

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

In Re: Student v.
Boston Public Schools

BSEA # 1702840

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL ch. 71B), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under these statutes.

On October 7, 2016, Parent requested an Expedited Hearing in the above-referenced matter. The case was granted expedited status by the BSEA's Director and scheduled to proceed to Hearing on October 24, 2016. The Parties participated in a telephone conference call with the Hearing Officer on October 19, 2016 during which Boston proposed to conduct school-based evaluations during the end of October and beginning of November 2016. According to Boston, Student's Team would meet later in November. Parent's attorney requested that the evaluations be conducted expeditiously and that Student's Team convened in early November. At the time of the call, Boston was under the impression that Student was receiving "wrap around services" at Head Start, and proposed to conduct the evaluations there. Boston also proposed to provide Student with the services recommended pursuant to Student's private neuropsychological evaluation until such time as Boston were able to convene the Team to discuss the results of its own evaluation. This Hearing Officer instructed Boston to put its offer in writing and forward it to Parent's attorney. Parent's attorney would then advise the Hearing Officer of the status of the case by Friday, October 21, 2016.

Very late in the afternoon of October 21, 2016 Parent filed a Motion For An Immediate Hearing On The Papers and attached several exhibits to her Motion/ written argument. On October 24, 2016, the BSEA received Boston's Response opposing Parent's request.¹

Absent agreement of the Parties to proceed on the documents, this Hearing was therefore held on October 24, 2016, at the Offices of DALA/ BSEA, One Congress St., Boston, Massachusetts before Hearing Officer Rosa I. Figueroa.

Those present for all or part of the proceedings were:

¹ Parent received Boston's Opposition after business hours on Friday October 21, 2016.

Parent ²	
Inge Gomez Ortega ³	Court Certified Interpreter
Melanie Jarboe, Esq.	Attorney for Parent
Jeannette Sedgwick, Esq.	Attorney for Boston Public Schools
Maryann Malloy	Boston Public Schools
Daniel T.S. Heffernan, Esq.	Initial Attorney for Parent/ Co-counsel

The official record of the Hearing consists of documents submitted by Parent marked as exhibits PE-A through PE-D, and documents submitted by Boston Public Schools marked as exhibits SE-1 through SE-5⁴; recorded oral testimony, and oral closing arguments.

ISSUES FOR HEARING:

1. Whether Boston failed to identify, locate and evaluate Student in a timely fashion? If so,
2. Whether Boston's procedural violations resulted in a deprivation of a free, appropriate public education (FAPE) for which Student is entitled to receive compensatory services?

POSITIONS OF THE PARTIES:

Parent's Position:

Parent asserts that as of June 2016, Boston was on notice that Student, who presents with disabilities related to lead poisoning, needed to be evaluated, and a Team meeting needed to be convened to find him eligible and offer him services. According to Parent, Boston's former attorney had agreed to conduct the Boston-based evaluations of Student as soon as school started in September 2016. Despite this agreement, Parent states that by October 2016, Student had not yet been evaluated and he remained without much needed educational services.

Parent requests that firm deadlines for conducting the evaluations be set and that Boston be required to adhere to them. Specifically, Parent wants all evaluations to be completed by October 26, because Boston should have completed them by October 17, 2016. Parent requests that the evaluation reports be translated into Spanish and provided to her by November 1, 2016, since according to Parent, Boston should have convened Student's Team to discuss Dr. David Dinklage's neuropsychological evaluation report within ten days of receipt, but failed to do so, Parent seeks that Student be found eligible and provided with an IEP and placement by November 4, 2016. Parent asserts that Boston's failure to evaluate Student in a timely fashion, find him eligible and provide services to him constitutes a

² Parent participated via telephone conferencing.

³ The interpreter participated via telephone conferencing.

⁴ SE-1 was admitted over objection and for limited purposes.

violation of “Child Find” which has resulted in a denial of FAPE to Student. As such, Parent seeks compensatory services for Student as a result of Boston’s delays.

Boston’s Position:

Boston does not deny its responsibilities pursuant to Child Find and asserts that at no time prior to June 2016 did it receive any referral for special education from Parent or any agency that may have been involved with Student.

Boston argues that its enrollment records show that Parent registered Student in August 2016, contrary to Parent’s assertions that she did so earlier in 2016. Similarly, Boston asserts that in June 2016, it did not receive a neuropsychological evaluation report by Dr. Dinklage.

Since receiving Parent’s Hearing Request, which included Dr. Dinklage’s report, Boston states that it has “located and identified” Student as a student with a disability who may be eligible to receive special education services and has sent a Consent for Evaluation Form to Parent, translated into Spanish. In addition, personnel from Student’s neighborhood school attempted to contact Parent. Boston states that it also contacted the Disabilities and Mental Health Coordinator at ABCD Head Start and Children’s Services to confirm Student’s participation in said program.

Once it received Parent’s consent for evaluations, Boston expedited the evaluations and put in place a timeline for the evaluations to occur taking into account Parent and Student’s availability. At the time of the Hearing, Boston had already initiated the school-based evaluations, and remained committed to completing the evaluations so that a Team meeting could be convened to assess Student’s special education eligibility.

Regarding Parent’s assertions that Boston had agreed to provide Student speech and language and occupational therapy services prior to completing its own evaluation, Boston denies that it promised delivery of those services; rather, prior to Hearing, Boston explored options including provision of those services.

In light of the above, Boston denies that it has committed any procedural or substantive violation.

Boston also asserts that it is premature to discuss compensatory services as any such discussion should occur after Student’s eligibility has been established. Boston has scheduled Student’s Team meeting for November 10, 2016, at which time Student’s eligibility will be determined and if the Team finds that compensatory services are owed, Boston remains open to having that discussion. Boston argues that initiating provision of services prior to a placement determination may result in unnecessary movement of Student, which might not be beneficial. Boston asserts that now that it has located and identified Student, it remains committed to moving forward expeditiously.

FINDINGS OF FACT:

1. Student is a four-year-old resident of Boston, MA, who has attended daycare at the Head Start program (Parent).
2. Student suffered lead poisoning which was detected when, during a routine pediatric visit he was observed to present with significant language delays while otherwise appearing healthy. Parent reported that a neighbor had been treated for lead poisoning and noted that a month prior to the pediatrician's office visit, Student had been eating a large strip of paint that had flaked off the wall. At 37 months of age⁵ Student's blood lead levels were so high (Pb=125 at the highest point on June 29, 2015) that on two separate occasions (June and September of 2015) he required inpatient chelation (PE-A).⁶ Student's blood lead levels decreased but they remain well above acceptable levels (Pb=50). To date, he continues to be seen at Children's Hospital on a monthly basis for consultation and treatment for elevated blood lead levels (PE-A).
3. On November 18 and 25, 2015, Dr. David Dinklage, Ph.D., assisted by Emily Wilner, Psy.D. (a fluent Spanish speaker), performed a neuropsychological evaluation of Student (PE-A). Dr. Dinklage administered the Bateria-III, NEPSY-II: A Developmental Neuropsychological Battery, the TVIP-(Spanish Version of the Peabody Picture Vocabulary Test), the Wechsler Preschool and Primary Scale of Intelligence-IV (non-verbal measures), and conducted an interview with Parent (PE-A).
4. Dr. Dinklage noted that Student spoke only in Spanish during the evaluation and stated that Student "exhibited very little spontaneous speech... respond[ing] to questions in one or two word phrases. His pronunciation and idiosyncratic use of words made it difficult for both [Parent] and the Spanish speaking examiner to understand him. Instructions needed to be repeated and visual demonstrations were often required when possible" (PE-A). Several subtests could not be administered because Student could not understand the instructions. Student was easily distracted during the evaluation, got easily derailed and had difficulty sustaining his attention, requiring the evaluator to provide frequent reminders to focus and to consider all of the available options. Dr. Dinklage noted that when tasks became too hard for Student he would "repeat the same one word response" or he pointed to the same number/picture option. By parental report the same language deficits, distractibility and behaviors observed in Student during the neuropsychological evaluation had been displayed in the home (PE-A).

⁵ Student's medical and developmental history up to eleven (11) months of age notes a healthy infant with the usual illnesses, and normal lead blood levels (Pb=2). At ages 16 and 20 months, Student had two episodes of febrile seizures that did not develop into epilepsy (PE-A).

⁶ "No 'safe' blood lead level for children has been identified. The center for disease control ('CDC') recommends public health intervention for a child whose lead level is above 5 µg per deciliter of blood. See Lead, U.S. Centers for Disease Control and Prevention, <http://www.cdc.gov/nceh/lead/>." (PE-A).

5. Student's testing results demonstrated variability in his cognitive functioning with weaknesses in verbal comprehension skills (3rd percentile) and strengths in visual-spatial and non-verbal reasoning skills (24th –37th percentiles). Deficits in basic skills (e.g., identifying body parts) were noted and Student was unable to complete subtests measuring skills such as sound blending, auditory memory, and visual matching. Attentional challenges were also noted (PE-A).
6. Dr. Dinklage found that Student's abstract spatial reasoning was an area of strength, with scores falling within the low end of the average range. Student however,

...presented with severe expressive and receptive language difficulties as well as moderate attention regulation problems. Delays in fine motor planning were also noted. [Student] will require intensive special education intervention as soon as possible to address his language problems. Ongoing intervention, accommodations, and support to minimize the interference due to attention problems will likely be required throughout his schooling.

[Student's] limited spontaneous speech, responses of only 1 or 2 word length, poor understanding of verbal directions, and significantly reduced scores on the language measures he did comprehend all indicate a significant expressive and receptive language processing disorder (F80.9, ICD 10). This clearly limits his ability to engage socially and make use of pre-academic instruction. Individuals with early language delays are at marked risk for developing reading and writing disorders upon entering formal schooling. It has been demonstrated that early (pre-school) speech and language services can reduce that risk to some degree. Language development is time sensitive in that gains are much more easily achieved the earlier the intense intervention occurs.

...[Student] also presents with attention problems that will likely interfere with his ability to learn in school settings... He did not present as particularly hyperactive and he was not openly oppositional during the testing (PE-A).

7. Dr. Dinklage diagnosed Student with a mixed receptive and expressive language disorder and with Attention Deficit Hyperactivity Disorder, inattentive type. Dr. Dinklage recommended Student's participation in a structured, bilingual special education pre-school program where his language, pre-academic skills, and attention regulation skills could be addressed through intensive interventions. To address Student's attentional issues, Dr. Dinklage recommended consultation to the classroom from a behavioral psychologist. He further recommended that Student receive immediate intensive one-to-one speech and language therapy services (3 times per week) in Spanish even if Student attended a bilingual or an English speaking pre-school program, and also recommended provision of occupational therapy. Dr. Dinklage further recommended that Parent receive psycho-education support to learn strategies for providing structure in the home and on how to address Student's attention/behavioral regulation issues, as well as have the speech therapist teach Parent how to practice and reinforce skills in the home (PE-A). Lastly, Dr. Dinklage noted that Student

Is likely to need language services for an extended period of time (perhaps all of elementary school) to minimize long-term difficulties. Some level of support for attention issues (less intense) may be needed throughout all of his schooling. The extent of reading and writing problems is not yet clear and may depend on the effectiveness of the implementation of [the above-stated] recommendations, but [Student] in any case, will be at high risk for problems in these domains.

8. The record is not clear as to when Dr. Dinklage's evaluation was received by Parent but this evaluation was attached to Parent's Hearing Request filed on October 7, 2016 (Administrative Record).
9. Sometime between November 18 and November 25, 2015, Student was accepted to and started attending a Head Start program in Boston (PE-A).
10. Sometime in early 2016 Parent registered Student at Boston Public Schools. Parent however, did not know that she had to indicate that Student had special needs and instead registered him as a regular education pre-school student subject to school lottery (Parent). Parent also did not request that Boston evaluate Student at that time. Boston never received any referral from Early Intervention. Since Student did not make the lottery, he was not offered a seat at a Boston pre-school program (PE-A; PE-C).
11. Sometime in late May or the beginning of June of 2016, Parent hired an attorney to represent her regarding Student's special education eligibility (Daniel Heffernan). Parent's Attorney contacted Boston's former Attorney sometime at the beginning of June of 2016, to notify Boston of Student's situation and to request an evaluation for Student (PE-C). On June 13, 2016 Parent's attorney asked Boston to check on the status of the initial evaluations for Student given that Parent had registered Student and had not yet heard from Boston (PE-C; Heffernan).
12. Boston's Attorney responded to Parent's Attorney's inquiry on June 15, 2016, explaining Parent's mistake in registering Student as a regular education student and inquired as to which Early Intervention program (EI) Student was associated so that she could have a Boston staff contact Parent and the EI. Parent's Attorney responded that Student had not received EI services (PE-C).
13. Parent's Attorney communicated again with Boston's former Attorney on June 29, 2016 inquiring about status, and on June 30, 2016 Boston's former Attorney responded that Boston would be sending Parent consent forms to proceed with evaluations, noting that since testing would not take place over the summer, Student's evaluation would be expedited in September 2016 (PE-C). The record lacks evidence as to whether the consent forms were mailed at that time.

14. Boston's last day of school during the 2015-2016 school-year was June 24, 2016 (SE-4).⁷
15. The first day of school in Boston for the 2016-2017 school-year was September 8, 2016 (SE-3).
16. On or about late September of 2016, Parent's Attorney once again inquired of Boston regarding the status of Student's evaluation. Via email dated October 3, 2016, Boston's Attorney apologized stating that she believed that the Consent Forms had previously been sent, and confirmed that on October 3, 2016 Spanish and English Parental Consent Forms to proceed with school-based evaluations had been forwarded to Parent (PE-C; SE-5).
17. On October 7, 2016, Parent filed a Hearing Request in the instant case with the BSEA and attached Dr. Dinklage's evaluation report. According to Boston, it did not receive Dr. Dinklage's evaluation report until October 17, 2016.
18. On October 15, 2016, Parent's attorney forwarded Boston, via email, a signed Parent Consent Form (PE-D; SE-5). Parent provided consent to all of the evaluations/assessments proposed by Boston (*Id.*). Parent testified that she had not seen Consent Forms until October 2016 (Parent).
19. Upon receipt of Parent's signed Consent Form, Boston initiated Student's assessment in his suspected areas of need, to wit: communication impairment and developmental delays. Specifically, Amy Martin (Early Childhood Liaison) would conduct the Battelle Developmental Inventory; Beth Ryan (Occupational Therapist) would conduct the Occupational Therapy evaluation; Erin McManus (School Nurse) would conduct a medical evaluation; and individual from Head Start Allston-Brighton would conduct the educational evaluation; Luis Duque (Psychologist) would perform the psychological evaluation; Robin Trusty (Bilingual Speech and Language Therapist) would conduct the Speech and language evaluation; and a Student Observation would be conducted by Silvia Johnson (SE-1; SE-2). The psychological evaluation was conducted on or about October 19, 2016 (SE-2; Malloy). A second evaluation was taking place as the Hearing convened. The rest of the evaluations would be conducted by early November 2016 (Malloy).
20. Mary Ann Malloy, Assistant Director of Early Childhood Special Education, in Boston Public Schools, testified that there are several ways in which students who may be eligible for special education are located and identified. For instance, a parent visiting the Welcome Center with proof of residency may request an evaluation for his/her child. That child is then given a temporary identification number and assigned to a Boston school for evaluation. A child may also be referred by an early intervention program, or may be identified during one of the Child Find screenings conducted by Boston (Malloy). According to Ms. Malloy, Student had not been referred through any of the aforementioned processes.

⁷ The Parties stipulated to June 24, 2016 as the last day of school for purposes of this Hearing.

21. During a telephone conference call with the Hearing Officer on October 19, 2016, Boston discussed its plan to complete its evaluations by the beginning of November 2016, not as quickly as it had indicated during a telephone conference call on October 14, 2016. Boston noted that it would however, be willing to provide Student services at Head Start consistent with the recommendations of his private neuropsychologist, while it completed its own evaluations. Parent's Attorney explained that the Head Start site Student had attended was closed.⁸ Boston would not have an in-district placement available for Student by October 24, 2016. The Hearing Officer suggested that Boston's Attorney discuss Parent's concerns with Boston, and that the Attorney forward to Parent a written proposal of what Boston was offering to do, including interim services to be provided, and the timeframe for completing the school-based evaluations and convening the Team.
22. On October 20, 2016, Parent's Attorney emailed Boston's Attorney several times, attempting to ascertain when to expect a written proposal from Boston and noting that withdrawal of the expedited status of the Hearing would depend on the reasonableness of Boston's interim plan. Parent's Attorney also requested clarification as to Boston's evaluation timeline and, via separate email, corroborated Parent's contact information. Boston's Attorney responded that her client had confirmed that Head Start site was still closed and was therefore reviewing the best options to deliver interim speech and language services to Student, and assuring Parent that she would inform her as soon as the plan was in place (PE-E).
23. An email dated October 21, 2016 was sent by Boston's Attorney to Parent's co-counsel. It stated that Student was being assessed by Boston to determine his eligibility for special education services, and noted that as of the date of the email, Boston had completed the psychological evaluation, the school nurse was obtaining information from Parent regarding Student's medical records and dates were being determined to proceed with the occupational therapy evaluation and speech and language evaluations. Boston further noted that Student's Team would be convened on November 7, 2016, at which time Student's eligibility, services and placement, if warranted, would be determined (PE-F). Boston also noted that

...BPS is not waiving its right under the law to fully conduct evaluations in order to determine special education eligibility. BPS is working expeditiously to [put] evaluations in place (PE-F).

Parent's Attorney sought clarification as to whether the explanation offered by Boston constituted the written plan and inquiring as to the service delivery, to which Boston's Attorney responded that

...students do not receive special education services unless or until they are determined eligible for special education through the IEP Team process. The process of determining eligibility is currently underway... (PE-F).

⁸ Due to a water-main break, Head Start Allston-Brighton has been closed.

24. Ms. Malloy testified that upon receipt of a parent's consent for evaluation, Boston had forty-five days to complete evaluations (within 30 days) and convene a Team meeting. She noted that in the instant case, the evaluation period had been truncated since receiving Parent's consent (Malloy). Ms. Malloy was unaware of the email exchanges between Boston's former attorney and Parent's attorney (Malloy).
25. On October 21, 2016, Boston composed the list of individuals who would be invited to participate in Student's Team meeting, and notified the Boston members of the Team via email the same date (SE-1; Malloy).⁹
26. At present, Student is at home without an educational program (Parent).

CONCLUSIONS OF LAW:

Parent and Boston agree that Student presents with serious communication and developmental delays as a result of severe lead poisoning at a very early age. Parent contends that Student is an individual with a disability falling within the purview of the Individuals with Disabilities Education Act¹⁰ (IDEA) and the state special education statute¹¹. Boston neither concurs nor disagrees because Student's school-based evaluations have not been completed and a Team has not been convened to determine Student's eligibility for special education services.

Parent asserts that Boston has been on notice of the need to evaluate Student since June 2016 and has abdicated its responsibility to promptly evaluate and find Student eligible for special education services. Moreover, although Boston verbally agreed to initiate speech and language, and occupational therapy services pending completion of its own evaluations, it has not, to date, offered Student anything. Parent seeks a finding that Boston has failed to fulfill its Child Find and evaluation mandates, as a result of which Student has been deprived of the FAPE to which he would have been eligible had Boston completed its evaluations in a timely manner. Parent seeks compensatory education for Student for this transgression.

Boston asserts that it never refused to proceed with the evaluations or denied Student services. Boston concedes that it initiated its evaluations on October 19, 2016 after receiving consent from Parent on or about October 15, 2016, and expedited the evaluations so that Student's Team could be convened by November 10, 2016, the forty-fifth day from the first day of the 2016-2017 school year. Once the Team convenes and determines Student's eligibility, it may develop an IEP that offers Student a free, appropriate public education

⁹ Those invited to the meeting were: Sherese E. Jones (SESS Coordinator), Silvia S. Johnson (Early Childhood Liaison/Observation), Robin Trusty, Luis Duque, the non-BPS Assessor from Head Start Allston-Brighton to be identified by Tracey Torres, Erin McManus, Beth A Ryan, Amy Martin (Early Childhood Liaison), and Parent (SE-1; Malloy).

¹⁰ 20 USC 1400 *et seq.*

¹¹ MGL c. 71B.

(FAPE)¹². Boston further states that when the services to be provided to Student are identified, it will compensate Student for any services it should have offered dating back to the beginning of the 2016-2017 school year. Boston states its willingness to work with Parent and hopes to establish a positive relationship with Parent moving forward.

The IDEA and the Massachusetts special education law, as well as the regulations promulgated under those acts, mandate that school districts offer eligible students a FAPE. A FAPE requires that a student's individualized education program (IEP) be tailored to address the student's unique needs¹³ in a way "reasonably calculated to confer a meaningful educational benefit"¹⁴ to the student.¹⁵ Additionally, said program and services must be delivered in the least restrictive environment appropriate to meet the student's needs.¹⁶ Under these standards, public schools must offer eligible students a special education program and services specifically designed for each student so as to develop that particular individual's educational potential.¹⁷ Educational progress is then measured in relation to the

¹² MGL c. 71B, §§1 (definition of FAPE), 2, 3.

¹³ E.g., 20 USC 1400(d)(1)(A) (purpose of the federal law is to ensure that children with disabilities have FAPE that "emphasizes special education and related services designed to meet their unique needs . . ."); 20 USC 1401(29) ("special education" defined to mean "specially designed instruction . . . to meet the unique needs of a child with a disability . . ."); *Honig v. DOE*, 484 U.S. 305, 311 (1988) (FAPE must be tailored "to each child's unique needs").

¹⁴ See *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) where the court explicitly adopted the meaningful benefit standard.

¹⁵ *Sebastian M. v. King Philip Regional School Dist.*, 685 F.3d 79, 84 (1st Cir. 2012) ("the IEP must be custom-tailored to suit a particular child"); *Mr. I. ex rel L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 4-5, 20 (1st Cir. 2007) (stating that FAPE must include "specially designed instruction . . . [t]o address the unique needs of the child that result from the child's disability") (quoting 34 C.F.R. 300.39(b)(3)). See also *Lenn v. Portland School Committee*, 998 F.2d 1083 (1st Cir. 1993) (program must be "reasonably calculated to provide 'effective results' and 'demonstrable improvement' in the various 'educational and personal skills identified as special needs'"); *Roland v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990) ("Congress indubitably desired 'effective results' and 'demonstrable improvement' for the Act's beneficiaries"); *Burlington v. Department of Education*, 736 F.2d 773, 788 (1st Cir. 1984) ("objective of the federal floor, then, is the achievement of effective results--demonstrable improvement in the educational and personal skills identified as special needs--as a consequence of implementing the proposed IEP"); 603 CMR 28.05(4)(b) (Student's IEP must be "designed to enable the student to progress effectively in the content areas of the general curriculum"); 603 CMR 28.02(18) ("*Progress effectively in the general education program* shall mean to make documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the child, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district.").

¹⁶ 20 USC 1412 (a)(5)(A).

¹⁷ MGL c. 69, s. 1 ("paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential. . ."); MGL c. 71B, s. 1 ("special education" defined to mean "... educational programs and assignments . . . designed to develop the educational potential of children with disabilities . . ."); 603 CMR 28.01(3) (identifying the purpose of the state special education regulations as "to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential. . ."). See also Mass. Department of Elementary and Secondary Education's (then, Department of Education) Administrative Advisory SPED 2002-1: Guidance on the change in special education standard of service from "maximum possible development" to "free appropriate public education" ("FAPE"), effective January 1, 2002, 7 MSER Quarterly Reports 1 (2001) (appearing at www.doe.mass.edu/sped) (Massachusetts Education Reform Act "underscores the Commonwealth's commitment to assist all students to reach their full educational potential").

potential of the particular student.¹⁸ At the same time, the IDEA does not require the school district to provide what is best for the student.¹⁹

In the case at bar Parent, the individual asserting procedural violations and raising compensatory claims must prove her case by a preponderance of the evidence, consistent with *Schaffer v. Weast*, 126 S.Ct. 528 (2005).

In rendering my decision, I rely on the facts recited in the Facts section of this decision and incorporate them by reference to avoid restating them except where necessary.

The evidence supports a finding that Boston failed to forward Parent consent forms within five school days of receipt of Student's referral in June 2016 and convene a Team to determine eligibility within forty-five school days. In this regard, Parent, has met her burden of persuasion pursuant to *Shaffer*. However, I find that by the time of the Hearing on October 24, 2016, Boston was well on its way to curing all defects and was only four school days short of meeting its forty-five day timeline for conducting evaluations and scheduling a Team meeting. My reasoning follows:

I. Referral and Initial Evaluation of Student:

At the heart of this matter are Parent's allegations that Boston failed to meet its substantive and procedural mandates regarding Child Find, conducting evaluations, convening a Team meeting, offering placement and initiating services for Student.

The IDEA is unequivocal in its mandate that all public school districts identify, locate and evaluate all disabled children regardless of the level of the severity of their disabilities and that they establish and implement viable methods for determining which children may and are receiving services, and which children are not. 20 U.S.C. 1412(a). Under the IDEA children with disabilities are eligible to receive special education and related services by age three and thus, eligible students must be identified and located through referral processes, notifications to resident parents, screenings, and other means, so as to promptly proceed with evaluating those students. In interpreting Child Find, federal courts have been adamant that school districts may not stonewall parents by refusing to evaluate and assist disabled students. *W.B. v. Matula*, 67 F.3d. 484 (3rd Cir. 1995).

¹⁸ *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 199, 202 (court declined to set out a bright-line rule for what satisfies a FAPE, noting that children have different abilities and are therefore capable of different achievements; court adopted an approach that takes into account the potential of the disabled student). See also *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 518 F.3d. 18, 29 (1st Cir. 2008), and *D.B. v. Esposito*, 675 F.3d at 36 ("In most cases, an assessment of a child's potential will be a useful tool for evaluating the adequacy of his or her IEP.").

¹⁹ E.g. *Lt. T.B. ex rel. N.B. v. Warwick Sch. Com.*, 361 F. 3d 80, 83 (1st Cir. 2004)("IDEA does not require a public school to provide what is best for a special needs child, only that it provide an IEP that is 'reasonably calculated' to provide an 'appropriate' education as defined in federal and state law.")

In a Third Circuit Court of Appeals decision, the Court noted the need to promptly proceed with the evaluation process once the student has been identified. The Court explained that while

Neither the statutes or regulations establish a deadline by which time children who are suspected of having a qualifying disability must be identified and evaluated, but we infer a requirement that this be done within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability.

...we think [that the reasonable time] requirement is implicit in the “child find” duty and as such was clearly established in September 1991. First, the statutes and regulations enacting the “child find” duty clearly establish the obligation to identify and evaluate disabled children. Second, to hold otherwise --to hold that the duty need not be discharged within a reasonable time-- would eviscerate that duty and thwart the undisputed legislative intent that disabled children be identified, evaluated, and offered appropriate services. It can come as no surprise to a reasonable school official that children must be located and evaluated within a reasonable time, and thus we conclude that a school official who failed to carry out his or her “child find” duty within a reasonable time “would understand that what he is doing violates that.” *W.B. v. Matula*, 67 F.3d. 484 (3rd Cir. 1995).

Thus, in interpreting the Child Find mandate in the IDEA, the *Matula* Court stressed the public school district’s affirmative duty to identify, locate and evaluate students with special needs within a reasonable time. Massachusetts has embraced both the spirit and letter of the law and has established specific timelines to comply with the Child Find requirement of the IDEA.

Consistent with federal law, in Massachusetts public schools are responsible to provide or arrange for provision of special education and related services for all eligible students ages three to twenty one. 603 CMR 28.03(1) and 28.02(9). For children three and four years of age, and for those eligible to enter kindergarten, school districts are responsible to conduct screenings to assess the child’s development

and to assist in identification of those children who should be referred for an evaluation to determine eligibility for special education services. 603 CMR 28.03(1)(d).

Additionally, students may be referred for an initial evaluation by a parent or any other individual in a caregiving or professional position who is concerned with the development of said child. 603 CMR 28.04(1). Once a student has been referred, the school district

- (a) ...shall send written notice to the student's parent(s) within five school days of receipt of the referral.
- (b) The notice required by 603 CMR 28.04(1) shall meet all of the content requirements set forth in M.G.L. c. 71B, §3, and in federal law and shall seek the consent of a parent for the evaluation to occur, and provide parents with the opportunity to express any concerns or provide information on the student's skills or abilities.
- (c) School districts shall provide the student's parents with an opportunity to consult with the Special Education Administrator or his/her designee to discuss the reasons for the referral, the content of the proposed evaluation, and the evaluators used.
- (d) Upon referral, school districts shall evaluate children who are 2 ½ years of age and who may be receiving services through an early intervention program. An initial evaluation shall be conducted in order to ensure that if such child was found eligible, special education services begin promptly at age three.²⁰

Once the school district receives the parent's consent to proceed with evaluations, it shall immediately provide or arrange for the student's evaluation in all suspected areas of disability to occur within 30 school days. 603 CMR 28.04(2). In addition to required assessments, the parent or special education administrator may recommend additional optional assessments. 603 CMR 28.04(2) (a) and (b).

With this guidance I turn to the facts in the case at bar.

In order to ascertain whether Boston violated its Child Find mandate, a chronology of facts must be established. I begin with the notice and consent for evaluation issues.

It is undisputed that as of June 13, 2016, Boston was on notice that Student, who resided in Boston, presented with disabilities and that he required an evaluation which was requested by Parent's Attorney (PE-C; Heffernan). Consistent with 603 CMR 28.04(1)(a),²¹ that notice, should have triggered issuance of a Consent Form for evaluation. It however, appears that Boston did not forward the Consent Form to Parent within the five days required under the Massachusetts Special Education Regulation.

The Parties stipulated that the 2015-2016 school year ended on June 24, 2016 and the new school year started on September 8, 2016 (SE-3; SE-4; Malloy). By the beginning of the 2016-2017 school year, Boston had not yet forwarded a Consent for Evaluation Form to Parent.

²⁰ To the extent that Parent argues that 603 CMR 28.04(d), is applicable, Boston is correct that it is not because Student was not referred by any agency forming part of its "extensive networking and referral process" (PE-B, Boston's Response to Parent's Hearing Request).

²¹ "(a) when a student is referred for an evaluation to determine eligibility for special education, the school district shall send written notice to the student's parent(s) within five school days of receipt of the referral". CMR 28.04(1)(a).

Boston forwarded the Consent for Evaluation Form to Parent on October 3, 2016 (SE-5). Boston received Parent's signed consent on October 15, 2016, after Parent had filed her Expedited Hearing Request. Once Boston received parental consent, it scheduled the school-based evaluations under a truncated timeline.

Assuming June 13, 2016, as the date on which Boston was first on notice of a child who may present special education needs and for whom an evaluation was requested (consistent with Boston's and Parent's attorneys' emails), Boston was responsible to forward Parent the evaluation consent form by June 20, 2016.

Parent argued that had Boston forwarded the Consent Forms by June 20, 2016, it could have received Parent's consent before school ended on June 24, 2016 or by no later than the first day of school in September 2016, and further argued that Boston could have completed the evaluations by no later than October 20, 2016 (or earlier if it had received the consent in June 2016).²² As such, Boston would have been responsible to convene Student's Team by no later than November 10, 2016, the 45th day. See 603 CMR 28.04 and 28.05. Parent however, sought much more stringent timelines for completion of evaluations and convening of the Team.

Ms. Malloy testified that upon receiving parental consent for evaluations she coordinated the evaluations and arranged for nine individuals to participate in Student's Team. She stated that she forwarded the invitations to Boston's Team participants on or about October 21, 2016 and also sent an invitation to Parent (translated into Spanish) the week of October 24, 2016 (Malloy).

Assuming Boston had forwarded a Consent Form to Parent on or about June 20, 2016, and that it had received said Consent by June 24th or no later than September 8, 2016 (the first day of classes for the 2016-2017 school year), the evaluations would have had to be completed by no later than October 20, 2016 and Student's Team would need to be convened no later than November 4, 2016.²³ Instead, Boston did not begin its evaluations until October 19, by October 24 it had completed its second evaluation and others were still pending. Boston offered to convene the Team on November 10, 2016 (Malloy). Therefore, while Boston technically failed to comply with its Child Find mandate by failing to forward the consent form in a timely manner, by failing to complete its evaluations by October 20th and by failing to convene the Team by November 4th, by the time this case was heard Boston had already begun to cure these procedural defects; the consent form had been sent and returned, the evaluations had been initiated and Boston had scheduled completion of the entire process

²² I note that Parent's and Boston's attorneys agreed that Boston would conduct Student's evaluations at the beginning of the 2016-2017 school year (PE-C; Heffernan).

²³ I note that Boston actually received Parent's Consent on October 15, 2016 (PE-D; SE-5). Under this scenario, Boston would have had a much longer timeframe to complete its evaluations. Also, some of the factual disputes were difficult to discern because Boston's initial attorney no longer represents Boston and was not called to testify, and Parent's credibility was difficult to assess given that she testified via telephone and most of the questions asked during direct examination called for only yes or no answers.

by convening the Team on November 10, 2016, only four school days later than it should have had the consent forms been sent in a timely manner. As such, and contrary to *Matula*, this appears to be a *de minimus* violation in terms of an outcome determinative standard.

II. Parent's Private Evaluation:

Parent also argued that Boston had failed to convene Student's Team when it received Dr. Dinklage's evaluation report attached to Parent's Hearing Request on or about October 7, 2016. Parent appears to rely on 603 CMR 28.04(6)(f), addressing independent evaluations which states that

Within 10 school days from the time the school district receives the report of the independent education evaluation, the Team shall reconvene and consider the independent education evaluation and whether a new or an amended IEP is appropriate.

While I agree with Parent that Dr. Dinklage's evaluation would have served to further place Boston on notice that Student may need special education services, I find Parent's reliance on 603 CMR 28.04(6)(f) is misplaced. This regulation discusses independent evaluations for students whose special education entitlement has been established, something that had not yet occurred here. Instead, Dr. Dinklage's evaluation constitutes a private evaluation that offers insightful information regarding Student which Boston may consider in determining Student's eligibility, placement and services, if appropriate.

III. Compensatory Services:

Parent also seeks compensatory education for Student resulting from Boston's procedural and substantive transgressions. Boston argued that since the Team had not yet convened to discuss the school-based evaluation results, determine eligibility and recommend services it was premature to discuss what compensatory services, if any, were due to Student. Boston's argument is persuasive, and since Parent did not present sufficient evidence providing specificity as to what services, what frequency or the duration of such compensatory services, any determination regarding this issue is deferred.

In sum, I find that Parent has met her burden of persuasion pursuant to *Shaffer* that Boston failed to proceed with its evaluation of Student in a timely manner, and similarly failed to convene the Team to determine Student's eligibility, placement and services consistent with federal and state law. However, since Boston had already initiated the evaluation process and had already scheduled Student's Team meeting for November 10, 2016, only four school days later than it should have been had the consent form been timely sent, I found the transgression to be of minimal impact on Student. Given this, and taking into account that all of the evaluations must be translated into Spanish prior to the meeting, I see no reason to force an even shorter timeline on Boston. Boston is however, advised that if Student is found eligible any potential compensatory services should be discussed at the November 10, 2016 Team meeting.

ORDER:

1. Parent's request to Order Boston to: complete evaluations by October 26, 2016; provide Parent with evaluation reports by November 1, 2016; and, convene Student's Team by November 4, 2016 is **DENIED**.
2. Boston shall complete its evaluations and convene Student's Team to determine eligibility by November 10, 2016.
3. Parent's compensatory education claim is premature and as such, is **DEFERRED**.

By the Hearing Officer,

Rosa I. Figueroa

Dated: November 3, 2016

November 3, 2016

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

BOSTON PUBLIC SCHOOLS

BSEA # 1702840

BEFORE

**ROSA I. FIGUEROA
HEARING OFFICER**

**MELANIE JARBOE, ATTORNEY FOR PARENT
JEANNETTE SEDGWICK, ESQ., ATTORNEY FOR
BOSTON PUBLIC SCHOOLS**