

# COMMONWEALTH OF MASSACHUSETTS

## Division of Administrative Law Appeals

### Bureau of Special Education Appeals

In re: Bo<sup>1</sup>

BSEA #1601297

#### RULING ON SCHOOL'S MOTION FOR SUMMARY JUDGMENT

This ruling is rendered pursuant to M.G.L. Chapters 30A and 71B; 20 U.S.C. § 1400 et seq.; 29 U.S.C. § 794; and the regulations promulgated under these statutes.

#### STATEMENT OF THE CASE

Bo is a twelve year old middle school student in Marlborough, Massachusetts. In 2010 and 2013 Parents sought to have Bo determined to be a student in need of special education and placed on an individual education program (IEP) by the Marlborough Public Schools (MPS). MPS did not find Bo to be eligible for special education services but did place him on a Section 504 Accommodation Plan (504 Plan).

On August 8, 2015 Parents requested a hearing before the BSEA seeking: 1) that Bo be found eligible for special education services and an IEP be developed that would provide him with a free and appropriate public education (FAPE); 2) that the IEP recognize and address Bo's diagnoses, and 3) that MPS should provide Bo appropriate compensatory services for the school years when he was denied a FAPE. MPS requested permission to perform updated school evaluations which was consented to by the Parents. Numerous pre-hearing conference calls were held and status reports filed. In November 2015 MPS proposed an IEP for Bo. In a November 2, 2015 status report Parents reported that the first two items on Parents' Hearing Request had been resolved but that the third issue of compensatory education had not been resolved. In this status report Parents requested that MPS provide compensatory education to Bo in the form of 1 ½ hours of weekly tutoring with a specific vendor of their choice for each week school is in session over the next five years. The parties then engaged in a resolution session in an effort to resolve this outstanding issue. The Hearing Officer issued a Show Cause Order on February 1, 2016. On February 10, 2016 Parents responded that the IEP proposed for Bo by MPS had now been accepted by Parents but that the resolution session and subsequent negotiations had not resolved the issue of compensatory education. After another pre-hearing conference call the parties agreed to a pre-hearing conference which ultimately took place on April 7, 2016. Meanwhile, on April 1, 2016 MPS filed a Motion for Summary Judgment (MSJ). The April 7, 2016 pre-hearing conference involved active negotiations but did not result in settlement. Parents then filed their Opposition to MPS' MSJ (Opposition). A telephonic motion session was then scheduled for and took place on April 28, 2016.

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<sup>1</sup> Bo is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in publicly available documents.

## **FACTUAL BACKGROUND**

The factual background in this case is based upon Parents' Hearing Request; MPS' Response; MPS' MSJ and accompanying exhibits labelled S-1 through S-9; Parents' Opposition and accompanying exhibits labelled P-1 through P-16; and the oral representations and arguments made by the parties during the motion session.

Bo has received several diagnoses from private evaluations from 2010 through 2013 (P-4, 10) which were reviewed by MPS at special education eligibility meetings in 2010 and 2013<sup>2</sup>. (See P-1; S-1.) MPS found Bo to be ineligible to receive special education services in both 2010 and 2013, determining that he had been making effective progress in the general education setting. (See P-1, 8, 9; S-1, 4, 5.) MPS did, however, place Bo on a 504 Plan (P-6, 15; S-6).

Parents accepted all 504 Plan services offered to Bo by MPS. Parents never formally or in writing rejected MPS' findings of special education ineligibility for Bo until the filing of the BSEA Hearing Request in 2015. MPS then evaluated Bo (P-12) and in November of 2015 found him eligible for special education and promulgated an IEP which has been accepted by Parents. (See P-13, 14, 16; S-7, 8, 9.)

## **STATEMENT OF POSITIONS**

MPS' position is that its MSJ should be granted because: 1) Parents claim for compensatory education is limited by the applicable statute of limitations (SOL); 2) Parents are precluded from requesting that the BSEA order compensatory services from a specific provider of the Parents own choosing; 3) Parents' claim for relief is further limited as there is no genuine issue of material fact; and 4) that Parents did not dispute the "Notice of Finding of No Eligibility" as a result of the team process in either 2010 or 2013. Therefore, MPS contends that Bo is not entitled to compensatory education services.

Parents' position is that MPS' failure to find Bo eligible for special education services in 2010 and 2013 deprived him of FAPE and that Bo has suffered harm as a result. Parents state that they disagreed with MPS' findings in both 2010 and 2013. Parents' position is that their claim for compensatory education services was raised within the applicable SOL and that there is no limit to the scope of compensatory services that may be awarded to achieve a complete remedy. Parents allege that there are multiple statements/allegations in MPS' MSJ with which they disagree and that there are genuine issues of fact in dispute.

## **LEGAL STANDARD**

Summary Judgment is available to parties in a BSEA proceeding where there are no genuine issues of material fact relating to all or part of a claim or defense and the party moving for summary judgment is entitled to prevail as a matter of law. (See 801 CMR 1:01(7) (h); *In re: Zoltan* BSEA #130006 and *Zelda v. Bridgewater-Raynham Regional School District and Bristol County Agricultural School* BSEA #06-0356 Byrne, Hearing Officer, both cases). A fact is material if it will affect the outcome of the case under applicable law. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 249 (1986). The burden of proof is on the party seeking summary judgment and all evidence and inferences must be viewed in the light most favorable to the non-moving party. (*Anderson, supra.*)

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<sup>2</sup> MPS also performed testing of Bo in 2013. (See S-2.)

## **RULING**

Based upon the written submissions, arguments, and representations referenced above, and a review of the applicable law, MPS' MSJ is **GRANTED** in part and **DENIED** in part.

My analysis follows.

### I.

Pursuant to 20 U.S.C. § 1415 (f)(3)(c):

Timeline for requesting hearing. A parent or agency shall request an impartial due process within 2 years of the date the parent or agency know or should have known about the alleged action that forms the basis of the complaint...

See also Hearing Rules for Special Education Appeals Rule I (C).

In this case Parents' Hearing Request was filed on August 8, 2015. MPS provided Parents' Notice of Procedural Safeguards to Parents in May/June 2013 (when Parents provided their private evaluation of Bo to MPS and MPS conducted its own evaluation.) (S-2) Such notice was also provided to Parents in October/November 2013 when MPS again found Bo ineligible for special education (S-4). Based upon the above cited federal SOL for special education appeals, Parents are entitled to reach back for two years from August 8, 2015 when they filed their BSEA Hearing Request to August 8, 2013. Parental claims for compensatory services prior to August 8, 2013 are time barred as a matter of law.

### II.

Pursuant to *Dracut School Committee v. Bureau of Special Education Appeals of the Massachusetts Department of Elementary and Secondary Education* WL3504012 D. Mass. (2010) the BSEA cannot order a school district to hire Parents' experts. Therefore, Parents' request to have MPS hire Parents' experts to provide the compensatory services sought as a remedy is precluded.

### III.

MPS' argues that since Parents did not dispute the 2013 Notice of Finding No Eligibility until the filing of their Hearing Request in August 2015, MPS had no notice of Parents' dissatisfaction with the 2013 finding until 2015, and thus no opportunity to address Parents' concerns. Parent argues that she expressed disagreement at the 2013 team meeting and has always said that Bo needed special education services.) Parent acknowledges that she never put anything in writing to MPS indicating that she disagreed with MPS' Finding of Ineligibility in 2013. Parent further acknowledges that she was informed she could file for a hearing in 2013 but did not want to do so at that time. Parent contends that at the 2013 team meeting she was told, and it is so noted, that a social skills group would be added to Bo's 504 Plan (P-9) but this was never done. The only 504 Plans which have been submitted are dated 2010 and 2012 (See P-6, 15; S-6.)

MPS analogizes Parents not contesting MPS' ineligibility finding in 2013 and failure to provide written notice to MPS of dissatisfaction until the filing of the 2015 Hearing Request to two other

situations: 1) the requirement that parents notify a school district of their intent to make a unilateral placement and seek reimbursement of costs for said placement from the district; and 2) the well-established principle that parents cannot accept an IEP and after the IEP has expired, seek a BSEA hearing alleging said accepted IEP was inappropriate.

Neither of the above situations is directly analogous. Here, Parents have not rejected a MPS IEP and are not seeking reimbursement or prospective funding for an out of district private placement. Neither are they attempting to revisit an accepted/expired IEP. They are seeking compensatory services given MPS' failure to find Bo eligible for special education services and, pursuant to the SOL, are limited to a two year reach back to August 2013.

MPS argues that Parents abandoned the team process. Given that Parents brought private evaluations to MPS in both 2010 and 2013 (P-4, 10) seeking special education services for Bo, and were rebuffed by MPS each time, I am unable to find that Parents abandoned the team process. Parents could well have concluded that any team process had ended.

MPS also argues that by not rejecting its finding of ineligibility for two years, Parents had effectively accepted MPS' position. Parents did not accept the finding, nor did they reject the finding. Parents did not respond in writing in any way. However, given Parents' lack of response, just as with an IEP that is neither accepted nor rejected, MPS could have pursued this issue informally with Parents and/or requested a hearing with the BSEA, but did not do so.

I am not unsympathetic to MPS' argument as to lack of notice for two years. Parent, herself an attorney, chose not to respond in writing in any way to MPS' 2013 finding of ineligibility. Such lack of any type of written notice, combined with the ambiguity of no response/lack of rejection, may result in the reduction or denial of compensatory services. (See *Ms. M. v. Portland School Committee* 360 F. 3d 267 1<sup>st</sup> Cir 2004.) Nevertheless, given the two year permissible reach back, Parents are entitled to a hearing on compensatory services for said limited time period.

## **ORDER**

Parents' BSEA Appeal may proceed solely regarding the issue of compensatory services, limited by to the SOL reach back period of two years to August 8, 2013. Should Parents prevail at the hearing on the merits, Parents' lack of notice to MPS for two years may reduce/eliminate any such award.

By the Hearing Officer,

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Dated: May 17, 2016