

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

In Re: Student and Hamilton-Wenham Regional School District

BSEA #2104095C

**ORDER/RULING RELATING TO THE PARTIES' REQUESTS/MOTIONS AS PER
THEIR RESPECTIVE STATUS REPORTS**

This matter comes before the BSEA following an Order issued on September 1, 2021 instructing the parties to submit status reports in the above-referenced matter on September 16, 2021. These reports were so submitted in a timely manner. Because each submission sought BSEA action, I treat the parties' respective status reports as Motions. Specifically, the District requested that the BSEA retain jurisdiction over the above-referenced matter until October 19, 2021. Parents requested same but also asserted non-compliance by the District with the September 1, 2021 Order and sought additional relief.

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

The District's Motion for continued jurisdiction over the matter until October 19, 2021 is ALLOWED. The Parents' Motion is ALLOWED, in part, and DENIED, in part.

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 what educational services and placement were appropriate 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 August 19, 2021, 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*, seeking issuance of "specific sanctions against the Parents, for their post decision willful and obstructionist interference with the District's implementation" of the Decision. Specifically, the District asserted 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.

¹ See BSEA Hearing Rule VI D.

² The facts in this section are drawn from the parties' pleadings and are subject to revision in further proceedings.

3. In response, on August 24, 2021, Parents filed *Parents' Opposition to Hamilton-Wenham Regional School District's Motion for Sanctions*, 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 intended to share the independent evaluation reports with the District once they receive them. They also filed *Parents' Motion for Sanctions Against Hamilton-Wenham Regional School District*, asking the BSEA to issue an order imposing sanctions on the District for failing to implement the Decision and entitling Parents to legal fees associated with having to file Parents' Motion and Opposition.
4. On September 1, 2021, I issued a *Ruling on 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, Parents' Opposition to Hamilton-Wenham Regional School District's Motion for Sanctions and Parents' Motion for Sanctions Against Hamilton-Wenham Regional School District*, denying all requests for sanctions. In addition, Parents were instructed to inform the District and the BSEA in writing, within five business days, whether they intended to submit Student for District assessments pursuant to the June 22, 2021 Order granting substitute consent. I also ordered the District to reconvene the IEP Team within 10 school days of receiving Parents' private independent education evaluation reports to consider the evaluations and whether a new or amended IEP was appropriate for Student. The District was also instructed to complete the assessments for which substitute consent was granted within 30 school days of the June 22, 2021 Decision. I also agreed to retain jurisdiction of the matter for compliance purposes only and asked the parties to submit written status reports on September 16, 2021.
5. On September 2, 2021, Parents informed the District and the BSEA that they intended to submit Student for District-based testing.
6. On September 9, 2021, the parties jointly requested that I maintain jurisdiction of the matter until September 29, 2021. Their request was granted.
7. On September 16, 2021, the District filed a status report asserting that a Team meeting was held on September 15, 2021 to consider the private evaluations completed by Dr. Robert Kemper and Dr. Barry Scoff. At Parents' request, both parties recorded the meeting. Dr. Kemper and Parents' Counsel attended the meeting. Following a review of the evaluations, the Team determined that, at that juncture, no initial changes to the IEP were appropriate and that the school-based testing ordered by the BSEA would need to be completed in order for the Team to revise the current IEP (which runs until November 17, 2021). Another meeting was scheduled for October 18, 2021 by which time all school-based testing would be completed. As such, the District requested that the BSEA retain jurisdiction over the matter until October 19, 2021 to allow for the completion of the process.
8. Also on September 16, 2021, Parents filed a status report with the BSEA. In it, Parents alleged non-compliance by the District with the September 1, 2021 Order. Specifically, Parents asserted that:
 - a. Prior to the IEP Team meeting, the District accused Student's expert of "advocating for himself rather than the student";

- b. The District refused to include Parents' Counsel and Dr. Kemper on the meeting invitation;
 - c. The meeting invitation noted that the purpose of the meeting was "Review Private Evaluations Submitted by Parents" rather than "Review Private Evaluations of Dr. Kemper and Dr. Scoff" whose evaluations were to be reviewed at said meeting;
 - d. The speech and language pathologist did not have the most current IEP at the Team meeting;
 - e. The Team reviewed the private evaluations but refused to review and amend the 2020-2021 IEP based on Dr. Kemper's recommendations;
 - f. The District continued to propose Pathways Academy until the Team reconvened to review the District-based assessment results, an action which was "not in the spirit of the BSEA Order";
 - g. The District "knew its position going into the meeting and that it had no intention to go through [Student's] IEP to determine if a new or amended IEP was appropriate";
 - h. The District was "guiding and/or interfering" with the testing process. At the IEP meeting, Dr. Ruiz stated that he "need[ed] to **communicate and talk with** [Student's] prior schools" in order to inform his assessment of whether Student has a social pragmatic disorder or autism. Although Parents offered to allow Dr. Ruiz to speak with Student's current program, Dr. Ruiz asserted that he "needed to communicate with *at least* Austin Prep";
 - i. The District offered October 18, 2021 as the next meeting date, but, in the meantime, Student remains without an appropriate program; and
 - j. The District did not provide Parents with the meeting notes at or following the meeting.
9. Parents requested that the BSEA maintain jurisdiction over the matter "until the testing ... AND the Team meeting related to same are concluded."
10. Parents also sought additional relief, including that:
- a. The District send another invitation to Parents for a continuation of the BSEA ordered IEP Meeting listing Dr. Robert Kemper and Parents' Counsel on the Meeting Invitation and noting that the purpose of the meeting is to review Dr. Kemper's evaluation report;
 - b. The Team conduct a "full review" of the 2020-2021 IEP to determine whether a new or a revised IEP is appropriate for Student;
 - c. The District provide Parents with its evaluation reports as soon as said reports are available; and
 - d. Any "further orders relating to the District's actions and/or non-compliance as the BSEA deems appropriate, including payment for a temporary school placement for [Student] at his current school (Fusion Academy) to allow for the District's testing process and the IEP Team to reconvene for its IEP Meeting to address [Student's] IEP and placement."
11. On September 17, 2021, the District responded that the District and the Team will continue to follow all regulatory processes and timelines for Student's school-based testing and the reconvening of his Team to review that testing, and develop his IEP for the balance of the 2021-2022 school year.

RELEVANT LEGAL STANDARD:

Like the September 1, 2021 Order issued in this matter, this Order/Ruling is being issued pursuant to the Individuals with Disabilities in Education Act (IDEA) and the Massachusetts special education regulations, which instruct that a decision of the Bureau of Special Education Appeals (BSEA) is final, subject only to judicial review.³ Although a BSEA Hearing Officer has no authority to enforce a BSEA decision,⁴ this general lack of enforcement authority does not preclude the BSEA from determining whether an order has 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 on that Motion.⁵ Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Commonwealth of Massachusetts Department of Elementary and Secondary Education or other office, for appropriate enforcement action.⁶

CONCLUSION:

The District's motion is ALLOWED. The Parents' motion is ALLOWED, in part, and DENIED, in part. Specific requests are addressed below:

1. *The BSEA Will Retain Jurisdiction Over the Above-Refenced Matter for Compliance Purposes Only until October 19, 2021.*

Because the Team is scheduled to reconvene to review District-based assessments on October 18, 2021, the BSEA will maintain jurisdiction over the matter until October 19, 2021. The District's request for continued BSEA jurisdiction over the matter is ALLOWED. The Parents' request for same is also ALLOWED.

2. *The District's Meeting Invitation for the September 15, 2021 Team Meeting Need Not Have Included Parents' Invitees Nor Did the Purpose of the Meeting Need to Have Been Indicated With Additional Specificity.*

The IDEA requires that IEP meeting notices to the parents indicate the purpose, time, and location of the meeting and who will be in attendance, including their position in the district.⁷ The purpose of the meeting notice is just that – notice. Parents should not be surprised by any member's presence nor by the content of the meeting.

³ See 20 U.S.C. s. 1415(i)(1)(B) and 603 CMR 28.08(6).

⁴ 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 administrative procedures, have no enforcement mechanism of their own"); *Longmeadow Public Schools*, BSEA # 08-0673 (Crane, 2010).

⁵ The Hearing Officer may also elect to rule on the motion without a hearing. See BSEA Hearing Rule VI D.

⁶ 603 CMR 28.08(6)(b); see also *BSEA Hearing Rules*, Rule XIV.

⁷ See 34 CFR 300.322(b)(1). See *Letter to Livingston*, 23 IDELR 564 (OSEP 1995).

Here, Parents were aware of their Counsel's and Dr. Kemper's pending attendance at the IEP meeting since they had, presumably, invited them. There was no obligation for the District to include them on its Meeting Invitation, as they were not invitees of the District, only the Parents. Thus, the District's IEP Meeting Invitation form complied with the IDEA requirements to provide Parents with their list of attendees. Moreover, the Meeting Invitation accurately described the purpose of the meeting as "Review Private Evaluations Submitted by Parents." Although Dr. Kemper's name was not referenced on the Meeting Invitation, the language of the notice was sufficient to inform the Parents of the meeting's purpose. Therefore, Parents' request is DENIED.

3. *The District Has Satisfied Its Obligation to Reconvene the Team and Consider the Independent Education Evaluations and Whether a New or Amended IEP is Appropriate.*

Here, the Parents' private evaluation reports were reviewed by the Team. The Team then decided that a new or amended IEP was not appropriate at that time, but scheduled an additional meeting for October 18, 2021 to review District-based assessments. Thus, the procedure followed by the Team met the standard set by IDEA and state regulations. The Parents also seem to be questioning how much deference the Team may or may not have given to the findings and recommendations of these evaluators. However, there is no requirement that a Team accept all or even some of the recommendations offered by outside providers.⁸ The IDEA only obligates the Team to "review and consider" an IEE.⁹ Similarly, Massachusetts regulations require only that the IEP Team reconvene and consider the evaluation and whether a new or amended IEP is appropriate.¹⁰ The District did this at the September 15, 2021 Team meeting. Parents' request to continue the September 2021 IEP meeting in order, once more, to review the private evaluations and to amend the IEP is DENIED.

4. *The District Must Provide Parents With the Team Meeting Notes As Soon As Practicable and Within Ten Days of the Initial Request.*¹¹

⁸ See *Mr. P v. W. Hartford Bd. of Educ.*, 885 F.3d 735, 753-54 (2d Cir. 2018) (where the Special Education Supervisor reviewed and commented on the independent educational evaluation at the meeting, the IEE was adequately "considered" in accordance with the IDEA); *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 806 (8th Cir. 2011) ("the IDEA requires only that an IEP team 'consider,' not 'incorporate,' such evaluations when developing an IEP").

⁹ 34 CFR 300.502(c)(1); *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 947 (1st Cir. 1991) (federal law requires only that an independent educational evaluation "must be considered", not that there be substantive discussion); *G.J. v. Muscogee Cnty. Sch. Dist.*, 668 F.3d 1258, 1266 (11th Cir. 2012); *D.S. ex rel. M.S. v. Trumbull Bd. of Educ.*, 357 F. Supp. 3d 166, 171 (D. Conn. 2019).

¹⁰ See 603 CMR 28.04(5)(f); *In re: Quinelle v Nashoba Regional School District*, BSEA # 20-09112 (Reichbach, 2021); *Neville v. Sutton Public Schools*, BSEA # 07-7534 (Crane, 2008) (rejecting Parents' position that the term "consider" requires that the IEP Team not only listen to the presentation of its neuropsychologist at the Team meeting, but also that the Team itself follow up this presentation with a substantive discussion of the findings and recommendations).

¹¹ Parents raised this issue in their Motion but did not seek specific relief relating thereto.

There is no specific requirement in federal or state special education law and regulations that a school district maintain IEP meeting notes.¹² However, where a school district chooses to do so, meeting notes become part of the student’s educational record and must be made available to the parents.¹³ Here, both parties recorded the September 15, 2021 IEP Team meeting. Parents also assert that the District documented the meeting in meeting notes but refused to provide these to the Parents. Because both the recording and the meeting notes are educational records, they must be made available to Parents “as soon as practicable and within ten days of the initial request” in compliance with Massachusetts student records laws.¹⁴ Therefore, Parents’ request that the BSEA order the District to provide Parents with the meeting notes of the September 15, 2021 Team Meeting is ALLOWED.

5. *The District Must Provide Parents with the District’s Evaluation Reports At Least Two Days In Advance of the October 18, 2021 Team Meeting.*

As part of the relief sought, Parents ask the BSEA to order the District to provide Parents with its Evaluation Reports as soon as said reports are available. 603 CMR 28.04(2)(c) states that summaries of assessments shall be completed prior to discussion by the Team and, upon request, shall be made available to the parents at least two days¹⁵ in advance of the Team discussion at the meeting. Therefore, Parents’ request is ALLOWED to the extent that such reports must be provided at least two calendar days in advance of the October 18, 2021 Team meeting.

6. *Student is Not Currently Without an Appropriate Program.*

Although Parents may not agree that the proposed IEP and placement are appropriate for Student, in *In re: Student and Hamilton-Wenham Regional School District*, BSEA #21-04633 (August 16, 2021), I found Student’s IEP for the period from 11/18/2020 to 11/17/2021 to be reasonably calculated to provide Student with a free and appropriate public education in the least restrictive environment. As such, Parents’ argument that Student is without an appropriate program is unpersuasive. Parents’ decision not to have Student access the program provided for in the 11/18/2020 to 11/17/2021 IEP, does not amount to a violation of FAPE on the part of the

¹² Nevertheless, in Massachusetts, school districts routinely provide parents with a summary report at the conclusion of the Team meeting and prior to providing the complete IEP. See *The Memorandum on the Implementation of 603 CMR 28.05(7): Parent Response to Proposed IEP and Proposed Placement* which may be found at <https://www.doe.mass.edu/news/news.aspx?id=3182>.

¹³ See 64 Fed. Reg. 48, 12477 (March 12, 1999) (“Any recording of an IEP meeting that is maintained by the public agency is an ‘education record,’ within the meaning of the Family Educational Rights and Privacy Act (‘FERPA’; 20 U.S.C. 1232g), and would, therefore, be subject to the confidentiality requirements of the regulations under both FERPA (34 CFR Part 99) and Part B (§§300.560-300.575)”); see also 603 CMR 23.07 and 603 CMR 23.03 (“The student record shall consist of the transcript and the temporary record, including all information recording and computer tapes, microfilm, microfiche, or any other materials regardless of physical form or characteristics concerning a student that is organized on the basis of the student’s name or in a way that such student may be individually identified, and that is kept by the public schools of the Commonwealth. The term as used in 603 CMR 23.00 shall mean all such information and materials regardless of where they are located, except for the information and materials specifically exempted by 603 CMR 23.04).”

¹⁴ 603 CMR 23.07(2).

¹⁵ Pursuant to 603 CMR 28.02(5), *day* means calendar day unless the regulation specifies school day, which shall mean any day, including a partial day, that students are in attendance at school for instructional purposes.

District, as this program continues to be made available to him by the District. Parents' request for relief on this claim, including but not limited to "payment for a temporary school placement for [Student] at his current school (Fusion Academy)" is DENIED.

7. All Other Relief Sought by Parents in Their Status Update/Motion is Denied.

Parents also make several claims that are not based in IDEA or state special education laws. Therefore, Parents' requests relative to the claims discussed below are DENIED.

Parents assert that prior to the IEP Team meeting, the District accused Student's expert of "advocating for himself rather than the student." I have no authority to guide communications of this nature between the District and Parents' experts.

In addition, Parents allege that the speech and language pathologist did not have the most current IEP at the September 15, 2021 Team meeting. Although IDEA requires that an IEP Team include individuals with knowledge or special expertise about the child¹⁶, it is silent regarding the documentation that should be available to Team members at the meeting. It would be far outside my authority to dictate to Team members what documents they must have with them at Team meetings; such decisions are based on individual considerations and variables and are best left to the attending individuals.

In addition, Parents argue that the District is "guiding and/or interfering" with the testing process. As grounds thereof, Parents cite to Dr. Ruiz's claim at the IEP meeting that he "needs to **communicate and talk with** [Student's] prior schools" in order to aide his assessment of whether Student has a social pragmatic disorder. Although Parents offered to allow Dr. Ruiz to speak with Student's current program, Dr. Ruiz asserted that he "needed to communicate with *at least* Austin Prep." As the professional conducting the assessment, Dr. Ruiz is best situated to determine what information he requires in order to assess and provide a comprehensive profile of Student. Although I decline to issue any order relative to this claim, it would behoove Parents to share and to make available to Dr. Ruiz as much information as possible in the course of conducting his evaluation.

ORDER:

Both the District's and the Parents' request for the Hearing Officer's continued jurisdiction over the above-referenced matter is ALLOWED. The BSEA will retain jurisdiction over the matter until October 19, 2021.

Parents' request that the BSEA order the District to provide Parents with the meeting notes for the September 15, 2021 Team Meeting is ALLOWED.

Parents' request that the BSEA order the District to provide Parents the evaluation reports in advance of the October 18, 2021 Team Meeting is ALLOWED to the extent that such reports must be provided at least two calendar days in advance of the October 18, 2021 Team meeting.

¹⁶ See 34 CFR 300.321(c).

ALL other requests for relief are DENIED.

So Ordered,

/s/ Alina Kantor Nir

Alina Kantor Nir, Hearing Officer

Date: September 22, 2021