

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

In Re: Dorian¹

BSEA #1702306

**RULING ON WALTHAM PUBLIC SCHOOLS' MOTION FOR SUMMARY
JUDGMENT AND PARENT'S MOTION TO RECONSIDER HER MOTION TO
POSTPONE**

This matter comes before the Hearing Officer on the Motion for Summary Judgment filed by Waltham Public Schools (Waltham or "the District") on November 10, 2017, as well as the Motion filed by Parent on November 17, 2017 to Reconsider my denial of her Motion to Postpone.

For the reasons below, the District's Motion for Summary Judgment is hereby **ALLOWED**, which renders moot Parent's Motion to Reconsider.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Parent filed a *Hearing Request* against Waltham Public Schools on September 20, 2016 alleging that the District had denied Dorian, a then-seventeen (17) year old student with an "emotional disability of [Post Traumatic Stress Disorder] and a health disability of [ADHD] and a processing disorder," a Free Appropriate Public Education ("FAPE"). She sought compensatory services and punitive damages, though she did not specify the period of time for which she sought relief. By way of a Motion she filed on or about March 3, 2017, Parent sought an order to "compel the District to provide the Student Emergency Unilateral Placement at a To Be Disclosed Private School at public expense," which was denied, after telephonic oral argument, on March 24, 2017.² On or about March 31, 2017, Parent amended her *Hearing Request* to seek compensatory services, as well as reimbursement for unilateral placement – and an order for continued placement – at an out-of-state, non-special education boarding school that was not approved by the Massachusetts Department of Elementary and Secondary Education (DESE).

The factual background and complex procedural history of this matter are detailed in several prior rulings. These include my *Ruling on Parent's Motion to Quash and Vacate Subpoenas and Waltham Public Schools' Motion to Compel*, issued on July 20, 2017; my *Ruling on Waltham Public Schools' Motion to Dismiss, Waltham Public Schools Motion for Rulings and Sanctions, Parent's Cross-Motion for Sanctions and Motion to Compel, and Parent's Motion to Enter Protective Orders*, issued August 29, 2017; and my *Ruling and Order on Parent's Motion to*

¹ "Dorian" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

² On or about March 3, 2017, Parent also sought an order requiring the District and all of its representatives to "suppress information through signing an agreement similar to a Confidentiality Agreement," which was also denied, after telephonic oral argument, by Order dated March 24, 2017.

Postpone (“Ruling and Order”), issued November 9, 2017. As such, I summarize only the information relevant to the present motions that has not been included in these earlier rulings.

Pursuant to my Ruling and Order dated November 9, 2017, the District was instructed to file its witness list and exhibits by close of business on November 10, 2017. In the alternative, the District could opt to file a Motion for Summary Judgment on that date, in which case the due date for its witness list and exhibits would be extended to November 20, 2017. The Ruling and Order also specified that Parent would have until 12:00 PM on November 17, 2017 to respond to any timely motions filed by the District; that a Conference Call would take place at 3:00 PM on November 17, 2017; and that the Hearing would take place, consistent with my Order dated September 7, 2017, on November 28 and 30 and December 4, 2017.

On November 10, 2017, the District filed the instant *Motion for Summary Judgment*, accompanied by a memorandum of law and Exhibits A through O in support thereof.

On November 17, 2017, just after 1:00 PM (after the established deadline for responding to the District’s *Motion for Summary Judgment*), Parent, now *pro se*, filed a *Motion for Extension of Time to Answer*, in which she requested an additional one (1) business day to respond to the *District’s Motion for Summary Judgment*. At the same time she submitted a letter dated November 16, 2017 stating that advocate Julianna Jennings would no longer be representing her, and requesting that the BSEA “give serious consideration the (*sic*) Motion to Postpone presented by Ms. Jennings” due to Parent’s unavailability to participate in the hearing or any related matters until at least December 28, 2017, depending on clearance from her healthcare providers.

Later the same day, Parent’s former advocate filed a *Motion for Reconsideration* and memorandum in support thereof. She argued that due to Parent’s “order by doctor not to work, which requires the Parent not to enter new agreements, to refrain from providing information and services, providing fiduciary duties, etc.” (which she characterized as “a description of the Parent’s work responsibilities as a Realtor Salesperson, task (*sic*) which she is unable to perform and relate to tasks needed to prepare for a hearing”), the BSEA should reconsider her *Motion for Postponement*. With her *Motion*, Parent’s former advocate submitted a letter on Atrius Health Letterhead, appearing to be from a doctor in a “Minimally Invasive GYN Surgery” practice that reads:

“[Parent] had surgery on 11/2/17 at the Beth Israel Deaconess Hospital and has been advised to remain out of work 8 weeks post procedure. Therefore, she will not be available until after December 28, 2017.

[Parent] cannot attend BSEA on 11/28 due to recovery of surgery.

We will notify you if her absence will exceed the dates stated above.”

Along with these documents, Parent’s advocate submitted a withdrawal of her appearance as representative for the Parent and Student in the matter before the BSEA, accompanied by a letter dated November 16, 2017 from herself to Parent indicating the same.

As both Parent and her advocate had communicated to the BSEA that Parent was now *pro se*, the BSEA contacted Parent for the previously-scheduled November 17, 2017, 3:00 PM Conference Call. Parent failed to appear. Even so, the undersigned Hearing Officer allowed her *Motion for Extension of Time*, extending to close of business on November 20, 2017 the due date for Parent's *Response* to the District's *Motion for Summary Judgment*, and took under advisement her *Motion to Reconsider*. Parent failed to file a response to the District's Motion by close of business on November 20, 2017.³

II. DISCUSSION

As a preliminary matter, because Parent filed for hearing, she is the party challenging the status quo in this matter. As such she bears the burden of proof to establish that the District's proposed IEPs (and placements) did not provide Dorian with a FAPE and that, as a result, Dorian Waltham owes Dorian compensatory services, prospective placement, and/or reimbursement for unilateral placement.⁴

A. Backdrop: Legal Standards for Free Appropriate Public Education and Unilateral Placements

The Individuals with Disabilities Education Act (IDEA) was enacted "to ensure that all children with disabilities have available to them a free appropriate public education."⁵ FAPE is delivered primarily through a child's individualized education program (IEP).⁶ An IEP must be "reasonably calculated to confer a meaningful educational benefit"⁷ and tailored to address each student's unique needs that result from his or her disability.⁸ As the United States Supreme Court recently concluded, the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."⁹ To prevail, a Parent challenging a school district's proposed IEP must demonstrate, through documentary and testimonial evidence, that the IEP does not meet this standard.

³ At 3:30 PM on November 20, 2017, Parent filed a *Second Motion for Extension of Time to Answer*, in which she stated, "We have not yet received a response from the Bureau on the initial motion for extension" and requested until 5:00 PM on November 21, 2017 to file her response. As noted above, the undersigned Hearing Officer had allowed Parent's initial *Motion for Extension of Time to Answer* (which she filed by fax) on November 17, 2017, but as Parent had not provided a fax number to receive a response, nor had she appeared for the previously scheduled Conference Call that afternoon, an administrative assistant at the BSEA called Parent to inform her of the outcome. Parent did not answer. The BSEA administrative assistant left a message requesting that Parent call her about her Motion. Parent did not return that telephone call before filing her second motion, which was denied on November 20, 2017. Once again, as a courtesy, a BSEA administrative assistant called Parent to report the outcome of her Motion. This time, Parent answered the telephone, and the BSEA administrative assistant read to her the November 20, 2017 Order denying her Motion.

⁴ See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (holding that the burden of proof in an administrative hearing challenging an IEP falls on the party seeking relief).

⁵ 20 U.S.C. § 1400 (d)(1)(A).

⁶ *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012).

⁷ *Sebastian M. v. King Philip Reg'l Sch. Dist.*, 685 F.3d 84, 84 (1st Cir. 2012).

⁸ See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982) (FAPE must be "tailored to the unique needs of the handicapped child").

⁹ *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S.Ct. 988, 1001 (2017).

Under the IDEA, a parent may be entitled to reimbursement for unilaterally placing a student in private school without the District's consent or referral.¹⁰ Section 1412 provides that a hearing officer may order reimbursement for the cost of that placement if she finds that a school district had not made FAPE available to the child in a timely manner prior to the parent's unilateral placement.¹¹ Hearing officers and courts have interpreted section 1412 to allow reimbursement for a unilateral placement when a parent proves that 1) the school district had not made a FAPE available to the student prior to that enrollment, and 2) the private school placement was appropriate.¹²

B. Legal Standard for Summary Judgment

Pursuant to 801 CMR 1.01(7)(h), Summary Decision may be granted when there is “no genuine issue of fact relating to all or part of a claim or defense and [the moving party] is entitled to prevail as a matter of law.” This rule of administrative practice is modeled after Rule 56 – Summary Judgment – of both the Massachusetts and Federal Rules of Civil Procedure.¹³ The party seeking summary judgment begins by demonstrating, with the support of its documents, that there is no genuine issue relating to the claim or defense. This party bears the burden of proof, and all evidence and inferences must be viewed in the light most favorable to the party opposing summary judgment.¹⁴

In response to a motion for summary judgment, the adverse party “must set forth specific facts showing that there is a genuine issue for trial.”¹⁵ To survive this motion and proceed to hearing, the adverse party must show that there is “sufficient evidence” in her favor that the fact finder could decide for her.¹⁶ “If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.”¹⁷

As such, to analyze whether the District, as the party moving for summary judgment, has met its initial burden such that the burden shifts to Parent, I must view all of the evidence it has submitted in the light most favorable to the parent and determine that there is no genuine issue of material fact related to Parent's claim for compensatory services, reimbursement for unilateral placement, and prospective placement at an out-of-state, non-special education boarding school that is not DESE-approved. If the District is successful in meeting its burden, Parent must then set forth specific facts showing that there is “sufficient evidence” in her favor that she could prevail at hearing. In other words, she must show that there is a genuine issue for hearing – that enough evidence exists for the undersigned Hearing Officer to determine that Waltham Public

¹⁰ 20 U.S.C. 1412(a)(10)(C)(ii).

¹¹ See *id.*

¹² See 20 U.S.C. 1412(a)(10)(C)(ii); *Sch. Comm. of Burlington v. Dept. of Educ.*, 471 U.S. 359, 369 (1985); *Schoenfeld v. Parkway Sch. Dist.*, 138 F.3d 379, 382 (8th Cir. 1998) (“Reimbursement for private education costs is appropriate only when public school placement under an individual education plan (IEP) violates IDEA because a child's needs are not met”); *In re: Medfield Public Schools*, 13 MSER 365, 371 (Crane 2007).

¹³ Federal Rule of Civil Procedure 56 authorizes the entry of summary judgment whenever it appears that “there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”

¹⁴ *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252 (1986).

¹⁵ *Id.* at 250.

¹⁶ *Id.* at 249.

¹⁷ *Id.* at 249-50.

Schools did not meet its obligation to provide Dorian with FAPE and that as a result, it owes him compensatory services, reimbursement for unilateral placement, and/or prospective placement.

C. Application of the Standard

In support of its *Motion for Summary Judgment*, the District submitted fifteen exhibits, consisting of affidavits, correspondence, and drafts of IEPs. Examination of the District's documents reveals the following:

1. On or about October 1, 2014, Parent withdrew Dorian from special education within the Waltham Public Schools. [Ex. D, Affidavit of Alyssa Bourque, High School Evaluation Team Leader, Waltham Public Schools; Ex. E, Confirmation of Intent to Refuse Special Education Services]
2. On or about January 11, 2016, Parent contacted Waltham by telephone to request that the District revisit Dorian's eligibility for special education. [Ex. D]
3. At a Team meeting on January 22, 2016, the District proposed, and Parent signed consent for, special education evaluations to determine Dorian's eligibility for special education services. The Team also reinstated Dorian's last agreed upon IEP, which provided for four periods of academic support as well as counseling services. [Ex. D]
4. Due to Dorian's absenteeism, the District could not complete its evaluations of him until May 2016. [Ex. D]
5. On June 3, 2016, the Team convened to determine Dorian's eligibility for special education. The Team found him eligible due to an emotional disability, proposed an IEP for the period from June 3, 2016 to June 2, 2017, recommended that a progress meeting take place in the fall of 2016, and recommended that Dorian attend summer school during the summer of 2016 if eligible. [Ex. D]
6. Parent rejected portions of the proposed IEP as well as the proposed placement. [Ex. F, Proposed 2016-17 IEP]
7. On or about October 20, 2016, the District communicated to Parent, through her former advocate, that it would make formal referrals to several out-of-district programs for an extended evaluation of Dorian. [Ex. H, letter from District Counsel to Parent's former advocate dated October 20, 2016]
8. At a Team meeting on or about November 2, 2016, Parent rejected the District's proposal of an extended evaluation and sought a permanent placement of Dorian at a private preparatory school. The Team rejected this option and offered a DESE-approved therapeutic collaborative or a private day school. [Ex. I, N-1 form dated November 14, 2016]

9. Following the November 2, 2016 Team meeting, the District proposed an IEP for the period from September 16, 2017 to June 2, 2017 placing Dorian in a therapeutic public day school. The proposed IEP was signed by the District on November 21, 2017. [Ex. I, proposed IEP for the period from September 16, 2016 to June 2, 2017]
10. On or about November 18, 2016, the District offered to make formal referrals for Dorian's "potential placement at any DESE approved, public or private, day or residential school."¹⁸ [Ex. J, letter from District Counsel to Parent's former advocate dated November 18, 2016]
11. Following a Pre-Hearing Conference that took place on December 21, 2016, the parties agreed to cooperate in referring Dorian to several programs for an extended evaluation, and the District agreed to provide ten (10) hours a week of tutoring through the referral period for an extended evaluation or through January 2017. [Ex. L, agreement signed by the parties at the Pre-Hearing Conference, dated December 21, 2016]
12. Dorian was subsequently admitted to one of the extended evaluation programs to which he had been referred, but Parent declined to consent to a release of information for two other programs. [Ex. M, e-mail from District Counsel to Parent's former advocate dated January 25, 2017]
13. On or about May 10, 2017, the District proposed an IEP for the period from June 3, 2017 to June 2, 2018. The IEP called for placement of Dorian at a DESE-approved therapeutic public day school. [Ex. N, proposed IEP]
14. When the District requested Dorian's academic records from the out-of-state, non-DESE-approved, non-special education boarding school Parent had informed Waltham Dorian was attending, it learned that Dorian had been expelled from that school in June 2017. [Ex. A, Affidavit of Kathy Hourrigan, Secretary to the Administrator of Pupil Personnel, Waltham Public Schools]
15. On or about September 17, 2017, Counsel for the District communicated to Parent, through her former advocate, that Waltham remained ready to "make referrals and support the student's placement in any DESE approved, public or private, day or residential school," and had been since November 2016; that is was "willing to support the student's placement at a collaborative school including Valley Collaborative, CASE Collaborative, LABB Collaborative, EDCO Collaborative, SEEM Collaborative, and Accept Education Collaborative;" and that the District's offer of "an extended evaluation and/or placement at HALT, SEEM, CREST, or Dearborn" remained available to the parent and student. [Ex. O, Letter from District Counsel to Parent's former advocate dated September 14, 2017]

Through its evidence, the District has established that Parent rejected a series of proposed

¹⁸ Waltham Public Schools (Waltham or "the District") also provided Parent with a release for referral packets to be sent to "any potentially appropriate DESE approved public or private therapeutic day schools. [Ex. I]

IEPs and corresponding placements. In response, Waltham offered several options, ranging from extended evaluation to placement at any DESE-approved special education school. Under these circumstances, for Parent to prevail, she would have to demonstrate, by way of documentary evidence and/or testimony, that the IEPs proposed by Waltham did not provide Dorian with a FAPE; that Dorian's needs are such that no DESE-approved special education school could meet them; and that the out-of-state, private, non-special education school in which Parent placed Dorian was appropriate for him.¹⁹

Parent has been largely unresponsive to discovery requests from the District and my orders compelling her to respond to those requests. To ensure that both Waltham and Parent received sufficient information to prepare for hearing, I issued a Ruling and Order on August 24, 2017 directing both parties to file exhibits and witness lists no later than fifteen (15) business days in advance of hearing. As a sanction for Parent's multiple failures to comply with discovery requests and her violations of BSEA Orders, as documented in my previous rulings on this matter, Parent was informed by way of the August 24, 2017 Order that "[a]ny documents not produced on or before this date, and any testimony regarding those documents, will not be permitted into evidence absent a finding that to do so would not prejudice either party." Once hearing dates were established, an Order dated September 7, 2017 specified that exhibits and witness lists would be due November 6, 2017, and reiterated the consequences of failure to meet this deadline.

On October 30, 2017, Parent requested postponement of the hearing until February 19, 2018. The district objected and pointed out that Parent continued to violate the BSEA's previous discovery orders such that it still had not received most of the information it had requested. Following a Conference Call, on November 3, 2017 I issued an Order directing Parent to file either her witness list and exhibits by close of business on November 6, 2017, as previously ordered, or documentation consistent with her representations regarding serious illness and emergency medical surgery at Massachusetts General Hospital, rendering her unable to participate in a BSEA hearing through February 28, 2017. Once again, this Order provided that failure to comply would result in Parent being unable to introduce evidence at hearing. Parent failed to comply with this Order and as a result I denied her *Motion to Postpone*, though on November 7, 2017 I issued an Order allowing her through close of business on November 8, 2017 to submit her witness lists and exhibits. Once again the Order specified that that "[a]ny documents not produced on or before this date will not be permitted into evidence absent a finding that to do so would not prejudice either party." Once again, Parent failed to submit her witness list and exhibits, instead filing (on the day they were due) a second *Motion to Postpone*, this time stating she would be unavailable at least until December 28, 2017. Once again the District objected and on November 9, 2017 I issued an Order denying Parent's *Motion to Postpone*.

Parent never submitted a single document as an exhibit in this matter, despite established due dates and several extensions. As such, by way of my November 9, 2017 Order, Parent was barred from submitting any documents, or testimony regarding those documents, into evidence at hearing absent a finding that to do so would not prejudice either party.

¹⁹ See 20 U.S.C. 1412(a)(10)(C)(ii); see also, e.g., *Burlington v. Dept. of Educ.*, 471 U.S. at 369; *Schoenfeld.*, 138 F.3d at 382; *In re: Medfield Public Schools*, 13 MSER 365, 371 (Crane 2007).

The District filed the instant *Motion for Summary Judgment* on November 10, 2017, arguing that Parent would be unable to prevail at hearing. Despite an extension at her request, Parent failed to respond.²⁰ As Parent has been barred from presenting her own evidence at hearing as a result of her continued noncompliance with a series of BSEA orders, she would have to rely on the District's evidence to prove her case.

By way of its documents, the District has met its burden. Waltham has established that as of November 26, 2016, Waltham was offering Dorian a range of programs, including an extended evaluation or placement at a wide range of potential placements – private or public, day or residential, therapeutic or otherwise. It is unclear what was offered to Dorian for the 2015-2016 school year, but the District has also established that Dorian's eligibility for special education, for purposes of the present matter, was not established until June 2016, as a result of Parent's decision to remove him from special education in 2014. As such, the IEPs in contention begin in June 2016.

To prevail at hearing, Parent must prove that the IEPs proposed by the District from June 2016 through the end of the 2016-2017 school year²¹ fail to provide Dorian with a FAPE. Moreover, to receive reimbursement for unilateral placement, Parent would also have to establish that her chosen school was appropriate for Dorian's needs, and she would have to provide

²⁰ On November 21, 2017, despite having been informed through a conversation with a BSEA administrative assistant the previous day that her second *Motion for Extension of Time to Answer* had been denied, Parent filed by fax a document she entitled an *Opposition to Motion for Summary Judgment*, accompanied by a Memorandum of Law and exhibits in support thereof. Parent's Memorandum focuses primarily on her requests for postponement of the Hearing. As to the substance of her claims against the District, Parent argues only that "[t]here are several instances outlined where the District failed to provide the student with FAPE, the exhibits provided that were sent to the district per the orders of discovery, demonstrate a few, including that the Student was not re-evaluated per 603 CMR 28.04(3) in January 2014 as planned and it was postponed until January 2015. His last re-evaluation was in January 2011 which goes against the law as written and did not occur until June 2016."

Even if I were to consider Parent's *Opposition*, which was submitted in knowing violation of my prior orders (consistent with the pattern established by Parent and her former advocate of disregarding BSEA orders), the outcome of the District's Motion would be no different. Waltham established through its evidence that Parent withdrew Dorian from special education in October 2014. Parent submitted an IEP for the 2014-2015 year dated before that withdrawal, the signed withdrawal itself, and an affidavit contending that she had requested only that her son's special education services were changed, but not that he be withdrawn from special education. Parent's affidavit is inconsistent with documentary evidence submitted by both the District and herself, but even if it weren't so, Parent's *Hearing Request* contains no child find allegations. As such, this point is immaterial.

Moreover and more significantly, Parent submitted no evaluations or other evidence regarding Dorian's needs, much less evidence that Waltham, through its proposed IEPs, failed to create an "educational program reasonably calculated to enable [Dorian] to make progress appropriate in light of the [his] circumstances." *Andrew F.*, 137 S.Ct. at 1001. This constitutes failure to create a genuine issue of material fact for hearing. Parent offered no evidence in support of this foundational contention, much less "sufficient evidence" in her favor that the BSEA could find for her. Because she will not be able to meet her burden to prove that Waltham's proposed IEPs failed to provide Dorian with a FAPE, summary judgment is appropriate.

²¹ Parent has made no claims regarding the 2017-2018 school year. As such, it appears that her *Hearing Request* involves the period from June 2016 through the end of the 2016-2017 school year, as the District has established through its documents that Dorian's eligibility determination was not made until June 2016 as a result of his absences between January 2016, when Parent requested that the District reconsider his eligibility, and May 2016.

documentation of her expenditures. Because she failed to respond to the District's *Motion for Summary Judgment*, Parent has not set forth specific facts showing that there is a genuine issue for hearing.²² Moreover given her inability to present any documents, or testimony based on those documents, of her own at hearing, she will be unable to produce "significantly probative" evidence in her favor.²³

CONCLUSION

The District has met its burden to establish that there is no genuine issue of material fact for hearing, and it is entitled to judgment as a matter of law.

This conclusion renders moot Parent's *Motion to Reconsider* my previous denial of her *Motion to Postpone*.

ORDER

Waltham Public Schools' *Motion for Summary Judgment* is hereby ALLOWED. As this disposes of the matter in its entirety, the hearing scheduled to begin November 28, 2017 is cancelled.

By the Hearing Officer,

Amy Reichbach
Dated: November 21, 2017

²² Anderson, 477 U.S. at 250.

²³ *Id.* at 249-50.