

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals
Bureau of Special Education Appeals

Berkshire Hills R.S.D.

&

BSEA #2008730

Tyler.¹

CORRECTED RULING ON SCHOOL’S MOTION TO PROCEED

This matter comes before the Hearing Officer on the Motion of Berkshire Hills Regional School District (“the School”) to proceed with a due process hearing after the Parents had withdrawn consent to special education. The Parents oppose continuation of the Hearing. The pertinent facts, taken from the pleadings and correspondence filed by the Parties’ attorneys, are not in dispute.

FACTUAL BACKGROUND

1. At a Team meeting held on February 26, 2020 the Student, Tyler, was found eligible for special education services.
2. Tyler received behavioral support during the 2019-2020 school year through an accepted Section 504 Plan.
3. Tyler’s multiple disciplinary incidents during the 2019-2020 school year were found to be manifestations of his known disability.
4. The Team met on March 11, 2020 and developed an Individualized Education Program (“IEP”) calling for special education services to be delivered within a separate, therapeutic day school. The Parents requested a full inclusion placement.
5. On March 27, 2020 the School filed a Request for Hearing at the BSEA seeking a determination that the March 2020 – March 2021 Individualized Education Program (“IEP”) it had developed for Tyler was reasonably calculated to provide a free, appropriate public education to him. It also sought a finding that the Section 504 Plan

¹ “Tyler” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student and Family in documents available to the public.

it developed for him in March 2020 would reasonably provide, support and ensure access to, a free, appropriate public education. Both the proposed IEP and the new Section 504 Plan offered Tyler a placement in a private day school.

6. After several postponements were granted to permit the parties additional time to resolve the dispute informally, the Hearing was scheduled to begin at 10:00 a.m. on June 1, 2020. The Hearing was to proceed by remote electronic means. Both parties were represented by attorneys.
7. At 9:45 a.m. on June 1, 2020, counsel for the School received an electronic communication directly from the Parents. The email was also sent to the School's Director of Special Education. In it the Parents revoked their earlier consent to special education services and procedures as well as to any educational accommodations and modifications available through a Section 504 Plan. They stated their intent to enroll the Student in the local High School as a general education student. They requested cancellation of the Hearing.
8. The School, the moving party, sought to present its evidence and receive a Decision on the substance of its Hearing Request. The Hearing Officer suspended the Hearing to address the jurisdictional issue raised by the Parents' revocation of consent.

ISSUE

May a school district proceed to a special education due process hearing after a parent has withdrawn consent to special education status and services?

LEGAL FRAMEWORK

Parental consent is a fundamental aspect of the IDEA and the Massachusetts special education statute M.G.L. c. 71B. School districts are required to obtain a parent's informed consent, in writing, for any evaluation, any direct special education service, any placement outside a general education classroom, and even any significant variance in the timelines and procedures set out in the federal and state regulations governing special education. Consent obtained for one component of the comprehensive special education process does not equal, or imply, consent for any other component. Consent, once given, may be revoked at any time. 20 U.S.C. §1414 (a) (1) (D); 34 CFR 300.300 (a) (ii); 34 CFR 300.300.9; 603 CMR 28.02 (4); 603 CMR 28.07 (1) (a) 2.

In a *Letter to Cox*, 54 IDELR 60 (OSEP 2009) the Federal Office of Special Education Programs instructed: "The right to revoke is absolute." It explained that once a parent revokes consent to special education status and services for his/her child, the district must provide the

parent with written notice in accordance with 34 CFR 300.503 of the imminent service termination, must cease providing any special education service, and must treat any subsequent evaluation request as one for an initial evaluation.

The effect of revocation of consent on access to the special education dispute resolution system is equally stark. 20 U.S.C. §1414 (a) (1) (D) (II) states that if a Parent... refuses to consent to the initial provision of special education and related services to an otherwise eligible child, the school “shall not” use the IDEA’s dispute resolution mechanisms to provide them.² Federal regulations provide additional emphasis: “If the Parent... refuses to consent to [initial] services...the public agency may not use... mediation... or due process... to obtain agreement or a ruling that the services may be provided to the child. 34 CFR 300.300 (b) (3) *emphasis added*.³

Similarly, Massachusetts special education regulations require explicit, written parental consent to the initial provision of special education services to a child, and acknowledge that consent may be revoked at any time. 603.CMR 28.07 (1) (a). The Massachusetts consent regulation follows federal law in distinguishing initial evaluations, services and placements from ongoing ones. 603 CMR 28.07. Echoing the federal limits on school authority it provides that written parental consent to an initial special education evaluation or placement must be secured in advance and that parental failure or refusal to provide such consent is not subject to challenge at the BSEA. An additional, and dispositive, jurisdictional limitation is clearly set out in the Massachusetts regulatory section governing the operation of the BSEA:

A school district may not request a hearing on a

² (II) For services. If the Parent of such child refuses to consent to services under clause (i) (II), the local educational agency shall not provide special education and related services to the child by utilizing the procedures described in section 615 [20 USC §1415].

(III) Effect on agency obligations. If the parent of such child refuses to consent to the receipt of special education and related services, or the parent fails to respond to a request to provide such consent-

(aa) the local educational agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special education and related services for which the local educational agency requests such consent;

1414 (a)(I)(D)(II),

³ (b) Parental consent for services. (1) A public agency that is responsible for making FAPE available to a child with a disability must obtain informed consent from the parent of the child before the initial provision of special education and related services to the child.

(2) The public agency must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child.

(3) If the parent of a child fails to respond or refuses to consent to services under paragraph (b) (1) of this section, the public agency may not use the procedures in subpart E of this part (including the mediation procedures under §300.506 or the due process procedures under §§300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child.

(4) If the parent of the child refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency.

(i) Will not be considered to be in violation of the requirement to make available FAPE to the child for the failure to provide the child with the special education and related services for which the public agency requests consent; and

(ii) Is not required to convene an IEP Team meeting or develop an IEP under §§ 300.320 and 300.324 for the child for the special education and related services for which the public agency requests such consent.

34 CFR 300.300 (b).

parent's failure or refusal to consent to an initial evaluation or initial placement of a student in a special education program.

603 CMR 28.08(a)(c).

A school district, however, has duties and responsibilities under 29 U.S.C. §794 ("Section 504") that are separate and distinct from those under the IDEA. Thus, revocation of consent to IDEA services does not necessarily extend to annulment of an existing Section 504 Plan. *Kimble v. Douglas County School District*, 925 F. Supp 1176 (D.CO 2013); *Lamkin v. Lone Jack C-6 School District*, No.11-CV-1072-DW-W (W.D. Mo. March 1, 2012), 58 IDELR 197.

DISCUSSION

After careful consideration of the limited, pertinent facts and the arguments of counsel for both Parties it is my determination that the BSEA lacks jurisdiction to continue to hear this matter and that Dismissal is warranted. The plain language of the governing statute and regulations compels this result.

The BSEA's statutory authority extends solely to disputes arising out of the exercise of rights and responsibilities set out in 20 U.S.C. §1400, 29 U.S.C. §794 and M.G.L. c.71B. The BSEA's jurisdiction is further circumscribed by specific proscriptions in the statutes, such as the one relevant here which removes disputes concerning the initial provision of special education services from the oversight of the special education due process system. 20 U.S.C. §1414(a)(I)(D)(II). In the instant matter the Parents have clearly and unequivocally rejected the School's offer of a special education placement by refusing consent to the proposed IEP outlining that placement, by refusing to consent to the proposed Section 504 Plan which outlines the same placement option, by revoking consent to the student's special education status as well as to any accommodations or modifications to the general education program otherwise available to him in accordance with his accepted Section 504 Plan, and by indicating their intent to enroll him in the general education program at the High School. Once consent is withheld and special education status is revoked in a manner consistent with the applicable regulations and school policy, as was done here, the student converts to general education status.

Thus, here, the Parents' June 1, 2020 communication to the School immediately changed Tyler's status from a student with a disability subject to the procedural and substantive protections of the special education statutes, to a general education student who may not be regarded as a student with a disability. The Parents' action animates the plain language of both federal and state law which forbids the School to use any IDEA dispute resolution mechanisms or procedures to challenge the Parents' decision to withdraw from initial special education services or to refuse the proffered initial placement. 20 U.S.C. §1414(a)(I)(D)(II). 603 CMR 28.07.

The Parents' action similarly deprives the BSEA of jurisdiction pursuant to 603 CMR 28.08(3)(c). General education students and disputes do not have access to the IDEA's due process procedures. The existing matter before the BSEA is, therefore, moot. There is no remedy to be obtained under the IDEA or M.G.L.c.71B. While Section 504 might provide an independent basis for asserting BSEA jurisdiction under some circumstances, it does not do so here. With the proposed March 2020 Section 504 Plan the School attempted to replicate the services and placement outlined in the March 2020 proposed IEP. The Parents rejected that Plan, however, and clearly and unequivocally withdrew their consent to the Student's current Section 504 Plan. As the purpose and intent of the March 2020 Section 504 Plan was solely to provide Tyler with special education services in a separate, therapeutic day school, an option now rejected twice by the Parents, no Section 504 service or accommodation remains that has not been subsumed in the proposed IEP. There is no foundation for an assertion of BSEA jurisdiction on these facts. Tyler, as a general education student, is now subject to the School's, and the community's, unmodified academic, administrative, behavioral and disciplinary rules and consequences.

ORDER

Having found that the BSEA no longer has proper jurisdiction to entertain this matter, the School's Motion to Proceed with the Hearing is DENIED. BSEA 20-08930 is DISMISSED.

By the Hearing Officer

Dated: June 12, 2020
Lindsay Byrne