

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

In re: Harrison & Isabella¹

BSEA #1504277

BSEA #1504282

**RULINGS ON AMEGO, INC.'S MOTION TO CONSOLIDATE AND MOTION TO
DISMISS ITSELF AS A PARTY**

These matters come before the Hearing Officers on two Motions filed by Amego, Inc. (hereinafter "Amego") in each of two cases pending before the Bureau of Special Education Appeals ("BSEA"). These cases began with Requests for Hearing filed by the Parents of Harrison and the Parents of Isabella on December 19, 2014 against Norton Public Schools (hereinafter "Norton") and Amego. Amego filed a Motion to Consolidate these two cases and a Motion to Dismiss Amego as a Party in each case, both on March 5, 2015. Parents and Norton oppose both Motions. Parents filed a "Motion to Oppose Amego Inc's Motions to Dismiss and Motion to Consolidate" (*sic*) on March 12, 2015. Also on March 12, 2015 Norton filed its Opposition to Amego's Motion to Consolidate and its Opposition to Amego's Motion to Dismiss. No party requested a hearing on either Motion², and as testimony or oral argument would not advance the Hearing Officers' understanding of the issues involved, this Ruling is being issued without a hearing pursuant to *Bureau of Special Education Appeals Hearing Rule VII(D)*. For the reasons set forth below, Amego's Motion to Consolidate is ALLOWED IN PART, and its Motion to Dismiss is hereby ALLOWED.

FACTUAL BACKGROUND AND RELEVANT PROCEDURAL HISTORY³

On December 19, 2014 the Parents of Harrison and Isabella each filed a Hearing Request with the BSEA against Norton and Amego, requesting expedited status pursuant to BSEA *Hearing Rule II(C)(1)(b)(iii)* as both students would soon be without a program. Among other things, the Hearing Requests included a claim for compensatory services from Amego. Both students are represented by the same advocate, and the Hearing Requests in the two matters were identical in their factual and legal allegations. Expedited status was granted and hearings in both matters were scheduled for early January 2015. After a Hearing Officer-initiated conference call on December 31, 2014, Parents' advocate requested that the matters be removed from the

¹ "Harrison" and "Isabella" are pseudonyms chosen by the Hearing Officers to protect the privacy of the Students in documents available to the public.

² The parties explicitly waived a Hearing on Amego, Inc. (hereinafter "Amego")'s Motions to Consolidate and Dismiss during a conference call on April 9, 2015.

³ A more detailed procedural history of these two cases is reviewed in a previous Ruling on this matter, which addresses Parents' Motion for Stay Put. That Ruling was issued on April 8, 2015 and will be referred to throughout this Ruling as "Previous Ruling."

expedited track in order to allow the parties to engage in alternative dispute resolution. At the request or with the consent of all parties this conference call, as well as the others that have taken place in the cases thus far, addressed the cases jointly.

The following facts are not in dispute and are taken as true for the purposes of this Motion.⁴ These facts may be subject to revision in subsequent proceedings.

1. Harrison and Isabella (hereinafter “Students”) began receiving services from Amego at the L.G. Nourse Elementary School, within the Norton Public Schools, in or around September 2013.
2. These services were detailed in an undated document on Amego’s letterhead entitled “Program Description, Amego Classroom” (hereinafter “Program Description”), signed by John V. Stokes, Vice President of Children’s Services at Amego, Inc. and Jeanne M. Sullivan, Director of Pupil Personnel Services at Norton Public Schools.⁵ The two and a half page document outlined the dates of the program, the staffing, the curriculum, and the services to be provided. During the 2013-2014 school year the program was to run for 196 days beginning on September 3, 2013. During the 2014-2015 school year the program was to run for 245 days. The starting and ending dates were not specified.
3. Pursuant to the Program Description, Amego was to oversee the development and implementation of the Individualized Education Programs (“IEPs”) for students in the classroom. Norton was to provide Amego with a classroom within one of its elementary schools and serve as the family’s liaison “as if the Amego program was an out of district placement.”
4. According to the Program Description, the “Amego classroom would be treated by the district as an out of district placement and program oversight would be provided by Amego.”
5. Students attended the Amego classroom throughout the 2013-2014 school year and into the 2014-2015 school year.
6. John Stokes sent a letter dated December 16, 2014 to Jeanne Sullivan, providing thirty day written notice that Amego was terminating its “Service Agreement” with Norton Public Schools. Norton informed Parents of this development.
7. Shortly thereafter, the Parents of Harrison and Isabella, through the same advocate, filed Hearing Requests with the BSEA on December 19, 2014. They alleged that they

⁴ Many of these facts are taken from the Previous Ruling.

⁵ In support of its Motion to Dismiss, Amego submitted additional documentation purporting to describe the relationship between it and Norton, including a document entitled “Amego, Inc. Service Agreement,” on Amego’s letterhead, which it refers to in its Motion as a contract. (Amego’s Motion to Dismiss, Exhibit A). As indicated by Norton Public Schools (hereinafter “Norton”) in its Opposition, this document was never signed by Norton.

were entitled to continued placement in the “Amego Classroom” within Norton, with services provided by Amego, and that Amego owed them compensatory services.

8. The Parties engaged in a joint mediation session on January 6, 2015. They entered into two identical Agreements Reached Through Mediation (hereinafter “Agreements”) on January 6, 2015 whereby Amego would continue to provide the services it had been providing for Harrison and Isabella at the L.G. Nourse Elementary School in Norton until the end of March. The Parties then requested that the matters be taken off-calendar.
9. Near the end of the time period covered by the Agreements, Parents filed identical Motions for Stay Put in both cases in which they argued that Harrison and Isabella were entitled to continue to attend the L.G. Nourse Elementary School, with all of their current services to be provided by Amego, during the pendency of this action before the BSEA.
10. Norton supported these Motions; Amego filed written Oppositions.
11. After a telephonic Motion Session, the Hearing Officers allowed the Parents’ Motions in part and denied them in part, in a written Ruling issued on April 8, 2015 (hereinafter “Previous Ruling”).

DISCUSSION

A. Motion to Consolidate

As grounds for its Motion to Consolidate, Amego argues administrative efficiency, given its contention that “the outcome for both matters will likely be the same.”

Both Norton and the Parents oppose the Motion for several reasons. First, they argue that the two cases involve two separate students with different needs. Although Harrison and Isabella have been educated in the same classroom under the Program Description since September 2013, the substance and delivery of appropriate programming for Students may not be the same going forward. Moreover, Parents’ allegations regarding compensatory services owed each student may differ. Although they have not been the subject of Motions or detailed discussions before this point in the proceedings, both of these issues will be addressed in hearings. In order for the Hearing Officers to make determinations regarding the appropriate placement for Harrison and Isabella going forward, and any compensatory services owed to either or both of them, the Parties will have to present confidential, sensitive information about both children and their families.⁶

⁶ Norton also argues that the number of documents and extensive testimony that will be introduced concerning each student is likely to cause considerable confusion, which would outweigh any administrative efficiencies gained from consolidation. Finally it asserts that the cumulative effect of testimony from two families, each of whom has a strained relationship with the District, might prejudice the Hearing Officers, leading them to “artificially grant that

Although the BSEA's *Hearing Rules* contain no provision for consolidation of matters, the Federal Rules of Civil Procedure and the Massachusetts Standard Adjudicatory Rules of Practice and Procedure provide some guidance on the topic. Pursuant to Rule 42 of the Federal Rules of Civil Procedure, "If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay."⁷ Massachusetts hearing rules allow for group hearings "if it appears from the request for a hearing or other written information submitted by the Parties that the matters involve questions of fact which are identical,"⁸ but "[i]f, at any stage of such group hearing, the Presiding Officer finds that any individual appeal involves questions of fact unique to the individual Petitioner . . . the Presiding Officer shall sever the appeal and hear it individually."⁹

Applying the principles informing these rules to the situation before us, we find that the goal of administrative efficiency is best served by consolidating the matters only insofar as they involve common questions of law and fact. For the purposes of pre-hearing proceedings (including conference calls) and Rulings, BSEA #1504277 and BSEA #1504282 are consolidated. The two cases will proceed separately to hearings.

B. Motion to Dismiss

In its Motion to Dismiss, Amego makes three arguments. First, it contends that the BSEA lacks jurisdiction over it in these matters because it was functioning as a consultant to Norton, rather than as a private school placement. Second, it asserts that it properly exercised its contractual termination rights with Norton. Third, it argues that to the extent it owes any compensatory services to Students, it is far less than what was claimed in their Requests for Hearing.¹⁰

In their Oppositions to Amego's Motion to Dismiss, Norton and the Parents argue that Amego has been responsible for providing all of Students' services over the past two years, in accordance with their IEPs and the Program Description; that most of Parents' allegations in the Hearing Requests pertain to Amego's actions or inactions; and that to the extent Parents are owed compensatory services, those services are owed by Amego.

Although generally 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,¹¹ 801 CMR 1.01 (7)(g)(3) and BSEA Hearing Rules XVII (B)(4), in this case Amego has filed a Motion to Dismiss

testimony more weight than it deserves." Neither of these arguments is convincing, as Hearing Officers contend with voluminous evidence and extensive (sometimes duplicative) testimony in cases involving difficult relationships on a regular basis.

⁷ FRCP 42(a).

⁸ 801 CMR 1.02(9)(a),

⁹ 801 CMR 1.02(9)(b).

¹⁰ Amego also argued that that to the extent Parents are entitled to a Stay Put Order, such an Order should obligate Norton, rather than Amego. This is, in fact, consistent with the Hearing Officers' Previous Ruling in these matters. Because the issue of stay put has been resolved it is not addressed here.

¹¹ See 801 CMR 1.01 (7)(g)(3); BSEA *Hearing Rules* XVII (B)(4).

itself from the proceedings, which requires an assessment of whether Amego is properly before the BSEA as a party in these matters at this time. For this reason, although Parents initially filed their hearing request against both Norton and Amego,¹² the outcome will be governed by the rule for joinder of additional parties.

The BSEA's joinder rule, set forth in Rule I(J) of the *Hearing Rules for Special Education Appeals*, provides as follows:

“Upon written request of a party, a Hearing Officer may allow for the joinder of a party in cases where complete relief cannot be granted among those who are already parties, or if the party being joined has an interest relating to the subject matter of the case and is so situated that the case cannot be disposed of in its absence. Factors considered in determination of joinder are: the risk of prejudice to the present parties in the absence of the proposed party; the range of alternatives for fashioning relief; the inadequacy of a judgment entered in the proposed party's absence; and the existence of an alternative forum to resolve the issues.”

The Hearing Officers have found previously that the services described in Harrison and Isabella's IEPs and provided at the L.G. Nourse Elementary School constitute their educational placements for the purposes of stay put.¹³ As we noted, since approximately September 2013, Norton has contracted with Amego to provide those services. In our Previous Ruling, we considered and rejected Norton's argument that the language in the Program Description providing that the Amego “classroom would be treated by the district as an out of district placement” requires a finding that Amego is a necessary component of Students' educational placements. In so doing, we concluded that during the time that Students attended the Amego classroom, Norton (as the Local Educational Agency):

“remained ultimately responsible for the delivery of Students' services.¹⁴ Upon terminating its contract with Norton, Amego ceased to have any obligation to Students with respect to future service delivery. In the absence of Amego's services and staffing,¹⁵ it will be Norton's responsibility to replicate ‘the educational program contemplated by the student[s'] original assignment[s],’ without diluting the quality of their education.¹⁶ In sum, Harrison and Isabella are entitled to implementation of their IEPs during the pendency of these proceedings. . . . They are not entitled to receive these services from Amego. Norton, as the responsible LEA, must ensure that Students receive these uninterrupted services pursuant to their IEPs. It will be up to

¹² Parents did later file a Motion to Join Amego, but as Amego was named in the initial Hearing Request and did not at that time object, that Motion was not addressed.

¹³ See *Drinker ex rel. Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 867 (3rd Cir. 1996) (“the dispositive factor in deciding a child's ‘current educational placement’ should be the Individualized Education Program (‘IEP’). . . . actually functioning when the ‘stay put’ is invoked.”)

¹⁴ See 300 CFR 300.33 (including in the definition of public agencies under this section LEAs responsible for providing education to children with disabilities).

¹⁵ See *DeLeon v. Susquehanna Cmty. Sch. Dist.*, 747 F.2d 149, 153 (3rd Cir. 1984) 747 (observing that replacing one teacher or aide with another would not constitute a change in educational placement).

¹⁶ *A.W. ex rel. Wilson v. Fairfax County Sch. Bd.*, 372 F.3d 674, 682 (4th Cir. 2004) (internal quotations omitted).

Norton to determine whether to provide Students' services using its own staff or using contracted service providers as it did with Amego."¹⁷

Moreover, we observed that the stay put placement is an "in-district substantially separate program, as opposed to an out-of-district placement,"¹⁸ and that "[d]espite the language used in the Program Description indicating that the Parties intended to treat the placement as an out-of-district placement, there is no legal or factual basis for finding it was anything other than a substantially separate classroom operated by contractors."¹⁹

Against this background we apply Rule I(J) of the BSEA *Hearing Rules* to decide this Motion. The key issue is that while a dispute may exist between Norton and Amego as to relationship between them and whether Amego in fact provided Students with all of the services specified in their IEPs and the Program Description for which Norton contracted with Amego, this dispute may be resolved appropriately in another forum. We have already determined in our previous Ruling that Norton retained responsibility for Students' education while they attended the Amego classroom. It appears, therefore, that in Amego's absence, there will be no impediment to a grant of complete, adequate relief among the other parties. To the extent a determination is made by the BSEA that services are owed to the Parents, it is Norton (as the LEA) that is ultimately responsible for providing those services. The case as framed by Parents' Hearing Requests may be disposed of without Amego. To the extent that Amego may have an interest related to the subject matter of this case (i.e. any compensatory services owed to the Parents), Norton may elect to pursue contractual violations, if any, in court. Amego is not, therefore, a necessary party.

CONCLUSION

For the reasons set forth above, Amego's Motion to Consolidate is ALLOWED as to pre-Hearing proceedings, and DENIED as to the Hearings themselves.²⁰ Amego's Motion to Dismiss Amego as a Party to the Parents' Hearing Request is hereby ALLOWED.

ORDER

- 1) BSEA #1504277 and BSEA #1504282 are consolidated only for the purposes of pre-hearing proceedings (including conference calls) and Rulings.
- 2) Amego's Motion to Dismiss Amego as a Party to this appeal is **ALLOWED**.

¹⁷ Previous Ruling at p. 6.

¹⁸ As we noted in the Previous Ruling, had we agreed with Parents' argument that the Amego classroom constituted an out-of-district placement, Students' stay put placement would have been an alternate out-of-district placement which could provide the services in Students' last accepted IEPs.

¹⁹ Previous Ruling at p. 6 n.20.

²⁰ Although Amego is no longer a party in this matter, it was a party when it filed its Motion to Consolidate. That Motion was meritorious for the reasons discussed above and has, therefore, been addressed.

- 3) The Hearing in Harrison's case will take place on June 9 and 10, 2015. The Hearing in Isabella's case will take place on May 4 and 6, 2015.

By the Hearing Officers:

Catherine Putney-Yaceshyn
Dated: April 15, 2015

Amy M. Reichbach
Dated: April 15, 2015