

**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; MOTION FOR A COURT
REPORTER FOR THE HEARING; AND MOTION FOR OBSERVATION OF
PROPOSED PROGRAM**

This matter comes before the Hearing Officer on several motions filed by Parent in a pending BSEA matter. Specifically on May 3, 2019 Parent filed a *Motion for an Order to Observe Proposed Program* [hereinafter “*Motion for Observation*”], accompanied by a number of documents. On May 6, 2019, she filed a *Motion for a Court Reporter for the Hearing* [hereinafter “*Motion for Court Reporter*”], and on May 9, 2019, she filed a third *Motion to Dismiss* [hereinafter “*Third Motion*”] the *Hearing Request* filed by Whitman-Hanson Regional School District (“the District,” or Whitman-Hanson). On May 13, 2019, Whitman-Hanson filed an *Opposition* to Parent’s *Third Motion* with a supporting document.

Because neither party has requested a hearing on any of the *Motions*, 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)*. Much of the factual background and procedural history of the matter is set forth in detail in my *Ruling on Parent’s Motion to Dismiss*, issued March 22, 2019; I do not repeat it here. For the reasons set forth below, Parent’s *Third Motion to Dismiss* is hereby DENIED, Parent’s *Motion for Observation* is DENIED, and Parent’s *Motion for Court Reporter* is ALLOWED in part and DENIED in part.

PROCEDURAL HISTORY

The District filed its initial *Hearing Request* on March 8, 2019, seeking an Order that its proposed Individualized Education Program (IEP) for Mark was reasonably calculated to provide him with a free, appropriate public education (FAPE) in the least restrictive environment. The District also sought an Order declaring that it is not required to fund an independent evaluation that exceeds the state-approved rate. Parent filed her first *Motion to Dismiss* [hereinafter “*First Motion*”] on March 20, 2019, asserting that because the District had not alleged a violation of the Individuals with Disabilities Education Act (IDEA) and because Parent had rescinded her request for an independent evaluation (IEE) at public expense, there was no basis for the District’s *Hearing Request*.

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

On March 22, 2019, the undersigned *Hearing Officer* issued an Order holding that Whitman-Hanson’s factual allegations plausibly suggested an entitlement to relief,² and accordingly, denied Parent’s *Motion*.³

On April 5, 2019, Parent filed her second *Motion to Dismiss* [hereinafter “*Second Motion*”] the *Hearing Request* filed by the District. In addition to the arguments she posed in her *First Motion*, Parent argued that because she accepted a new IEP on March 26, 2019, no issues remained for hearing. Parent included a copy of the new IEP for Mark, dated March 20, 2019 to March 19, 2020. On the signature page, Parent had checked the box “I accept the IEP as developed,” and on the placement page commented, “This is tentative as placement has not been determined. When will this IEP be implemented?” before signing and dating it March 26, 2019. In her *Second Motion* Parent requested that the District’s *Hearing Request* be dismissed with prejudice.

On April 8, 2019, Whitman-Hanson filed its *Objection* to Parent’s *Second Motion*, in which it acknowledged that Parent had accepted the proposed IEP, but emphasized that the acceptance was conditional, based on Parent’s comment on the placement page of the IEP. In support of its *Objection*, Whitman-Hanson included an email exchange between Parent and a school official that, the District asserts, demonstrates both that the proposed placement had not been accepted and that Parent opposed the request to send additional information regarding Mark to that placement.⁴

On April 16, 2019, the undersigned Hearing Officer issued an Order concluding, on the same basis as the previous Order, that the District’s claims plausibly suggested an entitlement to relief and consequently denied Parent’s *Second Motion*.

On May 3, 2019, Parent filed a *Motion for Observation*. On May 6, 2019 she filed a *Motion for Court Reporter*. On May 9, 2019, Parent filed her *Third Motion* seeking dismissal of the District’s *Amended Hearing Request*.⁵

²Pursuant to 20 U.S.C. § 1515(b)(6), the Bureau of Special Education Appeals (BSEA) has jurisdiction over a timely complaint filed by a parent/guardian or a school district “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” The “Scope of Rules” section of the BSEA *Hearing Rules for Special Education Appeals* also explains that the BSEA has jurisdiction over any matter concerning the provision of a FAPE. Accordingly, even in the absence of any allegations that the Individuals with Disabilities Education Act (IDEA) has been violated, Whitman-Hanson Regional School District (“Whitman-Hanson” or “the District”) may seek a declaration that it has met its obligations to provide Mark with a free, appropriate public education (FAPE) as a form of relief.

³In the Order denying Parent’s *Motion to Dismiss*, the undersigned Hearing Officer noted, “[T]o the extent the evidence shows that Parent has, in fact, withdrawn her request for an Independent Educational Evaluation (IEE), so much of the District’s *Hearing Request* as involves this IEE will be dismissed, unless the District withdraws that claim beforehand.”

⁴It appears from this email exchange, dated April 2, 2019, that Whitman-Hanson initially sent redacted records to the proposed placement.

⁵On April 24, 2019 Whitman-Hanson filed a *Motion to Amend Hearing Request* accompanied by an *Amended Hearing Request*. The District’s Amendment to its *Hearing Request* adds the most recently proposed Individualized Education Program (IEP) for Mark, dated March 20, 2019 to March 19, 2020. On May 2, 2019, the undersigned Hearing Officer issued an Order allowing the amendment under BSEA *Hearing Rule I(G)(2)*.

DISCUSSION

As several motions are currently before me, I shall address each in turn.

A. Third Motion to Dismiss

In addition to her previous arguments, Parent asserts that because she “formally accepted” the district’s proposed IEP placement and delivered her acceptance, both by hand and via email, to the Director of Special Education on May 6, 2019, “...there are no disputes currently before the BSEA in this matter...” With her *Third Motion* Parent included the signed Placement Consent Form dated May 4, 2019.

On May 10, 2019, Whitman-Hanson submitted its *Opposition* to Parent’s *Third Motion*. The District’s response references an email sent on May 7, 2019 by a school official to Parent, in which the school official acknowledges receipt of the signed placement page and asks that Parent both sign a records release⁶ and set up a visit with any school that reaches out following receipt of Mark’s referral packet. According to the District, “if the parent signs the releases to allow packets to be sent out and follows through with the interview process,” it would consider postponing the Hearing. The District argues that Mark may remain without school placement if this matter is dismissed before a placement is secured.

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 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.”⁷ 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.”⁸ 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). . . .”⁹

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

⁶The District attached to the email sent to Parent on May 7, 2019 a list of ten (10) schools that it described as Department of Elementary and Secondary Education (DESE) approved Private Day Schools that it believes will meet Mark’s needs.

⁷*Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

⁸*Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

⁹*Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

In her April 16, 2019 Order regarding Parent’s *Second Motion*, the undersigned Hearing Officer stated that any pre-trial outcome-determinative motions would be treated as motions for summary decision, governed by 801 C.M.R. 1.01(7)(h). However, Parent’s *Third Motion* will be treated as a Motion to Dismiss as it relates to the *Amended Hearing Request* filed on April 24, 2019, rather than the District’s original *Hearing Request*.

In order for the District’s *Amended Hearing Request* to survive a motion to dismiss, the District need only assert “factual allegations plausibly suggesting . . . an entitlement to relief.”¹⁰ In its *Amended Hearing Request*, the District alleges that despite efforts to secure a placement for Mark, he remains out of school. The District continues to seek relief in the form of a declaration that its proposed IEP (including placement) is reasonably calculated to provide Mark with a FAPE. Taking the District’s allegations as true, as is required for purposes of evaluating a motion to dismiss, and because the pleading has not changed with regards to those allegations, I conclude that they plausibly suggest that Whitman-Hanson is entitled to the relief it seeks.¹¹ Accordingly, Parent’s *Motion to Dismiss the Amended Hearing Request* is DENIED.

Because a motion to dismiss is evaluated solely by reference to the pleadings, if the pleading remains unchanged, the outcome of any similar such motions will be the same. Therefore, barring amendment to the current *Amended Hearing Request*, should either party wish to file any pre-trial outcome-determinative motion, it will be treated as a motion for summary decision, to be governed by 801 C.M.R. 1.01(7)(h).

B. Motion for an Order to Observe Proposed Program

On April 26, 2019, Parent filed a Motion seeking an Order that her expert, Dr. Carol Leavell, be allowed to review the District’s proposed placements for Mark. Specifically, Parent requests that Dr. Leavell be granted access to evaluate the educational component of any placement proposed by the District.¹² Parent contends that placements previously proposed by the District were not reasonably calculated to meet Mark’s academic needs. As such, she argues that Dr. Leavell’s evaluation is necessary to determine whether any proposed program will adequately serve Mark’s “unique needs.” Parent expresses concern that no referrals have been sent to any placements since March 22, 2019, and asserts that her son is “in limbo due to the omission of a placement in the last accepted IEP,” dated March 20, 2019.¹³

1. *Legal Standard for Observation by Parents and their Experts*

¹⁰ See *Iannocchino*, 451 Mass. at 636 (internal citation and quotation marks omitted).

¹¹ See *Twombly*, 550 U.S. at 557; *Chelmsford Ob/Gyn, P.C.*, 420 Mass. at 407.

¹² In her *Motion for an Order to Observe Proposed Program*, Parent also requests that a detailed consent form be provided to her before any personally identifiable information is released regarding Mark, and reiterates a number of additional concerns (including allegations of procedural violations and an assertion that the District has failed to state a claim). I do not address these issues here as they are not relevant to the evaluation of the instant *Motion for Observation*.

¹³ According to documents submitted by Whitman-Hanson, on May 7, 2019, the District sent an email to Parent with a list of ten (10) proposed placements and included a consent form requesting Parent’s permission to release Mark’s records to each program.

Pursuant to 603 CMR 28.07(1)(a)(3), parents have the right to observe any program(s) proposed for their child if the child is identified as eligible for special education. As such, “a school committee shall, upon request by parents, provide timely access to parents and parent-designated independent evaluators and educational consultants, for... any proposed program for the child, including both academic and non-academic components of any such program.”¹⁴ Under this law, there is an expectation Parent and the District will work together to plan any logistical aspects of the observation over a reasonable period of time.¹⁵

The school district may impose limitations on parent’s otherwise appropriate observation for three reasons: to ensure the safety of students in the program; to ensure the integrity of the program while under observation; and/or to protect the students in the program from disclosure of confidential and personally identifiable information.¹⁶

2. *Application of Legal Standard*

To the extent that the Parent is seeking relief in the form of permission for her designated expert to evaluate placements proposed by Whitman-Hanson, she should request said access from the District and/or the programs themselves. Unless requested access will violate any of the three limitations referenced above, it is unlikely that Parent or her expert will be denied.¹⁷ This issue is not properly before the BSEA at this time.

C. Motion for a Court Reporter for the Hearing

In the Motion she filed on May 6, 2019, Parent requests that a court reporter attend the Hearing scheduled for May 28, 2019, as well as any future Pre-Hearing Conferences.¹⁸

Previously, by letter dated April 18, 2019, Parent requested that a court reporter attend the Pre-Hearing Conference scheduled for April 22, 2019. In response, the undersigned Hearing Officer issued an Order concluding that there is no requirement that a written transcript of pre-hearing proceedings be provided to the parties due to their informal nature. Accordingly, Parent’s request was denied with respect to the Pre-Hearing Conference. In the Order the Hearing Officer added that a stenographer will be present at the formal proceedings in this matter, and a written transcript of the Hearing will be provided to both parties.

Consistent with the undersigned Hearing Officer’s Order issued on April 18, 2019, Parent’s immediate request that a court reporter attend any future Pre-Hearing Conferences in this matter is DENIED.

Pursuant to rule 10(A)(7) of the BSEA *Hearing Rules for Special Education Appeal* and IDEA Section 1415(h)(3), all Parties, including the Parent, have a right to obtain a certified

¹⁴ M.G.L. c. 71B, §3.

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ It appears, based on an email sent by a school official to Parent on May 7, 2019, that the District does not intend to restrict Parent’s ability to evaluate proposed placements.

¹⁸ On May 14, 2019, the District requested postponement of the Hearing until September to permit Parent to view (and Mark to interview with) several potential placements. During a Conference Call that took place May 20, 2019, Parent agreed to a one month postponement.

written transcription of all proceedings that take place during the formal Hearing. As such, Parent's request that a court reporter attend the Hearing, now scheduled to begin June 26, 2019, is ALLOWED.

CONCLUSION

Upon consideration of the documents submitted to me, I find that Whitman-Hanson's *Amended Hearing Request* survives Parent's *Motion to Dismiss*; that Parent's *Motion for Observation* is not properly before me at this time; and that Parent is entitled to a court report for the Hearing, but not for additional informal pre-hearing proceedings.

ORDER

Parent's *Motion for an Order to Observe Proposed Program* is DENIED.

Parent's *Motion for Court Reporter* is ALLOWED with regard to the Hearing and DENIED with regard to any future Pre-Hearing Conferences.

Parent's *Third Motion to Dismiss* Whitman-Hanson Regional School District's *Hearing Request* is hereby DENIED. Any future *Motions to Dismiss* will be construed, and evaluated, as a *Motion for Summary Decision*.

The matter is continued to June 26 and 27, 2019 for Hearing, which will take place at Whitman Town Hall, unless a mutually acceptable alternate location is identified. It will begin at 10:00 AM each day.

Witness lists and exhibits are due by close of business June 19, 2019.

By the Hearing Officer:¹⁹

Amy M. Reichbach

Dated: May 21, 2019

¹⁹The Hearing Officer gratefully acknowledges the diligent assistance of legal intern Melanie Howland in the preparation of this Ruling.