

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

**In Re: Student & Barnstable Public Schools
& Dennis-Yarmouth RSD**

BSEA No. 2109285

**RULING ON DENNIS-YARMOUTH REGIONAL SCHOOL DISTRICT'S
MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT**

This matter comes before the Hearing Officer on the Dennis-Yarmouth Regional School District's (DYRSD) *Response to Parent's Request for Hearing and Motion to Dismiss and Motion for Summary Judgment* (Motion), which was filed with the BSEA on May 28, 2021. As grounds for its Motion to Dismiss, DYRSD asserts: that Parent has failed to state a claim upon which relief may be granted against DYRSD; that the BSEA lacks jurisdiction over DYRSD as DYRSD has not had any duty to educate Student since March 9, 2020 when DYRSD proposed Barnstable School District (Barnstable) assume programmatic responsibility¹; and that summary judgment is warranted as Student received educational services from a tutoring company contracted by DYRSD while hospitalized between May of 2019 and October of 2019. DYRSD concludes, therefore, that the case against it must be dismissed with prejudice and that summary judgment should be granted in its favor.

For the reasons articulated below, DYRSD's *Motion* is **DENIED** as to all procedural and substantive claims with regard to fiscal responsibility prior to October 21, 2019 and programmatic responsibility prior to May 12, 2020, but **ALLOWED** with prejudice as to all procedural and substantive claims after those dates.

RELEVANT PROCEDURAL HISTORY

On May 13, 2021, Parent filed a *Request for Accelerated Hearing*, asserting that the Student required 1:1 support in her day placement at Devereux School in order to receive a free and appropriate public education (FAPE)² and also compensatory services from Barnstable and/or DYRSD as a result of Student not receiving appropriate special education and related services during a period of hospitalization between May 8, 2019 and October 21, 2019.

A *Notice of Accelerated Hearing* was issued on May 14, 2021, and the Hearing was scheduled for June 14, 2021.

On May 24, 2021, Barnstable filed its *Response to Hearing Request*, asserting that 1:1 support is not needed in Student's day placement, or at least was not immediately needed so as to justify the request for an accelerated hearing, as she is currently educated in a classroom with a 1:3 staff

¹ This was accepted by Barnstable on May 12, 2020.

² According to the Accelerated Hearing Request, Student attends a Devereux residentially pursuant to a cost-share agreement with the Department of Children and Families (DCF). DCF has physical custody of Student via a Child Requiring Assistance (CRA) proceeding. Parent retains legal custody and all educational decision-making authority.

to student ratio. Barnstable further argued that evaluations conducted in February of 2021 determined that student did not require 1:1 support and that her failure to make progress in certain areas was due to behavioral challenges. Additionally, Barnstable submitted that the Request for Hearing was filed prematurely, prior to ongoing discussions and planned Team meetings with the parties and Devereaux to discuss the need for an academic 1:1. Barnstable further asserted that student was not enrolled in Barnstable between May 8, 2019 and October 21, 2019, the period for which compensatory services are sought, and thus the compensatory services, if warranted, are the sole responsibility of DYRSD and not Barnstable.

On June 2, 2021, Barnstable filed an *Assented-To Motion to Postpone the Automatic Hearing Date* until July 12, 2021, which was Granted on June 3, 2021 by the Hearing Officer³. In that same Order, the Hearing Officer noted that by virtue of granting this postponement, the matter was also being removed from the accelerated calendar. On the same date, by separate Order, the Hearing Officer also granted Parent's request for an extension of time to June 14, 2021 to respond to DYRSD's Motion. On June 14, 2021 Parent filed *Student and Parent's Opposition to Dennis-Yarmouth Regional School District's Motion to Dismiss and Motion for Summary Judgment* (Opposition), asserting that DYRSD's Motion to Dismiss should be denied as 1) Parent has, in his Hearing Request (which Parent contends is the only document that should be considered for a Motion to Dismiss), stated a claim upon which relief may be granted, and the BSEA has jurisdiction over the timely claims made against DYRSD; and 2) DYRSD's Motion for Summary Judgment should be denied as genuine issues of material fact remain. The information presented by DYRSD fails to evidence that DYRSD provided all special education and related services to Student for the entire period during which Student was entitled to receive such education and services, while hospitalized.

RELEVANT FACTS

For the purposes of this Motion, I must take the assertions set out in Parent's Hearing Request and Opposition as true.

1. Student is an 8th grade student residing at Devereaux School (Devereaux) via a cost-share agreement with DCF. Student's current IEP calls for her to be placed at Devereaux's private day school as well.
2. Student was moved to Devereaux after a period of in-patient hospitalization from May 8, 2019 through October 21, 2019. Prior to this hospitalization, Student resided with her Mother, who was, at the start of Student's hospitalization, residing in West Yarmouth. Mother moved to Barnstable in August 2019. As such, throughout Student's hospitalization, DYRSD was

³ The matter was thereafter administratively reassigned to this Hearing Officer.

programmatically and fiscally responsible to provide Student with her necessary special education and related services⁴.

3. Special education and related services that Student should have received, if any, but did not receive, during her hospitalization have not been addressed via provision of compensatory services to Student since her hospitalization.

4. Student is eligible for an IEP under the disability categories of emotional disability, health impairment and a specific learning disability in math and reading.

5. Student's proposed IEP at the time she was hospitalized, covering dates 2/14/19 to 2/13/20, called for her to be educated in a substantially separate classroom at the Mattacheese Middle School (2019-2020 IEP)⁵. This IEP contained goals in behavior, reading, written language, mathematics and communication. The A grid called for consultation by a BCBA and an SLP 1 x15 minutes every 6 day cycle for each provider, and there were no B grid services. C grid services consisted of 2 x 30 counseling with a social worker, 6 x 227.5 behavioral support/education by a special education assistant, 5 x 45 reading, 6 x 45 language arts and 6 x 45 math from a special education teacher, and 2 x 30 speech and language services from an SLP. No extended school year services were proposed, but the N1 Form produced after this meeting indicates the Team agreed to "revisit eligibility for ESY as appropriate to [Student's] needs".

6. In support of DYRSD's Motion, it submitted, in addition to the Assignment Letter and Programmatic Agreement discussed above, emails dated May 14, 17 and 29, 2019 between DYRSD staff and tutors from LearnWell (the company with which DYRSD contracted to provide Student tutoring) relating to requests for Student's schoolwork. Additionally, invoices from LearnWell rendered on May 13, 14, 16, 17, 24, 28, 29 and 31, 2019 were submitted. Weekly academic reports from LearnWell relating to tutoring and other services provided to Student during the weeks of May 13-17, May 20-24, and May 27-31, 2019, as well as the weeks of October 7-11, and 14-18, 2019 were also provided. Parental Consent and Physician Statement forms dated August 23, 2019, and a second one dated October 9, 2019 and September 9, 2019, respectively were submitted, too⁶. Finally, DYRSD provided a contract between DYRSD and LearnWell signed by DYRSD on 10-10-19 for 10 hours per week of educational services to begin on 9/10/19.

⁴ DYRSD provided a copy of the November 25, 2019 Assignment of School District Responsibility (Assignment Letter) issued by the Department of Elementary and Secondary Education (DESE) that further confirmed programmatic and fiscal responsibility of DYRSD throughout Student's hospitalization. DESE ultimately determined that fiscal responsibility transferred to Barnstable upon the foster care placement of the Student by DCF residentially at Devereaux (on October 21, 2019), but programmatic responsibility remained with DYRSD. On March 9, 2020, in accordance with 603 CMR 28.10(4), DYRSD proposed to transfer programmatic responsibility to Barnstable. Barnstable signed this Agreement on May 12, 2020 (Programmatic Agreement). A copy of this Agreement was also submitted by Barnstable with the Motion.

⁵ A signed copy of this IEP was not provided by either party. According to the subsequent proposed IEP covering 2/10/20 to 2/9/21 (2020-2021 IEP), Student's mother rejected the 2019-2020 IEP and requested a meeting to discuss it, but did not attend this meeting scheduled on April 25, 2019. The meeting was rescheduled to May 10, 2019, but it is unclear if the IEP was ultimately accepted at that meeting or not. Moreover, the prior "stay put IEP", which would have applied if the 2019-2020 IEP remained rejected during Student's hospitalization has not been presented. Thus, at this stage, I am unable to determine with certainty what special education and related services Student was entitled to during her hospitalization, or whether or not she was entitled to extended school year services.

⁶ A total of 2 forms were submitted. Each form had a Parental Consent portion on the top and a Physician Statement portion on the bottom. The first form had the same date for both parts – August 23, 2019. The second form had the date of October 9, 2019 for the Parental Consent, and September 9, 2019 for the Physician Statement.

7. In support of Parent’s Opposition, Parent submitted an unsigned copy of the 2019-2020 IEP inclusive of the March 7, 2019 N1 concerning the February 14, 2019 Team meeting proposing this IEP. He also submitted an unsigned copy of the 2020-2021 IEP inclusive of the February 24, 2020 N1 concerning the February 10, 2020 Team meeting proposing this IEP. Finally, he provided the 2018-2019 DYRSD school calendar.

8. Since attending Devereaux, Student continues to struggle with maintaining safe and healthy behaviors. Without the support of a 1:1 assistant she has engaged in over 350 safety-interfering and self-injurious behaviors, including aggressions and attempts to harm herself using “sharps”, which have resulted, at times, in physical restraints as well as separation from her classroom.

9. Student’s maladaptive behaviors have impacted Student’s ability to make effective progress while at Devereaux, despite the substantial supports that are currently in place. This lack of progress is documented in an Educational Assessment completed on February 12, 2021.

LEGAL STANDARD

1. Legal Standard for a Motion to Dismiss.

Pursuant to Rule XVI(A) and (B) of the *Hearing Rules for Special Education Appeals* and 801 CMR 1.01(7)(g)(3), a hearing officer may allow a motion to dismiss if the party requesting the hearing fails to state a claim upon which relief can be granted. These rules are analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure. As such, hearing officers have generally been guided by the federal courts in deciding motions to dismiss for failure to state a claim.

To survive a motion to dismiss, there must exist “factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief...”⁷. The hearing officer must take as true “the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff’s favor”⁸. For Motions to Dismiss, the hearing officer looks to the facts alleged in the pleadings and documents attached or incorporated by reference to the Hearing Request as well as matters for which administrative notice may be taken⁹. The party opposing the Motion must show “factual allegations ... enough to raise a right to relief above the speculative level... [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)”¹⁰.

2. Legal Standard for a Motion for Summary Judgment.

Pursuant to 801 CMR 1.01(7)(h), “When a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the

⁷ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

⁸ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

⁹ *Nollet v. Justices of the Trial Court of Mass.*, 83 F. Supp. 2d 204, 208 (D.Mass. 2000), *aff’d*, 248 F.3d 1127 (1st Cir. 2000); *In Re: Ludlow Public Schools*, BSEA No. 1603808, 115 LRP 58373 (Figueroa, 2015).

¹⁰ *Iannocchino* 451 Mass. at 636 quoting *Bell Atl. Corp.*, 550 U.S. at 555 (internal citations omitted).

Party may move, with or without supporting affidavits, for summary decision on the claim or defense ...”¹¹. This regulation is consistent with Rule 56 of both the Massachusetts Rules of Civil Procedure and the Federal Rules of Civil Procedure, which provides that summary judgment is appropriate if the “ ... pleadings, depositions, answers to interrogatories and admissions [on file], together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law”¹².

The party seeking summary judgment bears the burden of proof for purposes of the Motion to demonstrate that there are no genuine issues of material fact on every relevant issue for which summary judgment is sought¹³. Moreover, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the non-moving party when considering a motion for summary judgment¹⁴.

In response to a motion for summary judgment, the opposing party “must set forth specific facts showing that there is a genuine issue for trial”¹⁵. An issue is genuine if it “may reasonably be resolved in favor of either party”¹⁶. While the moving party must show that there is “sufficient evidence” in its favor that the fact finder could decide for it¹⁷, the evidence presented by the non-moving party “... cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve at an ensuing trial”¹⁸. Summary judgment is appropriate if the non-moving party’s evidence is comprised merely of “conclusory allegations, improbable inferences, and unsupported speculation”¹⁹.

In undertaking this burden shifting analysis for this case, I will need to determine, based on the information submitted by the parties to date, viewed in the light most favorable to Parent, if a genuine issue of material fact exists as to whether Student was provided with all special education and related services to which she was entitled by DYRSD during her period of hospitalization and thereafter. If I find no such issue exists, DYRSD will prevail in its Motion, but if I find a genuine issue of material fact to exist, the Motion must be denied. I hence turn to the legal standards that apply to special education and related services for students who are hospitalized.

3. *Special Education and Related Services Required for Students Who are Hospitalized.*

The right for students to receive special education services while hospitalized exists in the federal definition of “special education” itself. IDEA defines “special education” in relevant part as “... specially designed instruction, at no cost to parents, to meet the unique needs of a

¹¹ 801 CMR 1.01(7)(h).

¹² Mass.R.Civ.P. 56(c); see Fed.R.Civ.P., 56(a).

¹³ *Pederson v. Time, Inc.*, 404 Mass 14, 17 (1989) (citations omitted); *In Re: Boston Public Schools*, BSEA No. 10-2417 110 LRP 65434 (Oliver, 2010).

¹⁴ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); see also *In Re: Norfolk County Agricultural School*, BSEA #06-0390 106 LRP 715 (Berman, 2005).

¹⁵ *Anderson*, 477 US at 250 quoting Fed.R.Civ.P. 56(e).

¹⁶ *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 581 (1st Cir. 1994) quoting *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir.1990) (citing and quoting, inter alia, *Anderson* 477 U.S. at 250 (other citations omitted)).

¹⁷ *Anderson*, 477 U.S. at 249.

¹⁸ *Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989).

¹⁹ *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990).

child with a disability, including: A) instruction conducted in the classroom, in the home, *in hospitals* and institutions, and in other settings ...”²⁰.

Under the Massachusetts special education laws and regulations, students who are hospitalized and thereby unable to attend school for more than 14 school days in any school year are entitled to educational services.²¹ The purpose of this regulation is to “provide a student with the opportunity to make educational progress even when a physician determined that the student is physically unable to attend school”²². The right to receive educational services during a hospitalization lasting longer than 14 school days is “... unequivocal and does not leave the provision of educational services in the [hospital] to the discretion of the school principal or the special education administrator where the requisite medical order is issued for medical reasons ...”²³.

The educational services to be provided to hospitalized students “... shall be provided with sufficient frequency to allow the student to continue his or her educational program, as long as such services do not interfere with the medical needs of the student”²⁴. Moreover, if a student is deemed eligible for special education, then the services to be provided should be special education services and “include services on the student’s IEP”²⁵. The Department of Elementary and Secondary Education (DESE) has issued, and recently revised, written guidance on the implementation of these regulations. Both Questions 4 and 5 address the amount, content, and type of educational services that are required to be provided. Of relevance, in response to Question 4 (“How Should Home or Hospital Services be Delivered?”), DESE advised that home/hospital instruction is:

“typically one-to-one or small group instruction that is provided on an individualized schedule, for less than a full school day or a full school week. The school district should determine the number of instructional hours per day or per week based on the educational and medical needs of the individual student. School districts may not preset the number of instructional hours per week provided to students who must remain at home or in the hospital; the decision must be individualized.... When planning and delivering home or hospital educational services, the school district should carefully consider all aspects of a

²⁰ 20 USC 1401(29) (emphasis added).

²¹ M.G.L. c. 71B § 2; 603 CMR 28.03(3)(c); see *In Re: Hampden-Wilbraham School District*; BSEA No. 1403110 114 LRP 33121 (Figueroa, 2013).

²² *In Re: Scituate Public Schools* BSEA No. 1702015 116 LRP 51777 (Figueroa, 2016); citing Question and Answer Guide on the Implementation of Educational Services in the Home or Hospital, (issued February 1999, revised June 2021), Answer to Question 1 (“What is the intent of the Massachusetts Regulations on Educational Services in the Home or Hospital?”), <https://www.doe.mass.edu/prs/ta/hhep-qa.html>.

²³ *In Re: Lowell Public School District*, BSEA No. 02-1497 106 LRP 32474 (Figueroa, 2001); see also *In Re: Bay Path Reg. Voc. Tech. HS*, BSEA No. 1805746 118 LRP 37182 (Figueroa, 2018) finding that “Nothing in 603 CMR 28.03(3)(c) requires that a student be absent for 14 days prior to receiving tutoring. Rather, anticipation of 14 days of absences due to medical reasons triggers initiation of tutoring. Similarly, the regulation leaves the school principal no discretion to delay provision of tutoring when a valid Physician’s Statements for Temporary Home or Hospital Education Form is presented.”

²⁴ 603 CMR 28.03(3)(c).

²⁵ *Id.* Additionally, 603 CMR 28.04(4) requires Districts to convene the Team and consider evaluation needs, amend an existing IEP or develop a new IEP suited to the unique circumstances of a student who has been hospitalized, as appropriate, whenever such hospitalization “in the opinion of the student’s physician” is likely to last for more than 60 school days in any school year. Here, although Student’s hospitalization, lasting over 5 months, also appears to have been for more than 60 total school days, it spanned over two school years, thereby not technically triggering DYRS’s obligations under this regulation.

student's educational program while attending school, including any current IEP services, Section 504 plans and instructional accommodations, as well as the student's general education services”²⁶.

Similarly, in response to Question 5 (“Is the Academic Content of Instruction and the Certification of Staff Any Different for Home or Hospital Instruction Than for School-Based Instruction?”), DESE advises that home/hospital instruction:

“... must include the same academic content as that provided in the student's regular school-based program.... Teachers who provide home/hospital instruction to public school students must coordinate the instructional content, approach and student progress with the student's teachers at school.... For both public school students and private school students, special education and/or related services that are provided in a home or hospital setting under this provision must be delivered (or closely supervised) by staff certified or appropriately licensed to deliver such services”²⁷.

Thus, while educational instruction for special education students who are hospitalized will not necessarily look like a regular school day, it should be individualized for the student, address all of the special education and related services in the student’s IEP, be coordinated as to instructional content, approach and student progress with the student’s teachers at school, and be delivered or closely supervised by staff who are certified or appropriately licensed to deliver such services²⁸. With this framework in mind, I now turn to examine the arguments submitted by DYRSD in its Motion.

APPLICATION OF LEGAL STANDARD

In evaluating the Motion under the legal standards for a Motion to Dismiss and for a Motion for Summary Judgement set forth above, I take Parent’s allegations contained in the Hearing Request and in his Opposition as true, as well as any inferences that may be drawn from them. I also consider, for purposes of the Motion for Summary Judgment, the additional submissions filed with the Motion and Opposition in Parent’s favor and will deny Dismissal/Summary Judgment if these allegations establish that a genuine issue of material fact exists²⁹.

1. Dismissal is Not Warranted for Any Period of Time that DYRSD Had Programmatic or Fiscal Responsibility of Student.

²⁶ Question and Answer Guide on the Implementation of Educational Services in the Home or Hospital (issued February 1999, revised June 2021).

²⁷ *Id.*

²⁸ *Id.*; see also *In Re: Medford Public Schools*, 02-0640 102 LRP 32412 (Figueroa, 2002) wherein the Hearing Officer ordered compensatory services to be provided to the student, in part, due to the failure of the student to have received speech and language services and social pragmatic supports during a period of home tutoring, which the District acknowledged not providing; Question and Answer Guide on the Implementation of Educational Services in the Home or Hospital (issued February 1999, revised June 2021), Answer to Question 1, which states, in relevant part, that “while it is impossible to replicate the total school experience through the provision of home/hospital instruction, a school district must provide, at a minimum, the instruction necessary to enable the student to keep up in his/her courses of study and minimize the educational loss that might occur during the period the student is confined at home or in a hospital.”

²⁹ See *Anderson*, 477 US at 252.

In its Motion, DYRSD argues that dismissal is warranted because it no longer has programmatic or fiscal responsibility for Student, and, as such, is not able to assess Student's needs, nor has it been responsible for providing Student with special education or related services for over fifteen months. Thus, the BSEA has no jurisdiction to order relief against DYRSD, should parent prevail in any of his claims at Hearing. However, as presented, the Hearing Request is not seeking solely prospective relief or services for Student. In fact, throughout the Hearing Request, Parent continually noted that he also was looking for compensatory services for the period of time when Student was hospitalized and was allegedly not provided with the special education and related services she was entitled to receive. According to Parent, as set forth in the Hearing Request, this failure to receive services at that time has contributed to Student's current struggles to make effective progress while at Devereaux.

The claims with regards to the missing services during Student's hospitalization in 2019 are well pled, plausible and not speculative³⁰. Despite these claims, DYRSD argues, it is entitled to dismissal because it has no educational responsibility for Student at this time. This argument must fail, however, as such a rule would create situations where school districts, which are no longer educationally responsible for students, insulate themselves from any liability against timely claims brought as to actions or inactions taken in providing students with a FAPE while they were educationally responsible. Thus, to prevail on its Motion for Summary Judgment as to the period of hospitalization, DYRSD must submit evidence to show that it did not have any educational responsibility for Student during this period of hospitalization, or thereafter³¹. The evidence submitted by DYRSD, does not show that, at least for the period of hospitalization.

According to the Assignment Letter, DYRSD was deemed to have been fiscally responsible for Student up to the time of her placement at Devereaux, on October 21, 2019, and remained programmatically responsible for Student after that time. This programmatic responsibility was shifted to Barnstable on May 12, 2020 when Barnstable executed the Programmatic Agreement. DYRSD has thus demonstrated, that it no longer had fiscal responsibility for Student after October 21, 2019, and it no longer had programmatic responsibility for Student after May 12, 2020, with regard to any issues contained in the Hearing Request relating to the denial of a FAPE to Student after these dates. For this reason, as to any claims against DYRSD after these dates, the Motion is GRANTED³².

However, during Student's hospitalization, DYRSD was both programmatically and fiscally responsible to provide Student with her special education and related services. Parent claims this was not done, and if I find that a genuine issue of material fact exists as to whether Student was provided all special education and related services to which she was entitled while hospitalized,

³⁰ *Iannocchino* 451 Mass. at 636 quoting *Bell Atl. Corp.*, 550 U.S. at 555 (internal citations omitted).

³¹ Although DYRSD's argument on this point is set forth in its Motion to Dismiss, given that it relies on submission of additional information to prove its educational responsibility or lack thereof, it would have more properly been presented as a motion for summary judgment. Because the Motion itself consists of both a request to dismiss and a request for summary judgment, I am willing to examine evidence outside the Hearing Request in determining the appropriateness of DYRSD's continued involvement as a party for all the issues presented in the Hearing Request.

³² No genuine issue of material fact exists as to DYRSD's cessation of fiscal responsibility as of October 21, 2019 and programmatic responsibility as of May 12, 2020. Parent has not submitted any evidence to the contrary establishing any educational responsibility for Student by DYRSD after these dates.

then dismissal of DYRSD as to these claims is not warranted now. Without DYRSD as a party appropriate relief would not be available to the Parent on this claim³³.

2. A Genuine Issue of Material Fact Exists as to Whether or Not Student Received All Necessary Educational Services While Hospitalized.

Turning to the claim for compensatory services for the period of hospitalization, in the Motion, DYRSD alleges that it met its special educational obligations to Student by virtue of its contracting for tutoring services from LearnWell. Thus, according to DYRSD, summary judgment is warranted on this claim as well. Parent, in turn, argues that genuine issues of material fact remain with regard to the tutoring services contracted for and provided, as the information submitted by DYRSD does not evidence that the services provided by LearnWell met DYRSD's obligation to provide Student with a FAPE during her entire period of hospitalization. Parent points out that no evidence was offered of any tutoring services being provided between June 1, 2019 and October 7, 2019, and the evidence seems to indicate that for the remaining three weeks in October, Student only attended one hour of tutoring instruction, despite attempts by LearnWell to provide more. Further, Parent questions whether the tutoring services aligned with Student's IEP, and whether or not all of the related services Student was required to receive pursuant to her IEP were provided.

A review of the evidence submitted by DYRSD to support its argument, as well as the evidence submitted by Parent in his Opposition, taken in the light most favorable to Parent, and drawing all reasonable inferences in Parent's favor, indicate that several issues of material fact remain with regard to this claim for compensatory services. As discussed, *supra*, upon receipt of the requisite medical statement, a school district is required, to forthwith provide the necessary educational services to a student who will be hospitalized for more than 14 school days³⁴. There is no required 14-day waiting period before these services are to commence, they are required to be provided "without undue delay after the school district receives written notice from the student's physician that such services are necessary"³⁵.

While it is unclear from the parties' submissions to date when DYRSD received the requisite medical statement, based upon the emails submitted, an inference in favor of Parent could be made that it was received by May 14, 2019. Thus, as of this date, DYRSD would have been obligated to begin providing educational services to Student. Since it is not disputed that at all times relevant Student was eligible to receive special education and related services, the hospital services that DYRSD was required to provide should have been individualized for her, addressing all of the special education and related services in the her IEP, coordinated as to instructional content, approach and progress with the Student's teachers at school, and delivered or closely supervised by staff who are certified or appropriately licensed to deliver such

³³ If DYRSD were to be dismissed entirely, and Parent were to prevail on his request for compensatory services for the period of time Student was hospitalized, complete relief could not be granted with the remaining parties, and thus it would be necessary to re-join DYRSD to the proceedings pursuant to Rule I(J) of the Hearing Rules.

³⁴ 603 CMR 28.03(3)(c).

³⁵ *Id.*; see also *In Re: Bay Path Reg. Voc. Tech. HS*, BSEA No. 1805746, 18 LRP 37182 (Figuroa, 2018); Question and Answer Guide on the Implementation of Educational Services in the Home or Hospital (issued February 1999, revised June 2021), Answer to Question 3 ("How Can Home or Hospital Education Services be Accessed?").

services³⁶. Student should have received these services from May 14, 2019 through at least June 18, 2019³⁷, and then again from the first day of school for the 2019-2020 school year through October 21, 2019. It is also plausible that Student was entitled to receive educational services in the hospital over the summer since, as discussed above, as it is unclear from the IEPs submitted what the status of ESY programming was for Student.

DYRSD only submitted evidence of service provision for some or all of three weeks in May 2019 and some or all of two weeks in October 2019. Further, it is not clear from the evidence submitted how many hours of services were actually provided to Student on these days. Viewing the evidence with respect to tutoring services in the light most favorable to Parent, it appears that only twenty-eight total service hours were scheduled for Student for the 2018-2019 school year days during which she was hospitalized, and only eighteen hours were scheduled for the 2019-2020 school year days during which she was hospitalized. Of these scheduled hours, only six hours in May were actually provided, and only one hour was actually provided in October. While it appears that at times the Student refused services offered, and at other times was “excused” from the services, it is unclear based on the information submitted whether or not it was Student’s choice to not access the tutoring.

Additionally, no evidence was submitted to show that any speech and language or counseling services were provided, if in fact such services ultimately were due Student under her then-current IEP³⁸. The weekly tutoring summaries appear to indicate that only academic tutoring was being offered. Further, it appears that the LearnWell tutors were unsuccessful, despite repeated attempts, in obtaining work from Student’s teachers for use in their tutoring sessions.³⁹ Additionally, it is unclear what the certification of the tutors working with Student (or their Supervisors, if appropriate) were. Given this, I find that genuine issues of material fact exist regarding Parent’s claim for compensatory services against DYRSD for the period of May 2019 through October 21, 2019. As such, DYRSD’s Motion is DENIED as to this claim.

ORDER

1. As outlined in this Ruling, the DYRSD’s *Motion to Dismiss and Motion for Summary Judgment* is **ALLOWED, in part, with prejudice**, as to any claims Parent is bringing against DYRSD after October 21, 2019 for fiscal responsibility, and after May 12, 2020 for programmatic responsibility, but is **DENIED** as to all claims brought against DYRSD prior to these dates.

2. The Hearing will proceed on October 21 and 22, 2021, as per my June 22, 2021 Ruling, on the following issues:

³⁶ *Id.*; see also *In Re: Medford Public Schools*, 02-0640 102 LRP 32412 (Figueroa, 2002); Question and Answer Guide on the Implementation of Educational Services in the Home or Hospital (issued February 1999, revised June 2021), Answer to Question 1.

³⁷ Per the school calendar submitted by Parent, the last day of school (inclusive of 5 snow days) for the 2018-2019 in DYRSD was June 25, 2019. It is unclear how many snow days occurred this school year, so the last day of school fell somewhere between June 18, 2020 and June 25, 2020.

³⁸ See footnote 5 for more discussion as to the questions that exist relating to the actual IEP services Student should have been receiving.

³⁹ In fact, when Student’s teacher finally responded to the LearnWell tutor (on May 29, 2019), she confusingly indicated she did not “have any additional insight as to her academic current performance to provide” and referred her to the Team, noting specifically that the tutor should speak with Student’s educational advocate.

A. Whether DYRSD provided Student with the special education and related services to which she was entitled during her period of hospitalization between May 8, 2019 and October 21, 2019; and,

i. If not, what, if any, compensatory services are owed by DYRSD; and

B. Whether Barnstable is required to provide Student with 1:1 support in her day placement at Devereaux School in order for her to receive a FAPE.

By the Hearing Officer,

/s/ Marguerite M. Mitchell
Marguerite M. Mitchell

Date: June 28, 2021