

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

In re: Mark¹

BSEA #1908079

RULING ON PARENT'S MOTION TO DISMISS

This matter comes before the Hearing Officer on Parent's *Motion to Dismiss* the *Hearing Request* filed by Whitman-Hanson Regional School District ("the District," or Whitman-Hanson) regarding Parent's son Mark. The District filed its *Hearing Request* on March 8, 2019. On March 18, 2019, Parent requested a two-day extension to file her *Response*, which was allowed, and on March 20, 2019 she filed the instant *Motion to Dismiss*. Neither party has 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, Parent's *Motion to Dismiss* is hereby DENIED.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY²

On March 8, 2019, the District filed a *Hearing Request* with the Bureau of Special Education Appeals ("BSEA") seeking an order that its most recently proposed Individualized Education Program (IEP) for Mark is reasonably calculated to provide him with a free, appropriate public education (FAPE) in the least restrictive environment. The District also sought an order stating that it is not required to fund an independent evaluation for Mark at a rate that exceeds the state-approved rate.

According to Whitman-Hanson, although Mark had previously been found ineligible for special education, the Team reconvened on April 6, 2018 and found him eligible, as he had begun to "demonstrate increased anxiety and rigidity." Shortly thereafter, Mark's private counselor provided the District with a letter stating that Mark has been diagnosed with autism. The Team proposed an IEP dated April 6, 2019 to April 8, 2019 that included goals in the following areas: academic responsibility/transition; social/emotional; and social skills. Parent partially rejected this IEP, and the Team reconvened on June 10, 2018 to review her rejections. At some point during the spring of 2018, Mark stopped attending school.

Following Team meetings in August, September, October, and November, 2018, the Team proposed a change in placement to Pilgrim Area Collaborative, which placement Parent accepted verbally at the Team meeting on November 2, 2018. Mark attended the Collaborative during January 2019, but at a Team meeting on January 28, 2019, Parent informed the Team that he would not be returning. Since that time, Mark has not attended school.

In the meantime, Parent requested that a referral packet be sent to Corwin-Russell. Although Whitman-Hanson did not believe this to be an appropriate placement, the District sent a packet. Mark was not admitted. At times, the District contends, it has arranged for tutoring for Mark, but Parent has either fired or turned away several tutors. The District also offered online courses,

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

²The information in this section is drawn from the District's *Hearing Request*, for the purposes of this Ruling, and is subject to revision in further proceedings.

which Parent rejected. At this point, the Team has held eight meetings since June of 2018, each time revising its proposed IEP in response to Parent's concerns. Parent has partially rejected each IEP. The District sought consent to send packets to three additional out-of-district schools. As Parent has not consented, Whitman-Hanson sent, or plans to send, redacted packets to these schools.

As to evaluations, the District alleges that it has funded a neuropsychological evaluation of Mark and agreed to fund independent occupational therapy (OT) and central auditory processing evaluations. Whitman-Hanson appears to be challenging a requested evaluation at the Koomar Center, though the *Hearing Request* does not specify what type of evaluation this would be.

The Hearing was scheduled for March 28, 2019, and a Conference Call was scheduled for March 21, 2019. On March 13, 2019, the District requested postponement of the Hearing due to the unavailability of District counsel and personnel.

On March 20, 2019, Parent filed a *Motion to Dismiss*, accompanied by several documents: an email to the District, dated March 12, 2019, rescinding her request for an independent OT evaluation at public expense; a neuropsychological evaluation conducted by Dr. Carol Leavell, and communications related to that evaluation; and an email exchange with District personnel concerning Parent's request that the District withdraw its hearing request. In her *Motion*, Parent asserts that because she has rescinded her request for an independent educational evaluation (IEE) at public expense, the District lacks grounds for a *Hearing Request*. Specifically, Parent argues, because the District has not alleged a violation of the Individuals with Disabilities Education Act (IDEA), and because there was no pending request for an IEE, the District had no reason to file for hearing other than to "force [her] into submission."

During the Conference Call that took place March 21, 2019, Parent assented to Whitman-Hanson's request to postpone the Hearing, and new hearing dates were selected.

DISCUSSION

The outcome of Parent's *Motion to Dismiss* is governed by the application of the legal standard by which a *Motion to Dismiss* is evaluated, as well as regulations concerning BSEA jurisdiction.

A. Legal Standards

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 standard 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 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."⁴ These "[f]actual allegations must be enough to raise a right to relief above the

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).

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

The BSEA has jurisdiction over requests for hearing filed by a “parent or school district . . . on any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state⁶ and federal law,⁷ or procedural protections of state and federal law for students with disabilities. A parent of a student with a disability may also request a hearing on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973. . . .”⁸

B. Application of Legal Standards

To survive a motion to dismiss, the District need only assert “factual allegations plausibly suggesting . . . an entitlement to relief.”⁹ In determining whether it has met this burden I must take the District’s allegations as true, as well as any inferences that may be drawn from them, even if the allegations are doubtful in fact.¹⁰ The District requests a finding that the IEP it has proposed for the period from April 6, 2018 to April 8, 2019, as amended, is reasonably calculated to provide Mark with a FAPE, and requests that the BSEA find that it is not required to fund an additional IEE. To support its request, the District alleges that it has provided “a very significant number of assessments” of Mark and that he remains out of school and without services despite its significant efforts. Specifically, Whitman-Hanson alleges that it has convened the Team at least eight times between June 2018 and February 2019 to consider Parent’s ongoing objections to its revised IEPs; proposed a number of placements to assist Mark in returning to school; and worked hard to put tutoring into place for him in the meantime.

Although Parent asserts that there is no basis for the District’s *Hearing Request*, which she characterizes as “bogus,” at this stage I must take the District’s allegations as true.¹¹ As such, I find that the District’s factual allegations do plausibly suggest an entitlement to the relief it seeks. To the extent the evidence shows that Parent has, in fact, withdrawn her request for an IEE, so much of the District’s *Hearing Request* as involves this IEE will be dismissed, unless the District withdraws that claim beforehand.

CONCLUSION

Upon consideration of Parent’s *Motion to Dismiss* the District’s *Hearing Request*, I find that Whitman-Hanson’s request for hearing is properly before me. Should this case proceed to hearing, the District will have the burden of establishing that it acted in accordance with the law and offered FAPE to Mark through its proposed IEP. To the extent the District’s claim regarding Parent’s request for an IEE remains, Whitman-Hanson will have the burden of establishing that Parent does not qualify for an IEE at public expense and/or that its evaluations of Mark were comprehensive and appropriate.

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

⁶ See M.G.L. c. 71B; 603 CMR 28.00.

⁷ See 20 U.S.C. 1401; 34 CFR 300.

⁸ See 29 U.S.C. 794 (Section 504 of Rehabilitation Act); 34 CFR 104.

⁹ See *Iannocchino*, 451 Mass. at 636 (internal citation and quotation marks omitted).

¹⁰ See *Golchin*, 460 Mass. at 223; *Blank*, 420 Mass. at 407.

¹¹ Whether the District’s *Hearing Request* was, in fact, filed simply to “force [Parent] into submission” is an issue that may be addressed at Hearing.

ORDER

Parent's *Motion to Dismiss* Whitman-Hanson Regional School District's *Hearing Request* is hereby DENIED.

The matter is continued to April 22, 2019 for a Pre-Hearing Conference, which will take place at 11:00 AM at Whitman-Hanson Regional High School, 610 Franklin St., Hanson, unless the parties agree to an alternate location. The purpose of a Pre-Hearing Conference is to clarify the issues in dispute and discuss the status of the case, including the possibility of settlement.

The Hearing will take place May 28 and 29, 2019 at the same location, starting at 10:00 AM each day.

Witness lists and exhibits are due by close of business May 20, 2019.

By the Hearing Officer:

Amy M. Reichbach

Dated: March 22, 2019