COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS

Student v. Hingham Public Schools **BSEA # 1804284**

Ruling on Hingham Public Schools' Motion for Summary Judgment

Relevant Facts[1]

Student is eighteen years old and resides within the Hingham Public School District, (hereinafter, Hingham). He currently attends school at Brewster Academy (hereinafter, Brewster,) a non-DESE approved private boarding school located in Wolfeboro, New Hampshire, where he was unilaterally placed by his parents (hereinafter, Parents) in the fall of 2015. (See Parents' Hearing Request.) Prior to being unilaterally placed at Brewster, he attended Hingham. He had an accepted IEP for the period from March 15, 2013 through March 14, 2014 which identified a specific learning disability in reading. The IEP provided for services in the areas of Reading Decoding, Reading Comprehension, and Written Language. Services proposed included consultation with staff 1 x 10 minutes/ 4 days, inclusion English with a special education teacher and a paraprofessional 4 x 47 minutes/4 days; and Reading Decoding with a reading teacher or special education teacher 2 x 47 minutes/4 days. Parents accepted the IEP in full, but noted that they "will not be sending [Student] to summer school. In the grid, next to the proposed ESY reading Decoding, Parent wrote "declined." (Hingham Ex. B)

Student's IEP for the period from March 13, 2014 through March 12, 2015 contained services in the same areas as the previously accepted IEP. The A Grid called for consultation with staff 1x10 minutes/4 days through June 30, 2014 and 1 x 10/7 days from September 2, 2014 through March 12, 2015. Grid B proposed inclusion English 4 x 47 minutes/4 days. The C Grid included reading decoding 2 x 47 minutes/4 days from March 13, 2014 through June 30, 2014 and 3 x 57 minutes/7 days from September 2, 2014 through March 12, 2015, as well as academic support with a special education teacher 3 x 57 minutes/7 days from September 2, 2014 through March 12, 2015. The IEP also included ESY reading decoding with the reading teacher 2 x 60 minutes/week from June 30, 2014 through July 31, 2014. Parents accepted all services except ESY reading decoding and reading decoding from September 2, 2014 through March 12, 2015. (Hingham Ex. C)

In August 2014 Father called the school psychologist and asked him to remove Student from his IEP and informed him that Student felt stigmatized by being a special education student. (Affidavit of Parents, ¶ 7) On or about August 28, 2014, prior to the beginning of Student's freshman year at Hingham High School, Parents signed a form declining special education services for Student. The form, entitled, "Parental Request to

[1] The facts are established for purposes of this Ruling only.

discontinue special education services" was signed by Mother and returned to Hingham on August 28, 2014. The form contained the following language:

> You are choosing to discontinue with the current special education services as proposed at Hingham High School. The school will honor this request on receipt of your signed consent. Your signature provides that Hingham Public Schools will be exempt from the provision of the annual team IEP meeting and three year reevaluation in alignment with special education regulations from this point forward. Please understand that we remain available to meet with you to review eligibility for special education. (Hingham Ex. D)

Hingham sent Parents an N1, dated 8/28/14, which stated that Hingham High School would discontinue special education services at the request of the family. It stated, "These will include services, accommodations, and any scheduled or future assessments." Lastly, it stated that the family could contact the counseling department with questions regarding accommodations or alternative disability plans. (Hingham Ex. E)

Student completed his freshman year at Hingham High School as a general education student. He did not have any behavioral or disciplinary issues until the last day of school. On the last day of school, Student was involved in a disciplinary incident in which he was accused of finding a final exam, taking a photo of it, and sharing it with six other students. He was suspended from all extracurricular activities including clubs, sports, and social events. His punishment was to last through January 2016. Parents informed Hingham administrators that Student was devastated by the punishment and requested that it be changed, but Hingham did not agree. (See Parents' Hearing Request, Parents' Affidavit, ¶¶ 9, 10, 11)

Parents withdrew Student from Hingham and unilaterally placed him at Brewster Academy in the fall of 2015, just prior to his sophomore year. He remains a student there to date. (Parents' Hearing Request)

On or around November 2, 2016 Parents requested an evaluation of Student for special education eligibility. In response, Hingham sent Parents an N1 proposing to complete an initial evaluation. (Hingham Ex. F) Hingham sent an Evaluation Consent Form with a notice date of November 20, 2016. Parent signed the consent on or around December 8, 2016 and it was received by Hingham on or around December 13, 2016. (Hingham Ex. G)

The Team met on March 2, 2017 and found Student not eligible for special education services. On or around March 5, 2017, Hingham sent Parents an N2, Finding of No Eligibility. The N2 stated that although Student had a history of a health disability and a specific learning disability in written expression, he is able to access the curriculum, was making effective progress, and did not require specialized instruction. The N2 noted that Student did present areas that could use accommodations and regular education support and further that the special education team would make a referral to the school counseling department for consideration of a section 504 accommodation plan.

Parents filed their request for hearing on November 17, 2017.

Hingham's Position

Hingham argues that it is entitled to summary judgment in this matter because all of Parents' claims for relief fail as a matter of law in light of the undisputed facts. On August 28, 2014, Parents revoked consent for the provision of special education and related services to Student by Hingham. Subsequently, they enrolled him in an unapproved, out-of-state school in New Hampshire in the fall of 2015. They did not request an initial evaluation until November 2016. After the initial evaluation, Student was found ineligible for special education and related services on March 2, 2017. Parents are not entitled to reimbursement for a unilateral placement of Student at a non-DESE approved school during the period for which they had revoked consent for Student to receive special education and related services. Further, the statute of limitations for claims under the IDEA (and section 504, as established by previous BSEA decisions) is two years. Finally, to the extent that Parents seek reimbursement for services provided at Brewster Academy pursuant to Section 504, Hingham is not obligated to provide accommodations at Student's private school or to otherwise fund his education there.

Parents' Position

Parents claim that they signed a form removing Student from IDEA services, but that they did not eliminate 504 accommodations. They state that Student suffered emotional trauma due to the severe discipline that was imposed upon him after he found and showed a final exam to other students. They state that Hingham was aware that Student had emotional issues due to prior testing and IEPs.

Summary Judgment Standard

Summary judgment is appropriate when "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" when the evidence is such that a reasonable fact-finder could resolve the point in favor of the non-moving party, and a fact is "material" when it might affect the outcome of the suit under the applicable law. *Morris v. Gov't Dev. Bank*, 27 F.3d 746, 748 (1st Cir. 1994). The non-moving party bears the burden of placing at least one material fact into dispute after the moving party shows the absence of any disputed material fact. *Mendes v. Medtronic, Inc*., 18 F.3d 13, 15 (1st Cir. 1994) (discussing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

801 CMR 1.01(7)(h), a rule of Standard Ajudicatory Rules of Practice and Procedure, modeled after Rule 56 of both the Massachusetts and Federal Rules of Civil Procedure, provides that 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." "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly

supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986) This means that "only disputes over facts that might affect the outcome of the [case] under the governing law would prevent summary judgment." *Id*. at 248. Moreover in determining whether a genuine issue of material fact exists, the fact-finder must view the entire record "in the light most flattering" to the party opposing summary judgment and "indulg[e] all reasonable inferences in that party's favor." *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 581 (1st Cir. 1994); see *Galloway v. United States*, 319 U.S. 372, 395 (1943).

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." *Anderson*, 477 U.S. 242 at 250. To survive this Motion and proceed to hearing, the adverse party must show that there is "sufficient evidence" in his favor that the fact finder could decide for him. *Id.* At 249. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50. Moreover, if the law would not provide a remedy for a plaintiff even if all of his allegations are true, summary judgment may be allowed.[2]

Analysis

In *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) the Court ordered reimbursement for private school expenses to parents of a special education student who sought more intensive services from a district and unilaterally placed their child when the school refused to comply. The instant case is distinguishable. Here, Parents removed Student from special education services and more than a year later placed him at an unapproved non-special education private boarding school and thereafter sought reimbursement from the district. Under the circumstances of this case, Hingham correctly argues that it acted appropriately by treating Student as a general education student after Parents withdrew him from special education formally and in writing. See 34 C.F.R. § 300.300(b)(4)(III)-(iv); 73 Fed.Reg. 73013 ("Section 300.300(b)(4)(iii) – (iv) makes clear that once a parent revokes consent for special education and related services, the public agency (a) will not be considered in violation of the obligation to make FAPE available to the child for failure to provide the child with further special education and related services, and (b) will not be required to convene an IEP Team meeting or develop an IEP, under §§ 300.320 through 300.324."). During the time period after August 2014, when Parents withdrew Student from special education, Hingham was not required, or even permitted to convene a Team meeting, even if there had been any concerns regarding Student's emotional state, as alleged by Parents. Parents argued that although they withdrew Student from special education services provided pursuant to the Individuals with Disabilities Education Act, they did not remove him from Section 504

[2] *Cf. Ocasio-Hernández v. Fortuño-Burset*, 777 F.3d 1, 8 (1st Cir. 2015) (quoting *Rodriguez-Sanchez v. Municipality of Santa Isabel*, 658 F.3d 125, 130-31 (1st Cir. 2001) ("in order to defeat summary judgment, the plaintiffs have the burden of directing us to sufficient record evidence to 'create a triable issue'") (internal citation omitted).

eligibility[3]. However, guidance provided by the U.S. Department of Education , Office for Civil Rights indicates that "by rejecting the services developed under the IDEA, the parent would essentially be rejecting what would be offered under Section 504." *Letter to McKethan*, 25 EDELR 295 (1996). Further, Parents never requested that the 504 team convene when they removed Student from special education services or at any time prior to or after unilaterally placing Student.

Parents' hearing request alleges that during Student's freshman year at Hingham High School (2014-2015) when Parents had removed him from special education services, Student engaged in conduct that caused him to be punished. They claim that Student's actions, providing a copy of a final exam to peers, were the result of Hingham's failure to deal with Student's social emotional issues during his junior high years or his freshman year at the high school. Hingham correctly states that Student's claims are barred by the statute of limitations. The BSEA has consistently held that that two year statute of limitations for claims brought pursuant to the IDEA applies to Section 504 claims. See *Barnstable Public Schools and Cape Cod Regional Technical High School*, 111 LRP 42177 (June 15, 2011), *In re: Boston Public Schools*, 15 MSER 100 (March 23, 2009). The Third Circuit Court of Appeals has also held that the two year statute of limitations found within the IDEA applies to Section 504 cases, writing, "We also note that there are few federal statutes as closely related, and under which such similar claims may be brought, as the IDEA and § 504 of the Rehabilitation Act." *P.P. ex Rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 736 (3d Cir. 2009). Parents cite to no authority for their assertion that there is a three year statute of limitations for Section 504 claims involving special education, and I am unaware of any. Parents claim that Hingham failed to provide services to address Student's emotional needs during his freshman year (2014-2015). In order for Parents to raise claims with respect to Hingham's alleged failure to provide appropriate special education services, they would have had to file their request for hearing by August 2016, two years after they revoked their consent for special education. They did not file the instant action until November 17, 2017, fourteen months after the statute of limitations had run.

Finally, Hingham argues that with respect to any services provided to Student at Brewster Academy pursuant to Section 504, the statute does not require Hingham to provide any accommodations at Student's private school, nor is there any obligation to fund the placement. If, to provide FAPE, a school district places a student with a disability in a private school, then the school district is required to pay for the private school. However, if a school district makes FAPE available and the student's parents choose to place the child in a private school, the school district is not required to pay for the student's education in the private school. See 34 C.F.R. § 104.33(c)(4).[4]

[3] It should be noted that Parents initially filed a hearing request which was substantially similar to the hearing request filed in this matter, except that it referenced the IDEA and section 504 and the current hearing request references only Section 504. That hearing request was withdrawn by Parents on October 11, 2017, after Hingham filed a motion for summary judgment. (See BSEA #1708912) Parents filed their request for hearing in this matter on November 17, 2017.

[4] See also, U.S. Dep't of Education, Offices for Civil Rights, "Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools," (December 2016)

Parents' hearing request did not include any claims with respect to Hingham's initial evaluation of Student conducted pursuant to Parents' request for evaluation in November 2016, nor Hingham's subsequent determination that Student was not eligible for special education services on March 2, 2017. Therefore, I make no findings or conclusions with respect to events that occurred between November 2016 and March 2, 2017.

The undisputed facts are that Student was eligible for special education services until August 2014, when Parents withdrew him from special education. Student attended Hingham High School as a regular education during the 2014-2015 school year. At no time during that school year did Parents request that Student be evaluated for eligibility for special education services. On the last day of school of the 2014-2015 school year, Student was found to have committed a significant infraction and was punished accordingly. Parents unilaterally placed Student at an out-of-state non-special education school for the 2015-2016 school year. Parents did not request that Student be evaluated for special education eligibility during the 2015-2016 school year. On November 2, 2016, Parents requested that Hingham evaluate Student for special education eligibility. Hingham conducted an initial evaluation and the Team found that Student was not eligible for special education services. Based upon the foregoing, Hingham is entitled to summary judgment as to all of Parents' claims.

ORDER

Hingham's Motion for Summary Judgment is ALLOWED with respect to all claims raised by Parents' hearing request.

So Ordered by the Hearing Officer,

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Catherine M. Putney-Yaceshyn
Dated: March 23, 2018