

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

In Re: Neighborhood House Charter School

BSEA #1909934

RULING ON NEIGHBORHOOD HOUSE CHARTER SCHOOL'S MOTION TO DISMISS

In the instant case, the Neighborhood House Charter School (NHCS or School) proposed IEPs for Student for the periods of November 2017-November 2018 and June 2018-June 2019 calling for, respectively, partial- and full-inclusion placements at NHCS. During August 2018, Parent rejected both IEPs and placements, unilaterally placed Student at Learning Prep School (LPS or Learning Prep), and requested both reimbursement and prospective funding for this placement from NHCS. NHCS denied Parent's funding request.

On April 24, 2019, Parent filed a request for hearing with the Bureau of Special Education Appeals (BSEA) seeking the following relief: (1) a determination that the NHCS' proposed IEP and placement for June 2018-2019 was not calculated to provide Student with a free, appropriate public education (FAPE); (2) an order directing NHCS to reimburse Parent for her expenditures for Student's Learning Prep placement for the 2018-2019 school year; (3) a determination that NHCS failed to convene Student's Team meeting within ten days after receipt of the report of an independent evaluation in violation of 603 CMR 28.04(5)(f); and, (4) an order for prospective funding for Student's placement at LPS or a similar out-of-district school, for the 2019-2020 school year.¹ On May 3, 2019,² NHCS filed a *Motion to Dismiss* ("Motion") claims numbered (2), (3), and (4).³ On May 10, 2019, Parent filed an *Opposition* to the School's *Motion*. For the reasons discussed in this *Ruling*, NHCS' *Motion to Dismiss* is **DENIED**.

I. Standard for Ruling on A Motion to Dismiss

According to the BSEA *Hearing Rules for Special Education Appeals*, Rule XVI.B.4., a hearing officer may dismiss all or part of a hearing request for "failure to

¹ Parent also requested an order for attorney's fees and "such other or further relief as may be just," but the parties have not addressed these claims in connection with this *Motion to Dismiss*.

² On May 1, 2019, NHCS filed a *Motion to Join the Boston Public Schools* as a party in this matter. This *Motion* was denied in a Ruling dated June 14, 2019.

³ NHCS has not sought dismissal of claim No. 1, which challenges the appropriateness of the IEP for June 2018-June 2019.

state a claim upon which relief may be granted.” *Id.*⁴ In determining whether to dismiss a claim, a hearing officer must consider as true all facts alleged by the party opposing dismissal. The hearing officer should not dismiss the case if the alleged facts, if proven, would entitle the non-moving party to relief that the BSEA has authority to grant. *Caleron-Ortiz v. LaBoy-Alvarado*, 300 F.3d 60 (1st Cir. 2002); *Ocasio-Hernandez v. Fortunato-Burset*, 640 F.3d. 1 (1st Cir. 2011). A motion to dismiss will be denied if “accepting as true well-pleaded factual averments and indulging all reasonable inferences in the plaintiff’s favor...recovery can be justified under any applicable legal theory.” See *Caleron-Ortiz, supra*. See also *San Juan Cable LLC v. Puerto Rico Telephone*, 612 F.3d 25 (1st Cir. 2010). The factual allegations must be sufficient to “raise a right to relief above a speculative level on the assumption that the allegations in the complaint are true (even if doubtful in fact.)” *Bell Atlantic v. Twombly*, 550 U.S. 554, 555 (2007).

The case may be dismissed only if the Hearing Officer cannot grant any relief under federal⁵ or state⁶ special education statutes, or Section 504 of the Rehabilitation Act.⁷ See *Calderon-Ortiz, supra*; *Whitinsville Plaza Inc. v. Kotseas*, 378 Mass. 85, 89 (1979); *Nader v. Citron*, 372 Mass. 96, 98 (1977); *Norfolk County Agricultural School*, 45 IDELR, 26 (2005). Conversely, if the allegations of the party opposing dismissal “contain sufficient factual matter...to ‘state a claim to relief that is plausible on its face,’” under any one or more of these statutory provisions, the matter should not be dismissed. See *Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2011), quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

II. Factual Background

For purposes of this *Ruling* the following assertions set forth in Parent’s hearing request are considered to be true and construed in favor of Parent as the party opposing dismissal, as required by the above-cited decisions:

1. Student is an 11-year-old child who is a resident of Boston. Student is eligible for special education services on the basis of several disabilities, including a language-based learning disability (dyslexia), a specific learning disability in mathematics, mixed receptive and expressive language disorder, anxiety disorder, and executive functioning disorder.

⁴ See also *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3). These provisions are analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure which states: “...a party may state the following defenses by motion...failure to state a claim upon which relief may be granted...” The BSEA is guided by this rule and cases decided thereunder in evaluating motions to dismiss.

⁵ Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et. seq*

⁶ M.G.L. 71B

⁷ 29 U.S.C. § 794

2. Student first enrolled in NHCS during the 2012-2013 school year, when she entered Kindergarten, and attended NHCS continuously until approximately August 2018, when she began attending LPS pursuant to a unilateral placement by Parent.
3. NHCS found Student eligible for special education services and provided her with an Individualized Education Plan (IEP) on the basis of a communication disorder during the 2015-2016 school year, when she was in second grade. Her IEP called for a full-inclusion placement. Student continued to receive full- inclusion services, with increasing pullouts for speech/language and reading services, through third grade.
4. Beginning in approximately January 2016, Student underwent several evaluations and classroom observations conducted by outside providers, all of whom expressed concerns about whether the services provided by NHCS were sufficient to meet Student's needs, and some of whom recommended a substantially-separate language-based setting for Student.
5. On August 30, 2017, NHCS proposed an IEP with a partial-inclusion placement for Student's fourth grade year (2017-2018). Parent partially rejected this IEP for omission of decoding objectives.
6. In November 2017, NHCS conducted a three-year evaluation of Student, and proposed a new IEP covering the period from November 29, 2017 to November 28, 2018. This IEP made certain changes to Student's services and returned her from a partial-inclusion to a full-inclusion placement. Parent accepted additional counseling services that were proposed, but rejected changes in other services. At that point, Parent requested that NHCS support Student's placement in a substantially-separate language-based program.
7. In April and May of 2018, Student underwent a private educational evaluation and classroom observation. The evaluator concluded that Student's progress in her program at NHCS was "extremely slow," and recommended Student's placement in a language-based program for all academic instruction, with

peers with similar learning needs and levels. The record does not indicate whether or when this evaluation was made available to, or considered by, the NHCS Team.

8. In June 2018, the Student's Team met to discuss the rejected portions of the IEP covering November 2017 to November 2018. A representative from Boston attended the meeting. At the meeting, NHCS continued to maintain that it could meet Student's needs. As stated above, the parties' submissions do not disclose whether the Team considered the private evaluation referred to above.
9. In a letter dated August 10, 2018, Parent stated that she "revoke[d] any acceptance of [Student's] most recent IEP,"⁸ and that Student "will not be attending [NHCS] for the 2018-2019 school year. Instead, [Student] will be attending Learning Prep School in Newton, Mass." Parent's letter further stated: "I request that [NHCS] and/or Boston Public Schools support [Student's] placement at Learning Prep through an appropriate IEP, as well as funding tuition and providing transportation for the 2018-2019 school year..."
10. On or about August 17, 2018, two months after the Team meeting of June 2018 and approximately one week after Parent's letter notifying NHCS of her intent to unilaterally place Student at Learning Prep., NHCS issued an IEP covering the period June 2018 – June 2019 which proposed a full-inclusion placement within NHCS for the 2018-2019 school year.
11. On August 29, 2018, NHCS convened a Team meeting to discuss Parent's notice of unilateral placement. At this meeting, NHCS informed Parent that it would not fund an out-of-district placement because Student was not enrolled in NHCS, and suggested that Parent enroll Student in BPS, which had been invited to the meeting, since BPS was Student's district of residence.

⁸As of the date of this letter, NHCS had not yet issued an IEP or amendment pursuant to the Team meeting of June 2018; therefore, by this letter, Parent was now fully rejecting the IEP of November 2017-November 2018, that she previously had accepted in part.

12. On the same date as the Team meeting, August 29, 2019, Parent rejected the IEP issued by NHCS on August 17, 2019. Parent gave notice of such rejection to both NHCS and BPS.
13. Neither NHCS nor BPS has proposed an IEP or amendment since the NHCS IEP covering June 2018 – June 2019. To date, Parent has not enrolled Student in BPS.
14. In December 2018, Student underwent a private neuropsychological evaluation with Jeffrey Drayer, Ph.D., who, like prior evaluators, recommended placement in a substantially-separate language-based program across all academic subject areas.
15. Parent delivered a copy of Dr. Drayer’s report to NHCS on February 25, 2019, but NHCS has not convened Student’s IEP Team to consider the report, contending that it has no obligation to do so because Student is no longer enrolled in NHCS.
16. Meanwhile, Student continued her placement at Learning Prep for the 2018-2019 school year.

III. Issue Presented

At issue is whether Parent has failed to state a claim for which relief may be granted on the basis that all of NHCS’ obligations for Student’s educational programming in August 2018, when Parent unilaterally placed her at Learning Prep.

IV. Positions of the Parties

The underlying premise of NHCS’ *Motion to Dismiss* is that its responsibility for Student terminated either upon Parent’s notification of her intent to place Student at LPS or upon her actual placement. NHCS argues that according to the statutory and regulatory provisions governing special education obligations of charter schools, as interpreted by prior BSEA decisions, NHCS has no responsibility for funding Student’s private special education placement, either retroactively or prospectively, because Student “unenrolled” from NHCS when Parent unilaterally placed her at Learning Prep. Additionally, according to NHCS, it had no obligation to convene a Team meeting to consider Dr. Drayer’s outside evaluation of December 2018 because at that time the evaluation was completed and submitted to NHCS, Student was no longer enrolled there.

NHCS further contends that all responsibility for Student's special education programming shifted to Boston upon her placement at LPS. In support of this position, NHCS relies on MGL c. 71, §89(s) and 603 CMR 28.10(6)(a)(3), which provide that fiscal responsibility for any charter school student who is currently enrolled in, or is determined to require, a private special education placement lies with the student's district of residence. Therefore, NHCS argues, Parent's requests for reimbursement (Claim No. 2); an order regarding the post-evaluation Team meeting (Claim No. 3), and for prospective funding of Student's placement (Claim No. 4), must be dismissed.

Parent counters, first, that Student's enrollment in NHCS did not terminate with her unilateral placement at LPS. Such enrollment, and corresponding NHCS responsibility, is not contingent on Student's physical attendance at NHCS; otherwise, "there would be no situation in which a parent could unilaterally place a child in private school and seek funding from the LEA."⁹ Thus, according to Parent, NHCS continues to be responsible for providing Student with FAPE "absent a determination by NHCS that she requires an outside placement, at which point programmatic and financial responsibility 'return to the school district where the student resides'" pursuant to 603 CMR 28.10(6)(a)(3), and such a determination was never made by NHCS in this case. Rather, NHCS has consistently maintained that it could meet Student's needs, and has never determined—or even suggested—that Student needed an out-of-district placement. Finally, Parent cites to several prior BSEA decisions for the proposition that "to the extent NHCS argues that it can never be financially responsible for the cost of an outside placement for one of its students, this argument fails."

V. Discussion

It is axiomatic that a non-charter public school district is not automatically relieved of its responsibility of an eligible student because a parent avails him or herself of "self-help" in the form of a unilateral private school placement when faced with a possibly inappropriate IEP. Depending on the circumstances, the parent may be entitled to a range of relief, including reimbursement from the district for the costs of that placement, compensatory services, or a new or modified IEP. *Florence County School District Four v. Carter*, 501 U.S. 7 (1993); *School Committee of Burlington v. Dept. of Educ.*, 471 U.S. 359, 369 (1985) The same principle applies to charter schools, as discussed below.

The Massachusetts statute governing charter schools, MGL c. 71, §89, describes the responsibility of such schools to special education students as follows:

Charter schools shall comply with the [sic] chapters 71A and 71B; provided, however, that the fiscal responsibility of a special needs student currently enrolled in or determined to require a private day or residential school shall remain with the school district where the

⁹Here, Parent appears to refer to the right of parents of children enrolled in non-charter public schools to seek reimbursement from their LEAs consistent with *Florence County School District Four v. Carter*, 501 U.S. 7, (1993) and *School Comm. of Burlington v. Dept. of Education*, 471 U.S. 359, 369 (1985).

student resides. If a charter school expects that a special needs student currently enrolled in the charter school may be in need of the services of a private day or residential school, it shall convene an individual education plan team meeting for the student. Notice of the team meeting shall be provided to the...school district in which the child resides...Personnel from the school district in which the child resides shall be allowed to participate in the team meeting concerning future placement of the child. MGL c. 71, §89(s)

The above-quoted regarding enrollment in private school cannot be read to include or contemplate situations where the student's "then-current" enrollment in a private school is occasioned by a self-help action by a parent. Contrary to the argument of NHCS, Parent's unilateral placement of Student at Learning Prep, which was made in response to an IEP that Parent had deemed inappropriate and had rejected, did not absolve NHCS of its responsibility for Student's special education placement under MGL c. 71 §89(s) and c. 71B. Such responsibility included, but is not limited to, the duty to convene a Team meeting to consider the report of an outside evaluation provided by a parent, and to issue a new or amended IEP if the Team deems it appropriate. 603 CMR 28.04(5)(f). Thus, Parent's unilateral placement of Student at NHCS did not absolve the Charter School of responsibility to convene a Team meeting to consider Dr. Drayer's report. Parent's claim for relief based on NHCS' alleged failure to do so should not be dismissed.

Moreover, the mere fact that Parent unilaterally placed Student in an out-of-district program does not result in an automatic shift of responsibility to Boston as Student's district of residence. Pursuant to MGL c. 71, §89(s) and 603 CMR 28.10(6) (a), such shift is triggered by a determination *by the charter school Team* that a student may need an out-of-district placement to implement his or her IEP. See *Amherst Public Schools, et al.*, 18 MSER 336 (Scannell, 2012) As stated in the applicable regulation, 603 CMR 28.10(6)(a), upon a determination by the Team that a student may need an out-of-district placement, the Team is required to terminate the meeting without designating a placement type, and then convene a separate placement meeting to which the school district of residence is invited. Responsibility for the student's placement only shifts to the district of residence after the placement Team determines that the student needs an out-of-district placement, proposes an IEP designating such placement, and the parent accepts the IEP and placement.¹⁰ 603 CMR 28.10(6)(a)(1)-(3).

Here, in contrast to the situation described in the above-referenced statute and regulations, the charter school TEAM never determined or suggested that Student needed, or may have needed, an out-of-district placement. Rather, NHCS has consistently asserted that it can provide Student with a FAPE within the context of a full-inclusion or partial-inclusion placement. The above-cited statutory and regulatory provisions neither apply to nor contemplate the scenario presented in the instant case.

¹⁰Obviously, were the district of residence to offer, and Parent to accept, an in-district placement, Student would return to the district of residence. 603 CMR 28.10(6)(a)(2)

In light of the foregoing, Parent's allegations, if proven, could plausibly give rise to a range of potential remedies, and it would be premature, without full development of an evidentiary record at a hearing, to foreclose any of the relief requested by Parent by dismissal of part or all of the hearing request.

ORDER

The District's *Motion to Dismiss* Parent's claims Nos. 2, 3, and 4 is DENIED.

By the Hearing Officer,

Dated: July 19, 2019

Sara Berman