

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

In Re: Student

&

BSEA #2005314

Haverhill Public Schools

RULING ON SCHOOL'S MOTION FOR PARTIAL SUMMARY JUDGMENT

In the instant case, the Haverhill Public Schools (Haverhill or HPS) has filed a *Motion for Summary Judgment* in which it asserts that it has agreed to provide Parent with all of the prospective relief that she seeks on behalf of Student, namely, funding for a day placement at a private school chosen by Parent. For reasons discussed in this *Ruling*, Haverhill's *Motion* is GRANTED with respect to this prospective relief.

LEGAL FRAMEWORK

Summary judgment is available at the BSEA if "there is no genuine issue of fact relating to all or part of a claim or defense and [the moving party] is entitled to prevail as a matter of law..." 801 CMR 1.01(7)(h). In determining whether to grant summary judgment, BSEA hearing officers are guided by Rule 56(a) of the Federal Rules of Civil Procedure, which provides that summary judgment shall be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.*

The BSEA is also informed by Rule 56(a) of the Massachusetts Rules of Civil Procedure, which provides that summary judgment may be granted only if the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* See also *Rulings on Motions for Summary Judgment* in: *Zelda v. Bridgewater-Raynham Public Schools and Bristol County Agricultural School*, 12 MSER 4 (Byrne, 2006); *In Re Westwood Public Schools*, 16 MSER 378 (Figueroa, 2010); *In Re: Mike v. Boston Public Schools*, 12 MSER 364 (Oliver, 2010); *In Re Bridgewater-Raynham Public Schools*, 19 MSER 17 (Figueroa, 2013). Facts are considered "in the light most favorable to...the non-moving

party.” *Xiaoyan Tang v. Citizens Bank, N.A.*, 821 F. 3d 206 (1st Cir. 2016), quoting *Perez-Cordero v. Wal-Mart P.R. Inc.*, 656 F. 3d 19, 20 (1st Cir. 2011).

“An issue is ‘genuine’ if it can ‘be resolved in favor of either party,’ and a fact is ‘material if it ‘has the potential of affecting the outcome of the case.’” *Tang, supra*, quoting *Perez-Cordero, supra* at 25, and *Calero-Cezero v. U.S. Dept. of Justice*, 355 F.3d 6, 19 (1st Cir. 2004). The moving party has the initial burden of producing evidence that there is no dispute of material fact. Once the moving party has done so, the burden then shifts to the party opposing summary judgment to establish, via affidavits or other documents, specific facts showing that there is a “genuine issue for trial.” *Celotex Corp. v. Catrell*, 477 U.S. 242, 248-50 (1986); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249 (1986); *Kathleen Burns v. Johnson*, 2016 WL 3675157 (July 2016).

UNDISPUTED FACTS

The following facts are not in dispute, and are derived from the hearing request, Haverhill’s response thereto, the District’s *Motion for Summary Judgment*, supporting Memorandum and Exhibits A-J as well as Parent’s *Opposition to Haverhill’s Motion*. These facts are considered in the light most favorable to Parent as the non-moving party.

1. Student is a five-year-old child with disabilities who lives with Parent in Haverhill, MA. At all relevant times, Student was and is eligible for special education services from the Haverhill Public Schools pursuant to the Individuals with Disabilities Education Act (IDEA)¹ and the Massachusetts special education statute.²
2. On December 4, 2019, Parent filed a hearing request with the Bureau of Special Education Appeals (BSEA) in which she alleged multiple substantive and procedural violations of Student’s rights under the above-referenced statutes. Parent’s 14-item claim for relief included requests for compensatory services as well as for prospective relief including additional evaluations and “an appropriate IEP and placement” for Student.
3. The former hearing officer³ held a conference call with the parties on December 26, 2019, during which Parent clarified that she was seeking a day placement for Student at New England Pediatric Care (NEPC). Counsel for Haverhill stated that the District would make a referral to NEPC on behalf of Student.

¹ 20 USC 1400 *et seq.*

² MGL c. 71B

³ This case was administratively reassigned to the undersigned hearing officer on June 14, 2020.

4. On December 27, 2019, HPS sent a referral packet to NEPC. On January 2, 2020, NEPC informed HPS that it would not immediately accept Student; however, NEPC proposed conducting its own evaluations of Student in the areas of speech, occupational therapy (OT) and physical therapy (PT), and drafting an IEP. If both Parent and Haverhill were to sign and accept this proposed IEP, NEPC would “revisit the child’s admission into [its] program.”
5. Parent consented to NEPC’s proposed evaluations, which were completed on February 4, 2020 and forwarded to Haverhill on or about February 19, 2020.
6. On February 25, 2020, HPS convened a Team meeting to discuss NEPC’s evaluation results and recommendations for service delivery. NEPC stated that if Parent was satisfied with the evaluations and proposed services, it would advance Student’s referral to its admissions committee; if not, NEPC would not advance the referral.
7. Parent requested time to consider the NEPC referral. Parent and HPS agreed that Parent would contact Haverhill’s counsel on February 27, 2020 to report her decision on proceeding with the NEPC referral. If Parent wished to proceed, the District agreed to develop an IEP reflecting NEPC’s service delivery recommendations. If Parent elected not to pursue NEPC’s proposal, the parties scheduled a Team meeting for March 3, 2020 to develop an IEP.
8. On February 27, 2020, Parent informed Haverhill’s counsel that she would like the District to (1) place Student at NEPC for half-days only; (2) provide Student with compensatory services in the afternoon at her home; and (3) have her private-duty nurse accompany Student on the transportation vehicle and be compensated by the District. Parent requested that this arrangement be in place for six months, after which Student would transition to full days at NEPC.
9. On February 28, 2020, Haverhill informed Parent that it would agree to each of Parent’s requests, referred to above. The parties outlined the terms of their agreement in a conference call with the former hearing officer and agreed to finalize the terms of the agreement with the assistance of a BSEA mediator. This mediation was cancelled as the result of the COVID-19 pandemic.
10. On April 3, 2020, Haverhill issued an IEP calling for a half-day placement at NEPC, per Parent’s request.
11. On or about June 12, 2020, Haverhill provided Parent with a revised service delivery grid calling for a full-day placement. The cover letter

accompanying the revised service delivery grid stated that the District's intent was to "give [Parent] the choice of a full-day or half-day program." NEPC had previously agreed to this arrangement.

12. During a telephonic motion session held on June 29, 2020, HPS agreed that Student could begin attending NEPC on a half-day basis,⁴ progressing to full days after six months or when appropriate.
13. Haverhill represents that its proposal of the above-described IEP and placement at NEPC is not contingent upon Parent's waiver of any of her compensatory claims.

DISCUSSION

After reviewing the parties' submissions, I conclude that there is no dispute of material fact, and that Haverhill is entitled to summary judgment in its favor as a matter of law because it has offered Parent all of the prospective relief that she seeks with respect to Student's placement; therefore, Parent's request for prospective relief is moot.

In her hearing request, Parent sought an order from the BSEA directing Haverhill to provide Student with "appropriate IEP and placement," which Parent later clarified to mean a day placement at NEPC. Upon learning of Parent's specific placement request, HPS promptly referred Student to NEPC, which conducted its own evaluations and ultimately agreed to enroll Student into its day program.

Parent then sought to have Student attend NEPC for half days for her initial 6 months in the program as well as to have Haverhill pay for Student's private-duty nurse to accompany Student on the transportation vehicle during that period. Haverhill, with the assent of NEPC, agreed to this arrangement, and also agreed that Parent could elect to expand Student's attendance to full days at a later time. In sum, very shortly after Parent filed her hearing request, the District offered Parent all of the relief she sought with respect to Student's prospective placement.

Neither courts nor the BSEA may render decisions where there is no live controversy between the parties such that the case becomes moot. See, e.g., *Thomas R.W. ex rel Pamela R. v. Mass. Dept. of Education*, 130 F.3d 477 (1st Cir. 1997), and cases cited therein. In this case, Parent's request for a day placement at NEPC became moot when Haverhill offered to provide that placement. In other words, Haverhill's offer to Parent of NEPC, which was exactly the placement she had requested for her daughter, eliminated the controversy between the parties as to Student's prospective placement. In the

⁴ On information and belief, NEPC is not currently admitting new day students into its building because of the pandemic, but is providing remote learning of some type to enrolled day students.

absence of such controversy, summary judgment on the issue of prospective relief in the form of an “appropriate IEP and placement,” is warranted.

CONCLUSION AND ORDER

For the reasons stated above, Haverhill Public Schools’ *Motion for Partial Summary Judgment* is GRANTED with respect to Parent’s request for prospective relief in the form of an “appropriate IEP and placement.” Parent’s claims for compensatory relief are preserved for the hearing that is now scheduled for July 9, 10 and 14, 2020. A separate order clarifying the scope of the compensatory claims will be issued shortly.

By the Hearing Officer,

/s/ Sara Berman

Sara Berman
Dated: June 30, 2020