**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

In re: Ryder[[1]](#footnote-1) BSEA **#**2100796

**RULING ON WORCESTER PUBLIC SCHOOLS’ MOTION FOR SUMMARY JUDGMENT**

This matter comes before the Hearing Officer on the *Motion for Summary Judgment* [hereinafter “*Motion”*] filed by Worcester Public Schools (Worcester or “the District”)

on January 15, 2021. Parents filed an *Opposition* to Worcester’s *Motion* on January 19, 2021. As the matter is scheduled for Hearing beginning January 25, 2021, neither party has requested a hearing on the *Motion*, and neither testimony nor oral argument would advance the Hearing Officer’s understanding of the issues involved, this Ruling is being issued without a hearing pursuant to *Bureau of Special Education Appeals Hearing Rule* VII(D).

For the reasons set forth below, the District’s *Motion* is hereby DENIED.

1. FACTUAL BACKGROUND AND PROCEDURAL HISTORY[[2]](#footnote-2)

On August 21, 2020, Parents filed a *Hearing Request* against Worcester asserting that the District has failed to offer Ryder a free, appropriate public education (FAPE) since August 2018 and, as such, they are entitled to compensatory services and/or reimbursement of tuition and mileage expenses for that failure. Parents also contend that Bancroft, a private, special education day school for students who struggle with language-based and other complex social emotional needs, is appropriate for Ryder, and that Worcester should be ordered to fund his placement there for the 2020-2021 school year. The Hearing was scheduled for September 25, 2020.

After requesting, and being granted, two assented-to extensions, on September 14, 2020, the District filed its *Response*, arguing that Ryder has never been enrolled in Worcester Public Schools and Parents have not allowed him to participate in any of the special education services or supports proposed by the District; that the Individualized Education Programs (IEPs) and full inclusion placements proposed by Worcester for Ryder during the relevant time period have been reasonably calculated to provide him with a FAPE; and that Ryder does not require an out-of-district day placement at the Bancroft School. As such, Worcester asserts, Parents are not entitled to the relief they seek.

In the meantime, on September 9, 2020, Worcester filed a *Motion to Continue* the Hearing, to which Parents assented, and the matter was scheduled for Hearing on December 15, 16, and 17, 2020. The parties jointly proposed a *Protective Order*, which I signed and issued on October 15, 2020. On November 12, 2020, the District filed a *Motion to Permit Observation*, requesting that the BSEA issue an Order allowing the District to observe Ryder at the Bancroft School on the grounds that such observation is necessary for the full presentation of its case at hearing. On the same date, Parents filed an *Opposition*, asserting that Worcester had improperly served them, as neither they nor their attorney has any authority or responsibility regarding Bancroft’s decision whether to allow observation of its program and, as such, the BSEA should deny the District’s *Motion*. We discussed this issue during the Pre-Hearing Conference on November 12, 2020, at which time I requested further briefing on the issue from Worcester. Receiving none, on December 3, 2020, I issued an Order denying Worcester’s *Motion to Permit Observation*. In the meantime, on November 23, 2020, the parties jointly requested that the Hearing be postponed an additional six weeks to permit them to continue working together toward resolution. I allowed this request, and the Hearing was scheduled for January 25, 26, and 27, 2021.

1. DISCUSSION

In its *Motion for Summary Judgment*, Worcester argues that Parents’ claims regarding the 2018-2019 school year should be dismissed because on June 26, 2018, Parents accepted fully the IEP dated June 14, 2018 to June 13, 2019 (2018-2019 IEP) and consented to the corresponding placement, and they did not reject this IEP before it expired. Moreover, Parents placed Ryder at Bancroft unilaterally in September 2018, but at no time prior to or during the 2018-2019 school year did they provide Worcester with notice of their intent to place Ryder unilaterally or of their placement of him at Bancroft. Because Parents fully accepted Ryder’s 2018-2019 IEP and did not reject the IEP or revoke consent at any time during its term, and because Parents did not provide the District notice of Ryder’s unilateral placement at any time during the 2018-2019 school year, Worcester asserts, they are precluded from bringing claims or seeking compensatory services or reimbursement for this time period.

In support of its *Motion*, Worcester submitted the attendance sheet from the June 14, 2018 Team meeting; the accepted 2018-2019 IEP; the N-1 associated with that IEP; an affidavit signed by Worcester Manager for Special Education and Intervention Services Kay Seale; the attendance sheet from the Team meeting that took place on June 5, 2019, indicating that Bancroft had been contacted but had not sent any staff, and the associated meeting invitation; and an N-1 issued on September 30, 2019 showing that Parents had rejected an IEP on July 1, 2019, that Parents had provided Notice of unilateral placement for the 2019-2020 school year on September 13, 2019, and that the District was proposing an IEP. According to Ms. Seale’s affidavit, the District provided all parents of students with special needs, including Ryder’s parents, a copy of the Parent’s Notice of Procedural Safeguards (“PNPS”) prior to the start of the 2018-2019 school year and Ryder’s Parents had also received the PNPS with the District’s April 2018 Consent to Conduct Initial Eligibility Evaluation.

Among other things, Ms. Seale also attested that the 2018-2019 IEP proposed itinerant Reading services to be delivered at Tatnuck Magnet School, that Parents fully accepted this IEP on June 26, 2018, that Ryder never accessed the accepted services, and that the District did not receive notice of Ryder’s unilateral placement at Bancroft in accordance with 20 U.S.C. § 1412(a)(10)(C)(iii).

In their *Opposition* to Worcester’s *Motion*, Parents contend that Worcester failed on multiple occasions to provide Parents appropriate notice of their rights and responsibilities, including but not limited to the PNPS. Due in part to these failures, under the particular circumstances of this case, Parents argue, issues of material fact are in dispute regarding whether they in fact rejected the 2018-2019 IEP and provided appropriate notice of unilateral placement.[[3]](#footnote-3) Moreover, to the extent Worcester bases its argument regarding reimbursement for unilateral placement on Parents’ failure to provide the requisite ten days’ notice, whether reimbursement is reduced or denied is within the discretion of the Hearing Officer.

In support of their *Opposition*, Parents submitted an affidavit in which they attest that they do not recall being provided a PNPS, nor do they have a copy in their records, in connection with any Team meetings, eligibility evaluations, or proposed IEPs during the relevant time period. Parents also attested, among other things, that in October 2018 they had informed Worcester personnel of their unilateral placement of Ryder and their decision not to access the offered Reading services but were not informed at this time that they needed to reject the proposed placement and services in writing. In addition to their affidavit, Parents submitted their First Request for Production of Documents and paperwork they had received in connection with Team meetings, eligibility determinations, evaluations, and proposed IEPs. None of this documentation includes a PNPS. Moreover, although each Initial Evaluation Consent Form, IEP, and/or IEP Amendment Notice includes an option to indicate whether Worcester included the “Parents’ Rights Brochure,” this option is not checked on any of the documents that were provided to Worcester by Parents and submitted by Parents in support of their *Opposition*.

1. Legal Standard for a Motion for Summary Judgment

Pursuant to 801 CMR 1.01(7)(h), Summary Decision may be granted when there is “no genuine issue of fact relating to all or part of a claim or defense and [the moving party] is entitled to prevail as a matter of law.” This rule of administrative practice is modeled after Rule 56 – Summary Judgment – of both the Massachusetts and Federal Rules of Civil Procedure.[[4]](#footnote-4) The party seeking summary judgment begins by demonstrating, with the support of its documents (pleadings, affidavits, and other evidence), that there is no genuine issue of fact relating to the claim or defense. The moving party bears the burden of proof, and all evidence and inferences must be viewed in the light most favorable to the party opposing summary judgment.[[5]](#footnote-5)

 In response to a motion for summary judgment, the opposing party “must set forth specific facts showing that there is a genuine issue for trial.”[[6]](#footnote-6) An issue is genuine if it “may reasonably be resolved in favor of either party.”[[7]](#footnote-7) To survive this motion and proceed to hearing, the adverse party must show that there is “sufficient evidence” in her favor that the fact finder could decide for her.[[8]](#footnote-8) In other words, the evidence presented by the nonmoving party “must have substance in the sense that it [demonstrates] differing versions of the truth which a factfinder must resolve at an ensuing trial.”[[9]](#footnote-9) The non-moving party’s evidence will not suffice if it comprised merely of, “conclusory allegations, improbable inferences, and unsupported speculation.”[[10]](#footnote-10)

 As such, to analyze whether the party moving for summary judgment has met its initial burden such that the burden shifts to the opposing party, I must view all of the evidence it has submitted in the light most favorable to the opposing party and determine that there is no genuine issue of material fact related to the moving party’s claims. Only if the moving party is successful in this first step does the burden then shift to the opposing party.

 To determine whether there exists a genuine issue of material fact relating to Parents’ claims regarding the 2018-2019 school year, I must consider the substantive law governing reimbursement for unilateral placements, expired IEPs, and procedural protections.

1. Relevant Substantive Standards

*i. Reimbursement for Unilateral Placements*

Under the Individuals with Disabilities Education Act (IDEA), parents may be entitled to reimbursement for unilaterally placing a student in private school without the school district’s consent or referral.[[11]](#footnote-11) The relevant section of the IDEA contains a notice requirement, under which parents seeking such reimbursement must either inform the school district of their intent to reject a proposed placement and enroll the student in private school at public expense at the most recent IEP meeting they attend prior to removal of the child from the public schools, or provide written notice at least ten days prior to the removal.[[12]](#footnote-12)

Section 1412 of the IDEA provides that a Hearing Officer may order reimbursement for the cost of that placement if the Hearing Officer finds that a District had not made a FAPE available to the child in a timely manner prior to the parent’s unilateral placement.[[13]](#footnote-13) Hearing Officers and courts have interpreted section 1412 to allow reimbursement for a unilateral placement when 1) the school district had not made a free appropriate public education available to the student prior to that enrollment, and 2) the private school placement was appropriate.[[14]](#footnote-14) The Parents bear the burden of proving that the school district’s proposed IEP did not provide a FAPE.[[15]](#footnote-15) Even where Parents succeed in meeting their burden on these elements, the IDEA permits hearing officers to deny or limit reimbursement on the basis that parents failed to provide sufficient notice, as described above, of their intent to place their child unilaterally.[[16]](#footnote-16) Exceptions to the notice requirement prevent the reduction or denial of reimbursement under certain circumstances, including failure by a school district to provide notice to parents, pursuant to the IDEA’s procedural safeguards,[[17]](#footnote-17) of the notice requirement itself.[[18]](#footnote-18) Otherwise, reduction or denial or reimbursement lies within the discretion of the hearing officer.[[19]](#footnote-19)

*ii. Expired IEPs*

Where an IEP has been accepted fully and expires without being rejected, Parents generally may not allege after the fact that the IEP was not reasonably calculated to provide their child with a FAPE and seek compensatory relief for the period of that IEP.[[20]](#footnote-20) In these circumstances, the analysis shifts to implementation.[[21]](#footnote-21) This analysis may, however, be affected by procedural defects in the process that prevent parents from participating meaningfully in the development of the IEP.[[22]](#footnote-22)

*iii. Procedural Protections*

The IDEA’s procedural protections for children with disabilities serve a dual purpose; they ensure that each eligible child receives a FAPE, and they provide for meaningful parental participation.[[23]](#footnote-23) They are so important that the IDEA recognizes that even if no substantive irregularities have occurred, procedural errors may amount to a deprivation of a FAPE if “the procedural inadequacies – (I) impeded the child’s right to a free appropriate public education; (II) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents’ child; or (III) caused a deprivation of educational benefits.”[[24]](#footnote-24) In *Endrew F. v. Douglas County School District RE-1*, the United States Supreme Court reaffirmed its earlier declaration that collaboration between parents and educators is a key component of the IDEA.[[25]](#footnote-25) In determining whether procedural violations amount to a deprivation of FAPE, courts focus on the degree to which school districts offered parents the opportunity to play an important participatory role in the process.[[26]](#footnote-26)

1. Application of Legal Standards

In the instant matter, the District contends that because Parents accepted the 2018-2019 IEP and did not reject it during its term, they can raise only implementation claims related to this IEP. As such, Worcester is entitled to summary judgment as to Parents’ claims regarding the adequacy of the IEP, a required element for Parents to prevail on their request for reimbursement for unilateral placement of Ryder during the 2018-2019 school year. Moreover, according to Worcester, Parents’ failure to provide the requisite notice before enrolling Ryder at Bancroft for the 2018-2019 school year defeats their request for reimbursement. The evidence provided by the District in support of its assertions establishes, even in the light most favorable to Parents,[[27]](#footnote-27) both that Parents accepted the 2018-2019 IEP and did not reject it in writing before it expired, and that Parents did not inform the District of their intent to reject a proposed placement and enroll Ryder at Bancroft ten days prior to his enrollment or at the last Team meeting they attended before he began there.

Analytically, because Worcester has met its initial burden, the burden now shifts to Parents to set forth specific facts showing that there exists a genuine issue for hearing, which precludes entry of summary judgment against them.[[28]](#footnote-28) Through their affidavit and submission of documents produced by Worcester omitting any reference to the provision of a PNPS to Parents by the District, Parents have created a genuine issue of material fact. Whether Worcester committed a procedural error in failing to provide Parents with the PNPS is a genuine issue because it “may reasonably be resolved in favor of either party.”[[29]](#footnote-29) It is material because should I determine, in these circumstances, that Worcester’s procedural error constituted a violation that amounted to a deprivation of a FAPE, Parents may be able to demonstrate that their failure to reject the accepted 2018-2019 IEP in writing and/or provide the requisite ten days’ written notice of their intent to seek reimbursement for unilateral placement of Ryder does not defeat their claim.

CONCLUSION

 Upon consideration of the District’s *Motion for Summary Judgment*, memorandum of law, and supporting documents, and Parents’ *Opposition* thereto, memorandum of law, and supporting documents, I find that Worcester has not met its burden to establish that there is no genuine issue of material fact relating to Parents’ claims regarding the 2018-2019 school year. As such, the District is not entitled to judgment as a matter of law on these claims.

**ORDER**

The matter will proceed to Hearing, as scheduled, on January 25, 26, and 27, 2021 on Parents’ claims regarding the District’s failure to offer Ryder a FAPE since August 2018, including their requests for compensatory services, reimbursement, and/or public funding for his placement at Bancroft through the expiration of the most recently proposed IEP.

By the Hearing Officer:

 /s/ Amy Reichbach

Date: January 21, 2021

1. “Ryder” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public. [↑](#footnote-ref-1)
2. The information in this section is drawn from the parties’ pleadings and is subject to revision in further proceedings. [↑](#footnote-ref-2)
3. Parents argue that in these circumstances, their placement of Ryder at Bancroft and Worcester’s awareness of this placement constitutes a *de facto* rejection of the 2018-2019 IEP. [↑](#footnote-ref-3)
4. Federal Rule of Civil Procedure 56 authorizes the entry of summary judgment whenever it appears “from the pleadings, depositions, answers to interrogatories, and responses to requests for admission on file, together with the affidavits, if any… that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” [↑](#footnote-ref-4)
5. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252 (1986). [↑](#footnote-ref-5)
6. *Id.* at 250. [↑](#footnote-ref-6)
7. *Maldanado-Denis v. Castillo-Rodriguez,* 23 F.3d 576, 581 (1st Cir. 1994). [↑](#footnote-ref-7)
8. *Id*. at 249. [↑](#footnote-ref-8)
9. *Mack v. Great Atl. & Pac. Tea Co.,* 871 F.2d 179, 181 (1st Cir. 1989). [↑](#footnote-ref-9)
10. *Medina-Munoz v. R.J. Reynolds Tobacco Co.,* 896 F.2d 5, 8 (1st Cir. 1990). [↑](#footnote-ref-10)
11. 20 U.S.C. § 1412(a)(10)(C)(ii). [↑](#footnote-ref-11)
12. See *id*. at § 1412(a)(10)(C)(iii). [↑](#footnote-ref-12)
13. See *id.* at§ 1412(a)(10)(C)(ii). [↑](#footnote-ref-13)
14. See 20 U.S.C. 1412(a)(10)(C)(ii); *Sch. Comm. of Burlington v. Dept. of Educ.,* 471 U.S. 359, 369 (1985); *Schoenfeld v. Parkway Sch. Dist.,* 138 F.3d 379, 382 (8th Cir. 1998) (“Reimbursement for private education costs is appropriate only when public school placement under an individual education plan (IEP) violates IDEA because a child's needs are not met”); *In re: Medfield Public Schools*, 13 MSER 365, 371 (Crane 2007). [↑](#footnote-ref-14)
15. See *Schaeffer v. Weast,* 546 U.S. 49, 62 (2005) (holding that the burden of proof in an administrative hearing challenging an IEP falls on the party seeking relief). [↑](#footnote-ref-15)
16. See 20 U.S.C. § 1412(a)(10)(C)(iii), (iv)(II). [↑](#footnote-ref-16)
17. See 20 U.S.C. § 1415. [↑](#footnote-ref-17)
18. See 20 U.S.C. § 1412(a)(10)(C)(iv)(I)(bb). [↑](#footnote-ref-18)
19. See 20 U.S.C. § 1412(a)(10)(C)(iii). [↑](#footnote-ref-19)
20. See *Colón-Vazquez v. Dep’t of Educ*., 46 F. Supp. 3d 132, 144 (D. P.R. 2014) (citing 20 U.S.C. § 1401(9)(D)); *Indep. Sch. Dist. No. 433 v. J.H. ex rel. B.H*., 8 F. Supp. 2d 1166, 1175-76 (D. Minn. 1998); *In Re. Quincy Public Schools*, BSEA #2002950 (Reichbach 2020). [↑](#footnote-ref-20)
21. See *Colón-Vazquez*, 46 F. Supp. 3d at 144; *B.H*., 8 F. Supp. 3d at 1175-76; *Quincy Public Schools, supra*. [↑](#footnote-ref-21)
22. See *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994-95 (1st Cir. 1990). Worcester recognized as much in its *Motion for Summary Judgment*, asserting, “Where a parent had the opportunity to participate in the IEP development and received options for rejecting an IEP and requesting a due process hearing, the parent cannot reach back and seek compensatory services on the basis that the IEP was inappropriate.” [↑](#footnote-ref-22)
23. See *Honig v. Doe*, 484 U.S. 305, 311 (1998) (“Congress repeatedly emphasized throughout the [IDEA] the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness). [↑](#footnote-ref-23)
24. 20 U.S.C. §1415(f)(3)(E)(ii); 34 CFR 300.513(a)(2); see *Roland M.*, 910 F.2d at 994. [↑](#footnote-ref-24)
25. 137 S. Ct. 988, 994 (2017) (“These procedures [set forth in 20 U.S.C. § 1414] emphasize collaboration among parents and educators”); see *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982) (“Congress placed every bit as much emphasis on compliance with procedures giving parents and guardians a large measure of participation in every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard”); see also *C.G. v. Five Town Cmty. Sch. Dist.*, 513 F. 3d 279, 285 (1st Cir. 2008) (“development of an IEP is meant to be a collaborative project”). [↑](#footnote-ref-25)
26. See, e.g., *Roland M*., 910 F.2d at 995 (where parents did not cooperate with attempts to create IEP and there was no “indication of procedural bad faith” on school’s part, school district had “fulfilled the essence of its procedural responsibility”); *A.M. v. Monrovia Unified Sch. Dist*., 627 F.3d 773, 780 (9th Cir 2010) (no procedural violation of parental right to participate meaningfully where parents did not participate in Team meeting but district had taken steps to obtain their presence); *Ms. S.* *ex rel. G v. Vashon Island Sch. Dist.,* 337 F.3d 1115, 1132-33 (9th Cir. 2003) (superseded by statute on other grounds) (where parent disagreed with receiving district’s temporary placement of her son, upon transfer, pending completion of a “proper evaluation” and alleged that District’s “take it or leave it” position did not allow for meaningful parental participation, court found that where school district attempted to schedule several assessments and other IEP meetings, notifying her in advance, “school district ha[d] repeatedly provided the parent with the opportunity to participate meaningfully in the IEP process” and as such, “ha[d] not violated its obligations under 34 CFR §300.345”). [↑](#footnote-ref-26)
27. See *Anderson*, 477 U.S. at 252. [↑](#footnote-ref-27)
28. See *id*. at 250. [↑](#footnote-ref-28)
29. *Maldanado-Denis v. Castillo-Rodriguez,* 23 F.3d 576, 581 (1st Cir. 1994). [↑](#footnote-ref-29)