

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

IN RE: OZAL¹

&

BSEA #19-11391

BILLERICA PUBLIC SCHOOLS

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the BSEA initially on Billerica's May 30, 2019 Request for Hearing seeking relief from the Parents' Request for Public Funding for an Independent Educational Evaluation (hereinafter "IEE"). Subsequently, on June 11, 2019, the School filed a Motion for Summary Judgment asserting that no facts were in dispute and that it was entitled to a judgment in its favor as a matter of law. The Parent filed a Cross-Motion for Summary Judgment and/or a Motion to Dismiss. Various replies and oppositions ensued. The Hearing on the merits of the Parties' dispute is set to begin on July 16, 2019.

LEGAL FRAMEWORK

A. Summary Judgment

In a Massachusetts administrative Hearing concerning a dispute under the IDEA and/or M.G. L.c71B, consideration of a Motion for Summary Judgment is governed by 801 CMF 1.01 (7) (h). This regulation essentially parallels the Massachusetts Rules of Civil Procedure (MCRP) and the Federal Rules of Civil Procedure (FRCP). MCRP and FRCP Rule 56 provide that summary judgment may be granted only if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show both that there are no genuine issues as to any material fact relating to all or part of a claim or defense, and that the moving party is entitled to judgment as a matter of law. The party seeking summary judgment bears the burden of proving that there are no genuine issues of material fact on every relevant issue. *Patterson v. Time, Inc.* 404 Mass. 14, 17 (1989). Further, on a Motion for Summary Judgment, all evidence and/or inferences are to be viewed in a light most favorable to the party opposing summary judgment. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 232, 252 (1986). See also: *Bridgewater-Raynham*, 12 MSER 4 (2006); *Newton*, 24 MSER 161 (2018)

¹"Ozal" is a pseudonym assigned by the Hearing Officer to protect the privacy of the Student in documents available to the public. "Ms. O," is a derivative of that pseudonym.

B. Dismissal

A Motion to Dismiss may be granted if the party requesting the hearing fails to state a claim for which relief is available through the BSEA. 801 CMR 1.01 (7) (g); BSEA Hearing rules XVII (4). See also FRCP Rule 12 (b) (6) and MRCP Rule 12 (b) (6). Dismissal on pleadings is disfavored. In considering whether dismissal is warranted a Hearing Officer must accept all factual allegations set forth in the petitioner's hearing request as true. Similarly, the Hearing Officer must resolve all factual inferences and/or inconsistencies, as well as the veracity or provability of a factual claim, in favor of the non-moving party. If those facts, proved at hearing, would entitle the non-moving party to any form of relief from the BSEA, then dismissal for failure to state a claim is not appropriate. *Ashcroft v. Iqbal* 556 U.S. 662 (2009); *Ocasio-Hernandez v. Fortunato-Burset*, 640 F.3d. 1 (1st Cir. 2011); *Doe v. Attleboro*, 2011 U.S. Dist. LEXIS 98235 (Mass. 2011) (not in official reporter).

FACTUAL BACKGROUND

At this stage in the proceedings the facts available to the Hearing Officer are few and not well developed. The following "facts" are taken from the Parties' submissions and presented in the light most favorable to the Party resisting dismissal on each issue.

1. Ozal is a resident of Billerica entitled to receive special education services.
2. A Team meeting was held on May 15, 2019. On May 17, 2019, as a result of that discussion, Billerica requested the Parent's consent to conduct a transition assessment. The parent has not, to date, provided the necessary consent to move forward with that assessment.
3. On May 21, 2019, the Parent through her attorney, requested a publicly funded IEE. She wrote: "[Ms. O] rejects the District's most recent transition assessment to the extent the District has ever completed one."
4. On May 30, 2019 the School requested a BSEA Hearing to determine its responsibility to authorize an IEE pursuant to 603 CMR 28.04 (5).
5. There is no information in the record concerning formal or informal transition assessments, evaluations, observations, data collection, planning meetings, interviews, vocational or prevocational instruction or placements conducted by Billerica for Ozal.

PARTIES' POSITIONS

The School argues that a necessary predicate for a publicly funded IEE is a corresponding and preceding evaluation conducted by the School. Since Ms. O. has not consented to the

transition assessment offered by the School, and since the School may not conduct that assessment until consent is obtained, Ms. O's request for an IEE is premature. Parents are not entitled to an IEE until the School has conducted its own evaluation. *Shrewsbury*, 21 MSER 247 (2015)

The Parent does not directly address the School argument, contending instead that she is requesting an IEE because the School has failed, to this point, to conduct a proper transition assessment. She claims she is entitled to an IEE because the School did not evaluate an area of suspected disability. She also points out that the IDEA does not permit a district to impose an arbitrary time limit within which a Parent may assert a right to an IEE. *Shrewsbury, supra*.

FINDINGS AND CONCLUSIONS

The Parties appear to be miscommunicating. As a result, their submissions to the BSEA are clear as mud – the perfect set-up for a highly contested, fact intensive hearing. Thus, the amount of time and effort spent to contest this matter in advance of a timely scheduled Hearing is dispiriting indeed.

After careful consideration of the very few pertinent undisputed facts available to the BSEA, as well as the muddle of disputed and/or missing facts, along with the applicable legal principles I find that both parties are partially right and partially wrong. To the extent that the Parent is basing her request for an IEE on the School's May 17, 2019 offer to conduct a transition assessment without having either consented to, or receiving the results of, that assessment, the Parent's IEE request is improper. 603 CMR 28.4 (5); 34 CFR 300.502. Therefore, the School's Motion for Summary Judgment on that discrete issue is well placed.

Nevertheless, the Parent asserts an alternative interpretation of her May 21, 2019 letter rejecting the School's offer to conduct a transition assessment: a claim of continuing failure to assess an area of suspected disability which cannot now be cured by an evaluation proposed to extend six months into the future. This assertion provides firmer ground for an IEE request, if the predicate facts are proved at Hearing. As those necessary facts are not agreed upon, or even fully fleshed out, in the Parties' submissions, her Motion for Summary Judgment must fail.

Similarly, the Parent's Motion to Dismiss the School's Hearing Request is inapt. The School, the non-moving party, has raised facts and pointed to precedent that could fairly defeat the Parent's claim if proved at Hearing. The school may show that the IEPs it developed for Ozal and the information it has gathered about his educational participation amounted to the type and extent of formal and/or informal transition assessment required by Massachusetts and the IDEA. It is entitled to the opportunity to show that such efforts, if made, resulted in information pertinent to Ozal's transition needs that is comprehensive and appropriate.

ORDER

The School's Motion for Summary Judgment, limited to the discrete issue of whether the Parent may obtain an IEE at public expense after failing to consent to a school proffer of an

evaluation in the area for which the IEE is sought, is GRANTED. The School may proceed to challenge the Parent's IEE request on the alternate basis of failure to conduct a comprehensive and appropriate evaluation in an area of suspected need.

The Parent's Motion for Summary Judgment is DENIED due to the existence of disputed and/or inadequate material facts.

The Parent's Motion to Dismiss is DENIED as disputed and potential material facts have been raised by the parties and should be proved at Hearing.

By the Hearing Officer

Lindsay Byrne
Dated: July 8, 2019