

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

In Re: Westwood Public Schools

BSEA #2007024

**RULING ON MOTION TO DISMISS ON PROCEDURAL GROUNDS OF WESTWOOD
PUBLIC SCHOOLS**

On January 22, 2020, Parents filed a request for hearing with the Bureau of Special Education Appeals (BSEA) seeking the following relief: (1) a determination that IEPs proposed by Westwood Public Schools (Westwood or School) for the period from February 26, 2019 to February 25, 2020 are inadequate to provide Student with a free, appropriate public education (FAPE); (2) an order directing Westwood to reimburse Parents for their expenditures for Student's placement at two out-of-state¹ residential programs: Elements Wilderness Program ("Elements") between March 28, 2019 and June 12, 2019 and Discovery Ranch between June 12, 2019 and the date of the decision in this matter; and (3) an order for prospective funding for Student's placement at Discovery Ranch.

On February 3, 2020, Westwood filed a *Response to Hearing Request and Motion to Dismiss on Procedural Grounds* ("Motion"). In its *Motion*, Westwood seeks dismissal of Parents' claims for reimbursement for the costs of both Elements and Discovery Ranch, arguing that Parents failed to give the District the 10-day prior notice required when unilateral placements are made.² On February 12, 2020, Parents filed an *Opposition to the School's Motion*. For the reasons discussed in this *Ruling*, Westwood's *Motion to Dismiss* is **DENIED**.

I. 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.

1. Student is 17 years old and is a resident of Westwood. Student is eligible for special education services on the basis of emotional and health disabilities as well as difficulties with executive functioning.

¹ Both programs are located in Utah.

² Westwood disputes Parents' claim for prospective relief but has not sought its dismissal on procedural grounds.

2. Student attended Westwood Public Schools from kindergarten until March 2019, when Parents unilaterally placed him at Elements, and, subsequently, at Discovery Ranch. He has been served under IEPs issued by Westwood from approximately sixth grade (2014-2015) until the time of his unilateral placement.
3. During Student's middle school years, his IEPs provided for therapeutic support within the inclusion setting. During Student's ninth grade year at Westwood High School (2017-2018), as well as the first half of his tenth grade year (2018-2019), Student participated in the FLEX program, which consisted of general education classes supplemented by one to two hours per day of academic and therapeutic support in substantially-separate classrooms.
4. In February 2019, Parents wrote a letter to Westwood reporting a significant decline in Student's social, emotional, and academic functioning, and requesting that the Team consider placing him in a different educational setting. After a Team meeting to discuss Parents' concerns, Westwood issued an IEP covering February 26, 2019 to February 25, 2020 which proposed continued enrollment in the FLEX program.
5. On March 28, 2019, Parents unilaterally placed Student at Elements. The placement process entailed Student's involuntary removal from his home by Elements staff, who then transported Student to Utah, where the program is located. In a letter to the School of the same date, Parents rejected the most recently-proposed IEP, informed Westwood of the unilateral placement, which they described as a first step towards meeting Student's long-term needs, and stated that Student would not be returning to Westwood High School during the 2018-2019 school year. Parents further explained that the sensitivity and urgency of Student's placement, coupled with his emotional volatility, precluded their informing Westwood of the placement until after it had occurred. Westwood refused Parents' request for funding for Elements in a letter dated March 29, 2020.
6. On April 3, 2019, the Team convened without Parents and proposed an IEP calling for "Collaborative Day Program—TBD." Westwood also requested consent to conduct psychological and home assessments and to refer Student to the TEC Collaborative. Parents partially rejected the IEP but accepted increased services and conditionally accepted the placement to enable Westwood to make the TEC referral. Parents also consented to the proposed evaluations.
7. On May 8, 2019, the Team convened to consider private evaluations obtained by Parents, and issued an IEP that was similar to the IEP issued in April. The Team proposed placement in an undetermined therapeutic collaborative program that met the criteria listed by the independent evaluators.

8. In a letter dated June 17, 2019, Parents informed Westwood that Student had completed the program at Elements on June 12, 2019, and that they had transferred Student to Discovery Ranch on or about the same day. In the letter, Parents requested funding for Discovery Ranch from Westwood. On June 19, 2019, Westwood declined Parents' request.

II. Standard for Ruling on A Motion to Dismiss

According to Rule XVI.B.4 of the BSEA *Hearing Rules for Special Education Appeals*, (*Hearing Rules*) a hearing officer may dismiss all or part of a hearing request for "failure to state a claim upon which relief may be granted." *Id.*³ 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 f, 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 federal⁴ or state⁵ special education statutes, or Section 504 of the Rehabilitation Act.⁶ 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).

III. Discussion

At issue here is whether Parents are, as Westwood asserts, "procedurally barred" from requesting an order for reimbursement for the costs of Elements and/or

³ 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.

⁴ Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et. seq*

⁵ M.G.L. 71B

⁶ 29 U.S.C. § 794

Discovery Ranch, such that their claim for such must be dismissed, because they allegedly failed to give the District the 10-day prior written notice required by 20 USC §1412(a)(10)(C)(iii)(I). This provision states the following:

(iii) Limitation on reimbursement:

The cost of reimbursement [for the cost of a unilateral placement] described in clause (ii) may be reduced or denied—

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days...prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa)... *Id.*

Although Westwood has not articulated the nexus between this portion of the statute and the criteria for granting dismissal of all or part of a hearing request before the BSEA, the District appears to argue that Parents' alleged failure to provide the requisite 10-day notice bars the award of reimbursement they have requested in this matter. As such, Westwood appears to contend that Parents' claim for such relief cannot be granted under any set of facts, and must be dismissed.

Parents counter that Westwood has misconstrued the statute, which does not automatically preclude reimbursement in cases where a parent does not fully comply with the prior notice requirement; rather, the statute gives a BSEA hearing officer discretion, as an equitable matter, to deny or reduce reimbursement in such cases. Accordingly, failure to provide the advance notice set forth in the statute does not automatically require dismissal of Parents' claims for relief. Parents cite several BSEA decisions in support of this argument.

Parents' interpretation of 20 USC §1412(a)(10)(C)(iii)(I) is correct. There is nothing in the statute that requires a hearing officer to dismiss claims for reimbursement if a parent has not strictly complied with the notice requirement. On the contrary, the plain language of the statute authorizes, but does not require, hearing officers to exercise their discretion by denying or limiting reimbursement in such cases. As Parents have noted in their *Opposition*, whether and to what extent a hearing officer limits a district's obligation to reimburse parents is an equitable determination, to be made after an evidentiary hearing. Based on evidence presented at the hearing, the hearing officer may determine whether or not the parents' actions have frustrated the purpose of the statute and thereby harmed the district. *In Re: Cambridge Public Schools*, 14 MSER 336 (Crane, 2008). Such factual determinations are not properly the subject of a motion to dismiss.

In the instant case, Parents argue that their actions neither frustrated the purpose of the statute nor prejudiced Westwood. They assert that on the contrary, Westwood had ample notice of Parents' position and opportunities to respond to it. The hearing request alleges that by February 2019 at the latest, Parents had informed Westwood that they believed Student needed more intensive programming. The hearing request further alleges that Parents notified Westwood of Student's placement at Elements on the day that it occurred, and that Westwood held two subsequent Team meetings to consider Parents' and its own respective positions. Further, Parents state that their hearing request alleges facts suggesting that the statutory exception to the 10-day notice rule applies in this case because compliance with the rule would likely result in serious emotional or physical harm to Student.⁷

Whether or not Parents' failure to strictly comply with the 10-day notice requirement caused harm or prejudice to Westwood, and whether or not compliance with the rule would have caused physical or emotional harm to Student, are questions of fact, to be developed during an evidentiary hearing. Dismissal of any of Parents' claims prior to such a hearing is not appropriate.

ORDER

The District's *Motion to Dismiss* Parent's claims for reimbursement for their expenditures for Elements and Discovery Ranch is DENIED. As agreed by the parties, the hearing in this matter is scheduled for May 6, 7 and 11, 2020, beginning at 10:00 AM, at the office of the BSEA, 14 Summer Street, 4th Floor, Malden, MA. The parties shall exchange and file proposed exhibits and witness lists by close of business on April 29, 2020.

By the Hearing Officer,

Sara Berman

Dated: March 3, 2020

⁷ 20 USC §1412(a)(10)(C)(IV)(II)(bb), (cc).