**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re**: Norwell Public Schools v. **BSEA#** 1901470

 Student

**CORECTED DECISION**

This decision 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.

This matter comes to the BSEA as a Hearing Request initiated by the Norwell Public Schools and received on August 6, 2018.

The Hearing was held on October 16, 2018, at the Sparrell School building, 322 Main Street, Norwell, Massachusetts, before Hearing Officer Rosa Figueroa. Those present for all or part of the proceedings were:

Father *Pro-se*

Mother *Pro-se*

Jean Chiasson[[1]](#footnote-1) U.S. Postal Service employee, Norwell, Massachusetts

Suzan Theodorou Director of Student Services, Norwell Public Schools

Olivia Murino School Psychologist, Norwell Public Schools

Mary Ellen Sowyrda, Esq. Attorney for Norwell Public Schools

The official record of the hearing consists of documents submitted by Parent marked as exhibits PE-1, and Norwell Public Schools (Norwell) documents marked as exhibits SE-1 through SE-20; recorded oral testimony, and oral closing arguments. The record closed on October 16, 2018 at the conclusion of the Hearing.

**PROCEDURAL BACKGROUND**:

This matter was initially scheduled to proceed to Hearing on August 27, 2018. The Hearing was continued at Norwell’s request and scheduled to proceed at 10:00 a.m. on October 11, 2018 via an Order issued on August 23, 2018.

On or about October 8 and 9, 2018, Mother contacted the BSEA via telephone and requested a telephone conference call, as she alleged that she had not received any communications from the BSEA and had been unaware that a Hearing had been scheduled for later that week. Mother alleged that Norwell had just informed her that the present matter was scheduled to proceed on October 11, 2018.

A telephone conference call with the Hearing Officer was held on October 9, 2018, during which the Parties’ availability on October 11, 2018 was ascertained, and Mother confirmed that she was available in the afternoon but not the morning. Given the limited scope of the Hearing, Norwell assented to the time change. During this conference call it was also agreed that a Pre-hearing Conference would be held on October 11, 2018, prior to commencing the Hearing.

On October 10, 2018, Mother filed a “Request for Postponement of the Pre-trial Conference and Hearing[[2]](#footnote-2)” to which she had previously assented. An Order[[3]](#footnote-3) was issued on October 10, 2018, denying Mother’s Request to Continue the Pre-hearing Conference and scheduling a Motion Session for October 11, 2018, to address Mother’s request for postponement of the Hearing. In the Order the Hearing Officer assured the Parties that a determination on whether or not the Hearing would be continued would be entered at the Motion Session on the same date.

When Mother hand-delivered her Motion to continue the proceedings on October 10, 2018, at the Hearing Officer’s request, a BSEA support staff asked Mother to furnish her email address so that the Order could be emailed to her later that day. Mother refused to provide her email address and instead instructed the support staff to have somebody read the Order to her over the telephone. When the Order was issued later on October 10, 2018, the BSEA Director called Mother as requested to read the Order to her, but Mother did not answer the phone. The BSEA Director left Mother a message to return the call and given the length of the Order, read only the time sensitive portion of the document onto Mother’s voicemail. The Order was also mailed to Mother, in her name, at the address on record, which address she had confirmed was correct[[4]](#footnote-4).

Father and Norwell’s representatives attended the proceedings on October 11, 2018, but Mother did not. Father noted that Mother had been delayed at a meeting and would not be attending. Consistent with the Order issued on October 10, 2018, a Pre-hearing Conference and a Motion Session were held and a short continuance of the Hearing was granted. The Hearing Officer requested that Father inform Mother of the continuance, which he stated he would do. Father later confirmed that he had sent a text to Mother on October 11th informing her of the continuance and the new Hearing date, and noted that he also spoke to her on Saturday October 13, 2018. On October 11, 2018, Father was handed a copy of Norwell’s Exhibits and of all of the Orders issued up to that point in the case. No written Order memorializing the continuance was issued on October 11, 2018.

Norwell’s representatives and witnesses, Father and Mother attended the Hearing on October 16, 2018, but Mother left during the taking of the testimony of Norwell’s second witness.

**ISSUE FOR HEARING:**

1. Whether Norwell is entitled to substitute consent authorizing the School District to proceed with a three year re-evaluation for Student which is currently overdue.

**POSITIONS OF THE PARTIES:**

**Norwell’s Position:**

According to Norwell, Student is a middle school student currently receiving services under an IEP and is in good standing. Student’s last school evaluation was completed in 2013 and she is overdue for an evaluation that should have taken place in 2016. Norwell’s most recent request to secure parental consent was issued on April 10, 2018, but Parents continue to decline consent. Norwell asserts that its numerous attempts to secure Parents’ consent to proceed with Student’s three year re-evaluation have been unsuccessful and it now seeks substitute consent from the BSEA to proceed with Student’s re-evaluation.

Arguing that the Hearing was already postponed at Parent’s request, Norwell objects to any further postponement as the overriding concern is the necessity to complete the overdue evaluations in order to understand Student’s current needs.

Lastly, Norwell asserts that it has mailed all its correspondence to Mother and Father at Mother’s address and has also emailed documents to Mother’s email address, which address Mother concedes is correct.

**Mother’s Position:**

Mother did not provide a written response to Norwell’s Hearing Request. She made her position known during the telephone conference call held on October 10, 2018 and at the Hearing on October 16, 2018.

Parent has declined her consent to Norwell’s three year evaluation of Student because of her objections to the individual who conducted Student’s previous evaluations. Mother asserts that the previous evaluator failed to recognize Student’s dyslexia and, as a result, Student was deprived of services until Parents secured independent evaluations. Mother distrusts Norwell’s personnel in general, asserting that Norwell’s staff will report only what the administration instructs them to report. She opines that Student’s educational best interest has been compromised by Norwell in the past and will once more be compromised if Student is evaluated by Norwell. Mother wishes to bypass any evaluation conducted by Norwell and instead wants to proceed with an independent evaluation of Student.

Mother objected to proceeding with the Hearing on October 16, 2018, alleging that she had never received any correspondence from either Norwell or the BSEA, including exhibits. Thus, proceeding to Hearing was a violation of her procedural due process rights.

**Father’s Position:**

Father also noted his disagreement with the individual who conducted Student’s previous evaluation of Student, and similarly with Norwell’s personnel in general. Like Mother, he is concerned that the only reason Student is still receiving Orton-Gillingham (OG) services is because of the recommendations made by a previous independent evaluator and fears that Norwell is attempting to use the results of a new evaluation to terminate Student’s services. According to Father, Student’s issues with dyslexia are ongoing and the OG services have proven helpful. He does not wish anything to get in the way of Student’s continued receipt of OG services and as such refuses consent to the evaluations proposed by Norwell.

Father noted that he is at a loss regarding Mother’s allegations that she does not receive mail containing his last name, noting that he has never stopped receiving mail addressed to him at his previous address (Mother’s address).

**FINDINGS OF FACT:**

1. Student is an almost fourteen-year-old resident of Norwell who attends middle school in district. She receives special education services under an IEP that provides services to address Dyslexia (SE-1; SE-2; SE-3).

1. Student is in good academic standing, having received As, Bs and a few Cs in her classes during the last two years (SE-9; SE-10). Progress reports for the 2016-2017 school year note that Student achieved her Reading goal in sixth grade (SE-11).

1. Norwell’s last evaluation of Student took place in November and December of 2013 (SE-15; SE-16; SE-17; SE-18; SE-19). This evaluation included an academic achievement evaluation, a speech and language pathology assessment, psycho-educational assessment and an educational assessment (Id.). Student scored mostly within the average range in all assessments except for reading scores on the Wechsler Individual Achievement Test- Third Edition, in which her scores fell in the low average range (SE-15; SE-16; SE-17; SE-18; SE-19). The Team convened on or about January 10, 2014 to discuss the results of the evaluation and Student’s eligibility to receive special education services (SE-20).

1. Sometime around the time of Norwell’s evaluation, Parents had Student privately evaluated. Those evaluations were reviewed by Norwell and considered in finding her eligible to receive special education services.

1. Parents have supplemented Norwell’s program by privately funding Lindamood Bell services. While Student was in elementary school, Parents requested that Student receive Orton Gillingham interventions but this service was not provided at that time.

1. Student’s IEP covering the period from September 1, 2016 to January 16, 2017 offered Student direct reading services by a special educator five, forty-five minutes sessions per ten day cycle (SE-1). On August 17, 2016, Mother accepted the proposed middle school placement in Norwell, but rejected the portions of the IEP involving “evaluation results; goal benchmark/objectives [in] read[ing] to be updated; delivery of instruction should specify Orton-Gillingham trained educator to provide instruction” (SE-1). Mother’s partial acceptance was received in Norwell on September 8, 2016.[[5]](#footnote-5)
2. Student’s previous IEP, covering the period from January 17, 2016 to January 16, 2017, offered Student: one, forty-five minute reading session per five day cycle in the general education classroom with a special educator, January 17, 2016 to June 17, 2016; and two forty-five minute direct reading sessions with a special educator for the period from January 17, 2016 to June 17, 2016. For the period from September 7, 2016 through January 16, 2017, Student was offered five, forty-five minute sessions of reading services per ten day cycle (SE-2). (The IEP in the record lacks the placement and program signature pages but all services were to be delivered in Norwell) (SE-2).
3. Student received a 4 (Meeting Expectations) in English Language Arts and a 3 (Approaching Expectations) in Mathematics on the Spring 2015 PARCC, when she was in fourth grade (SE-2).

1. Student’s more recent MCAS scores are as follows:

**English Language Arts**

Spring 2017 MCAS grade 6 scaled score 497 Partially Meeting Expectations

Spring 2018 MCAS grade 7 scaled score 489 Partially Meeting Expectations

**Mathematics**

Spring 2017 MCAS grade 6 scaled score 517 Meeting Expectations

Spring 2018 MCAS grade 7 scaled score 510 Meeting Expectations

**Science and Technology/Engineering**

Spring 2016 MCAS grade 5 scaled score 250 Proficient (PE-1; SE-12).

1. Parents’ concerns involve Student’s below grade-level reading fluency and comprehension skills and fear that Student’s attentional issues may negatively affect her ability to follow instructions and classroom routines. They are also concerned that Student’s reading deficits may impact her expressive language and written skills (SE-1; SE-2; SE-3). Specifically, Parents are concerned about Student’s “reading fluency, comprehension, vocabulary development, and writing” and worry that after Student finally began to receive reading remediation, Norwell wished to “test her in order to take away her services” (SE-14). Parents note that while Student’s accommodations/services are effective, they are insufficient to remediate Student’s disabilities (SE-1; SE-2; SE-3).
2. On January 19, 2017, Janice Mazzola, Assistant Principal, Norwell, wrote to Parents via email noting that the District had previously written to Parents seeking their consent to proceed with Student’s three year re-evaluation and had not yet received a response from Parents. Assistant Principal Mazzola expressed her willingness to meet with Parents to discuss any concerns and noted that if no response was received by January 24, 2017, Norwell would have to file a Request for Hearing with the BSEA to obtain substitute consent from a Hearing Officer (SE-7). Lastly, Assistant Principal Mazzola noted that a Norwell employee had reached out to Parents to schedule Student’s annual IEP review to discuss Student’s progress (SE-7).
3. Email correspondence between Mother and Assistant Principal Mazzola, on or about January 19, 2017, notes Mother’s position that Parents do not consent to an evaluation of Student, further noting Parents’ opinion that “…[Student] is receiving appropriate, in fact excellent support, for the first time from the Norwell Schools with Ms. Kinslow. We do owe Ms. Kinslow some proposed meeting times…” (SE-7). Assistant Principal Mazzola forwarded this response to Mrs. Theodorou seeking input as to next steps (SE-7).

1. Mrs. Theodorou has been Norwell’s Director of Special Education for 8 years (Theodorou). In the past she has been a special education teacher and elementary school assistant principal. She holds Massachusetts licensure in numerous categories including administrator of special education. Mrs. Theodorou has not met Student although she has been actively involved in efforts to secure Parents’ consent for re-evaluation, including emails to both parents and telephone calls with Mother (Theodorou).

1. Mrs. Theodorou wrote to Parents on January 23, 2017, explaining the District’s need to conduct a three year re-evaluation of Student pursuant to 603 CMR 28.04(3) and expressing her preference to resolve the issue with Parents rather than proceed to the BSEA (SE-7). Parents did not respond.

1. Mrs. Theodorou wrote to Parents again on January 27, 2017, informing them that Norwell would have to proceed to the BSEA to seek consent for Student’s three year re-evaluation (SE-27).

1. On January 27, 2017, Mother responded via email to Assistant Principal Mazzola by stating:

Thank you for notice and we look forward to the details of your justification for such an evaluation. I regret that the school system…focuses more efforts on attempting to evade providing the education mandated for a protected population of students than actually delivering the necessary education. We have already spent over $10,000 of our personal funds to remediate Norwell’s failure to meet [Student’s] educational needs. We are prepared to spend more to prevent unfounded attempts to deny services to [Student] and demand copies of all correspondence and documentation supplied to the BSEA (SE-7).

1. Assistant Principal Mazzola answered Parents on January 30, 2017, explaining that Massachusetts required that every student on an IEP has an annual review of his/her IEP and a re-evaluation every three (3) years to discuss the student’s progress and ensure that students are receiving the services and supports they require (SE-7).
2. On March 8, 2017, Hannah R. Kinslow, Special Educator, Norwell, issued a Notice of Proposed School District Action (N1), proposing an IEP for Student and noting that Norwell was proposing to act based on a then-expired IEP for Student and Parents’ refusal of consent for Student’s three year re-evaluation (SE-14). Norwell relied on “curriculum assessments, parent input, progress notes, teacher feedback, and data collection” as the bases for the proposed action. The N1 notes that Norwell had reached out to Parents on numerous occasions attempting to secure their consent for Student’s re-evaluation (SE-14).

1. Student’s Team convened on February 3, 2017, to review Student’s progress (SE-14). The IEP resulting from this meeting, which covers the period from January 17, 2017 to January 16, 2018, contains a single goal, to address Reading. The IEP offers Student daily 45 minute ELA services in the general education setting, delivered by a Special Education Aide, and five, forty-five minute sessions per ten day cycle of direct reading services to be delivered by the special educator (SE-14). The Parent response pages in this IEP are blank (*Id*.).

1. On June 16, 2017, Mrs. Theodorou wrote to Parents relating her understanding that Student would attend a private school the following school year and inquiring as to whether Parents wished to continue with special education services for Student.[[6]](#footnote-6) If so, the District sought a response from Parents and consent to proceed with an evaluation of Student by June 20, 2017, and advised Parents that if the consent was not received, Norwell would proceed to the BSEA. Mrs. Theodorou noted that if no response was received Norwell would assume that no services were desired and Student’s services would be terminated at the conclusion of the then-current school year (SE-7). Parent responded on June 19, 2017 that Student would matriculate at Norwell Middle School on September 6, 2017 (SE-7).
2. On June 20, 2017, Mrs. Theodorou corresponded with Parents via email once again requesting their consent to evaluate Student and hoping that Parents would consider Norwell’s proposal, again noting Norwell’s preference to settle the issue with Parents rather than proceeding to the BSEA (SE-7). In her email, Mrs. Theodorou advised Parents that

…As I mentioned earlier, at the conclusion of our evaluation, should the team find [Student] no longer eligible for special education [Student] would have a ‘stay-put’ right to services while we resolve our dispute. If you return the consent to evaluate prior to July 17th, we could arrange for the evaluation to take place at the Middle School during the summer to minimize the interruptions at school during [Student’s] first month of 7th grade (SE-7).

1. On June 20, 2017, Kacey A. Zych, Team Leader, Norwell Middle School, forwarded to Parents the District’s proposal to conduct a three year re-evaluation of Student involving observations, academic, cognitive, and transitional testing (SE-6). This request sought parental consent by July 17, 2017, and noted Norwell’s agreement to conduct the testing during the summer (SE-6).
2. On or about March 15, 2017, Norwell filed its first Hearing Request with the BSEA seeking substitute consent for an evaluation. The matter was later withdrawn (without prejudice) on July 20, 2017, because Student was transferring to a private school (Theodorou; Administrative Notice of BSEA #1707615). Efforts to obtain parental consent would later be resumed when Student returned to Norwell (Theodorou).
3. On September 19, 2017, Ms. Zych forwarded to Parents Norwell’s proposal to conduct a three year re-evaluation of Student involving observations, academic, cognitive and transitional testing (SE-5).
4. Student attended a private school, for a portion of the 2017-2018 school year, returning to Norwell during the fourth term of 2018 (SE-8; SE-9). Specifically, Student was withdrawn from Norwell in November 2017 and she returned in March 2018 (Theodorou).
5. Student’s academic grades for the second trimester (the Winter Term Program) at the private school reflect an 83 in English, a 91 in History, a 92 in Math and a 95 in science (SE-8). Her final grades in Norwell after the fourth term were: B in English, B in Social Studies, B+ in Math, A in STEM Concepts 7, A in Science, C in Spanish I, A- in Technology Education, A in Food and Nutrition and a “pass” in Art, Library and Physical Education (SE-9).

1. On April 10, 2018, Ms. Zych forwarded to Parents an Evaluation Consent Form seeking to conduct the following educational and academic assessments and evaluations: WISC-V (cognitive), WIAT (academic), Educational Assessment A and B (Observations of [Student’s] strengths and weaknesses), Health Assessment, GORT- Gray Oral Reading Test, Gray Silent Reading Test, Test of Written Language (TOWL) (SE-4).
2. On May 31, 2018, Mrs. Theodorou, Director of Student Services at Norwell, wrote to Parents via email alerting them that Student was still in need of a re-evaluation and noting that a Consent Form had previously been forwarded in April 2018, shortly after Student had returned to Norwell (SE-7). Ms. Theodorou advised Parents that she was hoping to obtain consent from them instead of having to proceed to the BSEA, which Norwell would do if no response was received from Parents by June 8, 2018 (SE-7).

1. On July 24, 2018, Assistant Principal Mazzola wrote to Parents via email regarding the status of Student’s IEP, which had expired on January 16, 2017. Assistant Principal Mazzola noted in her email that Ms. Zych and Mrs. Theodorou had previously reached out to Parents regarding Student’s re-evaluation, but had not received a response from Parents. Assistant Principal Mazzola invited Parents to share with her their thoughts and concerns regarding the re-evaluation process, agreeing to meet with Parents to discuss the same (SE-7).
2. On August 6, 2018, Norwell filed the current Hearing Request with the BSEA.

1. The Hearing Officer initiated a telephone conference call on October 10, 2018, at Mother’s verbal request (per an October 8 and 9, 2018, conversation she had with a BSEA support staff).

1. During the telephone conference call on October 10, 2018, Mother stated that she had first learned of the upcoming Hearing when an unspecified staff person in Norwell told her about it late the previous week. She further noted that she and Father were divorced and that they shared 50/50 custody of Student. She stated that they no longer lived together and explained that she had instructed the mail carrier not to deliver anything to her house in Father’s name, and thus, anything mailed by the BSEA or the District addressed to her in his name or her former married name, had never been received, including notices, orders and/or documents/exhibits.
2. Also, during the October 10, 2018 call, the Hearing Officer asked Mother if it would help with her employer if she were to be issued a subpoena requiring her attendance at the Hearing. (This offer was later renewed at the Hearing on October 16, 2018 when Mother stated that she could only stay for one hour.) Both times, Mother declined the offer.
3. At the commencement of the Hearing on October 16, 2018, Mother objected to proceeding with the Hearing alleging that she had never received any correspondence or exhibits from either Norwell or the BSEA. Thus, proceeding to Hearing was a violation of her procedural due process rights. Norwell’s attorney noted that in addition to mailing the exhibits, she had emailed them to Mother. Initially, Mother denied receiving the email, but after looking more closely at her email boxes she stated that the email had gone to her junk mail inbox, which she had not checked. Copies of the documents were provided to Mother prior to the taking of the testimony and she was assured by the Hearing Officer that she could take time to review them. To avoid further delays, Father offered her his copy of the exhibits book while another copy of the documents was prepared. Mother reviewed the exhibits and, noting that she was familiar with them, did not object to their admission into evidence, but requested that one more document be admitted, Student’s MCAS results. Mother’s request to admit this document was granted (PE-1).

1. At commencement of the Hearing, the participants were instructed to turn all cellular telephones off. Mother muted her telephone ringer and was observed to text during the proceedings.
2. At the Hearing both Mother and Father were offered the opportunity to make opening statements, closing statements and question the witnesses. They were also advised on the record that since they were appearing pro-se, they would be sworn in so that they could provide testimony, after which the school could cross-examine them and the Hearing Officer might also ask questions for clarification purposes. This had previously been explained to Father during the Pre-hearing Conference/Motion Session on October 11, 2018. The Parties offered opening statements and Mother cross-examined Norwell’s first witness[[7]](#footnote-7). She however, left during the direct examination of Norwell’s second witness, disregarding the Hearing Officer’s instructions that she had not been released. As she exited, Parent noted that she “had better things to do”.

1. Olivia Murino, school psychologist, Norwell Middle School, is the individual who would be conducting Student’s proposed evaluations in Norwell (Murino). Ms. Murino has held an M.Ed./Ed.S. in school psychology since 2017 and she is an Ed.D. candidate (class of 2020). She has been a Nationally Certified School Psychologist since June of 2017. She also holds Massachusetts licensure as a school psychologist since August 2017 (SE-13; Murino). She is proficient in the administration and interpretation of standardized assessments/rating scales, which include the WISC-V, Stanford-Binet V, WIAT III, WAIS IV, WNV, ABAS III, ASRS, and the BASC III (SE-13). Ms. Murino is also trained in counseling and in the general practice of school psychology. She testified that she has never met Student and has no preconceived opinions about her needs (Murino).

1. During the 2017-2018 school year Ms. Murino evaluated between 40 and 50 students in Norwell, including administering the WISC-V to approximately 50 students (Murino). She has also conducted over 100 observations of students in various structured and unstructured settings. She testified that the WISC-V could be used to ascertain whether there was a gap between cognitive and verbal comprehension and reading ability, however, she was also generally acquainted with research that disfavored this, and the Grey Oral Reading Test (GORT), test for children with dyslexia (Murino). Ms. Murino has administered the WIAT approximately 10 times, and the TOWL, GORT and GST twice before. Ms. Murino explained that the CELF and the Test of Phonological Process were administered by a speech pathologist, not a school psychologist, noting that the CELF had not been identified as one of the tests to be administered to Student (Murino).

1. Mrs. Theodorou testified that the CELF and CTOPP were administered as part of the 2013 evaluation resulting in only one below average score (memory), with all other scores falling within the above average range. Given the results of the 2013 tests, Norwell did not see a need to re-administer the CELF or the CTOP (Theodorou). However, if Parents wished for those tests to be administered, Norwell would do so (Theodorou).

1. Ms. Murino testified that she was familiar with Student’s previous evaluations and noted that she has seen Student at school. Her evaluation would include formal and informal observations of Student. She was first requested to conduct Student’s evaluation in 2017 but parental consent had not been received. Ms. Murino would administer the tests delineated in SE-4, and would also have discussions with the special education teacher servicing Student and other pertinent staff to gain a comprehensive understanding of Student’s strengths and weaknesses. She testified that she would be able to complete the evaluation within 30 days and was willing to conduct the testing after school hours (Murino, Theodorou). Ms. Murino further noted that the health assessment was a form that Student’s pediatrician would be asked to complete. She opined that the proposed evaluation would be comprehensive and appropriate (Murino). When the evaluation was complete, Student’s Team would convene to discuss the results and Ms. Murino would be in attendance.
2. Mrs. Theodorou testified that the Parents Procedural Guidelines are sent to parents yearly and are also provided at the Team meetings (Theodorou). She further noted that sometimes things (e.g., consent forms, procedural guidelines) may also be sent home in students’ backpacks.

1. Mrs. Theodorou testified that she has not received any requests from Parents for specific instruments to be used as part of Student’s evaluation at any time since efforts to secure Parents’ consent were initiated (Theodorou).

1. Mrs. Theodorou testified that she had never been told that the addresses Norwell had for Parents may not be correct (Theodorou).

1. Father testified that he and Mother shared 50/50 custody of Student.[[8]](#footnote-8) He testified that he opposed the testing for Student, noting that Ms. Kinslow opposed the test being proposed. He was further discouraged by a statement allegedly made to him by Mrs. Theodorou that Norwell would go to hearing over the consent issue and win (Father). To Father, that was not an indication of desiring a cooperative relationship. He acknowledged that Student was doing well with the services being provided at present and he did not want them to stop. He stated that Mother and Mrs. Kinslow had a conversation regarding what tests should be used. Father is looking for assessments that measure Student’s reading, writing and comprehension abilities (Father).

1. Father testified that on October 11, 2018, he had informed Mother, via text, of the determination to continue the Hearing to October 16, 2018. He and Mother had a lengthy (over one and a half hour long) telephone conversation on Saturday October 13, 2018 regarding the upcoming Hearing. He acknowledged receiving Notification of the Hearing from an email and copies of the exhibits. Before providing his updated address he stated that all of his mail was being left for him at the couple’s former address (Mother’s current address), noting that he was receiving everything supposedly going there (Father). In his closing statement, Father noted that he did not know what Mother’s allegations regarding mail not being left for her at her address was all about, because he was still receiving and getting mail at her address (Father).

1. Jean Chiasson is the Norwell mail carrier responsible for delivering mail at Mother’s address (Chiasson).[[9]](#footnote-9) Ms. Chiasson has been the mail carrier covering the route including Mother’s address for the past 17 years. She testified that she was very well acquainted with the house and the larger than typical mail box (Chiasson).

1. Ms. Chiasson testified that every morning she sorts the mail before leaving to deliver it. If and when she notices a name that is not familiar to her on an envelope addressed to one of the houses at her route, she places a yellow sticker on it, asking the customer whether the customer would like the mail forwarded to a different address. The customer is further instructed to place the envelope with instructions back on the mailbox for Ms. Chiasson to retrieve, bring it back to the post office and then one of the clerks sends it back. Otherwise, the mail gets delivered automatically to the address on the envelope (Chiasson).

1. Ms. Chiasson testified that she delivers all of the mail on Tuesdays through Saturdays and has done so for the period from August 6 to October 12, 2018, except for Wednesday October 10, because she had jury duty and had a doctor’s appointment that week so she delivered the mail on Thursday, Friday and Saturday.

1. Ms. Chiasson testified that she has delivered everything addressed to Mother’s address, noting that there is a “sizable mailbox” at that location and that she has been instructed to leave packages at the garage door. She testified that during the time in question she has delivered everything including packages, and that at no point has she placed a yellow sticker on any envelope, nor has Mother given her any instructions not to deliver mail addressed to “Mr. and Mrs.---”. She has left all mail addressed to Mother’s address regardless of size or to whom it was addressed (Chiasson).

**CONCLUSIONS OF LAW**:

The sole issue before me is Norwell’s request for substitute consent to proceed with Student’s three year re-evaluation as Norwell’s efforts to secure consent had been unfruitful.

Norwell is the moving party in this case and carries the burden of persuasion. As such, it must prove its caseby a preponderance of the evidence*.*

I note that in rendering my decision, I rely on the facts recited in the Facts section of this decision and incorporate them by reference to avoid restating them except where necessary.

Upon consideration of the evidence, the applicable legal standards and the arguments offered by the Parties, I find that Norwell has met its evidentiary burden of persuasion and thus is entitled to substitute consent to proceed with its three year re-evaluation. My reasoning follows.

Federal and Massachusetts regulations specifically require that public schools obtain parental consent before proceeding with an initial or a re-evaluation of a special education student. CFR 300.300 et seq.; 603 CMR 28.04(4). Beginning with the initial evaluation, state and federal regulations make it mandatory for the public school to “…make reasonable efforts to obtain the informed consent from the parent…”. 34 CFR 300.300(a)(1)(iii). Similarly, the regulations require informed parental consent before proceeding with any re-evaluation of an eligible student.[[10]](#footnote-10) 34 CFR 300.300(c)(1). If, however, the parent refuses to provide his/her consent for re-evaluation, consistent with 34 CFR 300.300(a)(2), the public school may pursue the “consent override procedures described in paragraph (a)(3)” of said federal regulation, providing that

(3)(i) If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation under paragraph (a)(1) of this section, or the parent fails to respond to a request to provide consent, the public agency may,…utilize[e] the procedural safeguards in subpart E of this part (including mediation procedures under §300.506 or the due process procedures under §§300.507 through 300.516) …except to the extent inconsistent with State law relating to such parental consent. 34 CFR 300.300(a)(3)(i).

In Massachusetts, consistent with federal law, the Special Education Regulations require school districts to reevaluate students every three years, or sooner when necessary, after obtaining parental consent.[[11]](#footnote-11) 603 CMR 28.04(4). The aforementioned Massachusetts regulations rely on federal law and regulations regarding the utilization of procedural safeguards regarding dispute resolution when parents fail to provide consent. Since the BSEA is the agency responsible for resolving special education disputes in Massachusetts, public schools must proceed to the BSEA if and when they seek substitute consent for an eligible student’s reevaluation.

Moreover, as noted in *In re: Lowell Public Schools*, BSEA # 11-0039 (9/10/2010, Crane)

Courts have made clear that, as a general rule, a parent may not preclude a school district from evaluating their son or daughter, nor may a parent force a school district to rely upon a parent’s own evaluation. Rather, if a parent desires special education services, he or she may be required to allow the school district to conduct its own assessments for the purpose of the school district’s determining the extent of the student’s special education needs and how those needs should be addressed.[[12]](#footnote-12)

Pursuant to the IDEA, parental participation is paramount with respect to determinations involving the special education of eligible students. In order to be successful in any claim regarding substitute consent for re-evaluation, the school district must show that it has informed parent as to which evaluations and instruments it seeks to employ *and* must also show that it has made reasonable efforts to obtain said informed consent from the parent prior to proceeding to the BSEA.

With this guidance I turn to the case at bar.

Norwell persuasively argues that since 2016 it has engaged in numerous attempts to obtain Parents’ consent to proceed with Student’s three year re-evaluation which is now well overdue. In 2017, Norwell filed a Hearing Request, but withdrew the request in the hopes that the matter would resolve informally. Parents however, never provided their consent and instead removed Student to a private school from November 2017 to March 2018. Upon Student’s return to the District and following numerous additional unsuccessful attempts to secure parental consent, Norwell filed the instant Hearing Request in August 2018.

Norwell has identified Olivia Murino as the evaluator to conduct Student’s evaluation and argues that without updated evaluations it is ill equipped to modify Student’s IEP to meet Student’s needs. Norwell is also willing to conduct any additional testing Parents desire.

Parents object to Norwell’s evaluation on the basis that they had attempted to work with Norwell to have the testing conducted outside the school day and alleging that Norwell had not been willing to engage with Parents. I note that the record shows Norwell’s willingness to conduct the evaluation during the summer of 2017. Also, Ms. Murino’s testified that she would be available to conduct the evaluation after school hours (SE-7). Parents are further concerned that cognitive testing is disfavored for students with dyslexia as those types of assessments typically produce inaccurate higher functioning results. Parents however, have not requested that Norwell conduct any evaluations other than the ones proposed (to which they object). Lastly, with minor exceptions, Parents generally distrust Norwell’s personnel.

In the instant case there is no dispute that Student’s three-year re-evaluation is overdue. The evidence is further convincing that over the past two years, Norwell has repeatedly attempted to obtain Parents’ consent and also attempted to engage Parents in discussions regarding their concerns, all to no avail (See Facts # 11, 12, 14, 15, 16, 17, 18, 20, 21, 22, 27, 28, 29; SE-7; SE-4). It appears that Parents are concerned that if the evaluation shows that Student no longer requires special education services, Norwell will move to terminate her eligibility and Parents feel strongly that Student continues to require assistance. Updated evaluations are however, not only required by federal and state law and regulations, but they are also necessary in order to ascertain what Student’s current strengths and weaknesses are, whether she may require services different from or in addition to the ones she currently receives, or none at all. Thus, Norwell must proceed with the evaluations delineated in SE-4 notwithstanding Parents lack of consent, after which Parents may dispute some, all or none of the results.[[13]](#footnote-13)

The evidence further supports a finding that Ms. Murino possesses the requisite licensure and knowledge to perform the evaluations that she is called to conduct on behalf of Norwell despite somewhat limited experience in administering some of the instruments (Murino).

Based on Mother’s cross examination of one of Norwell’s witnesses, it would appear that she is concerned that all of Student’s strengths and weaknesses may not be captured by the evaluations proposed by Norwell. If that is the case, Parent may request that Norwell conduct additional speech and language evaluations.

Should Parents withdraw Student from Norwell prior to completion of the re-evaluation, Norwell shall be relieved of its responsibility to re-evaluate Student unless: a) Parents seek continued provision of special education services by Norwell, or b) Student returns to the district at any time in the future, at which time Norwell shall conduct/complete its evaluation.

Lastly, I address Mother’s conduct during the Hearing and her assertions that she did not receive any mail from either the BSEA or Norwell.

Taken together, Mother’s efforts to delay the Hearing, her disregard of the Hearing Officer’s instructions, and her early departure from the Hearing can only be construed as a blatant disregard for the process. Similarly, the record leads to the inescapable conclusion that she has engaged in dilatory tactics and has effectively obstructed the timely completion of the legally mandated evaluation process for 2 years. Without necessary updated information on Student’s progress and needs, such deliberate tactics may seriously be impacting Student’s ability to receive appropriate services. As such, substitute consent is warranted.

Finally, Mother’s denial of receipt of correspondence from the BSEA and Norwell clearly fails, in light of the contradictory statements made by Father and the particularly credible, persuasive, contradictory testimony offered by Mrs. Chiasson, the mail carrier to Parents’ address for 17 years, who has no knowledge of, or interest in, the outcome of this matter.

**ORDER:**

1. Norwell shall conduct Student’s re-evaluation consistent with SE-4 forthwith notwithstanding the lack of consent from Parents.

2. By the close of business on November 19, 2018, Parents shall inform Norwell of any additional speech and language evaluation they desire Norwell to conduct as part of Student’s re-evaluation. Should Parents withdraw Student from Norwell prior to completion of the re-evaluation, Norwell shall be relieved of its responsibility to re-evaluate Student unless: a) Parents seek continued provision of special education services by Norwell, or b) Student returns to the district at any time in the future at which time Norwell shall conduct/complete its evaluation.

By the Hearing Officer,

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Rosa I. Figueroa

Dated: November 9, 2018

**November 9, 2018**

# COMMONWEALTH OF MASSACHUSETTS

# DIVISION OF ADMINISTRATIVE LAW APPEALS

# BUREAU OF SPECIAL EDUCATION APPEALS

**NORWELL PUBLIC SCHOOLS**

**BSEA # 1901470**

### BEFORE

**ROSA I. FIGUEROA**

**HEARING OFFICER**

**PARENTS PRO-SE**

**MARY ELLEN SOWYRDA, ESQ., ATTORNEY FOR**

**NORWELL PUBLIC SCHOOLS**

1. Ms. Chiasson testified via speaker phone. [↑](#footnote-ref-1)
2. Mother’s Request stated:

I, the undersigned and legal guardian of [Student], hereby file an objection to the scheduling at 1:41 p.m. on October 10, 2018 of a pre-trial hearing in the above –referenced matter for 2:00 pm on October 11, 2018 in Norwell Ma, at which time the Hearing Officer has represented that such Officer shall decide whether a subsequent hearing in the above-referenced matter will immediately commence, on the basis that the Norwell Public Schools has failed to deliver appropriate notice so that I may prepare and represent the interests of minor [Student] in such matters. The failure to provide adequate notice is part of a continued pattern and practice of the Norwell Public Schools to infringe upon the rights of [Student], including her right to a full and fair hearing and complete due process. [↑](#footnote-ref-2)
3. The October 10, 2018 Order scheduling the Pre-hearing, Motion Session and time change of the proceedings specifically stated that,

The Hearing Officer further informed Parent that she could raise any questions regarding process at that time. Moreover, given Parent’s assertion that she could not attend the Hearing in the morning as she was committed to a meeting through 1:00 pm in Western Massachusetts, the Hearing Officer changed the start time of the Pre-Hearing and Motion Session to 2:00 pm in Norwell, Massachusetts…Parent was also advised that as part of a Pre-hearing conference possible options for resolution of this matter would be discussed…Parent noted disagreement with the individual who had conducted Student’s evaluations and with Norwell’s personnel in general. The Hearing Officer recommended that Parent provide her and the school with the names of the individuals to whom Parent objected, noting that school districts typically had numerous individuals qualified to administer evaluations and that could be discussed during the Pre-hearing conference. Parent responded that she was seeking an independent evaluation, which the Hearing Officer explained she could request if she disagreed with the results of the school district’s evaluation. Norwell’s attorney noted that the district had been attempting to obtain Parent’s consent for over two years given that its last evaluation had taken place in 2013…Parent is strongly encouraged to attend so that her position may be heard prior to the Hearing Officer entering a determination on whether the Hearing will proceed on October 11 consistent with the Order issued on August 23rd.

During the telephone conference call, the Hearing Officer expressed her willingness to listen to the Parties and facilitate communication between them in the hopes that the Parties may find common ground and Norwell’s Attorney noted the District’s willingness to work collaboratively to resolve matters. I further note that for purposes of the October 10, 2018 Order, “Parent” refers to Student’s mother. [↑](#footnote-ref-3)
4. All of the correspondence from the BSEA to Mother has been mailed to the correct address. Until October 9, 2018, the envelopes had been addressed to “Mr. and Mrs.” using Father’s last name. Father no longer lives at that location. [↑](#footnote-ref-4)
5. The record contains an earlier IEP covering the period from January 17, 2015 through January 16, 2016, which offered Student one half hour of language arts services per five day cycle in the general education classroom and five, thirty-minute direct language arts sessions by the special educator (SE-3). Student’s spring of 2014 MCAS scores resulted in a Needs Improvement score in English Language Arts (232) and in Math (234) (SE-3). (SE-3 lacks the placement and program signature pages) (SE-3). [↑](#footnote-ref-5)
6. The record is unclear as to how she learned this information. [↑](#footnote-ref-6)
7. Mother was observed to read her questions from a document she had previously prepared. [↑](#footnote-ref-7)
8. According to Father, he and Mother are in the process of finalizing their divorce. [↑](#footnote-ref-8)
9. In light of Mother’s insistence at the beginning of the Hearing and during the telephone conference call, that she had not received any mail from the BSEA or Norwell regarding the Hearing because she had instructed the mail carrier not to leave items in Father’s name at her house, and/or because the documents were sent from the BSEA in “Mr. and Mrs. ---” name and therefore had not been delivered, this Hearing Officer became concerned that Mother may not have received the mail which could have serious procedural ramifications. As mentioned earlier to Mother and Father, the BSEA could hear testimony from her mail carrier to support Mother’s contention. The Hearing Officer made a determination that the testimony of this individual was necessary and instructed Norwell to facilitate said testimony before closing of the record. The mail carrier was available to testify on October 16, 2018 and her testimony was thus obtained. [↑](#footnote-ref-9)
10. *Parental consent for reevaluations*. (1) Subject to paragraph (c)(2) of this section, each public agency--

(i) Must obtain informed parental consent, in accordance with §300.300(a)(1), prior to conducting any reevaluation of a child with a disability.

(ii) If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures described in paragraph (a)(3) of this section [referring to the due process procedures]. 34 CFR 300.300(c). [↑](#footnote-ref-10)
11. “(3) **Annual reviews and three-year reevaluations**. The school district shall review the IEPs and the progress of each eligible student at least annually. Additionally, every three years, or sooner if necessary, the school district shall, with parental consent, conduct a full three-year reevaluation consistent with the requirements of federal law.” 603 CMR 28.04(4). [↑](#footnote-ref-11)
12. E.g., *M.T.V. v. Dekalb County School District*, 446 F.3d 1153, 1160 (11th Cir. 2006) (parents cannot force the school to rely solely on parents’ independent evaluation); *Johnson by Johnson v. Duneland Sch. Corp*., 92 F.3d 554, 558 (7th Cir. 1996) (school district has the right to conduct its own evaluation); *Andress v. Cleveland Indep. Sch. Dist*., 64 F.3d 176, 178-79 (5th Cir. 1995) (school district has the right to reevaluate a student using its own personnel); *Dubois v. Connecticut State Board of Education*, 727 F. 2d 44, 48 (2nd Cir. 1984) (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. 1982) (school is entitled to have student examined by qualified psychiatrist of their choosing); *M.L. ex rel. A.L. v. El Paso Independent School Dist*., 2009 WL 1019969
(W.D.Tex. 2009 (parent “may not … assert that A.L. is entitled to special education services while simultaneously refusing to allow [the school district] to evaluate A.L. to determine what those services may be”). [↑](#footnote-ref-12)
13. I note that Student would be entitled to continue to receive her special education services under Stay-Put during the pendency of any dispute between the Parties. [↑](#footnote-ref-13)