

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

In Re: Student & Waltham Public Schools & Belmont Public Schools BSEA #2208477

**RULING ON WALTHAM PUBLIC SCHOOLS’
MOTION FOR SUBSTITUTED CONSENT**

This matter comes before the Hearing Officer on the Waltham Public Schools’ (Waltham) *Motion for Substituted Consent (Motion)*, filed with the BSEA on May 26, 2022. Waltham seeks an Order, pursuant to 603 CMR 28.07(1)(b), allowing substitute consent to conduct an observation of Student in his current placement, the LINC program at Fitzgerald Elementary School in Waltham. Waltham requested that the parties discuss the *Motion* during a Conference Call that had already been scheduled for June 1, 2022. On May 31, 2022, Parents filed *Parents’ Opposition to Waltham’s Motion for Substituted Consent (Opposition)*, claiming substitute consent is unavailable to Waltham as its requested observation is being performed “solely for the purposes of litigation”, which Parents contend to be an impermissible reason¹. Parents further requested that, should Waltham’s *Motion* be allowed, their independent evaluator be permitted to accompany Waltham’s observer.

On June 1, 2022, the parties, including Belmont Public Schools (Belmont) who had been joined as a party², participated in the previously-scheduled Conference Call. Waltham and Parents each verbally supplemented and clarified their arguments. Belmont advised that it took no position on the *Motion* or *Opposition*.

For the reasons articulated below, the District’s *Motion* is **ALLOWED**, and substituted consent is provided to Waltham to allow it to perform the requested observation, along with a person of Parents’ choosing.

FACTS

The following facts are not in dispute and are taken as true for the purposes of this *Ruling*, only. These facts may be subject to revision in subsequent proceedings³.

1. Student is 10 years old, currently attending the fourth grade at Fitzgerald Elementary School in Waltham, Massachusetts, where he is placed in a partial inclusion program (the LINC program), pursuant to an IEP dated 11/16/2021 to 11/17/2022 (“Current IEP”). Student

¹ Parents also claimed to be prejudiced by Waltham’s request as it was being made less than two (2) weeks prior to the first scheduled day of Hearing. However, thereafter, on June 3, 2022, the Hearing was postponed for reasons unrelated to Waltham’s *Motion*, in accordance with my *Ruling on Districts’ Motion for Postponement*.

² See May 27, 2022 *Ruling on Waltham Public Schools’ Motion to Join Belmont Public Schools (Joinder Ruling)*.

³ The parties are also referred to the factual summary provided in the *Joinder Ruling*.

presents with Specific Learning Disabilities in the areas of reading, writing and math. The LINCS program is described as a “partial inclusion language-based program” that provides a “... systemic, multi-sensory approach to reading, written expression, and mathematics in a small group setting with opportunities for practice and review of students’ skills at a modified pace outside of the general education setting.” Student’s eligibility for special education and related services, and his disability category are not at issue in this matter. (*Hearing Request; Response to the Hearing Request (Response)*).

2. On December 20, 2021 Parents fully accepted the Current IEP and consented to Student’s placement. (*Exhibit A to Response*).
3. The previous IEP, dated 8/31/2021 to 11/24/2021, as revised through June 1, 2021 (“Prior IEP”), also provided for Student to be placed in the LINCS partial inclusion program. This revised IEP was fully accepted, and the proposed placement was consented to on June 10, 2021. (*Hearing Request; Response*).
4. In March 2022, Cathy Mason, M.Ed. conducted an independent educational evaluation of Student, including an observation of Student in the LINCS program on March 2, 2022. According to Parents, Ms. Mason concluded that the LINCS program was not appropriate for Student, as it “lacked cohesion and explicit instruction in language strategies and skills across all settings. Additionally, the [Orton-Gillingham] instruction was not delivered with fidelity ... [and] the ELA class does not teach written language using the explicit, language-based instructional methodologies that [Student] needs to be successful.” Ms. Mason recommended Student be placed in a “full-time, language-based program delivered in small classes with language-based instruction integrated throughout the curriculum.” (*Hearing Request; Motion*).
5. Parents provided Waltham with a copy of Ms. Mason’s report on March 23, 2022, and provided an updated version of Ms. Mason’s report on March 29, 2022. (*Response*).
6. Parents filed their *Hearing Request* on March 24, 2022, contending Student’s current program and placement are inappropriate and requesting, among other relief, that Student be placed at Landmark School for the 2022-2023 school year. (*Hearing Request; Response*).
7. A Team meeting to review Ms. Mason’s report was scheduled for the second week of April, 2022⁴. (*Response*).
8. On May 25, 2022, Waltham contacted Parents to request consent to observe Student, but Parents denied this request⁵. (*Exhibit 1 to Response*).

⁴ During the initial Conference Call in this matter, Waltham and Parents confirmed this meeting was held as scheduled, however, it is unclear from the current record what the outcome of the Team meeting was.

⁵ Specifically, Waltham intended to have Jill Hartman, a reading and lexia expert perform the observation. Waltham contracted with Ms. Hartman to observe the LINCS program as a result of the *Hearing Request*. As LINCS is Student’s current placement, it would be impossible for Ms. Hartman to observe this program without also observing Student. As such, Waltham sought consent for this observation from Parents. Parents agreed that they considered Ms. Hartman’s observation to be an educational evaluation, and thus concurred that it is necessary for consent to be received prior to the observation. Parents declined to provide the requested consent.

9. Waltham maintains that the proposed services and placement are appropriate and provide Student with a free, appropriate, public education (FAPE). (*Response*).
10. In its *Motion*, Waltham contends that the requested observation is “warranted and necessary in order for the District to defend the allegation in this case that instruction in the LINCS program does not provide adequate language-based instruction to meet the Student’s needs” and that it “may also help to resolve the case”. (*Motion*).

LEGAL STANDARD

Pursuant to 603 CMR 28.07(1)(a), prior to undertaking an evaluation of a student, parental consent must be obtained. However,

“[i]f, subsequent to initial evaluation and initial placement and after following the procedures required by 603 CMR 28.00, the school district is unable to obtain parental consent to a reevaluation . . . , the school district shall consider with the parent whether such action will result in the denial of a free appropriate public education to the student. If, after consideration, the school district determines that the parent's failure or refusal to consent will result in a denial of a free appropriate public education to the student, it shall seek resolution of the dispute through the procedures provided in 603 CMR 28.08. Participation by the parent in such consideration shall be voluntary and the failure or refusal of the parent to participate shall not preclude the school district from taking appropriate action pursuant to 603 CMR 28.08 to resolve the dispute...”. 603 CMR 28.07(1)(b)⁶.

Notwithstanding the critical importance of parental consent, as public school districts are tasked with ensuring, funding and implementing the special education and related services that a qualified student requires, they are entitled to obtain and rely on evaluative information from their own chosen sources, in the first instance⁷. District’s do not have to accept or adopt evaluation findings and recommendations from third parties not chosen by the District, even if those evaluations are the most recent sources of evaluative information⁸.

With these legal requirements in mind, I turn to consider Waltham’s *Motion*.

⁶ Districts are also required to document their efforts to obtain parental consent. 603 CMR 28.07(1)(c).

⁷ *Johnson by Johnson v. Duneland Sch. Corp.*, 92 F.3d 554, 558 (7th Cir. 1996) (*internal citations omitted*) “[B]ecause the school is required to provide the child with an education, it ought to have the right to conduct its own evaluation of the student and the school cannot be forced to rely solely on an independent evaluation conducted at the parents' behest.” See *G.J. v. Muscogee County School Distr.*, 683 F.3d 1258, 1263-64 (11th Cir. 2012); *M.T.V. v. DeKalb County School Dist.*, 446 F.3d 1153, 1160 (11th Cir. 2006) (*internal citations omitted*) agreeing with the second, fifth seventh and ninth Circuit Courts of Appeals in holding that the school district had the right to reevaluate the student by an expert of its choice and did not have to rely solely on independent evaluations; *Dubois v. Connecticut State Bd. of Educ.*, 727 F.2d 44, 48 (2d Cir.1984) “[T]he school system may insist on evaluation by qualified professionals who are satisfactory to the school officials.”; *Vander Malle v. Ambach*, 673 F.2d 49, 53 (2d Cir.1982) School officials are “entitled to have [the student] examined by a qualified physician of their choosing.”; *In Re: ABC Schools*, BSEA#1303743, 19 MSER 91, (Crane, 2013), discussed *infra*.

⁸ See *DeKalb County School Dist.*, 446 F.3d at 1160; *In Re: ABC Schools*, BSEA#1303743, 19 MSER 91, (Crane, 2013), discussed *infra*.

APPLICATION OF LEGAL STANDARD

Here, Waltham is requesting substitute consent to allow an expert of its choosing to observe Student in LINCS, which is his current and proposed program. Such observation is described as a component of the expert's overall evaluation of LINCS, with respect to the instant FAPE dispute. While Parents originally declined the requested observation given the proximal timing to the Hearing,⁹ they maintain their lack of consent even now that the Hearing has been postponed, as they do not feel Waltham is seeking the observation for an appropriate reason. Parents object to Waltham's stated reasons for seeking the observation, that is, to assist the "... District to defend the allegation in this case that instruction in the LINCS program does not provide adequate language-based instruction to meet the Student's needs" and that it "may also help to resolve the case". Parents claim that substituted consent is only warranted in situations where a district contends that the requested evaluation/observation is necessary to avoid a denial of a FAPE to a student. Thus, they argue that Waltham's reasons for seeking the instant observation do not meet that legal standard, relying on language in *In Re: ABC Schools*¹⁰.

While said language in *In Re: ABC Schools*, may, at first blush, appear to provide some support for Parents' objection herein, when it read in its entirety, along with the example given by the Hearing Officer to explain it, its supportive value is diminished. Specifically, the Hearing Officer explains,

“[f]or example, ABC Public Schools could not obtain an order from the BSEA for an occupational therapy assessment for Student if no occupational therapy services have been proposed or provided, and if there were nothing to indicate that this is a suspected area of disability or need for purposes of providing FAPE to Student.” *Id.*

Here, Waltham is not seeking to evaluate something that is not at issue or otherwise inapplicable to Student's needs. Rather it is requesting the observation for the very issue in dispute – that is, whether the LINCS program is an appropriate placement for Student, or whether Student should be placed at Landmark in order to receive a FAPE. Moreover, *In Re: ABC Schools* awarded the district substitute consent to conduct certain requested three-year reevaluations (rather than utilizing recent evaluations completed by a private day school student no longer attended) based upon established legal authority in several Circuits recognizing a public school's right to conduct its own evaluations using its chosen evaluators¹¹. Parents did not address or acknowledge this language in relying on the *In Re: ABC Schools* Decision. *Id.*

⁹ Had there been insufficient time for the requested observation to occur and the Team to convene to review the results prior to the Hearing, that may well have played a role in my determination herein.

¹⁰ BSEA#1303743, 19 MSER 91 (Crane, 2013). Specifically, the Parents rely on the Hearing Officer's recognition that the authority of a district to evaluate "is not unlimited [and] cannot be extended to areas outside of its responsibility to conduct a three-year reevaluation and provide FAPE for Student."

¹¹ Specifically, Parents did not address Hearing Officer Crane's analysis that, "... court decisions have consistently made clear that as the school district responsible for providing FAPE to Student, ABC Public Schools has the right to conduct its own evaluations. Parent may not force ABC Public Schools to utilize and rely upon the evaluations of others, whether they are Parents' private evaluations or [the prior day

Unlike many other cases, in the instant case Waltham was not aware that there was any issue as to whether Student was appropriately placed at LINCS or instead requires placement at Landmark School, until, at best, the day before Parents filed their *Hearing Request*. The first written document that Waltham would have received to indicate there was a FAPE dispute would have been Ms. Mason's report, the original version of which was not provided to Waltham until March 23, 2022, the day before the *Hearing Request* was filed. Waltham also had not had an opportunity to convene a Team to discuss this report or its recommendations and amend the IEP, as needed, until after the *Hearing Request* was filed¹².

Student's Prior IEP and Current IEP had and have been fully accepted by Parents and placement was and is consented to, even now. So, prior to Waltham becoming aware of the underlying FAPE dispute, Parents own evaluator had already observed Student and the program in preparation for bringing their claim. Waltham now seeks to do the same with its chosen evaluator for their preparation purposes, regarding the same FAPE dispute¹³.

While Waltham acknowledges that it is requesting this observation to both defend the allegations made by Parents and assist in attempting to resolve the matter, the very allegations Waltham is seeking to defend involve whether Student is being denied a FAPE. Although Waltham has at all times contended that LINCS provides Student with a FAPE, the requested observation by an expert of its choosing will enable Waltham to fully assess its position and at the same time ensure that a FAPE is truly being provided to Student.

Given the circumstances of this matter, I do not find Waltham's request to be inconsistent with the regulatory provisions cited supra, and thus I conclude that substitute consent is here

schools] evaluations. It is irrelevant that Parents' and [the private day school] may arguably be comprehensive and may arguably be sufficient to allow ABC Public Schools to write a new IEP and make a placement decision. The courts have left little doubt that in the instant dispute, ABC Public Schools must be allowed to conduct its own evaluations, unless Parents choose to forfeit their right to receive all special education services for Student.... Parents understandably would like to control ABC Public Schools' evaluations since these evaluations may influence ABC Public Schools' understanding of Student's special education needs and how these needs should be met through services and placement. But the IDEA and Massachusetts special education law simply do not allow for this to happen. Instead, Parents have comparable rights of their own. That is, they have the right to conduct their own evaluations, as they have done numerous times in the past, with their own evaluators determining the design of the evaluations and how the evaluations are to be conducted." *Id.*

¹² As I have not yet had a chance to review the original version of Ms. Mason's report that was provided to Waltham on March 23, 2022, and compare that to the revised version provided to Waltham on March 29, 2022, it is also unclear if what was given to Waltham on March 23, 2022 included information to indicate Parents were then challenging the appropriateness of the LINCS placement. As it is unknown at this stage what the revisions to Ms. Mason's report consisted of, it is possible that the *Hearing Request* was the first time Waltham was made aware of the underlying dispute as to Student's appropriate placement.

¹³ *Muscogee County School Distr.*, 683 F.3d at 1263-64; *DeKalb County School Dist.*, 446 F.3d at 1160; *Johnson by Johnson*, 92 F.3d at 558; *Dubois*, 727 F.2d at 48; *Vander Malle*, 673 F.2d at 53; see also *GD v. Westmoreland School District*, 930 F.2d 942, 948 (1st Cir. 1991) "FAPE may not be the only appropriate choice, or the choice of certain selected experts, or the child's parents' first choice, or even the best choice."

warranted¹⁴. In order to ensure that Parents are not prejudiced by Waltham's requested observation, however, Waltham shall allow a person of Parents' choosing to accompany Jill Hartman. Waltham will work to coordinate the scheduling of this observation so as to enable such participation by Parents' chosen observer prior to the Pre-Hearing Conference scheduled in this matter.

Waltham's *Motion* is hereby **ALLOWED**, and substitute consent is granted for Jill Hartman to observe Student as part of her evaluation of the LINC'S, provided that a person of Parents' choosing is allowed to accompany Ms. Hartman on such observation, as set forth above.

So Ordered by the Hearing Officer

/s/ Marguerite M. Mitchell

Marguerite M. Mitchell

Dated: June 8, 2022

¹⁴ This is not to say that any time parents file a Hearing Request placing FAPE at issue, a District then has the right to conduct observations or evaluations. My analysis is applied to the circumstances of this case, in which the FAPE issue was not known to the District until, essentially, the filing of Parents' *Hearing Request*.