

**COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS  
BUREAU OF SPECIAL EDUCATION APPEALS**

**In re:** Student v.  
Lynn Public Schools

**BSEA #1500643**

**RULING ON LYNN PUBLIC SCHOOLS’  
MOTION TO DISMISS**

This Ruling is issued pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL ch. 71B), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under these statutes.

On September 26, 2014, Parent<sup>1</sup> filed a Hearing Request with the Bureau of Special Education Appeals (BSEA) on behalf of her adult son, over whom Parent has guardianship. Parent sought reimbursement for her unilateral placement of Student at the Middlesex Community College Transition Program.

Lynn Public Schools (Lynn) responded by filing a Motion to Dismiss on October 6, 2014, asserting that Parent had entered into a Settlement Agreement on or about May 25, 2012, which agreement set forth Student’s educational placement through June 12, 2017 (Student’s twenty second birthday). The Agreement does not contemplate the placement now chosen by Parent. Lynn asserts that the Agreement is controlling and as such states that the instant case should be dismissed because Parent has failed to state a claim upon which relief can be granted.

Parent filed an Opposition to Lynn’s Motion on October 14, 2014, and thereafter, requested a hearing on the Motion to present evidence and further argue her position. By agreement of Parties during a telephone conference call on October 16, 2014, the Motion Session was scheduled for January 16, 2015, and was held on the aforementioned date.

Those present for all or part of the proceedings were:

Student’s Parent  
Student’s Grandparent

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<sup>1</sup> Mother has guardianship of Student who is over eighteen years old, but, since both parents were involved in the decision-making early on, this Ruling may refer to “Parent” or “Parents” depending on each parent’s involvement at the particular time.

Colby Brunt, Esq.	Attorney for Lynn Public Schools
Cheryl Mennino	Director of Special Education, Lynn Public Schools
Susan Howell	Out of District Chairperson, Lynn Public Schools
Lois Gould	Transition Supervisor, Learning Prep School
Stacey Pena	Program Specialist, Learning Prep School
Jean E. Foster	Chief Operations Officer, IEP Chairperson, Learning Prep School
Cinthia Manning	High School Principal, Learning Prep School
Robert Owens, Jr.	Counselor, Learning Prep School

The official record consists of Lynn’s Motion and Parent’s Opposition, documents submitted by Parent marked as exhibits PE-1 through PE-35; recorded oral testimony, and oral arguments.

Upon consideration of the testimony, documentary evidence and arguments offered by the Parties, Lynn’s Motion to Dismiss is GRANTED, as explained below.

**Facts:**

1. Student is a child with a disability within the purview of the IDEA. Neither his disability nor his entitlement to special education is in dispute.
2. In March 2010 Parents placed Student unilaterally at the Learning Prep School (LPS) and filed a claim with the Bureau of Special Education Appeals seeking a placement order and reimbursement for said unilateral placement. Consistent with Parents’ decision, Parents signed an agreement with Nancy Rosoff, then LPS’s Director, President and CEO, on or about March 19, 2010, for the period from March 8 through June 30, 2010, establishing the funding arrangements and obligations of Parents and LPS. Lynn was not a signatory to this agreement (PE-1).
3. On or about August 31, 2010, in lieu of proceeding with a BSEA Hearing, the Parties entered into a cost-sharing, settlement agreement for the period from September 1, 2010 through June 12, 2017. Pursuant to this agreement, Lynn agreed to make an annual contribution of \$14,000.00 per year for the 2010-2011, 2011-2012, 2012-2013 and the 2013-2014 school years for Student’s placement at the LPS, as well as to provide and fund Student’s transportation to said program. The Agreement was contingent on Student attending LPS and remaining in good standing. The Parties further agreed that all future claims regarding Student’s special education entitlement would be extinguished at the conclusion of the 2013-2014 school year except in the event that Student suffered a significant, unanticipated illness or injury which resulted in a “substantial and material change in the Student’s disabling condition” which event would trigger reconvening of the Team. The agreement further provided that

the Team would reconvene annually to draft Student's IEP and that if Student left LPS prior to the final year of the Agreement, the Team would reconvene within fifteen (15) school working days to provide Student with a program and placement that offered him FAPE in the least restrictive setting. If at that point a dispute regarding the new IEP developed, the IEP developed by Lynn would be recognized as Student's "stay-put" placement. The Parties further agreed that upon satisfactory completion of MCAS and the applicable course distribution requirements, Lynn would issue Student a high school diploma (PE-1).

4. Both Parties were represented by legal counsel at the time of this agreement and the agreement notes that the Parties

...understand and acknowledge that they are waiving specific rights which accrue to them pursuant to M.G.L. ch. 30A and 71B, 20 U.S.C. 1400 et seq. and Section 504 of the Rehabilitation Act of 1973 (PE-1).

Lastly, the agreement contained a confidentiality clause (PE-1).

5. In August 2011, LPS agreed to accept the City of Lynn's reduced tuition payment as full tuition for Student's placement for the 2011-2012 school year and reserved its right to continue said financial arrangement beyond the 2011-2012 school year (PE-2).
6. Following Ms. Rosoff's departure from LPS, via letter dated November 15, 2011, Joan Foster, LPS's Interim Director, notified Parents that LPS would recognize Parents' \$500.00 payment as full Parental contribution toward Student's tuition for the 2011-2012 school year, but would not extend said payment arrangement beyond that school year. The letter further indicated that failure to agree to LPS's offer would result in Student's termination process at LPS (PE-3).
7. Parents wrote to Susan Howell, the Out of District Coordinator in Lynn's Special Education Department, on March 16, 2012, notifying her of LPS's determination not to accept Parents' payment as full Parental contribution toward Student's tuition, and asking Ms. Howell to reconvene the Team to determine Student's program and placement for the 2012-2013 school year. Parent specifically requested that Lynn consider and forward referral packets to Merrimack Special Educational Collaborative (MSEC), Marblehead Public High School, LABB Collaborative and EDCO Collaborative in addition to any program considered in Lynn. Parents further agreed to make Student available for evaluations if Lynn considered it necessary (PE-4).

8. When Lynn did not respond to Parents' initial letter, Parents renewed their request by letter dated March 29, 2012, and requested that Lynn forward referral packets to the schools identified in their previous letter (PE-5).
9. When Lynn initially refused to fully fund Student's placement at LPS, Parents contacted Senator Thomas McGee who reached out to Lynn. Following Senator McGee's intervention, Lynn agreed to meet with Parents and consider a new agreement between Parents and Lynn (Parent).
10. Dr. Cheryl Meninno, Lynn's Executive Director of Special Education, emailed Parents on April 5, 2012, notifying them that after consultation with Lynn's attorney and Susan Howell, Lynn would agree to fully fund Student's placement at LPS until his graduation in 2014 and would convene a Team meeting to this end. Lynn's Attorney would also draft and forward a new settlement agreement for Parents' consideration and signature reflecting Lynn's position (PE-7).
11. Rita McDonough, CFO at LPS, wrote to Parents on April 11, 2012, noting LPS's disagreement with assertions made by Parents in a previous correspondence and appendix to the agreement between them and declining to further amend their agreement (PE-6). On or about April 11, 2012, LPS responded to Parents' correspondence agreeing to let Student remain therein for the 2012 school year, but refusing to consider further amendments to its agreement with Parents.
12. On May 9, 2012, Parents emailed Ms. Meninno conveying their willingness to enter into the new Settlement Agreement and requesting two changes (in Paragraphs 3 and 5) to the draft forwarded by Lynn (PE-8; PE-9). According to Parent, the request for the changes to Paragraph #3<sup>2</sup> and Paragraph #5<sup>3</sup> of the Agreement, mentioned in the email, were suggested by Father (who is an attorney) (Parent). In closing, Parent noted in her email that

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<sup>2</sup> "Paragraph 3: we can add '...Student will be placed in an appropriate public special education program within or otherwise supported by Lynn for the remainder of the Contract Period as needed to assist the Student's transition to adult services'" (PE-8).

<sup>3</sup> "Paragraph 5: of the new agreement is slightly different from the original agreement, can we add the same wording as before 'The Student's IEP for placement at the Private School shall be administratively developed by Lynn in a form and with substance that is consistent with the Private school's program for the student' (note the Team meets each Fall, not the Spring)" (PE-8).

If we can make those edits and have Sue fax me another copy I can ask [Father to] sign right away. I have informed Learning Prep of the meeting date and time next week.

Again, we truly appreciate everything you have done on behalf of Lynn and for [Student] (PE-8).

Father did not participate in the settlement negotiations with Lynn (Parent). According to Parent, he simply reviewed the Agreement and suggested the aforementioned changes (Parent).

13. On or about May 15 or 16, 2012, Joan Foster, Susan Howell (Lynn's Team Chairperson), Jane Lavoie (Lynn's attorney) and Parent met in Lynn to discuss and sign the new Settlement Agreement drafted by Lynn, and review Student's IEP (PE-9; PE-10; PE-34). The Team meeting attendance sheet also lists Jennifer Collado (LPS Educational Team Facilitator) and Jessica Goldstein (LPS Lit/ LA Teacher) as being present at the meeting at LPS (PE-34).
14. The Parties executed a second Settlement Agreement (Agreement) covering the period between September 1, 2012 and June 12, 2017 (Student's twenty second birthday). The Agreement refers to this time period as the "Contract Period" (PE-9).
15. Through the Agreement Lynn agreed to solely fund Student's placement at the LPS, Parents' placement of choice, for the 2012-2013 and the 2013-2014 school years. Student attended LPS consistent with the Parties' Agreement for both years (PE-9).
16. As reflected in Paragraph #3 of the Settlement Agreement, for the period from July 1, 2014, through June 12, 2017, the remainder of the Contract Period, the Agreement provided that

At the conclusion of the Two Years, the Student's placement at the Private School will end. For the remainder of the Contract Period, Lynn will have no obligation to provide or fund private special education services of any kind or nature. If the Team determines that the Student needs additional special education services at the conclusion of the Two School Years, the Student will be placed in a public special education program within Lynn for the remainder of the Contract Period as needed to assist the Student's transition to adult services (PE-9).

17. Paragraph #4 of the Agreement provided that

The parties agree that by paying the Tuition for the Student's day placement at the Private School for the Two School Years, providing Transportation for the Two School Years, and providing a public special education program within Lynn as needed for the remainder of the Contract Period, Lynn will meet in full its obligation to provide a free and appropriate public education to the Student for the Contract Period; Lynn has no responsibility or obligation to provide or fund any other services of any kind or nature to the Student and/or Parents for the Contract Period. Parents hereby waive any claim for services or funding during the Contract Period above and beyond the agreed upon tuition to the Private School for the Two School Years, Transportation for the Two School Years, and public special education services within Lynn as needed for the remainder of the Contract Period. The Parties further agree that by paying the Tuition for the Student's day placement at the Private School for the Two School Years, providing Transportation for the Two School Years, and providing a public special education program within Lynn as needed for the remainder of the Contract Period, Lynn will fulfill its obligation to provide the Student a free appropriate public education and will therefore be held harmless against any future claims to provide education services of any kind to the Student (PE-9).

18. Paragraph #6 reflects the Parties understanding that Parents relinquished Student's placement pending appeal during the pendency of any dispute beyond the Two School years, that is, after June 2014 (PE-9).

19. Paragraph #9 of the Agreement provided that

Except as otherwise provided in this Settlement Agreement, and except to enforce the terms of this Settlement Agreement, the parties release and forever discharge each other from all debts, demands, actions, causes of action, suits, liabilities, claims of procedural violations, claims for compensatory services and any and all claims of any kind by any party for payment of attorneys' fees and other costs and/or damages, concerning the provision of special education services to the Student, up to the date of this Settlement Agreement (PE-9).

20. Paragraph #10 further provides

The Parties to this Settlement Agreement are represented by legal counsel and understand and acknowledge that they are waiving specific rights which accrue to them pursuant to M.G.L. ch. 30A and 71B, 20 U.S.C. 1400 et seq., and Section 504 of the Rehabilitation Act of 1973 (PE-9).

This paragraph is the same as Paragraph #10 appearing in the Parties' previous 2010 Agreement, although Parent was not represented by counsel in 2012 (Parent). The Parties further agreed that the terms of the Settlement Agreement would be confidential. Both Parents signed the Settlement Agreement on May 15, 2012 and Cheryl Meninno of Lynn signed it on May 16, 2012. A copy of the signed Agreement was forwarded to Parents at the end of May 2012 (PE-9; PE-10). Ms. Howell was also made aware of this Settlement Agreement (Parent).

21. Parent testified that she understood that signing the Agreement would allow Student to attend LPS for the two last years of high school and she understood that Lynn would be solely responsible to fund said placement (Parent). She further testified that she had not been able to afford legal counsel at the time and was therefore, unrepresented (Parent). However, Parent contacted her former attorney and let him know how she felt about the Agreement. After communicating with Lynn to request a signed copy of the Settlement Agreement, Parent received a copy of the Agreement on May 25, 2012 (PE-10; Parent).
22. Student's Transition Planning was initiated in September 2012 as reflected through the email communication between Parents and Ms. Howell for the period between September and November 2012 (PE-11). During this period Student underwent academic and educational assessments, and also a vocational assessment through the Northeast ARC, Heritage Industries (PE-16). The evaluations were funded by Lynn (Parent).
23. Student's Team convened on November 27, 2012, to discuss the results of his vocational assessments and transition planning. Present at the meeting were: Kathy Kelly (Transition Director at Northeast ARC); Caitlin Casale (Heritage Industries), Susan Howell, Parent, Student and other LPS Team members. Dr. Meninno was neither present at this meeting, nor was she a Team member (PE-11; Parent). The

Team drafted a Transition Plan for Student which included Student's Vision Statement,

My vision for the future is to be as independent as possible and to have a meaningful job that I am good at and social life. I am very eager to work and make my own money to spend. I want to explore different job options now. I don't know how my disabilities will impact me in the future and would like someone to help me figure that out. I would like to develop ways to cope with these challenges and to learn to communicate what I need to help me. I want to be able to know my own community. I would like help with exploring transportation options that I am going to need to get myself around because I can't drive. My big goal after high school is to be able to live away from home at a school that will help me make friends, work and live as independently as I can (PE-11).

24. The Transition Planning Form (TPF) resulting from this meeting stated that Student

...continues to have complex medical and medication needs due to his ADEM, Seizures, Anxiety, Intellectual Disability, Complex Learning Disabilities and Developmental Delays. The complexity of these require continuing in his programs, including but not limited to a strong transition, vocation/job coaching program, continued academic program post high school including summer programs that meet his needs and various support programs that will help [Student] gain safe independence, these programs are basic math, reading, social and independent skills, basic money management and public safety and transportation as well as self-advocacy.

[Student] has limited understanding of "realistic career path in goals". He will need continued guidance and support to make realistic and positive choices for a job and social thinking. [Student] needs exploration and job training as well as work place readiness. [Student] remains at risk and will need to learn many basic safety skills to become more independent in a job and within his community (PE-11).

25. The Action Plan drafted by the transition Team was designed to address Student's job skill training and coaching as well as limit regression (PE-11). It included the following:



- He will participate in a specialized vocational program as part of his high school curriculum [to] build a strong vocational foundation;
- Through the program [he] will have assistance in obtaining a paid job/ internship PRIOR to graduation from high school;
- He will participate in a job coaching program and will explore as many opportunities as needed;
- Through participation in the vocational and additional programs [he] will learn basic living skills, safe use of public transportation, independence, basic money and time management as well as social thinking and building peer relationships (PE-11).

26. As part of the Transition Plan, Student's transition program would address basic money management, reading skills and independent basic living skills, while living away from home. Student would explore two year transition programs, post high school, and including summers, so as to gain social growth, independent basic living skills and basic academics such as reading, math and money management. He would continue to participate in community programs that offered social skill readiness, independent skills support and job coaching with paid employment opportunities. Career exploration would focus on

...hands on vocational skills, work place readiness, including social skills, and acquiring the necessary skills for safe decision making and learning public transportation skills. This will be achieved by participating in a paid internship program through his participation in a program such as Heritage/ Northeast ARC and also within his community (PE-11).

27. The Team convened again between February 7, 2013 and March of 2013, to re-evaluate Student's Transition Plan and the potential Transition Programs appropriate for Student. The IEP recommended participation in summer programming and continued Student's education at LPS through the following school year (PE-12). The Team further agreed that Student required participation in a full-time transition program and Team suggestions included:

Embark at Salem State, Sore at Gordon College and Project Forward at North Shore Community College. Susan Howell highly recommended SOAR for [Student]. Other Team members also suggested Threshold, Lesley College and the Transition Program through Middlesex Community College (PE-12).

28. Parent communicated via email to Lois Gould and Robert Owens of LPS, that if Student passed his MCAS, he would be deferring his high school diploma until he turned 22 years old. Also, anticipating that the 2013-2014 school year would be Student's last year at LPS, Parent requested advancing Student's Team meeting to October 2013 (PE-13).
29. On July 15, 2013, Parent notified Susan Howell that she and Student would be touring Middlesex Community College. Parent further notified Ms. Howell that she had been awarded guardianship of Student (PE-13). Ms. Howell acknowledged awareness of the information contained in Parent's email in a response dated August 9, 2013. Ms. Howell's response was silent regarding Student's tour of Middlesex Community College (PE-14).
30. During the summer of 2013, Student attended a vocational program through the Northeast Arc, organized by Heritage. Student was assigned a job coach and he worked on work skills and life skills. Student would attend the Heritage Program again during school vacation and during the summer of 2014 (PE-15).
31. Student attended LPS for the 2013-2014 school year fully funded by Lynn.
32. Via email to the Team dated September 25, 2013, Parent requested that Student's Team convene on the morning of October 16, 2013, as Parent and Student would be visiting the SOAR Program at Gordon College later that day. Parent noted that Student and Parent would start visiting programs mindful of Student's desire to live as independently as he could, attend college and work (Parent). Parent expressed her interest in exploring programs such as Milestones, SOAR and Middlesex Community College since, in her view, Student did not "meet many of the criteria for the more college bound programs" (PE-15). Parent also noted that in addition to attending the vocational summer program, Student had successfully maintained his four hour, weekend job and was taking "The Ride" to and from work. He was also taking "The Ride" to his ARC Social Skills program, albeit experiencing some anxiety about "The Ride" (PE-15).
33. Student's Team convened on October 16, 2013 to further discuss Student's Transition Plan (Parent).
34. Student attended a Transition Program Information Session at Middlesex Community College on November 14, 2013 (PE-17). Parent and Student also attended an Open

House at the SOAR Program on October 16, Project Access/NSCC on October 29, 2013, and later visited Threshold Program/ Lesley on December 2, 2013 (PE-17).

35. On December 3, 2013, Student applied to the Threshold Program (PE-17).
36. Student's Team met again on February 6, 2014 at LPS. Present at the meeting were: Eleni Carayannopoulos, Ms. Howell, Parent, Student, Mr. Wong (Student's LPS counselor), Amalia Atwater-Rhodes (LPS language arts teacher), and Lois Gould. The IEP promulgated pursuant to this meeting offered Student services at LPS through June 6, 2014, Student's anticipated graduation date (PE-30).<sup>4</sup> The IEP notes that a Chapter 688 referral for DDS had been made by Lynn, and contains Student's transition planning vision, quoting Student's statement that he

...could see [himself] graduating from LPS in June... [his] vision is to go to a college that helped [him] with more independent work skills and to develop [his] interests...in art (PE-30).

According to Parent, several issues and items in the IEP were not discussed, such as Student's Vision (Parent).

37. Parent's comments to the proposed IEP were forwarded on February 10, 2014 (PE-18). She wrote again on February 14, 2014, requesting the following additional edits to the transition planning section of the draft IEP:

[Student] will attend a transition program within a community college;  
Participate in at least 1 social program on campus;  
Learn to navigate the college campus with minimal assistance;  
Will have internships; paid or non-paid;  
Will attend a vocation[al] training program for his extended year (PE-18).

38. The Team reconvened on or about March 11 or 13, 2014, at LPS to discuss Student's transition plan. The Team discussed three programs presented by Susan Howell, the only representative from Lynn present at the meeting. The programs presented were: Embark, SOAR and a third program being developed in Lynn that did not yet have a

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<sup>4</sup> A hand written note in this IEP contains two asterisks calling for addition of a "travel form" and for Student to "attend a community college program, participate in job training, internships" (PE-30).

name<sup>5</sup>. The Team also discussed the Middlesex Community College Transition Program and Lesley's Threshold Program (Foster). The Fresh Start Program was not mentioned by name as it was new and Ms. Howell did not know much about it (Howell, Foster). The Team also did not discuss the Settlement Agreement between Parent and Lynn although LPS' business office was aware of the Settlement Agreement (Foster).

39. During the March 2014 Team meeting Student discussed his feelings about each one of the programs he visited, noting his preference for the Transition Program at Middlesex Community College. Ms. Howell expressed her opinion that Parent/ Student were asking for a Cadillac and Lynn was only responsible to offer the equivalent of a Chevy. Parent understood this to mean that Lynn would deny Student's program choice "based on financial cost". Parent further understood Lynn's position to suggest prejudice based on their previous Settlement Agreement (PE-19; PE-20; PE-34; Parent). At the conclusion of the meeting given Student's preference and apparent appropriateness of the program, many of the participants supported consideration of the Middlesex Community College Transition Program and Ms. Foster recommended that Parent/ Student apply to reserve a place for September 2014 (Foster, Owens).

40. No IEP was forwarded by Lynn between February 6 and March 3, 2014, and no specific placement determination was reached (Parent). Also, LPS did not develop any IEPs going beyond early June 2014 (Parent).

41. Parent wrote to Dr. Meninno on March 18, 2014, reminding her that Student was eligible for services through his twenty- second birthday and advising her that the Team had agreed that he would not graduate at the end of the year since he had not yet met many of his goals. Instead, Student would attend a transition program. Parent further stated that they had exhausted efforts in looking at potential programs (such as SOAR, Embark and Project Access) which had not turned out to be appropriate for Student. However, Student had been accepted to Middlesex Community College Transition Program, an out-of-district program. Parent requested that Lynn continue to provide Student with out-of-district special education transition services and fund the aforementioned placement from August 2014 through June 2016, with transportation (PE-21; PE-35; Parent).

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<sup>5</sup> Witnesses referred to this program during the Hearing as the "nameless program". This program later came to be known as Fresh Start.

42. Sometime between March 18 and March 25, 2014, Parent received a telephone call from Dr. Meninno during which Dr. Meninno stated that she would have to “think of a creative way to fund [Parent’s] request” for placement of Student at Middlesex Community College Transition Program. Parent asked Dr. Meninno to contact Kathy Kelley of the Northeast ARC because she was familiar with Student’s transition plan and Student’s case as he was a client of the ARC (Parent).
43. In an email exchange between Dr. Meninno and Parent, Dr. Meninno denied Parent’s request for funding of the Middlesex Community College Transition Program on the basis that Lynn would not fund college programs (SE-22). In an email exchange dated April 28, 2014, between Parent and Dr. Meninno, Parent provided the breakdown of tuition costs including the two programs suggested by Lynn: Embark and SOAR, both of which were non-certificate programs and were located on college campuses. According to Parent, denial of Student’s choice program had been for financial issues (Parent). On April 29, 2014, Parent requested a meeting with Dr. Meninno (Parent).
44. In May 2014, Student was accepted to Middlesex Community College Transition Program and he received a \$2,500 scholarship award toward his tuition (Parent’s Hearing Request). The total amount for Student’s two year tuition at said program would be \$10,000 (PE-26; Parent). Parent accepted the Middlesex Community College Transition Program placement in May 2014 (Parent). Meanwhile, also in May 2014, Lynn continued developing an in-district Transition Program which it later called Fresh Start (Meninno).
45. Student, Parent, Dr. Meninno and Ms. Howell met on May 8, 2014, to discuss the Team’s recommendations, Parent’s/ Student’s preference for Middlesex Community College Transition Program and Lynn’s denial of said request (PE-23; Parent). Katherine Parmar of the Massachusetts Rehabilitation Commission (MRC), and Robert Owen (School Adjustment Counselor) and Cynthia Manning from LPS participated via telephonic conference (*Id.*). Mr. Owen testified that his role during the conversation was to present Student’s profile as a learner since, as Dr. Meninno stated, Student had not been receiving his education in Lynn and nobody in Lynn really knew him (Owens, Meninno). To facilitate Student’s placement at Middlesex Community College Transition Program, MRC offered to cover transportation expenses for the two years that Student attended, and Student offered to contribute his \$2,500 Elsie Frank Scholarship (Parent).

46. On May 13, 2014, Dr. Meninno communicated Lynn's denial of Parents'/Student's request for funding of Middlesex Community College Transition Program, noting that Lynn would not fund college options for its students. Also on May 13, 2014, Lynn reiterated availability of an in-district program (PE-24).
47. On May 15, 2014, Parent wrote to Senator McGee, seeking his assistance in interceding with Lynn so as to obtain funding for Student's placement at the Middlesex Community College Transition Program (PE-25). She also contacted the Mayor of Lynn, her aides, Teury Y. Marte (Area Director, MRC) and Congressman Tierney, all of whom contacted Dr. Meninno on Student's behalf (Parent).
48. Parent emailed Dr. Meninno again on June 16, 2014, breaking down the financial implications of funding for different transition programs, seeking funding for her program of choice which was supported by Student's Team, informing her of the response received from Senator McGee's office, and requesting a meeting (PE-26).
49. By June 2014, Student had passed his science, math and ELA MCAS (PE-35). He had also completed the core curriculum requirements for high school. However, he deferred acceptance of his diploma so that he could pursue additional transition services through his twenty-second birthday. As such, Student received a certificate of completion in June 2014, instead of a diploma (Parent).
50. Upon learning that Student had deferred<sup>6</sup> his diploma, and based on the information Lynn had on Student, Dr. Meninno directed Ms. Howell to draft an IEP offering Student participation in the Fresh Start Program (Meninno, Howell).
51. An IEP with a Team meeting date of June 24, 2014, promulgated by Lynn, offered Student continuation of transitional services at Lynn's Fresh Start Transition Program (Fresh Start), developed in collaboration with the North East ARC, located at the Lynn Vocational and Technical Institute Annex. The proposed IEP covered the period from September 3, 2014 through June 5, 2015. Student's program at Fresh Start would address independent living skills, personal/social skills, life skills, and vocational and functional academics (PE-35).
52. Dr. Meninno wrote to Student on June 26, 2014, congratulating him on his graduation from LPS, enclosing the proposed IEP and offering him placement at the Fresh Start Program (PE-27).

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<sup>6</sup> Parent used the term "deferred the diploma" to mean that Student had rejected his diploma at that time.

53. On June 30, 2014, Parent rejected Lynn's proposed IEP and placement. Via separate letter, also dated June 30, Parent noted that Lynn's proposed program had not been discussed prior to June 26, 2014. Parent again requested a meeting inclusive of LPS staff (PE-28; PE-29).
54. On July 10, 2014, Dr. Meninno wrote to Parent quoting the terms of their Settlement Agreement, denying Parent's request for funding and offering to further discuss the Fresh Start Program (PE-28). Parent responded on July 15, 2014, stating that she was aware of the Settlement Agreement which had been presented to Parent "under duress and without [her] ability to hire counsel a second time" (PE-30). Parent testified that at the time of entering into the last Settlement Agreement she lacked the financial means to retain legal counsel (Parent). Parent again rejected Lynn's IEP and placement offers because the IEP contained changes that had not been the result of discussions at a Team meeting. Parent requested a meeting inclusive of the Superintendent, Mayor Kennedy and Ms. Marte (MRC) noting that she "would not be reluctant to pursue this matter further" (PE-30). Parent also contacted the Mayor's Office and Congressman Tierney's Office during July 2014, seeking support for her position (PE-31). She also sought assistance through Andy Fila, a retired School Principal in Lynn, whom the Mayor had asked to meet with Dr. Meninno, but said meeting never occurred (Mr. Fila had contacted Lynn while Dr. Menino was on vacation) (PE-31; PE-35; Meninno). In her letter, Parent also requested that the Parties engage in a BSEA mediation, which request Lynn rejected (PE-31; PE-35).
55. On July 15, 2014, Parent sent a letter to Dr. Meninno rejecting Lynn's proposed program and placement at Fresh Start (PE-35). She explained that Student was refusing his diploma because he required additional transitional services through his twenty-second birthday (PE-35; Parent). According to Parent, up to this point, Lynn had not stated that its refusal to fund Middlesex Community College Transition Program was due to the Parties' 2012 Settlement Agreement (Parent).
56. On July 23, 2014, Dr. Meninno emailed Parent information regarding the Fresh Start Program which pamphlet was dated May 2014 (PE-32). The information pamphlet notes that Fresh Start is designed for students with mild cognitive, learning and/or social weaknesses who completed high school but still needed additional services to transition into adulthood. The program focused on further development of self-help skills, functional academics and community living skills with an emphasis on: safety awareness, travel training, social skills, interpersonal skills, self-advocacy, independent living skills, cooking skills and leisure activities. The vocational piece of

the program offered students off-site work opportunities twice per week to develop and practice employment skills in preparation for future DDS placement and services (PE-32). The Fresh Start Program was developed by Lynn in coordination with Kathy Kelley of the Northeast ARC, with whom Lynn has a contract for consultation around transition planning, vocational education, sexual education, and the like (Meninno).

57. Dr. Meninno further testified that the Fresh Start Program was connected to the North Shore Community College in Lynn, but it is a Lynn program housed within the Annex of the Lynn Vocational Technical High School. Although exposed to vocational programs, students in the Fresh Start Program do not receive a vocational certificate per se (Meninno). All students at Fresh Start would be required to complete a vocational assessment. The program was staffed by Lisa Mageary, a special education teacher, as well as a paraprofessional (PE-32; PE-33).
58. Students in the Fresh Start Program would start the day with a morning meeting followed by academics for the workplace which focused on developing public speaking skills, reading and writing skills, money skills, banking, budgeting, time management, computer skills and organizational skills, all with a focus on a more adult functioning model as opposed to more traditional academics (PE-32; Meninno). Students then received employment training for development of workplace social skills, safety, proper attire, resume development, interviewing skills, learning to be a “team player”, career exploration and participating in business tours. Students also engage in transition skills courses which provide self-advocacy, health and well-being skill development, shopping and cooking, skills to develop and sustain peer relationships, interests and hobbies that last, and discussing current events. Unlimited work, job-shadowing and internship opportunities would be developed through the North Shore ARC (PE-32; Meninno).
59. Following an Open House in August 2014, Fresh Start launched in September 2014. At present the program services a total of ten students, 8 males and two females, and unlike Student, many of the students attending Fresh Start have been unable to pass MCAS (PE-33; Meninno). Parent testified that she did not recall anything related to an Open House or anything about an informational session in the spring of 2014 regarding this program (Parent).
60. Middlesex Community College Transition Program is a post-secondary program described as follows:



- Two year non-credit certificate program designed for students with significant learning disabilities who would find college level academics too challenging, even with extensive supports.
- Prepares students for Office and Business Support occupations through specialized coursework.
- Provides on-the-job training through internship placements in competitive business settings.
- Focuses on good work habits and personal development and communication skills.
- Teaches Job Seeking and Job Survival Skills.
- Is nationally recognized and the only program of its kind located in a community college in Massachusetts. (See [www.middlesex.mass.edu/transitionprogram](http://www.middlesex.mass.edu/transitionprogram)).

61. Student began attending Middlesex Community College Transition Program in mid-August 2014, and remains there at present (Parent).

62. As noted above, Parent filed a Hearing Request with the Bureau of Special Education Appeals on September 26, 2014, seeking placement of Student at Middlesex Community College Transition Program and reimbursement for expenses associated with his unilateral placement there. In her Hearing Request Parent stated that Lynn had failed to comply with the Massachusetts Special Education Regulations, 603 CMR 28.00, and asserted that Lynn had “pre-determined” Student’s placement,

...based on a settlement agreement that did not address any future transition needs or goals and was signed under duress.

63. Parent requested that Lynn pay the total tuition cost of \$7,500 which represents the balance due to Middlesex Community College Transition Program after Student’s \$2,500 scholarship is applied to the \$10,000 total for his two years at said program. Parent also seeks reimbursement of the \$440.00 she paid as part of Student’s first semester tuition (Parent’s Hearing Request).

## Conclusions of Law:

### I. Legal Standards

Pursuant to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3) and Rule 17B of the *BSEA Hearing Rules for Special Education Appeals*, a hearing officer may allow a motion to dismiss if the party requesting the hearing fails to state a claim upon which relief can be granted. This rule is analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure and as such hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim. Specifically, what is required to survive a motion to dismiss “are factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”<sup>7</sup> In evaluating the complaint, the hearing officer must take as true “the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff’s favor.”<sup>8</sup> These “[f]actual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . .”<sup>9</sup>

### II. BSEA Jurisdiction

The BSEA jurisdiction is limited consistent with pertinent federal and state law and regulations, as described below. Hearing Officers have only the power expressly granted by the statutes and regulations that establish the agency and determine its roles and responsibilities.<sup>10</sup> The IDEA expressly grants special education Hearing Officers jurisdiction over issues relating to “the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child”. 20 U.S.C. §1415(b)(6)(A).

Pursuant to Massachusetts law, the BSEA holds adjudicatory hearings to resolve

disputes between and among parents, school districts, private schools and state agencies concerning: (i) any matter relating to the identification, evaluation, education program or educational placement of a child with a disability or the provision of a free and appropriate public education to the child arising under

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<sup>7</sup> *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

<sup>8</sup> *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

<sup>9</sup> *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

<sup>10</sup> *Cf. Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 378 (1994) (discussing limited jurisdiction of federal courts).

this chapter and regulations promulgated hereunder or under the Individuals with Disabilities Education Act, 20 U.S.C. section 1400 et seq., and its regulations; or (ii) a student's rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. section 794, and its regulations. M.G.L. ch. 71B, § 2A(a).

The applicable state regulation, 603 CMR 28.08(3)(a), further describes those issues on which parents and school districts may request hearings, as matters

concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protection of state and federal law for students with disabilities [as well as] any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973, as set forth in 34 CFR §§ 104.31 through 104.39.

The BSEA's jurisdiction therefore is limited by the parameters set forth in the IDEA, M.G.L. ch. 71B and the regulations promulgated under those statutes, as well as Section 504 of the Rehabilitation Act of 1973.

### **III. Discussion**

Lynn argues that the Parties entered into a legally binding Settlement Agreement which determined Lynn's responsibilities with respect to Student's educational placements for the period from May 25, 2012 through June 12, 2017. Furthermore, Lynn asserts that the rights and responsibilities delineated in the Parties' Settlement Agreement fall within the purview of the BSEA, giving the BSEA subject matter jurisdiction.<sup>11</sup> Relying on the BSEA's jurisdiction, Lynn seeks dismissal of Parent's claim based on the plain language of the agreement<sup>12</sup> between the Parties, and asserting that Parent failed to state a claim on which relief can be granted.

Parent agrees that the BSEA has jurisdiction to hear the claim but opposes dismissal and asserts that the BSEA should set aside the Settlement Agreement and award the relief sought.

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<sup>11</sup> Defined within the IDEA as "the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child". 20 U.S.C. 1415(b)(6)(A)).

<sup>12</sup> See *In re: Longmeadow Public Schools* (Ruling on Longmeadow's Motion to Dismiss), 14 MSER 249 (Crane, 2008); *In Re: Peabody Public Schools*, 15 MSER 154 (Crane, 2009); *In Re: Marlborough Public Schools*, BSEA #11-3650 (Figueroa, 2011); *In Re: Norwood Public Schools*, 11MSER 161 (Crane, 2005).

Parent's Hearing Request addresses two separate Settlement Agreements entered between Parents and Lynn; one in 2009 and another in 2012. Since her concern primarily involves the 2012 Settlement Agreement, I only touch briefly on the allegations regarding the first Agreement as background information, and because Parent raised it in her defense against Lynn's Motion to Dismiss.

Parent argued that Lynn had failed to fulfill its responsibilities pursuant to the 2009 Settlement Agreement, to offer Student a FAPE, when it failed to fully fund Student's out-of-district placement. Under that Agreement Lynn agreed to partial payment of Student's tuition at LPS, that is, the Parties entered into a "cost-sharing" agreement. In late 2011, Parent argued that said arrangement was illegal and as a result, Student risked losing his placement at LPS, where he was making effective progress.

At the time the Parties entered into the 2009 Agreement, Parent was represented by counsel. She signed the agreement voluntarily, including acknowledging that she had consulted with counsel and that she understood the terms therein. Lynn fulfilled its responsibilities pursuant to the 2009 Agreement by paying its share of LPS tuition. It was only when LPS changed its position regarding Lynn's and Parent's contribution to the tuition, that Parent made a new, different, financial arrangement with Lynn so as to maintain Student's placement at LPS. Parent acknowledged that Lynn had offered Student the opportunity to return to the District, something Parent rejected in favor of continuation of the out-of-district placement through Student's completion of high school. After Parent had contacted several City and State officials, Lynn agreed to Parent's request to fully fund Student's out-of-district placement through twelfth grade and, should additional services be needed thereafter, provision of same in Lynn post 2014. The Parties memorialized this new arrangement through in 2012 Settlement Agreement (PE-9).<sup>13</sup>

When signing the 2012 Settlement Agreement with Lynn, Parent knew that she was executing an agreement that afforded Student two more years at her school of choice (through 2014) in exchange for any future out-of-district services. Father, who is a lawyer, also signed the agreement after requesting two amendments. Parent asserts that the 2012 Agreement was signed under duress, because it was the only way to keep Student at LPS through the end of high school.<sup>14</sup> Nothing in the record shows that Parent was threatened or

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<sup>13</sup> I note that the 2012 Settlement Agreement between Parents and Lynn resulted from LPS' apparent repudiation of the 2009 arrangement Ms. Rosoff had made with the family, which was separate from the Settlement Agreement between Parents and Lynn.

<sup>14</sup> Parent's Hearing Request states, "When the District was informed that [Student] would lose his placement due to the illegal terms and if the district did not pay the full tuition as required by the DOE and OAG, the district's response was "he can come back to the district". [Student] was making great progress and I could not risk the

coerced into doing anything that was not of her own free will. I find that Parent presented no persuasive evidence that the Settlement Agreement was signed under duress.<sup>15</sup>

Parent also argued that in 2012, she could not foresee the needs Student would have at the end of high school. This argument is not persuasive as the Settlement Agreement contemplates the fact that Student might require services through his twenty-second birthday, that is, June 2017, even if the specific services could not be foreseen. To have predetermined the specific services would have been inappropriate.

The Parties' agreement regarding services between 2014 and 2017 can be found at paragraphs #3 and #4 of the 2012 Settlement Agreement. Said paragraphs contained the following language:

At the conclusion of the Two Years, the Student's placement at the Private School will end. For the remainder of the Contract Period, Lynn will have no obligation to provide or fund private special education services of any kind or nature. If the Team determines that the Student needs additional special education services at the conclusion of the Two School Years, the Student will be placed in a public special education program within Lynn for the remainder of the Contract Period as needed to assist the Student's transition to adult services (Paragraph #3, PE-9).

The parties agree that by paying the Tuition for the Student's day placement at the Private School for the Two School Years, providing Transportation for the Two School Years, and providing a public special education program within Lynn as needed for the remainder of the Contract Period, Lynn will meet in full its obligation to provide a free and appropriate public education to the Student for the Contract

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consequences of taking him out of a program where he was making such effective progress. I did reach out to Senator McGee who in turn reached out to Dr. Meninno. The district drafted a 2<sup>nd</sup> agreement for me to sign. Without the financial ability to retain a lawyer, I met with the City Attorney and signed the new Agreement that had been drafted by the City attorney. I am sure that you can understand the extreme duress and position I was in and like any parent in this position would have done anything to secure the placement for their child. Additionally, at the time this 2<sup>nd</sup> agreement was signed, [Student's] future needs, desires, goals and transition needs could not have been known (Parent's Hearing Request).

<sup>15</sup> "... A condition where one is induced by wrongful act or threat of another to make contract under circumstances which deprive him of exercise of his free will. *Hyde v. Lewis*, 25 Ill. App. 3d 495, 323 N.E. 2d 533, 537. Includes any conduct which overpowers will and coerces or constrains performance of an act which otherwise would not have been performed. *Williams v. Rentz Banking Co.*, 112 Ga. App. 384, 145 S. E. 2d 256, 258." Black's Law Dictionary, Fifth Edition, West (1979).

Period; Lynn has no responsibility or obligation to provide or fund any other services of any kind or nature to the Student and/or Parents for the Contract Period. Parents hereby waive any claim for services or funding during the Contract Period above and beyond the agreed upon tuition to the Private School for the Two School Years, Transportation for the Two School Years, and public special education services within Lynn as needed for the remainder of the Contract Period. The Parties further agree that by paying the Tuition for the Student's day placement at the Private School for the Two School Years, providing Transportation for the Two School Years, and providing a public special education program within Lynn as needed for the remainder of the Contract Period, Lynn will fulfill its obligation to provide the Student a free appropriate public education and will therefore be held harmless against any future claims to provide education services of any kind to the Student (Paragraph #9, PE-9).

The Agreement clearly contemplates the likelihood that Student will need services through his twenty-second birthday. In exchange for Lynn's agreement to fully fund the LPS placement, Parent agreed that the remainder of Student's services post-LPS would be provided in Lynn.

In this same vein, Parent also argued that the terms of the 2012 Settlement Agreement were too vague and ambiguous to enforce generally and especially as to the period post-high school, because the Parties could not anticipate what Student's needs would be at that time. As such she opined that the Settlement Agreement was unenforceable. A simple reading of the Agreement shows that there is nothing vague or ambiguous in the paragraphs *supra*, or in the rest of the Settlement Agreement. In looking at the language, it is evident that the intention, responsibilities and expectations of the Parties were clearly outlined as discussed below.

Student's Team at LPS agreed in 2014 that Student would need transitional programming beyond high school. Moreover, based on the programs discussed at the Team meetings in 2013 and 2014, Parent and Student had selected a program which appeared to be appropriate for Student albeit, out-of-district. Parent argued that Ms. Howell who was empowered to commit Lynn's financial resources, had presented three different out-of-district program options during the Team meetings at LPS. The programs proposed by the Team and viewed by Parent and Student had all been outside Lynn. According to Parent, it was disingenuous for Lynn to present an in-district program at the proverbial "twenty-fifth hour". Parent considered Lynn's actions to have muddied the language of their Agreement making it vague and ambiguous. According to Parent, in having her look at outside placements, Lynn had failed to abide by the terms of its own agreement, causing Parent significant confusion.

Parent testified that at first she “was under the belief that she was not able to view other programs not ‘within Lynn’”; but in looking at the programs discussed at the Team meetings, Parent thought that the services to be offered by Lynn post-high school did not necessarily have to be provided within Lynn per se.

When evaluating Parent’s allegations in light of her testimony, it is clear that rather than the terms of the agreement being “vague and ambiguous”, Parent took Lynn’s *actions* in considering post-high school programs, to create ambiguity as to what Parent/ Student were free to consider. Parent testified that what later came to be known as the Fresh Start Program, was not discussed in 2013 when she and Student began to look at Transition Programs (Parent). This, then nameless program, was not brought to their attention until the spring of 2014, after she and Student had visited and selected the program Student ultimately attended (Parent, Owen, Howell, Foster, Meninno). Parent testified that by the time she learned of this program, the Team that had been convened at LPS had endorsed the Middlesex Community College Transition Program (*Id.*).

The evidence demonstrates that Ms. Howell provided the names of out-of-district programs for consideration at the Team meetings in 2014 but she also mentioned the fact that Lynn was creating a program in-district; a program yet unnamed (Foster, Owen, Howell). Ms. Howell and Dr. Meninno testified that the program was then being developed, but was not finalized until the spring of 2014, and that it was in place by September 2014. Parent conceded that she was aware of the Fresh Start Program and of Lynn’s offer to place Student there prior to Student’s start date at Middlesex Community College Transition Program (Parent, Howell, Meninno).

Lynn never offered an out-of-district program post LPS, and it did not lose its contractually bargained for right to offer an in-district program simply because the Team discussed out-of-district programs. Moreover, Lynn’s placement offer was timely as it was made approximately two months prior to the September start date and the program appears to be appropriate.

Lynn’s actions were consistent with the plain language in the Parties’ 2012 Settlement Agreement, and under the Settlement Agreement it was not required to offer an out of district transition program for Student. The language set forth therein is clear and unequivocal as to the understanding and responsibilities of the Parties. See *In Re: Marlborough Public Schools*, BSEA # 11-3650 (2011).

As such, Lynn correctly argues that where as in the instant case, the language of the agreement is unambiguous, “the contract must be enforced according to its terms.” See *Alison H. v. Byard*, 163 F. 3d 2, 6 (1<sup>st</sup> Cir. 1998). The language in the agreement is clear that in order to receive full funding for two years at LPS, any further education beyond those two years and through Student’s twenty-second birthday would be provided in Lynn. Again, the agreement, specifically stated

Parents hereby waive any claim for services or funding during the Contract Period above and beyond the agreed upon Tuition to the Private School for the Two School Years, Transportation for the Two School Years and public special education services within Lynn as needed for the remainder of the Contract Period” (PE-9).

The agreement speaks for itself. Mother understood its terms, and although she may not have then (or now) been pleased with all terms, she voluntarily agreed to them. Having full guardianship of Student beyond his eighteenth birthday, she also committed Student to its terms. Father, who is an attorney, reviewed, made suggestions for changes and also signed the Agreement (PE-8; Parent). In seeking to extricate herself from the contract, Parent did not allege a material change in circumstances regarding Student’s needs. On the contrary, she testified that Student had made effective progress during his years at LPS and through the summer programs attended (Parent).

When entering private Settlement Agreements, Parties commonly waive rights to which they would otherwise be entitled under the IDEA (e.g., stay put rights). This is done in consideration of the alternative, which is to proceed to a BSEA hearing, a process of which Parent was fully aware as she had previously filed a Hearing Request in 2009 (Parent).

At the time Parent entered into the 2009 Settlement Agreement, she was represented by counsel. That Settlement Agreement called only for partial funding of Student’s initial year at LPS (Parent). Through the second Settlement Agreement, Student received *full* (as opposed to partial) funding including transportation for two more years at LPS, i.e., 2012-2013 and 2013-2014 (PE-9). Parent was not represented by counsel when she negotiated the terms of the second Settlement Agreement with Lynn, but the final draft of the Agreement was in fact reviewed by Father, an attorney (Parent).

Moreover, consistent with Paragraphs #3 and #4 of the 2012 Settlement Agreement, once Parent notified Lynn that Student would not accept his diploma and instead wished to pursue two more years of transitional services, Lynn complied with the request. Relying on the



Settlement Agreement, and considering that it had already partially performed the terms of the Agreement by fully funding the two years at LPS, Lynn offered Student transition services in-district, which services met the recommendations of the Team. In June 2014, Lynn drafted an IEP offering Student placement in September 2014 at the Fresh Start Transition Program in Lynn, which according to Dr. Meninno, was developed with Student (and similar students) in mind (Meninno).

Support for Lynn's position can be found in a recent First Circuit Court of Appeals determination in *South Kingstown School Committee v. Joanna S. et al*, #14-1177 (Barron, 12/09/2014), in which the Court upheld the portion of the District Court's finding that a settlement agreement partially relieve[d] the school of its obligation to perform some of the evaluations sought by the parent. The dispute in *South Kingstown School Committee* centered on what the parent had given up through a settlement agreement in which she relinquished the right to five of nine independent evaluations in exchange for the School Committee funding private placement of the student and conducting four of the nine evaluations originally requested by the parent. Following placement of the student, the parent requested ten additional evaluations. Judge Barron explained that a party's consent to relinquish certain rights through a settlement agreement

[W]ould be meaningless if [the party] could nonetheless turn around the next day and demand the foregone [terms] anew. We cannot accept [this] reading of the Agreement, as we find it difficult to suppose the parties intended such a meaningless outcome of their negotiations. See *AccuSoft Corp. v. Palo*, 237 F.3d 31, 40 (1<sup>st</sup> Cir. 2001) (explaining that intent of the parties is one factor in interpreting a settlement agreement).

The Court in *South Kingstown School Committee* adopted the school's argument that the agreement released the school from any obligation to provide the parent with the additional evaluations she was seeking, *except* if the parent's request arose from a change in circumstances after the agreement was signed. The First Circuit's determination was in keeping with the Third Circuit's approach regarding settlement agreements in *E. Brunswick Bd. of Educ.*, 109 F.3d 896, 898 (3d Cir. 1997).<sup>16</sup> Without a showing of a sufficient change in the circumstances of the case, the Court in *South Kingstown* upheld the plain language of

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<sup>16</sup> In *E. Brunswick Bd. of Educ.*, 109 F. 3d at 900-901, "the court held an IDEA settlement could preclude a parent from bringing future IDEA claims -- unless, that is, those claims were based on changed circumstances. That conclusion reflects both the role settlements may play in resolving IDEA disputes and the legitimate concern with allowing IDEA settlements to bargain away-- potentially for all time and without regard to the change in conditions that may arise in the course of a child's development -- the statutory right to a free appropriate public education".

the settlement agreement.<sup>17</sup> The Court stated that the settlement agreement relieved the school district of the parent's desired remedy that the agreement had already addressed. The Court noted that

...in addition to providing an administrative process for addressing such disputes, Congress also expressly allowed parties to resolve them through settlements. And when parties do so, the settlements must be given appropriate effect.

In the instant case, Lynn entered into the Settlement Agreement and it consistently upheld its obligations thereunder. The program proposed by Lynn addresses all of the areas of need identified by the LPS Team and it is an in-district program consistent with the language of the Settlement Agreement. Since Parent has not raised a substantial change in circumstances, acquiescing to Parent's request "would undermine the integrity and efficacy of the settlement process" and as such neither Party may be allowed to avoid their obligations under the agreement. *In Re: Longmeadow Public Schools*, 14 MSER 249 (Crane, 2008)<sup>18</sup>. To allow Parent to proceed to an evidentiary hearing on the merits before the BSEA, would work the opposite result.

Lastly, I consider Parent's final argument that Lynn's placement offer was inappropriate because the decision regarding placement had been unilaterally made by Lynn outside the Team process and was therefore illegal.

The evidence shows that Lynn's selection of the Fresh Start Program was not made outside the Team process. The Fresh Start Program, among other programs, was discussed as a then nameless program during the March 2014 Team meeting. Lynn never issued an N1 calling for any out-of-district placements. Rather, when Lynn issued the IEP calling for the Fresh Start Program in late June 2014, Lynn had received the input and recommendations of Student's Team at LPS, as well as Parent's and Student's opinions and preferences. Lynn incorporated the Team's program recommendations into the proposed IEP (PE-35). The

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<sup>17</sup> While clear on its position regarding the effect of settlement agreements in IDEA matters, the Court in *South Kingstown School Committee* refused to address the issue of an IDEA Hearing Officer's authority to consider the settlement agreement as a school committee defense noting that this issue had divided lower courts<sup>17</sup>. The Court however, concluded that even if the administrative forum lacked authority, the federal court was not precluded from reviewing the scope of the settlement agreement. See *Cf. Mayhew*, 2014 WL 6224938, at \*3 n.4 and *Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2137 (2012).

<sup>18</sup> Ruling on a Motion to Dismiss.

only difference between the proposal made by Lynn and what Parent/Student were expecting was that the program was in-district, thus consistent with the Settlement Agreement. While Parent is correct that the placement selection was made by Lynn it was not “outside the Team process” as Parent submits, and it was consistent with the Parties’ Settlement Agreement. Paragraphs #3 and #4 of the 2012 Settlement Agreement waived future funding of out-of-district placements beyond high school, and the Settlement Agreement is silent as to the need to convene a Team for the purpose of proposing a transition program post completion of LPS. In pertinent parts, the Agreement simply calls for Lynn to provide Student’s transition services program within Lynn for the remainder of the Contract Period (Paragraph #3, PE-9) and goes on to explain that by

...providing a public special education program within Lynn as needed for the remainder of the Contract Period, Lynn will meet in full its obligation to provide a free and appropriate public education to the Student for the Contract Period; Lynn has no responsibility or obligation to provide or fund any other services of any kind or nature to the Student and/or Parents for the Contract Period. Parents hereby waive any claim for services or funding during the Contract Period above and beyond the agreed upon tuition to the Private School for the Two School Years, Transportation for the Two School Years, and public special education services within Lynn as needed for the remainder of the Contract Period. The Parties further agree that by paying the Tuition for the Student’s day placement ...and providing a public special education program within Lynn as needed for the remainder of the Contract Period, Lynn will fulfill its obligation to provide the Student a free appropriate public education and will therefore be held harmless against any future claims to provide education services of any kind to the Student (Paragraph #9, PE-9). Emphasis Supplied.

I am however, not persuaded by Lynn’s argument that since the 2012 Settlement Agreement was silent as to convening Team meeting during the Transition Period, said right had been waived by Parent. In effect, Lynn’s position would leave the Parent/ Student at the mercy of whatever program Lynn offered, regardless of its appropriateness. It is clear from the Agreement that the Transition Program is to occur within Lynn, or in a program proposed by Lynn (including consideration of a program proposed by Lynn out-of-district), but nothing in the Settlement Agreement states that the Parties waive the right to meet to discuss the appropriateness of the services to be offered. As such, I decline Lynn’s invitation to interpret

the language of the contract beyond what is specifically stated therein. Parent's right to dispute for example, the frequency, the types of services, or options regarding in-district placements has not been waived nor is it precluded by this Ruling. Parents' choices per the Settlement Agreement however, are limited to programs available within/ or proposed by Lynn. Parent also presented no evidence challenging the appropriateness of the Fresh Start Program, but rather only argued that the Middlesex Community Program Transition Program was better suited for Student and provided a better peer group (Parent).

The evidence is persuasive that in light of the plain language of the Parties' 2012 Settlement Agreement, which terms Parent understood and voluntarily accepted, and without a change of circumstances, I may not set aside the agreement and order an out-of-district placement not contemplated by the Settlement Agreement. Such action would undermine the settlement process, and would afford Parent rights beyond those originally agreed to. This is especially so where Lynn has already performed its end of the bargain by fully funding the two years at LPS with transportation. As such, Parent's request for out-of-district placement must be denied. For all of the aforementioned reasons, Lynn's Motion to Dismiss is **ALLOWED** as to Parent's request to set aside the Settlement Agreement and Order Lynn to fund Student's out-of-district placement at Middlesex Community College Transition Program, the sole remedy requested by Parent in the case before me.

**ORDERS:**

1. Lynn's Motion to Dismiss with Prejudice is hereby **GRANTED**.
2. BSEA #15000643 is **DISMISED WITH PREJUDICE**.

So Ordered by the Hearing Officer,

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Rosa I. Figueroa  
Dated: March 13, 2015