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

In re: Mark[1] BSEA #1908079

RULING ON PARENT'S SECOND MOTION TO DISMISS

This matter comes before the Hearing Officer on Parent's second *Motion to Dismiss* [hereinafter "*Second Motion*"] the *Hearing Request* filed by Whitman-Hanson Regional School District ("the District," or Whitman-Hanson) regarding Parent's son Mark. The District filed its *Hearing Request* on March 8, 2019, seeking an order that its most recently proposed Individualized Education Program (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 evaluation for Mark at a rate that exceeds the state-approved rate. Parent filed her first *Motion to Dismiss* [hereinafter "*Motion*"] on March 20, 2019, arguing because she has rescinded her request for an independent educational evaluation (IEE) at public expense, and because Whitman-Hanson has not alleged a violation of the Individuals with Disabilities Education Act (IDEA), there is no basis for the District's *Hearing Request*.

On March 22, 2019, the undersigned Hearing Officer issued an Order concluding that the District's factual allegations plausibly suggest an entitlement to relief and, consequently, denying Parent's *Motion*.[2] The matter was scheduled for a Pre-Hearing Conference on April 22, 2019 and a Hearing May 28 and 29, 2019, in accordance with Whitman-Hanson's assented-to request.

On April 5, 2019, Parent filed her *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 Whitman-Hanson's *Hearing Request* be dismissed with prejudice.

On April 8, 2019, Whitman-Hanson filed its Objection to Parent's *Second Motion*. The District acknowledged that Parent had accepted the proposed IEP, but highlighted that the acceptance was conditional, given Parent's comment on the IEP. With its objection, Whitman-

[1] "Mark" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in the documents available to the public.

[2] In the Order denying Parent's *Motion to Dismiss*, the undersigned Hearing Officer noted, "[T]o 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 this IEE will be dismissed, unless the District withdraws that claim beforehand."

Hanson submitted an email exchange between Parent and a school official which, it asserts, demonstrates both that the proposed placement has not been accepted and that Parent opposes the request to send additional information regarding Mark to that placement.[3]

Neither party has requested a hearing on Parent's *Second Motion*, and as testimony or oral argument would not advance the Hearing Officer's understanding of the issues involved, this Ruling is being issued without a hearing pursuant to *Bureau of Special Education Appeals Hearing Rule VII(D)*. The factual background and procedural history of the matter is set forth in detail in my *Ruling on Parent's Motion to Dismiss*, issued March 22, 2019; I do not repeat it here. For the reasons set forth below, Parent's *Second Motion to Dismiss* is hereby DENIED.

DISCUSSION

Pursuant to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3) and Rule XVI(B)(4) of the BSEA *Hearing Rules for Special Education Appeals*, a hearing officer may allow a motion to dismiss if the party requesting the appeal fails to state a claim on which relief can be granted. This rule is analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure and as such hearing officers have generally used the same standard as the courts in deciding motions to dismiss for failure to state a claim. Specifically, what is required to survive a motion to dismiss "are factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief."[4] In evaluating the hearing request, 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."[5] 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). . . ."[6]

To survive a motion to dismiss, the District need only assert "factual allegations plausibly suggesting . . . an entitlement to relief."[7] In determining whether it has met this burden I must take the District's allegations as true, as well as any inferences that may be drawn from them, even if the allegations are doubtful in fact.[8]

First, I address Parent's assertion that because Whitman-Hanson has not alleged a violation of the Individuals with Disabilities Education Act (IDEA), there is no basis for the District's *Hearing Request*. Pursuant to Massachusetts regulations, the BSEA has jurisdiction over requests for hearing filed by a "parent or school district . . . on any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state[9] and federal law,[10] or procedural protections of state and federal law for students with disabilities."[11] The

[3] It appears from this email exchange that Whitman-Hanson Regional School District initially sent redacted records to the proposed placement.
[4] *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).
[5] *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).
[6] *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).
[7] See *Iannocchino*, 451 Mass. at 636 (internal citation and quotation marks omitted).
[8] See *Golchin*, 460 Mass. at 223; *Blank*, 420 Mass. at 407.
[9] See M.G.L. c. 71B; 603 CMR 28.00.
[10] See 20 U.S.C. 1401; 34 CFR 300.

District has requested a finding from the BSEA that the IEP it has proposed for the period from April 6, 2018 to April 8, 2019, as amended, is reasonably calculated to provide Mark with a FAPE.[12] This request concerns Mark's IEP and placement and as such, falls within the BSEA's jurisdiction.

Moreover, in its *Hearing Request*, Whitman-Hanson alleges that it has convened the Team at least eight times between June 2018 and February 2019 to consider Parent's ongoing objections to its revised IEPs; proposed a number of placements to assist Mark in returning to school; and worked hard to put tutoring into place for him in the meantime. Yet he remains out of school.

As I concluded in my *Ruling* on Parent's first *Motion to Dismiss*, taking the District's allegations as true, I find that they do plausibly suggest an entitlement to the relief it seeks: a finding that its proposed IEP (including placement) is reasonably calculated to provide Mark with a FAPE. Because a Motion to Dismiss is evaluated solely by reference to the pleadings, the outcome of any future such motions in this matter will be the same. Should either party wish to file an additional pre-trial outcome-determinative motion, it will be treated as a motion for summary decision, to be governed by 801 C.M.R. 1.01(7)(h).

CONCLUSION

Upon consideration of Parent's *Second Motion to Dismiss* the District's *Hearing Request*, I find that Whitman-Hanson's request for hearing is properly before me. Should this case proceed to hearing, the District will have the burden of establishing that it acted in accordance with the law and offered FAPE to Mark through its proposed IEP and proposed placement. To the extent the District's claim regarding Parent's request for an IEE remains, Whitman-Hanson will have the burden of establishing that Parent does not qualify for an IEE at public expense and/or that its evaluations of Mark were comprehensive and appropriate.

ORDER

Parent's *Second Motion to Dismiss* Whitman-Hanson Regional School District's *Hearing Request* is hereby DENIED.

The matter is continued to April 22, 2019 for a Pre-Hearing Conference, which will take place at 11:00 AM at the Hanson Public Library, 132 Maquan Street, Hanson. The purpose of a Pre-Hearing Conference is to clarify the issues in dispute and discuss the status of the case, including the possibility of settlement.

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[11] See 603 C.M.R. 28.08(3)(a).

[12] Whitman-Hanson's *Hearing Request* initially sought a finding that it was not required to fund an additional Independent Educational Evaluation (IEE). Parent asserted, in her initial *Motion to Dismiss*, that she had withdrawn her request for the IEE. Neither party addressed this claim in the instant motion or objection thereto. As such, I do not address it here.

The Hearing will take place May 28 and 29, 2019 at the same location, starting at 10:00 AM each day.

Witness lists and exhibits are due by close of business May 20, 2019.

By the Hearing Officer:

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Amy M. Reichbach
Dated: April 16, 2019