

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

In Re: Flora<sup>1</sup> and the Beverly Public Schools

BSEA #1309072

**RULING**

This matter comes before the Bureau on the Motions of the Beverly Public Schools to Join the Saugus Public Schools to the instant action and To Dismiss Parents' Claims arising prior to June 2013, and the Oppositions thereto. A Hearing on the Motions was held on October 3, 2013.

**FACTUAL BACKGROUND**

The pertinent undisputed facts are:

- 1.) Flora is a student with special learning needs and is entitled to receive a free appropriate public education pursuant to MGL c. 71B and 20 U.S.C. § 1400 et seq.
- 2.) The last accepted IEP for the student was developed by the Saugus Public Schools. It provided for the student's placement in a private special education day school: Futures Behavioral Therapy Center. The Parents approved the IEP on August 11, 2011. At that time the student was a resident of Saugus. The Student has attended Futures continuously since at least August 11, 2011.
- 3.) In February 2012 the Parents and the Saugus Public Schools entered into a private settlement agreement which in part provided for a non-standard financial arrangement. Beverly was not and is not a Party to that Agreement. There are no allegations that Saugus has failed to discharge its obligations under that Agreement.
- 4.) The Student continued to reside in Saugus and to attend the Futures Center until October 4, 2012 when the family relocated to Beverly, MA.

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<sup>1</sup> "Flora" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

- 5.) The Parents contacted Beverly Public Schools to request public funding of Flora's placement at the Futures Center beginning November 1, 2012 consistent with the last accepted IEP developed by Saugus.
- 6.) Beverly conducted a Team meeting on November 28, 2012 and proposed an IEP providing for a substantially separate in-district program the Team believed was comparable to the Futures Center.
- 7.) Beverly conducted 3-year evaluations over the course of the winter 2013.
- 8.) The Team reconvened on April 23, 2013 to review the evaluations. Beverly proposed a 2013-2014 IEP calling for placement in the substantially separate in-district "AIM" program at the Cove School. The Parents rejected the proposed IEP on May 16, 2013.
- 9.) On June 13, 2013 the Parents requested a due process Hearing. They seek:
  - A. a finding that Beverly failed to fund Flora's placement at Futures in accordance with her last accepted IEP;
  - B. a finding that the special education placement Beverly offered to Flora in November 2012 was not comparable to Futures;
  - C. a finding that the IEP proposed by Beverly in December 2012 was procedurally deficient;
  - D. a finding that the IEP proposed by Beverly as a result of the April, 2013 Team meeting is not reasonably calculated to provide a free appropriate public education;
  - E. a finding that Futures is the least restrictive appropriate available placement for Flora;
  - F. Reimbursement of all expenses associated with Flora's placement at Futures since November 1, 2012.
- 10.) There are no allegations that Futures has not been appropriately paid for its services to Flora. There are no allegations that Flora is in danger of termination from Futures due to non-payment of tuition.

## LEGAL FRAMEWORK

The arguments undergirding both Motions rest on application of the Massachusetts "move-in" law. This law, intended to provide some budgetary predictability to school district and town planners, provides in pertinent part:

[I]f a child with a disability for whom a school committee currently provides or arranges for the provision of special education in an approved private day or residential school placement pursuant to the provisions of section 3, or his parent or guardian, moves to a different school district on or after July 1 of any fiscal

year, such school committee of the former community of residence shall pay the approved budgeted costs, including necessary transportation costs, of such day or residential placement.

MGL c. 71B § 5<sup>2</sup>.

Beverly and Saugus agree that their fiscal relationship to the Parents, to the Futures Center and to each other is governed by the Massachusetts move-in law. They contend that by its clear terms financial responsibility for Flora's placement at the Futures Center during both the 2011-2012 and the 2012-2013 school years rests with Saugus, as the town in which Flora resided both before, on and after July 1, 2013. Beverly and Saugus also agree that Beverly became programmatically responsible for Flora's special education when she established residence in Beverly on October 4, 2012.

The Parents argue that the move-in law does not apply to Flora's situation. They contend that, due to the wording of the settlement agreement reached with Saugus, Flora moved to Beverly without an IEP, without a responsible LEA, and in the same position as a student whose parents had chosen to make a privately funded unilateral placement at Futures. They rely on the phrase "currently provides or arranges for the provision" for the proposition that when an LEA agrees to alternate financial arrangements to meet its own obligations toward resident students with disabilities – and those arrangements do not result in a current IEP - the LEA cannot be found to be "providing" a private day placement.<sup>3</sup> They argue that immediately upon the Student's move to Beverly, Beverly became responsible for funding her placement at Futures either as a continuation of the last accepted placement made by Saugus or as a continuation of the quasi-unilateral placement the Parents had judged to be appropriate.

I am convinced by neither argument. The Parents' positions appear to rest on the shaky notion that once "expired" an IEP has neither force nor relevance. That is untrue. 20. USC §1415 (j); 34 CFR 300.518; 603 CMR 28.08 (7). See discussion generally at *In Re: Agawam*, 17 MSER 319 (2011). An accepted IEP remains in force until another IEP is developed and accepted by the Parents, ordered by the BSEA, or the student is no longer eligible for special education. Here it is undisputed that the last accepted IEP in Flora's educational history was developed by Saugus and provided for placement at Futures. There is no subsequently accepted IEP. There is no intervening BSEA Order. Flora remains eligible for special education services under applicable Massachusetts and federal laws. Therefore the Saugus IEP the Parents accepted

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<sup>2</sup> MGL c. 71B §5 continues: "The school committee of the new community of residence shall assume all responsibilities for reviewing the child's progress, monitoring the effectiveness of the placement, and reevaluating the child's needs from the date of new residence; provided however, that during the period when the financial obligation of the former community of residence for such day or residential placement continues pursuant to this section, the school committee of such new community or residence shall provide the school committee of the former community of residence with notice of any such review, monitoring, and reevaluation, and an opportunity to participate; and provided, further, that the school committee of such new community of residence shall be financially responsive for any increase, and the obligation of the school committee of such former community of residence shall be reduced by any decrease, in the costs of such day or residential placement during such period which results from any such review, monitoring or reevaluation."

<sup>3</sup> Should the Parents have concerns about the wording of and compliance with their settlement agreement they should seek clarification in Court with jurisdiction over private contracts.

in August 2011 properly governs the actions and expectations of both Beverly and the Parents. Beverly correctly relied on that IEP and placement when addressing Flora's then current educational claims and presentation in October 2012.

As to the second prong of the Parents' argument it is well established that Parents who choose a unilateral special education placement always bear the financial risk that their choice may not be deemed appropriate for public funding by the district or by the BSEA. Had the Parents moved to Beverly without an accepted IEP for Flora's placement at Futures that is the position they would have found themselves in, and the one to present to the BSEA.<sup>4</sup>

In summary I find that the undisputed facts compel an uncomplicated application of the Massachusetts "move-in" law. Flora was a resident of Saugus before and after July 1, 2012. She attended and continues to attend an approved private day school pursuant to the IEP developed by Saugus and accepted by the Parents in August 2011. Saugus is thus the fiscally responsible LEA for both the 2011-2012 and the 2012-2013 school years under the plain terms of the move-in law. Beverly has been programmatically responsible for Flora's special education since October 4, 2012, and both fiscally and programmatically responsible for Flora's special education since July 1, 2013.

#### BEVERLY MOTION TO JOIN SAUGUS

BSEA Hearing Rule I J provides for involuntary joinder of a party to a BSEA proceeding when complete relief cannot be granted among the existing parties, or when the proposed party has an interest in the matter and is so situated that the dispute cannot be disposed of in its absence. Factors to be considered in determining whether to join a party are:

- 1.) the risk of prejudice to the present parties in the absence of the proposed party;
- 2.) the range of alternatives for fashioning relief;
- 3.) the inadequacy of a judgment entered in the proposed parties' absence; and
- 4.) the existence of an alternative forum to resolve the issues.

After careful consideration I find no compelling factual or legal basis for the involuntary joinder of Saugus in this matter. There is no allegation of fiscal malfeasance or nonfeasance with respect to Saugus. The Parents are not seeking any substantive or procedural findings concerning the actions of Saugus during the time Flora was a Saugus resident, nor is there any claim of current educational harm that could logically or legally be attributed to Saugus. Participation by Saugus would not aid the Parties, or the Hearing Officer, in understanding the issues, obtaining necessary evidence, or crafting and enforcing any potential remedy. Therefore the Motion of the Beverly Public Schools to Join Saugus is DENIED.

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<sup>4</sup> *School Comm. Of Burlington v. Department of Education of Mass.*, 471 U.S. 359, 370 (1985).

## BEVERLY MOTION TO DISMISS

A Motion to Dismiss may be granted if the party requesting the Hearing fails to state a claim for which relief is available through the BSEA. 801 CMR 1.01(7)(g)(3); BSEA Hearing Rule XVII(B)(4). In considering whether dismissal is warranted a Hearing Officer must accept all factual allegations set forth in the hearing request as true, and must resolve all factual inferences and/or inconsistencies, as well any doubts as to the provability of those factual allegations, in favor of the non-moving party. If the facts that form the basis of the Hearing request would entitle the non-moving party to any form of relief the BSEA is authorized to award, then dismissal for failure to state a claim is not appropriate. *Lincoln-Sudbury Regional School District*, 19 MSER 83 (2013).

Here, Beverly's Motion to Dismiss all Parental Claims arising prior to June 30, 2013 also rests on application of the state's "move-in" law. As noted above, that law limits Beverly's financial exposure to expenses associated with Flora's attendance at the Futures Center during the 2012-2013 school year, by placing that responsibility on Saugus as Flora's town of residence on July 1, 2012. Therefore, to the extent that Parents seek reimbursement of expenses they shouldered, for any reason, which were associated with Flora's continued attendance at the Futures Center during the period October 4, 2012 to June 30, 2013 pursuant to her last accepted IEP, there is no relief available from Beverly. Consequently, as the BSEA may not Order any form of the tuition reimbursement relief the Parents are seeking, they have not stated a viable claim.

However, the Parents also present several procedural claims arising out of Beverly's actions in response to the family's initial notification of residence in October 2012 and subsequently, in convening a Team meeting, in arranging for evaluations, and in developing IEPs. These claims are separate from the reimbursement request covered by the move-in law and attach to Beverly's programmatic responsibility. Should they be proved at hearing, these procedural claims could rise to a level justifying an equitable remedy. At that point the Parents' actions and arguments, as well as equitable considerations such as "unclean hands" and "unjust enrichment" become as equally pertinent to the BSEA's analysis as the school district's actions. Determinations of this nature are highly fact dependent and unique to the circumstances of each case. Dismissal for failure to state a claim at this juncture would be premature.

Therefore Beverly's Motion to Dismiss Parents' claims arising before June 30, 2013 is GRANTED in part and DENIED in part. Those claims that relate solely to reimbursement of expenses incurred by the Parents in association with Flora's attendance at Futures Center during the 2012-2013 school year are dismissed for failure to state a legally viable claim against Beverly. Those claims that relate to the proper discharge of Beverly's responsibility as the programmatic LEA after October 4, 2012 are not dismissed and will proceed to Hearing.

ORDER

Beverly's Motion to Join the Saugus Public Schools is DENIED.

Beverly's Motion to Dismiss is GRANTED in part and DENIED in part.

The Parties shall submit written status updates on November 20, 2013, including a minimum of 5 mutually convenient dates for Hearing and a statement of all issues remaining for resolution at Hearing consistent with this Ruling.

By the Hearing Officer

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Dated: November 13, 2013

