

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

In Re: Griffin¹

BSEA #1804286

**RULING ON PARENTS' MOTION TO DISMISS AND/OR FOR SUMMARY
JUDGMENT**

This matter comes before the Hearing Officer on the Motion to Dismiss and/or for Summary Judgment filed by Parents on November 27, 2017. For the reasons below, Parents' Motion is hereby **DENIED**.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On November 17, 2017, Weston Public Schools ("Weston" or "the District") filed a *Hearing Request* against Parents, seeking a determination that the home/hospital educational services form submitted by Parents to obtain home tutoring for Griffin is invalid, and seeking substitute consent for both Griffin's three-year evaluation and his attendance at the language-based program at Woodland School pending resolution of any disputes regarding his placement and services for the remainder of the 2017-2018 school year. The Hearing was scheduled for December 8, 2017.

In support of its requested relief, Weston alleged that Griffin, a seven year-old second grader, is currently out of school without appropriate documentation to support a request for home/hospital tutoring. According to the District, he attended an elementary school in Weston during the 2016-2017 school year. In May 2017, Griffin's TEAM convened and recommended a language-based program at a different Weston elementary school. Parents rejected this Individualized Education Program (IEP) and placement on or about June 2017; on or about November 7, 2017, Parents partially accepted this IEP by accepting six of eight goals, while continuing to reject the remainder of the IEP as well as the placement.

The District contends that Griffin's Parents pulled him from school prior to the end of the 2016-2017 school year. He attended the Carroll School for the summer of 2017, and was enrolled privately by his parents at Friends Academy in Dartmouth, Massachusetts. After he attended for September and October, on or about October 27, 2017, Weston received from the Parents a Physician's Statement for Temporary Home or Hospital Education form, signed by his child psychiatrist. According to the statement, Griffin has been diagnosed with dyslexia and ADHD, Inattentive type; has had multiple failed school placements; has been observed to "manifest unpredictable escalation of self-regulation difficulties in school settings;" and requires ongoing clinical evaluation.

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

In its *Hearing Request*, Weston further alleged that the District has sought permission from the Parents to speak with Carroll School, Friends School, and Griffin's health care providers to assist the District in better understanding Griffin's medical and educational needs. Parents declined to allow the District to speak with anyone. Moreover Griffin's three-year evaluation is due "shortly," with consent due by early December 2017, but Parents have already refused to give their consent. The District has also suggested that Griffin attend a different Weston elementary school for a full or partial day until the parties are able to agree on a placement, but Parents have refused and continue to keep him home. Although the District believes he is not entitled to a home tutoring program based upon an insufficient Physician's statement, Weston will nevertheless "provide [Griffin] with home tutoring and related services pursuant to his last accepted IEP during the pendency of the dispute over placement and services, and pending formal action on this hearing request by the BSEA."

On November 27, 2017, Parents filed their Response to Weston's *Hearing Request*. Their cover letter refers to a motion to dismiss, the document accompanying that letter is entitled "Response of Parents to Hearing Request of School District and Request for Hearing on Parents' Motion for Summary Judgment Pursuant to 801 CMR Sec. 101(7)(h)," and immediately under the title appears the following: "Request for Dismissal for Failure to State a Valid Claim and For Filing a Hearing Request Prematurely, on Issues Not Ripe for Hearing." A letter dated November 2, 2017 from a psychiatrist currently working with Griffin accompanied their Response and Motion. Parents appear to conflate the standards for motions to dismiss and motions for summary judgment, arguing that Weston's "Hearing Request fails to contain genuine issues of fact supporting its claims and, as such, Parents are entitled to prevail as a matter of law . . . [and that it] fails to state a claim, for the reasons set forth . . . and is furthermore premature as the issues raised are not ripe for hearing."

Parents argue, in essence, that in its *Hearing Request* the District mischaracterized the situation it described. As to the physician's statement for temporary home tutoring, Parents contend that Griffin is currently without a placement, and that he is undergoing a psychological evaluation at home because his psychological and emotional needs cause him to be so dysregulated in school settings that he cannot attend. They assert that these mental health issues qualify as a medical condition for purposes of home tutoring. As to substitute consent for Griffin's three-year re-evaluation, Parents argue that Griffin's re-evaluation is not yet due; that Parents are not denying that the District has the right to conduct the evaluations; and that Parents' position is that conducting evaluations of Griffin is not appropriate right now, because he needs to be emotionally stabilized first. As to substitute consent to determine placement, Parents argue that they are "working hard to support Student academically and emotionally" as he is undergoing a private psychological evaluation, and that the situation does not justify such an extreme measure.

On November 28, 2017, the District filed a request for postponement of the hearing, and during a conference call that took place November 30, 2017, Parents assented to this postponement. The parties agreed to new dates for hearing and to a Pre-Hearing Conference. They also offered arguments on Parents' Motion.

II. DISCUSSION

As a preliminary matter, because the District filed for hearing, it bears the burden of proof to establish that it is entitled to a declaration that the home/hospital educational services form submitted by Parents is invalid, and that it is entitled to substitute consent on evaluations and/or placement.² As the moving party on the present Motion, however, Parents bear the burden to demonstrate that dismissal or summary judgment is warranted. Because it is unclear what they seek, I consider each motion in turn.

A. Motion to Dismiss

1. *Legal Standard for Motion to Dismiss*

Pursuant to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3) and Rule XVII(B) of the BSEA *Hearing Rules for Special Education Appeals*, a hearing officer may allow a motion to dismiss if the party requesting the appeal fails to state a claim on which relief can be granted. This rule is analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure and as such hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim. Specifically, what is required to survive a motion to dismiss “are factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”³ In evaluating the complaint, the hearing officer must take as true “the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff’s favor.”⁴ These “[f]actual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . .”⁵

2. *District’s Hearing Request Survives a Motion to Dismiss*

In its *Hearing Request*, the District alleges that Parents are keeping Griffin out of school despite the existence of a program he could attend during the pendency of the dispute over placement; that they have failed to submit a physician’s request sufficient to meet the standard for temporary home/hospital educational services; and that Parents have refused consent to a three-year reevaluation of Griffin. Although the District requested, among other things, substitute consent for a placement, in essence Weston appears to be seeking substitute consent for a reevaluation of Griffin and a finding that its actions are appropriate such that Weston need not provide home tutoring or offer a different interim placement for him. A declaration that Weston has met its obligations to provide Griffin with a free, appropriate public education (FAPE) is a form of relief. Taking the District’s allegations as true, as I must for purposes of a motion to dismiss, I conclude that they plausibly suggest that Weston is entitled to relief.⁶ As such, Parents’ Motion to Dismiss the *Amended Hearing Request* in its entirety is DENIED.

² Cf. *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).

³ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

⁴ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

⁵ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

⁶ See *Twombly*, 550 U.S. at 557; *Chelmsford Ob/Gyn, P.C.*, 420 Mass. at 407.

B. Summary Judgment

1. *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.⁷ 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.⁸

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.”⁹ 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.¹⁰ “If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.”¹¹

As such, to analyze whether Parents, as the party moving for summary judgment, have met their initial burden such that the burden shifts to the District, I must view all of the evidence it has submitted in the light most favorable to the District and determine that there is no genuine issue of material fact related to the District’s claims. Only if Parents are successful in this first step does the burden then shift to the District.

2. *Application of the Standard*

The crux of Parents’ argument in support of their *Motion for Summary Judgment* is that the District’s *Hearing Request* fails to contain sufficient facts and/or legal support, and is “rife with omissions of relevant facts.” According to Parents, the District “sets forth a fragmented view of the realities in this case” and “paints an inaccurate picture of the current situation.” These statements alone demonstrate that summary judgment is inappropriate.

Summary judgment is a tool that may be used to dispose of matters where there are no material facts in dispute. Here, Parent disputes many of the facts upon which the District relies, from Griffin’s presentation and progress in school settings and the District’s “actual knowledge” (or lack thereof) of “medical reasons for Student’s inability to attend school,” to the due date of three-year evaluations and whether Parents have indicated an unwillingness to consent to them. These facts are at the core of the dispute between the parties. As I stated above, if the District’s

⁷ 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.”

⁸ *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252 (1986).

⁹ *Id.* at 250.

¹⁰ *Id.* at 249.

¹¹ *Id.* at 249-50.

version of events is true, Weston may well be entitled to relief. If Parents' version is accurate, however, they may well prevail. An evidentiary hearing, at which both parties will present documentary and testimonial evidence, is necessary for me to determine what happened and whether the District is, in fact, entitled to any or all of the relief it seeks.

CONCLUSION

Parents have not established that the District's factual allegations, if true, fail to raise a right to relief above the speculative level, and they have failed to establish that there is no genuine issue of material fact for hearing.

ORDER

Parents' *Motion to Dismiss and/or Motion for Summary Judgment* is hereby DENIED. The parties have agreed that the matter will proceed as follows:

1. A Hearing Officer-initiated Conference Call will take place at 4:30 PM on December 18, 2017.
2. A Pre-Hearing Conference will take place at 11:00 AM on January 3, 2018 at the Offices of the BSEA, 1 Congress St., Boston. The purposes of a Pre-Hearing Conference are TO clarify the issues in dispute and to explore the possibility of settlement of the case.
3. The Hearing will take place March 20, 21, and 22, 2018, also at the BSEA. It will begin at 10:00 AM each day.

By the Hearing Officer,

Amy Reichbach

Dated: December 14, 2017