

**Commonwealth of Massachusetts
Division of Administrative Law Appeals
Bureau of Special Education Appeals**

In re: AI

BSEA #2007208

RULING

STATEMENT OF THE CASE

AI¹ is a 14-year-old boy who carries the diagnosis of Autism Spectrum Disorder (ASD). His overall cognitive abilities fall within the extremely low range. He communicates verbally and with the assistance of an augmentative and alternative communications device (ACC). He exhibits challenging behaviors that include tantrums, self-injury and stereotypy.

On February 4, 2020 Parents filed a hearing request against the Newton Public Schools (NPS) seeking reimbursement for their unilateral placement of AI at the New England Center for Children (NECC) since April 11, 2019, and prospective placement at NECC for the 2020-2021 school year. A hearing date was set for March 10, 2020. NPS filed its response on February 14, 2020. A pre-hearing conference call took place on February 24, 2020. On February 27, 2020 the parties jointly requested a postponement of the March 10, 2020 hearing date and requested that a pre-hearing conference be scheduled for April 30, 2020 and that hearing dates be set for May 27, 28, 29, 2020. These requests were allowed. Discovery thereafter took place. On April 27, 2020 NPS filed a Motion to Postpone the hearing scheduled for May 27, 28, 29, 2020. On April 29, 2020 Parents filed their Opposition to NPS' postponement request. On April 30, 2020, a pre-hearing conference call took place. All outstanding discovery issues were dealt with and the Hearing Officer heard supplemental oral argument regarding NPS' postponement request and Parents' opposition thereto. On April 30, 2020 the Hearing Officer orally denied NPS' motion to postpone the hearing, giving his rationale for same and issuing a written order. On May 1, 2020 NPS wrote to the Hearing Officer arguing against the Hearing Officer's order.

STATEMENT OF POSITIONS

NPS' position is that it requires a postponement because it wishes to engage an expert witness to observe AI in his current NECC program as well as to observe NPS' proposed in-district program for AI. However, because of the COVID-19 crisis, NPS is closed, NECC is closed, and both will remain closed for at least the remainder of the 2019-2020 school year. Hence NPS' expert cannot observe either program and cannot testify as to such observations at the hearing. NPS argues that proceeding to hearing in late May would be prejudicial to NPS without these observations and because NPS teachers are working from home to implement remote hearing strategies for students, thus NPS' counsel has had no opportunity to prepare NPS witnesses for

¹ AI is a pseudonym chosen by the Hearing Officer to protect the privacy of Student in publicly available documents.

hearing. NPS argues that proceeding to hearing over NPS' objection will create a persuasive basis for appeal of the BSEA decision and may result in a remand.

Parents' position is that they strongly oppose further postponement of this hearing. Parents state that both parties have already exchanged discovery and NPS has already subpoenaed documents from NECC and Parents' two private evaluators. Parents contend that NPS had all of the 2019-2020 school year to observe AI or arrange for an outside observation of AI at NECC and of the proposed NPS program. Parents further contend that long before filing this BSEA appeal on February 4, 2020, their counsel attempted to engage NPS in a process to resolve this dispute over AI's placement. Parents state that NECC is well known to NPS and that NPS has extensively observed that program. Parents further state that they have been paying for NECC for the 2019-2020 school year and are entitled to proceed to hearing to obtain relief for that substantial and ongoing burden. Finally, Parents argue that to allow NPS' postponement request until its expert observes both AI at NECC and the proposed NPS program would likely result in a postponement of at least five months.

RULING

NPS' Motion for Postponement is **DENIED**.

My analysis follows.

Pursuant to 20 U.S.C.s. 1415, strict timelines govern special education due process hearings. Despite the COVID 19 crisis, the Secretary of Education for the U.S. Department of Education has recently determined that there will be no relaxation or extension of federal timelines regarding this statute. Therefore, the federal commitment to a timely and expeditious due process hearing remains unchanged, even under current extraordinary conditions.

Pursuant to Rule III of the *Hearing Rules for Special Education Appeals*, the decision whether to postpone a hearing is within the discretion of the Hearing Officer who is required to give serious consideration to any opposition to a request for postponement. The Hearing Officer must also, however, ensure that each party has a full opportunity to present its case and to secure witnesses and evidence to present its claims. (Rule IX (B) (6))

Thus the Hearing Officer must, within the constraints of federal timelines, attempt to balance the equities, as articulated in NPS' and Parents' position, above. The primary basis for denying NPS' postponement request is that it is for an indefinite period of time. No one can predict with certainty when either public or private schools will reopen. Once they do, neither NECC nor NPS will want an expert observation until their programs are again up and running normally so that the evaluator will get a true picture of the programs under review. In reality, NPS is requesting a postponement that could be 4-6 months or more.

NPS argues that its postponement request "would impose absolutely no prejudice to Student." (emphasis in original). However, if the situation were reversed and this was a "bring

back” case in which NPS was funding NECC and wanted to bring AI back to an in-district placement; and Parents requested on indefinite postponement NPS would surely consider such a postponement request to be highly prejudicial.

I understand that NPS’ postponement request was made in good faith. However, to allow NPS’ postponement request under these circumstances would be tantamount to allowing any school district to prevail on a postponement request based solely on the COVID-19 emergency, and such blanket action cannot be endorsed. Due process requires that a case by case determination be made with respect to postponement requests, and given the circumstances presented in the instant matter, an indefinite postponement simply cannot be justified.

NPS argues that if Parents did not have an independent evaluator they would simply delay their request for hearing until they obtained one, but that NPS does not have the same opportunity. However, when Parents are opposing a school district in a due process proceeding they often require an independent evaluation (as provided under both state and federal special education law) or a private evaluator to counter the district’s cadre of educational and related service professionals. While it is legitimate for NPS to wish to engage an additional outside expert, that does not constitute reasonable cause to postpone the hearing indefinitely.

Finally, both Parents’ Hearing Request and NPS’ Response to same indicates that AI had been placed at NECC for a period of years until April 2019 pursuant to a mediation or settlement agreement between NPS and Parents. Therefore, NPS already has substantive knowledge regarding AI’s program at NECC.

In summary, given the federal statutory scheme, and having balanced the equities in the instant case, I conclude that NPS’ Motion to Postpone this Hearing indefinitely must be **DENIED**.

By the Hearing Officer,

Raymond Oliver (SKP)

Date: May 7, 2020