

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

**In Re: Student & Brookline Public Schools
& Boston Public Schools**

BSEA No. 2200340

RULING ON BOSTON PUBLIC SCHOOLS' MOTION TO DISMISS

This matter comes before the Hearing Officer on the Boston Public Schools' (Boston) *Motion to Dismiss (Motion)*, which was filed with the BSEA on July 23, 2021. As grounds for its *Motion to Dismiss*, Boston asserts that Parents' Hearing Request has failed to state a claim upon which relief may be granted against Boston. Specifically, Boston submits that since the placement meeting required by 603 CMR 28.10(6)(a) has yet to occur, and the student has not enrolled in the Boston Public Schools, the hearing request is premature as to Boston, and, therefore, must be dismissed.

For the reasons articulated below, Boston's *Motion* is **DENIED** *without prejudice*, as to all procedural and substantive claims with regard to programmatic and/or fiscal responsibility after June 10, 2021, but is **ALLOWED** *with prejudice* as to all procedural and substantive claims prior to this date.

RELEVANT PROCEDURAL HISTORY

On July 13, 2021, Parent filed a *Request for Hearing* against the Brookline Public Schools (Brookline) and Boston, asserting that the Student, who resides in Boston, but attended school in Brookline until summer 2020 under the METCO program, required placement in a full-day, private, specialized, language-based school. Parents had placed Student unilaterally at the Carroll School starting in the summer of 2020 and sought reimbursement for that placement (summer 2020, academic 2020-2021 and summer 2021) as well as prospective relief for the 2021-2022 school year. With regard to Brookline, only, Parents asserted that Brookline had failed to meet its "child find" requirements regarding Student, and had failed to provide Student with an individualized educational program (IEP) that was reasonably calculated to provide a free appropriate public education (FAPE) in the least restrictive environment (LRE). Parents also asserted that Brookline committed procedural violations applicable to METCO students, alleging that Brookline failed to convene a placement meeting for Student when Parents unilaterally placed Student at the Carroll School. Parents further asserted that both Brookline and Boston committed procedural violations of METCO rules on and after June 10, 2021, when the Brookline Team (during a meeting that Boston declined to attend), determined Student required full-day, substantially separate, language-based programming that Brookline was unable to provide. Finally, Parents asserted Boston had failed to meet its programmatic and fiscal responsibilities for Student since June 10, 2021.

A *Notice of Hearing* was issued on July 14, 2021, and the Hearing was scheduled for August 17, 2021.

On July 23, 2021 Boston filed the underlying *Motion* requesting dismissal of Boston for the reasons set forth above.

On July 29, 2021, Parents filed *Parents' Response in Opposition to Boston Public School District's Motion to Dismiss* asserting that their *Hearing Request* raised plausible claims raised in Parents' *Hearing Request* that give rise to some form of relief against Boston in this matter. Parents further argued that Boston failed to comply with the procedural requirements of 603 CMR 28.10(6)¹ by declining to attend Student's team meeting(s) when Boston was on notice from Brookline that placement was at issue. Finally, Parents' dispute Boston's contention that Parents' failure to enroll Student in Boston after their unilateral placement of Student precludes liability for Boston.

During a Conference Call on August 2, 2021, Brookline advised verbally that it was also opposing the *Motion to Dismiss* for reasons similar to the Parents; and the Parties advised that they were not seeking a separate hearing on the *Motion*. The Parties also agreed to provide Brookline with an extension until August 12, 2021 to file both an *Opposition to Boston's Motion to Dismiss* and its *Response to the Hearing Request*.

On August 6, 2021, the Hearing was postponed to October 27, 28 and 29, 2021 at the joint request of the Parties for good cause, to allow the Parties time to engage in settlement negotiations and conduct discovery, if needed.

On August 9, 2021 Brookline submitted a letter advising it would not be filing a separate *Opposition* but requested the *Motion* be denied for the reasons stated in the Parents' *Opposition*. On August 12, 2021 Brookline submitted its *Response to Parents' Hearing Request*.

RELEVANT FACTS

For the purposes of this *Ruling*, only, I take the factual assertions set out in the Parties' submissions as true and set forth those factual assertions relevant to the *Motion*.

1. Student is a rising 6th grade student residing in Boston, but who, starting in Kindergarten, was enrolled in Brookline under the METCO program established by M.G.L. c. 74 §12A. Student attended Brookline schools until Parents unilaterally placed Student at the Carroll School beginning in the summer of 2020.
2. Brookline initially found Student eligible for an IEP in February 2019 based on a specific learning disability in reading.

¹ The headings in Parents' *Opposition* reference 603 CMR 10.06, however all substantive argument refers to 603 CMR 28.10(6). Thus, I consider the reference to 10.06 to be a typographical error, especially as 603 CMR 10.06 concerns Annual School Spending Requirements.

3. At the time of Student's unilateral placement, the IEP proposed by Brookline (dated 5/11/20-5/10/21) called for a full inclusion placement for the remainder of the 2019-2020 school year, but a change to a partial inclusion placement in Brookline's Language and Academic Home Base (LAHB) program starting with academic 2020-2021, Student's 5th grade year (20/21 IEP). Additionally, Brookline proposed extended school year (ESY) services.
4. The 20/21 IEP (5th grade) proposed consultation in academic support (1 x 10) and speech and language (1 x 5) in the A-Grid; speech and language (1 x 30), math (5 x 45) and academic support (5 x 60) direct services in the general education classroom in the B-Grid; and two separate reading (5 x 60 and 5 x 45, respectively), speech and language (1 x 30), and academic support (2 x 30) services in the C-Grid. Goal areas in the IEP included Reading (decoding/encoding); Reading (fluency/comprehension); Communication, Academic Support and Written Language.
5. Parents partially accepted this IEP, accepting all services, but rejecting that it was not sufficiently intense in conformance with their independent evaluation report which had recommended a "full-day, language-based program in small classes, with specially trained teacher and with carryover of the highly structured, systemic, linguistically controlled, rule-based reading program into all classes including specials."
6. In June 2020, Parents notified Brookline that they intended to unilaterally place Student in the ESY program at the Carroll School.
7. On August 17, 2020, Parents notified Brookline of their intention to unilaterally place Student at the Carroll School for the 2020-2021 school year. On August 18, 2020, Brookline notified Parents of its denial of their request for public funding for this unilateral placement.
8. Brookline first notified Boston of Student's unilateral placement on December 16, 2020 by an email that also stated Brookline believed it "[could] serve [Student] in district."
9. Brookline scheduled an annual review Team meeting for June 10, 2021². Although a representative of Boston was not included on the Team meeting invitation that was sent out on May 13, 2021, Boston was invited to the meeting via email from Brookline on May 25, 2021. Boston chose not to attend the Team meeting³.
10. During the June 10, 2021 meeting, the Team reviewed documents provided by Parents and developed a new IEP (dated 6/10/21 – 6/9/22) for academic 2021-2022, Student's 6th

² I note that this date was after the 20/21 IEP had expired. It is unclear from the pleadings why this delay occurred. Notwithstanding, after receiving the Team meeting invitation, on May 19, 2021, Parents sent Brookline a copy of the most current Carroll School progress report, standardized test scores and an Observation Report, conducted by their independent evaluator, of Student at the Carroll School on March 24, 2021. Parents requested these documents be discussed at the upcoming Team meeting.

³ In the Motion, Boston argues that it was "unclear whether the purpose of this meeting was to discuss [Student's] IEP services or [Student's] IEP setting". Boston tried to clarify this purpose by email to Brookline on May 27, 2021 but received no response from Brookline.

grade year (21/22 IEP). This IEP added a Written Language Goal to the goal areas in the 20/21 IEP. It also eliminated any B-Grid services, proposing only A-Grid consultation related to reading, communication and academic support, and C-Grid services (5 x 50 each) in the areas of Social Studies, Science, ELA, Speech and Language, Mathematics and Academic Support. ESY services were not proposed.

11. The June 18, 2021 N1 Notice associated with the 21/22 IEP advised that the Team agreed Student required language-based programming in all core content areas and Brookline's language-based program does not offer substantially separate classes in the areas of science and social studies.
12. During the June 10, 2021 Team meeting, Brookline advised the Parents that Boston had declined to attend the meeting, although they had been invited, but that Brookline would invite Boston to a placement meeting.
13. The Team meeting notes from the June 10, 2021 Team meeting state: "Public Schools of Brookline will follow up with Boston Public Schools and send home a release of confidential information form given that Brookline does not have the program that [Student] requires. Public Schools of Brookline will support the transition process to Boston Public Schools once a consent is furnished. Brookline invited Boston Public Schools to be in attendance at the 6/10/2021 meeting and the Boston Public Schools representative declined to attend."
14. At the conclusion of the Team meeting Brookline provided Parents with a Release of Information form, authorizing a release of Student's confidential information to Boston, which Parents signed and returned to Brookline on June 14, 2021.
15. On June 15, 2021 Brookline notified Boston that the Team had determined that Student needed programming that Brookline did not have or was not willing to create and the Team planned to reconvene for a discussion of Student's placement. No such placement meeting has occurred to date.
16. Parents' Hearing Request contains, in Paragraph 31, the following statement: "On information and belief, Brookline has unsuccessfully attempted to engage Boston in Brookline's Team process regarding [Student] since at least the Team meeting that occurred in June, 2021⁴."

LEGAL STANDARD

1. Legal Standard for a Motion to Dismiss.

⁴ In its *Motion*, Boston submits that the delay in scheduling the Team meeting was not due to any actions of Boston and that it responded to the June 15, 2021 email from Brookline and followed up with Brookline on the status of the placement meeting again on June 24, 2021 but has not received a response. Brookline's *Response* does not provide any further information on this point.

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...”⁵. 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”⁶. For motions to dismiss, the hearing officer looks to the facts alleged in the Hearing Request and documents attached or incorporated by reference to the Hearing Request as well as matters for which administrative notice may be taken⁷.

Motions to dismiss are analyzed following a two-pronged approach⁸. First hearing officers “begin by identifying and disregarding statements in the [Hearing Request] that merely offer ‘legal conclusion[s] couched as ... fact[]’ or ‘[t]hreadbare recitals of the elements of a cause of action.’”⁹. Once this is completed, “non-conclusory factual allegations in the [Hearing Request] must then be treated as true, even if seemingly incredible”¹⁰. 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) ...”¹¹.

2. METCO

M.G.L. c. 76 §12A, entitled “Plan for Attendance in Public School to Eliminate Racial Imbalance; Adoption; Financial and Technical Assistance” establishes what has commonly been referred to as the “METCO” program. Under this law, cities or towns whose school committees have received approval from the Board of Education for a plan for attendance, shall accept for attendance any child who resides in another city or town or regional school district in which “racial imbalance”, as determined by a statutory formula, exists in the public schools¹². The receiving communities shall be provided with financial assistance from the Commonwealth of Massachusetts for such non-resident attending students, including the “cost ... of special education services provided to each such child determined to be in need of such services pursuant to chapter seventy-one B”¹³. Students who receive special education services are explicitly statutorily included for participation in the METCO program. The regulations relating

⁵ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

⁶ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

⁷ *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).

⁸ *Ocasio-Hernandez*, 640 F.3d at 12.

⁹ *Id.*, citing *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009) (quoting *Bell Atl. Corp.*, 550 U.S. at 555).

¹⁰ *Id.*, citing *Iqbal*, 129 S.Ct. at 1951.

¹¹ *Iannocchino* 451 Mass. at 636 quoting *Bell Atl. Corp.*, 550 U.S. at 555 (internal citations omitted); see also *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011).

¹² M.G.L. c. 76 §12A. Currently only Boston and Springfield meet the definition for racial imbalance existing in the public schools.

¹³ *Id.*

to payments for special education services qualify this participation by providing that “school districts which enroll non-resident students pursuant to ... M.G.L c. 76 §12A (METCO receiving districts) ... shall provide and pay for the special education and related services specified in the approved individual education plan for every student so enrolled whose special education needs can be met in a program operated by the district”¹⁴.

Massachusetts regulations have also established procedures for both the receiving district (included in the special education regulations under the definition of “program school”¹⁵) and the resident district whenever a receiving district’s Team determines that a METCO student may require an out-of-district IEP¹⁶. Specifically, programmatic and fiscal responsibility for METCO students who are receiving special education services remains with the program school so long as the METCO student is enrolled. However, “when the Team determines that the student may need an out of-district placement” the resident District then must be given notice¹⁷. In such cases, the regulations provide that:

“... the Team shall conclude the meeting pursuant to 603 CMR 28.06(2)(e) without identifying a specific placement type, and shall notify the school district where the student resides within two school days.

1. ... the program school shall schedule another meeting to determine placement, and shall invite representatives of the school district where the student resides to participate as a member of the placement team pursuant to 603 CMR 28.06(2)(e)(1)¹⁸.
2. The Team meeting convened by the program school shall first consider if the school district where the student resides has an in-district program that could provide the services recommended by the Team, and if so, the program school shall arrange with the school district where the student resides to deliver such services or develop an appropriate in-district program at the program school for the student.
3. If the placement Team, in accordance with the procedures of 603 CMR 28.06(2)(e), determines that the student requires an out-of-district program to provide the services identified on the student's IEP, then the placement proposed to the parent shall be an out-of-district day or residential school, depending on the needs of the student. Upon parental acceptance of the proposed IEP and proposed placement, programmatic and financial responsibility shall return to the school district where the student resides. The school district where the student resides shall implement the placement

¹⁴ 603 CMR 10.07(2).

¹⁵ 603 CMR 28.02(16).

¹⁶ 603 CMR 28.10(6)(a).

¹⁷ *Id.*

¹⁸ Pursuant to 603 CMR 28.06(2)(e)(1) this meeting must occur within ten (10) school days following the meeting at which the Team determines the METCO student may need an out-of-district placement.

determination of the Team consistent with the requirements of 603 CMR 28.06(3)”¹⁹.

In the instant case, Parents have alleged that Boston failed to comply with the above-cited procedural requirements. They have also alleged that under these regulations and relevant METCO provisions, programmatic and fiscal responsibility for Student’s special education and related services has shifted at some point in time from Brookline to Boston²⁰. Boston claims that since a placement meeting has not been held to date, it has not violated any of the METCO procedural requirements that apply to it as the resident-district at this time. To that end, Boston submits that programmatic and fiscal responsibility continues to remain with Brookline . It is within the context of both the legal standards applicable to motions to dismiss and the special education and METCO laws and regulations that I now analyze Boston’s *Motion*.

APPLICATION OF LEGAL STANDARD

In evaluating the Motion under the legal standards for a motion to dismiss, I take Parents’ factual allegations as true as well as any inferences that may be drawn therefrom in Parents’ favor²¹.

1. Dismissal is Not Warranted at this Time from June 10, 2021, Forward.

In its Motion, Boston argues that dismissal is warranted because a placement meeting has not yet occurred, and Student has not otherwise enrolled in Boston as of this date. Thus the *Hearing Request* is premature as to Boston. According to Boston, the BSEA has no jurisdiction to order relief against Boston as the *Hearing Request* fails to state a claim upon which relief may be granted as to Parents’ claims against Boston. However, contrary to Boston’s assertion, the *Hearing Request* sets forth specific claims against Boston, supported by factual allegations, that, when viewed in the light most favorable to Parents, creates plausible, not speculative, allegations that would entitle Parents to prevail²².

Specifically, although the Team meeting on June 10, 2021 was not a “placement meeting” that Boston was required to attend, it is unclear from the pleadings why Boston did not participate in a placement meeting after the June 10, 2021 Team meeting. Parents allege that Brookline has “unsuccessfully attempted to engage Boston” in the Team process for such a placement meeting, while Boston claims that it has not participated in a placement meeting because Brookline has not responded to its inquiries regarding one²³. Whether or not Boston bears any responsibility for a placement meeting not having yet taken place , is an issue of fact that should be determined at a hearing.

¹⁹ 603 CMR 28.10(6)(a)(1-3).

²⁰ Parents’ Hearing Request alleges this shift occurred “since at least 6/10/2021” although in their *Opposition* they claim it may have actually occurred “dating back to December of 2020”.

²¹ *Iannocchino* 451 Mass. at 636 quoting *Bell Atl. Corp.*, 550 U.S. at 555 (internal citations omitted).

²² *Id.*

²³ I take administrative notice from Brookline’s website that Brookline’s last day of school for the 2020-2021 school year was June 22, 2021. This date was only eight (8) school days after the June 10, 2021 Team meeting. Thus, if such a meeting has not in fact occurred, regardless of the reason , it can still be scheduled within the timeframes set forth in 603 CMR 28.06(2)(e) and 603 CMR 28.10(6)(a).

Making all inferences in favor of Parents from the facts as alleged, it is plausible, that Boston does have some responsibility for the placement meeting not having occurred yet²⁴. In such a case, Parents would be entitled to relief on some or all of their claims that Boston (a) violated the METCO special education procedural requirements of 603 CMR 28.10(6) by “failing to attend ... a meeting to discuss placement following the June 10, 2021 Team meeting, despite purportedly being invited to attend such a meeting by Brookline”; (b) is programmatically and fiscally responsible for providing FAPE in the LRE to Student since at least June 10, 2021 and (c) owes Student “... other educational programming, and/or any other compensatory relief and/or any other appropriate relief ...” for its failure to “comport with 603 CMR 28.10(6) since at least 6/10/21”^{25,26}. For these reasons, Boston’s request to be dismissed must be DENIED *without prejudice* as to any claims from June 10, 2021, forward.

2. Dismissal is Warranted Prior to June 10, 2021.

Although, as discussed above, after drawing all inferences in favor of Parents, plausible claims exist for the timeframe from June 10, 2021, forward, the same cannot be said to exist as to Boston prior to June 10, 2021. It is undisputed that the “... *Team* did not determine that [Student] may need an out-of-district placement until June 10, 2021”²⁷. The 20/21 IEP called for a partial inclusion program for Student’s 5th grade. No Team meeting occurred after development of the 20/21 IEP on May 11, 2021 until the June 10, 2021 Team meeting. It is similarly undisputed that Student was at all times enrolled in Brookline until her unilateral placement at the Carroll School.

Contrary to Parents’ argument, their unilateral placement of Student did not trigger any programmatic or fiscal obligation on the part of Boston under the special education provisions applicable to METCO students. Those regulations are only triggered when the Team makes the decision that an out of district placement may be required, not to situations of unilateral placements. This is particularly so where, as here, Student did not enroll in Boston after such unilateral placement occurred.

This very issue was addressed in a recent BSEA Ruling regarding the applicability of 603 CMR 28.10(6)(a) to a student attending a charter school (charter schools are also covered by these provisions), who had been unilaterally placed after the Parent rejected the charter school’s proposed in-district placement²⁸. The Hearing Officer, found that these regulations did not apply, reasoning: “... because the Team has never suggested or prescribed an out-of-district placement for Student ... the procedures for shifting responsibility to BPS under 603 CMR

²⁴ *Ocasio-Hernandez*, 640 F.3d at 12 citing *Iqbal*, 129 S.Ct. at 1951; see also *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. at 407.

²⁵ These claims are a portion of Legal Issue #7, Legal Issue #8 and a portion of Legal Issue #10 set forth in the Parents’ Hearing Request.

²⁶ *Iannocchino* 451 Mass. at 636 quoting *Bell Atl. Corp.*, 550 U.S. at 555 (internal citations omitted).

²⁷ 603 CMR 28.10(6)(a) (emphasis added).

²⁸ *In Re: Student & Neighborhood House Charter School*, BSEA No. 1909934, 25 MSER 131, (Ruling on Motion to Join) (Berman, 2019).

28.10(6)(a) are not applicable here”²⁹. I agree with this analysis and similarly conclude that 603 CMR 28.10(6)(a) does not shift responsibility to the school district where the student resides (here Boston) when a METCO student is unilaterally placed in an out of district program. That shifting responsibility only is implicated upon a Team determination of the possibility that the METCO student may need an out-of-district program to receive a FAPE in the LRE, and only will actually occur once an IEP developed at a duly convened placement meeting, is accepted. As such, Boston’s *Motion* is ALLOWED as to all claims in the Hearing Request prior to June 10, 2021.

ORDER

1. , Boston’s *Motion to Dismiss* is **ALLOWED, with prejudice**, as to any claims Parents are bringing against Boston prior to June 10, 2021.

2. Boston’s *Motion to Dismiss* is **DENIED, without prejudice** as to all claims brought against Boston from June 10, 2021, forward. Boston may reinstate its request should it become undisputed that Boston had no responsibility in the failure to convene a placement meeting on or after June 10, 2021, as the record becomes developed in this matter.

3. The Hearing will proceed on October 27, 28 and 29, 2021, as per the August 6, 2021 Ruling, on the following issues as to Boston³⁰:

- A. Whether Boston violated 603 CMR 28.10(6) by failing to attend Student’s Team meeting on June 10, 2021 or a meeting to discuss placement following the June 10, 2021 Team meeting; and
- B. Whether Boston is programmatically and fiscally responsible for providing FAPE in the LRE to Student since at least June 10, 2021; and
- C. If the answer to either A or B is yes, what, if any, educational, compensatory or other services or relief are owed by Boston.

By the Hearing Officer,

/s/ Marguerite M. Mitchell

Marguerite M. Mitchell

Date: August 16, 2021

²⁹ *Id.* Boston’s reliance on this Ruling to justify its dismissal from all claims in this matter is inappropriate, however, as contrary to Boston’s argument, the Team in that matter never determined the student may have needed an out of district placement. However, in the instant matter, the Team did reach such a conclusion at its June 10, 2021 Team meeting. Thus, Hearing Officer Berman’s Ruling only supports dismissal of Boston up to the June 10, 2021 Team meeting.

³⁰ The issues for Hearing with regard to Brookline will be established separately.