

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

**In Re:** Student v.  
Lexington Public Schools

**BSEA # 1701925**

**Ruling on Lexington Public Schools' Motion To Dismiss**

This Ruling is issued pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL ch. 71B), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under these statutes.

On September 1, 2016, Parents filed a Hearing Request with the Bureau of Special Education Appeals (BSEA) seeking to set aside a Settlement Agreement entered into by the Parties in October 2013, and requesting that Lexington Public Schools (Lexington) fund a private therapeutic placement for Student. Parents also sought retroactive reimbursement for their unilateral placement of Student at CEDC, Avalon Hills and Dearborn. Parents alleged a substantial change of circumstances regarding Student's emotional diagnosis and needs.

On September 12, 2016, Lexington filed a Motion to Dismiss asserting that Parents had failed to state a claim upon which relief could be granted because the Parties had entered into a Settlement Agreement which clearly stated that Lexington's fiscal and programmatic responsibility toward Student ended on June 30, 2015. Lexington alleged that the circumstances had not changed and sought that the BSEA uphold its Agreement.

Parents filed an Opposition to the District's Motion to Dismiss on September 19, 2016 reiterating their change of circumstances allegations and renewing their request.

During a conference call on September 19, 2016, the Parties stated their preference to have the Motion decided on the documents, which included affidavits. At the request of the Hearing Officer, the Parties agreed to hold a second conference call once the Hearing Officer had reviewed the materials. On September 26, 2016, the Parties were informed that the Motion could be decided on the documents as originally requested, and dates for a possible Hearing on the merits (depending on the outcome of the Motion to Dismiss) would also be selected. The Hearing dates were selected during a subsequent telephone conference call on October 12, 2016 and those are reflected at the end of this Ruling.<sup>1</sup>

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<sup>11</sup> Via separate Ruling issued on September 29, 2016, the case was scheduled to proceed to Hearing in November 2016 in the event the Motion to Dismiss was not allowed, to allow sufficient time for the Parties to conduct Discovery as requested. During a second conference call on October 12, 2016 the Hearing dates were changed to January 2017 by agreement of the Parties.

In rendering this Ruling the following documents were considered: Parents' Hearing Request and Opposition to Lexington's Motion to Dismiss and Parents' Exhibits A through D (PA to PD), and Lexington's Motion to Dismiss and Exhibits 1 through 9 (S1 to S9).

Upon consideration of the documents and arguments offered by the Parties, Lexington's Motion is Granted in Part, as explained below.

**Facts:**

The facts delineated herein are presumed to be true for purposes of this Motion only.

1. Student is a seventeen year old resident of Lexington, Massachusetts.
2. In August 2011, Student's family moved to the United States and settled in Lexington, MA. Student was enrolled in school and began attending seventh grade at the Jonas Clarke Middle School (Clarke) in Lexington on August 29, 2011 (PA; S1).
3. According to Parents, prior to the move, Student was a happy, social child who enjoyed school (PA; PB). She had an open and positive relationship with Parents.
4. Upon entering Lexington, Student had a difficult transition. She became overwhelmed with academic work and had no friends (S1; PB). After two weeks, she did not attend school one day stating that she did not want to go back. Lexington worked with the family by sending two of her teachers to Student's home to assist her with the transition, and changed Student's schedule to add art (PA; PB; S1). According to Parents, Student was being teased, bullied and called "fat" and "disgusting" (PA; PB).
5. In the fall of 2011, at Mother's request, Ellen Vera (Guidance Counselor in Lexington) recommended that Student see Becky Kosternan (Licensed Social Worker) to help Student with her transition issues (PA; S1).
6. While in seventh grade, Student began to receive private psychological therapy with Ms. Kosternan (S1). In school, Student received regular education supports such as math intervention, Learning Center and Guided Study, but she continued to struggle academically with variable performance. According to Lexington, it was difficult to assess her skills because of her emotional responses (S4).
7. By all accounts, Student's seventh grade was difficult (See S7; PA). An email from Alicia Kascak, Student's seventh grade English teacher, dated May 30, 2012, notes

that Student was attracting negative attention with a cut in her arm which she was picking with a metal object (S3). Ms. Kascak directed Student to see the school nurse because the arm looked infected and raw, but after a brief exit from the classroom Student returned with her bandage unchanged stating that she did not need to see the nurse. Ms. Kascak directed her to see the nurse again and as Student exited other students commented “she is cutting”. Ms. Kascak was concerned that Student’s situation was escalating (S3). While Lexington believed that Student was cutting herself in and out of school, Parents denied that she was cutting (S1; S3; S4; PA; PB). According to Parents, what Student had on her arm was not a cut but rather a burn mark (PA; PB).

8. On several occasions Lexington expressed concerns to Parents regarding Student’s emotional well-being; and in June of 2012, gathered some school administrators, teachers, Student’s guidance counselor and Parents to discuss Student’s difficulties in regulating her mood (S4).
9. During the 2012-2013 school year Student continued to struggle emotionally and academically (S1; S2; PB). According to Parents, Student’s classmates called her names. The bullying led Student into deeper emotional distress and she became increasingly unable to manage her feelings and behaviors in school (S1; PB).
10. Student’s therapist raised concerns that Student may have a non-verbal learning disability, which concern Parents raised at a meeting with Student’s teachers on November 5, 2012. The same date, Parents emailed Rachel Cohen, Evaluation Team Leader in Lexington, giving consent for Lexington to proceed with a special education evaluation of Student. Parents also referred Student to Dr. Laura Musikant-Weisner, a private child psychiatrist (S1).
11. On November 7, 2012, Parents consented to Lexington’s proposed psychological evaluation of Student. Lexington received that consent on November 13, 2012 (S4).
12. On November 15, 2012, Dr. Laura Musikant-Weisner diagnosed Student with clinical depression and severe anxiety, likely related to Student’s experience in Lexington where she lacked the necessary academic and social supports. According to Parents, during this time, Ms. Vera suggested to Parents that Student’s difficulties appeared to be wholly emotional even if she also had a learning disability (S1; S2).<sup>2</sup>

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<sup>2</sup> It was reported that during this period of time, Student “was wetting her bed on some nights. She was concerned about a man hiding under her bed. She had done some cutting, and reported that she had thought of hurting herself” (S4).

13. On November 20, 26, 27 and 28, 2012, Dr. Alissa Talamo, pediatric neuropsychologist, conducted a neuropsychological evaluation of Student at Parents' request. At that time Student was thirteen years old and in eighth grade in Lexington (S6).
14. Dr. Talamo found Student's verbal and non-verbal cognitive abilities to fall within the low average range (12<sup>th</sup> percentile for age in the WISC-IV), noting performance variability depending on task demands. Dr. Talamo found that several of Student's test scores had been "impacted by her difficulties responding in a typical manner to social situations" and by Student's deficits with abstract thinking and with thinking flexibility (S6).
15. Dr. Talamo's evaluation included parental and Student self-report measures both of which "indicated elevated scores related to depressive symptoms, anxiety symptoms, attentional problems, oppositional behavior, rule breaking behavior, and social problems" (S6).
16. Dr. Talamo diagnosed Student with a Nonverbal Learning Disability (NLD) including executive functioning weaknesses which impacted organization, attention, processing speed, working memory and emotional regulation. She also demonstrated reduced fine motor skills and deficits in social functioning. Student's performance on the WIAT-III, Math Reasoning sub test was also significantly low. Dr. Talamo also agreed that Student presented clinically significant levels of anxiety and depression especially as they relate to her social functioning (S6). Dr. Talamo however, found Student's reading fluency, vocabulary knowledge, and math calculation skills to be areas of strength (S6).
17. Dr. Talamo opined that because of Student's deficits, she would not be able to "naturally and independently develop social/emotional or executive functioning skills" or meet grade level expectations and would require individualized and specialized supports in numerous areas. She recommended that Student be placed in a small group (classes of 6 to 12 students), highly structured and organized setting, with a slower pace of instruction that allowed for comprehension checks, chunking and opportunities for repetition, that offered her academic and social skills supports. Thinking Maps and EmPOWER were recommended to address some of Student's executive functioning deficits and Dr. Talamo also recommended one-to-one, or a very small group of no more than three students for speech and language therapy focusing on communication, to address Student's linguistic pragmatic vulnerabilities.

Dr. Talamo also recommended that Student receive reading instruction using a systematic program for comprehension such as Lindamood-Bell Visualizing-Verbalizing, and noted that all of Student's instruction should be delivered by teachers with vast experience teaching children with significant learning disabilities (S6). According to Dr. Talamo, it was important that Student's teachers understood Student's "learning style and areas of vulnerability, specifically organizing complex visually presented information, seeing the 'big picture', drawing expected inferences (academically and socially), and managing abstract information"(S6).

18. Dr. Talamo was concerned that Student's struggles with social pragmatic skills represented "an enormous risk factor from an emotional point of view" and found it imperative that Student received "structured, curriculum-based social skills training with a professional experienced in working with children with NLD" (S6). Lastly, Dr. Talamo opined that Student required continued work with a therapist and a psychiatrist to address her clinically significant levels of anxiety and depression (S6).
19. Dr. Musikant-Weisner started Student on anti-depressant medication on November 29, 2012 (S1). At the time Student was having suicidal thoughts (S1).
20. On December 7, 2012, Ms. Vera left a voicemail message for Parents suggesting that Student be taken to McLean Hospital to be evaluated for possible hospitalization. Ms. Vera and Ms. Kosternan had a discussion during which Ms. Kosternan recommended that Student be placed at the Compass program while Student was evaluated further by Lexington. Lexington refused this request (S1).
21. Via email dated December 7, 2012, Father responded to Ms. Vera's email requesting that she be considerate of the family while they coped with Student's treatment for depression and recent diagnosis of a severe NLD. While acknowledging that Student's behavior had deteriorated in school, Father specifically took issue with Ms. Vera's comment that Student's issues were largely emotional, and her inquiry as to whether Student's therapist and psychiatrist had considered hospitalization for Student. Parents asserted that they were working with the private specialists and were awaiting the neuropsychological evaluation report to decide how they would proceed (S5; PA; PB).
22. Ms. Vera's suggestion that Student be taken to McLean's Hospital for an evaluation or hospitalization+ was particularly upsetting to Mother who found it "inappropriate that the guidance counselor would make that comment when she knew [that Student

was working with a psychiatrist and a therapist” (PA). At home, Student was having nightmares and was wetting her bed on occasion (PA).

23. Ms. Kosternan and Dr. Musikant Weisner discussed the situation and recommended that Student not return to Lexington. On December 20, 2012 Dr. Musikant-Weiser completed a Home and Hospital Form, requesting that Student be educated in the home due to increased levels of depression (S1; S8). Student received two hours per day of home tutoring through April 2013. According to Parents, during this time Student’s symptoms improved (S1).
24. On January 24, 2013, Lexington’s school psychologist, Mary E. Neumeier, conducted a psychological evaluation of Student (S4). Because of Student’s recent neuropsychological evaluation by Dr. Talamo, Ms. Neumeier’s evaluation was intended as supplemental (S4).
25. Ms. Neumeier reported that on the Pier-Harris 2 Self-Concept Scale, Student scored in the very low range on the Intellectual and School Status scale, on the Physical Appearance and Attributes scale, on the Freedom from Anxiety scale, on the Popularity scale and on the Happiness and Satisfaction scale, suggesting serious self-concept deficits across all domains. She reported high dissatisfaction, unhappiness and high levels of emotional distress pertaining to her physical appearance, intellectual and social abilities, and also as to her perception of herself as a valued family member (S4).
26. Ms. Neumeier found Student’s verbal and non-verbal abilities to fall within the average range pursuant to the Cognitive Battery of the Differential Ability Scales (DAS-II), noting that Student’s abilities presented stronger than when measured by Dr. Talamo (S4).
27. Ms. Neumeier opined that Student’s deficits with mood regulation and difficulties with social interactions persisted as areas of significant concern. She recommended that Student return to a school environment that offered wrap-around services to address Student’s needs as they manifested during the day. She further opined that Student required a structured environment where Student did not feel overwhelmed but where she was held accountable for fulfilling her academic demands (S4).
28. At a Team meeting convened on March 26, 2013 to discuss the results of the evaluations, Student was found eligible to receive special education services to address her academic, social and emotional deficits. Lexington proposed placement

in a therapeutic program, but Parents refused this offer, requesting instead that Lexington place Student at the Learning Prep School (Learning Prep). Lexington rejected this placement on the basis that it did not offer the emotional supports that Student required. Parents then unilaterally placed Student at Learning Prep in April of 2013 (PA).

29. Via letter dated March 27, 2013, Parents reiterated their academic and social-emotional concerns for Student and noted their concerns over what they considered to be unacceptable behavior by Student's Guided Study and Math Intervention teachers (PC).

30. In April 2013 Parents unilaterally placed Student at Learning Prep (PA).

31. In a letter dated June 13, 2013 from Parents to Beverly Hegedus (Lexington's then Special Education Director), in preparation for a BSEA mediation, Parents offered to clarify their position. Parents explained that at her previous school, Student had been happy and she had good grades, but at Clarke, Student had become lonely, isolated, unhappy and was struggling with her academics. In Lexington, Student had been suspended twice when she had allegedly responded to bullying. Parents further noted,

We believe that, and we have communicated to [Student's] Team multiple times, that the psychological assessment generated by Ms. Neumeier contains numerous serious errors/misrepresentations/omissions. Further, we believe that due to the number of serious errors/misrepresentations/omissions made in this report, it depicts an erroneous and negative image of [Student] as a girl who entered Clarke emotionally damaged; had never successfully made the transition to a new and larger school prior to joining Clarke; was unhappy prior to Clarke; performed poorly academically prior to Clarke; had serious problems at her previous school; had an inability to make friends; had refused to attend Clarke prior to attending a single class; was a "cutter", who had received tutoring in the hospital, and had parents who let her go to tutoring unwashed and disheveled (S2).

32. According to Parents, at Learning Prep Student thrived socially and academically; she was not having nightmares, was not bedwetting and no longer needed medication (PA).

33. On August 28, 2013, the BSEA received Parents' Hearing Request (BSEA #1401820). In it, Parents noted Student's difficulties acclimating to Lexington.<sup>3</sup> The Hearing Request stated:

Her transition to Clarke School was extremely difficult for her; her grades started to fail, she had to drop a foreign language, and she struggled to make friends, she did not feel accepted. (S1).

34. BSEA #1401820 was closed on November 15, 2013, when the Parties notified the BSEA that they had reached a settlement agreement facilitated by Reece Erlichman, BSEA Director, during a Settlement Conference held on October 16, 2013 (Administrative Notice of BSEA #1401820). At the Settlement Conference, Parents were represented by a special education advocate (Ginny Brennan) and Lexington by a special education attorney (Colby Brunt, Esq.) (S9).

35. The Parties' Settlement Agreement (Agreement) dated October 16, 2013, covered the period from April 2013 through [...2021], the Student's twenty second birthday (S9). The Agreement provides that Lexington would fund Student's placement at Learning Prep, including transportation, for the 2013-2014 and the 2014-2015 school years (*Id.*). The Agreement specifically notes Parents' unilateral selection of Learning Prep, which placement Lexington did not recommend, and further states that Parents bear the responsibility for the quality and quantity of services/programming that Student would receive at Learning Prep, as well as Student's supervision while at Learning Prep. This Agreement was entered into by the Parties for the sole purpose of resolving all their disputes (S9).

36. Pursuant to Paragraph 2(c) of the Agreement, Parents waived Lexington's obligation to convene Student's IEP, provide extended school year services, conduct further evaluation or reimburse Parents for any independent evaluation. Moreover, under Paragraph 2(d), Parents assumed any and all tuition and related educational expenses after June 30, 2015, and waived Lexington's obligation to offer Student a FAPE for the 2015-2016 school year and through Student's 22<sup>nd</sup> birthday (S9).

37. Paragraph 4 of the Agreement specifically provides that,

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<sup>3</sup> At the time, Parents were represented by an advocate.



Additional costs/services by PARENT. Except for the portions of the tuition to be paid by LEXINGTON as provided in paragraphs 2 and 3, PARENTS will be responsible for any and all costs and services associated with Student's education for each of the 2013-2014 through the STUDENT's 22<sup>nd</sup> birthday, including, but not limited to, any cost associated with attendance at private or public schools, transportation, extended day or year services, MCAS tutoring, test preparation courses, transition planning or services, consultation, related services, and assistive technology. PARENTS specifically waive any rights they may have to seek additional costs, transition services or related services from LEXINGTON during the named school years. PARENTS further agree that they will hold LEXINGTON harmless and indemnify LEXINGTON against any liability, judgment, legal fees or other costs or expenses arising out of claims by Learning Prep or any third party for payment of tuition costs in excess of the amount agreed to be paid by LEXINGTON hereunder (\$9).

38. Paragraph 6 delineates Lexington's obligations as of June 30, 2015, specifically providing that

The Parents agree that Lexington's financial and programmatic responsibility under state and federal laws and regulations for the student's education shall terminate as of June 30, 2015. PARENTS specifically waive the right to re-enroll the STUDENT in any of the Lexington Public Schools. PARENTS specifically waive the right to seek any educational services and/or financial compensation from LEXINGTON after June 30, 2015.

39. Paragraph 9 of the Agreement states that

This AGREEMENT is intended to and does settle any and all disputes that exist or may exist between the parties relating to Student's regular education needs, rights and services and special education and related services needs, rights and services since she became a resident of Lexington through the Students 22<sup>nd</sup> birthday [...2021]. PARENTS agree to indemnify LEXINGTON against any and all claims that the Student may acquire at age 18 against Lexington Public Schools and/or its officers and agents. Without limiting the foregoing, PARENTS

specifically waive all rights against LEXINGTON that might have accrued to them or to Student under M.G.L. c. 30A, 71, 71B, 76; 20 U.S.C. §1400 et seq., Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, 42 U.S.C. §1983, and any and all other related acts, laws and regulations since Student became a resident of Lexington through [Student's birthday in 2021]. PARENTS and LEXINGTON specifically agree that the foregoing release will not preclude any action to enforce the terms of this AGREEMENT. LEXINGTON agrees to forever discharge and release Parents all debts, demands, actions, cause of action and their lawsuits concerning this matter that may have arisen or will arise through [...2021] (S9).

40. Paragraph 10 of the Agreement provides the Parties' acknowledgement that they had read the entire Agreement, had an opportunity to consult with an attorney, and signed the Agreement of their free will having understood its terms. The specific language in the Agreement was:

The parties acknowledge that they each have had an opportunity to consult with an attorney, that they have read this entire AGREEMENT, and have signed this AGREEMENT voluntarily with full understanding of its terms and without any other inducements or promises except for those set forth herein. The PARENTS have chosen to forgo counsel from attorney in making this AGREEMENT. PARENTS are specifically waiving their right to have counsel on this matter or use that as a defense in any action described in paragraphs 8, 9, or 11 of this AGREEMENT. [The] Parties further agree to waive the right to any attorney's fees and/or advocates' fees (S9).

41. Consistent with the Agreement, Student attended Learning Prep and Lexington funded said placement for the 2013-2014 and the 2014-2015 school years.
42. On or about January of 2014, after approximately two months of skipping meals and having experienced extreme weight loss, Parents arranged for Student to see a nutritionist, Hillary Monroe RD, LDN (PB; PD). Student disclosed to Ms. Monroe that she was bingeing, purging, and using laxatives (PD; PA).
43. On February 26, 2014, Parents placed Student at the Cambridge Eating Disorder Clinic ("CEDC"), a residential treatment program, where she remained through April 8, 2014. At the CDEC Student disclosed that prior to entering Lexington she had

been repeatedly sexually assaulted by older students at her previous school who used to call her “fat” and “disgusting” (PA).

44. At the CEDC Student was diagnosed with Eating Disorder-NOS, Post –Traumatic Stress Syndrome, Depressive Disorder-NOS, and Pervasive Developmental Delay-NOS (PA).
45. In April 2014, Student was discharged and admitted to the CEDC’s Partial Hospital Program for outpatient treatment. She transitioned back to Learning Prep but when her weight continued to drop she was readmitted to CEDC’s residential program on May 30, 2014. Student transitioned back to Learning Prep but in October 2014 had a major relapse and was admitted to Children’s Hospital where she was fed via a feeding tube for several days (PA).
46. Upon her discharge from Children’s Hospital Parents placed Student at Avalon Hills Eating Disorder Treatment Center (Avalon) in Utah, a residential therapeutic treatment center for adolescent females. At Avalon Student’s eating disorder improved but she became increasingly dysregulated with suicidal ideation and displaying violent behavior towards the staff, which resulted in a hospitalization at MacKay Dee Hospital from February 14 to 18, 2015 (PA).
47. On February 18, 2015, Student attempted suicide and was hospitalized at the University of Utah Hospital for two days after Father shared his mother’s significant mental health history with her (PD).<sup>4</sup> Upon being they returned to Massachusetts (PA).
48. On March 3, 2015, Student began attending McLean’s DBT program. She eloped on the first night she was there and when found was taken to the Massachusetts General Hospital’s emergency room (PA).
49. On March 6, 2015, Student was admitted to Franciscan’s Hospital (Franciscan) where she required chemical and physical restraints to address her self-injurious behaviors<sup>5</sup>.

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<sup>4</sup> Albeit having no formal diagnosis, it is suspected that Student’s paternal grandmother suffered bi-polar disorder and depression. She committed suicide when Father was young (SD). Parents had previously denied any mental health issues within the immediate family when they provided their family history to Dr. Talamo during Student’s neuropsychological evaluation in 2012. Dr. Talamo’s report states,

Family history is notable for dyslexia and mood disorder in the extended family but is otherwise unremarkable for neurological, psychiatric, behavioral, or academic issues in the immediate/extended family (S6).

<sup>5</sup> The self-injurious behaviors included “elopement attempts and swallowing foreign objects” (PD).

While there, she made several suicide attempts and was kept in locked door seclusion. Franciscan was unable to stabilize Student's behavior and in April 2015, she was transferred to the Worcester Recovery Clinic's (Worcester) inpatient recovery program (PA).

50. At Worcester she received intensive therapy in addition to family therapy. Eventually, Student was able to spend weekends at home and in October 2015 she was discharged (PA).
51. On or about October 13, 2015<sup>6</sup>, Student began attending Dearborn Academy's STEP (Dearborn) program and living at home (PA).
52. On November 1, 2015 Student was evaluated at Emerson Hospital and later admitted to CBAT level care at Wayside Youth and Family on November 2, 2015, after revealing to her parents that she was thinking of hurting herself at home (PA). Student was released home the following day and she continued to attend Dearborn (PA).
53. During the February 2016 break, Student was visiting with a friend when she encountered her abuser at a party. Student was traumatized again when one of her aggressors attempted to engage her sexually (PA). A February 26, 2013 Confidential Report by Dearborn Academy STEP Program however states that  

...[Student] reported feeling significantly stressed prior to the trip. Upon her return, [Student] appeared in good spirits and reported that overall she had a positive experience during the vacation.
54. On March 31, 2016, she was admitted to Children's Hospital when she attempted suicide. Thereafter she was transferred to Children's Psychiatric Ward and discharged on April 18, 2016, after which she resumed her program at Dearborn (PA).
55. At present Student has been diagnosed with Post Traumatic Stress Disorder (PTSD), Eating Disorder- NOS, Nonverbal Learning Disability and R/O Bipolar Disorder (PA). Student takes 0.5mg Cogentin twice per day and 900mg of Lithium, 30mg Abilify, 8mg Prazosin, and 100mg Levothyroxine daily (PD).

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<sup>6</sup> Parents' Opposition to the District's Motion to Dismiss states that Student entered the STEP program on October 15, 2015 whereas Parents' Hearing Request and Mother's Affidavit (PA) state that it was on October 13, 2015.

56. In a February 23, 2016, Dearborn Academy STEP Program Educational and Clinical Assessments Confidential Report, Dearborn recommended that Student participate in a day therapeutic program located within commuting distance from her home. The report states that Student

...requires the ongoing structure and supports inherent to a small therapeutic school in order to maintain stability and make progress toward internalizing coping mechanisms (PD).

57. Dearborn's recommendations included Student's participation in: small therapeutic classroom with a high staff to student ratio; regular access to therapeutic supports throughout the day; weekly individual therapy sessions with a community based provider; regular medication management with outside community psychiatrist; regular meetings with a therapeutic mentor; weekly school-based counseling, ongoing collaboration between all providers (school and community); regular contact with Beth Meyer, eating disorder specialist; home based parent support/family counseling; and, exploration of community resources and activities. Numerous other special education interventions were recommended to address Student's academic/educational and social deficits (PD).

58. On September 1, 2016, Parents filed the instant Hearing Request seeking public funding for placement of Student at Colebrook High School, CASE Collaborative or Riverside School (BSEA #1701925).

59. Student has been rejected by the Victor School, Arlington, Beacon High School and Dr. Franklin Perkins, all of which were recommended by DMH and Dearborn personnel (PA). She has been accepted by the CASE Collaborative High School and Riverside Community Day program (PA).

## **Conclusions of Law:**

### **I. Legal Standards**

Pursuant to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3) and Rule XVII A and B of the BSEA *Hearing Rules for Special Education Appeals*, a hearing officer may allow a motion to dismiss if the party requesting the hearing fails to state a claim upon 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.”<sup>7</sup> 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.”<sup>8</sup> 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). . .”<sup>9</sup>

The Parties in the instant case do not challenge the jurisdiction of the BSEA to hear this matter pursuant to the pertinent federal<sup>10</sup> and state<sup>11</sup> law and regulations. As stated in Massachusetts regulation 603 CMR 28.08(3)(a), parents and school districts may request hearings

concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protection of state and federal law for students with disabilities [as well as] any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973, as set forth in 34 CFR §§ 104.31 through 104.39.

As such, the BSEA’s jurisdiction is governed by the parameters set forth in the IDEA, M.G.L. ch. 71B and the regulations promulgated under those statutes, as well as Section 504 of the Rehabilitation Act of 1973, and if the BSEA Hearing Officer cannot grant relief under one of the aforementioned statutes, then the case may be dismissed. See *Calderon-Ortiz v. LaBoy-Alvarado*, 300F.3d 60 (1<sup>st</sup> 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 (2005). However, if the facts alleged by the party opposing the motion to dismiss raise the plausibility of a viable claim that may give rise to some form of

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<sup>7</sup> *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

<sup>8</sup> *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

<sup>9</sup> *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

<sup>10</sup> The IDEA expressly grants special education Hearing Officers jurisdiction over issues relating to “the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child”. 20 U.S.C. §1415(b)(6)(A).

<sup>11</sup> Massachusetts law, grants the BSEA jurisdiction to hold adjudicatory hearings to resolve “disputes between and among parents, school districts, private schools and state agencies concerning: (i) any matter relating to the identification, evaluation, education program or educational placement of a child with a disability or the provision of a free and appropriate public education to the child arising under this chapter and regulations promulgated hereunder or under the Individuals with Disabilities Education Act, 20 U.S.C. section 1400 et seq., and its regulations; or (ii) a student’s rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. section 794, and its regulations. M.G.L. ch. 71B, § 2A(a).

relief under any of the aforementioned statutes, the case may not be dismissed. See, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).<sup>12</sup>

Lexington argues that the BSEA further has subject matter jurisdiction to enforce settlement agreements which terms “fall within the purview of the BSEA”.<sup>13</sup> As such, Lexington seeks dismissal of Parents’ claims based on the unequivocal, plain language of the Parties’ Agreement in 2013<sup>14</sup> asserting that Parents therefore have failed to state a claim on which relief can be granted.

## II. Discussion

Lexington argues that in October of 2013, the Parties entered into a legally binding Settlement Agreement which determined Lexington’s responsibilities with respect to the provision of special education programs and placements for Student through her 22<sup>nd</sup> birthday. Lexington relies on previous BSEA Rulings stating that where “the wording of the contract is unambiguous, the contract must be enforced according to its terms.” See *In Re: Longmeadow Public Schools, (Ruling on Longmeadow’s Motion to Dismiss)* 14 MSER 249 (Crane 2008) citing *Alison H. v. Byard*, 163 F.3d 2. 6 (1<sup>st</sup> Cir. 1998).

Lexington states that the language in the Agreement is clear and speaks for itself, arguing that the Agreement specifically stated that Lexington’s responsibility for Student’s education terminated on June 30, 2015, and further that Parents specifically waived “the right to seek any additional educational services and/or financial compensation from Lexington after June 30, 2015” (S9). There is no clause in the Agreement excepting “changed circumstances” from this waiver. Moreover, Lexington asserts that Parents were provided with the opportunity to consult an attorney prior to signing the Agreement and they voluntarily chose to rely on the recommendations of their experienced special education advocate. According to Lexington,

... It would undermine the integrity and efficacy of the settlement process if either party were allowed to avoid their obligations under the agreement, proceed to an evidentiary hearing before the BSEA, and have the BSEA issue a decision on the merits. *In re: Longmeadow*

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<sup>12</sup> Denying dismissal if “accepting as true all well-pleaded factual averments and indulging all reasonable inference in the plaintiff’s favor...recovery can be justified under any applicable legal theory”. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).

<sup>13</sup> Defined within the IDEA as “the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child”. 20 U.S.C. 1415(b)(6)(A).

<sup>14</sup> See *In re: Longmeadow Public Schools (Ruling on Longmeadow’s Motion to Dismiss)*, 14 MSER 249 (Crane, 2008); *In Re: Peabody Public Schools*, 15 MSER 154 (Crane, 2009); *In Re: Marlborough Public Schools*, BSEA #11-3650 (Figueroa, 2011); *In Re: Norwood Public Schools*, 11MSER 161 (Crane, 2005).

*Public Schools* (Ruling on Longmeadow's Motion to Dismiss), 14 MSER 249 (Crane, 2008).

Lexington argues that it entered into the Agreement in good faith and that it upheld all of its obligations. Moreover, Lexington asserts that here, as in *In Re; Lynn Public Schools, BSEA #1500643(2015)*, the language in the Agreement clearly delineated the intention, responsibilities and expectations of the Parties.

Lexington argues secondarily that Parents' allegations of changed circumstances as to Student's needs are without merit, as Student had significant social and emotional issues at the time the Parties entered into the Agreement, all of which were amply documented. Lexington notes that it was precisely for that reason that it offered Student placement in a therapeutic program in 2013 and why it did not support Student's placement at Learning Prep.

Relying on *South Kingstown School Committee v. Joanna S. et al*, #14-1177 (Barron, 12/09/2014), Parents argue that "there has to be careful balance between 'the legitimate concern of enforcing the settlement agreement and the statutory right to a free appropriate public education'", noting that "the South Kingstown Court resolved this balance by looking at whether there was a 'change in circumstances' after the time the settlement agreement was signed". Parents assert that in the case at bar there have been significant and material changes in both Student's symptoms and diagnoses which now include PTSD, Eating Disorder-NOS and R/O Bipolar, which were not present in 2013, which warrant setting aside of the Agreement. As such, Parents seek reimbursement for Student's unilateral placements at CEDC, Avalon Hills and Dearborn, as well as prospective placement of Student in a therapeutic program.

When signing the Agreement in 2013 both Parents knew that they were executing an agreement that afforded Student two years at Learning Prep in exchange for fully releasing Lexington of any and all future educational responsibility for Student (S9 paragraphs 2 (a) through (d), 3, 4 and 6). Parents advance no argument to suggest that the Agreement was signed under duress or that they were threatened or coerced into doing anything that was not of their own free will. They only assert that the circumstances later changed and that in 2013, they could not foresee the needs Student would later have.

Parents' reliance on *South Kingstown School Committee* regarding "changed circumstances" is misplaced. The settlement agreement under review therein contained language which stated that the parent "waived" any and all causes of action ...[of] which [she] kn[ew] or should have known". The *South Kingstown School Committee* Court therefore properly reasoned that "...the agreement may be comfortably read to preserve requests premised on



new circumstances that may arise”. The instant case is distinguishable as it contains far broader waiver language. No such “knew or should have known” limitation on the waiver exists in the language of the Agreement, and therefore it does not contemplate or allow for future claim(s). As such, the instant Agreement may not be set aside on a changed circumstances argument. Such action would undermine the settlement process, and would afford Parent rights beyond those originally agreed to.

The plain language of the Agreement, which terms Parents fully understood and apparently voluntarily accepted, and on which Lexington performed fully, contemplated that Lexington’s financial and programmatic responsibilities toward Student through her 22<sup>nd</sup> birthday ended once they funded the two years at Learning Prep (S9 Paragraphs 2 and 6). Under the Agreement, if Student stopped attending Learning Prep and instead enrolled in a different private school, Lexington would pay either the tuition amount of the private placement or the amount it would have paid Learning Prep, whichever was less (S9 Paragraphs 2(a) and (b)). Moreover, the Agreement specifically states that Parents “shall be responsible for any and all tuition/educational expenses after June 30, 2015” and further states that Parents “specifically waive Lexington’s obligation to provide a free and appropriate education for the 2015-2016 school year through the student’s 22<sup>nd</sup> birthday” (S9 Paragraph 2(d)). Additionally, Parents waived their “right to seek any educational service and/ or financial compensation from Lexington after June 30, 2015” and also waived the “right to re-enroll Student in any of the Lexington Public Schools” (S9 Paragraph 6). There is no language in the agreement exempting Lexington or Parents based on a change of circumstances.

Close examination of the Agreement and the circumstances at the time of the negotiations (seen in the light most favorable to Parents), shows that the language in the Agreement is clear and unambiguous. The language plainly intended finality of any and all dealings between the Parties, specifically releasing Lexington of any other responsibility or obligation regarding Student up to and through her 22<sup>nd</sup> birthday (S9 paragraphs 2(a) through (d), 4 and 6). The Agreement speaks for itself and the Parties have not advanced any arguments indicating that they did not understand the terms, or that they did not voluntarily agree to them in 2013. Lexington correctly argues that where the language of the agreement is unambiguous, “the contract must be enforced according to its terms.” See *Alison H. v. Byard*, 163 F. 3d 2, 6 (1<sup>st</sup> Cir. 1998). See also, *In Re: Marlborough Public Schools*, BSEA # 11-3650 (2011).

Even assuming, arguendo, that Parents were able to properly invoke the “changed circumstances” theory, such argument would be without merit, as Student’s significant social and emotional issues were present and amply documented at the time the Parties entered into the Agreement. As Lexington correctly notes, it was precisely for that reason that it offered

Student placement in a therapeutic program in 2013 and did not support Student's placement at Learning Prep where concededly, Student's symptoms worsened after a few months.

In *South Kingstown School Committee* the First Circuit Court of Appeals upheld the portion of the District Court's finding that a settlement agreement partially relieve[d] the school of its obligation to perform some of the evaluations sought by the parent. *South Kingstown School Committee* centered on the language of a settlement agreement in which the parent relinquished the right to five of nine independent evaluations in exchange for public funding of a private placement for the student. Following placement of the student in private school, the parent requested numerous additional evaluations. The presiding judge reasoned that a party's consent to relinquish certain rights through a settlement agreement

[W]ould be meaningless if [the party] could nonetheless turn around the next day and demand the foregone [terms] anew. We cannot accept [this] reading of the Agreement, as we find it difficult to suppose the parties intended such a meaningless outcome of their negotiations. See *AccuSoft Corp. v. Palo*, 237 F.3d 31, 40 (1<sup>st</sup> Cir. 2001) (explaining that intent of the parties is one factor in interpreting a settlement agreement).

The *South Kingstown Court* further stated

...in addition to providing an administrative process for addressing such disputes, Congress also expressly allowed parties to resolve them through settlements. And when parties do so, the settlements must be given appropriate effect.

So, to fully acquiesce to Parents' position herein would be to "undermine the integrity and efficacy of the settlement process", as neither Party should be allowed to avoid its obligations under the Agreement. *In Re: Longmeadow Public Schools*, 14 MSER 249 (Crane, 2008)<sup>15</sup>.

Nevertheless, at least one court in Massachusetts has expressed a preference for further development of the record at the administrative level regarding determination of Parents' understanding of an Agreement. Consistent with the U.S. District Court for the District of Massachusetts' determination in *Michelle K. In Her Own Right, and As Guardian And Next Friend Of Alicia K., v. Pentucket Regional School District and The Bureau Of Special Education*, Civil Action NO. 13-11414-DPW (Woodlock, January 16, 2015), a BSEA Hearing Officer may be responsible to hear "parole evidence regarding [Parents']

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<sup>15</sup> *Ruling on a Motion to Dismiss.*

understanding of the settlement agreement”. *Michelle K.*, at 21. Even when Parents in the instant case did not advance this defense, drawing from *Michelle K.* (involving a pro se parent), Parents should be provided an opportunity to be heard on this issue prior to considering dismissal of the case with prejudice.

Guided by this language, Parents herein are therefore, granted ten (10) business days to inform the BSEA whether they wish to proceed with a Hearing on the merits regarding the Parties’ understanding of the settlement agreement. If Parents fail to respond by November 2, 2016, this matter will be dismissed with prejudice consistent with this Ruling. No further Motions or other written submissions will be accepted outside of relevant documents that the Parties may desire to submit in relation to this narrow issue.

As such, the Ruling on Lexington’s Motion to Dismiss is DEFFERED pending Parents’ notification of their intention to proceed to a Hearing on the merits regarding their understanding of Agreement itself.

During a Telephone Conference call on October 12, 2016, the Parties had agreed to Hearing dates as stated below. However, given the narrowed issue involved (in the event a future Hearing is pursued) a request for advancement of the dates noted below will be entertained:

- 1) Exhibits and Witness lists are due by the close of business on January 11, 2017.
- 2) A Hearing will be held on January 18 and 19, 2017, at 10:00 a.m., at the Offices of DALA/BSEA, One Congress Street, 16<sup>th</sup> floor, Boston, MA.

Lastly, I note that this Ruling is limited only to educational responsibility for Student as it pertains to Lexington, and does not address potential responsibility or lack thereof with respect to any other district.

**ORDERS:**

1. Lexington’s Motion to Dismiss is hereby **DEFFERED** through November 2, 2016.
2. Parents’ shall inform the BSEA in writing of their desire to proceed to a Hearing on the Merits regarding their understanding of the Agreement by the close of business on November 2, 2016.

So Ordered by the Hearing Officer,

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Rosa I. Figueroa

Dated: October 19, 2016