

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

In re: Robert¹

BSEA #1605714

RULING ON CHELMSFORD PUBLIC SCHOOLS' MOTION TO DISMISS

This matter comes before the Hearing Officer on the Motion of the Chelmsford Public Schools ("District") to Dismiss the Hearing Request filed by Robert's Parents. The Motion to Dismiss was filed on February 2, 2016, along with a supporting Memorandum of Law. To date the *pro se* Parents have not filed a response. No party has requested a hearing on the Motion, and as testimony or oral argument would not advance the Hearing Officer's understanding of the issues involved, this Ruling is being issued without a hearing pursuant to *Bureau of Special Education Appeals Hearing Rule VII(D)*. For the reasons set forth below, the District's Motion to Dismiss is hereby DENIED.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On January 20, 2016 the Parents of Robert filed a Request for Hearing with the Bureau of Special Education Appeals ("BSEA") against the District alleging that their son had been discharged improperly from the Integrated Public Preschool Program he had been attending pursuant to an Individualized Education Program. They alleged that mold was discovered in their home in November 2015, requiring them to search for a new place to live that would not pose a danger to Robert. "Due to the urgency of the situation, [they] moved to what [they] thought may be temporary to Sandown, NH . . . over the holidays." In their request, the Parents listed as the student's address an address in Chelmsford and also included an address in Sandown, NH marked "current." They implied that Robert would begin kindergarten in Sandown in the fall, and sought a decision that he be permitted to complete the school year in Chelmsford.² The Hearing was scheduled for February 26, 2016.

On February 1, 2016 the District filed its Response to the Parents' Request for Hearing and on February 2, 2016 it filed a Motion to Dismiss the Parents' Claim and Memorandum of Law in support thereof.

The substance of both of the District's filings is that the Parents established a new permanent residence in New Hampshire at the end of 2015, and as a result they no longer live in

¹ "Robert" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

² Parents' Request for Hearing. The Hearing Request included details about the Parents' dissatisfaction with the Sandown, NH Public Schools' plans for Robert, but as this issue is irrelevant to the questions before me I do not address it.

Chelmsford. For that reason, although the District permitted Robert to remain in the Integrated Pre School Program until January 22, 2016 “in an effort to assist the family with the Student’s transition into the New Hampshire Public Schools,” it has no obligation to provide educational services to Robert and its decision to terminate his enrollment “cannot and does not constitute a denial of a free appropriate public education.”³

In the interim, on February 1, 2016, the Parents sent a letter to the BSEA stating that their son is currently without a placement and requesting, essentially, that the BSEA find that Robert has stay put rights to his Individualized Education Program in Chelmsford “until Sandown has agreed to meet his IEP and enable him to transition into the Sandown Public Schools.”⁴

A Conference Call took place on February 10, 2016. The parties discussed scheduling and agreed to postpone the Hearing scheduled for February 26, 2016 to allow for discovery and exploration of alternatives to Hearing pending this Ruling.

DISCUSSION

A. Standard for Ruling on Motion to Dismiss

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*, a hearing officer may allow a motion to dismiss if the party requesting the appeal fails to state a claim on which relief can be granted. This rule is analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure and as such hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim. Specifically, what is required to survive a motion to dismiss “are factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”⁵ In evaluating a hearing request, 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.”⁶ 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). . . .”⁷

B. Application of Legal Standard

To survive a motion to dismiss, Parents need only make “factual allegations plausibly suggesting . . . an entitlement to relief.”⁸ In determining whether they have met this burden I

³ District’s Response to Hearing Request.

⁴ Parents’ Letter to BSEA, dated February 1, 2016.

⁵ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

⁶ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

⁷ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

⁸ *Iannocchino v. Ford Motor Co.*, 451 Mass. at 636 (internal citation and quotation marks omitted).

must take their allegations as true, as well as any inferences that may be drawn from them, even if the allegations are doubtful in fact.⁹

Citing M.G.L. c. 76, § 5, the District argues that is not required to allow Robert to complete the school year in Chelmsford, as his parents no longer “reside” in the town.¹⁰ Though this is true as a general matter, the federal McKinney-Vento Homeless Education Assistance Act (“Act”) carves out an exception for children who are “homeless” as defined by the Act.¹¹ Pursuant to the Act, a child who becomes homeless during a particular academic year is permitted to remain in his school of origin for the duration of the school year, if it is in his best interests.¹² Moreover if the child begins living in an area served by another school district, he is entitled to transportation to and from the school of origin, with costs apportioned among the two school districts.¹³ The Act defines as homeless, children “who lack a fixed, regular, and adequate nighttime residence” and includes “children and youth who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason.”¹⁴

Although the Parents have not alleged that they are sharing the housing of other persons in New Hampshire, their Hearing Request indicates that they lost their housing in Chelmsford due to the presence of mold and that they thought the move might be temporary in nature.¹⁵ Because a hearing officer evaluating a hearing request in the context of a Motion to Dismiss must take as true “the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff’s favor,”¹⁶ and base her decision on the face of the complaint, for the purpose of this Ruling only I must infer that Robert may qualify as “homeless” under the Act. Should the District establish through discovery that he does not qualify, it is welcome to make that argument in the context of a Motion for Summary Decision, which would enable me to go beyond the complaint to evaluate the evidence before me.¹⁷

CONCLUSION

Upon consideration of Chelmsford Public Schools’ Motion to Dismiss Parents’ Hearing Request, I cannot determine at this time that Chelmsford is free from any obligation to educate Robert. Should this case proceed to Hearing, the operative question will be whether Robert was “homeless” as defined by the McKinney-Vento Act at any time between November 2015 and the present.

⁹ See *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. at 223; *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. at 407.

¹⁰ See M. G. L. c. 76, § 5 (“Every person shall have the right to attend the public schools of the town where he actually resides . . . No school committee is required to enroll a person who does not actually reside in the town unless said enrollment is authorized by law or by the school committee.”).

¹¹ See 42 U.S.C. § 11431 *et. seq.* (as amended by PL 114-95, Dec. 10, 2015, 129 Stat. 1802).

¹² See 42 U.S.C. § 11432(g)(3)(A) -(B).

¹³ See *id.* at (g)(1)(J)(iii)(II).

¹⁴ See 42 U.S.C. § 11434a(2).

¹⁵ Parents’ Hearing Request.

¹⁶ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. at 407.

¹⁷ Compare 801 CMR 1.01(7)(g) and Fed. R. Civ. P. 12(b)(6) with 801 CMR 1.01(7)(h) and Fed. R. Civ. P. 56.

ORDER

The District's Motion to Dismiss Parents' Hearing Request is hereby DENIED.

The District's request for postponement of the Hearing, assented to by the Parents during the Conference Call on February 10, 2016 and filed in writing the next day, is hereby ALLOWED.

In order to advise the Bureau of Special Education Appeals regarding the current status of the case, the Parents shall (and the District's attorney may but is not required to) provide a written status report, to be received by the Hearing Officer no later than close of business on March 10, 2016 unless the *Hearing Request* is withdrawn by that date.

By the Hearing Officer:

Amy M. Reichbach
Dated: February 11, 2016