

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

In Re: Student v.
Milford Public Schools

BSEA # 1405530

Ruling on Milford Public Schools' Motion to Dismiss

On February 13, 2014, Milford Public Schools (Milford) filed a Motion to Dismiss the above-referenced matter without prejudice. According to Milford, Parents' Hearing Request is premature. Following two disciplinary suspensions as a result of violations of the *Student Code of Conduct*, in an "abundance of caution" Milford held a manifestation determination meeting for this regular education student, and thereafter recommended Student's participation in a 45-day assessment program at BICO Collaborative. Milford asserts that it has continued to offer to conduct an initial special education evaluation of Student since December of 2012, but has been prevented from conducting the evaluation as a result of Student having been unilaterally placed out of district since January 2013. Without an opportunity to evaluate Student, and until such time as it is able to do so, Milford asserts that it is unable to assess Student's eligibility for special education. Accordingly, Milford argues that Parents' claim is premature and should be dismissed without prejudice until such time as Milford has an opportunity to evaluate Student and convene the eligibility Team. Milford further notes that Student was and remains a regular education student.

Parents filed an Opposition to Milford's Motion to Dismiss on February 20, 2014. Parents argued that they should not be prevented from proceeding with their case and stated that Student would be made available when he is visiting in June 2014 and in the alternative proposed that Milford conduct Student's evaluations at his out-of-state school.

Thereafter, Milford requested to be heard on the Motion and the case was scheduled for February 27, 2014 at which time the Parties made their arguments via telephone conference call.

This Ruling addresses only the limited issue of whether Parents' Request for Hearing is premature given that Milford has not had an opportunity to conduct Student's initial evaluation where it has been ready willing and able to perform one. I rely on the submissions made by the Parties to date and their oral arguments of February 27, 2014.

Facts:

1. Student is a 17-year-old resident of Milford, Massachusetts.

2. Student transferred from a different school district to Milford over parental concern that Student was cutting classes and was being pressured to join a gang (PE-1 HR).
3. A Discharge Summary from Cambridge Hospital dated May 2, 2012 documents Student's first psychiatric hospitalization (PE-1 HR). The Summary notes that Student had been hospitalized on April 24, 2012 as a result of having ingested a large quantity of alcohol and having suicidal ideation after an argument with one of his Parents. Student was diagnosed with a Mood Disorder NOS, Alcohol Abuse and Cannabis Abuse. Student was discharged home with Parents on May 4, 2012 with the following recommendations:
 - Individual therapy on emotion recognition and appropriate emotional expression. Consider family therapy as well to discuss safety rules at both parents' homes and how to address normal adolescent behavior and recognized emotional dysregulation.
 - Outpatient psychopharmacology management recommended to monitor medication benefits and consider increased as needed for mood stabilization.
 - [Student] should be encouraged to engage in activities that he enjoys in order to improve his sense of self-worth.
 - Return to school and resume academic responsibilities after being discharged. Consider discussing [Student's] emotional issues with school counselor and recommended regular checking with him.
 - If, despite all other recommendations, [Student] is feeling unsafe or behaving unsafely, please call 911 or go to your nearest emergency room for an evaluation. Evaluation does not necessarily mean hospitalization. [Crisis intervention telephone numbers were provided] (PE-1 HR).
4. On or about December 14, 2012 Student was suspended from school for five (5) days from December 17 through December 21, 2012 because he was "under the influence of drugs in school" and had been found "in possession of drug paraphernalia in school" (SE-A; PE-2 HR).

5. On December 16, 2012 Student engaged in behavior that violated the Student Handbook¹. Student was suspended from school for another five (5) days from January 2 through January 8, 2013 (SE-B; PE-2 HR).
6. As a result of Student's conduct, Milford conducted a manifestation determination on December 21, 2012 although Student had neither been found eligible to receive special education or related services nor was he receiving accommodations pursuant to a Section 504 plan at the time (SE-C; PE-3 HR). The Team had difficulty determining that Student's behaviors were a manifestation of his disability because Student neither had a diagnosis from an outside provider of a social/emotional disability nor an active IEP or Section 504 plan. The Team did not agree that Student presented with a disability within the meaning of the IDEA but agreed that Student should receive accommodations through the District's START initiative, which would allow him access to accommodations within the classroom setting. The Team also recommended that Student undergo academic, cognitive, psychological and educational evaluations, as well as a risk assessment and requested Parental consent to proceed with the evaluations. Parent consented to the evaluations on December 21, 2012 (SE-C; PE-3 HR).
7. In January 2013, Parents sent Student to the Phoenix Outdoor Wilderness Program (Phoenix) in North Carolina (SE-D; PE-4 HR). While at Phoenix, Student underwent a psychological evaluation with Scott Miller, Psy.D. Dr. Miller performed cognitive, achievement, behavioral and substance abuse assessments and documented Student's long-standing alcohol and drug abuse. He diagnosed Student with Bipolar Disorder NOS, Cannabis Dependence, Alcohol Abuse, Oppositional Defiant Disorder, Parent-Child Relational Problem and recommended that Student participate in individual and family therapy, and receive intensive addiction treatment. Dr. Miller further noted that continuation of "alcohol or drug use, defiant and rule-breaking behaviors, or school conduct problems" should be considered an indication that Student was in need of a "more structured environment". Lastly, Dr. Miller noted that

Student has the cognitive abilities and the foundation of academic knowledge to do well in school and move on to college. He tends to be disinterested in school and unmotivated for work. He may benefit from an academic environment with a low student-teacher ratio and enough individual attention to monitor his progress closely, encourage his

¹ A tweet made by Student, seen by Milford students, was found to be disruptive to the learning environment, inappropriate behavior in the school environment, a non-school conduct that is unsafe, dangerous, or irresponsible and concerns regarding safety by the school's Assistant Principal (SE-B).

success, and re-orient him towards achievement. Considering his difficulties accepting limits and containing frustrations, an environment in which the academic challenges are manageable and he can be 'set up for success' is essential (PE-4 HR).

8. On February 24, 2013, Parents completed an application for Student's enrollment at the Family Foundation School (Foundation) in Hancock, New York (SE-E). Foundation is currently known as the Allynwood Academy.
9. Student's North Carolina evaluation result was reviewed at a Team meeting on March 5, 2013. The Team again recommended that Student participate in a 45-day extended evaluation at the Finberg Center, a therapeutic program which is part of the Bi-County Collaborative (BICO), so as to assess Student's functional performance within a school setting that offered academic and therapeutic supports (SE-D; PE-5 HR). The Team proposed that Student receive a neuropsychological evaluation and a functional behavioral assessment within the context of the 45-day extended evaluation to assess his academic, social/emotional, and behavioral functioning (SE-G). Keder Brown of Phoenix participated in the Team meeting via telephone conference call. Ms. Brown conveyed that the greatest concern relating to Student's return to Massachusetts was that he would have a substance abuse relapse. Milford forwarded the proposed program offer to Parents on March 11, 2013. Parents however, rejected the offer for Student's participation in the 45-day assessment at the Finberg Center (SE-D; PE-5 HR).
10. Student transferred from Phoenix to Foundation on March 15, 2013 (SE-F). Parents requested that Milford provide public funding for Parents' unilateral placement in March 2014 (SE-G).
11. On March 25, 2013, Deb Freidman, Milford's Special Education Assistant Director wrote to Parents acknowledging receipt of Parents' request and reminding them that Milford had not yet been given the opportunity to perform Student's initial evaluation (which Milford desired to perform at BICO), and denied Parents' request for public funding of Student's private school. Procedural safeguards were provided (SE-G).
12. At Foundation/Allynwood, Student underwent a psychological evaluation by Dr. Mark Vogel, Ph.D., Psychologist (SE-F).

13. According to Milford, Student's progress at Foundation has been *de minimis* at best (PE-6 HR; PE-7 HR). Milford questions Student's ability to derive educational benefit from this program.
14. On July 1, 2013, Milford renewed its request to conduct an initial evaluation of Student (SE-I).
15. On October 2, 2013, Milford again renewed its request to evaluate Student during a home visit from his school program in New York. Parents responded that they were willing to have Milford evaluate Student but expressed the difficulties in coordinating visits and an evaluation because Student had to earn home visits from his therapeutic program in order to come home. Parents noted that they may not have a great deal of notice before visits were allowed so as to coordinate with Milford. Parents instead offered that Milford perform its evaluation at Student's school in New York (SE-J).
16. Student's progress at Foundation/Allynwood was described by Parents as "rocky" (SE-K). While there, he did not earn any home visits.
17. On October 11, 2013, Milford responded to Parents that it had a right to determine the manner in which Student would be evaluated. Milford also alerted Parents that it had not received complete information regarding Student's then-current performance despite numerous attempts by Milford to obtain the information. Also, given Student's age, Milford stressed the need to hear Student's perspective and concerns regarding his vision (presumably as to what he aspired to do after graduation) to include in his transition planning (SE-K).
18. On February 3, 2014, Parents notified Milford that Student would be transferred to Grand River Academy in Austinburg, Ohio on February 10, 2014 and stated that they would be seeking public funding for this placement (SE-G). According to Milford, Grand River is an unapproved, non-special education school (SE-G).
19. On February 3, 2014, Parents revoked their consent for Milford to communicate with Foundation/Allynwood (SE-G).
20. Via fax forwarded on February 6, 2014, Milford restated its desire to evaluate Student and the importance of including him and his vision in planning and for resolution of all issues regarding his education (PE-2).

21. On February 10, 2014, Parents' attorney notified Milford's attorney that Student would not be back in Massachusetts until June 2014 at which time Parents would make him available to be evaluated by Milford. Previously, Parents agreed to have Milford evaluate Student on February 18 and 19, 2014 which coincided with Massachusetts school vacation week and during which Milford did not have staff available to evaluate Student (SE-G). According to Parents, this was the first time (since January 2013) that Student returned to Massachusetts for a home visit.
22. To date, Milford has not had an opportunity to evaluate Student as he remains out of state.
23. In a February 17, 2014, statement, Student explained that he is now a different person who is doing well in school and is motivated to attend college and help others. He explained that he is no longer haunted by the negative emotions and constant anxiety he felt in the past and is no longer doing drugs or avoiding school (PE-3).

Legal Framework:

Neither party questions the BSEA's jurisdiction pursuant to Rule 17B of the *Hearing Rules for Special Education Appeals* to entertain motions to dismiss brought on the grounds that the matter is not *ripe* and therefore, the party requesting the hearing has failed to state a claim upon which relief may be granted. See also 801 CMR 1.01(7)(g).

In multiple previous rulings, the BSEA has held that such motions may be analyzed within the framework of a Rule 12(b)(6) of the Federal Rules of Civil Procedure. That is, the Hearing Officer may consider the facts alleged in the pleadings, documents attached or incorporated by reference in the complaint and matters of which judicial notice may be taken (*Nollet v. Justices of the Trial Court of Mass.*, 83 F. Supp. 2d at 204, 208 (D.Mass. 2000), *aff'd*, 248 F.3d 1127 (1st Cir. 2000)), and must take as true all the factual allegations in the complaint and must draw all reasonable inferences in the plaintiff's favor, here, the Parents. *Langadinos v. Am. Airlines, Inc.*, 199 F.3d 68, 69 (1st Cir. 2000). After considering as true the allegations made by the opposing party (in the instant case Parents) and drawing all reasonable inferences in their favor, the motion to dismiss may only be allowed if relief cannot be granted under the federal or state special education law or the relevant portions of Section 504 of the Rehabilitation Act of 1973 (Section 504).

Also, consistent with *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), if the opposing party's allegations raise the plausibility of a viable claim that may give rise to some form of relief under special education law or Section 504, the matter may not be dismissed.

Ruling:

Milford further argues that as a matter of law, pursuant to 20 USC 1414(a)(1)(A) it has a right to conduct an initial evaluation of Student prior to initiating provision of services, and further argues that it is prohibited from requesting a hearing on a parent's failure or refusal to consent to an initial evaluation of Student pursuant to 603 CMR 28.08(3)(c). It states that Parents' failure to make Student available for Milford to conduct its initial evaluation (first proposed in December 2012) "constitutes a constructive revocation of their purported consent" to the initial evaluation. Milford asserts that until it has the opportunity to conduct its proposed initial evaluation, the case is not ripe and Parents have therefore, failed to state a claim for which relief may be granted at the BSEA. Moreover, it argues that to force it to defend its position at Hearing without the opportunity to obtain relevant evaluative information regarding Student's potential educational needs would be fundamentally unfair and contrary to law, as the delay in conducting the initial evaluation has been created by Student's unavailability as he has been out of state since January 2013.

Milford does not, however, dispute that Parents may have a claim in the future if following the districts' evaluations Parents disagree with Milford's position regarding eligibility or the contents of any proposed IEP or Section 504 plan. At present, Milford asserts that Parents' claims are premature and should be dismissed without prejudice as a matter of law.

Parents object to Milford's Motion. They assert that Student's social/emotional issues began in April 2012 with a suicide attempt², for which he was hospitalized and later discharged with a diagnosis of mood disorder. According to Parents, Milford's interventions when Student returned to school were insufficient, leading to the events causing his suspension in December 2012. Parents argue that they had no choice but to remove Student from Milford and Massachusetts in January 2013. They assert that Foundation was appropriate and effective for Student and state that the decision to remove him to a different school was motivated by Parents' desire to place Student in a less restrictive placement given that he will turn 18 in November 2014. According to Parents, conducting an evaluation now, as Milford suggests, would not yield relevant information as it is not likely to show how emotionally disturbed Student was in 2012.³ Milford of course, disputes Parents' assertions that an evaluation at this time would be useless.

This case embodies the challenges presented when the evaluation and eligibility process is interrupted by removal of a student from his or her home state. The question before me is not whether Student should have been found eligible to receive special education services or

² According to Milford, Student has had a substance abuse problem since he was 12 years old, which was not disclosed to Milford until Student's discharge following the two month hospitalization. Milford asserts that Student's need to get sober prevented Student from receiving educational services while he was hospitalized.

³ According to Milford, Parent's and the out of state program's biggest concern about Student as of March 2013 was a relapse into drugs. Milford disputes that an evaluation even at this point would not yield relevant information about Student, his needs and necessary programming/ services.

whether Parents should be entitled to reimbursement for their unilateral placement of Student in private programs, all of which may or not be the case at a later time. Rather, the sole question before me is whether the case is *ripe* given that Milford has not been able to conduct its initial evaluation of Student by virtue of Parents' removal of Student to North Carolina, New York and now Ohio, after Milford offered to conduct its initial evaluations for special education and has remained ready and willing to conduct the evaluations (when Student is made available in Massachusetts during regular school days) consistent with federal and state special education law.

The undisputed facts herein are that Milford offered to conduct its evaluations within 30 school days of receipt of Parents' consent for evaluation of Student dated December 21, 2012. Student however, was removed from the jurisdiction prior to Milford being able to initiate its evaluations. See 603 CMR 28.04. The Massachusetts Special Education Regulations, which mirror federal law regarding evaluation of students upon referral, are unequivocal as to how a school district must proceed when a student is referred for evaluation. The evaluation is the preliminary step to a finding of special education eligibility and the determination of services to be offered. Unless a school district fails to conduct the evaluations to which a parent consents within the 30 school days from the date of receipt of parent's consent, the district retains the responsibility of conducting the initial evaluation. Furthermore, nothing in the IDEA or the Massachusetts Special Education Regulations requires that a school district perform an initial evaluation out of state. Addressing this issue, the Court in *Patricia P. v. Board of Educ. of Oak Park*, 8 F.Supp.2d 801, 809 (N.D.Ill. 1998) stated

It was the further finding of the hearing and reviewing officers that once Patricia sent Jacob to Maine, he became unavailable for a reevaluation. There is no question on the record that Patricia did not offer to tender Jacob back to Illinois for such an evaluation. Instead she suggested that District either (1) convene a staffing based solely on outside evaluations that she would procure or (2) send its personnel to Maine to conduct an out-of-state evaluation of Jacob. As to that latter suggestion, IDEA clearly does not contemplate a school district having to incur such an expense. And as to the former, it is entirely without merit.

Similarly, Milford is not required to conduct the initial evaluation out of Massachusetts. The impact of Student's unavailability, given Milford's determination to evaluate Student in Massachusetts after Parents' consented, is that the process has been virtually "suspended" until Parents make Student available for participation in Milford's initial evaluation. As such, Milford is correct that the case is not *ripe* for hearing. I note that in Massachusetts,

contrary to federal law⁴, the district is prevented from initiating a Hearing when parents refuse to consent to an initial evaluation. This option was therefore, not available to Milford.

Parents did not formally respond to Milford's offer of an extended evaluation but the events that followed show that they have constructively rejected Milford's offer by failing to make Student available for the 45-day assessment. At this juncture, Milford is advised to conduct the neuropsychological evaluation inclusive of academic, cognitive, educational and psychological assessments it proposed outside the 45-day context. Should Milford continue to believe that a risk assessment is necessary at this juncture, said risk assessment may be conducted by a behavioral psychologist or other appropriate professional in Massachusetts, or since Parents have consented, and at Milford's discretion, at Student's current placement. Milford is not persuasive that the evaluations and information it needs on Student can only be obtained within the context of a 45-day extended evaluation at BICO, especially in light of Student's apparent emotional stabilization (PE-3).

Milford is correct that this matter must be dismissed without prejudice and all of Parents' claims are preserved for filing at a later time, once Milford has had the opportunity to evaluate Student.

Order:

Milford's Motion to Dismiss Without Prejudice is GRANTED. This matter is Dismissed Without Prejudice.

So Ordered by the Hearing Officer,

Rosa I. Figueroa

Dated: March 13, 2014

⁴ Compare 20 USC §1414 et seq. and 603 CMR 28.08(3)(c).