

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

In re: Jaclyn¹

BSEA #1803315

**RULING ON MANSFIELD PUBLIC SCHOOLS' MOTION TO DISMISS OR, IN THE
ALTERNATIVE, STATEMENT OF COUNTERCLAIMS**

This matter comes before the Hearing Officer on the Motion of the Mansfield Public Schools (Mansfield or “the District”) to Dismiss the *Hearing Request* filed by Parents on behalf of Jaclyn against Mansfield or, in the Alternative, Statement of Counterclaims [hereinafter “*Motion*”]. The District filed its *Motion* on November 29, 2018, accompanied by a memorandum of law in support thereof. Parents filed their Opposition on December 6, 2018. Although the undersigned Hearing Officer attempted to set up a Conference Call to discuss the *Motion*, Parents failed to make themselves available and/or return telephone calls to the BSEA, despite repeated attempts to reach them. As neither party requested a hearing on the *Motion*, and as testimony or oral argument would not advance the Hearing Officer’s understanding of the issues involved, this Ruling is being issued without a hearing pursuant to Bureau of Special Education Appeals *Hearing Rule VII(D)*. For the reasons set forth below, Mansfield’s *Motion to Dismiss* is hereby DENIED.

I. **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**²

On October 5, 2017, Parents³ filed a *Hearing Request* against Mansfield Public Schools seeking reimbursement for the cost of Jaclyn’s unilateral placement for the 2016-2017 school year including tuition, transportation and costs, and an order of placement at the Hamilton program at the Wheeler School for the 2017-2018 school year, with transportation, and reimbursement for any tuition, transportation, and costs advanced by them. Parents argued that the District has incorrectly refused to find Jaclyn eligible for special education services and correspondingly failed to provide her with any form of special education services, despite her diagnoses and her continuing struggle to compensate for her disability-based weaknesses. Specifically, they asserted, Jaclyn has been diagnosed with a Specific Learning Disorder in Reading, a Disorder of Written Expression, Attention Deficit Hyperactivity Disorder (ADHD), and Anxiety Disorder. According to Parents, the District considered its own eligibility testing

¹“Jaclyn” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

²For purposes of this *Motion*, the facts are summarized from Parents’ *Hearing Request*, except where noted.

³At the time they filed their *Hearing Request*, Parents were represented by an attorney. On or about September 17, 2018, their attorney withdrew from the case and Parents now proceed *pro se*.

and/or independent evaluations several times during 2015 and 2016, but as of June 2015, and again in March 2016, the Team determined that Jaclyn was making effective progress and therefore did not qualify for special education services. On August 20, 2016, Parents notified the District that they were unilaterally placing Jaclyn in the Hamilton Program at the Wheeler School in Providence, Rhode Island. Following an additional academic assessment by Parents' expert in August 2016, Jaclyn's Team met again in October 2016, and once again found her ineligible for special education, though it recommended that the District consider her eligibility for a 504 Plan.

On November 1, 2017, the District, having been granted an extension, filed its *Response to Parents' Hearing Request*, asserting that it had appropriately found that Jaclyn was making effective progress on curriculum-based measures and standardized testing and, as such, was not eligible for special education. Mansfield requested that the BSEA deny Parents' request for relief, including but not limited to placement at and funding for the Hamilton Program.

The Hearing was scheduled for November 14, 2017. Pursuant to the District's assented-to request, it was postponed due to the unavailability of District Counsel and personnel. A Pre-Hearing Conference was scheduled for January 11, 2018, and the Hearing was scheduled to begin February 6, 2018. On December 4, 2017, the District requested that the BSEA issue subpoenas *duces tecum* to the Keeper of the Records of the Hamilton School and to Gretchen Timmel, the parents' expert; the BSEA issued these subpoenas on December 6, 2017. Following the Pre-Hearing Conference, the District requested that the Hearing be postponed to permit it to pursue outstanding discovery; it was engaged in ongoing negotiations with the Wheeler School regarding Jaclyn's records, and Ms. Timmel's subpoena had been unclaimed. After some discussion Parents agreed, and the Hearing was scheduled to begin April 24, 2018. On April 5, 2018, the parties jointly requested a further postponement to permit them to obtain documentation from outside sources, and they renewed this request again on July 19, 2018. The Hearing was scheduled to begin September 25, 2018.

On September 17, 2018, Counsel for the Parents withdrew his appearance and Parents subsequently requested that the Hearing be continued to permit them to obtain new representation. The District assented to Parents' request, and the Hearing was scheduled for January 22, 24, and 25, 2019. Although Parents filed a status report on October 15, 2018 that appeared to raise several issues outside the scope of their *Hearing Request* and noted that they would "be seeking permission to amend [their] hearing request in hopes of addressing some issues – ongoing and recently identified," the BSEA has received no further correspondence to this effect.⁴

⁴On October 17, 2018, the District filed a Response to Parents' Status Update indicating, among other things, its opposition to an Amendment and/or to the inclusion of the additional allegations raised by Parent as issues for hearing.

As Mansfield’s *Motion* encompasses both a *Motion to Dismiss* and a *Statement of Counterclaims*, I address each in turn.

II. Motion to Dismiss

The basis of Mansfield’s *Motion to Dismiss* is the District’s assertion that it has offered Parents the relief they requested, rendering their claims moot. In support of its *Motion*, the District submitted a letter dated September 14, 2018, written by District Counsel to Parents’ then-attorney. Whether Parents’ claim survives the District’s *Motion* turns on both the procedural standard for such a motion and the substantive standards governing their claim.

A. Standard for Ruling on Motion to Dismiss

Pursuant to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3) and Rule XVIIB of the BSEA *Hearing Rules for Special Education Appeals*, a hearing officer may allow a motion to dismiss if the party requesting the appeal fails to state a claim on which relief can be granted. This rule is analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure and as such hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim. Specifically, what is required to survive a motion to dismiss “are factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”⁵ In evaluating 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.”⁶ These “[f]actual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . .”⁷

In the instant case, Parents allege both that Jaclyn is eligible for special education, and that Mansfield is required to reimburse them for her unilateral placement.

B. Eligibility

For a student to be eligible for special education under federal law, she must have one or more of the requisite disabilities and, “by reason thereof, needs special education and related services.”⁸ Pursuant to Massachusetts law, a student is eligible for special education if she has

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

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

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

⁸20 USC §1401(3)(A); 34 CFR 300.8(a)(1).

one or more of the requisite disabilities and, “as a consequence, is unable to progress effectively in the general education program without specially designed instruction or is unable to access the general curriculum without a related service.”⁹ An individual aged three to twenty-one who meets at least one of these standards is considered an “eligible student.”

C. Unilateral Placement of Eligible Students

The Individuals with Disabilities Education Act (IDEA) and its implementing regulations govern placement of children who are eligible for special education in private schools. When parents elect to place a student unilaterally in a private school notwithstanding the availability of a free appropriate public education (FAPE) through the school district, parents retain responsibility for the cost of that education.¹⁰ Parents who enroll a student in a private school without the consent of or referral by the school district may, however, obtain reimbursement if a hearing officer finds both that the school district “had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate” for the student.¹¹ The regulations allow for reduction or denial of reimbursement in certain circumstances pertaining to, among other things, the sufficiency of notice to the school district and parental refusal to consent to proposed evaluations.¹²

D. Application to Mansfield’s Motion to Dismiss

To determine whether reimbursement for and placement at the Wheeler School is appropriate, I must determine first whether Jaelyn is eligible for special education. If I find that she is eligible under the standards discussed in II (B) above, I must then determine whether Parents are entitled reimbursement for her unilateral placement by applying the standards discussed in II (C). Although Parents’ ability to prove either of these elements of their claim will turn on evidence that is not before me at this early stage in the proceedings, they have alleged facts that, if true, may justify reimbursement for their unilateral placement of Jaelyn. As such, through their *Hearing Request*, Parents have raised “factual ‘allegations plausibly suggesting’ . . . an entitlement to relief” from the District.¹³ Whether the District has offered the relief requested by Parents may be relevant to any award of relief, particularly where a case involves an equitable remedy such as reimbursement,¹⁴ but it is inapposite to the present analysis. At this time, dismissal is inappropriate. Mansfield’s *Motion to Dismiss* is DENIED.

⁹ 603 CMR 28.02(9).

¹⁰ See 34 CFR 300.148.

¹¹ 34 CFR 300.148(c). See 20 USC § 1412(a)(10)(C)(ii); see also *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 243 (2009) (explaining that § 1415(i)(2)(C)(iii) authorizes “reimbursement when a school district fails to provide a FAPE and a child’s private-school placement is appropriate”).

¹² See 34 CFR 300.148(d)

¹³ *Iannocchino*, 451 Mass. at 636 (quoting *Twombly*, 550 U.S. at 557).

III. Statement of Counterclaims

In the alternative, the District filed a Statement of Counterclaims for attorneys' fees and substitute consent for its proposed evaluation. I examine each of these in turn.

A. Attorneys' Fees

The IDEA permits a district court to award attorneys' fees to a prevailing school district "if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation."¹⁵ The BSEA is without authority to make such an award.

B. Substitute Consent

Both the IDEA and Massachusetts law require that every three years, or sooner if necessary, the school district conduct a full three-year reevaluation of each eligible student, unless both parties agree that such reevaluation is unnecessary.¹⁶ In the event that parents refuse consent for a reevaluation, a school district may, but is not required to, pursue substitute consent for the reevaluation through the BSEA if it determines that a parent's failure or refusal to consent "will result in a denial of a free appropriate public education to the student."¹⁷ By its terms, however, this provision applies only where, subsequent to initial evaluation and placement, "the school district is unable to obtain parental consent to a reevaluation or to placement."¹⁸ As such, where, as here, Mansfield has never found Jaclyn eligible for special education and has never placed her in a special education program, it may not seek substitute consent for an initial evaluation.

Even so, the District is not without recourse. Although Mansfield may not seek to override Parents' refusal to consent to an initial evaluation or reevaluation after placing Jaclyn in a private school at their own expense,¹⁹ in these circumstances the District is not "required to consider the

¹⁴See *School Union No. 37 v. Ms. C.*, 518 F.3d 31, 31 (1st Cir. 2008).

¹⁵34 CFR 300.517(a)(1); see 20 USC § 1415(i)(3)(B).

¹⁶See 20 U.S.C. 1414(a)(2); 34 CFR 300.303; 603 CMR 28.04(3).

¹⁷See 603 CMR 28.07(1)(b).

¹⁸*Id.*

¹⁹34 CFR 300.300(d)(4)(i).

child as eligible for services.”²⁰ This is a factual issue to be determined at hearing, but would serve as a bar to relief rather than a counterclaim.

CONCLUSION

Upon consideration of Mansfield Public Schools’ *Motion to Dismiss and, in the alternative, Statement of Counterclaims* and the arguments of the Parties, I find that dismissal is unwarranted. Moreover, the BSEA does not have jurisdiction over counterclaims for attorneys’ fees or substitute consent for an initial evaluation.

ORDER

The District’s Motion to Dismiss is hereby DENIED.

The Hearing will take place at 10:00 AM on January 22, 24, and 25, 2019 at the new Offices of the BSEA, 14 Summer St., 4th Floor, Malden.

By the Hearing Officer:²¹

Amy M. Reichbach
Dated: January 8, 2019

²⁰*Id.* at 300.300(d)(4)(ii).

²¹The Hearing Officer gratefully acknowledges the assistance of legal intern Sarah Joor in preparing earlier drafts of this Ruling.