parents sought data as to the costs of the student's special education programs for the preceding four years, arguing that this information could show whether the district's finding of ineligibility was motivated by a desire to save money. The hearing officer allowed the district's motion for protective order with regard to this request, finding that it was not relevant: "Even if it could be determined exactly how much the District has spent providing services to [the student] on an individual basis, this information makes a finding of [the student's] eligibility no more or less likely." 21 MSER at 133.

12. The hearing officer did allude to the possibility of obtaining syllabi in connection with another request, discussed below.

- *District’s legal expenses.* Not surprisingly, the hearing officer used the same rationale with regard to the parents’ request for copies of the district’s legal bills relating to the student or his family. Parents have, however, been able to obtain this information via the Massachusetts Public Records Law, M.G.L. c. 66, § 10.
- *Documents relating to RTI, Title I, and fluency determination.* The parents sought documents indicating “‘how RTI [response to intervention] is determined and developed, how Title I resources are allocated,’ and ‘how math fluency and phonetic fluency are determined.’” 21 MSER at 133. The district objected on grounds of overbreadth, burden, relevance, and vagueness. The hearing officer allowed the parents to obtain the information, such as professional development presentations on the specified topics, to the extent that documents existed. As she stated, “It does not matter that this information is not specific to [the student],” *id.*, since the information “may be relevant to the District’s allocation of resources in general, which may impact [the student] specifically,” and may lead to admissible evidence regarding his eligibility. *Id.* at 134. The hearing officer found no undue burden in requiring the district to produce such documents.
- *Documents relating to the district’s training of its staff with regard to special education eligibility, Section 504 plans, IHCPs, IEP development, ESY determination, and decisions regarding filing for hearing.* Similarly, the hearing officer permitted the parents to obtain copies of the district’s annual trainings for its special education staff on the determination of special education eligibility and the determination and development of IEPs, Section 504 plans, individualized health care plans, and extended school year services. Again,

the hearing officer found that these documents, though they did not mention the student, could lead to admissible evidence regarding his eligibility.

The hearing officer granted the district’s motion for protective order insofar as the parents sought documents concerning the district’s “process for determining when to go to a due process hearing.” 21 MSER at 134. She found that these documents would likely implicate the attorney-client privilege, and in any event would not be relevant to the issue of the student’s eligibility.

- *Documents “demonstrating academic and IEP progress listing all of [the student’s] educators, related service providers, and substitutes.”* The hearing officer, in discussing this request, concluded that information regarding the student’s progress was relevant to the issue of his continued eligibility for services. (We think that this is correct but runs counter to her statement with regard to lesson plans and syllabi, discussed above.) The district claimed that complying with this request would require the district to generate new documents, and the hearing officer granted the district’s motion for protective order on this basis. The district agreed to produce the information to the extent it appeared in existing documents.

The hearing officer commented that although the district had agreed to provide lists of the student’s educators, related service providers, and substitutes to the extent such documents existed, the information did not appear reasonably calculated to lead to the discovery of admissible evidence. We do not understand this statement, since it would seem that the names of those potential witnesses would be highly relevant. Of course, the parents should also be able to obtain this information via an interrogatory. ■

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