

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

Student

v.

Sudbury Public Schools and Lincoln-Sudbury Regional School District

BSEA#1403509

**RULING ON SUDBURY PUBLIC SCHOOLS' MOTION FOR SUMMARY JUDGMENT
AND LINCOLN-SUDBURY REGIONAL SCHOOL DISTRICT'S MOTION FOR
SUMMARY DECISION**

BACKGROUND

On November 12, 2013, Parents filed an appeal with the BSEA against the Sudbury Public Schools (SPS) and the Lincoln-Sudbury Regional School District (LS). Parents seek retroactive reimbursement for their unilateral, residential school placement of Student at Lake House Academy (LHA) in North Carolina for Student's eighth and ninth grade years, to wit: 2011-2012 and 2012-2013 school years. Parents reside in Sudbury, MA. SPS runs through the eighth grade. SPS is a member of LS for grades nine through twelve.

Student attended SPS through 7th grade. She was a regular education student until 7th grade when SPS found her eligible for a Section 504 Plan. Independent and school evaluations were done in March and May 2011. In May 2011 Parents placed Student in a 60 day therapeutic wilderness program. On June 21, 2011 a team meeting was held and SPS found Student eligible for special education and promulgated an Individual Education Program (IEP) which proposed that Student be placed in a substantially separate special education program, the ACCESS Program, at SPS' Curtis Middle School, effective September 2011. At that team meeting, Parents and their experts requested that SPS consider a residential placement for Student as well as extended year services, which requests which were rejected by SPS. Following Student's discharge from the therapeutic wilderness program, Parents placed her at LHA. On August 24, 2011, Parents accepted the proposed services of SPS' IEP but rejected SPS' proposed ACCESS placement and lack of extended year services.

Parents never formally gave notice to SPS of Student's unilateral residential placement at LHA nor formally requested SPS or LS to pay for the LHA placement until the filing of this BSEA appeal. Indeed, Parents never gave any notice at all to LS. However, on September 12, 2011 SPS sent correspondence to Parents indicating SPS' knowledge that Student would not be returning to SPS that fall and that if Student was attending a different school, she needed to be officially withdrawn from SPS. On September 13, 2011 Parents responded informing SPS: 1) that Student had been attending LHA since August 22, 2011; 2) giving SPS contact information regarding LHA; and 3) withdrawing Student from SPS. Student attended the residential placement at LHA for the 2011-2012 and 2012-2013 school years, the time period for which Parents seek retroactive reimbursement from SPS and LS.

On March 6, 2014 LS filed a Motion for Summary Decision (MSD) with accompanying exhibits, affidavits, and legal argument. On March 13, 2014 SPS filed an Opposition to LS' MSD (SPS Opposition) and a Cross Motion for Summary Judgment (MSJ) with accompanying exhibits, affidavits and legal argument. On March 27, 2014 LS filed a Reply to SPS' Opposition. On March 28, 2014 Parents filed their Opposition to both LS' MSD and SPS' MSJ (Parents' Opposition) with accompanying exhibits, affidavits and legal argument. On April 4, 2014, LS filed a Reply to Parents' Opposition. On April 7, 2014, SPS filed a Reply to Parents' Opposition.

Numerous pre-hearing conference calls took place to initially determine Parent representation, to allow the parties to exchange information, and to set up the above motion schedule. After the motions were submitted, several conference calls were held in an attempt to resolve this case but were unsuccessful.

On May 27, 2014 a telephonic motion session took place in which the parties offered oral argument in support of their respective motions and positions.

STATEMENT OF POSITIONS

LS' MSD states that there is no genuine issue of material fact with respect to LS' responsibility for Student for either the 2011-2012 or 2012-2013 school years under the facts of this case and that LS is entitled to a decision in its favor as a matter of law. Regarding the 2011-2012 school year, Student's 8th grade year, LS argues that it is responsible for educating only high school students from the towns of Lincoln and Sudbury. Regarding the 2012-2013 school year, Student's 9th grade year, LS argues that it is not responsible for providing Student with a free and appropriate public education (FAPE) since it had no knowledge of Student and was not on notice that she was a Sudbury resident who was a 9th grade student on an IEP until it was served with Parents' hearing request after Student had already completed 9th grade at LHA.

SPS' MSJ states that it had no responsibility for Student for her 9th grade year, 2012-2013, because Student had completed the 8th grade and could no longer attend SPS. Regarding the 2011-2012 school year, Student's 8th grade year, SPS argues: 1) that Parents accepted SPS' proposed 9/11 to 6/12 IEP and never rejected said IEP during its term; and 2) Parents failed to

provide SPS the required written statutory notice of Parents' unilateral placement of Student at LHA and requesting SPS to pay for such placement. SPS opposes LS' MSD arguing that SPS did provide notice to LS regarding Student's out of state residential placement.

Parents' Opposition opposes both LS' MSD and SPS' MSJ. Regarding SPS and the 2011-2012 school year, Parents argue that they did not fully accept SPS' proposed IEP and that they did inform SPS of Student's placement at LHA. Regarding LS and the 2012-2013 school year, Parents' argue that there is a genuine issue of material fact as to whether SPS gave sufficient notice to LS of Student as a special education student in an out of district placement.

RULING

Based upon the written exhibits and affidavits submitted by the parties, the written and oral arguments advanced by the parties, and a review of the applicable law, I conclude as follows:

- I. LS' MSD is GRANTED for the 2011-2012 school year.
- II. SPS' MSJ is DENIED for the 2011-2012 school year.
- III. SPS' MSJ is DENIED for the 2012-2013 school year.
- IV. LS' MSD is DENIED for the 2012-2013 school year.

My analysis follows.

Pursuant to 801 CMR 1.01(7)(h), Summary Decision is available to parties when there is no genuine issue of fact relating to all or part of a claim or defense and the moving party is entitled to prevail as a matter of law. This rule of administrative practice is modeled after Rule 56 of both the Massachusetts and Federal Rules of Civil Procedure. The party seeking summary judgment bears the burden of proof, and all evidence and inference must be viewed in the light most favorable to the party opposing summary judgment. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252 (1986).

I.

SPS educates Sudbury students through grade 8. For grades 9 through 12 SPS is a member of LS. LS is a regional school district which educates students who live in the towns of Lincoln and Sudbury from 9th through 12th grades. LS has no legal responsibility for any students until they enter high school. Therefore LS MSD is GRANTED for the 2011-2012 school year which was Student's 8th grade school year.

II.

SPS contends that it is not responsible for Student's 8th grade year because Parents accepted SPS' proposed IEP for the 2011-2012 school year and never rejected said IEP during its term i.e., until after it had expired as an accepted IEP. SPS cites numerous BSEA and court cases in support of its position. However, in all of these cases, Parents had fully accepted the IEPs offered

by the school, the IEPs were implemented by the school, the students received the proffered services under these IEPs, and only after the students had received services under these IEPs and said IEPs had expired did Parents attempt to retroactively reject these expired IEPs. In none of these cited cases, did the school ever receive any notice from parents that parents disputed or rejected the proffered IEPs while said IEPs were operative.

In the instant case, it is totally clear that Parents wanted a residential out of district placement for Student, and made that fact known to SPS at the June 21, 2011 team meeting. This fact is demonstrated by SPS' IEP itself where it is noted: "Parents and outside service providers requested a residential therapeutic placement..." The last sentence of the N1 of the IEP states: "The Educational Consultant indicated the IEP/placement would be rejected based upon the placement and extended year services." Parents also told SPS at the team meeting that they were rejecting SPS' ACCESS Program and that they would have to seek an alternative placement for Student. (See affidavit, Father.) On August 24, 2011 Parents accepted the IEP services but specifically rejected the proposed placement. (See IEP.) Further, as indicated under **BACKGROUND**, above, there were communications between Parents and SPS in September 2011 regarding Student's placement at LHA.

Therefore, I find that SPS was clearly put on notice, in a timely manner, that while Parents were accepting the services of the IEP that they were rejecting SPS' proposed placement for Student and that Parents would have to find an alternative placement. SPS sent the IEP to the BSEA as a rejected IEP and SPS refers to the fact that it had a rejected IEP on file for Student. (See affidavit, Dixon.) The evidence is thus clear from SPS' own actions that SPS was aware the IEP had not been fully accepted.

SPS further argues that Parents never provided written notice of their intent to unilaterally place Student at LHA pursuant to 20 U.S.C. Sec.1412(a)(10)(C)(iii)(bb). While Parents did not file the formal written notice pursuant to the above statutory section, their actions, described above, appear to have fulfilled the requirements of 20 U.S.C. Sec.1412(a)(10)(C)(iii)(aa), and only (aa) or (bb) needs to be fulfilled. Further, the above cited statutory section provides that reimbursement for a unilateral placement may be reduced or denied if Parents did not fulfill the requirements of (aa) or (bb). There is nothing in the statute which mandates a denial of all reimbursement if the above statutory section is not fulfilled. However, this issue will be one of the factors to be considered in deciding the question of reimbursement, should Parents prevail on the merits of the case.

Based upon the above, SPS' MSJ for the 2011-2012 school year is DENIED.

III.

Given that SPS is a member of LS for grades 9 through 12, SPS would generally have no responsibility for any students beyond 8th grade and no responsibility for Student in 9th grade during the 2012-2013 school year. However, LS alleges that it received no notice from SPS

regarding Student, i.e., no IEP, no 504 Plan, no evaluations and no records. LS also alleges that Student did not appear on any list of potential students from Sudbury who might be attending LS as a 9th grader for the 2012-2013 school year. (See affidavits from LS.) SPS alleges that it provided three indicia of notice to LS regarding Student, one of which was oral and two of which were written. (See affidavits from SPS.) A written list which SPS alleges was sent to LS has not been found by LS and has not been produced by SPS. The one written document from SPS to LS is a November 2011 list, incorrectly identifying Student as a 7th grader during 2011-2012, when in actuality she was then an 8th grader. There is thus a dispute regarding a material issue of fact which may impact upon responsibility for the 2012-2013 school year. Under such circumstances, a MSJ is not appropriate. Therefore, SPS' MSJ is DENIED.

IV.

The issue of notice from SPS to LS is similarly critical regarding LS' responsibility for Student for the 2012-2013 school year. LS was the Local Education Authority (LEA) responsible for Student's education for the 2012-2013 school year. However, Parents provided no notice to LS regarding Student until they requested a hearing before the BSEA in November 2013. LS contends it received no notice from SPS regarding Student except the November 2011 e-mail incorrectly identifying Student as a 7th grader rather than an 8th grader. SPS contends that notice was given to LS. Again this is an issue of material fact which makes it inappropriate to grant LS' MSD. Therefore LS' MSD for the 2012-2013 school year is DENIED. However, pursuant to 20 U.S.C. Sec.1412(a)(10)(C)(iii), Parents' lack of any notice whatsoever to LS regarding Student for the 2012-2013 school year may reduce any reimbursement should Parents prevail on the merits and LS is found liable for the 2012-2013 school year.

By the Hearing Officer

Date: