

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

In re: Preston¹

BSEA #2004002

**RULING ON NASHOBA REGIONAL SCHOOL DISTRICT'S MOTION TO
POSTPONE**

This matter comes before the Hearing Officer on the Motion of the Nashoba Regional School District (NRSD or “the District”) to Postpone the Hearing scheduled to begin May 11, 2020 due to school closures in connection with COVID-19. NRSD filed its *Motion to Postpone* on April 13, 2020, arguing that the complex nature of this litigation is such that a fair hearing cannot be conducted virtually and, as a result, the District will be prejudiced. In addition, NRSD asserted, Preston remains at The Three Rivers Program with no set discharge date; for this reason, a short delay would not prejudice him.

On April 15, 2020, the Department of Mental Health (DMH or “the Department”) filed a letter noting that while it does not join in the District’s request for postponement, it does not object. The Department asserted that while it agrees with NRSD that an in-person hearing is preferable to a video proceeding for just resolution of the matter, it does not agree that a fair hearing cannot be achieved virtually. Moreover, as Preston is not clinically ready for discharge, nor is such readiness anticipated in the near future, DMH believes a short delay would not prejudice him.

On April 20, 2020, Parents filed an *Objection to NRSD’s Motion to Postpone*, asserting that resolution had already been delayed unnecessarily for 4 months by NRSD’s request for Local Educational Agency (LEA) assignment (see below), and that Preston had already suffered educational harm and further delay would be prejudicial. According to Parents, Three Rivers personnel have stated that they lack legal authority to determine an appropriate step-down for Preston upon discharge, as this decision must be led by NRSD, and Three Rivers cannot discharge him until a subsequent placement is identified and secured. As such, he is essentially “stuck” there until the issue of placement is resolved. Finally, multiple steps must occur before Preston may be discharged: (1) the type of placement he will require must be identified; (2) his Team must convene and agree upon potential referrals; (3) referral packets must be sent, and applications reviewed by potential placements; (4) he must secure a seat, likely for either summer 2020 or the 2020-20201 school year. As neither NRSD nor DMH has agreed to assume financial responsibility for Preston’s next placement, the BSEA must decide this issue as soon as possible.

The parties explored the issue of postponement during the Conference Call that took place on April 13, 2020, and they agreed that no further hearing on the District’s *Motion* was

¹ “Preston” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

necessary. During the call, I explained that my decision would turn on the risk of prejudice to the Parent/Student if the postponement were allowed, and the risk of prejudice to the District if it were denied. For the reasons set forth below, Nashoba Regional School District's *Motion to Postpone* is hereby DENIED.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY²

On October 18, 2019, Parents filed a *Hearing Request* against Nashoba Regional School District alleging that then-eight-year old Preston, who presents with Specific Learning Disabilities in Reading and Writing, Executive Dysfunction, Dysgraphia, Reactive Attachment Disorder, and Disruptive Mood Dysregulation Disorder, with a rule out of Anxiety Disorder, requires a residential therapeutic educational placement. They asserted that the intensive supports and services provided to Preston, including at a Community Based Acute Treatment (CBAT) program and an Extended Evaluation at the Walker School, were not sufficient to enable Preston to cope and handle his emotions such that he could progress in his education. In fact, Preston had recently been hospitalized at Franciscan Children's Hospital, and subsequently placed at Three Rivers, a Clinically Intensive Residential Treatment Program – the most intensive residential treatment setting provided by Massachusetts for children under the age of 13. Yet NRSD continually refused to consider a small, specialized residential program designed to meet the needs of children with emotional needs and learning and language disorders, using a systematic full-day approach, and instead proposed at every Team meeting that Preston could be educated in the public school setting. The most recent Individualized Education Program (IEP) proposed for Preston, for the period from May 22, 2019 to May 21, 2020, placed him in the Early Rise Program. The District describes Early Rise as a substantially separate therapeutic program, but Parents contend it is actually a partial inclusion program. Parents requested that the BSEA order NRSD to place Preston in a residential therapeutic school designed for children with co-existing psychiatric, emotional, and learning disabilities, and order the District to compensate for past failures to provide Preston with a free, appropriate public education (FAPE), through both substantive and procedural violations, in the form of reimbursement for costs associated with private therapy, hospitalization, psychiatrist and psychologist fees, evaluations, and tuition and transportation to a full-year therapeutic residential program.³

The Hearing was scheduled for November 21, 2019. On October 23, 2019, NRSD requested postponement of the Hearing. The following day, the District filed its *Response*, arguing that Preston does not require a residential placement in order to receive a FAPE, and that the District's ongoing proposal for the Early Rise Program is reasonably calculated to meet his educational and social/emotional needs in the least restrictive environment. To the extent Preston may require a residential placement, NRSD argues, this is due to familial issues that are separate from the District's obligation to provide him with a FAPE.

During a Conference Call that took place on November 5, 2019, the parties jointly requested a two-month postponement to permit them to work together toward resolution and file

² The information in this section is taken from the parties' pleadings and motions. It is taken as true for the purposes of this *Ruling* only.

³ Parents also requested money damages, attorney's fees and costs, and expert witness fees.

a motion to join DMH. The Hearing was scheduled for January 27, 29, and 30, 2020, with a Pre-Hearing Conference to take place December 12, 2019.

On November 6, 2019, the District filed a *Motion to Join the Department of Mental Health*. NRSD asserted that Parents are seeking residential placement which, if needed, may be for non-educational reasons. Furthermore, DMH has found Preston eligible for its services and is actively involved with Preston and his family, up to and including the agency's funding of Preston's placement at Three Rivers. Although DMH initially opposed joinder, on November 20, 2019, the agency withdrew its *Opposition*.

During the Pre-Hearing Conference on December 12, 2019, Counsel for NRSD mentioned that she might request LEA assignment from the Massachusetts Department of Elementary and Secondary Education (DESE), as Father resides in a different town (and school district) from Mother, who resides within the boundaries of NRSD. On December 13, 2019, I issued an Order joining DMH, and scheduled a further Conference Call for December 18, 2019. On December 19, 2019, after that call, two more dates were added to the hearing: February 3 and 6, 2020.

On January 7, 2020, Parents filed a *Motion to Compel* regarding outstanding discovery requests to NRSD; they modified this *Motion* on January 14, 2020. On January 16, 2020 I received Notice of LEA assignment from NRSD, indicating that DESE had assigned Berlin-Boylston Regional School District (BBRSD) joint fiscal and programmatic responsibility for Preston. Counsel for NRSD also flagged a potential conflict of interest. I *sua sponte* joined BBRSD to the matter, as Counsel for NRSD also represented BBRSD, and as such could not move for joinder. We discussed both of these issues during a Conference Call on January 17, 2020. On January 21, 2020, I received a Notice of Conflict from Counsel who represented both districts, along with a postponement request noting that new counsel for NRSD and BBRSD would require time to familiarize themselves with the matter. When replacement Counsel for each school district filed a Notice of Appearance, they also requested postponement. Parents objected strenuously, arguing that NRSD was aware of father's residence and had mailed information to him at his address prior to the filing of the *Hearing Request*, Counsel for the District was aware of the potential conflict of interest at the time of the Pre-Hearing Conference, and NRSD had not informed DESE of the pending BSEA matter at the time it requested LEA assignment. As such, Parents argued, NRSD had not acted in good faith and the Districts' joint postponement request should be denied. Following a Conference Call on January 29, 2020, Parents agreed to the continuance and the Hearing was scheduled for May 11-14, 2020, with a further Conference Call on April 13, 2020.

BBRSD appealed DESE's assignment of joint responsibility or about February 14, 2020, and on March 11, 2020, DESE reversed its earlier decision, assigning sole responsibility to NRSD. On March 19, 2020, replacement counsel for NRSD withdrew, and initial counsel filed a Notice of Appearance. Replacement counsel for BBRSD did the same shortly thereafter. On April 6, BBRSD filed a *Motion to Dismiss* itself from the matter, and on April 7, 2020, I allowed that *Motion*.

During the Conference Call that took place on April 13, 2020, the parties discussed the pending expiration of the most recently proposed IEP for Preston and the anticipated amendment

of Parents' *Hearing Request* following a Team meeting that would occur within the following week or two. That same day, I issued an Order outlining the issues for Hearing as follows:⁴

1. Whether the IEP to be proposed for [Preston] for the period from April/May 2020 to April/May 2021 is reasonably calculated to provide him with a free appropriate public education (FAPE);
 - a. If I find that it is not, can it be modified to do so or does he require a therapeutic residential program?
 - b. If I find that [Preston] requires a therapeutic residential program, is that for educational reasons?
2. Whether the IEPs proposed for [Preston] for the period from March 7, 2018 to March 6, 2019 and the period from March 13, 2019 to March 12, 2020, and the amendments thereto, were reasonably calculated to provide [Preston] with a FAPE;
 - a. If I find that the answer to either of those questions is no, whether Parents are entitled to compensatory services for past failure to provide FAPE, in the form of reimbursement for costs associated with private therapies, hospitalization, psychiatric/psychological fees, evaluations, etc. and/or prospective placement in and transportation to a full year therapeutic residential program.
3. Whether NRSB committed any procedural violations between October 18, 2017 and the present – specifically, by failing to provide prior written notice; failing to discuss IEP goals, services, and placement at Team Meetings; unilaterally pre-determining placement; failing to give reasonable consideration to the input of Preston's clinicians and Parents; and/or failing to monitor Preston's progress or convene a Team meeting during his placement at Three Rivers – that amounted to a deprivation of a FAPE because they impeded Preston's right to a FAPE; significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Preston; or caused a deprivation of educational benefits.

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II. DISCUSSION

A. Relevant Law, Regulations, & Rules

The Bureau of Special Education Appeals (BSEA) has the authority to resolve educational disputes pursuant to M.G.L. c. 71B and its implementing regulations, 603 CMR 28.00. BSEA proceedings are conducted in accordance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 *et seq.*, Section 504 of the Rehabilitation Act of 1973 (20 U.S.C. § 794), and the regulations promulgated thereunder (34 C.F.R. § 300 and § 104,

⁴ I reissued this Order on April 17, 2020, with a correction, but unintentionally omitted the third issue.

respectively). Proceedings are governed by the BSEA *Hearing Rules*, which were developed in accordance with 603 CMR 28.00, federal due process procedures, the Massachusetts Administrative Procedure Act, M.G.L. c. 30A, and the Massachusetts Standard Adjudicatory Rules of Practice and procedure, 801 CMR 1.10 *et seq.* Although the parties in the instant matter did not cite to these provisions, I review them here because they informed my decision to deny NRSD's postponement request.⁶

1. *Postponement Requests*

BSEA *Hearing Rule III* governs requests for postponement. Pursuant to this rule, a party may request postponement of a hearing at least 6 business days before the scheduled hearing date. The Hearing Officer may grant this request for good cause. The decision whether to postpone a hearing is within the discretion of the Hearing Officer, who must give serious consideration to opposition to a request.

2. *Hearing Officer's Obligation to Ensure Fair and Orderly Hearing*

BSEA *Hearing Rule IX* sets forth how a hearing is conducted. According to Rule IX(A), the Hearing Officer "has the authority and obligation to ensure that appropriate standards of conduct are observed and that the hearing is conducted in a fair and orderly manner." Rule IX(B) assigns to the Hearing Officer both the duty and the power to "[r]egulate the presentation of the evidence and the participation of the parties for the purpose of ensuring an adequate and comprehensive record of the proceedings."

B. Application of Provisions in this Matter Requires that Postponement Be Denied

As explained above, when a party – particularly the moving party – opposes a postponement request, the Hearing Officer must consider seriously the reasons for that opposition. The January dates initially established by agreement were postponed because of the LEA assignment and conflicts in representation; as such, resolution has already been delayed four months. At this point, Parents are concerned that unless and until the appropriate placement for Preston upon discharge from Three Rivers is identified and secured, Preston may remain there past the time when clinicians believe discharge is appropriate. This process may be lengthy; his Team (or the BSEA) will have to determine the appropriate type of placement, and, if it is outside of NRSD, agree to potential programs, send referral packets, and receive at least one acceptance. Moreover, if the program is an outside placement, responsibility for funding that placement must also be determined. Although Three Rivers clinicians do not appear to believe discharge is imminent, continuing the hearing until schools reopen could mean a postponement

⁶ Although not raised by Nashoba Regional School District as a basis for its postponement request, 801 CMR 1.01(12) provides, "The Presiding Officer, may, if no Party objects, designate that all or a portion of a hearing be conducted with one or more participants situated in different locations and communicating through the medium of one or more telecommunication devices." I do not see this regulation as an absolute bar to proceeding. I would still consider the risk of prejudice to the parties of either course of action, as I have done here.

of at least four months. The risk of prejudice to Preston if I allow the District's postponement request is significant.

The District's primary argument in favor of postponement is that the complexity of the litigation in this matter means a fair hearing cannot be conducted virtually. I agree with both NRSD and DMH that an in-person hearing is preferable, particularly given the number of witnesses I anticipate this proceeding will entail over a period of four days. At the same time, a Pre-Hearing Conference and numerous Conference Calls have occurred to date, and the parties have conducted themselves professionally throughout. Although not ideal, I believe it will be possible, in the circumstances of this case, for me to ensure that in a virtual hearing, "appropriate standards of conduct are observed and that the hearing is conducted in a fair and orderly manner." The "practice run" we have scheduled over Zoom will assist us in identifying any areas that need to be addressed beforehand. As such, the risk of prejudice to NRSD of denying its postponement request is lower than the risk of prejudice to Preston of allowing the request.

CONCLUSION

Upon consideration of Nashoba Regional School District's *Motion to Postpone* and Parents' *Opposition*, and the arguments advanced by all parties, I conclude that in the unique circumstances of this case, postponement is unwarranted.

ORDER

The District's *Motion to Postpone* is hereby DENIED.

Exhibits and witness lists are due by close of business on May 5, 2020. The parties are instructed to work together to ensure that the Hearing Officer and all parties have all exhibits in hand by that time. They must also provide, in a separate document, one list of all witnesses and their email addresses to the Hearing Officer at the same time. The parties are also instructed to work together to ensure that all witnesses have access to all exhibits relevant to their testimony before the Hearing commences.

A practice Zoom call will take place at 11:30 AM on May 7, 2020. All parties and their Counsel are expected to join, and to notify the witnesses they expect to call, so that as many witnesses as possible will be available at this time.

The matter will proceed to Hearing via Zoom on May 11, 12, 13, and 14, 2020. It will begin at 10:00 AM each day.

By the Hearing Officer:

/s/

Amy M. Reichbach

Dated: April 22, 2020