

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

In re: Dee¹

BSEA #1700794

RULING ON SCHOOL'S MOTION TO DISMISS PARENTS' APPEAL

BACKGROUND

Parents have filed a Hearing Request with the BSEA seeking: 1) an order finding Dee eligible for special education services; and 2) an order of residential placement at Sedona Sky Academy with reimbursement for tuition, boarding, related costs and transportation, beginning June 10, 2016. Mansfield Public Schools has filed a Motion to Dismiss Parents' Appeal, alleging that Parents can prove no set of facts which would entitle them to the relief sought, namely: (a) a determination of Dee's special education eligibility based solely on a private evaluation, and (b) tuition reimbursement and prospective placement in a private residential facility located in Arizona, while Parents continue to refuse to make Dee available to Mansfield Public Schools for any school based evaluations. Mansfield Public Schools contends that based upon special education statutes, regulations and established case law, the Hearing Officer cannot order such relief.

STATEMENT OF THE CASE²

Dee is a 15 year old girl who resides in Mansfield, Massachusetts with her father and stepmother. She attended the Mansfield Public Schools (MPS) throughout her academic career as a regular education student. She had never been referred for a special education evaluation by either MPS or Parents. Dee finished her 2014-2015 8th grade year (middle school) with course grades of six A's and one B, and only four absences. In September 2015 Dee transferred, with the rest of the 8th grade class, to Mansfield High School (MHS), where she was enrolled in college preparatory and honors level classes and also attended a college level art class outside of the school day. Until she stopped attending MHS on Monday, March 7, 2016, she did not have a single absence during the 2015-2016 school year.

On Sunday, March 6, 2016 Dee was apparently caught leaving her college level art class to meet a young man, had a discussion/confrontation with her stepmother regarding this event,

¹ Dee is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in publicly available documents.

² The information contained in this ruling is derived from Parents' Hearing Request; MPS' Motion to Dismiss Parents' Appeal; Parents' Opposition thereto with attached exhibits and Father's affidavit; and Parties' oral argument on the instant Motion.

became upset and went to the bathroom, took a handful of over the counter medication and put it into her mouth. Her stepmother stopped her. Dee was hospitalized for 2 days and then transferred to a psychiatric hospital where she was hospitalized for an additional 2 days. Following hospital recommendations, Dee was then immediately placed by her parents on March 10, 2016, at Trails Carolina Wilderness Therapy Program in North Carolina (Trails Carolina). Shortly after Dee was placed at Trails Carolina, MPS was notified via Parents' counsel that she was attending Trails Carolina but that Parents did not intend to seek reimbursement from MPS for that placement.

In April 2016 while in attendance at Trails Carolina, Dee underwent a private psychological assessment by Dr. Lorena Bradley, who diagnosed Dee with Major Depressive Disorder; Social Anxiety Disorder; Oppositional Defiant Disorder; and other Specified Trauma- and-Stressor Related Disorder with Attachment Issues. Dr. Bradley advised that Dee required intensive therapeutic treatment in a residential setting to address her complex needs. This assessment was apparently completed on May 2, 2016 and a copy was provided to MPS on May 16, 2016. On May 11, 2016 because Dee had never received special education services under an Individualized Education Program (IEP) Parents, through counsel, requested that MPS convene a team meeting to consider Dee's eligibility for special education services and assistance in identifying an appropriate placement for her upon her completion of Trails Carolina. MPS declined to convene a team meeting to consider Dee's eligibility for special education services unless and until MPS had performed and considered its own school based evaluation.

During May 2016 Parents received recommendations from Dee's clinicians/consultants that she transfer to a residential therapeutic program at Sedona Sky Academy in Arizona immediately upon completion of the Trails Carolina program. On May 24, 2016 Parents, through counsel, notified MPS that they intended to enroll Dee at Sedona Sky Academy at public expense, but that they consented to MPS' evaluation of Dee while she remained in the Trailways Carolina program. On May 31, 2016 MPS formally sought parental consent for initial school based testing including a clinical psychological evaluation, education evaluation and academic testing. Parents signed consent on June 5, 2016 however MPS did not receive the consent until July 20, 2016. Dee remained in Trails Carolina until June 8, 2016 when she was transferred directly to Sedona Sky Academy in Arizona for continued therapeutic residential treatment. MPS takes the position that it is not required to perform testing out of state at Dee's residential treatment center. Parents, despite having provided written consent, have refused to make Dee available for MPS testing in Mansfield, citing advice from Dee's therapist at Trails Carolina that a return to Mansfield would be counterproductive and unsafe for Dee.

ISSUE

Is MPS entitled to a dismissal of Parents' BSEA Appeal given that Dee has never been a special education student and Parents have failed to make Dee available to MPS for an initial special education evaluation by MPS?

STATEMENT OF POSITIONS

Parents' position is that they have consented to Dee being evaluated by MPS but that her clinicians have advised that it would be counterproductive and unsafe for her to return to

Mansfield for such an evaluation. Parents offer the psychological evaluation performed by Dr. Bradley while Dee was at Trails Carolina in lieu of a MPS evaluation. Parents also offer to consent: to any private evaluator(s) of MPS' choosing in Arizona to perform evaluations of Dee at Sedona Sky Academy; and/or to any MPS evaluators who would go to Arizona to evaluate Dee at Sedona Sky Academy. Finally, Parents agree to pay for reasonable expenses for MPS evaluator(s) to travel to Arizona to evaluate Dee.

MPS' position is that Dee has been a successful general education student in MPS and that under special education law it has the right to perform its own initial evaluations of Dee prior to the convening of a team meeting or the provision of any special education services under an IEP. While MPS will certainly consider Dr. Bradley's private evaluation, it contends that it is not mandated to utilize her evaluation in lieu of conducting its own initial evaluation. MPS argues that it was/is unreasonable to expect MPS' experts to travel to North Carolina or to Arizona to evaluate Dee. When Dee returns to Mansfield, MPS will conduct its initial special education evaluation, convene a team meeting, and propose any necessary special education services.

RULING

The standard applicable to a motion to dismiss, pursuant 801 CMR 1.01(7)(g)(3) of the Standard Adjudicatory Rules of Practices and Procedure, Rule XV11(B)(4) of the Hearing Rules for Special Education Appeals, Rule 12 (b)(6) of the F.R.C.P. and Rule 12 (b)(6) of the M.R.C.P. is essentially identical, that is: a motion to dismiss may be granted if the party requesting the appeal or hearing fails to state a claim upon which relief may be granted. Therefore, a hearing officer, considering all of the allegations in a hearing request to be true, may dismiss the case if he or she cannot grant relief under either federal or state special education statutes (20 U.S.C. §1400 et seq. or M.G.L.c.71B) or the relevant sections of Section 504 (29 U.S.C. § 794).

In the instant case, MPS contends that Parents can prove no set of facts that would entitle them to the relief sought (i.e., a determination that Dee is eligible for special education services and an award of retroactive reimbursement for /prospective placement in a private residential facility in Arizona) given that Parents have failed to make Dee available to MPS for an initial, school based evaluation. I concur.

My analysis follows.

I wish to make clear that I am not, in any way, faulting Parents for the parental decisions they have made in doing what they believed was best for their daughter. Nor do I find that Parents are deliberately withholding Dee from evaluation by MPS to obtain any tactical advantage in this case. Indeed, they do not seek reimbursement for their unilateral Trails Carolina placement after her 4 days of hospitalization, they have consented in principle to a MPS evaluation, and have attempted to put forth several alternatives to enable this to occur.

However, the fundamental reality is that Dee's immediate post hospitalization transfer to Trails Carolina, followed by her subsequent direct transfer from Trails Carolina to Sedona Sky

Academy residential facility, without returning to Mansfield (or even to Massachusetts) has effectively denied MPS any opportunity to conduct an initial school based evaluation.

M.G.L.c.71B s.3 provides that after a child is initially referred for an evaluation and parental consent is obtained, the school committee shall provide an evaluation. Emphasis added.

603 CMR 28.04. Referrals and Evaluations provides:

2) Initial evaluation. Upon consent of a parent the school district shall provide or arrange for the evaluation of the student by a multi-disciplinary team within 30 days. Emphasis added.

20 U.S.C. § 1414(a)(1) provides:

1) Initial evaluations. (A) In general, a State educational agency, other state agency or local education agency shall conduct a full and individual evaluation in accordance with this paragraph and subsection (b) before the initial provision of special education and related services to a child with a disability under this part. Emphasis added.

34 CFR 300.301 Initial evaluation provides:

(a) General. Each public agency must conduct a full and individual initial evaluation in accordance with § 300.305 and 300.306 before the initial provision of special education and related services to a child with a disability under this part. Emphasis added.

The law is thus clear that a local education agency is the entity charged with performing the initial evaluation of a student, and that such evaluation is to be performed before a student receives special education or related services.

If Dee had been evaluated by MPS, found eligible for special education/related services, and had an IEP prior to her out of state residential placements, my ruling would be very different. However, Dee had been a general education student in MPS for 8½ years, was taking college prep and honors classes, was successful academically, had no attendance issues and had no in-school behavioral issues. Then suddenly, on a Sunday, at home, Dee had a confrontation with her stepmother over an incident that occurred on the weekend, took pills and her life dramatically changed. As the above special education statutes and regulations provide, MPS clearly has the right to do its own initial evaluations and convene a team meeting to determine her special education eligibility and, if eligible, to determine the nature and scope of special education services to be provided.

Parents are, pursuant to their Hearing Request, asking that MPS be ordered to find Dee, a general education student for her entire educational career, eligible for special education and be ordered to fund a non (Massachusetts) approved, out of state residential placement, the most restrictive placement under special education law, without MPS ever having been given the opportunity to evaluate her.

I find nothing in the law that mandates MPS to accept Parents' private evaluation in lieu of its own under the facts of this case. Similarly, I find nothing in the law that mandates MPS

evaluators to travel across the country to perform an initial evaluation on a MPS student. I note that MPS has represented that it will make arrangements with Parents to evaluate Dee anywhere in Massachusetts, even if that means conducting the evaluation in a private or hospital setting.

Federal courts have consistently and uniformly held that if parents wish to have their child receive special education under the IDEA, the school must be allowed to evaluate the child by qualified professionals of its own choosing and cannot be required to rely solely on a private evaluation. In the leading case on this issue, *Andress v. Cleveland Independent School District*, 64 F. 3rd. 176, 178 (8th Cir. 1995), the U.S. Court of Appeals held, in pertinent part:

If a student's parents want him to receive special education under the IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation. *Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1315 (9th Cir. 1987) ("If the parents want the student to receive special education under the Act, they are obliged to permit testing.") *Dubois v. Conn. State Bd. of Ed.*, 727 F.2d 44, 48 (2nd Cir. 1984) ("[T]he school system may insist on evaluation by qualified professionals who are satisfactory to the school officials."); *Vander Malle v. Ambach*, 673 F.2d 49, 53, (2nd Cir. 1983) (School officials are "entitled to have [the student] examined by a qualified psychiatrist of their choosing.") A parent who disagrees with school's evaluation has the right to have the child evaluated by an independent evaluator, possibly at public expense, and the evaluation must be considered by the school district. 34 C.F.R. § 300.503.

It would be incongruous under the statute to recognize that the parents have a reciprocal right to an independent evaluation, but the school does not.

A parent who desires for her child to receive special education must allow the school district to reevaluate the child using its own personnel; there is no exception to this rule. Student's parents refused to allow the school district to reevaluate him. Therefore, [the] student was not eligible for special education. (Emphasis added)

Similarly, in *Johnson v. Duneland School Corporation* 92 F. 3rd 554, 588 (7th Cir. 1996) the U.S. Court of Appeals, citing *Andress*, noted that every circuit which has addressed the school's right to conduct an evaluation has ruled that because the school is required to provide the student with his/her education, it must have the right to conduct its own evaluation of the student and cannot be forced to rely upon private parental evaluations. See also *M.T.V. v. Dekob County School District* 2006 U.S. App. Lexis 9621 (11th Cir. 2006).

Consistent with federal court decisions, BSEA decisions have held that schools are entitled to employ or contract with qualified professionals of their own choosing to conduct evaluations and that parents cannot limit the school to only utilizing private parental evaluations or place conditions upon the school's evaluation. See *In re: Falmouth Public Schools*, 4 MSER 95 (1998); *In re: Boston Public Schools* 5 MSER 144 (1999); *In re: Lowell Public Schools* 8 MSER 154 (2002); *In re: Hampden-Wilbraham Regional School District* 11 MSER 238 (2005).

Further, federal courts have consistently held that removal of a student from the state where the local school is located to an out of state placement/location clearly limits a school district's obligation to evaluate the student, and that when such occurs, the student becomes unavailable for evaluation. See *C.G. v. Five Town Cmty Sch District* 513 F 3d 279 (1st Cir 2008) and see *Patricia B. v. Board of Education of Oak Park* 8 F. Supp. 2d 801, 809 (N.D. Ill. 1998), affirmed 203 F. 3rd 462 (7th Cir. 2000) and that the local school districts had no obligation to accept parental testing or to send staff/contract with out of state third parties to perform evaluations.

The *Patricia B.* Court went on to state:

Parents, who because of their failure to cooperate, do not allow a school district a reasonable opportunity to evaluate their disabled child forfeit their claim for reimbursement for a unilateral private placement.

See also 34 CFR 300.148 (d)(2) which provides that where parents remove a child who has already been found by the LEA to have a disability from public school, place him in a private school, and go to a BSEA hearing seeking reimbursement for such private placement, reimbursement may be reduced or denied if the LEA requested to evaluate the child but parents did not make the child available for evaluation. Obviously the facts in this case are even more striking in that Dee has never been evaluated by MPS or been found to have a disability by MPS. See also *Andress*, quoted above.

In summary, all federal courts (which have addressed the issue) and the BSEA have uniformly held that school districts have the right to conduct their own school based evaluations using qualified professionals of their own choice, since such local school districts are responsible for providing the student his/her special education and related services. Similarly, federal courts have ruled and 34 CFR 148(d)(2) provides that by rendering a child unavailable for evaluation by the LEA, Parents forfeit their right to reimbursement for a unilateral placement/ special education.

ORDER

I. BSEA #1700794 is hereby **DISMISSED WITH PREJUDICE**.

II. Upon parental notification of the date of Dee's return to Massachusetts, MPS shall immediately make arrangements with Parents for a timely evaluation of Dee within Massachusetts (even if that is within a hospital based setting or private school setting).

By the Hearing Officer,

Raymond Oliver

Dated: December 16, 2016