COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

In re: Ann[1] BSEA #1709151

RULING ON MEDFORD PUBLIC SCHOOLS' MOTION FOR PARTIAL SUMMARY JUDGMENT

BACKGROUND

On April 27, 2017 Parents filed a Hearing Request (including three exhibits labelled P-1 to P-3) against the Medford Public Schools (MPS). The request seeks reimbursement for Ann's unilateral private day school placement at the Carroll School (Carroll) from April 27, 2015 through June 2016, pursuant to the two year statute of limitations under 20 U.S.C. 1415(f)(3)(C). Parents also seek retroactive reimbursement and prospective payment from MPS for Ann's unilateral private residential school placement at Eagle Hill School (EH) for the 2016-2017 school year, and continuing into the 2017-2018 school year. On May 10, 2017 MPS filed its Response to Parent's Hearing Request and requested a postponement of the initial hearing date. During a May 17, 2017 pre-hearing conference call, MPS' unopposed request for postponement was granted and MPS indicated that it would be filing a preliminary motion. On May 24, 2017 MPS filed a Motion for Partial Summary Judgment (MPSJ), a Memorandum of Law in support thereof, and several exhibits labelled S-1 to S-4. On June 5, 2017 Parents filed their Opposition to MPS' MPSJ (Opposition), a Memorandum of Law in support thereof and several exhibits including Father's affidavit labelled P-4 to P-7. In a telephonic motion session on July 17, 2017 the parties orally argued their respective positions and MPS filed an additional exhibit (S-5). The Hearing Officer then allowed Parents additional time to file a response to MPS' additional exhibit. On July 25, 2017 Parents filed their Supplemental Opposition to MPS' MPSJ (Supp. Opp.) modifying their original position. On July 27, 2017 MPS filed its Response to Parents' Supp. Opp. to MPS' PMSJ (Response Supp. Opp.) thereby closing the record regarding MPS' MPSJ. Neither party requested the opportunity to present oral testimony.

HISTORY/SUMMARY OF THE CASE[2]

Ann is a 15 year old girl who resides with her family in Medford, MA. She has never attended MPS. Ann attended a private pre-school (First Circle Learning Center in Lexington) until she was 5 years

[1] Ann is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in publicly available documents.

[2] All information cited is obtained from the pleadings, exhibits and affidavit filed by the parties, as well as the July 17, 2017 oral arguments.

old. MPS evaluated Ann in 2006, found her eligible for special education services, and developed an Individual Education Program (IEP) covering May 2006 to May 2007. This IEP provided a full inclusion placement with several accommodations and occupational therapy (OT) once per week. (See P-5.) Parents accepted the OT services from MPS but placed Ann at the Atrium School (Atrium), a private school, for kindergarten. On January 17, 2007 a team meeting was held in which the team, including Parents, reviewed Ann's progress. The team determined that Ann had met or exceeded her OT objectives and after a discussion of all available information determined that Ann no longer presented with a disability, was making effective progress and was no longer eligible for special education. A Finding of No Eligibility was sent to Parents on January 31, 2017, with a specific notation to Parents that they could dispute such finding via the BSEA or the Massachusetts Department of Education's Problem Resolution System (PRS). A Notice of Procedural Safeguards was enclosed. (See S-5.) Parents never disputed the termination of Ann's OT services/IEP. Ann remained privately placed at Atrium through grade 2.

In November 2009 Parents obtained a private neuropsychological evaluation of Ann. In April 2010 Father telephonically contacted MPS' Ms. Cassidy (who had been Ann's liaison pursuant to her 2006-2007 IEP), regarding an IEP for Ann and requesting funding for Carroll if Parents decided to place Ann there. (See P-4.) On April 26, 2010 Parents registered Ann for in MPS as a regular education student. (Note that although there was a box on the registration form to be checked reflecting special education status, said box was not checked by Parents.) (See S-1.) On June 7, 2010 Father wrote to Ms. Cassidy providing the 2009 private neuropsychological evaluation, noted that Parents were considering placing Ann at Carroll, and inquired about resources MPS might provide. (See S-2.) Ms. Cassidy is now deceased, however her notes reflect that she contacted Parents on June 17 and 21, 2010 regarding scheduling a June 2010 team meeting, however Parents were unable to attend. Ms. Cassidy's notes further reflect that Parents were to get back to her with possible viable dates but never did. Ms. Cassidy's notes also indicate that she resumed calling Parents on September 15, 2010 and left messages; and that on September 22, 2010 she reached Father who stated that Ann had been enrolled at Carroll and Parents did not want a team meeting. (See S-3.) Ms. Cassidy followed up with a September 22, 2010 letter to Parents summarizing the above notes, including her attempts to schedule a team meeting, that Parents no longer wanted a team meeting, that Parents had enrolled Ann at Carroll at private expense, and that Parents did not plan to enroll Ann in MPS. (See S-4.) Parents placed Ann at Carroll for 3rd grade where she remained for 6 years through grade 8.

In June 2016, as Ann was completing 8th grade at Carrol, Parents had another neuropsychological evaluation, privately performed, contacted MPS, and requested a team meeting. (See P-1, 4.) An eligibility team meeting was held on June 16, 2016, during which MPS found Ann eligible for special education and proposed an IEP for June 16, 2016 to June 15, 2017. This IEP provided for a substantially separate special education program within Medford High School. (See P-2.) MPS also request Parents' consent to perform its own evaluation of Ann, and Parent so consented on June 24, 2016.

On August 15, 2016 Parents provided MPS notice of their intent to unilaterally place Ann at EH for the 2016-2017 school year (Ann's 9th grade). Parents rejected the MPS IEP and placement at Medford High School on August 24, 2016. (See P-2.) MPS evaluated Ann at EH in November 2016. MPS convened a team meeting on December 20, 2016 to review its own evaluations and issued a new IEP dated December 20, 2016 to December 19, 2017, which was very similar to its original IEP, placing Ann

in a substantially separate placement at Medford High School. Parents rejected this MPS IEP and placement in full. (See P-3.)

STATEMENT OF POSITIONS

MPS' position is that it bears no legal responsibility for Ann's special education placement at Carroll during the 2015 – 2016 school year. MPS moves for Partial Summary Judgment on the grounds that, as a matter of law, Parents are not entitled to reimbursement of their unilateral placement of Ann at Carroll for the 2015-2016 school year as Ann: 1) was not enrolled in MPS during the 2015-2016 school year; and 2) was not a special education student on a current IEP for whom Medford was responsible to provide a free and appropriate public education (FAPE) in the least restrictive educational environment (LRE).

Parents' original position was that MPS had failed to hold a team meeting or develop a new IEP when Ann's May 2006 to May 2007 expired, thus Ann continued to remain a special education student. Parents also originally contended that after Father's phone contact with MPS in April 2010 and letter to MPS on June 7, 2010 requesting an IEP and including a copy of Ann's most recent, private neuropsychological and language evaluations, MPS never responded, failed to hold a team meeting, and failed to develop an IEP. Parents originally contended that MPS had failed in its child find responsibility pursuant 20 U.S.C. 1412§ (a) (3) and 34 CFR 300.111(a) in both 2007 and 2010 and that such procedural failure constituted a continued denial of FAPE for Ann. Parents also argue that pursuant to the two year statute of limitations cited above, they are entitled to reach back and litigate Ann's Carroll School placement for the 2015-2016 school year.

Given that during the Motion Session, MPS produced a copy of the January 31, 2007 Finding of No Eligibility (S-5) which Parents never contested, Parents no longer argue that Ann remained eligible for special education or that MPS failed in its procedural obligations in 2007. Parents continue to press their position that they were misinformed about the process when they orally contacted MPS in April 2010. Therefore, Parents contend the 2015-2016 school year is appropriately before the Hearing Officer and they oppose MPS' MPSJ regarding said year at Carroll.

RULING

MPS' PMSJ is **GRANTED.** My analysis follows.

In May 2006 MPS developed an IEP for Ann covering the period May 2006 to May 2007 (P-5). However on January 17, 2007 the team met, determined that Ann was making effective progress and was no longer eligible for special education. On January 31, 2017 MPS sent Parents a Finding of No Eligibility with a specific notation that Parents could dispute MPS' finding via the BSEA or PRS, and enclosed a notice of procedural safeguards (S-5). Parents never disputed MPS' Finding of No Eligibility. (See **HISTORY/STATEMENT OF THE CASE**, above.)

Based upon the above, I find that no further team meetings or promulgation of IEPs by MPS were required at that time because Ann was no longer a special education student, but rather a general education student. Thus, I find that MPS did not violate any child find mandates.

In April 2010 Father contacted MPS by phone and on April 26, 2010 registered Ann at MPS while she continued to attend a private regular education school. (See P-4.) On June 7, 2010 Father wrote to Ms. Cassidy of MPS requesting an IEP for Ann, enclosing privately obtained evaluations and requesting funding for Carroll if Parents placed Ann there. (See S-2.) Ms. Cassidy attempted to set up a team meeting in June 2010 but could not obtain a date on which both Parents could attend and Parents did not get back to her with acceptable dates. Ms. Cassidy began calling again in September 2010 and leaving messages. Ms. Cassidy reached Father on September 22, 2010, and Father then informed her that Parents no longer wished to schedule a team meeting, that they had enrolled Ann at Carroll at their own expense, and that Ann would not be attending MPS. (See S-3.) Ms. Connolly documented all of the above in a letter to Father that same day, September 22, 2010. (See S-4.) Parents never responded to said letter. (See **STATEMENT/HISTORY OF THE CASE**, above.)

Based upon the above, I find that Ann's status was that of a regular education student when she was enrolled in MPS on April 26, 2010. I further find that no team meeting or development of an IEP took place because on September 26, 2010 Parents informed MPS that they no longer wished to have a team meeting, that they had privately placed Ann at Carroll, and that Ann would not be attending MPS. Finally, I find that MPS was prepared to convene a team meeting, consider Parents' private evaluations and potentially develop an IEP (as MPS had done in the past) but that Parents' actions terminated the team meeting/IEP process. Thus, Ann legally remained a privately parentally placed regular education student and no violations of child find occurred. Her status changed when in June 2016 Parents again contacted MPS with new private evaluations, a June 16, 2016 team meeting was held, and she was found eligible for special education, after which an IEP was developed by MPS (See P-1, 2.)

20 U.S.C. §1415(f)(3) permits Parents to reach back two years from the filing of a BSEA Hearing Request. In the instant case the hearing request was filed on April 27, 2017 thus the reach back period would be limited to April 27, 2015 which would include Ann's final school year at Carroll. However 20 U.S.C. §1412(a)(10)(c)(iii)(bb) also provides that reimbursement for a private parental placement may be reduced or denied if Parents failed to give appropriate notice to the public school prior to the unilateral placement of their intent to place the child at private school at public expense. (See also 34 CFR 300.148(c)(ii).) MPS contends (and Parents have submitted no argument or documentation to the contrary), that Parents did not give any prior notice to MPS of their intent to place Ann at Carroll for the 2015-2016 school year at public expense. Parents' first notice to MPS of their intent to privately place Ann at public expense was prior to their residential placement of Ann at EH in June 2016. In summary, MPS first learned of Parents' request for reimbursement for their 2015-16 Carroll School placement when the instant Hearing Request was filed on April 27, 2017 - almost 2 years after the Carroll placement had occurred and almost 1 year after the Carroll placement had ended.

Parents contend that in a phone conversation Father had with Ms. Cassidy in April 2010, he requested MPS funding of Carroll if Parents decided to place Ann there, and that Ms. Cassidy told Father "There is no way that is going to happen." (See S-4 – Father's affidavit, page 4.) Parents contend that because this was legally inaccurate, information[3] Parents may seek reimbursement for Carroll for the 2015-2016 school year despite the lack of prior parental notice regarding unilateral placement. In brief Parents' entire rationale for leave to litigate reimbursement for the 2015-2016 school year without prior

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3Forest Grove School District v. T.A. 557 U.S. 230 (2009) held that Parents may be entitled to reimbursement whether or not a child had previously received special education from the public school.

notice is the alleged phone call in April 2010 (no specific date) and Father's interpretation of Ms. Cassidy's statement. . (See P-4/affidavit.) This purported conversation took place 7 years prior to the filing of Parents' Hearing Request. Father's affidavit (P-4), dated June 5, 2017, indicates it was written after MPS filed its MPSJ on May 24, 2017. There is no indication in the affidavit that Father made any contemporaneous notes of his alleged conversation with Ms. Cassidy in April 2010. Thus, before me is an affidavit which was written in June 2017, in preparation for litigation, recalling a conversation which ostensibly took place over 7 years ago. Ms. Cassidy is now deceased. MPS has submitted the contemporaneous notes she made beginning on June 17, 2010 through September 22, 2010 (S-3) which were memorialized in a letter dated September 22, 2010, the same date she spoke with Father. Her notes reflect that he declined his previously requested team meeting to review private evaluations or to develop an IEP, stated that Parents no longer planned to have Ann attend MPS, and stated that they had enrolled Ann privately at Carroll (S-4). There are no references to any April 2010 phone conversation in either Ms. Cassidy's notes or her September 22, 2010 letter to Parents. (See S-3, 4.) Indeed, even Father, in his June 7, 2010 letter to Ms. Cassidy requesting an IEP for Ann and enclosing her private evaluations, makes no reference to any prior conversations with Ms. Cassidy in April 2010 or any other time. (See S-2.)

I conclude that I am unable to justify awarding any reimbursement to Parents from MPS for their unilateral placement of Ann at Carroll for the 2015-2016 school year given that there was absolutely no prior notice to MPS of Parents' intention to place Ann and seek public funding (not to mention that subsequent notice, was not given until some two years hence, and then only in the form of a hearing request). Furthermore, the comment alleged to have been made by Ms. Cassidy, even assuming arguendo that it did occur, was made over 7 years ago, well beyond the 2 year statute of limitations. Second, questions arise as to the accuracy of Father's affidavit, written more than 7 years after the alleged statement was made and specifically in preparation for litigation. I find this issue to be especially concerning given the inaccuracy of past parental allegations, as follows.

Parents' Hearing Request alleges that in 2007 MPS failed to do a follow up team meeting, allowed Ann's 2006-2007 IEP to expire, and promulgated no new IEP. During the motion session MPS produced its January 31, 2007 Finding of No Eligibility (resulting from a January 17, 2007 team meeting) which finding was never contested by Parents (See S-5) thus completely rebutting Parents' allegations.

Similarly, Parents' Hearing Request alleges that in response to Parents' June 7, 2010 submission of Ann's private evaluations and request for an IEP, MPS held no team meeting and developed no IEP for Ann. Parents requested that the Hearing Officer find that MPS breached its responsibilities for "child find" in June 2010. Such allegation is directly disproved by Ms. Cassidy's notes and September 22, 2010 letter (S-3, 4), which documents MPS' repeated attempts to schedule a team meeting to consider Parents' private evaluations and Father's declining of such team meeting in 2010. Even after reviewing Ms. Cassidy's notes and September 22, 2010 letter Father states in his June 5, 2017 affidavit:

> While we are not disputing that they occurred, neither my wife nor I recall the telephone conversations from June and September 2010 or Ms. Cassidy's September 22, 2010 letter.

Given the inaccurate parental allegations above, I can give little if any weight to Parent's seven year old recollection of a phone conversation he purportedly had with someone who is now deceased. Indeed the instant fact pattern graphically illustrates the underlying rationale for the existence of the statute of limitations.

It is important to note that even if Ms. Cassidy said what Father believes that she said in 2010, the "cure" would have been for Parents to attend the meeting they had requested, discuss her alleged comments to get feedback and context from MPS, discuss the then current private evaluations, and see what type of IEP MPS may have developed. The team may have proposed Carroll or it may have proposed an in-district IEP. [4] Parents' remedy had Carroll not been proposed would have been to give MPS prior notice of their intent to unilaterally place Ann at Carroll and then seek a hearing before the BSEA for the 2010-2011 school year. Here, Parents themselves short-circuited this legal process by refusing the originally requested 2010 team meeting.

ORDER

Parents have no legal basis to litigate Ann's Carroll School placement for the 2015-2016 school year. Therefore, MPS' MPSJ is **GRANTED**.

By the Hearing Officer,

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Dated: August 21, 2017

[4] *Forest Grove* simply gives parents leave to seek an out of district placement even if the child has never been in a public school education program, it does not require a public school to propose one.