

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

**In re:** Easthampton Public Schools v.  
Student

**BSEA# 1911816**

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

On June 7, 2019, Easthampton Public Schools (Easthampton) filed a request for Hearing in the above-referenced matter. Thereafter, on June 26, 2019, Easthampton filed the instant *Motion for Summary Judgment (Motion)* and three exhibits in support of its *Motion*.

Easthampton's position is that Parents are not entitled to public funding for the requested IEE because: 1) Parents' IEE request was untimely since the evaluation on which Parents based their request had occurred over two years prior; and 2) Parents had refused consent to Easthampton's May 2019 request to conduct its three year reevaluation of Student, which Easthampton argued was a pre-requisite for entitlement to a publicly funded Independent Evaluation.

Consistent with this position, in its *Motion* Easthampton argued that it had a right to conduct its evaluation first, and that Parents' request was late and barred by the two-year statute of limitations applicable to IDEA cases.

During a telephone conference held on July 16, 2019, Parents' advocate informed the BSEA that Parents had no intention of filing a response to Easthampton's *Motion* and that they would proceed with a private evaluation of Student. The advocate explained that Parents had only requested funding for an education evaluation (which their insurance did not cover) and had been terribly disappointed when the district denied their request and responded by filing the instant Hearing Request. The advocate further noted that Parents intended on accepting the evaluations proposed by Easthampton. As of the date of the conference call Parents had not yet done so.

On July 19, 2019, Parents' advocate wrote to the BSEA stating that Parents would not respond to the *Motion* and noting that Parents were delivering the signed consent for re-evaluation requested by Easthampton.

I note that Parents did not file a response to Easthampton's Hearing Request, and neither party requested a Hearing on the *Motion*.<sup>1</sup>

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<sup>1</sup> I note that a Hearing on the *Motion* would not have advanced the Hearing Officer's understanding of the issues. See *Rule VII(D) of the Hearing Rules for Special Education Appeals*.

In consideration of the pleadings and argument proffered by the Easthampton, Parents' position as conveyed by her advocate, and the applicable laws and regulations, the District's *Motion* is hereby **DENIED** as set forth below.

**Undisputed Facts:**

1. Student is a ten-year-old child with disabilities, who recently completed the fourth grade at Maple Elementary School in Easthampton, Massachusetts.
2. Student's most recent school-based academic evaluation was conducted by Morgan L. Jones, M.ED., Teacher of Moderate Special Needs, on September 27 and 28, 2016, nearly three years ago. This evaluation consisted of the Kaufman Test of Educational Achievement, Third Edition (KTEA-3) and a review of Student's records including classroom based assessments and previous evaluations. Thereafter, Student's Team discussed the results of said evaluation at a meeting held on or about October 13, 2016.
3. On May 16, 2019, Easthampton proposed conducting speech and language, academic achievement/educational, and psychological assessments as part of Student's three year reevaluation. Easthampton's request for consent to proceed with the school-based evaluations was a few months ahead of schedule.
4. On May 30, 2019, Parents wrote to Sarah Mochak, Special Education Director in Easthampton, requesting an Independent Educational Evaluation (IEE) in response to Student's 2016 evaluation.
5. Easthampton received Parents' request for the IEE on May 31, 2019.
6. To date, Parents have not granted consent for Easthampton's proposed three year re-evaluations<sup>2</sup>.
7. On June 7, 2019, Easthampton filed a *Hearing Request* in response to Parents' request for an IEE for Student, and on June 26, 2019 the instant *Motion*. Parents did not respond to either the Hearing Request or the *Motion*.

***Legal Standard for a Motion for Summary Judgment:***

Pursuant to 801 CMR 1.01(7)(h), "summary decisions 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."<sup>3</sup> A party may obtain summary judgment if it can show that the opposing side has no reasonable expectation of proving the essential elements of the case. The moving party bears the burden of proof, and all evidence presented and inferences made must be viewed in the light most favorable to the party opposing summary judgment.<sup>4</sup>

Once the party seeking summary judgment has met its initial burden, the opposing party then "must set forth specific facts showing that there is a genuine issue for trial" in order to

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<sup>2</sup> According to Easthampton, the refusal was based on Parents' belief that proceeding with the school evaluation would impede Parents' ability to receive funding for the independent evaluation evaluation requested.

<sup>3</sup> See also Rule 56(c) of the Federal Rules of Civil Procedure.

<sup>4</sup> *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252 (1986).

survive the motion.<sup>5</sup> A “genuine issue” is an issue which could be resolved in favor of either party. In this context, the evidence presented must be both substantial and substantive; that is, sufficient evidence is that which goes beyond mere speculation or conclusory allegations. Rather, the evidence presented “must have substance in the sense that it [feasibly depicts] differing versions of the truth which a fact finder must resolve at an ensuing trial.”<sup>6</sup>

Thus, summary judgment is appropriate in IDEA proceedings only when the party seeking summary judgment can show, with the support of documents, affidavits, and other evidence, that the parties agree on all operative facts and thus there is no genuine issue of fact relating to the claim or defense.<sup>7</sup>

To determine whether there is a genuine issue of fact arising out of Easthampton’s claim that Parent is not entitled to public IEE funding as a matter of law, I must also consider the law surrounding IEE requests.

### ***Legal Standards for Independent Educational Evaluations:***

In Massachusetts, 603 CMR 28.04 governs procedure regarding referrals for evaluations and evaluations, including IEEs, for students with, or suspected of presenting with, special education needs. This regulation states that within five school days of the date of receipt of a referral for an evaluation, the school district must forward to the parent notice seeking parental consent for the proposed evaluations. Consistent with M.G.L. c.71 B§3 and the IDEA<sup>8</sup>, notice must be provided and parental consent must be obtained before the evaluation can occur.

Once the school receives consent to conduct the evaluation, the school district must complete the evaluation within thirty days. The evaluation is conducted by (or may be arranged to be conducted) by a multidisciplinary team using assessments adapted to the age of the student. All testing shall meet the evaluation requirements set out in state and federal law.”<sup>9</sup>

Once the evaluation is completed, an evaluation report must be prepared, which report must be forwarded to the parent no later than two days before the Team convenes for the purpose of discussing the results of the evaluations. 603 C.M.R. 28.04(2)(c). Upon receipt of the school district’s evaluation reports, if a parent disagrees with the evaluation, the parent has the right to request an independent evaluation at public expense.<sup>10</sup> As noted 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

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<sup>5</sup> *Id.* At 250.

<sup>6</sup> *In Re: Student v. Bridgewater-Raynham Regional School District*, BSEA #1303762 (Figueroa, 2013).

<sup>7</sup> *In Re: Bridgewater-Raynham Regional School District, Ruling on Parents’ Motion for Summary Judgment*, BSEA #1303762, 19 MSER 17 (Figueroa, 1/18/2013); *Anderson*, 477 U.S. 242 at 252.

<sup>8</sup> 603 C.M.R. 28.04(1) et seq.

<sup>9</sup> 603 C.M.R. 28.04(1)(b).

<sup>10</sup> 603 C.M.R. 28.04(5).

own evaluation and only if the parent disagrees with the results of the district's evaluation."<sup>11</sup> [Emphasis supplied].

Moreover, consistent with the IDEA, school districts are charged with the responsibility to assess eligible students' progress no less than once per year and, with parental consent, to re-evaluate eligible students every three years, or sooner if deemed necessary. 603 C.M.R. 28.04(3). Only after the district conducts its initial evaluation (or re-evaluation) may the parents potentially be entitled to a publicly funded IEE. (Parents may proceed with private evaluations any time they so choose.)

Massachusetts has created an additional pathway to full or partial funding of an IEE. Pursuant to this process, students who can verify that they meet certain income requirements are entitled to full or partial funding for an IEE provided that they request the IEE within 16 months of the date of the school-based evaluation or re-evaluation. 603 C.M.R. 28.04(5)(c)(iv)(6).

Furthermore, 603 C.M.R. 28.04(5)(d), requires school districts to seek a hearing before the BSEA in instances where the student does not meet income eligibility standards, the family chooses not to provide financial documentation to establish their income level, or parents request an IEE in an area not previously assessed by the school district. The aforementioned regulation provides that, if a school district declines to fund the IEE,

The district shall either agree to pay for the independent educational evaluation or, *within five school days*, proceed to the Bureau of Special Education Appeals to show that its evaluation was comprehensive and appropriate. If the Bureau of Special Education Appeals finds that the school district's evaluation was comprehensive and appropriate, then the school district shall not be obligated to pay for the independent educational evaluation requested by the parent.<sup>12</sup> [Emphasis supplied].

A school district that fails to request a due process hearing to defend the appropriateness of its evaluation within the five school day limit may be foreclosed from contesting a parents' timely request for an IEE.

No explicit time limitation exists under the federal statute and regulations. However, the Office of Special Education Programs (OSEP) has explained that "it is not unreasonable for a school district to deny a parent reimbursement for an IEE that was conducted more than two years after the public agency's evaluation". *Letter to Thorne*, 16 IDELR 606 (OSEP Feb. 5, 1990). A parent's request for reimbursement or funding of an IEE two or more years after the district's evaluation would be untimely because by then, the school district's evaluation

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<sup>11</sup> BSEA No. 04-3493 (Figueroa 2004).

<sup>12</sup> 603 C.M.R. 28.04(5)(d).

was stale.<sup>13</sup> In the same letter, OSEP advised that in such instance the public school district need not initiate a hearing. Notwithstanding OSEP's letter, Massachusetts establishes the additional requirement for school districts to request a hearing discussed *supra*.

With this guidance I turn to the issues and arguments in the case before me.

***Discussion:***

The record shows that on May 16, 2019, Easthampton sought Parents' consent to conduct Student's three year re-evaluation approximately four months early. Student's re-evaluation was not due until September 2019.

In a letter dated May 30, 2019, Parents did not respond to Easthampton's request for consent, and instead requested funding for an IEE based on the evaluation conducted by Easthampton in September 2016, almost three years earlier. Easthampton received Parents letter on May 31, 2019, and on June 7, 2019 (within five school days of the date of receipt of parents' request), Easthampton filed the instant Hearing Request challenging Parents' request for an IEE.

I note that the short time frame established in Massachusetts pursuant to 603 C.M.R. 28.04(5)(d), leaves school districts with little time to gather and evaluate the information necessary for the determination of whether it will fund the evaluation. As such, it is prudent for school districts to file a request for hearing with the BSEA within the five school days, so as to preserve the district's right to dispute the IEE; a right which it would otherwise lose. It is therefore not uncommon for school districts in Massachusetts to file hearing requests when receiving requests for independent evaluations, and then sift through the information to determine whether the case may be solved absent a Hearing.

Easthampton correctly asserts that a school-based evaluation is a pre-requisite to a publicly-funded IEE.<sup>14</sup> A parent's right to a publicly-funded IEE stems from the parent's disagreement with the results of the school-based evaluation, or from the parent's belief that a different area must be evaluated. Since the parent's request is in essence a challenge to the school-based results, the request for a publicly funded IEE must be received within a reasonable time from the date of completion of the school-based evaluation if the information resulting from the evaluation is to achieve the desired purpose; that is, to confirm a finding, counter a finding, or provide additional information on the student. Mindful of this purpose, Massachusetts has established a 16 month limit on a publicly-funded evaluation in certain circumstances where the parents meet the income eligibility criteria, and while the IDEA does not prescribe a limit *per se*, OSEP and some Courts have maintained that anything over two years is too late.

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<sup>13</sup> See generally *T.P v. Bryan County Sch. Dist.*, 63 IDELR 45, 9 F. Supp. 3d 1397 (S.D. Ga. 2014) vacated and remanded on other grounds, 65 IDLR 254, 792 F. 3d 1284 (11<sup>th</sup> Cir. 2015) analogizing a two-year limit with the IDEA two-year statute of limitations.

<sup>14</sup> *Ruling on Motion to Dismiss and/or Motion for Summary Judgment*, BSEA #11-1279 (Berman, 2011).

In the instant case, the evaluation Parents challenge and on which they request an IEE was conducted over two and a half years ago. As such, it would appear that the information contained in Easthampton's 2016 evaluation is now stale. Easthampton has already requested parental consent for a three year re-evaluation. Contrary to Parents' belief, at this juncture, consenting to Easthampton's three year re-evaluation would be the proper way for Parents to request/receive a publicly funded IEE. Since Parents' Advocate has communicated Parents' intent to consent to the proposed three year re-evaluation, Parents would have a right to timely request an IEE upon completion of that evaluation.

Regarding the IDEA two-year statute of limitations, if it were Parents who requested the hearing before the BSEA to obtain the desired IEE, they would be prevented from doing so as the alleged transgression (disagreement with Easthampton's 2016 evaluation) surpassed the two-year mark.<sup>15</sup>

In the instant matter the uncontested evidence, viewed in the light most favorable to Parents, shows that Parents did not request an IEE in a timely manner as Easthampton's school-based evaluation occurred nearly three years ago. Easthampton however, can point to no law or regulation setting a specific limit to a parent's right to a publicly funded IEE except for the Massachusetts regulation addressing income eligibility criteria, and the record is silent as to whether Parents meet this criteria. Moreover, while the 11<sup>th</sup> Circuit case cited by Easthampton in its brief is persuasive, it is not binding in Massachusetts. Similarly, in its letters, OSEP expresses only an opinion. Neither of these is law.

Therefore, given the lack of explicit time limitations in federal and state law, this matter cannot be disposed of via summary judgment. While there may not be a dispute of material fact, Easthampton has not successfully demonstrated that it is entitled to the relief it seeks as a matter of law. Unless Parents withdraw their request for IEE on the 2016 school-based evaluation, Easthampton must proceed to Hearing on this matter. Easthampton's Motion for Summary Judgment is hereby **DENIED**.

## **ORDER**

Easthampton's *Motion for Summary Judgment* is hereby **DENIED**. This matter is scheduled for Hearing on August 16, 2019, at 10:00 am at the Offices of DALA/ BSEA 14 Summer St., fourth floor, Malden, MA. The Parties may choose to have the case decided on submission of documents only including, but not limited to, submission of *affidavits*.

So Ordered by the Hearing Officer,

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Rosa I. Figueroa  
Dated: July 22, 2019

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<sup>15</sup> 34 C.F.R. § 300.507(a)(2).