

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

In Re: Student and Hamilton-Wenham Regional School District

BSEA #2104095C

RULING ON
HAMILTON-WENHAM REGIONAL SCHOOL DISTRICT’S MOTION FOR
SANCTIONS RESULTING FROM PARENTS’ NON-COMPLIANCE AND WILLFUL
INTERFERENCE WITH BSEA DECISION #2104095 AND, SPECIFICALLY, WITH
IMPLEMENTATION OF THE DECISION IN RE: STUDENT AND HAMILTON-
WENHAM REGIONAL SCHOOL DISTRICT
AND
PARENTS’ OPPOSITION TO HAMILTON-WENHAM REGIONAL SCHOOL
DISTRICT’S MOTION FOR SANCTIONS
AND
PARENTS’ MOTION FOR SANCTIONS AGAINST HAMILTON-WENHAM
REGIONAL SCHOOL DISTRICT

On August 19, 2021, Hamilton-Wenham Regional School District (hereinafter, the District) filed a *Motion for Sanctions Resulting from Parents’ Non-Compliance and Willful Interference with BSEA Decision #2104095 and, Specifically, with Implementation of the Decision In Re: Student and Hamilton-Wenham Regional School District* (hereinafter, the District’s Motion). The Motion seeks issuance of “specific sanctions against the Parents, for the their post decision willful and obstructionist interference with the District’s implementation” of the Order articulated in the Decision issued in the above-referenced matter on June 22, 2021 (hereinafter, the June 2021 Order and June 2021 Decision, respectively). Specifically, the District asserts that Parents showed “bad faith” by having Student participate in independent psychoeducational testing in July 2021, after failing to respond to two emails from the District attempting to arrange the testing granted by the June 2021 Decision. The District seeks an order that

- i. Parents immediately turn over the results and reports and all other evaluation records related to the privately obtained evaluations;
- ii. the BSEA retain jurisdiction over the matter to ensure Parents’ cooperation;
- iii. in the event that comprehensive and appropriate testing of Student cannot be accomplished due to the practice effect resulting from Student’s private testing, the District be afforded additional time (up to one year from the date of the private testing) to administer its own evaluations; and
- iv. the Team be under no obligation to review the results of any private testing until school-based testing is completed.

In response, on August 24, 2021, Parents filed an *Opposition to Hamilton-Wenham Regional School District’s Motion for Sanctions* (hereinafter, the Opposition) asserting that no sanctions should be imposed on Parents because the District failed to immediately implement the June

2021 Decision; Parents were entitled to have Student privately tested at their expense at any time in an effort to place him for summer and fall programming; and Parents intend to share the independent evaluation reports with the District once they receive them. On the same day, Parents filed a *Motion for Sanctions Against Hamilton-Wenham Regional School District* (hereinafter, the Parents' Motion) asking the BSEA to issue an order imposing sanctions on the District for failing to implement the June 2021 Decision and entitling Parents to legal fees associated with having to file Parents' Motions.

Although the District and the Parents, respectively, titled their motions as requests for sanctions, I read them as motions alleging parental interference with a BSEA order and a school district's non-compliance with same and seeking sanctions as a result. Therefore, this Ruling is issued pursuant to BSEA Hearing Rule XIV, which provides, in relevant part, that a "party contending that the Hearing Officer's decision is not being implemented may file a motion requesting the BSEA to order compliance with the decision. ... Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief"

Neither party has requested a hearing on the motions, and I find that a hearing is not needed because it would not likely advance my understanding of the issues.¹

RELEVANT FACTS² AND PROCEDURAL HISTORY:

1. On June 22, 2021, I issued a Decision in the above-referenced matter in which I found that, despite Parents' refusal to consent to a three-year re-evaluation of Student, updated testing was necessary for the District to determine appropriate educational services and placement for Student. Therefore, I granted the District substitute consent to conduct a psychological assessment, a speech and language evaluation, academic achievement testing, and an educational assessment of Student notwithstanding Parents' lack of consent.
2. On July 12, 2021, Parent testified in BSEA Matter No. 2104633³ that, at that time, the District had yet to reach out to her regarding testing.
3. On July 26, 2021, Mother contacted the District via email indicating that the District had "yet to contact [them] to request/provide direction on testing."
4. On July 27, 2021, Ms. Stacy Bucyk, Director of Student Services for the District, responded with September 2021 testing dates.

¹ See BSEA Hearing Rule VI D.

² The facts in this section are drawn from the parties' pleadings and exhibits and are subject to revision in further proceedings. The parties' exhibits were identical, consisting solely of the email communications referenced in this section.

³ The Hearings in BSEA #2104095 and BSEA #2104633 were bifurcated: the issue of substitute consent was heard first; thereafter the substantive issues were heard.

5. On August 6, 2021, Ms. Bucyk emailed Parents offering additional August testing dates for the academic portion of the re-evaluation and reiterating the September dates.
6. On August 18, 2021, Father responded that Student was on vacation with Mother. Also on August 18, Mother responded that she would discuss the proposed testing with Student and indicated that they were away until August 22. Mother furthermore informed Ms. Bucyk that, having not heard from the District after June 22, 2021, Parents had arranged and had completed metalinguistic, education, and cognitive testing in July 2021. Mother asked whether the District would fund “the balance of High School” for Student. Mother wrote, “Please let me know, and we will forward test results.”⁴
7. In response, the District filed the Motion at issue. Parents filed their Opposition and Motion for Sanctions.
8. On August 30, 2021, Parents submitted to the BSEA that they had provided the District with the independent evaluation reports.⁵
9. Also on August 30, 2021, the District responded that District evaluators will need to review Parents’ private evaluations to determine if they can still conduct their testing and do so in a way that is comprehensive and appropriate. The District argued that if there are test instruments District evaluators would have used but now cannot, this will compromise their ability to test, and thus undermine the BSEA Order allowing them to conduct school-based testing.

LEGAL STANDARDS AND DISCUSSION:

A. Legal Standards:

1. *Compliance with and Enforcement of a BSEA Decision*

Pursuant to the Individuals with Disabilities in Education Act (IDEA), a decision of the Bureau of Special Education Appeals (BSEA) is final, subject only to judicial review.⁶ A final decision of the BSEA must be implemented immediately,⁷ but it may be appealed to a court of competent jurisdiction.⁸

Although a BSEA hearing officer has no authority to enforce a BSEA decision,⁹ this general lack of enforcement authority does not preclude the BSEA from determining whether an order has

⁴ In Parents’ Motion, Parents assert that they have yet to receive the reports from their independent educational evaluations, but they intend to provide them to District upon receipt. On August 30, 2021, Parents informed the BSEA that they have provided said assessments to the District.

⁵ Via email on August 30, 2021, Parents offered to provide copies of the reports to the BSEA, to which the District objected. On the same date, via email, the Hearing Officer declined to view the reports.

⁶ See 20 U.S.C. s. 1415(i)(1)(B).

⁷ According to Black’s Law Dictionary, the adjective “immediate” means occurring without delay, instant.

⁸ See 603 CMR 28.08(6).

⁹ See, e.g., *A.R. v. New York City Department of Education*, 407 F.3d 65, n.13 (2nd Cir. 2005) (although the terms of a special education Hearing Officer’s decision are enforceable by a court, “[Hearing Officers], as is common in

been complied with. According to Massachusetts special education regulations and the BSEA Hearing Rules, a party contending that a BSEA decision is not being implemented may file a motion with the BSEA setting out the areas of non-compliance. The hearing officer may convene a hearing of limited scope.¹⁰ Upon a finding of non-compliance, the hearing officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Education or other office for appropriate enforcement action.¹¹

Where a hearing officer finds that a school district failed to comply with a BSEA decision, hearing officers have generally fashioned equitable relief in the form of additional compensatory education and/or monetary reimbursement for privately secured services.¹² Cases involving a parent's failure to comply with a BSEA decision are limited. However, in *In Re: Hampden-Wilbraham Regional School District and James*, BSEA #05-4878, Hearing Officer Ray Oliver found that non-compliance by parents who interfered with the school district's ability to conduct a previously ordered comprehensive evaluation "undercut the integrity of the BSEA process." As a result, he sanctioned Parents by dismissing with prejudice several parental claims.¹³

In *In Re: Hamilton-Wenham Public Schools*, BSEA # 04-4201, Hearing Officer Rosa Figueroa concluded that where a school district was unable to comply with a BSEA decision because of a parent's or a student's actions, the school district was found compliant with a previous decision ordering the school district to place a seventeen-year old student in a private, residential program, because the district had attempted to make FAPE "available" to the student who refused to attend. According to Hearing Officer Figueroa, the IDEA does not require a district to motivate a student to avail himself of the education services and placement offered, especially when the student is not compelled by state law to attend school, and his Parents fail to require him to do so. In contrast to the young age of the student in the matter of *In Re: Hampden-Wilbraham Regional School District and James*, in *In Re: Hamilton-Wenham Public Schools*, the student had turned seventeen years of age and was no longer subject to the Commonwealth's compulsory school attendance laws. Accordingly, judicial remedies compelling the student's attendance at the residential program secured by the school district were no longer an option. Therefore, Hearing Officer Figueroa concluded that the district had met its legal obligation.¹⁴

B. Application of Legal Standards:

For the reasons articulated below, the District's *Motion for Sanctions Resulting from Parents' Non-Compliance and Willful Interference with BSEA Decision #2104095 and, Specifically, with Implementation of the Decision In Re: Student and Hamilton-Wenham Regional School District* is DENIED, in part, and ALLOWED, in part. The Parents' *Motion for Sanctions Against Hamilton-Wenham Regional School District* is DENIED.

administrative procedures, have no enforcement mechanism of their own"); *Longmeadow Public Schools*, BSEA # 08-0673 (Crane, 2010).

¹⁰ The hearing officer may also elect to rule on the motion without a hearing. See BSEA Hearing Rule VI D.

¹¹ 603 CMR 28.08(6)(b); *BSEA Hearing Rules*, Rule XIII (B) and (C), Rule XIV.

¹² See *In Re: Chicopee Public Schools and Nelida*, BSEA #04-0093, 10 MSER 276 (Byrne, 2004); *In Re: Dracut Public Schools*, BSEA # 08-5330c, 15 MSER 178 (Crane, 2009).

¹³ *In Re: Hampden-Wilbraham Regional School District and James*, BSEA #05-4878, 12 MSER 71 (Oliver, 2006).

¹⁴ *In Re: Hamilton-Wenham Public Schools*, BSEA #04-4201, 10 MSER 210 (Figueroa, 2004).

a. *Parents May Secure an Independent Educational Evaluation (IEE) of Student at Personal Expense At Any Time.*

Parents correctly assert that they are free to obtain an independent evaluation at personal expense at any time.¹⁵ And, while understandable, the District’s argument that District evaluators’ ability to conduct their testing may be compromised does not serve to curtail the Parents’ otherwise unfettered right to secure a private evaluation of their child. Different test instruments are available to the District and may be utilized by District evaluators in its testing.

b. *The Team Must Reconvene to Consider Parents’ Privately Funded Independent Educational Evaluations (IEEs) Within 10 School Days of Their Receipt.*

The District seeks an order that the IEP Team “be under no obligation to review the results of any private testing until school-based testing is completed.” However, federal and state special education laws preclude such an order.

Pursuant to 34 CFR 300.502(c)(1), if a parent obtains an Independent Educational Evaluation (IEE) at public or private expense and shares same with the school district, then the IEE must be considered by the Team in any decision made with respect to the provision of FAPE to the child. In Massachusetts, 603 CMR 28.04(5) governs. 603 CMR 28.04(5)(f) states that within 10 school days of receiving parents’ independent education evaluation reports, the IEP Team shall reconvene and consider the evaluation and whether a new or amended IEP is appropriate for Student.¹⁶ Most hearing officers apply this 10 day rule to all IEEs, be they publicly or privately funded.¹⁷ Therefore, regardless of whether the District’s assessments have been completed, within 10 school days of receiving Parents’ independent education evaluation reports, the IEP Team shall reconvene and consider the evaluation and whether a new or amended IEP is appropriate for Student.

c. *The BSEA Has No Authority to Compel Parents’/Students’ Participation in the Re-Evaluation, But If Parents Submit Student to Assessment, the District May Not Unilaterally Postpone the Three-Year Re-Evaluation.*

Parents’ privately obtained IEEs do not limit the District’s entitlement to evaluate Student with qualified personnel of its choosing.¹⁸ Nevertheless, as in *In Re: Hamilton-Wenham Public Schools*, in the present matter, Student’s age (16) precludes the involvement of any state agency

¹⁵ See 603 CMR 28.04(5)(b) (“The parent may obtain an independent education evaluation at private expense at any time”).

¹⁶ At least one Hearing Officer has interpreted the 10 day rule articulated in 603 CMR 28.04(5) as applying only to a “true IEE” (i.e., one that is requested by parents after a school evaluation) and not to privately obtained parental evaluations. See *In Re: Hampden-Wilbraham Regional School District and James*, BSEA #05-4878, 12 MSER 71 (Oliver, 2006).

¹⁷ E.g., *In Re: Nashoba Regional School District and Quinelle*, BSEA #2009112, 27 MSER 84 (Reichbach, 2021); *In Re: Boston Public Schools*, BSEA # 1310180, 19 MSER 208 (Figueroa, 2013).

¹⁸ See detailed analysis in *In Re: Hamilton-Wenham Regional School District*, BSEA #2104095, 27 MSER 287 (2021). The District originally argued that if Parents refuse to cooperate (i.e., by failing to provide the District with a list of the assessment tools recently utilized by independent evaluators), District-conducted assessment results may be skewed or even invalid. The District’s argument was valid but is now moot as Parents have provided the independent evaluation reports to the District.

to assist the District in having Student participate in the three-year re-evaluation for which substitute consent had been granted. Without such assistance, the District is not obligated to ensure, nor am I able to force, Student's participation in the evaluations.¹⁹ Therefore, I find that if Parents choose not to submit Student for District assessments, the District shall be deemed to have satisfied its obligation to comply with the June 22, 2021 Order.²⁰ However, if Parents opt to submit Student for assessment, the District must complete the evaluations for which substitute consent has been granted within the regulatory timeframe, as is discussed below.

d. Unless Parents Refuse to Cooperate with the Assessment Process or Fail to Submit Student for District Assessments, the District Must Conduct Said Assessments Within 30 School Days of June 22, 2021 in order to Comply with the June 2021 Decision.

Parents correctly assert that the District was obligated to immediately implement the June 2021 Order. In the absence of caselaw clarifying the obligation for immediate implementation, I first look to the legal definition of "immediately," which, according to Black's Law Dictionary, means without delay. Therefore, to determine whether a "delay" has occurred, I examine the rules governing special education evaluation timelines.

Both IDEA and Massachusetts regulations clearly establish timelines for initial evaluations. Under 34 CFR § 300.301(c)(1), an initial evaluation must be conducted within 60 days after receiving parental consent for the evaluation or, if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe.²¹ Pursuant to 603 CMR 28.04(2) (Initial Evaluation), "the school district shall provide or arrange for the evaluation of the student by a multidisciplinary team within 30 school days." In Massachusetts, pursuant to 603 CMR 28.05(1), this timeline, and that applying to the subsequent team meeting, also applies to reevaluations.²²

The IDEA sets out (and Massachusetts has adopted) limited exceptions to the timeline for conducting evaluations.²³ Specifically, the time frame required by 34 CFR 300.301(c) does not apply where the parent of a child repeatedly fails or refuses to produce the child for evaluation; or a child enrolls in a school of another public agency after the relevant time frame has begun, and prior to a determination by the child's previous public agency as to whether the child is a

¹⁹ See *In re: Student with a Disability*, 00236/09-10AS, 111 LRP 16554 (SEA PA, 2010) ("systemic process and legal determinations do not serve to force a parent to avail themselves of programs deemed appropriate").

²⁰ I make this conclusion based on the exhibits which demonstrate clearly that the District offered Parents multiple testing dates.

²¹ See *Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations*, Answer B-3 (OSEP, June 2010) ("The IDEA 60-day timeline applies only to the initial evaluation").

²² See 603 CMR 28.05(1) ("Within 45 school working days after receipt of a parent's written consent to an initial evaluation or reevaluation, the school district shall: provide an evaluation; convene a Team meeting to review the evaluation data, determine whether the student requires special education and, if required, develop an IEP in accordance with state and federal laws; and provide the parents with two copies of the proposed IEP and proposed placement, except that the proposal of placement may be delayed according to the provisions of 603 CMR 28.06(2)(e)...") (emphasis added).

²³ Under IDEA, the exceptions apply to initial evaluations, but state law expands to reevaluations also.

child with a disability.²⁴ There are no exceptions in IDEA that would permit the applicable initial evaluation timeline to be suspended because of a school break.²⁵ Under state regulations,

[the] evaluation assessments shall be completed within 30 school working days after receipt of parental consent for evaluation. Summaries of such assessments shall be completed so as to ensure their availability to parents at least two days prior to the Team meeting. If consent is received within 30 to 45 school working days before the end of the school year, the school district shall ensure that a Team meeting is scheduled so as to allow for the provision of a proposed IEP or written notice of the finding that the student is not eligible no later than 14 days after the end of the school year.²⁶

Pursuant to this regulation, June 22, 2021, the date of my Order, begins the timeline for completing the re-evaluation at issue. According to the District's 2020-2021 school calendar, the last day of school was June 17.²⁷ Because consent (or, in this case, substitute consent) was not received within 30 to 45 school working days before the end of the school year, the evaluations I ordered need not have been conducted to date. Unless Parents refuse to cooperate with the assessment process or fail to submit Student for assessment, the District must conduct the assessments within 30 school days of June 22, 2021.²⁸

e. The BSEA Has No Authority to Award Attorney's Fees.

As an administrative hearing officer, I have no authority to award attorney's fees.²⁹ As such, all such requests are denied.³⁰

ORDER:

The District's *Motion for Sanctions Resulting from Parents' Non-Compliance and Willful Interference with BSEA Decision #2104095 and, Specifically, with Implementation of the Decision In Re: Student and Hamilton-Wenham Regional School District* is DENIED, in part,

²⁴ See 34 CFR § 300.301(d).

²⁵ See *Letter to Reyes*, 59 IDELR 49 (OSEP, 2012) ("The Office of Special Education Programs recognizes that conducting evaluation activities during extended breaks, such as the typical school's summer vacation, can be challenging for school districts, particularly if fewer staff members are available. Nevertheless, the IDEA contemplates that the initial evaluation of a child suspected of having a disability not be unreasonably delayed so that eligible children with disabilities are not denied a FAPE").

²⁶ 603 CMR 28.05(1). Similarly, Massachusetts regulation 603 CMR 28.04(2) uses the term "school days" in establishing the timeline for initial evaluations, and 603 CMR 28.02(5) defines "day" to mean calendar day unless the regulation specifies school day, which means any day, including a partial day, that students are in attendance at school for instructional purposes.

²⁷ The District's 2020-2021 school calendar may be found at https://www.hwschools.net/uploaded/District/School_Calendars/Copy_of_2020-2021_School_Calendar_SC_approved_12.19.18.pdf. Information is not available to this Hearing Officer on the number of snow days for the District during 2020-2021.

²⁸ I decline to specify a date in this Ruling because it is not clear to me whether June 17, 2021 was the last school day on 2020-2021 or whether additional days were added to accommodate snow days.

²⁹ See *In Re: Rockport Public Schools*, BSEA #01-4954 (Crane, 2002).

³⁰ For a discussion of the appropriate forum to address claims for attorney's fees, see *id.*

and ALLOWED, in part. Specifically, the District's request for sanctions against Parents is DENIED. In addition, the District's request that Parents be ordered to immediately turn over to the District the results and reports and all other evaluation records related to the privately obtained independent evaluations is DENIED. The District's request that it be afforded all necessary time to ensure that the District's testing is "free of practice effect" is DENIED. The District's request to postpone the three-year re-evaluation is DENIED. The District's request that the Team be under no obligation to review the independent reports until the District's assessments have been completed is DENIED. The District's request that the BSEA retain jurisdiction over the matter is ALLOWED.

The Parents' *Motion for Sanctions Against Hamilton-Wenham Regional School District* is DENIED.

In addition, I order as follows:

1. Within 5 business days of this Ruling, Parents must inform the District and the BSEA in writing whether they intend to submit Student for District assessments pursuant to the June 22, 2021 Order granting substitute consent.
2. Within 10 school days of receiving Parents' independent education evaluation reports, the IEP Team shall reconvene and consider the evaluation and whether a new or amended IEP is appropriate for Student.
3. The District shall complete the assessments for which substitute consent was granted within 30 school days of the June 22, 2021 Decision. However, the District shall be excused from adhering to this timeline if Parents refuse to cooperate with the assessment process or if they fail to submit Student for assessment.
4. If Parents choose not to submit Student for District assessments, the District shall be deemed to have satisfied its obligation to comply with the June 22, 2021 Order.
5. The Hearing Officer will retain jurisdiction of this matter for compliance purposes only. Except as specified in #1 above, the Parties shall submit written status reports on September 15, 2021.

So Ordered,

/s/ Alina Kantor Nir

Alina Kantor Nir, Hearing Officer

Date: September 1, 2021