

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

In re: Mark<sup>1</sup>

BSEA #1908079

**DECISION**

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL c. 71B), the state Administrative Procedure Act (MGL c. 30A), and the regulations promulgated under these statutes.

A hearing was held on September 24, 2019 before Hearing Officer Amy Reichbach. Those present for all or part of the proceedings were:

Dr. John Dorn	Chief Psychologist, READS Clinic
Cheryl Jacques	Program Director, Pilgrim Academy
Lauren Mathisen	Director of Student Services, Whitman-Hanson Regional School District (WHRSD)
Wendy Rosenblum	Director, The Victor School
Alisa St. Florian	Attorney for WHRSD
Jane Williamson	Court Reporter

The official record of the hearing consists of documents submitted by Whitman-Hanson Regional School District (WHRSD or the District) and marked as Exhibits S-1 to S-25, and a one-volume transcript produced by a court reporter. Parent did not appear for hearing or file any exhibits at the time. At the request of the District the case was continued to October 18, 2019 and the record held open for submission of closing arguments. On September 30, 2019, Parent submitted by facsimile, without cover or argument, several documents. The District submitted its closing argument on October 18, 2019 and the record closed on that date. On October 24, 2019, I issued an Order reopening the record through November 7, 2019 for submission of arguments regarding the issue of mootness in a case, such as the instant matter, in which a student was not attending school, despite a fully accepted Individualized Education Program (IEP). The District submitted its argument on this issue on October 31, 2019. After close of business on November 7, 2019, Parent submitted a document entitled “Closing.”<sup>2</sup> The record closed on that date.

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

<sup>2</sup> The “Closing” submitted by Parent after close of business on November 7, 2019 consists primarily of comments regarding home and hospital orders, proposed schedules, medical accommodations, and evaluations. As the record had closed on October 18, 2019 and reopened for the limited purpose of arguments regarding mootness, I consider only the content that addresses this issue.

## INTRODUCTION

On March 8, 2019, Whitman-Hanson Regional School District filed a *Hearing Request* with the Bureau of Special Education Appeals (BSEA) seeking an order that its most recently proposed IEP for Mark is reasonably calculated to provide him with a free, appropriate public education (FAPE) in the least restrictive environment. The District also sought an order stating that it is not required to fund an independent educational evaluation (IEE) for Mark at a rate that exceeds the state-approved rate; by the time of the hearing, WHRSD was no longer seeking a BSEA decision on the IEE. Parent filed multiple motions to dismiss and several other motions, discussed in detail below, and ultimately failed to appear at the September 24, 2019 hearing.

## PROCEDURAL HISTORY

The Hearing was initially scheduled for March 28, 2019, and a Conference Call was scheduled for March 21, 2019. On March 13, 2019, the District requested postponement of the Hearing due to the unavailability of District counsel and personnel. On March 20, 2019, Parent filed a *Motion to Dismiss*, accompanied by several documents: an email to the District, dated March 12, 2019, rescinding her request for an independent occupational therapy evaluation at public expense; a neuropsychological evaluation conducted by Dr. Carol Leavell, and communications related to that evaluation; and an email exchange with District personnel concerning Parent's request that the District withdraw its hearing request. In her *Motion*, Parent asserted that because she had rescinded her request for an IEE at public expense, the District lacked grounds for a *Hearing Request*. Specifically, Parent argued, because the District has not alleged a violation of the Individuals with Disabilities Education Act (IDEA), and because there was no pending request for an IEE, the District had no reason to file for hearing other than to "force [her] into submission." During the Conference Call that took place March 21, 2019, Parent assented to WHRSD's request to postpone the Hearing, a Pre-Hearing Conference was scheduled for April 22, 2019, and the Hearing was continued to May 28 and 29, 2019. On March 22, 2019, I denied Parent's *Motion to Dismiss* on the basis that the District's factual allegations plausibly suggest an entitlement to relief.<sup>3</sup>

On April 5, 2019, Parent filed another *Motion to Dismiss (Second Motion)*. In addition to her previous arguments regarding the District's *Hearing Request*, Parent asserted that she had signed and accepted a new IEP on March 26, 2019 and forwarded it to the District and, as such, "there is nothing that remains to be heard on the district's complaint." She included a copy of an IEP for Mark, dated March 20, 2019 to March 19, 2020, including the signature page. Parent had checked the box "I accept the IEP as developed," and commented, "This is tentative as placement has not been determined (see placement page. *sic*) When will this IEP be implemented?" before signing the page and dating it March 26, 2019. In her *Second Motion*, Parent requested that WHRSD's *Hearing Request* be dismissed with prejudice.

On April 8, 2019, WHRSD filed its Objection to Parent's *Second Motion*. The District acknowledged that Parent had accepted the proposed IEP, but highlighted that the acceptance

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<sup>3</sup> 25 MSER 41 (Reichbach 2019). I also noted that to the extent the evidence shows that Parent has, in fact, withdrawn her request for an IEE, so much of the District's *Hearing Request* as involves the IEE will be dismissed, unless the District withdraws that claim beforehand.

was conditional, given Parent’s comment on the IEP. With its objection, WHRSD submitted an email exchange between Parent and a school official which, it asserted, demonstrated both that the proposed placement has not been accepted and that Parent opposed the request to send additional information regarding Mark to that placement.<sup>4</sup>

On April 16, 2019, I issued an Order denying Parent’s *Second Motion to Dismiss*. I also notified the parties that because a motion to dismiss is evaluated solely by reference to the pleadings, meaning that the outcome of any future motion to dismiss the same *Hearing Request* would be the same, any further motion to dismiss would be construed and analyzed as a motion for summary decision.

On April 24, 2019 WHRSD filed a *Motion to Amend Hearing Request* accompanied by an *Amended Hearing Request*. The amended request excluded the IEE claim, but included the most recently proposed IEP for Mark, dated March 20, 2019 to March 19, 2020. By Order dated May 2, 2019, I allowed the amendment under BSEA *Hearing Rule I(G)(2)*.

On May 3, 2019 Parent filed a *Motion for an Order to Observe Proposed Program*, accompanied by a number of documents. On May 6, 2019, she filed a *Motion for a Court Reporter for the Hearing*, and on May 9, 2019, she filed a third *Motion to Dismiss the Hearing Request* filed by WHRSD (*Third Motion*). Parent argued 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 a signed Placement Consent Form dated May 4, 2019. On May 10, 2019, WHRSD submitted its *Opposition to Parent’s Third Motion*, referencing 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 release<sup>5</sup> and set up a visit with any school that reaches out following receipt of Mark’s referral packet. The District suggested that if parent cooperated with the referral and admission process, it would consider postponing the hearing, but argued that Mark may remain without school placement if the matter were to be dismissed before a placement is secured. On May 21, 2019, I issued an Order in which I concluded that Parent’s *Motion for Observation* was not properly before me and that Parent is entitled to a court reporter for the Hearing, but not for additional informal pre-hearing proceedings, and denied Parent’s *Third Motion to Dismiss*.<sup>6</sup> As I emphasized in that *Ruling*, pursuant to 20 U.S.C § 1515(b)(6) and Bureau of Special Education Appeals (BSEA) *Hearing Rules for Special Education Appeals*, a party need not allege an IDEA violation for a hearing request to be properly within the jurisdiction of the BSEA. Rather, the BSEA has jurisdiction over “any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education.”<sup>7</sup> Accordingly,

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<sup>4</sup> It appears from this email exchange that Whitman-Hanson Regional School District initially sent redacted records to the proposed placement.

<sup>5</sup> The District attached to the email sent to Parent on May 7, 2019 a list of 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.

<sup>6</sup> 25 MSER 83 (Reichbach 2019). As I noted in my *Ruling*, because Parent’s *Third Motion* pertained to an *Amended Hearing Request*, I treated it as a motion to dismiss rather than a motion for summary decision.

<sup>7</sup> “Scope of Rules,” BSEA *Hearing Rules for Special Education Appeals*.

even in the absence of any allegations that IDEA has been violated, the District may seek a determination that a rejected proposed IEP and placement are reasonably calculated to provide a student with a FAPE.

On May 14, 2019, WHRSD requested a three month postponement of the hearing to permit Parent to visit, and Mark to interview with, potential placements. On May 20, 2019, Parent assented to a one month postponement, and the hearing was postponed to June 26 and 27, 2019.

On May 22, 2019, Parent filed a *Motion to Recuse* and a *Motion for Production of Documents from the Department of Elementary and Secondary Education Special Education Dept (sic) and the Whitman Hanson Regional School District*. By way of the *Motion for Production*, Parent sought “a copy of the Whitman Hanson Regional School District signed Assurances made to the SEA as a condition upon which the LEA would receive the IDEA special education funds [and] a copy of the Assurances signed by the SEA and given to OSEP as part of the condition upon which the state made to OSEP to receive approximately \$642 million since 2011 in special education funding.” On May 23, 2019, the District filed an *Opposition* to Parent’s *Motions*. On June 11, 2019, I issued an Order denying both motions, as I concluded that recusal was neither necessary nor appropriate, and there was no basis for an order that WHRSD or the DESE produce copies of the Assurances sought by Parent.<sup>8</sup>

In the meantime, by way of letters filed May 23 and June 5, 2019, the District sought further postponement of the hearing, as one of its key witnesses would not be available, and reiterated its prior request for a longer continuance. Parent did not object. Despite numerous attempts, the BSEA was unable to reach Parent, by telephone or by letter, to schedule a Conference Call to discuss the District’s request. On June 14, 2019, I issued an Order allowing the District’s postponement request and scheduling the Hearing for September 24 and 26, 2019.

On August 22, 2019, Parent filed a *Fourth Motion to Dismiss (Fourth Motion)*.<sup>9</sup> On September 9, 2019, the BSEA forwarded a copy of Parent’s *Fourth Motion* to Counsel for the District, triggering the 7 day period for the District’s response. I also reminded the parties that Parent’s filing would be construed as a *Motion for Summary Decision*. WHRSD filed an *Opposition* to Parent’s *Fourth Motion* on September 12, 2019. The BSEA was unable to reach Parent to schedule oral arguments on the motion, and as such, on September 16, 2019, I issued an Order explaining that I would entertain these arguments at the beginning of the Hearing on September 24, 2019.

On September 19, 2019, Parent filed a letter objecting to the sufficiency of the District’s *Hearing Request*; objecting to any further amendments or postponements, and indicating that she did not intend to participate in the Hearing scheduled for the following week. On September 20, 2019, I issued an Order explaining that to the extent Parent’s letter constituted a sufficiency

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<sup>8</sup> 25 MSER 107 (Reichbach 2019).

<sup>9</sup> Parent’s *Fourth Motion to Dismiss* did not comply with BSEA *Hearing Rule* I.C., which requires that a party serve its motion on the opposing party and the Hearing Officer simultaneously and include a signed statement to the effect that she has sent a copy to the opposing party. Parent failed to file this statement and in fact, it appears that the District never received this Motion from Parent.

challenge under BSEA *Hearing Rule* I.E., it was untimely, and that the hearing would go forward in Parent's absence should she elect not to attend.

Parent did not appear for Hearing on September 24, 2019. As she did not submit affidavits or sworn statements with her *Motion for Summary Decision*, and was not available to supplement her one-page *Motion* with oral arguments, I denied the motion orally.

### **ISSUE FOR HEARING**

The only issue for hearing is whether the IEP proposed by Whitman-Hanson Regional School District for the period from March 20, 2019 to March 19, 2020, as amended June 26 and September 16, 2019, including placement at the Victor School, is reasonably calculated to provide Mark with a free, appropriate public education in the least restrictive environment, or FAPE.

### **FINDINGS OF RELEVANT FACT**

1. On or about June 26, 2019, Parent signed an IEP for Mark dated 3/20/2019 to 3/19/2020, as amended that day to specify placement at The Victor School. WHRSD received this signed IEP on or about July 1, 2019. (S-5; S-5A)
2. Mark's Team convened on September 16, 2019 to review an audiology assessment and consider Parent's request for a reduced schedule for Mark. On or about September 17, 2019, the District generated an IEP Amendment proposing accommodations based on the audiology assessment and rejecting Parent's request. (S-25; Mathisen, T: 38-48)
3. On or about September 27, 2019, after the close of the hearing, Parent signed this amendment. (Documents submitted by Parent after hearing, before the record closed; District's closing statement)

### **DISCUSSION**

At this point, Parent has signed Whitman-Hanson Regional School District's proposed IEP for the period dated March 20, 2019 to March 20, 2020, as amended on June 26 and September 16, 2019. By signing the IEP and amendments, Parent has accepted the proposed program and placement as written. This fully accepted IEP defines the scope of WHRSD's responsibility for, and obligations to, Mark during this time period.<sup>10</sup>

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<sup>10</sup> Should the Individualized Education Program (IEP) be rejected before it expires on March 20, 2020, the District may file a new *Hearing Request* and request that the Hearing Officer take into account the evidence, including the transcript, submitted and developed in the instant matter.

## **CONCLUSION**

Whitman-Hanson Regional School District has proposed, and Parent has accepted, an IEP placing Mark at The Victor School. There is no live issue before me.

## **ORDER**

*So ordered.*

By the Hearing Officer:

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Amy M. Reichbach  
Dated: November 8, 2019