

# COMMONWEALTH OF MASSACHUSETTS

## Division of Administrative Law Appeals

### Bureau of Special Education Appeals

In re: Ken<sup>1</sup>

BSEA #: 1400255

#### RULING ON SCHOOL'S MOTION FOR CLARIFICATION OF BSEA ORDER

#### BACKGROUND

On December 19, 2013, after a two day hearing on the merits, BSEA issued a decision in the above-entitled matter. The **DECISION** in BSEA #1400255 is hereby incorporated, in its entirety, by reference in this **RULING**. The **ORDER** in BSEA #1400255 stated:

#### ORDER

- 1) Ken requires a 45 day EE. (Extended Evaluation)
- 2) Such EE should occur in a therapeutic special education environment outside of KP. (King Philip Regional School District)
- 3) Substitute consent is granted for KP to send referral packages to BICO, Dearborn Academy, READS Collaborative, South Shore Collaborative and Assabet Valley Collaborative regarding performance of a 45 day EE.

On January 31, 2014 KP filed with the BSEA a Motion for Clarification of BSEA Order or, in the alternative, a Motion for Hearing on Parents' Non-Compliance with BSEA Order. KP states that referral packages have been sent to the above schools for an EE and that such schools have scheduled intake interviews with Ken, but that Parents have refused to have Ken attend/participate in such intake interviews. KP also states that Parents contend that KP must file another Request for Hearing to place Ken in any of the above programs. KP disagrees stating that the Hearing Officer has already determined that Ken requires an EE in a therapeutic special education setting outside of KP and that KP has the right to choose the setting in which the EE is completed, just as it has the right to choose its own evaluations for a re-evaluation.

On February 6, 2014 Parents filed an Opposition to KP's Motion for Clarification or Motion for Compliance Hearing. Parents continue to assert that BSEA does not have the legal authority to override Parents' lack of consent to an EE. Parents contend that KP must proceed to an additional hearing before the BSEA to present evidence regarding the program it wants Ken to

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

attend. However, Parents also contend that BSEA has no authority to compel Parents/Ken to participate in the EE process.

## **RULING**

The statutory and regulatory basis that: 1) grants a school district the right to appeal to the BSEA to seek substitute consent to evaluate a student when parents have refused to provide consent to such evaluations; and 2) confers upon the BSEA authority to grant substitute consent in such situations, has already been set forth in the **FINDINGS AND CONCLUSIONS** section of BSEA # 1400255. Similarly, the regulatory EE process (i.e., that an EE is considered an evaluation and not a placement; and that if Parents do not argue with the results of the EE and any IEP promulgated as a result of the EE, the student returns to his last accepted placement/IEP prior to the EE until the matter is either settled by the parties or resolved by a BSEA hearing) has been fully discussed within the aforementioned **FINDINGS AND CONCLUSIONS**. Finally, the **DECISION** is clear that Ken's current placement at KP is not providing him a free and appropriate public education (FAPE) and the resulting **ORDER** specifies that Ken's EE must take place outside of KP.

Therefore, KP had the right to seek a BSEA hearing on Ken's need for an EE, to seek substitute consent for such EE, and to send out referral packages to those sites KP considered appropriate to conduct Ken's EE. An EE is not a placement but an evaluation. Just as KP has the right to choose its own evaluators for an evaluation or a re-evaluation, KP has the right to determine the setting in which the EE takes place and is completed. KP is not required to pursue an additional hearing to present evidence regarding the EE venue it determines that Ken should attend. At the conclusion of the EE, if Parents disagree with the IEP/Placement proposed by KP as a result of the EE, they may seek a BSEA hearing. Ken would return to KP at the conclusion of the EE pending any such BSEA hearing.

I note that even if the BSEA were to conduct another hearing/compliance hearing with respect to the EE, Parents' Opposition makes it clear that Parents will refuse to comply with any BSEA Order. Unfortunately, the BSEA has no power or enforcement mechanism to compel Parents to participate in the EE process. Therefore, KP must proceed to Superior Court for enforcement of the BSEA Order.

By the Hearing Officer

Date: \_\_\_\_\_