

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

In re: Larry<sup>1</sup>

BSEA #1905981

**RULING ON LOWELL PUBLIC SCHOOLS' MOTION TO DISMISS AND PARENTS'  
MOTION FOR SUMMARY DECISION**

This matter comes before the Hearing Officer on two motions: Lowell Public Schools' *Motion to Dismiss Parents' Hearing Request*, filed January 29, 2019, and Parents' *Motion for Summary Decision*, filed February 1, 2019. Upon joint request, a Hearing scheduled to take place on February 26, 2019 was postponed until March 22, 2019. For the reasons set forth below, both motions are hereby DENIED.

I. BACKGROUND AND PROCEDURAL HISTORY<sup>2</sup>

On January 22, 2019, Larry's Parents filed a *Hearing Request* asserting that Lowell Public Schools (Lowell or the District) violated its legal obligations in relation to funding independent educational evaluations ("IEE")s of Larry that they had requested. Specifically, Parents contend that they requested funding, through their advocates, for independent neuropsychological and "psych-linguistic" evaluations in the fall of 2017, but Lowell neither funded these evaluations nor filed for hearing, instead declining to fund the latter and offering to fund the former under certain conditions.<sup>3</sup> Following this request, Parents, through their attorney, sent an electronic message (email) to counsel for Lowell with the subject line, "[Larry]- FBA meeting, IEE funding, etc.," on January 22, 2018. In the email, Parents' attorney wrote that Larry needed "a comprehensive assessment in both speech-language and reading" and that a particular named evaluator "is highly skilled in both areas," then asked, "Would Lowell fund this?" Similarly, Parents' attorney asserted that Larry needed a comprehensive neuropsychological assessment and stated, "I am hoping that Lowell will agree to fund a neuropsych (*sic*) by either [of two evaluators]." The email also included the following request, "Let me know if Lowell will fund either or both of these." According to Parents, when the District failed to respond to their requests, they hired independent evaluators at their own expense.

In their *Hearing Request*, Parents assert that this January 22, 2018 email constituted a request for comprehensive speech-language (inclusive of reading) and neuropsychological assessments at public expense. They seek full reimbursement from Lowell for the costs of both evaluations.

<sup>1</sup>"Larry" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

<sup>2</sup>Except where noted, the information in this section is drawn from the parties' pleadings and is subject to revision in further proceedings.

<sup>3</sup>According to Parents, they filed a hearing request with the BSEA in the fall of 2017 alleging that the District failed to provide adequate reading and language services for Larry, and one of the conditions proposed by Lowell included a waiver of some of these claims. (Mother's Affidavit in Support of Motion for Summary Decision)

Specifically, Parents request \$5,800 (\$3,200 for a neuropsychological evaluation performed by ICCD and \$2,600 for a speech-language evaluation performed by Architects for Learning) and reimbursement for the cost of attendance by both evaluators at the May 2018 Team meeting, as well as attorney's fees and costs.

On January 29, 2019, Lowell filed a *Motion to Dismiss* accompanied by a memorandum in support thereof. The District contends that Parents never requested a publicly funded IEE. Lowell views the communication cited by Parents in their *Hearing Request* as part of an ongoing attempt to reach a settlement, rather than a request that obligated the District to either agree to fund the independent evaluation or initiate a due process hearing. Consequently, Lowell asserts, the *Hearing Request* should be dismissed for failure to state a claim on which relief can be granted.

On February 1, 2019, Parents filed an *Objection to Lowell's Motion to Dismiss* and a *Motion for Summary Decision*. In their *Objection*, Parents argue that not only does the District's motion fail to support dismissal, but it also corroborates Parents' three attempts to request that Lowell fund independent neuropsychological and speech-language evaluations. As such, Lowell failed to meet its legal obligations. Parents argue such failure establishes a claim on which relief can be granted and therefore Lowell's *Motion to Dismiss* should be denied.

The basis of Parents' *Motion for Summary Decision* is that the District's pleadings and written statements actually support Parents' claims. As such, Parents assert, there is no genuine issue of material fact in dispute and they are entitled to prevail as a matter of law. Specifically, in its own pleadings the District acknowledged and admitted that:

- 1) Parents requested that Lowell fund two independent evaluation, once through their advocates in the fall of 2017, and twice through counsel in January 2018;
- 2) Lowell rejected these requests and refused to fund the evaluations; and
- 3) Lowell did not file any action with the BSEA to seek an order that it was not obligated to fund these two evaluations within five days of receiving any of the three requests it acknowledges that Parents made.

Lowell then filed a *Response to Parents' Hearing Request* on February 4, 2019 reiterating its arguments from its *Motion to Dismiss*. The District denies that it failed to comply with the laws regarding funding for independent evaluations. As such, Lowell asserts, there is no basis for an order requiring it to reimburse Parents for the evaluations they obtained at their own expense and/or attendance at the Team meeting by their evaluators.

On February 14, 2019 the District filed an *Objection to Parents' Motion for Summary Decision*. It argues that, viewed in the light most favorable to Lowell, genuine issues remain for hearing. At the center of the instant dispute is whether the communications from Parents to Lowell constitute a request for a publicly funded IEE. To make this determination, the Hearing Officer will require additional information regarding the context in which these communications were made.

A *Joint Motion to Postpone the Scheduled Hearing Date* was filed on February 19, 2019 and pursuant to that Motion, an Order was issued on February 26, 2019 postponing the hearing to March 22, 2019. On February 26, 2019, Lowell filed a motion requesting further postponement of the Hearing to April 3, 2019 on the basis of Counsel’s unavailability for a period of time between late February and mid-March. Parents have not objected to this request.

On March 8, 2019, Parents filed a *Rebuttal to Lowell Public Schools’ Objection to Motion for Summary Judgment* and a *Further Legal Brief in Support of MSJ*.

As neither party requested a hearing on the pending cross-motions, in accordance with my Order dated February 26, 2019, 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)*.

## II. DISCUSSION

As this Ruling involves both a *Motion to Dismiss* and a *Motion for Summary Decision*, I discuss each in turn.

### A. MOTION TO DISMISS

#### 1. 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 XVI(B)(4) 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.”<sup>4</sup> In evaluating a hearing request, 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.”<sup>5</sup> 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). . .”<sup>6</sup> To determine whether the *Hearing Request* in the instant matter

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<sup>4</sup>*Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

<sup>5</sup>*Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

<sup>6</sup>*Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

fails to state a claim on which relief can be granted, I must consider the substantive law governing requests for IEEs.

## 2. Substantive Standards for Independent Educational Evaluations

Parents of a child with a disability have a right to obtain an independent evaluation, which is an evaluation conducted by a qualified examiner who is not an employee of the public agency responsible for the education of the child.<sup>7</sup> Under certain circumstances, this independent evaluation may be publicly funded.<sup>8</sup> If parents disagree with an initial or re-evaluation obtained by the public agency, they may request an IEE at public expense.<sup>9</sup> Once the District receives a request for a publicly funded evaluation it **must**, within five school days, either:

- 1) Agree to pay for the independent evaluation; or
- 2) File a Hearing Request with the BSEA in order to establish that its evaluation was comprehensive and appropriate.<sup>10</sup>

The issue here is whether the communication between Parents and the District constitutes a request for an IEE at public expense sufficient to trigger the requirements of 34 CFR 300.502 and 603 CMR 28.04(5).<sup>11</sup>

## 3. Application

Parents allege that they requested publicly funded independent neuropsychological and speech-language evaluations through their advocate in the fall of 2017 and again, twice, in January 2018. Their second request included an email from their attorney to Lowell's attorney containing the following language:

“At this point, he needs a comprehensive assessment in both speech-language and reading, and Kristen Mallett is highly skilled in both areas and has been employed at two different public school districts in the past. **Would Lowell fund this?** I think they will be more than satisfied with the quality of the assessment.”

For the purposes of this *Motion to Dismiss*, I must take Parents' allegations as true, including their allegation that their communication constituted, or at the very least meant to convey, a

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<sup>7</sup> See 34 CFR 300.502.

<sup>8</sup> See 34 CFR 300.502 (b); 603 CMR 28.04(5)(c).

<sup>9</sup> See 34 CFR 300.502(b)(1); 603 CMR 28.04(5).

<sup>10</sup> See 34 CFR 300.502(b)(2); 603 CMR 28.04(5)(d).

<sup>11</sup> Pursuant to 34 CFR 300.502(a)(3)(ii), “Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with 300.103.”

request for publicly funded IEEs.<sup>12</sup> In response to the request, the District did not agree to fund the IEE, nor did Lowell request a hearing within five (5) days, which would have permitted a hearing officer to determine whether the district was obligated to fund the evaluations.<sup>13</sup> 34 CFR 300.502(b)(2) states the District **must**, without unnecessary delay, respond to a request for an IEE in one of these two ways. If the Parents requested a publicly funded IEE and the District did not respond in accordance with law, Parents may be entitled to relief in the form of reimbursement for the evaluations.<sup>14</sup> Assuming that the facts Parents allege are true, they plausibly suggest entitlement to relief.<sup>15</sup> Therefore, the District did not meet its burden to establish that Parents failed to state a claim upon which relief can be granted.<sup>16</sup>

## B. MOTION FOR SUMMARY DECISION

### 1. Standard for a Motion for Summary Decision

Pursuant to 801 CMR 1.01(7)(h), a rule of administrative practice modeled after Rule 56 of both the Massachusetts and Federal Rules of Civil Procedure,<sup>17</sup> 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.”<sup>18</sup> This means that “only disputes over facts that might affect the outcome of the [case] under the governing law would prevent summary judgment.”<sup>19</sup> 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.”<sup>20</sup>

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<sup>12</sup> See *Blank*, 420 Mass. at 407.

<sup>13</sup> See 34 CFR 300.502; 603 CMR 28.04(5).

<sup>14</sup> See 34 CFR 300.502; 603 CMR 28.04(5).

<sup>15</sup> See *Iannocchino*, 451 Mass. at 636.

<sup>16</sup> 801 CMR 1.01(7)(g)(3); Rule XVI(B)(4) of the *Hearing Rules for Special Education Appeals*.

<sup>17</sup> Federal Rule of Civil Procedure (FRCP) 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.”

<sup>18</sup> *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247-48 (1986).

<sup>19</sup> *Id.* at 248.

<sup>20</sup> See *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 Decision, the adverse party “must set forth specific facts showing that there is a genuine issue for trial.”<sup>21</sup> 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.<sup>22</sup> “If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.”<sup>23</sup>

## 2. Application of the Legal Standard

Parents argue there is no genuine issue of fact in dispute, as Lowell’s own pleadings and written statements support Parents’ claim. According to Parents, they requested public funding for an IEE on at least three occasions and the District acknowledges receipt of these three correspondences. Therefore, Parents assert, the District does not deny having received their requests and admits to not responding by agreeing to provide the IEEs at public expense or filing for hearing. As such, they are entitled on judgment as a matter of law.

The District objects to the *Motion for Summary Decision*, arguing that there is a genuine issue of material fact for hearing.<sup>24</sup> The issue is whether the email cited by both Parents and the District, in the context of communications between the parties, constituted a request for public funding for one or more IEEs. This is material because if Parents conveyed a request for an IEE to the District, Lowell had a duty to respond in one of two statutorily prescribed ways. However, if it was not a request, the District would not have such an obligation. The District argues that the email was simply part of ongoing settlement negotiations between the parties, not a request for public funding.

This *Motion* must be viewed in the light most favorable to the District, as the party opposing summary decision.<sup>25</sup> Whether Parents’ email, sent through counsel, constituted a counteroffer in a settlement negotiation, rather than a request for one or more publicly funded independent educational evaluations, cannot be determined without more information. The District has met its burden to show that there exists sufficient evidence to lead a fact finder to decide in its favor.<sup>26</sup> The dispute over this genuine fact is material.

## CONCLUSION

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<sup>21</sup> *Anderson*, 477 U.S. at 250.

<sup>22</sup> *Id.* at 249.

<sup>23</sup> *Id.* at 249-50.

<sup>24</sup> See 801 CMR 1.01(7)(h) and FRCP 56.

<sup>25</sup> See *Galloway*, 319 U.S. at 395; *Maldonado-Denis*, 23 F.3d at 581.

<sup>26</sup> See *Anderson*, 477 U.S. at 250.

Upon consideration of Parents' *Hearing Request*, the District's *Motion to Dismiss*, Parents' *Objection* thereto, and the arguments of both parties, I find that the District has not established that Parents failed to state a claim upon which relief can be granted. The District's *Motion to Dismiss* is hereby DENIED.

Upon consideration of Parents' *Motion for Summary Decision*, the District's *Objection* thereto, the arguments of both parties and the documents submitted by them, I find that Parents have failed to establish that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. Parents' *Motion for Summary Decision* is hereby DENIED.

## **ORDER**

Lowell Public Schools' *Motion to Dismiss* and Parents' *Motion for Summary Decision* are hereby denied. Lowell's unopposed *Motion* to continue the Hearing to April 3, 2019 is allowed. The matter will proceed as follows.

1. The Hearing will take place at 10:00 AM on April 3, 2019 at the BSEA, 14 Summer St., 4<sup>th</sup> Floor, Malden.
2. Witness lists and exhibits are due by close of business on March 27, 2019.

By the Hearing Officer:<sup>27</sup>

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Amy M. Reichbach  
Dated: March 11, 2019

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<sup>27</sup>The Hearing Officer gratefully acknowledges the diligent assistance of legal intern Jennifer Desmond in preparing this Ruling.