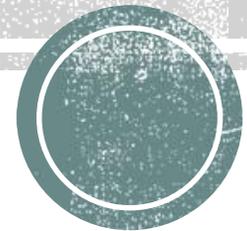


Legal and Legislative Matters Matter: - Knowledge is Power

Paige L. Tobin, Esquire

Murphy, Lamere & Murphy, PC



Topics

- OSEP and New Rules for the BSEA
- BSEA Statistics FY 2017
- Proposed HR 4286
- DESE and DCF Joint Guidance on Educational Stability for Students in Foster Care
- In Re: Framingham Public Schools and Student, Guild for Human Services, Inc. and the Department of Developmental Services, BSEA # 1808824
- In Re: Hingham Public Schools, BSEA # 1804284

OSEP – New Rules For BSEA

- Corrective Action Plan recently provided by BSEA to OSEP
- Once approved by OSEP, open for public comment for 60 days.

Probable New Rules:

1. No postponement without a new hearing date certain;
2. Elimination of “off calendar” status;
3. Elimination of advisory opinions;
4. Expedited HR for discipline: no postponements, no sufficiency challenge;
5. BSEA will grant expedited status sua sponte
6. Accelerated status rule
7. BSEA will need to report status to DESE (set aside for PRS)

expedited hearings

Student Discipline: In matters relating to the determination of an appropriate educational program for an eligible special education student who has been subjected to disciplinary procedures:

- (i) when a parent disagrees with either a school district's determination that the student's behavior was not a manifestation of the student's disability, or any decision regarding placement in the discipline context; or

- (ii) when a school district asserts that maintaining the current placement of the student during the pendency of due process proceedings is substantially likely to result in injury to the student or others.

accelerated hearings

Other: When the person or entity requesting the hearing asserts that:

- (i) the health or safety of the student or others would be endangered by delay; or
- (ii) the special education services the student is currently receiving are sufficiently inadequate that harm to the student is likely; or
- (iii) the student is currently without an available educational program or the student's program will be terminated or interrupted.

BSEA statistics FY2017

Rejected IEPs:

11,400 rejected IEPs received by the BSEA during FY 2017 (up from last year).

Mediation:

742 mediations conducted in FY 2017 (representing a decrease from the 778 conducted during the prior year), with an agreement rate of 83.8%.

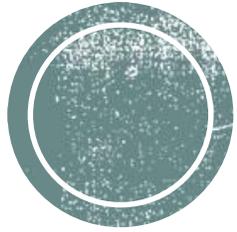
Due Process Hearings: 495 hearing requests during FY 2017

BSEA hearing officers conducted full hearings resulting in the issuance of 22 decisions
50 substantive written rulings were issued.

Prevailing Party Of the 22 decisions noted above, parents fully prevailed in 7, school districts 10, mixed relief 3, 2 LEA assignments

Proposed House Bill 4286

- Higher education opportunities for students with intellectual disabilities, autism, and other developmental disabilities
- ASE provided input to the proposed legislation through meetings with state legislatures and other stakeholders
- ASE was made part of the inclusive concurrent enrollment advisory board to advise the department on efforts to implement inclusive concurrent enrollment and to participate in educational outreach efforts related to inclusive concurrent enrollment



DESE and DCF Joint Guidance on Educational Stability for Students in Foster Care January 2018

- The Every Student Succeeds Act (ESSA), Title I, Part A ensures the educational stability of students in foster care and their equal access to the same free and appropriate public education through high school graduation as provided to other children and youth.

- Need collaboration between the Massachusetts Department of Elementary and Secondary Education (DESE), school districts, and the Massachusetts Department of Children and Families (DCF).

Foster care

- **Foster Care:** placement by DCF of a student into 24-hour out-of-home care, away from his/her parents or guardians. These placements include, among others:
 - Foster family homes;
 - Foster homes of relatives;
 - Emergency shelters (including STARR programs and Transitional Care units);
 - Residential facilities;
 - Child care institutions;
 - Group homes; and
 - Pre-adoptive homes.
- “Children awaiting foster care placement” should be considered students in foster care

Immediate Enrollment

- **Immediate Enrollment:** when it is in a student's best interest to leave the school of origin, enrollment in a school in the local school district must take place without delay, to prevent disruption of the student's education



District Foster Care Points of Contact (POC)

- Help ensure the educational stability of students in foster care.
- Ensure that students in foster care:
 - Are identified and supported through coordination between districts and DCF;
 - Are enrolled in and regularly attending school; and
 - Have full and equal opportunity to succeed in school and to meet the same challenging state academic standards as other students, and to receive educational services for which they are eligible.
- Districts should ensure that accurate information about their designated POC is available on [ESE's School and District Profiles](#) page

Best Interest Determination

- Best interest determinations are conducted to make decisions about the school a student will attend following a foster care placement or change in placement (to a new city/town).
- These decisions should be made collaboratively by the parties who are best situated to understand the student's unique needs.
 - DCF; student, the student's family; the district and school of origin; and the local school district (as appropriate).
 - All appropriate parties should have the opportunity to participate meaningfully in the decision making process.
- Every effort should be made to reach consensus regarding the appropriate school placement of a student in foster care.
- If there is disagreement regarding school placement for a student in foster care, **DCF is considered the final decision maker in making the best interest determination.**
- Under ESSA, to promote educational stability, **students should continue to attend their schools of origin while best interest determinations are being made.**

Considerations:

- student's age and grade level;
- student's preference, when age appropriate;
- preferences of the student's parent(s)/guardian(s) or EDM(s);
- student's attachment to the school, including meaningful relationships with staff and peers;
- placement of the student's sibling(s);
- distance/length of time to travel to/from school;
- time of academic year, academic performance, and skills;
- current educational goals and services;
- individual skills, needs, and social connections;
- anticipated length of time in placement, and whether reunification is the family goal;
- number of placements to date
- ability to maintain family relationships and engagement (including in extracurricular activities, where appropriate);
- clinical/behavioral issues;
- influence of the school climate on the student, including safety issues;
- availability and quality of the services in the school to meet the student's educational and social emotional needs;
- whether the student has an Individualized Education Program (IEP) and is receiving special education and related services, or the student is receiving special education or related aids and services under Section 504, and, if so, the availability of those required services in a school other than the school of origin; and
- if the school of origin is in the best interest but only for a limited duration of time (e.g., until the end of the school year, the end of a testing or grading period, or the end of a particular grade). Additionally, the parties involved in the decision may wish to determine a time to revisit the question of whether it is in the student's best interest to remain in the school of origin or enroll locally.

Transportation

- Some students in foster care will need transportation to remain in their school of origin
- Districts must collaborate with DCF to implement policies and procedures governing how transportation will be provided and arranged to ensure that students remain in their school of origin
- Districts and DCF should consider a variety of options for providing the necessary transportation in each case
- Options -- using Title I funds, regional collaborations among districts, help from foster parent(s), etc.

BOTTOM LINE:

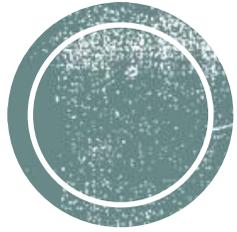
District of origin is responsible for providing transportation to and from the school of origin

- DESE and DCF are looking for possibilities for the state to claim federal funding through Title IV-E of the Social Security Act, to help with transportation costs
- If the state is able to receive federal approval via a Title IV-E state plan amendment, DESE and DCF would be in position to begin a claim process with those districts that have incurred unreimbursed costs to transport eligible students to and from the school of origin per ESSA
 - Document all transportation costs associated with these activities



Changes to 603 CMR 28.10 effective July 1, 2018

- **Summary:** The proposed amendments clarify programmatic and financial responsibility for the special education services of students in foster care; resolve a conflict between the current state regulation and new provisions in federal law relating to students in foster care; and simplify, and provide consistency and predictability for, the process of assigning responsibility to school districts for the special education of students in foster care.



**Framingham Public Schools and Student
v. Guild for Human Services, Inc. and the
Department of Developmental Services**

BSEA # 1808824

Catherine M. Putney-Yaceshyn

May 7, 2018

ISSUE

- Whether Student is entitled to “stay put” at his current placement, The Guild for Human Services



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Facts

- Student is a nearly 22 years old and has been placed at the Guild by the Framingham Public Schools in 2013 as a residential student.
- Extreme safety concerns in the home involving Student destroying property and physically interacting with his parents.
- Student has been diagnosed with autism, an intellectual disability, and intermittent explosive disorder.
- Recent increase in behaviors.
- March 24, 2018: Altercation with peer resulted in peer suffering injuries including a severe concussion
- March 29, 2018: Written notification of the emergency termination of Student from the Guild pursuant to 603 CMR 28.09(12) - in effect as of March 29, 2018.
- Framingham asked whether the Guild would permit Student to remain there while Framingham located an appropriate placement for Student to transition. The Guild was willing to schedule a meeting to discuss the possibility.

- The Guild did initially agree to delay termination and, during this interim period sought to keep Student and Peer separated.
 - They placed extra staff in the residence and tried to prevent contact
 - However, their home was a single family residence, and it was impossible to keep them completely separated.
- April 2, 2018: Another incident involving Student and Peer
- Staff tried to assist the Student and Peer in repairing their relationship (they were previously best friends), but Peer was frightened by Student's actions.
 - Peer would not return to the residence.
 - The Guild had to rent a hotel room after the incident to allow Peer to live separately from Student
 - The Guild modified its staffing and added an additional two staff members to ensure Student's aggressions do not cause harm to other students.
 - Peer also required twenty-four hour supervision which put a further strain on staffing levels

- On April 4, 2018, the Guild said it would be moving forward with the termination
- The Parties developed a plan to transition Student to a new placement
- Since the Guild made the decision to terminate Student's placement, and up until the commencement of the hearing, the Parties were not able to identify a placement to which Student could transition
 - Framingham initially sent referral packets to multiple placements, but none accepted the student

Stay Put

- BSEA stay put cases are divided:
 - “school specific” stay put cases: a hearing officer determined that “stay put” applied to a particular private school
 - “comparability cases” of stay put: “stay put” requirements could be fulfilled by providing student with services that were “comparable” to those he or she had been receiving, but in a different location

HEARING OFFICER:

- The comparability line of cases does not pertain to the instant case, because there simply is no other placement available to Student. If there was a viable option of placing Student in another residential school which could implement his accepted IEP, there would be no dispute in this matter
- Looked to the “school specific” cases for guidance
 - Lolani and Northampton Public Schools (BSEA #04-0359, 2003)

Stay Put and Private Schools

- The Guild argued that the IDEA’s “stay put” provision does not apply to it. It claims that it followed the procedures required by the Massachusetts special education regulations and its own policies, and thus is entitled to terminate Student
 - 603 CMR 28.09(12), Student Protections:
 - (b) Emergency termination of enrollment. The special education school shall not terminate the enrollment of any student, even in emergency circumstances, until the enrolling public school district is informed and assumes responsibility for the student. At the request of the public school district, the special education school shall delay termination of the student for up to two calendar weeks to allow the public school district the opportunity to convene an emergency Team meeting or to conduct other appropriate planning discussions prior to the student’s termination from the special education school program. With the mutual agreement of the approved special education school and the public school district, termination of enrollment may be delayed for longer than two calendar weeks.

HEARING OFFICER:

- 603 CMR 28.06(2)(f)(1): “Students in out-of-district placements shall be entitled to the full protections of state and federal special education law and regulation.”
- *Lolani and Northampton*: “There is no legislative language exempting publicly funded students placed in private special education facilities from application of the ‘stay put’ doctrine.”

Hearing Officer Finds:

- Guild followed 603 CMR 28.09(12) and its own termination policy
- However, **under the unique circumstances of this case**, where Student has no other placement available to him and is unable to safely return home, his “stay put” placement has to be the Guild.
- As a **matter of public policy** and if the IDEA’s stay put provisions are to have any meaning, the **BSEA cannot issue a decision finding that Student does not have any placement in which to remain during the pendency of this matter.**
- Therefore, even though the Guild has followed the requirements of both 603 CMR 28.09(12) and their own emergency termination policy, **under the very limited circumstances surrounding this case**, Student is entitled to “stay put” at the Guild.

ORDER

- Student is entitled to remain at the Guild during the pendency of this dispute
- The Parties must convene a Team to determine what safety measures are necessary to maintain Student at the Guild until another placement is identified
- Framingham is responsible for arranging and funding any additional personnel or service deemed necessary

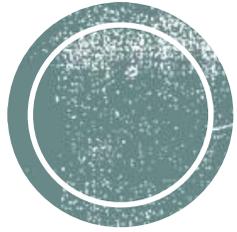


In Re: Hingham Public Schools

BSEA #1804284

**Catherine M. Putney-
Yaceshyn**

March 23, 2018



Facts

- Student is eighteen years old, attends school at Brewster Academy, a non-DESE approved private boarding school located in Wolfeboro, New Hampshire
- Was unilaterally placed by parents in the fall of 2015
- Prior to being unilaterally placed at Brewster, he attended Hingham
- Had an accepted IEP for the period from March 15, 2013 through March 14, 2014 which identified a specific learning disability in reading
- Student's IEP for the period from March 13, 2014 through March 12, 2015 contained services in the same areas as the previously accepted IEP. Parents accepted all services except ESY

- On or about August 28, 2014, prior to the beginning of Student's freshman year at Hingham High School, Parents signed a form declining special education services for Student
- Hingham sent Parents an N1, dated 8/28/14, which stated that Hingham High School would discontinue special education services at the request of the family
- Student completed his freshman year at Hingham High School as a general education student
- On the last day of school, Student was involved in a disciplinary incident in which he was accused of finding a final exam, taking a photo of it, and sharing it with six other students. He was suspended from all extracurricular activities including clubs, sports, and social events. His punishment was to last through January 2016
- Parents withdrew Student from Hingham and unilaterally placed him at Brewster Academy in the fall of 2015, just prior to his sophomore year

- On or around November 2, 2016 Parents requested an evaluation of Student for special education eligibility and Student was assessed
- The Team met and found Student not eligible for special education services
- Hingham sent Parents an N2, Finding of No Eligibility
- Although Student had a history of a health disability and a specific learning disability in written expression, he is able to access the curriculum, was making effective progress, and did not require specialized instruction
 - Student did present areas that could use accommodations and regular education support a
 - Made a referral to the school counseling department for consideration of a section 504 accommodation plan.

Parents filed their request for hearing:

- Claimed that they signed a form removing Student from IDEA services, but that they did not eliminate 504 accommodations
- Stated that Student suffered emotional trauma due to the severe discipline that was imposed upon him after he found and showed a final exam to other students.
 - Stated that Hingham was aware that Student had emotional issues due to prior testing and IEPs

Hingham Files Motion for Summary Judgment

- Parents revoked consent for the provision of special education and related services to Student by Hingham
- Subsequently, they enrolled him in an unapproved, out-of-state school in New Hampshire
- They did not request an initial evaluation until November 2016
- After the initial evaluation, Student was found ineligible for special education and related services on March 2, 2017
- Parents are not entitled to reimbursement for a unilateral placement of Student at a non-DESE approved school during the period for which they had revoked consent for Student to receive special education and related services
- Hingham is not obligated to provide accommodations at Student's private school or to otherwise fund his education there

Hearing Officer Finds:

- *Florence County School District Four v. Carter*, 510 U.S. 7 (1993)
 - Court ordered reimbursement for private school expenses to parents of a special education student who sought more intensive services from a district and unilaterally placed their child when the school refused to comply
- This case is DISTINGUISHABLE
- Parents removed Student from special education services and **more than a year later** placed him at an unapproved non-special education private boarding school and thereafter sought reimbursement from the district
- Hingham acted appropriately by treating Student as a general education student after Parents withdrew him from special education formally and in writing
- 34 C.F.R. § 300.300(b)(4)(III)-(iv); -- once a parent revokes consent for special education and related services, the public agency (a) will not be considered in violation of the obligation to make FAPE available to the child for failure to provide the child with further special education and related services, and (b) will not be required to convene an IEP Team meeting or develop an IEP, under §§ 300.320 through 300.324
- After Parents withdrew Student from special education, Hingham was not required to convene a Team meeting, even if there had been any concerns regarding Student's emotional state.

AND...

- By rejecting the services developed under the IDEA, the parent is essentially rejecting what would be offered under Section 504
 - *Letter to McKethan*, 25 EDELR 295 (1996)
- Parents never requested that the 504 team convene when they removed Student from special education services or at any time prior to or after unilaterally placing Student
- Section 504 does not require Hingham to provide any accommodations at Student's private school
- Ruling in favor of Hingham



Questions and Answers

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