

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

In Re: Student v.
Weston Public Schools

BSEA# 2202541

**CORRECTED RULING ON WESTON PUBLIC SCHOOLS' MOTION TO DISMISS
&
DECISION**

This Ruling and 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 U.S.C. 794), the state special education law (M.G.L. c.71B), and the regulations promulgated under these statutes.

On September 20, 2021, Parents filed a Hearing Request seeking public funding for an independent transition assessment of Student. Following Weston Public Schools' request for postponement of the Hearing, the matter was scheduled to proceed to Hearing on November 2 and 12, 2021.

On October 26, 2021, the day the exhibits and witness lists were due, Weston Public Schools' attorney emailed Parents' attorney offering to fund the evaluation requested by Parents, which was the subject of the hearing request. Weston however, did not agree to pay Parents' attorney's fees. On October 28, 2021, Parents wrote to the BSEA noting disagreement with Weston Public Schools' offer and requesting to proceed to Hearing so that findings of fact (regarding Weston Public Schools' alleged legal violations in denying funding for Parents' desired independent evaluation) could be entered. Since no agreement between the Parties was reached, Parents' request to proceed to Hearing was granted during a telephone conference call held on or about October 28, 2021.

On November 2, 2021, the day of the Hearing, Weston Public Schools filed a Motion to Dismiss. The Parties were allowed to argue the Motion orally and Parents were granted seven days (consistent with Rule VI: C¹ and D² of the *Hearing Rules for Special Education Appeals*) to submit a written response to the District's Motion to Dismiss. Over Weston's

¹ Rule VI: C provides that "written motions must be served on all parties and the Hearing Officer simultaneously. The party(ies) filing the motion must submit a signed statement that he/she has sent a copy of the motion to the opposing party(ies). The statement must indicate the method (e.g., fax, mail, hand-delivery) by which the copy was sent. Any party may file written objections to the allowance of the motion and may request a hearing on the motion within seven (7) calendar days after a written motion is filed with the Hearing Officer and the opposing party, unless the Hearing Officer determines that a shorter or longer time is warranted".

² Rule VI: D states: "If a hearing on a motion is warranted, a Hearing Officer shall give all parties at least three (3) calendar days' notice of the time and place for a hearing. A Hearing Officer may rule on a motion without holding a hearing if: delay would seriously injure a party; testimony or oral arguments would not advance the Hearing Officer's understanding of the issues involved; or a ruling without a hearing would best serve the public interest."

objection, testimony was taken that day, both with respect to Parents' Hearing Request, and in connection with Weston's Motion to Dismiss.³ The Hearing/Motion Session was conducted remotely.

Those present for all or part of the proceedings were:

Mother

Father

Student

Peter Hahn, Esq.

Attorney for Parent/Student

Angela B. Smagula

Attorney for Weston Public Schools

Carol Kusinitz

Registered Professional Reporter, Doris O. Wong Associates

The official record of the Hearing/ Motion Session consists of documents submitted by the Parents' and marked as Parents' Exhibits PE-1 to PE-20, Weston Public Schools' (Weston or District) Motion to Dismiss and attachment marked as SE-1, Parents' Opposition to Weston Public Schools' Motion, oral and written arguments, and Mother's testimony. Weston chose not to submit exhibits or a witness list five days before the Hearing and it did not present any witnesses at Hearing; it only sought to introduce the Motion to Dismiss with the attachment mentioned earlier.

As noted above, at Parents' request, the record remained opened for 7 additional days following taking of the testimony to allow Parents an opportunity to submit a written response to Weston's Motion to Dismiss received the morning of the Hearing. The record closed on November 9, 2021 upon receipt of Parents' Opposition to Weston's Motion to Dismiss.⁴

ISSUES:

1. Whether Weston's Motion to Dismiss should be allowed given its offer, prior to Hearing, to fund the independent evaluation sought by Parents.
2. Whether Parents are entitled to public funding of Student's independent transitional assessment.

³ Since the subject matter of the Motion and the Hearing were the same, in the interests of administrative expediency and to avoid further delays, the Hearing was allowed to proceed and testimony was taken *de bene*, subject to a determination on the Motion to Dismiss.

⁴ The forty days for issuance of the Decision was calculated from November 2, 2021.

PARTIES' POSITIONS:

Parents' Position:

Parents assert that they are entitled to public funding for an independent transitional assessment of Student requested in January of 2021. Parents state that Weston denied their request and failed to request a Hearing before the BSEA, as required by Massachusetts Special Education Regulations. Parents further argue that they are entitled to attorney's fees because several months elapsed between the date of the request for funding and Weston's agreement to do so, which occurred only five days prior to the Hearing (and was conditioned on Parents' waiving any claim for attorney's fees). By October 27, 2021, Parents had incurred significant attorney's fees and thus argued that they were entitled to reimbursement for the same. For these reasons, Parents rejected Weston's offer and requested to proceed to Hearing.

Parents acknowledge that pursuant to 20 U.S.C. 1415(i)(3)(B), they may receive reasonable attorney's fees if they prevail at Hearing, however that such an award may be limited if the district makes a written offer of settlement more than 10 days before the Hearing is initiated and the Hearing Officer finds that "the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement". See 20 U.S.C. 1415 (i)(3)(D)(i). Parents argue, though, that because Weston's offer was received fewer than 10 days before the Hearing, the aforementioned statute is not applicable.

Parents further state that Weston's Motion to Dismiss was not timely, and thus should be denied. They seek a full evidentiary Hearing and findings of fact that Weston violated Parents'/ Student's right to a publicly funded independent evaluation, so that they may then request an award of attorney's fees in Court.

Weston's Position:

In support of its Motion to Dismiss, Weston asserts that the BSEA lacks jurisdiction over attorney's fees and, given its offer to fund the independent evaluation which is the subject of the Hearing Request, Parents have failed to state a claim for which relief can be granted. As there is no case or controversy that can be heard by the BSEA, the matter is moot and must be dismissed.

FINDINGS OF FACT

1. Student is a 16-year-old resident of Weston, MA, who has been found eligible to receive special education services under the category of emotional disability (PE-1; Mother).
2. Student's IEP, covering the period from January 21, 2020 through October 17, 2020, called for full inclusion through participation in Weston High School's Bridge Program (SE-1). This IEP includes a Transition Planning Form dated February 6,

2020, which notes that Student is on the college track and that employment opportunities and community experiences will be explored in the future (SE-1). The plan lacked details regarding Student and transition planning. This IEP and placement were fully accepted by Parents on March 7, 2020, and later partially revoked in January of 2021 (PE-1; PE-2). (The record lacks evidence that any other IEP was promulgated by Weston for the period from October 2020 to October of 2021.)

3. Student's mother wrote to Jeffrey Dias, Team Chair Leader in Weston (copy to Lila Reid of Weston) on January 6, 2021, partially rejecting/ revoking Student's IEP for the period from January 2020 to October of 2020, and requesting a comprehensive transition assessment for Student. A Consent Form, dated January 5, 2021, included with the letter, provided consent for educational, psychological, learning and classroom assessments and an observation of Student, pursuant to his 3-year reevaluation, in addition to the TOWL-3, TOWL-4 and the comprehensive transition assessment (PE-2).
4. Mr. Dias acknowledged receipt of the letter and Consent Form on January 6, 2021. (PE-3).
5. Parent again wrote to Mr. Dias on March 19, 2021 in anticipation of the triennial meeting, requesting copies of Student's evaluation reports and data/ revised progress reports, as she had only received the psychological evaluation report conducted by Kristin Rivers (PE-4). Parents sought the reports/ data to better understand Student's then current presentation and ascertain whether Student qualified for compensatory services as a result of COVID (PE-4).
6. On March 22, 2021, prior to the Team meeting, Parent wrote to Mr. Dias informing him that Parents had not received the educational assessment, observation notes or the comprehensive transition assessment requested in January 2021 (PE-5).
7. Student's Team convened on March 22, 2021 with Mr. Dias, Parents, Student, Student's advocate and several Weston employees in attendance, including Student's guidance counselor, the school psychologist, the Bridge Program special education teacher and an intern (SE-6). Student's psychological and educational evaluations, progress and presentation were discussed. The transition assessment was never conducted despite Parents' request and consent, although Weston acknowledged having received same over two months earlier. Parent testified that according to Mr. Dias, Weston used to work with EDCO Collaborative to conduct the transition assessments but was no longer doing so. Instead, Weston was in the process of setting up a contract with ACCEPT, as the District was looking to revamp its transition planning/ programming (Mother). Parent raised concerns that no transition assessments/ planning had yet been done, and that Student would fall through the cracks (PE-6).
8. At the March 2021 Team meeting Parent proposed an independent transition planning evaluation, to which all of the Team members present acquiesced. Specifically,

Parents mentioned Judy Imperatore as the potential evaluator (PE-6). Parents' advocate's Team Meeting Notes reflect that the Team engaged in said discussion and specifically mention Ms. Imperatore (SE-7). However, no mention of the aforementioned independent transition assessment appears in Weston's Team Proposal Form (PE-8).

9. On March 24, 2021, Parent wrote to Mr. Dias confirming the Teams' discussion/agreement to fund Student's independent comprehensive transition assessment. Parents noted their intention to have the assessment include the following areas: living skills, independence skills, community access skills, self-determination, vocational skills, career development/ employability, training and education. Parents inquired whether the District wanted additional areas to be assessed, and mentioned Ms. Imperatore of Lynn Enterprises LLC and Kelly Challen of NESCA as potential evaluators (PE-9; PE-10). Later the same date, Parent wrote again to Mr. Dias to inform him of Ms. Challen's availability to conduct the evaluation in April of 2021 and she shared Ms. Challen's contact information so that Weston could proceed with contracting directly with her (PE-11).
10. Parent again wrote to Mr. Dias on March 26, 2021 seeking an update as to the District's efforts to engage NESCA for the comprehensive transition assessment and noting that Weston had not forwarded Parents' partial rejection of the IEP to the BSEA (PE-12). Mr. Dias responded that he had forwarded Parents' letter to Jennifer Truslow, Weston's Director of Student Services (PE-13).
11. On March 26, 2021 Parents wrote to Jennifer Truslow inquiring how to move forward with Student's independent transition assessment (PE-14). Ms. Truslow responded later that day that Weston

...want[s] to clarify that this is not an Independent Educational Evaluation (IEE). The district has agreed to do the evaluation. We contract with ACCEPT Collaborative for transition/vocational evaluations. Once you have signed the consent, we contact them and they work on scheduling times with the student at the school or at their office...(PE-15).
12. On April 2, 2021, Parents filed a complaint with the Department of Elementary and Secondary Education (DESE) Problem Resolution System (PRS) regarding Weston's denial of Student's independent transition evaluation and other issues (PRS #5522) (Mother). PRS later entered a finding of noncompliance as to the independent transition evaluation against Weston (Mother).
13. On April 15, 2021, Weston forwarded a proposed IEP covering the period from March 22, 2021 to March 21, 2022, and a completed Transition Planning Form to Parents (SE-16).

14. On May 20, 2021, Parents wrote to Mr. Dias and attached a four page letter containing their partial rejection of Student's IEP and acceptance of the proposed placement and services (per the Service Delivery Grid), further noting that they did not receive the IEP until April 20, 2021. Among Parents' rejections was Weston's failure to complete the comprehensive transition assessment requested in January 2021, and its failure to acknowledge the Team's agreement to fund the independent comprehensive transition assessment at the Team meeting in March of 2021 (PE-17).
15. On or about September 10, 2021, Parents' attorney contacted Weston's attorney requesting that Weston arrange for and fund Student's evaluation at NESCA (Mother).
16. A Corrective Action Report referencing PRS #5522 dated September 20, 2021 notes at paragraph C that,

[Weston] must provide the complainants written notice regarding the complainant's request for specific written language evaluations (TOWL). Provide the Department with a copy of the notice sent to the complainants (either a Notice of Proposed District Action or Notice of the District's Refusal to Act). The District must provide notice, consistent with 603 CMR 28.04(5)(d), indicating whether the District will publicly fund the requested Independent Educational Evaluation (IEE) or proceed to the Bureau of Special Education Appeals. Please provide the Department with a copy of the District's notice to the parents (PE-18).

Weston responded that the TOWL had been performed as part of the three-year re-evaluation and that the District had proposed to have ACCEPT Collaborative conduct the transition assessment, noting that Parents had not sent back the consent form.⁵ (The record lacks information that Weston provided the requested copy of the District's notice to the parents, presumably because it did not exist). Additionally, the District noted that as also directed by PRS, it had trained its staff relative to 603 CMR 28.04(5)(d) on September 13, 2021 (PE-18).

17. Following the PRS report, Weston developed systemic procedures to address parental requests for additional evaluations/ assessments, inclusive of contacting the parent within two days to discuss the desired evaluation and if the parent continued to request the evaluation Weston would complete it within 30 days; if Weston refused, the Director or Assistant Director of Student Services would be contacted so that a Hearing at the BSEA could be requested within five school days (PE-19).

⁵ Notably this response does not contain the specific dates on which the parental request was received or the date on which the District offered to conduct its transitional assessment evaluation.

18. Weston's September 2011 Special Education Policy Manual addressing Independent Educational Evaluations, provides in pertinent part that

If the parent is requesting an evaluation in an area not previously assessed by the district or is unwilling to share the appropriate financial documentation, Weston either pays for the IEE or, within five school days, proceeds to the BSEA to demonstrate that Weston's evaluation was appropriate and comprehensive. (PE-20)

19. On September 20, 2021, Parents requested a hearing with the BSEA.

20. On or about October 26, 2021, seven calendar days before the first day of Hearing, Weston offered to fund Student's independent transitional assessment at NESCA (\$4,100.00) (SE-1). Parents requested reimbursement for attorney's fees as part of the offer of settlement and Weston declined this request.

21. Weston has not conducted any transition assessments since Student turned 14 years old (Mother).

CONCLUSION:

The Parties agree that Student is an IDEA eligible individual, consistent with the Individuals with Disabilities Education Act⁶ (IDEA) and Massachusetts special education law.⁷ The issue in the instant case is a narrow one, limited to Parents' request for public funding of an independent evaluation of Student. As noted supra, both Parents' Hearing Request and Weston's Motion to Dismiss will be addressed herein.

I first address Weston's Motion to Dismiss.

A. Motion to Dismiss:

Consistent with the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3) and Rule XVII A and B of the BSEA *Hearing Rules for Special Education Appeals*, a motion to dismiss may be allowed if the party requesting the hearing fails to state a claim upon which relief can be granted. As discussed in multiple prior BSEA Rulings, this rule is analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and as such the same standards used by the courts are generally used by BSEA hearing officers in deciding motions to dismiss based on allegations of failure to state a claim.

⁶ 20 USC §1400 *et seq.*

⁷ MGL c. 71B.

What is required to survive a motion to dismiss “are factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”⁸ In evaluating the complaint, 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.”⁹ These “[f]actual allegations must be 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

In order to survive a motion to dismiss, the relief sought must be relief a hearing officer is able to grant consistent with federal and state statutes and regulations addressing special education, i.e., the IDEA, M.G.L. c.71B, and Section 504 of the Rehabilitation Act of 1973. See *Calderon-Ortiz v. Laboy-Alvarado*, 300 F.3d 60 (1st Cir. 2002); *Whitinsville Plaza Inc. v. Kotseas*, 378 Mass. 85, 89 (1979); *Norfolk County Agricultural School*, 45 IDELR 26 (2005). If the facts alleged by the party opposing the motion to dismiss (herein Parents) raise even the plausibility of a viable claim giving rise to some form of relief under any of the aforementioned statutes, the case may not be dismissed. See, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).¹¹

With this guidance I turn to the case at bar and consider the facts in the light most favorable to Parents.

Weston’s Motion to Dismiss is based on the BSEA’s lack of jurisdiction over attorney’s fees and Parent’s failure to state a claim for which relief can be granted. Weston argued that since it had made an offer to fund the independent evaluation sought in the hearing request (i.e., a transitional assessment to be performed by NESCA), there was no longer a case or controversy that could be heard by the BSEA, and as such the matter was moot.¹² The offer to fund the evaluation was communicated to Parents via email to their counsel on October 26, 2021. Weston then contacted NESCA to arrange for the evaluation.

Weston is emphatic that the sole remaining issue, attorney’s fees, is not something that can be entertained at the BSEA, a forum that also lacks the ability to issue declaratory judgment. According to Weston, Parents’ rejection of its offer stems from frustration that Weston’s offer prevents opposing counsel from obtaining prevailing party status.

Weston argues that to achieve prevailing party status under the IDEA (per the First Circuit), “judicial imprimatur” in the form of “court-ordered” change in the legal relationship of the parties is required. Weston relies on *Doe v. Boston Public Schools*, 358 F.3 2021 (1st Cir. 2004), a case in which parents/ student accepted an IEP with an offer of placement made by the school district shortly before the start of the Hearing, and later unsuccessfully sought an award of attorney’s fees in court. According to Weston, relying on the Supreme

⁸ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

⁹ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

¹⁰ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

¹¹ Denying dismissal if “accepting as true all well-pleaded factual averments and indulging all reasonable inference in the plaintiff’s favor. . . recovery can be justified under any applicable legal theory”.

¹² Weston clarified that the decision to pay for the evaluation was not an admission of liability, but rather a “strategic business litigation decision”.

Court's definition of the term "prevailing party," in *Buckhannon Bd. Care Home, Inc. v W. Va. Dept't of Health and Human Res.*, 532 U.S. 598, at 603-604, 121 S. Ct. 1835, the *Doe* Court conclude that under certain federal fee-shifting statutes (such as the IDEA), attorneys' fees could only be awarded to parties who received a final judgment on the merits or who obtained a court-ordered consent decree. See *Doe*, 264 F.Supp.2d at 67-71 (citing *Buckhannon*, 532 U.S. at 604-05, 121 S.Ct. 1835). Since *Doe* did not meet either criterion, she was not eligible for an award of fees (*Id.* at 72).

Parents in turn argue that *Doe* is not applicable here because contrary to *Doe*, Parents in the instant case did not accept the offer made by Weston and instead proceeded to Hearing. Moreover, Parents stressed that Weston's settlement offer was not made 10 days before Hearing and because it did not include attorney's fees, Parents were justified in rejecting it. Specifically, Parents noted that while other circuits have ruled on scenarios similar to the one in the instant case, neither the First Circuit nor the US Supreme Court has "definitively ruled on whether parents are allowed to proceed to a hearing after rejecting an offer as untimely, substantially justified for not including attorney's fees, or both, to earn prevailing party status".¹³

Parents further highlight language in *Gary G v. El Paso Ind. Sch. Dist.*, 632 F.3d 201 (5th Cir. 2011),

IDEA provides that a party may not recover attorneys' fees for services performed subsequent to a written settlement offer being made, if the relief obtained is not more favorable than the offer. 20 U.S.C. 1415(i)(3)(B)(i). In *Richard R.*, our court ruled that this provision "tacitly assumes that a party may reject such an offer and nevertheless attain prevailing party status: the statute permits an award of attorney's fees for work performed prior to the written offer of settlement, and prevailing party status is a predicate for any such award. See U.S.C. 1415(i)(3)(B)(i). The D.C., Third and Seventh Circuits have held a party who rejects a settlement offer and later obtains no more than what was offered "still 'prevails' by obtaining judicially sanctioned relief". See *Alegria ex rel. Alegria v. District of Columbia*, 391 F.3d 262, 267 (D.C. Cir. 2004); *T.D. v. LaGrange Sch. Dist. No. 102*, 369, 476 (7th Cir. 2003); *John T. ex rel. Paul T. v. Delaware County Intermediate Unit*, 318 F.3d 545, 557 (3rd Cir. 2003).

According to Weston, Parents appear to argue a long-rejected theory of recovery known as the catalyst theory¹⁴, affirmatively rejected by *Buckhannon*, which rejection was adopted by

¹³ Specifically, Parents rely on *Gary G v. El Paso Ind. Sch. Dist.*, 632 F.3d 201 (5th Cir. 2011); *A.O. v. El Paso Ind. Sch. Dist.*, 368 Fed.Appx. 539 (5th Cir. 2010); *El Paso Indep. Sch. Dist. v. Richard R.*, 591 F.3d 417 (5th Cir. 2009) noting that "a parent in an IDEA proceeding has a right to reject a settlement offer and proceed to a hearing, and that a school district's claim of non-justiciability, lack of subject matter jurisdiction, and mootness are unavailing."

¹⁴ The catalyst theory asserted that "a party is a prevailing party if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct". *Buckhannon*, 532 U.S. at 601,

the First Circuit in IDEA matters in the *Doe* case. See *Doe*, 358 F.3d at 25. Weston concludes that given its agreement to fund Parents' desired evaluation there is currently no case or controversy, thus the BSEA no longer has jurisdiction, and because there is no claim upon which relief can be granted, the instant matter must be dismissed.

Parents disagree arguing that Weston should not be allowed to evade its legal responsibility for months, force them to retain counsel and prepare for Hearing, only to make an offer at the last moment which does not include attorney's fees. Allowing Weston to do so, Parents assert, incentivizes unfair behavior and punishes Parents.

It is curious that the Parties were unable to settle their case and reach an agreement over attorney's fees prior to Hearing. While in retaining counsel Parents must generally have an expectation of paying fees to obtain a desired result, here, Weston must have known that failing to make an offer of settlement at least 10 days before the Hearing per 20 USC 1415 (i)(3)(D)(i), inclusive of attorney's fees would not fully resolve the dispute between the Parties. (See 20 USC 1415(i)(3)(B) allowing Parents to receive reasonable attorney's fees if they prevail at Hearing and 20 USC 1415 (i)(3)(D)(i) limiting said award of attorney's fees if the district makes a written offer of settlement at any time *more than 10 days before the Hearing is initiated*. [Emphasis supplied.]) While well intended, Weston's offer of settlement, which Parents rejected, was too little, too late, and left the door open for Parents to try their case before the BSEA, a forum that has jurisdiction over procedural and substantive violations of the IDEA and the Massachusetts Special Education Law. The dispute between the parties not having been fully resolved, Parents were entitled to proceed to Hearing.

Weston's Motion to Dismiss is **DENIED**.

B. Parents' right to public funding for Student's independent Transition Assessment:

The IDEA, MGL c. 71B and the regulations promulgated under said statutes grant parents the right to publicly funded independent evaluations for students in certain instances.

Generally, in addressing independent evaluations, 603 CMR 28.04(5) provides that,

Upon receipt of evaluation results, if a Parent disagrees with an initial evaluation or reevaluation completed by the school district then the parent may request an independent education evaluation.

Moreover, 603 CMR 28.3(5)(d) provides that,

If the parent is requesting an independent education evaluation in an area not assessed by the school district, the student does not meet income eligibility standards, or the family chooses not to provide financial documentation to the district establishing family income level,

the school district shall respond in accordance with the requirements of federal law [34 CFR 205.2]. Within five school days, the district shall either agree to pay for the independent education evaluation or 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 education evaluation requested by the parents. [Emphasis supplied].

The aforementioned regulation unequivocally provides that the district *shall* either pay for the evaluation requested by the parent *or* request a Hearing before the BSEA within five school days of the date on which it receives the parent's request for the independent evaluation if it wants an opportunity to challenge the parent's request. Failure to request a hearing within the prescribed five days will result in the school district's forfeiting its right to contest the parent's request, leaving the district with no other option but to fund the evaluation requested by the parent.

As the moving party in this matter, Parents carry the burden of persuasion and must prove their case by a preponderance of the evidence. *Shaffer v. Weast*, 126 S.Ct. 528 (2005). I find that Parents have met their burden regarding Student's entitlement to funding of the independent evaluation sought by Parents in the winter of 2021.

The record shows that Weston disregarded its legal obligation toward Student several times since January of 2021. First, it neither conducted the comprehensive transitional assessment it was responsible to complete within 30 days of Parents' request nor did it notify Parents in a timely manner that it would not or could not do so. Weston simply did nothing, waiting until the March 22, 2021 Team meeting to inform Parents of the contractual issues with EDCO and the intention to enter into a new contract with ACCEPT for conducting transitional assessments.

When the District's difficulties with conducting the assessment were discussed, the Team agreed to fund an independent comprehensive transitional assessment, but then ignored Parents' request to contract with NESCA. Almost one month later, Weston informed Parents that the District would instead have ACCEPT conduct the transitional assessment as soon as Parents signed the consent form.

In failing to conduct the requested evaluation in January of 2021 and failing to request a Hearing with the BSEA within five business days of receipt of Parents' request, Weston abrogated its responsibilities pursuant to 603 CMR 28.3(5)(d). Weston again violated Student's right to the comprehensive transition assessment when Parents again requested that it fund the evaluation in March of 2021. Both times the District failed to fulfill its obligations pursuant to 603 CMR 28.3(5)(d). By March of 2021 Weston had no other choice but to fund Student's evaluation at NESCA.

Moreover, it is troubling that Weston unilaterally chose to override the determination made by Student's Team on March 22, 2021. Nothing in federal or state statutes or regulations authorizes school administrative personnel to unilaterally override a Team's unanimous determination.¹⁵

Lastly, despite knowing that the Hearing in the instant matter would proceed on November 2, 2021, Weston did not make a settlement offer 10 or more days before the Hearing in contravention of 20 USC 1415 (i)(3)(D)(i). Only seven days before the Hearing Weston agreed to fund Student's independent evaluation, albeit not Parents' attorney's fees. Since the Parties did not reach full agreement over the entire dispute (including funding for the attorney's fees), and in light of Weston's multiple violations regarding the evaluation, Parents rejected the offer for settlement and chose to proceed to Hearing.

Student is entitled to public funding for the comprehensive transition assessment at NESCA to which the Weston's TEAM agreed on March 22, 2021.

ORDER:

1. Weston's Motion to Dismiss is **DENIED**.
2. Weston shall fund Student's independent transitional assessment at NESCA forthwith.

By the Hearing Officer,

Rosa I. Figueroa

Rosa I. Figueroa

Dated: December 13, 2021

¹⁵ It is also curious that Weston's Corrective Action Report makes no mention of what occurred in January 2021. While it mentions that it offered to conduct the transition assessment through ACCEPT, it fails to include the required form informing Parents of its denial of their request, fails to mention that it made said offer almost one month following Parents' March 2021 request, and then goes on to state that Weston is waiting for Parents to consent to the evaluation in order to proceed with the same. Since the record lacks a copy of PRS' report, it is difficult to form a whole picture of DESE's findings.

