

**2008 YEAR IN REVIEW
SIGNIFICANT SPECIAL
EDUCATION CASES, LEGISLATION,
AND REGULATIONS**

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**BUREAU OF SPECIAL
EDUCATION APPEALS**

STATISTICS (FY2008 – July 1 to June 30)

Rejected IEPs: 7,401 – an increase of 1,156 over
FY2007

Mediations: 906 mediations concerning sped and
504 matters a 9.2% increase over FY2007. 84%
of the mediations resulted in written agreement

BSEA

618 Hearing requests, an increase of 26

34 decisions

Plus 32 substantive rulings

Parents prevailed in 7 of the hearings (20%)

School districts prevailed in 19 (56%)

Mixed relief – 6 (18%)

2 decisions (6%) involved another state agency or dispute
between 2+ school districts

In the 7 cases where parents fully prevailed – 4
were represented by counsel, 3 pro se (the
school district was represented in all 7)

In the 19 cases where school district fully
prevailed, parents were represented by counsel
in 6, by an advocate in 2 and pro se in 11

THE END OF THE BSEA AS WE KNOW IT???

The DESE is considering whether to move or
dismantle the BSEA due to a federal advisory
requiring the DESE to address certain structural
issues to ensure impartiality

INDEPENDENT
FULL TIME
SPECIALIZED

- IDEA
- Section 504
- ADA
- MGL Chapter 71B

Decades of experience

An array of options, i.e. hearings, conferences,
motions, advisory opinions.

“IT AIN’T BROKE, SO...”

Commissioner Chester stated in his letter to US
DOE: “We have received no allegations or
complaints regarding the current structure for
hearings and mediations from anyone.”

Their decisions are upheld consistently by federal
and state court judges

The majority of parties that engage in mediation
resolve their disputes

Alternatives to the current structure

Consultants

??? Of expertise

Impartiality

Independence

Disputes about bias

Administrative Law Judges

Two tier system

DESE is hiring a consultant to review systems in other states, meet with constituencies and state officials, and recommend changes to the structure of the BSEA

PROGRAM OBSERVATIONS

Importance

Schaffer v. Weast

- Burden of proof on party seeking a change in placement
- Unfair advantage evened out by IDEA guarantee of parent access

Existing guarantees of observation

Federal

- IDEA and Code of Federal Regs
- *34 CFR 300.502(e)* – limits the conditions that a school district may impose upon a parent's independent education evaluation
- *Schaffer* interprets Fed law and regs saying parents' evaluator must be given access to all documents and information the school has

State

- *603 CMR 28.07(1)(a)(3) – parents have a right to observe any program(s) proposed for the child if the child is identified as eligible for special education services.”*

BSEA

- *Numerous decisions reflecting the importance of observations*
- *However, reluctant to get involved in such disputes and onerous to parents to institute such actions*
- *PQA not that helpful on this*

Access Issues

- Outright refusal to allow observation
- Unreasonable limits on time (20-45 minutes)
- Unreasonable limits on what observed or how
- CORI checks
- Requiring provide copy of notes
- Barring speaking with teachers*

MGL c. 71B, Section 3

Amended in 2008:

To insure that parents can participate fully and effectively with school personnel in the consideration and development of appropriate educational programs for their child...provide timely access to parents and/or parent-designated independent evaluators and educational consultants for observations of a child's current program and/or of any program proposed for the child, including both academic and nonacademic aspects of any

such program. Parents and/or their designees shall be afforded access of sufficient duration and extent to enable them to evaluate the child's performance in a current program and/or the ability of a proposed program to enable the child to make effective progress. School committees shall impose no conditions or restrictions on such observations that are not necessary to ensure the safety of children in a program or the integrity of the program while under observation or to protect children in the program from disclosure by an observer of confidential

and personally identifiable information in the event such information is obtained in the course of an observation.

- *In Re: Northbridge Public Schools*, BSEA #09-2533
(October 30, 2008)
- Mindful of the bill – N.B. footnote 20
- Importance of speaking with teachers
- Ordered to allow that

In re Weymouth Public Schools, BSEA #09-1335
(Crane, 2/20/09)

- 13 hours of observation of a program
- District failed to support its opposition to the length of the observation with detailed affidavits
- Relied on general policies, an appeal to “common sense” and arbitrary policies

New Statute – Same support needed

Need expert and well founded support for request for observation

ABUSE/CIVIL RIGHTS CASES DAMAGES

*In Re: Mashpee Public Schools, 14 MSER 143 (2008)
and 14 MSER 156 (2008)*

- Hearing Officer Bill Crane
- Consolidate case of 3 students on spectrum
- Physically abusive teacher
- Failure of supervision, reporting, etc.

ISSUES

- “Exhaustion”
- Role of BSEA
- Proving facts
- Damages
- Settlement dynamic between school and insurance company
- Statute of limitations

- Decision re: role of hearing officer and scope of hearing
- Settlement

- *In Re: Lexington Public Schools*
- Hearing Officer Ray Oliver
- 5-6 year old regular kindergarten class
- Secluded in “time out” room

ISSUES

- Consent
- Laws, regs re: time out, seclusion, restraint
- Damages
- Settlement dynamic between school and insurance company
- Statute of limitations

SECTION 1983 SUITS

Fitzgerald v. Barnstable, 2009 WL 128173 (S.Ct. January 21, 2009)

Title IX is not the exclusive remedy for addressing gender discrimination in schools, nor is it a substitute for Section 1983 suits as a means of enforcing constitutional rights.

TRANSITIONS/POST GRAD

IDEA 2004 renews emphasis on students achieving espoused goals. Students are to exit the education system with as much ability as possible to live independently, be gainfully employed, pursue further schooling, etc.

In Massachusetts - requirement of initiating the transition planning and transition services at age 14 instead of 16 under IDEA 2004

Accepting, refusing the diploma

- Tactically, should you refuse the diploma or seek or get an injunction/prior order

Experts/Evaluation

Challenges in evaluating post grad programs

- Appropriate expert
- What to evaluate?
- In Re: Melrose Public Schools, 14 MSER 160 (2008) *difficulty in challenging/evaluating a yet to be established program*

Lessard v. Wilton-Lydeborough and NH DOE, 518
F.3d 18 (1st Cir. 2008)

First proposed IEP had a one page transition plan
that ended mid-sentence

- District not required to provide a stand-alone transition plan, it could be incorporated throughout the IEP.

- No transition expert
- Parents did not specify what objections they had to the IEP despite district's request
- Parent did not testify before hearing officer
- Transitional services/plan interwoven throughout the IEP sufficient. Not enough to rely solely on the absence of a separate transition plan. Take the IEP in its entirety

DISCOVERY IN BSEA PROCEEDINGS

- Sanctions are rare but...

Boston Public Schools, 14 MSER 48 (2008)

- BPS failed to respond in a timely manner to Parents' discovery requests *and* to discovery order of the hearing officer after a motion to compel
- Barred BPS evidence on 2 of 3 years in dispute or any evidence on several important issues (peer groups and behavioral programming)

ENFORCING SETTLEMENT AGREEMENTS

In Re: Wachusett Regional School District, 14 MSER 382 (2008)

- Agreement provided for private day placement
- Hospitalized and then into a residential step-down program
- Considered whether that considered termination of placement necessitating reconvening of team
- No

JOINDER

BSEA Hearing Rule IJ allows joinder of state agencies

In Re: Worcester Public Schools, 14 MSER 434 (2008)

- Boy placed in day program at Franklin Perkins, hospitalized and then for several months in a residential step-down program.
- Parents filed for residential placement
- Worcester moved to join DCF

- Denied
- Student already receiving DCF home based services
- Did not want to delay case by bringing in DCF

In Re: Nashoba Regional School District, 14 MSER 298 (2008)

- Student in a DCF residential program and Nashoba funded therapeutic day placement
- Student sought to join DCF to BSEA proceeding seeking one program that would provide residential and educational services

- Held proper to join DCF
- Needed for determination of what, if any, services from DCF are required and whether they should be provided at a specific placement

Lawrence Public Schools, 14 MSER 1 (2008)

Student in the legal custody of DSS and living in a foster home and attending a therapeutic day school

GAL sought residential program

DSS resisted but was joined both because custody but also claim possibly for “non-educational” services, which would be DSS’s responsibility

Plymouth Public Schools, 14 MSER 32 (2008)

DMH funding residential portion of residential therapeutic placement

Dispute over Plymouth’s responsibility for funding it

DMH a necessary party because: if student hospitalized at time, need DMH resources, advocacy; may need non-educational services; BSEA appropriate forum for addressing DMH's responsibility for services that may affect Student's education

DISCIPLINE

BSEA is a welcome forum for appeals
Better alternative than courts
N.B. the burden of proof
Need for experts

Braintree Public Schools, 14 MSER 62 (2008)

Followed appropriate procedure for IAES a first grader who was a danger to himself and others

Parents expert, a psychologist, testified that student could be educated in regular education classroom with better staff training

Exclusion of student upheld – expert hadn't spoken with staff or reviewed any school records or reports

Milton Public Schools, 14 MSER 18 (2008)

15 year old altercation with teacher

Determined it *was* a manifestation of his disability but refused to readmit

Entitled to two months compensatory services

Parents sought damages for unlawful exclusion under G.L. c.76, Section 16

BSEA no authority to award monetary damages

2009 Legislation

- An Act to Improve Teacher Training in Augmentative and Alternative Communication
Lead sponsors: Sen. Creem, Rep. Bradley
- An Act to Ensure Students with Disabilities Succeed as Adults: Transition Coordinators
Lead Sponsor: Rep. Sannicandro
- An Act Addressing Bullying of Children with ASD
Lead Sponsor: Rep. L'Italien, Sen Jehlen

- An Act Relative to Equal Educational Opportunities for Students with Disabilities
Lead Sponsor: Rep. Sannicandro
- An Act to Maintain Short Term Objectives for Students with Disabilities
Lead Sponsors: Sen. Creem, Rep. Peisch
- An Act to Provide Fair Process for Students with Disabilities
Lead Sponsors: Sen. Eldridge, Rep. Wolf

- An Act to Support and Increase the Number of Qualified Providers of Intensive Intervention Providers for Children with Autism Spectrum Disorders *Lead Sponsor: Rep. L'Italien*

**AMERICAN RECOVER AND
REINVESTMENT ACT OF
2009**