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

In re: Foxborough Public Schools v. Student BSEA # 2109192

RULING ON FOXBOROUGH PUBLIC SCHOOLS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Hearing Officer on the *Motion for Summary Judgment* (Motion) filed by the Foxborough Public Schools (the District) on May 5, 2021. In it, the District asserts Parent is not entitled to public funding for an independent extended evaluation at TEC Collaborative or to an independent educational evaluation (IEE). In support of its *Motion*, the District alleges that: 1) Parent has refused consent to the District's request to conduct a clinical evaluation of Student, which is a pre-requisite for entitlement to a publicly funded IEE; and 2) the Team has not in fact proposed an extended evaluation for Student, and an extended evaluation may not be used as a diagnostic placement. The *Motion* was unopposed.

Neither party has requested a hearing on the *Motion*. Because neither testimony nor oral argument would 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).

For the reasons set forth below, the District's *Motion* is hereby DENIED.

I. ISSUES

At issue here is:

1. Whether, as a matter of law, Parent is entitled to an independent clinical evaluation at public expense; and
2. Whether, as a matter of law, Parent is entitled to an independent extended evaluation at TEC Collaborative.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY[1]

1. Student is a 14.8 year old, 9th grade student, who currently attends Foxborough High School. Student struggles with severe depression.
2. On January 8, 2021, while Student was undergoing an initial evaluation for special education, Parent requested that Student be placed in a "45-day evaluative placement." Her request was denied.

[1] The information in this section is drawn from the parties' pleadings and is subject to revision in further proceedings.

3. On March 17, 2021, Student was found eligible for special education services under the Emotional disability category.

4. The initial assessments used to determine Student's eligibility included a psychoeducational evaluation completed by school psychologist, Jacqueline Simmons. She utilized the following assessments:
    - Record Review/ Developmental History/Current Level of Performance
    - Wechsler Intelligence for Children -V (WISC-V)
    - Wechsler Individualized Academic Test 4 (WIAT 4)
    - Behavioral Inventory of Executive Functioning- Second Edition (BRIEF2)
    - Behavior Assessment Scales for Children – Adolescent, Third Edition (BASC3 –A)
    - Reynolds Adolescent Depression Scales Second Edition (RADS-2)
    - Revised Children's Manifest Anxiety Scale – Adolescent Version (RCMAS-2)
    - Clinical Interview

    In her report, Ms. Simmons offered a summary of academic, executive functioning and social/emotional and behavioral findings. She also made specific recommendations, including school-based accommodations.

5. The Team meeting summary dated March 17, 2021 states:
    Additional Information:
    - Recommendation for an Extended Clinical Evaluation. To be scheduled upon return of consent.
    - Upon completion of Extended Clinical Evaluation, the team will reconvene for results and discussion of next steps.

6. On March 30, 2021, the District issued an N1 stating, "As a result of the team meeting, the Team would like additional clinical information which will be obtained through a clinical assessment to fully understand [Student's] needs."

7. Subsequently, Parent requested an "Extended Evaluation in a therapeutic setting, specifically TEC High School".

8. In response to Parent's request, on April 20, 2021, the District filed a *Hearing Request* in the above-referenced matter asking the BSEA to deny public funding for the Independent Extended Evaluation requested by Parent. The District also requested that if, in the alternative, Parent's request is construed to request an independent clinical evaluation, the BSEA deny such request as well pending the Parent's consent to the District's proposed evaluation and the completion thereof.

9. On April 26, 2021, Parent responded alleging in part[2] that an additional clinical assessment is unnecessary since the assessment:

> "…would garner the same information [as Ms. Simmons's assessment] and provide no insight into how to support student throughout her day on a daily basis. Understanding a student's psychological profile is not necessarily a means to determining how to support that student in an educational setting ….
>
> Parent believes an extended evaluation in a therapeutic setting, specifically TEC High School would provide the intensive level of support required to help Student attend school and complete work more consistently. More importantly it can offer in the moment support, unlike Foxboro High School has been able to do, and help Student problem solve and use coping strategies in real time. This is the information that is necessary in order to determine if, when and how Student can appropriately be serviced in the public high school setting."

10. In her *Response,* Parent requested that the Hearing Officer find TEC High School is the appropriate course for extended evaluation and if a therapeutic placement is recommended as an outcome of the evaluation, that an order be issued to compel the District to fund TEC High School.

III. LEGAL STANDARD

A. Legal Standard for Motion for Summary Judgment

Pursuant to 801 CMR 1.01(7)(h), summary decision may be granted when 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."[3] As with motions to dismiss, in determining whether to grant summary judgment, BSEA hearing officers are guided by Rule 56 of the Federal and Massachusetts Rules of Civil Procedure, which provide 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."[4]

The party seeking summary judgment must first demonstrate, with the support of its documents (pleadings, affidavits, and other evidence), that there is no genuine issue of fact relating to the claim or defense. The moving party bears the burden of proof, and all evidence and inferences must be viewed in the light most favorable to the party opposing summary judgment.[5]

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[2] Parent also alleges that the special education services and supports currently provided to Student at Foxborough High School are insufficient and do not provide her with FAPE. This issue of whether Student's proposed IEP provides her with a FAPE in the LRE is not the subject of this Ruling.

[3] 801 CMR 1.01(7)(h).

[4] *Id*.

[5] *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252 (1986); see also *Zelda v. Bridgewater-Raynham Public Schools and Bristol County Agricultural Schools*, BSEA No. 06-0256 (Byrne, 2006); In *Re Westwood Public Schools*, BSEA No. 10-1162 (Figueroa, 2010*), In Re: Mike v. Boston Public Schools*, BSEA No. 10-2417 (Oliver, 2010).

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."[6] An issue is genuine if it "may reasonably be resolved in favor of either party."[7] To survive this motion and proceed to hearing, the adverse party must show that there is "sufficient evidence" in her favor that the fact finder could decide for her.[8] In other words, the evidence presented by the nonmoving party "must have substance in the sense that it [demonstrates] differing versions of the truth which a factfinder must resolve at an ensuing trial."[9] The non-moving party's evidence will not suffice if it is comprised merely of "conclusory allegations, improbable inferences, and unsupported speculation."[10]

As such, to analyze whether the party moving for summary judgment has met its initial burden such that the burden shifts to the opposing party, I must view all of the evidence it has submitted in the light most favorable to the opposing party and determine that there is no genuine issue of material fact related to the claims before me. Only if the moving party is successful in this first step does the burden then shift to the opposing party.

In the instant matter I must decide before whether there exists a genuine issue of material fact relating to the District's claim that Parent is not entitled to to an IEE or to public funding for an independent extended evaluation at TEC Collaborative. I hence first turn to legal standards regarding extended evaluations and IEEs, respectively.

B. Substantive Legal Standard Regarding IEEs.

Parents' right to IEEs is establish both in the IDEA and in Massachusetts special education law. 20 U.S.C. §1415 provides for an "opportunity for parents of a child with a disability to …obtain an independent educational evaluation of the child…." In addition, 34 CFR 300.502 provides, in pertinent part:

> "(b) Parent right to evaluation at public expense.
> (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.
> (2) If a parent requests an independent education evaluation at public expense, the public agency must, without unnecessary delay, either -
> (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
> (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria."

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[6] *Id.* at 250.
[7] *Maldanado-Denis v. Castillo-Rodriguez,* 23 F.3d 576, 581 (1st Cir. 1994).
[8] *Anderson*, 477 U.S. at 249.
[9] *Mack v. Great Atl. & Pac. Tea Co.,* 871 F.2d 179, 181 (1st Cir. 1989).
[10] *Medina-Munoz v. R.J. Reynolds Tobacco Co.,* 896 F.2d 5, 8 (1st Cir. 1990).

Massachusetts law mirrors the federal law but grants parents additional rights.[11] 603 CMR 28.04(5) allows parents to request IEEs "[u]pon 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." Furthermore, 603 CMR 28.04(5)(d) states:

> "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. 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 parent."

A school-based evaluation is a pre-requisite to a publicly- funded IEE, since a parent's right to a publicly-funded IEE stems from the parent's disagreement with the results of the school-based evaluation, or from the parent's belief that a different area must be evaluated. The parent's request must, in essence, be a challenge to the school-based results.[12]

C. Substantive Legal Standard Regarding Extended Evaluations.

603 CMR 28.05(2)(b) allows for extended evaluations under very specific circumstances. It states, in part that if "the Team finds the evaluation information insufficient to develop an IEP, the Team, with parental consent, may agree to an extended evaluation period." However, the "extended evaluation period shall not be used to allow additional time to complete the required assessments under 603 CMR 28.04(2)(a)."[13] In addition, the "extended evaluation shall not be considered a placement."[14]

The Department of Elementary and Secondary Education's *Administrative Advisory SPED 2019-2 - Extended Evaluations* further clarifies "that an extended evaluation is not a 'diagnostic placement' used to determine whether a particular school, setting or program is an appropriate placement for the student." In part, the *Advisory* also describes the extended evaluation process:

> "If the Team has determined that a student is eligible for special education and that an extended evaluation is appropriate, the Team shall write a partial IEP with the

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[11] See 603 CMR 28.04(5)(c)(1-6).

[12] *In Re: Easthampton Public Schools*, BSEA # 1911816, 25 MSER 143 (Figueroa, 2019). In contrast, see *In Re: Framingham Public Schools*, BSEA # 11-1276, 17 MSER 28 (Berman, 2011) (the general rule that a school-based evaluation is a pre-requisite to a publicly-funded IEE is inapplicable here because Parent did not refuse to consent to a school-based evaluation but rather it was Parent who asked the school to evaluate Student in the manner that the School deemed appropriate, and the School refused to either conduct what it considered to be an evaluation or to designate its "screening" as an evaluation).

[13] 603 CMR 28.05(2)(b)(2).

[14] 603 CMR 28.05(2)(b)(5). See also *Administrative Advisory SPED 2019-2 - Extended Evaluations* https://www.doe.mass.edu/sped/advisories/2019-2.html#3

information available. In the "additional information" section of the IEP Form, the school district should specify that an extended evaluation is being conducted and list the assessment(s), location of where the extended evaluation will take place, and the estimated date of completion. In addition, the school district must complete an Extended Evaluation Form (EE1 and EE-2). On this form, the district will indicate the current evaluation findings, what assessments need to be completed, the location where the extended evaluations will be completed, the anticipated completion date, among other required information (internal citations omitted)."

IV. APPLICATION OF LEGAL STANDARDS

In the instant matter, in order for me to grant summary judgment in favor of the District, there must first and foremost exist "no genuine issue of fact relating to all or part of a claim or defense."[15] The District, as the moving party, bears the burden of proof, and all evidence and inferences must be viewed in the light most favorable to the Parent.[16] The District has failed to meet its burden.

Hearing Officers have granted summary judgment in cases where it was undisputed, even with evidence viewed in the light most favorable to the parents, that parents refused consent to a District-proposed assessment before requesting a publicly funded independent evaluation instead.[17] However, such is not the case here. In the present case, there are at least three genuine issues of material fact: 1) what evaluations has the District already conducted; 2) what evaluation did the District propose? and 3) what evaluation did Parent request?

The District asserts that it has proposed a clinical evaluation but has yet to complete it and that, as a result, Parent is not yet entitled to request a publicly funded IEE. In contrast, Parent asserts that the psychological evaluation the District completed included a clinical assessment. Viewed in the light most favorable to the Parent, an assessment has, in fact, been completed; hence, the inquiry must now shift to the question of whether the District's assessment was comprehensive and appropriate; if it was not, then Parent has a claim for an IEE. This determination requires an evidentiary hearing. In addition, to the extent that Parent's request for an "independent extended evaluation" at TEC may be construed as a request for an IEE in an area of suspected disability which the District had failed to assess as part of its initial evaluation of Student, whether the District's denial of such request is appropriate requires an evidentiary hearing.

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[15] 801 CMR 1.01(7)(h).

[16] *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252 (1986).

[17] See, e.g., *In Re: Hudson Public Schools and Sam*, BSEA #093499, 15 MSER 133 (Oliver, 2009) ("The whole concept of an IEE is that if parents disagree with the evaluations performed by the school, they then have the right to seek a publicly funded IEE as, essentially, a second opinion"); *In Re: Billerica Public Schools and Ozal*, BSEA #19-11391, 25 MSER 136 (Byrne 2019); *In re: Middleton Public School and Cole*, BSEA #1909931, 25 MSER 86 (Reichbach, 2019); *In Re: Bridgewater Raynham Schools*, BSEA # 11-6444, 17 MSER 91 (Figueroa, 2011); *In re: Abington Public School,* BSEA # 04-3493, 11 MSER 16 (2004).

The District has not demonstrated with the support of its pleadings and evidence[18] that there is no genuine issue of fact relating to its claims. In fact, the evidence, viewed in the light most favorable to the Parent, suggest that there are a host of material facts very much at issue.

V. CONCLUSION

Upon consideration of the District's *Motion for Summary Judgment*, memorandum of law, and supporting document, I find that the District has failed to establish that there is no genuine issue of material fact relating to its claims and that it is not entitled to judgment as a matter of law.

VI. ORDER

Foxborough Public Schools' unopposed *Motion for Summary Judgment* is hereby DENIED. The Hearing will proceed on June 4, 2021 in accordance with the Order issued on May 5, 2021.

So Ordered by the Hearing Officer:

/s/ Alina Kantor Nir
Alina Kantor Nir

Dated: May 14, 2021

[18] In Support of its *Motion*, the District attached one Exhibit consisting of the email exchanges between Paernt and the District prior to the completion of the initial evaluations.