COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

BUREAU OF SPECIAL EDUCATION APPEALS

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In Re: Student

&. **BSEA #2007733**

Andover Public Schools
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RULING ON MOTION FOR PARTIAL SUMMARY JUDGMENT

In the instant case, Andover has filed a *Motion for Partial Summary Judgment* in which it asserts that relief that Parents seek with respect to the 2020-2021 school year, i.e., funding for Student's placement at The Landmark School (Landmark), is precluded by a settlement agreement that the parties executed in 2017. For reasons discussed in this *Ruling*, Andover's *Motion* is GRANTED.

PROCEDURAL HISTORY

On February 18, 2020, Parents filed a request for hearing with the BSEA in which they sought a determination that the IEP and placement offered by APS for the 2019-2020 school year was inappropriate, and requested an order that APS fund Student's placement at Landmark for that year. At the request of the parties, the hearing, originally scheduled for March 4, 2020, was postponed twice for good cause, and currently is scheduled to proceed on August 6, 2020.

On May 4, 2020, Parents filed an Amendment to their hearing request to reflect a newly proposed IEP and in-district placement for the period from April 2020 to April 2021. Parents had rejected that IEP and placement and sought continued funding for Landmark for that period.

On May 27, 2020, Andover filed the *Motion for Partial Summary Judgment* that is the subject of this *Ruling*, together with a supporting memorandum and exhibits. Parents filed their *Opposition* on June 12, 2020. The parties argued their respective positions during a conference call held on June 24, 2020.

LEGAL FRAMEWORK

Summary judgment is available at the BSEA if "there is no genuine issue of fact relating to all or part of a claim or defense and [the moving party] is entitled to prevail as a matter of law…" 801 CMR 1.01(7)(h). In determining

whether to grant summary judgment, BSEA hearing officers are guided by Rule 56(a) of the Federal Rules of Civil Procedure, which provides that summary judgment shall be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[1]

Facts are considered "in the light most favorable to…the non-moving party." *Xiaoyan Tang v. Citizens Bank, N.A.,* 821 F. 3d 206 (1st Cir. 2016), quoting *Perez-Cordero v. Wal-Mart P.R. Inc.,* 656 F. 3d 19, 20 (1st Cir. 2011). "An issue is 'genuine' if it can 'be resolved in favor of either party,' and a fact is 'material if it 'has the potential of affecting the outcome of the case.'" *Tang, supra*, quoting *Perez-Cordero*, *supra* at 25, and *Calero-Cezero v. U.S. Dept. of Justice*, 355 F.3d 6, 19 (1st Cir. 2004).

The moving party has the initial burden of producing evidence that there is no dispute of material fact. Once the moving party has done so, the burden then shifts to the party opposing summary judgment to establish, via affidavits or other documents, specific facts showing that there is a "genuine issue for trial." *Celotex Corp. v. Catrell*, 477 U.S. 242, 248-50 (1986); *Anderson v. Liberty Lobby*, *Inc*. 477 U.S. 242, 249 (1986); *Kathleen Burns v. Johnson*, 2016 WL 3675157 (July 2016).

UNDISPUTED FACTS

The following facts are not in dispute, and are derived from the hearing request, Andover's response thereto, the *Motion for Partial Summary Judgment* with a supporting *Memorandum* and Exhibit 1, as well as Parents' *Opposition* to Andover's *Motion.* These facts are considered in the light most favorable to Parents as the non-moving party.

1. Student is an eleven-year-old rising sixth grader who lives with Parents in Andover. She is a child with disabilities who at all relevant times was and is eligible for special education services from Andover pursuant to the Individuals with Disabilities Education Act (IDEA)[2] and the Massachusetts special education statute.[3]

[1] The BSEA is also informed by Rule 56(a) of the Massachusetts Rules of Civil Procedure, which provides that summary judgment may be granted only if the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law." *See also Rulings on Motions for Summary* Judgment in: *Zelda v. Bridgewater-Raynham Public Schools and Bristol County Agricultural School*, 12 MSER 4 (Byrne, 2006); *In Re Westwood Public Schools,* 16 MSER 378 (Figueroa, 2010); *In Re: Mike v. Boston Public Schools*, 12 MSER 364 (Oliver, 2010); *In Re Bridgewater-Raynham Public Schools*, 19 MSER 17 (Figueroa, 2013).

[2] 20 USC 1400 *et seq*.

[3] MGL c. 71B

2. Student has attended Landmark School (Landmark) from the 2016-2017 school year (second grade) through the 2019-2020 (fifth grade) school year pursuant to a private settlement agreement (SA) which the parties executed on May 15, 2017. The relevant portions of the SA, Paragraphs 9 and 10, are reproduced verbatim below:

> 9. 2019-2020 School Year: In order to ensure the orderly development of the IEP for the 2019-2020 (5th grade) school year, the Parents hereby consent and agree that the District shall have the opportunity to conduct evaluations, and present an IEP to the Parents for their review and response on or about May 1, 2019. In giving their consent at this time, the Parents waive their right to withdraw said permission at any later date. Should the District conduct the evaluation and present an IEP as provided above, and should any unresolved dispute exist regarding the Student's placement for the 2019-2020 (5th grade) school year, the parties understand and agree that the placement pending appeal (i.e., "stay put" placement) will be the program and placement proposed by the Andover Public Schools.
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> 10. Privately Obtained Educational Services from 2020-2021 School Year Forward: Except in the event of extraordinary circumstances which substantially and materially change the Student's disabling condition and educational needs, the Parents agree that neither they nor the Student shall seek public funding for any privately obtained or provided educational services, programming, or placements for the Student from the 2020-2021 school year through the end of the Student's possible eligibility for special education, including the Student's graduation from high school or her twenty-second (22nd) birthday, whichever comes first. The Parents further agree to indemnify and hold the District harmless from any such possible claim for public funding that the Student may bring on her own behalf.

3. Pursuant to Paragraph 9 of the SA, in or about April 2019, Andover re-evaluated Student and proposed an IEP for the period from April 2019 to

February 2020.[4] Andover proposed placement in its in-district language-based program. Parents rejected the proposed IEP and placement.

4. Subsequently, Parents unilaterally placed Student at Landmark for the 2019-2020 school year.

5. In or about January 2020, Andover convened a Team meeting to review the results of a private evaluation. No changes were made to the previously-rejected IEP for 2019-2020.

6. On February 13, 2020, Parents filed a hearing request with the BSEA seeking relief corresponding to the rejected IEP for April 2019-February 2020, referred to in Paragraph 3, above.

7. In or about April 2020, Andover proposed an IEP and in-district placement for the period from April 2020 to April 2021 (sixth grade). Parents rejected this proposed IEP and placement.

8. On or about May 4, 2020, Parents filed an Amendment to their hearing request to seek funding for Landmark School for the period from April 2020 to April 2021 in addition to the previously-requested reimbursement for the 2019-2020 school year. This Amendment to the hearing request is the subject of the pending *Motion for Partial Summary Judgment*.

ISSUE PRESENTED

At issue is whether Paragraph 10 of the SA, quoted above, precludes Parents from seeking an order at the BSEA directing Andover to fund Student's Landmark placement for the 2020-2021 school year. A corollary issue is whether the BSEA has authority to construe or interpret this paragraph, or whether the parties must seek such interpretation in a court.

POSITIONS OF THE PARTIES

Position of School (Moving Party)

Andover argues that the pertinent language of the SA explicitly and unambiguously prohibits Parents from "litigating the District's obligation to the Student with the exception of fifth grade," that the parties are bound by the plain language of the SA, and that the BSEA must not disturb or undermine the SA by conducting a hearing on issues covered by the SA. Alternatively, APS contends

[4]Although this IEP actually covered the last three or so months of fourth grade and the first 5 or 6 months of fifth grade, as a matter of convenience, the parties and this ruling refer to this IEP as covering "fifth grade" and the "2019-2020" school year. Similarly, the IEP for April 2020 to April 2021 is referred to as the IEP for the 2020-2021 school year, corresponding to sixth grade, even though in fact the IEP covers the last three months of fifth grade (2019-2020) and the first six months of sixth grade (2020-2021).

that if the language in Paragraph 10 of the SA is ambiguous, requires interpretation, or should be set aside or modified, then the dispute is in the nature of contract, and the BSEA lacks jurisdiction to address it. Rather, the parties must seek relief in a court with jurisdiction to decide contract disputes.

Position of Parents

This is not a case where the Parents are seeking to have the BSEA either enforce or set aside a settlement agreement. Rather, Parents have requested the BSEA to determine the services and placement that Student needs to provide her with a free, appropriate public education (FAPE) for the 2020-2021 school year.

Paragraph 10 of the SA is clear and unambiguous and would not require interpretation by the BSEA. The plain language at issue does not require Parents to waive their rights to pursue a FAPE for Student during 2020-2021 or thereafter, which may include pursuit of a private placement, prospectively.

On the contrary, Paragraph 10 provides only that Parents "shall not seek public funding" for any such services that were "privately obtained or provided…" (emphasis supplied). Parents argue that this language prohibits them from seeking reimbursement from Haverhill for any unilateral private placements that they may make, or any unilateral private services that they may secure, from the 2020-2021 school year forward. Parents have not "obtained or provided" such placement or services because the 2020-2021 school year has not begun. They are not seeking reimbursement but, rather, prospective relief in the form of a placement that they have chosen but have not obtained. If the parties had intended the SA to preclude Parents from seeking private placement as prospective relief, they would have so specified in the SA.

Further, if Paragraph 10 of the SA is interpreted to preclude Parents from seeking funding for a program that they chose, but did not obtain, for Student, then that paragraph would violate federal and state special education law by depriving the hearing officer of the full range of potential remedies for ensuring that Student receives FAPE for 2020-2021. Specifically, under APS' interpretation of the SA, even if Parents can demonstrate that Andover's proposed in-district placement is inappropriate and cannot be modified to be made appropriate, the hearing officer would be precluded from ordering a private placement. Such restriction on the ability of a hearing officer to grant relief would violate the IDEA.

Lastly, the BSEA has both the authority and expertise to interpret and apply the pertinent language of the SA. Parents should not be required to undergo the expense and delay of seeking relief in court.

DISCUSSION

The BSEA has jurisdiction to consider only those claims for which enabling statutes and regulations provide express authority. See *Globe Newspaper Co. v. Beacon Hill Architectural Comm.*, 421 Mass. 570 (1996). "The IDEA and conforming Massachusetts law give the BSEA authority to determine the respective rights and obligations of publicly funded agencies and parents/students in the implementation of federal and state special education statutes." *In Re: Monson Public Schools*, BSEA #10-5064 (Byrne, 2010).

The question of whether the BSEA has subject matter jurisdiction to interpret privately negotiated settlement agreements concerning special education matters and determine whether either party has breached such an agreement has been debated within courts and the BSEA for some time. There are reasonable arguments for and against asserting administrative due process jurisdiction over private agreements. *See*, *e.g*., *In Re Peabody Public Schools*, BSEA No. 09-6506 (Crane, 2009); *In Re Israel v. Monson Public Schools*, BSEA No. 10-5064 (Byrne, 2010). To date, there is no conclusive guidance on this issue from either the First Circuit or the Massachusetts Supreme Judicial Court. *S. Kingstown Sch. Comm. v. Joanna S.* 773 F.3d n.3 (1st Cir. 2014) (declining to address whether, or to what extent, administrative hearing officers—as opposed to courts--have jurisdiction over the interpretation of settlement agreements).

Courts in other jurisdictions are divided on this issue, which frequently arises in the context of a party's responsibility to exhaust the administrative process established by the IDEA before seeking judicial relief. For example, the Court of Appeals for the 11th Circuit has held that such exhaustion was required in a case where the Court deemed that an alleged breach of contract was related to provision of a free, appropriate public education ("FAPE"). *School Bd. Of Lee County FL. v. M.M. ex rel. M.M.*, 2009 WL 3182971(11th Cir. 2009); *J.P. v. Cherokee County Bd. of Educ.*, 218 Fed. Appx. 911 (11th Cir. 2007).

In contrast, the 2nd Circuit Court of Appeals held that a "due process hearing before an IHO [impartial hearing officer] was not the proper vehicle to enforce the settlement agreement," but the hearing officer must "consider the settlement agreement to the extent it might have been relevant to the issues before him [*i.e*. provision of FAPE to the student]." Similarly, in the matter of *T.L. ex rel. G.L. v. Palm Springs Unified School Dist.*, 304 Fed. Appx. 548 (9th Cir. 2008), the 9th Circuit held that exhaustion was mandatory when a breach of contract claim was related to educational services under the IDEA.

In general, the BSEA's practice has been to consider the existence and scope of a settlement agreement when adjudicating cases. Hearing officers do not "undo" settlement agreements, or proceed to an evidentiary hearing on a matter that has been addressed and resolved via a settlement agreement. To do otherwise would undermine the relevant provisions of federal and state special

education law as well as the underlying legislative purpose and public policy favoring informal, voluntary resolution of special education disputes. *See In Re Revere Public Schools*, BSEA No. 1507485 (Berman, 2015) citing 20 USC Sec. 1415(e)(2)(F), 34 CFR Sec. 300.506; *Masconomet Regional School District*, BSEA No. 1102194 (Oliver, 2010).

In situations where the language of a settlement agreement is ambiguous, or where a party questions the validity of the agreement for some reason, the BSEA has referred the parties to courts of competent jurisdiction for resolution. *In Re: Milford Public Schools,* BSEA No. 1601412, (Berman 2016)*; In Re Israel v. Monson Public Schools; In Re: Revere Public Schools, supra.*

In the instant case, I am persuaded that the language in Paragraph 10 of the settlement agreement is ambiguous and subject to interpretation. On the one hand, Andover reasonably argues that Paragraph 10 constitutes Parents' waiver of the right to seek public funding for any private placement or services for Student from the 2020-2021 school year forward. As Andover points out, Parents were represented by former counsel when they negotiated the SA.[5] There is no dispute that Andover fulfilled its obligations under the SA, and that Parents received the "benefit of their bargain." Parents may now be second-guessing their decision to agree to Paragraph 10, but their misgivings do not negate the effects of that paragraph.

On the other hand, Parents also are reasonable when they contend that while Paragraph 10 precludes them from seeking reimbursement for any unilateral private placement of Student from 2020-2021 forward, it does not bar them from seeking a prospective a private placement if they believe that Student needs one to receive FAPE. The SA does not require Parents to waive Student's future rights to a FAPE, which necessarily includes the right to have a hearing officer consider all available remedies in a dispute over Student's prospective placement.

The ambiguity in Paragraph 10 cannot be resolved by parsing the relevant language. There must be an inquiry into circumstances surrounding the negotiation of the SA, in order to determine the parties' intentions and to ascertain whether or not there was a "meeting of the minds." Such inquiry is within the purview of a court with jurisdiction over contract disputes, and not the BSEA. As such, summary judgment is warranted.

[5] Parents' current counsel in this matter was not involved in negotiating the SA.

CONCLUSION AND ORDER

For the reasons stated above, Andover's *Motion for Partial Summary Judgment* is GRANTED.

By the Hearing Officer,

/s/ *Sara Berman*

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Sara Berman
Dated: July 15, 2020