

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

In re: Wendy¹

BSEA #2206283

RULING ON GUARDIAN’S MOTION TO DISMISS

This matter comes before the Hearing Officer on Guardian’s *Motion to Dismiss* (Motion) filed in response to Amherst-Pelham Regional School District’s (APRSD or the District) *Hearing Request*. For the reasons set forth below, the *Motion* is hereby DENIED.

I. **BACKGROUND**

A. PROCEDURAL HISTORY

APRSD filed a *Hearing Request* on February 2, 2022, requesting that the Bureau of Special Education Appeals (BSEA) issue an order that the proposed Individualized Education Program (IEP) dated December 20, 2021, to December 19, 2022, providing for placement in a private day school (2021-2022 IEP) is reasonably calculated to provide Wendy with a free, appropriate public education (FAPE) in the least restrictive environment. According to the District, this alternative placement is required because of Wendy’s poor attendance, low or failing grades, and disciplinary infractions incurred in her current placement at APRSD’s Middle School. The Hearing was scheduled for February 23, 2022.

On February 11, 2022, the District requested postponement of the Hearing due to the unavailability of Counsel. On February 14, 2022, Guardian filed a *Response to District’s Hearing Request and Motion to Dismiss Complaint*. Guardian contends that the evaluations in progress must be completed before Wendy’s Team can determine what constitutes a FAPE and an appropriate placement for her. Failure to complete the evaluations before proceeding to hearing, she asserts, would violate Wendy’s right to equal protection because it would deprive her of access to current data and the ability to question the evaluators as witnesses. Moreover, APRSD’s *Hearing Request* is frivolous, and proceeding with the proposed placement at this time will prejudice Guardian and deny her access to an impartial hearing. Guardian also disputes the District’s claims of insufficient progress, noting that Wendy is at grade level or doing a “nice job” and “working hard” in English Language Arts, Math, Social Studies, and Science.

After I granted an extension, APRSD filed its response to Guardian’s *Motion to Dismiss* on February 23, 2022. APRSD reiterated that its placement recommendation was based on observable behavior including non-attendance, disciplinary infractions, and lack of academic progress. APRSD disputes Guardian’s statement that Wendy is doing well academically because although she is a capable student, Wendy’s social/emotional behaviors impede her ability to

¹ “Wendy” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

make meaningful progress. For these reasons, APRSD argues, even in the absence of additional data from the pending evaluations, an inclusion placement at the Middle School is no longer appropriate for Wendy, and the 2021-2022 IEP is reasonably calculated to provide her with a FAPE.

Pursuant to the parties' joint request the Hearing was postponed for good cause to May 5, 6, and 11, and a Pre-Hearing Conference was scheduled for March 15, 2022.²

B. FACTUAL BACKGROUND³

The following facts are not in dispute and are taken as true for the purposes of this Ruling.

1. Wendy is a fourteen-year-old eighth grade student currently attending the APRSD Middle School in an inclusion placement.
2. Wendy qualifies for special education services under the category of Emotional Disability based on her diagnoses of Reactive Attachment Disorder, Depression, and Other Specified Trauma Related Disorder.
3. According to clinical testing conducted in June and September 2019, Wendy demonstrates average cognitive flexibility with visual-motor sequencing tasks as well as average verbal-behavioral productivity, inhibition, and abstract reasoning. No concerns were noted in executive functioning. Social emotional testing showed that Wendy exhibits signs of confidence but also a tendency to oppositionality and defiance and she has difficulty with impulse control.
4. Wendy's struggles began prior to the Covid-19 pandemic, and throughout the pandemic Wendy's attendance was poor. According to APRSD, Wendy also struggles academically and has accumulated numerous disciplinary infractions.
5. On September 28, 2021, Wendy's Team recommended an extended evaluation at APRSD's in-district therapeutic school, Summit Academy, due to her social/emotional presentation. Guardian initially accepted this proposal, but later verbally rescinded her consent because Wendy refused to attend Summit Academy. Therefore, Wendy remains in her inclusion placement at the Middle School where she receives additional support through the Student Support Program (SSP). APRSD believes her current placement at the Middle School does not provide Wendy with a FAPE because of her social/emotional presentation and lack of engagement, as demonstrated by her low grades, high number of unexcused absences, and disciplinary infractions.

² In the meantime, also on February 14, 2022, Guardian, through her advocate, filed a *Motion to Recuse*, alleging that the Hearing Officers involvement in a prior, unrelated case involving her advocate and currently on appeal, creates impermissible prejudice. On March 1, 2022, this motion was denied.

³ Except where noted, the information in this section is drawn from the parties' pleadings and is subject to revision in further proceedings.

6. The Team reconvened on October 18, 2021 and discussed advancing Wendy’s three-year evaluation, due to be conducted in May 2022, given concerns about her presentation. Specifically, APRSD proposed a clinical psychological evaluation; achievement testing in reading, writing, and math; and a functional behavioral assessment. Guardian added a literacy assessment and a transition assessment to the consent form; APRSD indicated that it is willing to complete these evaluations as well. Guardian signed the consent form on January 27, 2022.
7. Following Wendy’s annual review meeting on December 20, 2021, the Team proposed the 2021-2022 IEP, which includes goals in the areas of self-regulation and academic skills and designates placement at a separate private day school. To date, the IEP and placement page are unsigned.
8. Wendy continues to attend APRSD while this matter is pending.

II. DISCUSSION

A. *Legal Standards*

1. Motion to Dismiss

Hearing Officers are bound by the *BSEA Hearing Rules for Special Education Appeals (Hearing Rules)* and the Standard Rules of Adjudicatory Practice and Procedure, 801 Code Mass Regs 1.01. Pursuant to *Hearing Rule XVII (A) and (B)* 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 used the same standards as the 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.”⁴ In evaluating a motion to dismiss, 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.”⁶

2. BSEA Jurisdiction

To survive a motion to dismiss, the moving party must allege a claim over which the BSEA has jurisdiction. Under its governing statute, the BSEA has the authority to provide:

adjudicatory hearings, mediation and other forms of alternative dispute resolution . . . for resolution of disputes between and among parents, school districts, private schools and state agencies concerning: (i) any

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).

matter relating to the identification, evaluation, education program or educational placement of a child with a disability or the provision of a free and appropriate public education to the child arising under this chapter and regulations.⁷

B. *Analysis*

APRSD's *Hearing Request* asks the BSEA to issue an order finding that its proposed IEP and placement for Wendy are appropriate. The matter, and the relief sought, are squarely within the BSEA's jurisdiction and authority.⁸ Specifically, the District alleges that Wendy is not able to access her education in her current placement, as demonstrated by her attendance, grades, and disciplinary record, and that the proposed 2021-2022 IEP, with placement in a private therapeutic program, will provide her with a FAPE. Taken as true, these facts raise the right to the relief sought by APRSD "above a speculative level."⁹

CONCLUSION

Upon consideration of APRSD's *Hearing Request*, Guardian's *Response to District's Hearing Request and Motion to Dismiss Compliant*, and APRSD's *Opposition to Guardian's Motion to Dismiss*, I find that APRSD has pleaded sufficient facts upon which relief can be granted. Guardian's *Motion to Dismiss* is hereby DENIED.

ORDER

The matter will proceed as follows.

1. The Pre-Hearing Conference will take place via Zoom at 1:00 PM on March 15, 2022.
2. The Hearing will take place, also via Zoom, on May 5, 6, and 11.
3. Witness lists and exhibits are due by close of business on April 28, 2022.

By the Hearing Officer:¹⁰

/s/ Amy Reichbach

Amy M. Reichbach

Dated: March 11, 2022

⁷ M.G.L. c. 71B § 2B.

⁸ See M.G.L. c. 71B § 2B; *Millis Pub. Sch. v. M.P.*, 478 Mass. 767, 785 n.20 (2018).

⁹ *Blank*, 420 Mass. at 407 (1995); see *Golchin* 460 Mass. at 223.

¹⁰ The Hearing Officer gratefully acknowledges the diligent assistance of legal intern Christopher Brosnahan in the preparation of this Ruling.