

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

In re: Isaac¹

BSEA #1901975

RULING ON NEWTON PUBLIC SCHOOLS' MOTION TO DISMISS

This matter comes before the Hearing Officer on the Motion of the Newton Public Schools (Newton or “the District”) to Partially Dismiss the Hearing Request filed by Parents on behalf of Isaac against Newton. Newton filed its Motion to Dismiss, accompanied by a Memorandum of Law in support thereof, on August 30, 2018. Parents filed their Opposition on September 6, 2018, also accompanied by a Memorandum of Law. Neither party requested a hearing on the Motion, and as testimony or oral argument would not advance the Hearing Officer’s understanding of the issues involved, this Ruling is being issued without a hearing pursuant to Bureau of Special Education Appeals *Hearing Rule VII(D)*. For the reasons set forth below, Newton’s Motion to Dismiss is hereby DENIED.

I. **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

On August 20, 2018, Parents filed a *Hearing Request* against Newton Public Schools, seeking reimbursement for the cost of Isaac’s series of unilateral placements for the period from the beginning of the 2016-2017 school year through December 23, 2018. According to Parents, they had enrolled Isaac at Landmark in August 2016 to address his dyslexia,² after providing Newton with the requisite notice of their intent to do so. Two weeks later, Isaac witnessed a traumatic event, which impacted him but he was able to complete his ninth grade year at Landmark. During the summer of 2017, Isaac began to display signs of mental distress, which included depression, trouble sleeping, agitation, and difficulty focusing in school. Following hospitalization and acute mental health treatment, Isaac’s parents enrolled him in an 8-12 week residential therapeutic program in Vermont. He attended that program from September 28, 2017 to January 2, 2018, at which point Parents transferred him to the small residential therapeutic program in Costa Rica where he remains today, with an anticipated discharge date in December 2018. During this period of time, Isaac’s Team proposed an Individualized Education Program (IEP) for the period from 10/6/16 to 2/28/17 placing him in a partial inclusion program within the Newton Public Schools, which Parents rejected in full on November 14, 2016. On May 1, 2017, Isaac’s Team met, then proposed an IEP with increased inclusion support and increased reading instruction, which Parents rejected on July 6, 2017. After a Team meeting in March 2018, Newton proposed an in-district therapeutic day school. The District last evaluated Isaac in April 2014.

In its *Motion to Dismiss*, Newton focused on the time period from September 2017 to the present. According to the District, after Parents rejected the IEP proposed by Newton for the

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

²According to Newton Public Schools (“Newton” or “the District”), prior to September 2017, Isaac’s educational needs were related to his diagnoses of Attention Deficit Hyperactivity Disorder (ADHD) and dyslexia.

2017-2018 school year and placed Isaac unilaterally at Landmark for the second year, they failed to inform the District of subsequent developments, including Isaac's new diagnoses of anxiety, depression, and possibly post-traumatic stress disorder (PTSD). Newton only learned of these diagnoses and of Isaac's subsequent unilateral placements, first at the True North Wilderness Program in Vermont ("True North") in September 2017 and then on January 3, 2018 at New Summit Academy ("New Summit") in Costa Rica, on March 15, 2018 when Parents notified the District in response to its invitation for Isaac's annual review. At this time, Parents also provided the District with reports and plans from True North and New Summit for the first time. To date, no psychological or other evaluations, including documentation from Isaac's September 2017 hospitalization, have been provided to the District. Newton contends that Parents' failure to provide the requisite statutory ten (10) day notice of Isaac's unilateral placements at True North and New Summit precludes them from seeking reimbursement. Moreover Parents' failure to inform Newton of significant changes in Isaac's educational and therapeutic needs deprived the District of the opportunity to consider that information and, if appropriate, propose new or different special education programming. As such, Parents' claims for reimbursement for Isaac's attendance at True North and New Summit should be dismissed.

In their *Opposition to Newton Public Schools' Motion to Dismiss*, Parents argue that no part of their claim is subject to dismissal at this stage in the proceedings. They assert that a hearing is necessary in order to flesh out equitable considerations relevant to a determination whether to reduce or deny reimbursement for a private placement, including the need to make timely decisions when Isaac's health was at issue. Moreover, they argue that Newton was on notice of Isaac's removal from the District and therefore further notice was not required for his placements at Truth North and New Summit.

II. DISCUSSION

Whether Parents' claim survives a partial *Motion to Dismiss* turns on both the procedural standards for such a motion and the substantive standards governing their claims.

A. Standard for Ruling on Motion to Dismiss

Pursuant to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3) and Rule XVIIB 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

³*Iannochino 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).

speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . .”⁵

B. Reimbursement for Unilateral Placement

The Individuals with Disabilities Education Act (IDEA) and its implementing regulations govern placement of children by parents when a free appropriate public education (FAPE) is at issue. When parents elect to place a student in a private school notwithstanding the availability of FAPE through the school district, parents retain responsibility for the cost of that education.⁶ Parents who enroll a student in a private school without the consent of or referral by the school district may, however, obtain reimbursement if a hearing officer finds both that the school district “had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate” for the student.⁷ The regulations allow for reduction or denial of reimbursement, even in these circumstances, if parents fail to provide sufficient notice of their intent to place a student unilaterally. Specifically, parents must either inform the school district of their intent to reject a proposed placement and enroll their child in a private school at public expense at the most recent IEP meeting they attend prior to removal of the student from the public school, or provide written notice at least ten (10) days prior to the removal.⁸ A hearing officer is not permitted to reduce or deny reimbursement for failure to provide the prescribed notice if, in pertinent part, compliance with the notice requirement “would likely result in physical harm to the child,”⁹ and may elect not to reduce or deny reimbursement for such a failure if compliance “would likely result in serious emotional harm” to the child.¹⁰ As demonstrated by these considerations and recognized by the First Circuit Court of Appeals, “[r]eimbursement is an equitable remedy.”¹¹

The analysis above applies to initial removals of students from public schools when they are placed in private schools by their parents. In 2010, the United States Office of Special Education Programs (OSEP) considered whether parents were required to inform a school district of their intent to unilaterally place their child in private school each consecutive year he is enrolled. As

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

⁶See 34 CFR 300.148(a).

⁷34 CFR 300.148(c). See 20 U.S.C. 1412(a)(10)(C)(ii); see also *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 243 (2009) (explaining that § 1415(i)(2)(C)(iii) authorizes “reimbursement when a school district fails to provide a FAPE and a child’s private-school placement is appropriate”).

⁸See 34 CFR 300.148(d)(1).

⁹*Id.* at 300.148(e)(1)(iii).

¹⁰*Id.* at 300.148(e)(2)(ii).

¹¹*School Union No. 37 v. Ms. C.*, 518 F.3d 31, 35 (1st Cir. 2008). See *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59 (3rd Cir. 2010) (court considered parents’ “unreasonable” actions in denying tuition reimbursement on equitable grounds, observing that “[t]he IDEA was not intended to fund private school tuition for the children of parents who have not first given the public school a good faith opportunity to meet its obligations”); *Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 16 (1993) (noting that discretionary equitable relief requires consideration of reasonableness of cost).

explained in *Letter to Miller*, OSEP determined that the notification requirement applies only at the time of the initial removal; parents are not required to notify the school district prior to each year private enrollment continues.¹²

C. Application of Standards Does Not Permit Dismissal

As explained in (B) above, in some circumstances, even where parents are able to prove that a school district failed to make FAPE available to their child before they placed him in a private school, and that the private school they selected is appropriate for him, their claim for reimbursement may be defeated by their failure to provide timely notice. In other circumstances, however, failure by parents to provide the requisite notice prior to unilateral placement may not defeat a claim for reimbursement. To determine whether Parents in the instant matter are entitled to reimbursement for their unilateral placements of Isaac at Truth North and/or New Summit, I must determine whether separate notice was required for each of these placements. If I answer this question in the affirmative, I must also determine whether compliance with the ten-day requirement before placement at Truth North and/or New Summit would have likely resulted in physical or serious emotional harm to Isaac. Bearing in mind that “[b]ecause reimbursement is an equitable remedy, a . . . hearing officer generally has discretion to determine both the appropriateness and the amount of reimbursement of a unilateral private school placement based on the equities of a particular situation,”¹³ I conclude that I cannot make a legal determination without considering the evidence.

CONCLUSION

Upon consideration of Newton Public Schools’ *Motion to Dismiss* and the arguments of the Parties, I find that Parents’ factual allegations plausibly suggest an entitlement to relief.¹⁴

ORDER

The District’s Motion to Dismiss is hereby DENIED.

A status report is due by close of business on November 1, 2018.

The Hearing will take place January 9, 10, and 11, 2019.

By the Hearing Officer:

Amy M. Reichbach

¹² See 55 IDELR 293 (May 5, 2010).

¹³ *Id.*

¹⁴ See *Iannocchino*, 451 Mass. 636 (internal quotation and citation omitted).

Dated: October 1, 2018