

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

In RE: Student v.
Canton Public Schools

BSEA #1507611

Ruling on Canton Public Schools' Motion to Dismiss

Student in the above-referenced matter filed a Hearing Request on April 9, 2015. Following numerous requests for postponement of the Hearing in 2015, the Parties requested Off Calendar status between January and April 2016. On April 4, 2016, the end of the Off Calendar period, Canton Public Schools (Canton) filed a Motion to Dismiss. Canton's reasons for requesting dismissal were Parents' alleged failure to prosecute and/or proceed with the Hearing and failure to state a claim upon which relief could be granted.

Specifically, Canton argued that during all relevant periods Student had been and continued to be served pursuant to fully accepted individualized educational programs (IEPs) which, according to Canton, were reasonably calculated to provide Student with a free, appropriate public education in the least restrictive environment. Canton further argued that the relief sought by Parents could not be awarded through a Hearing at the BSEA. According to Canton, Parents had failed to prosecute this case, had failed to engage in efforts to resolve the alleged outstanding issues, and had failed to respond to and/or comply with BSEA notices and orders over the past year. For these reasons, Canton sought dismissal.

On April 25, 2016, the BSEA received Parents'/Student's opposition to Canton's Motion. Parents argued that the case should not be dismissed because they disagreed that Student had "willingly, knowingly and voluntarily" signed and accepted his IEPs or that the services offered to him under the IEPs were appropriate. Parents/Student further stated that they may need a BSEA Decision in order to seek resolution in other forums if necessary. Lastly, Parents/ Student wished to wait until Student's "final needs become apparent" at the conclusion of the 2015-2016 school year.

Upon consideration of the Parties' submissions, the Hearing Request, and Canton's Response to the Hearing Request, Canton's Motion to Dismiss is **GRANTED in Part and DENIED in Part**, as explained below.

Facts:

The facts delineated below are presumed to be true for the purposes of this Ruling only:

1. Born on August 23, 1995, Student is a twenty-one years old resident of Canton. Upon turning 18 years old he assumed and has continued to retain all of his decision-making rights (School's Response to the Hearing Request).¹
2. Student presents with bilateral hearing loss and a documented communication/language disorder (SE-B). At age four he received a cochlear implant on the right side which allows him to detect tones in the moderate hearing loss range (SE-H). Student has difficulty expressing his thoughts and ideas clearly. Student uses ASL as his primary means of communication in school and is better able to communicate using ASL. At home Russian and English are spoken. There is a question as to whether Student may also present with Post Traumatic Stress Disorder (PTSD) associated with a previous placement (School's Response to the Hearing Request).
3. Student suffers from social anxiety and an inability to discern social cues. He also appears to experience impaired reality testing, concurrent with schizophrenia, as evidenced by aberrant behaviors observed at his school placements in early 2013 and in 2014², and by Dr. Michael Harvey during the 2013 psychological evaluation (SE-B; School's Response to the Hearing Request).
4. On the Wechsler Adult Intelligence Scale-Fourth Edition (WAIS-IV) administered in 2013, Student's Full Scale IQ was 75 (5th percentile).³ His arithmetic computational skills were assessed at approximately the beginning of sixth grade level, and his English reading comprehension skills at approximately the 2.6 grade equivalent level. The aforementioned achievement levels were consistent with in school assessments (SE-B).
5. Student's impairments impact his ability to articulate his thoughts via speech or sign language, and make it difficult for him to understand what others are saying to him especially in social contexts, or when he is stressed (Student's Hearing Request).
6. Student attended the READS Collaborative Deaf and Hard of Hearing Program between 2011 and 2012. He left this program after he was accused of inappropriate behavior in May of 2012. The exit from READS was upsetting to Student and left him with a feeling

¹ To the extent that Parents filed the Hearing Request on behalf of Student, Canton challenges Parents' standing to bring this action. See *In Re: Lincoln-Sudbury Regional School District and Rachel R.*, 16 MSER 424 (2010) (finding that the parents of a student who had turned 18 years of age lacked standing to request a BSEA Hearing on her behalf). In the instant case however, the Hearing Request, filed by an attorney, states that Student is the client.

² "... Several clinically concerning behaviors have been noted at school, including talking to inanimate objects (e.g., to the walls or lockers), looking over his shoulder as if someone were there, inability to formulate complete sentences/thoughts and to carry on a meaningful conversation, hoarding trash in his pockets, social isolation, confusion, difficulty focusing, suspiciousness of others, wearing the same hooded sweatshirt every day, restlessness/fidgetiness, and bending over to put his head on his desk" (SE-B at 8). According to Parents, these behaviors were due to Student's experiencing "a great deal of pain from the alleged incident at READS". Parents also believed that Student's cochlear implant was not functioning properly possibly causing Student to have difficulty hearing, or he could have heard overly-amplified sounds, or he could have been experiencing some feedback from the disabled device (Parents' Hearing Request).

³ Student's Verbal Comprehension Index score in the WAIS-IV was 68 (2nd percentile), his Perceptual Reasoning Index score was 107 (68th percentile), Working Memory Index score was 63 (1st percentile), and his Processing Speed Index score was 74 (4th percentile) (SE-B).

of apprehension regarding his safety and inclusion in a school setting (Student's Hearing Request; School's Response to the Hearing Request).

7. Student next received educational services at the EDCO Program for the Deaf and Hard of Hearing at Newton North High School, between September 2012 and March 2013. Thereafter, Student received home tutoring⁴.
8. On or about April 12, 2013, Student's Team agreed to continue Student's tutoring until he entered the Walden School in September 2013. The Walden School is a therapeutic educational program at the Learning Center for the Deaf.
9. Student underwent a full psychological evaluation inclusive of a risk assessment with Dr. Michael Harvey, a psychologist who is an expert in the field of deafness, on or about April 2013. Dr. Harvey's report was issued on April 9, 2013 and the Team convened on April 12, 2013 to discuss the results of his evaluation and recommendations. Regarding the educational setting, Dr. Harvey noted that,

...although [Student] continue[d] to require an academic environment like EDCO in which there [was] primarily a deaf peer group, teachers of the deaf, ease of access to sign language, in-school counseling, and language/speech therapy, it appear[ed] that at th[at] time he also require[d] a placement that [could] provide therapeutic supports, ongoing diagnostic assessment, a specific skills training with regard to reading social cues and functioning in a social milieu. The Walden School would be an appropriate facility (SE-C).
10. Following failed attempts to reconvene the Team in May 2013, Student's Team met on June 11, 2013 and a referral packet was sent to Walden School. The Team drafted an IEP covering the period from June 11, 2013 to June 10, 2014 which called for placement in an undetermined private day program inclusive of extended school year services (SE-G).
11. While receiving home tutoring on a regular basis between March and June 2013, Student was able to complete his MCAS and finish the school year.
12. On August 23, 2013, Student turned 18 years of age and educational decision-making authority transferred to him (SE-H).
13. In September 2013, Student was accepted by Walden School. Thereafter, Canton forwarded to Parents an IEP calling for Student's placement at Walden School, which IEP and placement Parents fully accepted on September 25, 2013 (SE-G). Student, who did not sign this IEP, attended Walden School during the 2013-2014 school year.
14. On June 2, 2014, Student's Team reconvened and recommended continued placement at the Walden School for Student inclusive of summer services. The Team also discussed a

⁴ Parents' Hearing Request incorrectly uses the term "homeschooling" to refer to home tutoring.

688 referral. Parents were invited but they did not attend this meeting (Parents' Hearing Request). Student was in attendance at the meeting (SE-H).

15. On July 13, 2014, Student accepted the IEP and placement in full (SE-H).
16. Between September 2013 and August 2014, Student received educational services at the Walden School, (Walden) under IEPs accepted first by Parents in September 2013 and later on July 3, 2014 by Student himself.
17. The Walden School is a Massachusetts Department of Elementary and Secondary Education (DESE) approved residential educational program. Per parental preference, Canton sought and received approval from DESE to allow Student to attend Walden as a day student (Parents' Hearing Request).
18. Relying on testing conducted at Walden School, Parents described Student's ability to understand written material at around the second grade level (Parents' Hearing Request). Parents opined that Walden School was not an emotionally or academically appropriate placement for Student. They asserted that Student's grades and mood worsened as the 2013-2014 school year progressed; also, Student's anxiety increased and he did not respond to the therapeutic interventions provided (Parents' Hearing Request).
19. In the summer of 2014, Parents arranged and paid for Student to receive one-to-one tutoring from Judith Wisnia & Associates. Parents opined the one-to-one setting was beneficial to Student whose demeanor, engagement, participation and sense of autonomy greatly improved. During the 2014 summer, Ms. Wisnia recommended that Student's cochlear implant be checked. Upon doing so, malfunctioning of the device was detected. The implant was subsequently repaired (Parents' Hearing Request).
20. For the 2014-2015 school year, Parents arranged for Student to continue to receive tutoring services with Judith Wisnia & Associates, Inc. instead of returning to Walden School. Neither Student nor Parents provided Canton notice of their decision before changing Student's placement and they did not seek Canton's input or approval for said unilateral placement. According to Canton, Parents also did not consider any other placement that could have addressed Student's social, emotional, educational, and transitional needs (Parents' Hearing Request; School's Response to the Hearing Request).
21. In September 2014, Walden School informed Canton that Student had not attended school since August 27, 2014 (the beginning of the school year). Up to this point, neither Student nor Parents had rejected Student's IEPs in whole or in part, raised concerns regarding Walden School, or requested reconvening of the Team (School's Response to the Hearing Request).
22. Parents retained private counsel in the fall of 2014 (Parents' Hearing Request).
23. On or about September 15, 2014, Canton's attorney contacted Parents' counsel to set up a Team meeting. At that point Student's/Parents' counsel informed Canton's counsel that

Parents had proceeded to enroll Student at Judith Wisnia & Associates and notified Canton that Parents were pursuing additional evaluations for Student. The attorneys agreed that the Team would be convened when the evaluation reports were received. Student's privately sought evaluation reports were received by Canton on or about October 14, 2014.

24. Student's Team convened on October 21, 2014 to review the evaluation reports and to discuss Student's placement. Parent, Student, Ms. Wisnia, Canton representatives and counsel for both parties were present at the meeting. Walden representatives participated via telephone conference call (Student's Hearing Request).
25. Shortly before the start of the October 2014 Team meeting, Student's ASL interpreter was called away and nobody fluent in ASL was able to attend the meeting. Parents asserted that this severely limited Student's ability to participate meaningfully at the meeting (Student's Hearing Request). Canton attempted to reconvene the Team with an ASL interpreter so that Student's input could be obtained, but Parents declined.
26. At the October 2014 Team meeting Parents stated their opinion that Student had not made effective progress at Walden School and that Walden School's placement was not appropriate for him. They also raised concerns that Student's cochlear implant had been malfunctioning, as detected by Ms. Wisnia. Parents again requested that Canton fund Student's unilateral placement with Ms. Wisnia (SE-J).
27. On December 20, 2014, Student's counsel informed Canton's attorney that Parents were pursuing additional evaluations and that the reports would be shared with Canton when available.
28. On March 2, 2015, Canton received the independent psychological evaluation report by Daniel K. Reinstein, Ph.D (SE-N) and attempted to schedule a Team meeting on March 27, 2015, to discuss the results of said evaluation. On March 25, 2015, Student's counsel informed Canton that Parents were unavailable for the meeting on March 27th. According to Canton, its efforts to reconvene the Team were met with resistance or were ignored by Parents and Student (School's Response to the Hearing Request).
29. On April 7, 2015, Student filed a Hearing Request with the BSEA seeking reimbursement and ongoing funding for tutoring with Judith Wisnia & Associates, and expenses associated with private courses and supplemental education since 2013, associated with Parents' withdrawal of Student from his previous placements, including the time during which Student was enrolled at and receiving educational services at the Walden School, as well as attorney's fees.
30. Student's Hearing Request stated that Student was being "homeschooled" and alleged that Student had not made effective progress at either READS or at EDCO, and noted that Student's academic performance had declined at both placements. Parents also questioned the veracity of the behavioral incidents that allegedly occurred while Student was enrolled at READS and in EDCO. The Hearing Request sought to find an

appropriate, mutually agreeable placement for Student which allowed him to continue working towards his high school diploma.

31. During the initial months following commencement of this Hearing the Parties worked collaboratively and resolved some of the issues delineated in Student's Hearing Request (Administrative Record).
32. In the summer of 2015, Canton provided Student with summer services and tutoring (Administrative Record).
33. Student's most recent IEP covers the period from May 6, 2015 to May 5, 2016, and calls for Student to receive services at Canton High School.
34. Student accepted the IEP on August 6, 2015. This IEP was later amended on October 29, 2015.
35. On November 2, 2015 an Order to Show Cause was issued due to the Parties' failure to comply with the Order issued on August 20, 2015, instructing the Parties to submit a written status report by the close of business on September 21, 2015 (Administrative Record).
36. On January 11, 2016, the Parties requested that the BSEA case be placed "Off Calendar". The Parties' request was granted and consistent with the Order dated the same day, the off calendar status would extend through April 4, 2016. This Order further warned the Parties that failure to reach full resolution of the case would result in the matter being scheduled for hearing (Administrative Record).
37. On April 4, 2016, Canton filed the instant Motion to Dismiss.
38. Student has been attending Canton High School where he is completing his senior year and is reportedly happy and doing well. Student is expected to graduate on or about June 8, 2016.
39. Neither Student nor Parents have raised any issues regarding Student's current placement in Canton. By all reports, Student is happy and doing well in Canton.
40. Parents want to "wait and see" if Student passes his English MCAS and whether he graduates, in order to see what remaining needs he may have.

Legal Framework:

I. Standard for Ruling on Motion to Dismiss

The standard for ruling on a Motion to Dismiss has been previously discussed in the *Ruling on Ludlow Public Schools' Partial Motion to Dismiss*, BSEA #1509319 (September 8, 2015), as follows

In the case at bar the parties do not dispute the jurisdiction of the BSEA over motions to dismiss involving failure to state a claim upon which relief may be granted, pursuant to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3), and Rule 17B of the BSEA *Hearing Rules for Special Education Appeals*. These provisions are analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

For a claim to survive a motion to dismiss, the factual allegations must plausibly suggest an entitlement to relief. *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 557 (2007)). In evaluating the complaint, the Hearing Officer must take as true “the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff’s favor.” *Blank v. Chelmsford Ob/GYN, P.C.*, 420 Mass. 404, 407 (1995). These “[f]actual allegations must be enough to raise a right to relief above the speculative level...[based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)...” *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted). The Hearing Officer will consider the facts alleged in the pleadings and documents attached or incorporated by reference. *Nollet v. Justices of the Trial Court of Mass.*, 83 F. Supp. 2d 204, 208 (D.Mass. 2000), *aff’d*, 248 F.3d 1127 (1st Cir. 2000).

Only if the Hearing Officer cannot grant relief under federal or state special education law (20 U.S.C. § 1400 et. Seq. or M.G.L. 71B), or Section 504 (29 U.S.C. § 479), may the case be dismissed. See *Calderon-Ortiz v. LaBoy Alverado*, 300 F.3d 60 (1st Cir. 2002); *Whitinsville Plaza Inc. v. Kotseas*, 378 Mass. 85, 89 (1979); *Nader v. Cintron*, 372 Mass. 96, 98 (1977); *Norfolk County Agricultural School*, 45 IDELR, 26 (December 28, 2005). Conversely, 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 (20 U.S.C. § 1400 et. Seq. or M.G.L. 71B), or Section 504 (29 U.S.C. § 479), the matter may not be dismissed. See *Ashcorft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).

With this guidance I turn to the case at bar and consider the facts alleged in the complaint in the light most favorable to Parents.

Discussion:

By all accounts, Student “has spent an enjoyable year [in Canton] in a program far better suited for him than his previous placement”. Student/Parents concede that Student is doing and has done well in his current placement in Canton, and is scheduled to graduate in June 2016. However, precisely because Student is a twelfth grader, Student/Parents wish to “wait” until the end of the school year “and see” if Student passes all of his MCAS (in particular English) and actually graduates from high school. Regarding passing the MCAS, I note that passing the MCAS is a pre-requisite for graduation. According to Canton, Student is scheduled to graduate, an event that would by operation of law extinguish Student’s entitlement to special education services in the future.

Student’s previous placement (Walden) is designed to serve students with severe special needs. Parents contend that Canton placed Student in an “incorrect program” at Walden and seek compensatory relief for the periods during which he was enrolled there, alleging that Student did not receive a FAPE. They further take issue with the fact that they did not attend the Team meeting in June of 2014 and question Student’s acceptance of the IEP for the 2014-2015 school year. Student/Parents’ distrust Canton and assert that in the past, it has offered services and reimbursements which it later withdraws. They further assert that the fact that there are no issues with Student’s current placement does not “absolve Canton from its prior actions which were exceptionally distressing” to Student. For all of the aforementioned reasons, they contest Student’s IEPs commencing in 2013 and seek reimbursement for out of pocket expenses for tutoring and speech therapy provided by them since June of 2014⁵. They also seek funding for continuation of those out of school services they intend to provide for the remainder of the 2015-2016 school year, or until he obtains his high school diploma, and for attorney’s fees.

At the outset I note that Student/Parents “wait and see” attempts to keep the case alive in the event that claims that are not yet evident or ripe arise after Student’s completion of twelfth grade are not before me. Between April 2015 and April 2016 Parents/Student consistently failed to respond to any Orders requiring status reports, and they did not request any continuances of the case. All the updates on the case and requests for postponements were by Canton. Student also never amended the Hearing Request to include any period beyond twelfth grade or June 2016 (Administrative Record).

Canton argued that Student/Parents’ claims were barred by the doctrine of Laches, because having had the opportunity to litigate the claim or engage in any attempt to resolve matters, Student/Parents disregarded the BSEA’s Orders and caused the matter to remain stagnant to Canton’s detriment. See *Murphy v. Timberlane Regional School District*, 22 F.3d 1186, at 1189 (1994); *Buna D.*, MSER 17, 18 (BSEA 1997). Parents argued that the doctrine of laches was incorrectly applied because Student’s needs in order to achieve his goal of graduating, which includes passing MCAS, were unclear.

⁵ The Proposed Resolution of the Problem section of Parents’/Student’s Hearing Request states that they seek reimbursement since 2013 through the time of filing of the Hearing Request. As such, for purposes of this Motion to Dismiss, I consider Parents’/Student’s claims since 2013.

I reject both Canton's and Parents arguments in this regard. In response to a Show Cause Order issued on November 2, 2015, Student requested to keep the case open to resolve the remaining issue of compensation to Parents for funds expended in Student's education intimating that the Parties had resolved the case in part. Later, in January 2016, Canton was in agreement with placing the matter Off Calendar. Regarding Student's/Parents' request to "wait and see" I decline to take jurisdiction of any claim not stated in the original Hearing Request received in April 2015.

IDEA claims are subject to a two year statute of limitations established under 20 U.S.C. §1415(b)(6)(B). In this context, Student's/Parents' claims seek redress starting in 2013 and they may not reach back beyond April 2013.

The record shows that Parents accepted the IEPs proposed by Canton in 2012 and 2013. Those IEPs were implemented in out of district placements. After Student stopped attending EDCO and Walden in August 2013 and 2014 respectively, he received parentally funded tutoring services through Judith Wisnia & Associates until he entered Canton High School for the 2015-2016 school year.

Canton states that Parents' are not entitled to reimbursement for the tutoring services provided by them to Student after he withdrew from EDCO and/or Walden School because: a) Student's IEPs had been accepted by Parents, and later Student, and b) the unilateral tutoring services were commenced without providing proper notice to Canton.⁶ I note that failure to provide the requisite notice of intention to unilaterally place a student alone may be insufficient to be dispositive in the context of a Motion to Dismiss.

It is well established through federal and BSEA decisions that Hearing Officers are precluded from revisiting IEPs that have been accepted and implemented once they expire, in situations where the individual holding educational decision-making power (parents or students 18 years of age), have participated in the IEP development, have received notice of their options for rejection of the IEP including the right to proceed to a due process hearing, and having chosen to accept the IEP never rejected the IEP during its term. See *Chris A. v. Stow Public Schools*, 16 EHLR 1304 (MA 1990), *aff'd. sub nom. Amann v. Stow School System* 982 F.2d 644 at 651 (1992). See also *Burlington v. Department of Education*, 471 U.S. 359 at 373 (1985); *Amherst-Pelham Regional School District v. Department of Education*, 376 Mass. 480 at 483 (1978); *Manchester School District v. Christopher B.*, 19 IDELR 143 (DNH); *In re: Marbelhead Public Schools*, 7 MSER 95 (SEA Mass 2006); *In Re: Hopkinton Public Schools*, 13 MSER 234 (2007).

The record shows that Parents attended and participated in the development of the 2012-2013 IEP, which was accepted and implemented in an out-of-district placement through the end of February 2013.⁷ On or about February 2013, Parents withdrew Student from the EDCO

⁶ In its response to the Hearing Request, Canton further reasoned that since Walden was the placement accepted by Parents, and later Student consistent with the 2013-2014 and 2014-2015 IEPs, Walden was Student's "stay-put" placement during the pendency of any dispute between the Parties. The Parties later agreed that Student would attend Canton High School for the 2015-2016 school year. Having entered into a partial agreement regarding prospective placement, I need not address this issue further.

⁷ Later, in August of 2015, Student accepted the proposed IEP for the 2015-2016 school year, as amended in October 2015. Said IEP was implemented in Canton where Student was reported to be happy and making progress.

program. Student began receiving home tutoring and at the Team meeting on April 9, 2014, the Team agreed to continue providing Student tutoring through EDCO until a new placement was found. According to Canton, tutoring was offered on a regular basis and Student was able to complete the MCAS and he finished the school year.

The record is unclear as to whether Parents formally rejected the EDCO placement, or how exactly home tutoring was initiated for Student in March 2013. On April 12, 2013, however, the Team agreed to continue Student's home tutoring services until a new placement was found. It is therefore plausible that April 12, 2013 could be construed as the date of Parents' revocation of the IEP calling for placement of Student at EDCO. It is also plausible that Parents' revocation may have occurred sometime in March. Without sufficient evidence regarding these issues as well as information on the specific services for which Student/Parents seek reimbursement and or compensatory education, Student's claims associated with "out of school education", starting in 2013 cannot be dismissed. Thus, Canton's Motion to Dismiss Parents' claims from March 2013 through such time as Student turned eighteen years of age (on August 23, 2013), is **DENIED**.

Canton argued that Parents/Student's claims for the 2013-2014 school year should also be dismissed because Student received services at Walden under an accepted IEP. The problem with Canton's argument is that Student had turned 18 years of age on August 23, 2013 and that IEP was accepted by Parents, not Student in September 2013, subsequent to his reaching the age of majority.

Federal and Massachusetts special education law and regulations mandate that educational decision-making power and all other rights accorded to parents of eligible students transfer to the student when the student reaches the age of majority. 20 U.S.C. §1415(m); MGL c.71B; 603 CMR 28.27(5)⁸ et seq. Barring limited circumstances such as granting of guardianship to the parents,⁹ the legal presumption is that the student is competent to make all of the decisions regarding his education upon turning 18 years of age. See *Stanek v. St. Charles Community Unit School District*, #303, 783 F.3d 634 7th Cir. (April 9, 2015). See also *Milton Public Schools v. Department of education & Boston Public Schools*, BSEA #07-4642 (April 30, 2007).

⁸ "(5) **Student participation and consent at the age of majority**. When the student reaches 18 years of age, he or she shall have the right to make all decisions in relation to special education programs and services. The school district shall have the obligation to obtain consent from the student to continue the student's special education program. The parents will continue to receive written notices and information but will no longer have decision-making authority, except as provided in 603 CMR 28.07(5)(a) through (c)...". 603 CMR 28.27(5).

⁹ The Department of Elementary and Secondary Education *Administrative Advisory SPED 2011-1, Age of Majority* specifically provides at #3 that,

When a student turns age 18, all of the decision-making rights in special education that have been exercised by the parent transfer to the adult student, unless

- A court has appointed a legal guardian for the student, or
- The student in the case that he or she wants to share decision-making with his or her parent(or other willing adult), or
- If the student indicates that he or she wants to delegate decision-making to his or her parent (or other willing adult).

The record lacks any information to suggest that any of the aforementioned exceptions apply.

In the instant case, the record lacks any documentation that Student delegated his decision-making authority to Parents upon turning eighteen years of age, or that Parents have been granted guardianship. To date Student retains decision-making authority. As such, it was he, and not Parents, who had the right to accept or reject continuation of services at Walden consistent with the proposed IEP starting on August 23, 2013. The record lacks evidence that Canton sought Student's acceptance of the 2013-2014 IEP following his eighteenth birthday. The record shows that Student attended Walden during that school year under an IEP accepted only by Parents, who lacked authority to accept the IEP. Therefore, Student may proceed to Hearing with his claims for the 2013-2014 school year. Canton's Motion to Dismiss Student's/Parents' claims for the 2013-2014 school year is **DENIED**.

The record shows that Student, already 18 years of age in June 2014, attended the Team meeting and accepted the proposed IEP for the 2014-2015 school year on July 3, 2014. The record shows that on or about September 15, 2014, Student's attorney notified Canton that Student would not be attending Walden and that he was receiving tutorials from Ms. Wisnia. For purposes of this Motion, I am accepting September 15, 2014, when the attorney notified Canton of Parents' unilateral placement of Student, as the date of Student's constructive rejection of the 2014-2015 IEP. Having plausibly revoked acceptance of the IEP on September 15, 2014, through his attorney, Student may be heard on his claims for the 2014-2015 school year with the exception of the period between July 3rd and September 15, 2014. Canton's Motion to Dismiss for this period is **GRANTED in PART** and **DENIED in PART**.

Lastly, I turn to the question of whether Student/Parents are entitled to reimbursement for the tutoring services provided after they withdrew Student from his placement at Walden in 2014.

Canton argued that dismissal should also be granted for Student/Parents failure to state a claim upon which relief can be granted; that is, that tutoring should be denied because pursuant to the IDEA, private tutoring does not qualify as an appropriate placement for an eligible student. See *Rafferty v. Cranston Public School Committee*, 315 F.3d 21 (2002).

Canton further asserted that the tutoring program selected by Parents was inappropriate because it did not provide Student with access to American Sign Language (ASL) instruction or to a teacher of the deaf, rendering the tutoring program too restrictive and inappropriate for Student.

Canton argued that in order to be entitled to reimbursement and prospective funding, Student/Parents "must establish not only that Walden was objectively inappropriate to meet [Student's] needs, but that his private placement with Judith Wisnia was an appropriate placement under the IDEA." See *School Committee of Burlington v. Department of Education of Mass.*, 471 U.S. 359, 374 (1985)¹⁰. In making this argument, Canton relies on *Rafferty*, a case involving a parent who withdrew her daughter from school and enrolled her in a private reading center. In that case, the First Circuit Court of Appeals denied reimbursement on the basis that the reading center was not an appropriate placement. *Rafferty*, 315 F.3d at 26-27. Relying on

¹⁰ "Parents who unilaterally change their child's placement... without the consent of state or local school officials, do so at their own financial risk" *Burlington*.

Rafferty, and asserting a similar set of facts in the instant case, Canton petitions dismissal of Parents'/Student's case with prejudice.

In this regard, Canton is not persuasive for two reasons: 1) there has not yet been an evidentiary Hearing to determine the appropriateness of Walden; and 2) it is possible that Parents may obtain reimbursement for tutoring under a different theory. Either way, it would be premature to dismiss the claims without a Hearing on the merits. Therefore, Canton's Motion to Dismiss for failure to state a claim upon which relief can be granted is **DENIED**.

The Parties will be contacted to schedule Hearing dates.

ORDER:

1. Canton's Motion to Dismiss Parents' claims from March 2013 through such time as Student turned eighteen years of age (on August 23, 2013), is **DENIED**.
2. Canton's Motion to Dismiss Student's claims starting on August 23, 2013 is **DENIED**. Student may proceed to Hearing with his claims starting on August 23, 2013 through July 3, 2014 (when he accepted the IEP), and from September 15, 2014 when Student's Attorney notified Canton of revocation of said acceptance through the end of the 2014-2015 school year.
3. Student's claims from July 3rd through September 15, 2014 are **DISMISSED with Prejudice**.

By the Hearing Officer,

Rosa I. Figueroa
Dated: June 17, 2016

