

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

In Re: Student v.
Boston Public Schools

BSEA # 1310180

Ruling on Boston Public Schools Motion to Dismiss

On July 12, 2013, Boston Public Schools (Boston) filed a Motion to Dismiss in the above-referenced matter. On July 12, 2013, Parents stated their intent to oppose the motion, and thereafter, filed their Opposition on July 17, 2013.

This matter involves Parents' challenge to Boston's finding of no eligibility for special education services. Parents raise procedural and substantive claims and seek placement of Student in a self-contained, small, language-based classroom for children with average cognitive abilities such as Landmark or the Carroll School; one-to-one or small group specialized reading instruction; individualized support for writing and math; therapeutic counseling; behavioral/ motivational reinforcers; instruction in executive functioning; access to a computer and assistive technology consultation; transition plan inclusive of vocational supports; and other accommodations. Parents do not seek reimbursement for Student's independent evaluations but wish for the Team to convene to discuss the results of their private evaluation.

Boston states that Parents have denied consent for Boston to proceed with its own evaluations and argues that it has a right to evaluate Student in all areas of suspected need prior to Parents' right to independent evaluations arising. As such Boston states that Parents' Hearing Request is premature and should be dismissed.

This Ruling is issued in consideration of the Parties' submissions and the applicable laws.

FACTS:

1. Student is a fifteen year old resident of Boston, Massachusetts, who entered the Frederick Pilot Middle School (Frederick) in September 2009, the beginning of his sixth grade.
2. On December 13, 2010, Parents referred Student for a CORE evaluation raising concerns regarding Student's writing, science and Attention Deficit Hyperactivity Disorder (ADHD) of which he had a history (PE-2). Student had trials of ADHD medication (Focalin XR and Concerta) but discontinued the medication a couple of weeks later because of headaches (PE-4).

3. On February 23, 2011, forty one (41) days following receipt of Parents' request for evaluation, Boston forwarded to Parents the School District's Notice of Proposed Action along with an evaluation consent form (PE-3). Boston proposed to conduct an educational assessment, a home assessment, a psychological evaluation, and an observation of Student in school. Parents consented to the evaluations on March 8, 2011 (*Id.*).
4. On April 12, 2011, Boston received Parents' consent for initial evaluation (PE-3). Boston conducted an educational and sociological evaluation on May 31, 2011 and a psychological evaluation on June 16, 2011.
5. On April 20, 2011, a private Pediatric Behavioral Development evaluation was conducted by Arathi Reddy, Developmental and Behavioral Pediatrician at Boston Medical Center. The evaluator noted her surprise at how poorly Student did in the Gray Oral Reading Test –4th Edition (GORT); on the Comprehensive Test of Nonverbal Intelligence (CTONI) the evaluator found significant discrepancy between his geometric and pictorial performance. Dr. Reddy found Student's cognitive abilities to fall within the average range but noted a discrepancy between his excellent reading skills and his below average comprehension scores. Dr. Reddy noted that Student's math and spelling abilities were at a fourth and third grade level respectively. Dr. Reddy diagnosed Student with ADHD (combined), Oppositional Defiant Disorder, Adjustment Reaction Disorder and Learning difficulties/ Academic Underachievement Disorder (PE-4).
6. Dr. Reddy recommended that Student receive three times per week academic support services for reading, spelling and mathematics. She also recommended that Student continue to receive counseling services and opined that the family would benefit from family therapy to better address his anger issues (PE-4). To address Student's ADHD symptoms, Dr. Reddy recommended Daytrana 10 mg (PE-4).
7. Boston conducted a social assessment of Student and a psychological evaluation on May 26 and June 16, 2011 (PE-5). His teachers noted that Student could be "defiant, disrespectful and manipulative" at times, that he did not follow through, often did not work at all and his assignments were variable and often incomplete. However, they had no concerns regarding Student's cognitive skills. Parents shared their continued concern regarding Student's behavior in school and in the home (PE-5). The evaluator, Ivys V. Carey, Ph.D. Licensed Clinical Psychologist, noted that on paper and pencil tasks requiring visual discrimination, Student's performance was slower than same age peers. She noted variability within the subtest scores of the WISC-IV regarding sequencing, visual scanning skills and social reasoning, all of which fell in the low average range when compared to same age peers. Dr. Carey's evaluation report lacks any significant discussion of the result of Student's evaluation. She recommended accommodations to help Student remain focused and attentive in class including: use of verbal, non-verbal or tactile cues to get his attention before giving instructions; use of verbal cues to keep him on task; providing reinforcement for

independent task completion and assignment completion; providing a structured environment; building in breaks during the school day and after intense periods of seatwork; preferential seating; and providing a position of leadership to help boost his confidence and focus (PE-5).

8. In June 2011, Boston notified Parents that Student would be retained in the seventh grade.
9. In November 2011, Boston conducted a Functional Behavioral Assessment of Student focused on homework completion. The FBA notes the interventions attempted with Student since 2010 which included: before, after school and during school homework assistance; online access to missing work; extra attention provided by teachers; phone calls to the home; detentions; incentives; ignoring behaviors; losses of privileges or disincentives; check-ins with staff on an as needed basis; once per week school-based counseling; and homework tracker. The FBA notes that even though Student had failed academically the previous year, he was still not completing his homework and did not appear to understand the benefits of homework or academic success (PE-17). It was recommended that Student continue to receive weekly school-based counseling, praise for good behavior, check-ins as needed, maintenance of daily logs for homework checks and implementation of classroom rules (PE-17).
10. An educational assessment completed from October 24 through October 27 and November 10, 2011, by Ms. Lyons notes that when tested in his native language, Student's skills in the areas of word identification, word attack, and reading fluency were very strong. Student also evidenced great difficulty in math calculation and fluency (PE-6). Ms. Lyons submitted her report of this evaluation on November 11, 2011 (*Id.*).
11. Ms. Lyons, who was also Student's reading teacher, noted that by the end of November Student had only read one of the eight required books. She noted how difficult it was to do editing and proof reading with him because he was very defensive and did not accept constructive criticism. When frustrated, he had a tendency to shut down. His attentional issues caused him to miss concepts in class very often and he did not respond to redirection, often talking back at the teacher. He was often absent or tardy, which impacted his ability to focus (PE-6).
12. Ms. Lyons recommended direct instruction in math calculation, problem solving, a step-by-step approach to completing tasks as well as opportunities for practice; explicit instruction on the use of POWER writing process; extra time to process information and to complete assignments; and increased time spent on reading. Lastly, she recommended the following method of instruction:

Individualized directions, one-on-one check-ins, teacher modeling with use of visuals, demonstrations and exemplars, manipulatives, [and] repeated practice (PE-6).

13. Other accommodations included: written directions, oral directions, behavior management, modified homework, behavior contracts, highlighting key words, and graphic organizers (PE-6).
14. Student's Team convened on November 22, 2011 and determined that Student was ineligible to receive special education services. Since he was found to have a health disability¹, difficulty with test-taking, and poor motivation, he was found to be a candidate for 504 accommodations (PE-7). A Notice of School District Refusal to Act was forwarded to Parent on December 15, 2011, twenty-two days after the Team meeting (PE-7).
15. Thereafter, following a meeting on March 12, 2012 (sixty three school days following issuance of the finding of no eligibility for special education) Boston offered Student a 504 plan which remains in effect through the present time. It states that Student has been diagnosed with ADHD, Adjustment Disorder –Unspecified, and Oppositional Defiant Disorder. It identified “learning” as the major life activity impacted by Student's disabilities. It calls for provision of modified homework and testing accommodations, and expects Student to complete his homework and be prepared for class discussions. Student may give his responses orally. Specifically, the 504 plan calls for Student to receive the following accommodations: preferential seating; small group setting as tolerated; alternate setting as tolerated; creative scheduling; homework modifications; frequent breaks; use of checklists, reference sheets, and graphic organizers and/ or an abacus (PE-8).
16. In June 2012, Boston retained Student in the seventh grade for the second time.²
17. On or about September 20, 2012, Parent pursued a private neuropsychological evaluation of Student with Dr. Carol Leavell of LifeDimensions Neuropsychological Services, Inc. which was scheduled to take place in January 2013 (PE-9; PE-10). Parent also sought funding from Boston for an independent academic evaluation and later withdrew her request (PE-12).
18. Dr. Leavell evaluated Student on January 2, February 19 and March 5, 2013 (PE-10; PE-13). Student was not on medication at the time of this evaluation. He was noted to become frustrated and visibly anxious when confronted with time constraints and/ or potential failure, but was cooperative and persisted with encouragement to task completion (PE-13).
19. Dr. Leavell found Student to present with higher level executive functioning deficits, and a constellation of learning disabilities associated with language-based processing,

¹ ADHD, Adjustment Disorder- Unspecified and Oppositional Defiance Disorder (PE-8).

² According to the Parties' submissions however, it appears that Student attended eighth grade during the 2012-2013 school year.

including fluency (with the English language), reading comprehension and also written output for math and composition. She noted that Student's oppositionality appeared to be related to his anxiety and his deficits in higher order reasoning and executive functioning. According to her, Student's "ability to comprehend and reason at an abstract level and organize language is highly inconsistent." Dr. Leavell opined that Student's diminished ability to learn from his experience and to solve problems in a flexible manner likely impacted Student's behavioral concerns in the home (PE-13). She noted that these deficits had been documented in Student's first evaluation performed in 2006. She made numerous recommendations including participation in a structured, self-contained, small, language-based classroom, which offered adequate intellectual stimulation and interventions that addressed his executive functioning issues, and medical follow-up for his anxiety levels. She also recommended social skills training, a behavioral plan, therapeutic counseling and vocational counseling³. To address his reading deficits, she recommended implementation of a specialized reading program such as Wilson, and individualized support to address his writing and math deficiencies. Regarding compensatory strategies to address his executive functioning issues, Dr. Leavell stated that the focus should be on helping Student develop self-monitoring and self-management approaches. She also recommended continuation of psychotherapy (PE-13).

20. In early January 2013, Parent again referred Student for special education consideration and requested funding for an independent neuropsychological and educational evaluation of Student (PE-11; PE-12). Boston forwarded a Notice of School District Proposed Action, on January 30, 2013, proposing to conduct evaluations of Student (PE-11). Boston forwarded consent for evaluation forms to Parent on January 30, April 30, and May 15, 2013, proposing to evaluate Student in the same areas as it had evaluated him in May, June and November of 2011 except that Boston did not seek an observation of Student in school (PE-11). Parents did not respond to Boston's requests for consent to evaluation.
21. On February 13, 2013, Parent's legal representative memorialized a telephone conversation with Molly Bettencourt Dallaire of Boston, notifying Boston that Parent had withdrawn her request for independent evaluation even though she would have been eligible for public funding given that her request had been made less than sixteen (16) months from the last evaluation conducted by Boston on November 22, 2011. According to Parent, a new evaluation by Boston would not be necessary to trigger Parent's right to public funding for her independent evaluation (PE-12).
22. Parent forwarded a copy of the report of Student's private neuropsychological evaluation to Boston on April 16, 2013 and requested a Team meeting to discuss the report and consider Student's eligibility for special education (PE-14). Following

³ Dr. Leavell noted that given Student's cognitive abilities, he could attend college and therefore, he should not be encouraged to make vocational decisions until his potential becomes clear after proper interventions have been implemented (PE-13).

telephone conversations on April 26 and 29, 2013, Student's Team meeting was scheduled for May 2, 2013 (PE-15).

23. At the May 2, 2013 Team meeting, Boston did not discuss the results of Dr. Leavell's evaluation and did not discuss Student's eligibility for special education. The record lacks information as to what was discussed at the Team meeting. Following the Team meeting, Boston proposed to conduct evaluations of Student.
24. On or about June 13, 2013, Boston sought Parental consent to conduct an educational and psychological evaluation of Student and to administer the Woodcock Johnson III, psychological testing and an educational assessment. The same date Parent consented only to administration of the Woodcock Johnson III, and the educational assessment (PE-16). Boston administered the Woodcock Johnson III on June 24, 2013.⁴
25. According to Boston, Student recently completed the eighth grade at the Frederick. Student has not yet received his grades for the 2012-2013 school year, has not been informed whether he was promoted to ninth grade or where he will attend school for the 2013-2014 school year.
26. According to Parent, Student was not invited to participate in the eighth grade graduation exercises with his peers.

LEGAL FRAMEWORK:

The BSEA Hearing Rules and the Standard Adjudicatory Rules for Practice and Procedure⁵ authorize the Hearing Officer to dismiss cases when the party requesting the appeal fails to state a claim upon which relief can be granted⁶ similar to the Federal and Massachusetts Rules of Civil Procedure which also allow dismissals when a party fails to state a claim on which relief can be granted.⁷

In order for a complaint to survive a motion to dismiss, it must contain factual allegations that "raise a right to relief above the speculative level."⁸ In the context of a motion to dismiss, all factual allegations must be accepted "as true and [the Hearing Officer must] draw

⁴ According to Boston, the district also requested consent to conduct an occupational therapy and a speech and language evaluation. The record however, does not contain a copy of the consent for evaluation form for these evaluations.

⁵ 603 C.M.R. 28.08(5)(b) ("Except as provided otherwise under federal law or the in the administrative rules adopted by the Bureau of Special Education Appeals, hearings shall be conducted consistent with the formal Rules of Administrative Procedures contained in 801 C.M.R. 1.00.").

⁶ BSEA Hearing Rule XBII (B)(4) ("Any party may file a motion or request to dismiss a case for . . . failure to state a claim upon which relief can be granted"); 801 C.M.R. 1.01(7)(g)(3) ("The Presiding Officer may at any time, on his own motion or that of a Party, dismiss a case . . . for failure of the Petitioner to state a claim upon which relief can be granted").

⁷ FED. R. CIV. P. 12(b)(6); MASS. R. CIV. P. 12(b)(6).

⁸ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007).

all reasonable inferences in the plaintiff's favor."⁹ Legal conclusions, however, are not entitled to a presumption of truth because, while legal conclusions may "provide the complaint's framework, they must be supported by factual allegations."¹⁰ The question on a motion to dismiss is not a matter of whether the plaintiff will prevail, but rather if the plaintiff should be given an opportunity to offer evidence in support of his/ her claims.¹¹

In this regard and following the "modern understanding" of Rule 12(b)(6) pursuant to *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and its forerunners¹², I find that Parent's allegations raise the plausibility of a right to relief, and as such, Boston's Motion to Dismiss must be DENIED as explained below.

CONCLUSIONS OF LAW:

In the instant case, Boston seeks dismissal of Parent's claims on the basis that under federal law, it is required to conduct a full, initial evaluation of Student before considering his eligibility for special education. 34 CFR §300.301. Boston argues that it cannot be required to rely on the result of independent evaluations alone and cites numerous cases in support of its position. See *Andress v. Cleveland Independent School District*, 64 F.3d 176, 179 (5th Cir. 1995); *Johnson by Johnson v. Duneland Sch. Corp.*, 92 F.3rd 554, 558 (7th Cir. 1996); *M.T.V. v. Dekalb County School District*, 446 F.3rd 1153, 1160 (11th Cir. 2006). Boston therefore, seeks dismissal of Parent's claims until it has first had the opportunity to evaluate Student and convene the Team to discuss the result of those evaluations.

Parents' Hearing Request raises numerous procedural and substantive claims regarding requests for evaluations, for convening of the Team and challenging Boston's denial of eligibility for special education. Boston seeks to have all of Parents' claims dismissed on the basis that it has a right to conduct evaluations of Student before Parents' procedural and substantive rights arise and that Parents' failure to consent to its most recent request to evaluate Student should cause the case to be dismissed.

⁹ *Doe v. Boston Public Sch.*, 560 F.Supp.2d 170, 172 (D.Mass. 2008). See also, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009) ("To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical . . . It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."); *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011) ("Non-conclusory factual allegations in the complaint must then be treated as true, even if seemingly incredible.").

¹⁰ *Ashcroft*, 129 S. Ct. at 1940.

¹¹ *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1419 (3d Cir. 1997). See also, *L.X. ex rel. J.Y. v. Bayonne Bd. of Educ.*, No. 10-05698, 2011 U.S. Dist. Lexis 32952 (D.N.J. Mar. 29, 2011) (citing *Burlington*); *Doe*, 560 F.Supp.2d at 172 ("If the facts in the complaint are sufficient to state a cause of action, a motion to dismiss the complaint must be denied."); *Ocasio-Hernandez*, 640 F.3d at 12 ("In short, an adequate complaint must provide fair notice to the defendants and state a facially plausible legal claim."); *Sepulveda-Villarini v. Dep't of Educ. of Puerto Rico*, 628 F.3d 25, 29 (1st Cir. 2010) ("The make-or-break standard . . . is the combined allegations, taken as true, must state a plausible, not a merely conceivable, case for relief.").

¹² See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), which along with *Iqbal*, explains that "an adequate complaint must provide fair notice to the defendants and state a facially plausible legal claim." *Ocasio-Hernandez v. Fortuño-Burset*, 640 F.3d 1, 8-9 (1st Cir. 2011).

The relevant facts in the instant case show that Boston responded to Parent's request for initial evaluations on February 23, 2011, forty one days after receiving Parents' request, even though it was mandated to complete said evaluation within thirty (30) school days. 603 CMR 28.04(2). Once it received Parental consent for conducting the evaluations on April 12, 2011, it did not complete its initial evaluations until November 2011. Later, on December 15, 2011, one year after Parent's initial referral for evaluation, it entered a finding of no eligibility for special education. Boston then supported a 504 plan for Student but did not convene a 504 meeting or draft a 504 plan until March of 2012. During this time, Student repeated seventh grade at least twice. The record is unclear as to whether in June 2013 Student completed eighth grade or seventh grade for the third time. In 2012, Parents pursued a private/ independent evaluation of Student, requested funding from Boston and reconvening of the Team to discuss the results. Boston denied funding, and sought to conduct its own evaluations. When Parents withdrew their request for funding and asked only for the Team to convene to discuss the results of its private/independent evaluation in early February 2013, Boston did not reconvene the Team.

The Massachusetts Special Education Regulations clearly state that

(f) Within ten school days from the time the school district receives the report of the independent education evaluation, the Team shall reconvene and consider the independent education evaluation and whether a new or amended IEP is appropriate. 603 CMR 28.04(5)(f).

Nothing in the federal or state laws, or the Massachusetts Special Education Regulations, grants Boston the right to an unscheduled evaluation in response to Parents' request to convene the Team to discuss private/independent evaluations. Parents intended on using their independent evaluations to challenge Boston's earlier finding of no eligibility for special education. Boston's determination was based on the result of the evaluations it conducted approximately 16 months earlier. Except for administration of the Woodcock Johnson III, Parents did not consent to Boston repeating any other evaluation. Therefore, Boston had no option but to rely on the results of its 2011 evaluations, Student's then current performance and Parents' independent evaluations to reassess Student's eligibility.

As noted, Parents withdrew their request for funding/ reimbursement of their independent evaluation in February 2013. Where Parents were no longer seeking reimbursement for their private/ independent evaluation of Student, Boston had no choice but to convene the Team within ten days school days to discuss the results of Parents' evaluation once it was made available. Boston could not delay convening of the Team by asking to repeat its own unscheduled evaluations.

Lastly, in its Motion to Dismiss, Boston references having sought parental consent for conducting an occupational therapy and a speech and language evaluation, in addition to the psychological evaluation, educational assessment and the Woodcock Johnson, in 2013. This Ruling addresses Boston's request regarding the psychological evaluation, educational assessment and the Woodcock Johnson. The record however, does not contain any consent

request by Boston to proceed with an occupational therapy and/ or a speech and language evaluation. To the extent that Boston is now seeking to evaluate Student in those areas, it may forward consent forms to Parents but it must convene a separate Team meeting to consider Parents' independent neuropsychological and educational evaluation, something it was mandated to do within ten days from the date of receipt of Dr. Leavell's evaluation forwarded to Boston on April 16, 2013.

I find that Parents have viable procedural and substantive claims and as such Boston's Motion to Dismiss is **DENIED**. Parent may proceed to Hearing on all substantive and procedural claims.

So Ordered By the Hearing Officer,

Rosa I. Figueroa
Dated: July 24, 2013