

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

**In Re:** Pembroke Public Schools v.  
Student

**BSEA# 1911125**

**ORDER & RULING**

This Order is issued pursuant to the telephone conference call held on June 12, 2019, in the above-referenced matter between counsel for Pembroke Public Schools, Parent's advocate and this Hearing Officer. During the call, this Hearing Officer entered determinations regarding the conduct of the Hearing which, at Parent's advocate's request, are memorialized in writing. This Order, also addresses Pembroke's request for postponement of the Hearing; a Ruling on Parent's Motion for an Order to Release and Provide the Corrective Action Plan and Compensatory Services; Parent's Pre-hearing Motion for an Order to Release and Provide Corrective Action Plan and Compensatory Services Pursuant To Program Resolution System April 13, 2019 Final Findings<sup>1</sup>; and Parent's Advocate's complaint to the Massachusetts Problem Resolution System. A Ruling on Parent's Motion to Dismiss and on Parent's Motion for Stay Put Order will be issued separately.

**I. Appearance at Hearing:**

During the telephone conference on June 12, 2019, Parent's advocate was advised that she would have to appear in Massachusetts for the Hearing. While the advocate (or any other out-of-state representative, including attorneys) may participate via telephone for informal matters such as a pre-hearing conference or motion session that does not involve the taking of testimony, the advocate's (or attorney's) physical presence is required for an evidentiary Hearing. Parent's advocate (who lives out of state), suggested that the Hearing could be done via video conferencing. For reasons explained below<sup>2</sup>, this request is **DENIED**.

I note that 801 CMR 1.0(12) does not explicitly prohibit hearing participants from participating remotely. Rather, the regulation leaves this determination within the discretion of the presiding officer, and even then, only when no Party objects.<sup>3</sup> At this time, Pembroke's position in this regard is unknown.

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<sup>1</sup> Parent's advocate submitted two separate but similar motions under the titles above.

<sup>2</sup> Furthermore, the BSEA lacks the technology to offer video conferencing.

<sup>3</sup> 801 CMR 1.01(12)

(12) Telecommunications. The Presiding Officer *may*, if no Party objects, designate that all or a portion of a hearing be conducted with one or more participants situated in different locations and communicating through the medium of one or more telecommunication devices. [Emphasis supplied].

I further draw a distinction between a witness testifying via telephone during a Hearing<sup>4</sup> (a practice not foreign to the BSEA) and a representative not accompanying her client to an evidentiary Hearing. It is the latter which I address here.

The powers and responsibilities of a BSEA Hearing Officer in Massachusetts are defined at 603 CMR 28:08(5)(c), the Massachusetts Special Education Regulations. The aforementioned regulation provides that

The Special Education Appeals hearing officer shall have the power and the duty to conduct a fair hearing; to ensure that the rights of all parties are protected; to define issues; to receive and consider all relevant and reliable evidence; to ensure an orderly presentation of the evidence and issues; to order additional evaluations by the school district or independent education evaluations at public expense when necessary in order to determine the appropriate special education for the student; to reconvene the hearing at any time prior to the issuance of a decision; to take such other steps as are appropriate to assure the orderly presentation of evidence and protection of the parties rights at the hearing; to ensure a record is made of the proceedings; and to reach a fair, independent, and impartial decision based on the issues and evidence presented at the hearing and in accordance with applicable law.

801 CMR 1.01 and Rule X of the *Hearing Rules for Special Education Appeals* further address the conduct of hearings at the BSEA. In general, Rule X is modeled after 801 CMR 1.01, which, as with other rules in the *Administrative Rules of Practice and Procedure*, leave within the discretion of the Hearing Officer the type of conference/proceeding to be held, the manner in which the event will be conducted and when or not to require appearance of the parties. One such rule describing the responsibilities of the Presiding Officer and leaving determinations solely within the discretion of a Hearing Officer in the absence of agency rules is 801 CMR 1.0(10), addressing hearings and conferences:

Hearings and Conferences.

(a) Pre-Hearing Conference. The Presiding Officer may initiate or upon the application of any Party, may call upon the Parties to appear for a conference to consider;

1. the simplification or clarification of the issues;

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<sup>4</sup> When a party makes a written request to take the testimony of a witness who may otherwise be unavailable via telephone this has customarily been allowed by MA BSEA hearing officers where the moving party has made the request for good cause and the opposing party assents. Parties are customarily advised, however, that this is not the preferred mode to take the testimony of a witness as it is much harder to assess the credibility of a witness who is not present.

2. the possibility of obtaining stipulations, admissions, agreements on matters of record, or similar agreements which will reduce or eliminate the need of proof;
3. the limitation of the number of expert witnesses, or avoidance of cumulative evidence, if the case is to be heard;
4. the possibility of an agreement disposing of any or all issues in dispute; and
5. such other matters as may aid in the disposition of the Adjudicatory Proceeding.

Those matters agreed upon by the Parties shall be reduced to writing and signed by them, and the signed writing shall constitute a part of the record. The scheduling of a pre-hearing conference shall be according to Agency rule or, in the absence of rules, solely within the discretion of the Presiding Officer.

Clearly, if the Hearing Officer may command the appearance of the parties for a pre-hearing conference, it follows that the Hearing Officer may command the appearance of parties at Hearing.

Furthermore, Rule X of the BSEA *Hearing Rules for Special Education Appeals*, specifically provides that the “Hearing Officer has the authority and obligation to ensure that appropriate standards of conduct are observed and that hearings are conducted in an orderly and fair manner.”<sup>5</sup> Rule X:A.

Rule X: B further describes the duties and powers of the Hearing Officer. Specifically,

The Hearing Officer shall have the duty to conduct a fair hearing, administer the oath or affirmation to witnesses testifying at the hearing; to ensure that the rights of all parties are protected; to define issues; to receive and consider all relevant and reliable evidence; to ensure an orderly presentation of the evidence and issues; to ensure a record is made of the proceedings; and to reach a fair, independent, and impartial decision based on the issues and evidence presented at the

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<sup>5</sup> See 801 CMR 1.01 (10)

(d) Conduct of Hearing:

1. Decorum. All parties, their Authorized Representatives, witnesses and other Persons present at a hearing shall conduct themselves in a manner consistent with the standards of decorum commonly observed in any court. Where such decorum is not observed, the Presiding Officer may take appropriate action. Appropriate action may include refusal to allow a disruptive Person to remain in the hearing room and, if such Person is a Party, to allow participation by representative only.

The list of remedies available to a Hearing Officer pursuant to 801 CMR 1.01 *et seq.* is not exhaustive. Section (10) (d) offers an example of the remedies that may be crafted by the Hearing Officer according to the circumstances.

hearing and in accordance with the law. In furtherance of these duties, the Hearing Officer may:

1. Authorize the BSEA to issue subpoena *sua sponte* or upon the request of any party to secure the presentation of evidence or testimony;
2. Request a statement of the issues and define the issues;
3. Rule on any requests or motions that may be made during the course of the due process proceedings;
4. After consultation with the parties and consideration of the proposed evidence, place reasonable limits on the presentation of evidence to prevent undue delay waste of time, or needless presentation of cumulative evidence;
5. Assist all those present in making a full statement of the facts in order to bring out all the information necessary to decide the issues involved and to ascertain the rights of the parties;
6. Ensure that each party has a full opportunity to present its case orally, or in writing, and to secure witnesses and evidence to establish its claims;
7. Regulate the presentation of the evidence and the participation of the parties for the purpose of ensuring and adequate and comprehensible record of the proceedings;
8. Examine witnesses and ensure that relevant evidence is secured and introduced;
9. Receive, rule on, or exclude evidence;
10. Introduce into the record any regulation, statutes, memoranda, or other materials relevant to the issues at the hearing;
11. Continue the hearing to a subsequent date to permit either party to produce additional evidence, witnesses and other information;
12. Order additional evaluations at public expense;
13. Order written briefs to be submitted by the parties, establish the issues to be addressed by the briefs, and set the deadline for their submission;
14. Reconvene the hearing at any time prior to the issuance of a decision for any purpose or pursuant to a post-hearing motion; and
15. Censure, reprimand, or otherwise ensure that all participants conduct themselves in an appropriate manner.

With this guidance I turn to the conduct of Massachusetts Bureau of Special Education Appeals hearings and the practice in this quasi-judicial forum.

Massachusetts BSEA Hearings may last several full days, and typically include the testimony of multiple witnesses. Issues regarding witness testimony, exhibits and other documents, as well as objections, frequently arise and require that the parties and their representatives privately consult and/or share information in the moment. In most instances, as in the case at bar, school districts are represented by licensed, trained, experienced Massachusetts attorneys. While Parent is represented by a lay advocate with experience in special education, such advocate may lack training and experience in trial practice, which makes the orderly presentation of Parent's case challenging as she defends, examines witnesses, responds to objections and motions and handles issues involving documentary evidence. Allowing the advocate/representative not to be physically present (while Parent and the rest of the participants are), will make it difficult for the Hearing Officer to ensure that the rights of all parties are protected, and that the evidence is presented in a fair and orderly fashion.

Depriving the Parent of a representative who is physically present during the Hearing places Parent at a disadvantage, makes it difficult for the Hearing Officer to manage the forum, and will likely cause unnecessary delays to the process. These delays will come at great expense as teachers, private and public service providers and/or evaluators, medical providers, administrators and other individuals called to be present at the Hearing will have to be absent from other responsibilities. Unnecessary delays of the process are also likely to have negative financial implications for the Parties.

I note that there may be instances where it would be appropriate and cost effective to take the testimony of one or two *witnesses* such as when the parties agree that the witness' knowledge and/ or credibility can be fairly assessed via telephone. This however, should be the exception and not the rule.

This guidance, taken together with the specific nuances presented by this case, requires me to evaluate how to best assure that the rights of the parties are protected while managing the orderly and efficient presentation of the evidence.

The difficulty in managing an evidentiary hearing over the telephone is illustrated by the communication problems that arose during the telephone conference on June 12, 2019. During the telephone conference the advocate confirmed that she was representing Parent and Student and that she intended to represent them at a Hearing if one occurred. Also, during the call, the advocate required the Hearing Officer to provide clarification and repeat instructions and statements several times. The advocate reached conclusions that were inconsistent with the Hearing Officer's statements as well. Communication was delayed by the need to repeat statements as the advocate interrupted the Hearing Officer and spoke over her, despite the Hearing Officer instructing her several times not to interrupt.

Given the advocate's submissions to date, her apparent lack of understanding of what was stated by the Hearing Officer and her difficulties following the Hearing Officer's

instructions, it is evident that she will require explanations, assistance, structure and guidance during the Hearing, if one occurs, which will be difficult if not impossible to provide by telephone. Having the advocate present in the room will allow the Hearing Officer to better manage situations as they arise and facilitate the orderly presentation of the evidence.

Even if Parent were willing to waive the attendance of her advocate at the Hearing, the difficulties in managing the forum to assure the proper introduction of evidence would be difficult with the advocate participating by telephone and potentially prejudicial to Parent and Student (who is almost 19 years of age and nearing the end of his entitlement to special education).

It is clear that under the Administrative Rules of Practice and Procedure, the Massachusetts Special Education Regulations and the BSEA Hearing Rules, the Hearing Officer is authorized to take appropriate steps to assure the orderly presentation of evidence and protection of the parties' rights. As such, if Pembroke's Hearing Request survives Parent's Motion to Dismiss, Parent's advocate is **ORDERED** to appear in person at the evidentiary hearing on the merits.

## II. Request for postponement of the Hearing:

On May 28, 2019, Pembroke filed a request for postponement of the Hearing because neither counsel for Pembroke nor school personnel were available to proceed to Hearing on the initial date of June 11, 2019. Pembroke's Counsel also requested a telephone conference call with Parent (who at that point appeared *pro-se*), but Parent did not respond to the BSEA's attempts to schedule the call. The call was ultimately scheduled following Parent's advocate's filing of a Motion to Dismiss (discussed below) on June 5, 2019.

Several alternate dates for Hearing were provided to the Parties during the telephone conference on June 12, 2019, but Parent's advocate did not commit herself to any, stating that her father was about to have brain surgery the following Thursday and that she was his caretaker. She further noted that she would not be available to appear in person at the Hearing, and that if the Hearing was to take place (depending on my ruling on her Motion to Dismiss) she would perhaps be available in September, October, November 2019 or preferably, January of 2020; an extension that was ultimately found to be unreasonable. Despite the Hearing Officer's best attempts to engage the parties in selection of new Hearing dates during the call, it was not possible due to the advocate's reluctance to commit to any specific dates. Having established that she would have to appear in Massachusetts for the Hearing, in deference to the situation with her Parent, and Pembroke's desire to proceed to Hearing expeditiously (preferably in July 2019), the Parties were provided options in August 2019. This compromise offered the advocate sufficient time to find substitute care for her parent so that she could be present at the evidentiary Hearing.

The Parties are **ORDERED** to submit their availability for Hearing (from the dates provided below) **by the close of business on June 25, 2019**. Should the Motion to Dismiss be decided in Parent's favor, the Parties may disregard the date selected for Hearing. However,

should the matter not be dismissed, the Hearing shall proceed on the date ultimately established by the Hearing Officer after reviewing the Parties June 25, 2019 submissions.

The possible dates for Hearing are: August 13, 14, 15, 16, 20, 21, 22, 23, 27 or 28, 2019. The Parties shall note their availability for three days of Hearing (preferably consecutive days).

**III. Parent's Motion for an Order to Release and Provide the Corrective Action Plan and Compensatory Services/ Parent's Pre-hearing Motion for an Order to Release and Provide Corrective Action Plan and Compensatory Services Pursuant To Program Resolution System April 13, 2019 Final Findings:**

On June 12 and June 14, 2019, Parent's Advocate filed Parent's Motion for an Order to release and Provide the Corrective Action Plan and Compensatory Services/ Parent's Pre-hearing Motion for an Order to Release and Provide Corrective Action Plan and Compensatory Services Pursuant To Program Resolution System April 13, 2019 Final Findings. I note that these two Motions are essentially the same. Pembroke filed a response on June 12, 2019.

In her motions Parent seeks BSEA intervention on a matter that is properly before DESE on Pembroke's appeal of a Corrective Action Plan and Compensatory Services. As such, any intervention by the BSEA would be inappropriate and premature. Parent's request is **DENIED**.

**IV. DESE Problem Solution Office Intake Information Complaint:**

On June 19, 2019, Parent filed a complaint with the Massachusetts Department of Elementary and Secondary Education (DESE) Problem Resolution System alleging that she had filed with the BSEA a Sufficiency Challenge to which the Hearing Officer had not responded within appropriate timelines, and asking DESE to remove the Hearing Officer from the instant case. I respond to Parent's advocate's allegations starting with her position on sufficiency.

On May 21, 2019, Pembroke filed its instant Hearing Request. On June 5, 2019, after having issued a Notice of Hearing, Parent's advocate filed an incomplete<sup>6</sup> Motion to Dismiss Pembroke's Hearing Request, noting that all supporting documents would be mailed separately. Parent's complete Motion to Dismiss (the hard copy and supporting documents) was received on June 11, 2019.

Embedded in the Motion to Dismiss, Parent's advocate challenged the jurisdiction of the Hearing Officer to grant the remedy sought by Pembroke, noting,

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<sup>6</sup> The Motion lacked the attachments.

The IDEA does not provide the hearing officer with the power and authority to force the parent through 34 CFR 300.300(4) consent override or as the district would like to call it, “substitute consent”, unless it is for an initial “evaluation”, which the district’s due process complaint does not assert as the student is 18 years old and has been deemed eligible for special education since the age of three. Therefore, the District’s due process complaint like the previous complaint BSEA 1804120, which was dismissed on the basis that the district due process complaint lacked sufficiency as it did not state a claim pursuant to **34 CFR 300.507**<sup>7</sup>. The district’s actions are to remove or terminate Parent’s rights to reject the IEP. The hearing officer does not have the power and authority to remove her rights through a state special education due process hearing. Therefore, the district’s due process complaint lacks merit and must be DISMISSED on its face. [Emphasis supplied]

Parent’s advocate’s submission constitutes a Motion to Dismiss, as opposed to a Sufficiency Challenge, as Parent alleges that Pembroke’s Hearing Request fails to state a claim upon which relief can be granted. I note that in her Motion to Dismiss, Parent’s advocate quotes 34 CFR 300.507, while her complaint to DESE quotes 34 CFR 300.508, a different regulation on which she does not rely in her Motion to Dismiss.

In her Motion, Parent’s advocate also mentions that a previous matter between the same Parties was dismissed, alluding to her understanding that the dismissal was somehow connected to a lack of sufficiency in that Hearing Request. Administrative notice of BSEA #1804120 shows that the matter was dismissed for a different reason and not as a result of a sufficiency challenge.

Parent’s advocate’s submission is unclear and lacks the necessary information to be considered a challenge to the Sufficiency of Pembroke’s Hearing Request pursuant to Section 615(b)(7)(a) of IDEA 2004<sup>8</sup> (which she does not mention in her pleading). Consistent with her appropriately titled pleading, it would appear that Parent’s advocate

<sup>7</sup> 34 CFR 300.507 addressing filing a due process complaint:

**(a) General.**

(1) A [parent](#) or a [public agency](#) may file a due process complaint on any of the matters described in [§ 300.503\(a\)\(1\) and \(2\)](#) (relating to the identification, [evaluation](#) or educational placement of a child with a disability, or the provision of FAPE to the child).

(2) The due process complaint must allege a violation that occurred not more than two years before the date the [parent](#) or [public agency](#) knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the [State](#) has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that [State](#) law, except that the [exceptions](#) to the timeline described in [§ 300.511\(f\)](#) apply to the timeline in this section.

<sup>8</sup> Section 615(b)(7)(a) of IDEA 2004 provides, in relevant part, that the Hearing Request must include the following:

intended to file a Motion to Dismiss. Assuming *arguendo*, that Parent's advocate's submission is somehow mistakenly intended as a Sufficiency Challenge, after careful review of Pembroke's Hearing Request, I find that the Hearing Request is sufficient as it satisfies the requirements of Section 615(b)(7)(a), for the reasons discussed below.

As with the Federal Rules of Civil Procedure, the purpose of the pleading rules under the IDEA is to provide fair notice to the opposing party. The United States Supreme Court has explained:

The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.<sup>9</sup>

The allegations raised by Parent's advocate in her Motion to Dismiss show that the advocate understood what Pembroke was requesting, at least in part, as a result of which she responded with a Motion to Dismiss raising substantive challenges and objections to the District's submission. (A Ruling on the substantive issues raised in Parent's Motion to Dismiss will be issued separately.)

Pembroke's Hearing Request is sufficient to provide Parent fair notice that Pembroke is seeking a finding regarding the appropriateness of its IEP and placement for Student as well as substitute consent for implementation of said IEP.

To the extent that Parent's letter to OSEP mentions removal of the Hearing Officer I take administrative notice of the fact that, Parent's advocate knows from her previous experiences with the BSEA that she must file a Motion to Recuse with the presiding BSEA Hearing Officer when seeking recusal. Since none has been received to date by this Hearing Officer, I defer any determination in this regard until the proper motion is before me.

I note that Parent's advocate has not filed her Response to Pembroke's Hearing Request which was due on May 31, 2019. Parent shall file her Response to the Hearing Request forthwith and by no later than June 25, 2019.

As explained to Parent's advocate during the June 12, 2019 telephone conference, Parent's Motion to Dismiss, and a Motion for Stay-put Order received on June 19, 2019, will be

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(I) name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

(II) in the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child and the name of the school the child is attending;

(III) description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(IV) proposed resolution of the problem to the extent known and available to the party at the time.

<sup>9</sup>*Leatherman v. Tarrant County N ICU*, 507 U.S. 163, 168 (1993).

addressed via separate rulings. The Parties are reminded that all submissions to this Hearing Officer in connection with this matter shall be forwarded via fax or US Postal Service. Electronic mail submissions will not be accepted.

Lastly, since Parent's advocate states in her submission to DESE that she has also filed a complaint with OSEP regarding her "sufficiency" allegations, this Order/Ruling is being forwarded to MA DESE and OSEP.

So Ordered by the Hearing Officer,

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Rosa I. Figueroa  
Dated: June 21, 2019