

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

In re: Elana¹

BSEA: 1803420

**RULING ON MARSHFIELD PUBLIC SCHOOLS' MOTION FOR SUMMARY
JUDGMENT**

This matter comes before the Hearing Officer on the *Motion for Summary Judgment* filed by the Marshfield Public Schools (“Marshfield” or “the District”) on June 20, 2018. The Parent filed a request to delay response on June 29, 2018 and subsequently, on July 10, 2018, filed her formal *Opposition*. 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,² 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, Marshfield’s Motion for Summary Judgment is GRANTED.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On October 30, 2017, Parent, *pro se*, filed a *Hearing Request* against Marshfield containing a number of allegations. Specifically, Parent claimed that the District failed to contact her regarding an assault and battery on her daughter in school on December 9, 2016; failed to document bullying of her daughter appropriately (including bullying on social media); failed to implement lead poisoning guidelines for her daughter; and charged her daughter with a dress code violation on September 16, 2017 – one day after Parent’s report to the guidance department regarding the ongoing harassment of Elana. As relief, Parent sought documentation of all bullying that had occurred and staff’s efforts to ensure that it would stop; transportation to Elana’s new school under her Individualized Education Program (IEP); Environmental Protection Agency (EPA) lead and copper certificates for all schools attended by Elana; court documents regarding the alleged assault and battery of Elana; and written comments regarding complaints about lead poisoning that Parent made to the Department of Education Office of Civil Rights (OCR), the U.S. Department of Health and Human Services, and the Massachusetts Attorney General, among others. The Hearing was scheduled for November 28, 2017.

On November 17, 2017, Counsel for Marshfield indicated that she had not received Parent’s *Hearing Request* and requested postponement of the hearing. The BSEA issued a recalculated Notice of Hearing, under which the hearing was rescheduled for December 22, 2017. On November 21, 2017, the District filed a challenge to the sufficiency of Parent’s *Hearing Request* and requested that Parent be instructed to file a new *Hearing Request* or other letter including “only matters over which the BSEA has jurisdiction, and, with regard to any

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

²The parties have participated in several Conference Calls, including a telephonic motion session on the District’s *Motion to Dismiss*, and a Pre-Hearing Conference, most of which addressed the same issue before me on the instant *Motion for Summary Judgment*.

special education issues involving testing, eligibility, accommodations, services or placement, a short explanation as to the issues and proposed resolution.”

On November 22, 2017, Parent filed her own request for postponement of the hearing and indicated that she had updated the IEP paperwork sent to the school. She also referenced complaints regarding lead poisoning that she had filed with the other agencies, including the Department of Children and Families and OCR. On November 24, 2017, the undersigned Hearing Officer issued an Order allowing the parties’ requests for postponement and denying the District’s *Sufficiency Challenge*.

On December 4, 2017, the District filed both its *Response to Parent’s Hearing Request* and a *Motion to Dismiss*, to which Parent filed an *Opposition*³ on December 18, 2017. Following a telephonic motion session, on December 22, 2017, the undersigned *Hearing Officer* allowed the District’s *Motion to Dismiss* in part and denied it in part, and continued the matter to February 15, 2018. The Order outlined the issues remaining for hearing as follows:

- A. Whether Marshfield failed to protect Elana from bullying and/or harassment, such that she was deprived of a free appropriate public education (FAPE) or discriminated against in violation of § 504.
- B. Whether Marshfield failed to consider the impact of plumbism on Elana in developing her IEP, such that she was deprived of a FAPE or discriminated against in violation of § 504.

On February 15, 2018, the District notified the undersigned Hearing Officer of its unavailability on the dates proposed for a *Pre-Hearing Conference* and requested further postponement. The postponement was allowed and the matter continued to April 30, 2018 for pre-hearing.

In the meantime Parent sent a number of documents, unsolicited, to the BSEA. The first set of documents, filed on January 22, 2018, purported to clarify her allegations regarding bullying of Elana and “as part of [her] response to modify parents (*sic*) opposition to Marshfield Public Schools’ Motion to Dismiss Parents (*sic*) hearing request.” On February 8, 2018, Parent sent a set of documents that included her rejection of a proposed IEP, accompanied by a letter of explanation carbon copied to OCR, the Board of Registration in Medicine, the BSEA, and several Marshfield district personnel; court documents and police reports regarding the alleged assault on Elana by her classmate; and Elana’s medical progress notes, among others. On April 4, 2018, Parent filed yet another set of documents that included correspondence and medical records and carbon copied many of the same agencies, as well as the Board of Bar Overseers and Social Security Disability Appeal.

Following the *Pre-Hearing Conference*, which took place April 30, 2018, the District filed an assented-to request for postponement of the hearing to September 20, 2018. On May 3,

³With her *Opposition*, Parent filed a number of documents, including an OCR guidance letter regarding bullying of students with disabilities, an ACTION sheet developed by the National Bullying Prevention Center, and an “Emergency Message” regarding disability claims potentially associated with Flint, Michigan Water Supply Contamination.

2018, the undersigned Hearing Officer granted the request and the hearing was scheduled for September 20, 2018.

II. DISCUSSION

A. Legal Standard for Summary Judgment

Pursuant to 801 C.M.R. 1.01(7)(h), Summary Decision may be granted where there is “no genuine issue of fact relating to all or part of a claim of 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 The party seeking summary judgment begins by demonstrating, with the support of its documents, that there is no genuine issue relating to the claim or defense. This 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

In response to a motion for summary judgment, the adverse party “must set forth specific facts showing that there is a genuine issue for trial.”⁶ 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.⁷ In so doing, she may not rely on the pleadings alone.⁸ “If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.”⁹

B. Application of Legal Standards

In its *Motion for Summary Judgment*, Marshfield asserts that on the undisputed facts of the case, Parent cannot demonstrate that Elana was bullied, harassed, or discriminated against on the basis of a disability, or that Elana suffers from any impact of plumbism. Furthermore, because Elana is currently receiving appropriate services to address her emotional disability, Parent cannot demonstrate that she has been denied a FAPE or discriminated against in violation of Section 504 of the Rehabilitation Act. I examine each claim separately.

1. *No Genuine Issue of Material Fact Exists As to Disability-based Bullying, Harassment, or Discrimination*

As Marshfield acknowledges through its submissions, Elana was, in fact, assaulted by another student on or about December 8, 2016. The District suspended that student, investigated the incident, and communicated with Parent regarding what had happened. Other than this incident, Parent has not alleged that this student has harassed or bullied Elana, much less that Marshfield has allowed her to do so, and Marshfield has established, through evidence it

⁴Federal Rule of Civil Procedure 56 authorizes the entry of summary judgment whenever it appears that “there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”

⁵*Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252 (1986).

⁶*Id.* at 250.

⁷*Id.* at 249.

⁸See *Correllas v. Viveiros*, 410 Mass. 314, 317 (1991).

⁹*Anderson*, 477 U.S. at 249-50.

submitted, that this student did not violate the conditions of her probation by contacting Elana, at least through September 2017.¹⁰ Parent also alleged that on or about October 4, 2017, a different student made Elana uncomfortable when he put his hand on her chair during one of her classes. Marshfield investigated this incident and determined that no bullying had occurred.¹¹ The District also took steps to ensure that it did not happen again; Parent set forth no specific facts to show that these steps were ineffective.¹² As to the “dress code violation” alleged by Parent, Marshfield asserts that the incident was limited to Elana being asked to comply with the school’s dress code by zipping up her sweatshirt when she was wearing inappropriate clothing to school; no disciplinary action occurred. Parent has set forth no specific facts to support her allegation that Elana was, in fact, disciplined, or that this occurred in retaliation for Parent’s contact with the Guidance office. Viewing this evidence in the light most favorable to Parent, for the purposes of this *Motion* I assume that Elana was assaulted by a fellow student, that a peer made her uncomfortable in class almost a year later, and that although the District investigated and responded to these incidents, it did not do so to Parent’s satisfaction. I cannot assume that Elana was disciplined for violating the dress code, but I do take as true that Marshfield staff asked her to zip up her sweatshirt some time shortly after Parent complained about what she perceived as the District’s insufficient response to bullying of Elana. Parent has not set forth any specific facts to demonstrate that any of these incidents, alone or in combination, was based on Elana’s social/emotional disabilities. Marshfield has therefore established that there is no genuine issue of material fact as to whether Elana’s right to FAPE has been violated due to disability-based harassment, bullying, or discrimination.

2. No Genuine Issue of Material Fact Exists as to the Impact of Plumbism on Elana

Parent’s second set of allegations focuses on Marshfield’s alleged failure to consider the impact of plumbism on Elana in developing her IEP, leading to a deprivation of FAPE and/or disability-based discrimination in violation of § 504.

In evaluating this claim, I take as true Parent’s allegation that Elana was exposed to lead as a child. Marshfield asserts that there is no evidence to support Parent’s argument that Elana has experienced any negative impact from this exposure, and supports its contention with an undated letter from a doctor at Children’s Hospital. According to this doctor, who reviewed Elana’s records, including her evaluation by a different doctor at the Children’s Hospital Lead Clinic, it “seems clear that she experienced a lead exposure earlier in life but that there has not yet been a detectable neurologic impact.”¹³ Marshfield’s submissions suggest that there is no genuine issue of material fact relating to the impact of plumbism on Elana, and as such, the District cannot be faulted for an IEP that does not include goals and services specifically relating to plumbism.

In response to Marshfield, Parent relies on her pleadings and a number of documents purporting to show that that Elana’s lead levels are high, that high lead levels may impact those exposed, and that educational interventions may assist children affected by lead. Parent does not,

¹⁰ School Exhibit B.

¹¹ School Exhibit C.

¹² School Exhibit C.

¹³ School Exhibit D.

however, set forth any evidence that Elana has, in fact, been impacted by plumbism,¹⁴ much less “sufficient evidence” for a fact-finder to decide in her favor on this claim.¹⁵ Parent’s inability to prove that Elana has been affected by her lead exposure will be fatal to her claim that the District has not addressed her plumbism sufficiently. Viewing the evidence in the light most favorable to Parent, I conclude that the District has established that there is no genuine issue of material fact as to whether Marshfield failed to consider the impact of plumbism on Elana in developing her IEP, such that she was deprived of a FAPE or discriminated against in violation of § 504.

CONCLUSION

The District has established that Parent’s factual allegations, if true, fail to raise a right to relief above the speculative level, and that there is no genuine issue of material fact for hearing. Marshfield is entitled to judgment as a matter of law.

ORDER

Marshfield’s Motion for Summary Judgment is hereby ALLOWED. The *Hearing* scheduled for September 20, 2018 is cancelled, and the case is DISMISSED.

By the Hearing Officer:¹⁶

Amy M. Reichbach

Dated: September 4, 2018

¹⁴Parent’s *Opposition* contains no legal argument, nor does it allege specific facts. Instead, it is comprised of a packet of documents that includes submissions to Probate and Family Court regarding child support; communication regarding an alleged data breach; an IEP progress report dated 1/29/2018 to 6/14/2018 containing handwritten notes, a partial IEP, and a report card; web-based articles; applications for a child’s insurance benefits and social security income; Elana’s medical records; and records that appear to be related to a court matter regarding lead exposure in an apartment.

¹⁵See *Correllas*, 410 Mass. at 317.

¹⁶The Hearing Officer gratefully acknowledges the diligent assistance of legal intern Jocelyn Simpson in the preparation of this Ruling.