

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

In Re: Zoltan<sup>1</sup>  
BSEA # 13-00068

**CORRECTED RULING ON THE MOTIONS OF THE NORWELL PUBLIC SCHOOLS  
TO DISMISS AND/OR FOR SUMMARY DECISION**

This matter comes before the BSEA on the Motion of the Norwell Public Schools to Dismiss the Hearing Request filed by Zoltan's Parents or for Summary Judgment. The Parents oppose both Motions and seek an evidentiary hearing. Both parties submitted briefs and affidavits in support of their respective positions. The pertinent procedural background may be briefly summarized:

On July 20, 2012 the Parents filed a Hearing Request at the BSEA seeking a determination that Norwell Public Schools failed to provide the free, appropriate public education to which Zoltan was entitled during the 2010-2011 and 2011-2012 school years, thereby violating its obligations and Zoltan's rights under the IDEA, Section 504 of the Rehabilitation Act of 1973, the ADA, M.G.L.c. 71 B and 69, and Article 114 of the Massachusetts Constitution. The Parents sought reimbursement of all expenses they incurred in providing substitute special education services during those school years as well as an award of compensatory education and related services. The School responded on September 4, 2012 with the instant Motion to Dismiss and for Summary Judgment. Most of the "facts" supplied by the Parties in those submissions, and that would support a ruling on a dispositive pre-hearing Motion, are in dispute.

Zoltan is currently a 15 year old 9<sup>th</sup> grade student. He has at all relevant times been a resident of Norwell. His current educational placement is not an issue in this due process proceeding. Zoltan has received special education services targeting his social-emotional and executive functioning weaknesses since the first grade. These facts are not in dispute.

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<sup>1</sup>"Zoltan" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

According to the Parents' hearing request Zoltan's in-school performance declined precipitously during the 7<sup>th</sup> grade, 2010-2011 school year. Norwell failed to implement accepted portions of his IEP, failed to recognize and address his increasing disengagement from the social and academic life at school, failed to respond appropriately to episodes of bullying, and implemented inappropriate and unwarranted disciplinary actions. In September 2011, the IEP Team reconvened but did not adequately evaluate, discuss or plan services for Zoltan's then current emotional needs. The resulting IEP lacked appropriate evaluative data, lacked appropriate social and behavioral interventions, lacked measurable academic goals, and failed to offer an appropriate special education setting or services. At the recommendation of Zoltan's therapist, and due to concerns about Zoltan's safety and that of other students and family members, Zoltan was removed from the Norwell Public Schools on October 18, 2011. The Parents hand-delivered a letter dated October 17, 2011 informing Norwell that Zoltan would be attending the Ironwood School in Maine. Zoltan began attending the Ironwood School on October 28, 2011. The Parents provided Norwell with consent to release of information and to evaluations. Norwood did not perform any evaluations, did not arrange any meetings with the Parents, Zoltan's service providers or The Ironwood School and did not exchange any information concerning Zoltan during this period of time.

On November 29, 2011 the Parents hand-delivered to Norwell a notice of Zoltan's immediate transfer to the Cherry Gulch program in Utah. Zoltan attended Cherry Gulch until March 2012 and made remarkable improvement. Norwell did not evaluate Zoltan during this time nor did it meet with the Parents, correspond with Cherry Gulch, or otherwise participate in Zoltan's education or return to the Norwell community.

The School's Response and Motion offers a different view of events, positing that it did not receive the required notice of the Parents' intention to place Zoltan in a private school, that the Parents did not cooperate with the School's attempts to evaluate Zoltan, and that the Parents obstructed the School's attempts to offer alternative placements and services.

Norwell moves to dismiss the Parents' hearing request and/or moves for summary judgment in its favor asserting that the Parents are not entitled to the retroactive reimbursement or compensatory education relief they seek because 1) the Parents failed to file the required notice of intent to make a unilateral placement pursuant to 20 U.S.C. § 145 (a) (10) (C) (iii) (I) (aa) or (bb); 2) the Parents' actions in moving Zoltan were unreasonable; and 3) reimbursement cannot be awarded as compensatory education.

### Motion to Dismiss

A Motion to Dismiss may be granted if the party requesting the hearing fails to state a claim for which relief is available through the BSEA. 801 CMR 1.01 (7) (g) (3); BSEA Hearing Rules XVII (B) (4). See also F.R.C.P. Rule 12 (b) (6) and M.R.C.P. Rule 12 (b) (6). In considering whether dismissal is warranted a hearing officer must accept all factual allegations set forth in the non-moving petitioner's hearing request as true. If those facts, proved at a hearing, would entitle the non-moving party to any form of relief from the BSEA, then dismissal

for failure to state a claim is not appropriate. Ashcroft v. Iqbal, 556 U.S.662 (2009); Ocasio-Hernandez v. Fortunato-Burset, 640 F.3d. 1 (1<sup>st</sup> Cir. 2011); Doe v. Attleboro, 2011 U.S. Dist. LEXIS 98235 (D. Mass.2011) (not in official reporter). Dismissal on pleadings is disfavored, as petitioners are given every benefit of doubt. Here the factual allegations set out in the Parents' hearing request would provide sufficient support for the identified legal claims and the type of relief requested from the BSEA were they to be proven at the hearing. Therefore the Parents have provided the required "fair notice" of their claims and dismissal at this juncture is inappropriate.

### Motion for Summary Judgment

Summary judgment is available to parties participating in a BSEA proceeding when "there is no genuine issue of fact relating to all or part of a claim or defense and [the party moving for summary judgment] is entitled to prevail as a matter of law." 801 CMR 1.01 (7) (h).

This rule of administrative practice is modeled on the F.R.C.P. Rule 56 and M.R.C.P. Rule 56 which provide that summary judgment may only be granted 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 facts and the moving party is entitled to judgment as a matter of law. The party seeking summary judgment bears the burden of proving that there are no genuine issues of material fact on every relevant issue. Reti v. Lexington Public Schools, C.A. No. 10-10412-WGY, (D. Mass September 27, 2012). An issue of fact is "genuine" if there exists a sufficient evidentiary basis on which a trier of fact could find for the non-moving party. A fact is "material" if it will affect the outcome of the case under the applicable law. Anderson v. Liberty Lobby Inc., 477 U.S. 242 (1986). When evaluating a request for summary judgment all the well pled assertions of facts, the supporting affidavits, and all inferences derived therefrom, must be viewed in the light most favorable to the party opposing summary judgment.

As set out in the discussion above, most of the material facts alleged in the Parents' request for Hearing in this matter are disputed by the Respondent School. Affidavits submitted by both parties serve only to sharpen, not resolve, those disputed facts. Since genuine material facts remain in dispute summary judgment is not appropriate.

### ORDER

After careful consideration of the arguments in support of, and in opposition to, the School's attempts to avoid an evidentiary hearing in this matter, I find that neither a Rule 12 (b) (6) dismissal nor summary judgment is available under the circumstances presented here. Therefore:

- 1) The School's Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted is DENIED.
- 2) The School's Motion for Summary Judgment is DENIED.
- 3) The Parties' Joint Motion to Change Venue is GRANTED. The Hearing will be held on November 5, 2012, beginning at 10:30 a.m. at the Office of Murphy, Hesse, Toomey and Lehane, 300 Crown Colony Dr., Quincy, MA.

By the Hearing Officer

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Lindsay Byrne

Dated: October 16, 2012