

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

In re: Cole¹

BSEA #1909931

**RULING ON MIDDLETON PUBLIC SCHOOLS' MOTION FOR SUMMARY
JUDGMENT**

This matter comes before the Hearing Officer on the *Motion for Summary Judgment* [hereinafter "*Motion*"] filed by Middleton Public School ("Middleton" or "the District") on May 14, 2019. Parent did not file a response to Middleton's *Motion* and neither party has requested a hearing. 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, the District's *Motion* is hereby ALLOWED.

BACKGROUND AND PROCEDURAL HISTORY

On April 24, 2019, Middleton filed a *Hearing Request* in response to Parent's request for an Independent Educational Evaluation (IEE) for Cole. The District asserts that because Parent refused to provide consent to the District's request to conduct a three year reevaluation of Cole, she is not entitled to the public funding she requested for an IEE. Middleton sought an Order from the Bureau of Special Education Appeals (BSEA) stating that Parent is not entitled to an IEE until she consents to the requested three year reevaluation by the District. The Hearing was scheduled for May 14, 2019.

Parent failed to participate in a scheduled conference call that took place on May 3, 2019, arguing that she had not received the District's *Hearing Request*.²

On May 3, 2019, Middleton requested a two week postponement of the Hearing in light of Parent's non-participation in the Conference Call. The undersigned Hearing Officer issued an Order the same day, granting the District's postponement request, for good cause. The Hearing was scheduled for May 28, 2019 and a Conference Call for May 9, 2019.

By email sent to BSEA Director Reece Erlichman on May 13, 2019, Parent requested postponement of the Hearing and asserted that she did not participate in the Conference Call that took place on May 9, 2019 because she was not provided with adequate prior notice. Although parent failed to file a request by fax or mail, her email was construed as a postponement request.

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

²Middleton Public Schools ("Middleton" or "the District") responded with a letter dated May 3, 2019, stating that it had sent a copy of the *Hearing Request* to Parent by mail, on the same date that the *Hearing Request* was filed with the Bureau of Special Education Appeals.

On May 14, 2019, the undersigned Hearing Officer issued an Order explaining that Parent's request for postponement was incomplete, as it did not include a new hearing date or request a postponement for a certain amount of time. The Hearing Officer included a form to be used to request a postponement and stated that the hearing would proceed as scheduled if the form was not submitted with new proposed hearing dates by May 22, 2019. The Hearing Officer also specified that, in order to be received, any future correspondence must be sent to her attention by regular mail and/or fax.

Also on May 14, 2019, Middleton filed the instant *Motion for Summary Judgment*, accompanied by a memorandum in support thereof.

On May 21, 2019, Parent submitted, by fax, the Change of Hearing Date Request Form that was provided to her on May 14, 2019. On the form, Parent proposed postponement for a period of "Unknown." The undersigned Hearing Officer issued an Order the same day, denying Parent's request to postpone the Hearing scheduled for May 28, 2019, due to non-compliance with prior instructions.³ Specifically, the Hearing Officer cited Parent's failure to specify a new Hearing date or length of time for postponement. Accordingly, the Hearing remains scheduled for May 28, 2019. The Order also stated that Parent had until close of business on May 21, 2019 to respond to Middleton's pending *Motion*, received on May 14, 2019.

DISCUSSION

On or about February 11, 2019, the District requested consent from Parent to conduct a three year reevaluation of Cole, to include academic achievement/ learning disabilities assessments; formal behavioral observations; educational assessment; observation of the student; health assessment; psychological assessment; and home assessment.⁴ Parent responded with two separate consent forms.⁵ On each form, Parent checked the box, "I reject the proposed evaluation in full," and on the first consent form, dated March 28, 2019, noted that she declined consent "due to conflict with District matters regarding fabricated, falsified statements and reports."⁶ The District asserts that due to lack of consent, it has not had the opportunity to conduct any evaluations of Cole and thus has not provided any evaluation to Parent. Accordingly, the District argues, Parent is not entitled to an IEE unless and until she provides consent for, and the District completes, an evaluation.

A. Legal Standard for a Motion for Summary Judgment

Pursuant to 801 CMR 1.01(7)(h), 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." This rule of administrative practice is modeled after Rule 56 –

³Instructions for requesting postponement of the Hearing date were provided by the Hearing Officer to the parties in Orders issued on May 3 and 14, 2019.

⁴See District Exhibit 1 filed in support of *Motion*.

⁵See *id.*

⁶See *id.* The first consent form dated March 28, 2019, does not include a signature. On the second consent form, Parent noted similar concerns before signing and dating the document April 3, 2019.

Summary Judgment – of both the Massachusetts and Federal Rules of Civil Procedure.⁷ The party seeking summary judgment begins by demonstrating, with the support of its documents (pleadings, affidavits, and other evidence), that there is no genuine issue of fact relating to the claim or defense. The moving party bears the burden of proof, and all evidence and inferences must be viewed in the light most favorable to the party opposing summary judgment.⁸

In response to a motion for summary judgment, the opposing party “must set forth specific facts showing that there is a genuine issue for trial.”⁹ An issue is genuine if it “may reasonably be resolved in favor of either party.”¹⁰ To survive this motion and proceed to hearing, the adverse party must show that there is “sufficient evidence” in her favor that the fact finder could decide for her.¹¹ In other words, the evidence presented by the nonmoving party “must have substance in the sense that it [demonstrates] differing versions of the truth which a factfinder must resolve at an ensuing trial.”¹² The non-moving party’s evidence will not suffice if it comprised merely of, “conclusory allegations, improbable inferences, and unsupported speculation.”¹³

As such, to analyze whether the party moving for summary judgment has met its initial burden such that the burden shifts to the opposing party, I must view all of the evidence it has submitted in the light most favorable to the opposing party and determine that there is no genuine issue of material fact related to the moving party’s claims. Only if the moving party is successful in this first step does the burden then shift to the opposing party.

To determine whether there is no genuine issue of fact relating to Middleton’s claim that Parent is not entitled to an IEE as a matter of law, I must consider the substantive law governing requests for IEE’s.

B. Substantive Standards for Independent Educational Evaluations

Parents of a child with a disability have a right to obtain an independent educational 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.¹⁴ Under certain circumstances, this independent evaluation may be publicly funded.¹⁵ If parents disagree with an initial or re-evaluation obtained by the public agency, they may request an IEE at public expense.¹⁶ Once a school district receives a request for a publicly funded evaluation it must, within five school

⁷Federal Rule of Civil Procedure 56 authorizes the entry of summary judgment whenever it appears “from the pleadings, depositions, answers to interrogatories, and responses to requests for admission on file, together with the affidavits, if any... that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”

⁸*Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252 (1986).

⁹*Id.* at 250.

¹⁰*Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 581 (1st Cir. 1994).

¹¹*Id.* at 249.

¹²*Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989).

¹³*Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990).

¹⁴See 34 CFR 300.502(a); 603 CMR 28.04(5)(a)

¹⁵See 34 CFR 300.502 (b); 603 CMR 28.04(5)(c).

¹⁶See 34 CFR 300.502(b)(1); 603 CMR 28.04(5).

days, either agree to pay for the independent evaluation or file a Hearing Request with the BSEA in order to establish that its evaluation was comprehensive and appropriate.¹⁷

A parent is only entitled to one IEE at public expense each time the public agency conducts an evaluation with which the parent disagrees.¹⁸ As Hearing Officer Rosa Figueroa stated, in *In Re Abington Public Schools*, the “language in the aforementioned regulation is unequivocal that the right to an independent evaluation does not arise until after the district has conducted its own evaluation and only if the parent disagrees with the results of the district’s evaluation.”¹⁹

C. Application of Legal Standard

In the instant matter, the uncontested evidence, even viewed in the light most favorable to Parent, demonstrates that Parent refused consent for Middleton’s three-year reevaluation before requesting a publicly funded IEE.²⁰ As the BSEA has recognized, “[c]ourts have made it clear that as a general rule, a Parent may not preclude a school district from evaluating their son or daughter, nor may a parent force a school district to rely upon a parent’s own evaluation. Rather, if a parent desires special education services, he or she may be required to allow the school district to conduct its own assessment for the purpose of the school district determining the extent of the student’s special education needs and how those needs should be addressed.”²¹

CONCLUSION

Upon consideration of the District’s *Motion for Summary Judgment* and documents submitted by the District, I find that the Middleton has succeeded in establishing that there is no genuine issue of material fact relating to its claims and that it is entitled to judgment as a matter of law. Parent is not entitled to an IEE until such time as she consents to, and Middleton conducts, its own evaluation(s) of Cole.

ORDER

Middleton Public School’s unopposed *Motion for Summary Judgment* is hereby allowed. The Hearing will not take place on May 28, 2019 and no further action is required.

By the Hearing Officer:²²

Amy M. Reichbach

¹⁷ See 34 CFR 300.502(b)(2); 603 CMR 28.04(5)(d).

¹⁸ See 34 CFR 300.502(b)(5).

¹⁹ BSEA No. 04-3493 (Figueroa 2004).

²⁰ See *Anderson*, 477 U.S. at 252.

²¹ *In re: Bridgewater Raynham Schools*, BSEA No. 11-6444 (Figueroa, 2011); see *In re: Abington Public Schools* (denying parent’s request for reimbursement for independent educational evaluation where parent had declined to consent to school district’s evaluation).

²² The Hearing Officer gratefully acknowledges the diligent assistance of legal intern Melanie Howland in the preparation of this Ruling.

Dated: May 24, 2019