COMMONWEALTH OF MASSACHUSETTS
SPECIAL EDUCATION APPEALS

In Re: Hampden-Wilbraham Regional School District   BSEA # 02-1842

RULING ON PARENTS’ MOTION FOR PARTIAL SUMMARY JUDGMENT

A. Introduction

Pursuant to 801 CMR 1.01(7)(h) and Bureau of Special Education Appeals (BSEA) Rule 6, Parents of Student (Parents) filed a Motion for Partial Summary Judgement (Motion) for the purpose of seeking public school funding of an independent psychological evaluation.¹

The basis of Parents’ Motion is that the School District allegedly failed to follow the requisite procedural requirements, with the result that the School District should be ordered to pay for the independent psychological evaluation.

B. Procedural History and Facts

The procedural history and material facts are not in dispute.

Student is a four-year-old child (date of birth December 21, 1997). On October 22, 2001, Parents filed with the BSEA a Request for Hearing. A Pre-Hearing was held on December 3, 2001. The parties agreed to delay a Hearing on the merits until Parents obtained counsel. On May 15, 2002, Parents (through counsel) filed an amended Hearing Request which asked that a BSEA Hearing address the School District’s denial of eligibility, its refusal to fund several independent evaluations, and various alleged procedural violations. Parents have requested additional postponement of the Hearing in order to obtain independent evaluations, and a Hearing on the merits is scheduled for July 2002.

The essential dispute (regarding the merits) of this matter is whether Student should be found eligible for special education and related services. Parents are seeking placement of Student into an integrated pre-school program, as well as the delivery of related services (physical therapy and occupational therapy).

¹ Parents’ Motion also sought funding for an independent occupational therapy evaluation and an independent physical therapy evaluation. During the Hearing on the Motion, the School District confirmed its prior agreement to fund these two evaluations, up to the amount allowed by the Massachusetts Division of Health Care Finance and Policy, and Parents therefore agreed to remove from the Motion their request for funding of these evaluations.
The School District has made a determination that Student is not eligible for special education or related services.

Although the School District performed a number of evaluations of Student for the purpose of determining whether he should be found eligible, the School District has not performed a psychological evaluation. The School District’s position is that “there is no evidence that [Student] is anything other than a happy, good-natured child” and “[Student] does not evidence any of the eligibility criteria for an emotional disability under the applicable regulations.”2 Accordingly, the School District found that a psychological evaluation is not warranted.

Parents take a contrary position, believing that Student’s physical disabilities place him at risk for social difficulties and problems with self-esteem.3 From their perspective, a psychological evaluation is necessary to assess these issues.

In order to seek public funding of a psychological evaluation of their son, Parents, on March 11, 2002, faxed a letter to Thomas Philpott (the School District’s Director of Student Services) and Debra Tobias (the School District’s Student Services Educational Coordinator). The letter stated in relevant part:

We are writing to inform you that we wish to exercise our right to obtain independent educational evaluations at public expense, pursuant to federal law, in each of these areas listed above . . . .

The “areas listed above” included a psychological assessment.

The attorneys for the parties and the Hearing Officer have had telephone conference calls on March 7, 2002, March 21, 2002 and April 25, 2002. During the March 21st conference call, in response to a question from the Hearing Officer as to whether the School District had anything else to bring up, the School District’s attorney noted Parents’ March 11th letter requesting independent evaluations and stated that the School District is responding with a standard letter pertaining to independent evaluations. The Hearing Officer then stated his understanding that the School District would have the responsibility to make a request to the Hearing Officer that there be included (in the list of disputed issues to be addressed by the BSEA) any refusal by the School District to pay for an independent evaluation.

The School District’s written response to Parents was a letter from Mr. Philpott dated March 21, 2002 (received by Parents on March 25, 2002). The body of Mr. Philpott’s letter consisted of the following:

2 School District’s response to Parents’ Motion, page 4.
3 Memorandum of Law in Support of Parents’ Motion, page 2.
Enclosed with this letter is a copy of the Parents’ Rights Brochure that describes on page 4 “Right to Independent Evaluation (IEE)”, your rights in regard to requesting an independent evaluation for your son, [Student’s name].

Once you have reviewed your rights, please notify me in writing as to how you wish to proceed.

If you have any further questions, please do not hesitate to contact me.

Parents, through their attorney, responded to Mr. Philpott’s March 21st letter with a letter to the School District’s attorney, dated April 5, 2002. In their letter, Parents took the position that the School District had failed, within five school days of Parents’ request for an independent evaluation, either to agree to pay for the evaluation or to proceed to the BSEA to show that its evaluation was comprehensive and appropriate, as required by 603 CMR 28.04(5)(d) and 34 CFR 300.502(2). Parents concluded in their letter that the School District was therefore required to pay for Parents’ independent psychological evaluation.

The School District’s attorney then sent a letter to the Hearing Officer, dated April 17, 2002, with a copy to Parents’ attorney, stating:

Pursuant to our previous Pre-hearing phone conference, [the School District] has requested that the Parents’ request for independent evaluations and the District’s response(s) thereto be included in the issues to be addressed in the upcoming BSEA Hearing before you.

On May 3, 2002, Parents filed their Motion for Partial Summary Judgement (Motion) for the purpose of seeking public school funding of an independent psychological evaluation on the basis of the School District’s alleged failure to follow the requisite procedural requirements. The School District filed its written response on May 13, 2002, and a telephonic Hearing was held on the Motion on May 17, 2002.

C. Discussion

1. Regulatory Standard.

The state special education regulations deal generally with the issue of independent education evaluation at 603 CMR 28.04(5). Parents are requesting an evaluation in an area not assessed by the School District, thereby bringing into play paragraph (d) of 603 CMR

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4 The federal regulations address independent education evaluations at 34 CFR 300.502. With respect to the five day requirement at issue in the present dispute, the federal regulations provide comparable, but less specific language, which appears to be less protective of Parents’ rights than the state regulations. States have the option of expanding upon the rights offered parents within the federal law and regulations, and I therefore focus my inquiry on the standards contained within the state regulations. *Town of Burlington v. Department of Education*, 736 F.2d 773, 792 (1st Cir. 1984) (states are “free to exceed, both substantively and procedurally, the protection and services to be provided to its disabled children”).
Paragraph (d) (with emphasis supplied) reads as follows:

If the parent is requesting an evaluation in an area not assessed by the school district, the student does not meet income eligibility standards, or the family chooses not to provide financial documentation to the district establishing family income level, the school district shall respond in accordance with the requirements of federal law. The district shall either agree to pay for the independent educational evaluation or within five school days, proceed to the Bureau of Special Education Appeals to show that its evaluation was comprehensive and appropriate. If the Bureau of Special Education Appeals finds that the school district’s evaluation was comprehensive and appropriate, then the school district shall not be obligated to pay for the independent educational evaluation requested by the parent.

I find the regulatory standard within the second sentence of this paragraph (d) to be clear and unambiguous in its mandate to the School District. Once the School District received from Parents the request for an independent evaluation, it could do only one of two things: either proceed to the BSEA within five school days to show that its evaluation was comprehensive and appropriate or agree to pay for the evaluation.


However, the School District, through Mr. Philpott’s letter to Parents dated March 21, 2002 sought to pursue a third course. Mr. Philpott’s letter responded to Parents request for an independent psychological evaluation by providing Parents with information regarding their right to public funding of an independent evaluation and by asking Parents to notify Mr. Philpott “as to how [Parents] wish to proceed”, arguably for the purpose of determining from Parents whether they would provide financial information and seek to have the School District apply a sliding fee scale. (See Procedural History and Facts section of this Ruling for the content of this letter.)

The School District argues that paragraph (c) of 603 CMR 28.04(5) supports its position by requiring application of a sliding fee scale where parents are willing to provide financial information to the school district. The School District takes the position that it would not be appropriate for the School District to either (i) agree to pay for the evaluation or (ii) proceed to the BSEA until it had determined from Parents whether they wished to seek full or partial payment by the School District pursuant to a sliding fee scale.

5 Mr. Philpott’s letter was several days late of the five day requirement contained in 603 CMR 28.04(5)(d). School District argues this to be a “de minimus” delay, caused by a family tragedy and having no deleterious effect on Parents’ request. During oral argument on Parents’ Motion, Parents’ counsel agreed, in principle, with this argument if the content of the letter had met the regulatory standards. In light of Parents’ position, I will not address further the issue of the timeliness of Mr. Philpott’s letter.
Assuming that a sliding fee scale is relevant to an independent evaluation with respect to an area not assessed by a school district, the School District’s argument proposes a process that has logical appeal. Unfortunately for the School District, however, the regulatory language in paragraph (d) does not allow the School District the option of taking the time to obtain additional information from Parents if, as a result of doing so, the School District cannot comply with the five day requirement described within paragraph (d).

The parties do not dispute the applicability of paragraph (d) to the present dispute. For me to agree with the School District and thereby allow an indefinite delay of the five day requirement while the School District seeks additional information from Parents would be to create an open-ended exception to paragraph (d) where none exists.

I therefore conclude that Mr. Philpott’s letter of March 21st did not satisfy the School District’s obligations under 603 CMR 28.04(5)(d).


I return to the question of whether the School District has otherwise “within five school days, proceed[ed] to the Bureau of Special Education Appeals to show that its evaluation was comprehensive and appropriate.”

When there is no pending dispute before the BSEA, the general practice is for a school district to satisfy this requirement by filing with the BSEA a Request for Hearing regarding the disputed issue of public funding of the independent evaluation. Where there is a pending dispute (as in the instant case), it is apparent that there may be several ways of bringing the issue before the BSEA. However, whatever way is chosen, it must be timely and include notice to the Hearing Officer and parents that the school district is requesting that the BSEA resolve the disputed issue.

The first written submission by the School District to the BSEA relevant to public funding of the psychological independent evaluation was a letter, dated April 17, 2002, from School District’s counsel to the BSEA Hearing Officer. The letter stated in relevant part:

Pursuant to our previous Pre-hearing phone conference, [the School District] has requested that the Parents’ request for independent evaluations and the District’s response(s) thereto be included in the issues to be addressed in the upcoming BSEA Hearing before you.

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6 It is not clear to me that a sliding fee scale is relevant to a request for an independent evaluation when the independent evaluation is requested in an area not assessed by a school district. I note that paragraph (d) of 603 CMR 28.04(5), which specifically applies in this context, states that a school district must respond to such a request “in accordance with the requirements of federal law”. Federal law does not provide for application of a sliding fee scale with respect to independent educational evaluations. 34 CFR 300.502. Neither party explicitly considered this question in its oral or written arguments, and I therefore decline to address it.
This letter was sent twenty-four school days (not counting weekends, holidays and school vacation) after the School District’s receipt of Parents’ March 11th letter. Knowing that its letter was too late to satisfy the regulatory requirement that the School District proceed to the BSEA within five school days, School District’s counsel argues that previous telephone conferences with the Hearing Officer (referenced generally in counsel’s April 17th letter), together with his April 17th letter satisfies the requirements contained within 603 CMR 28.04(5)(d) when the parties are already before the Hearing Officer pursuant to an earlier Request for Hearing.

I will assume, arguendo, that in the present context it might be possible to “look back” to previous telephone conference calls for the purpose of allowing School District’s letter of April 17th to meet the regulatory requirements. I will therefore review the relevance of the telephone conference calls referenced by School District’s counsel.

The regulatory language of 603 CMR 28.04(5)(d) requires a response by the School District to Parents’ March 11, 2002 letter requesting public funding of an independent evaluation. It is apparent that any telephone conference calls with the Hearing Officer and the parties prior to March 11th cannot be considered to be responsive.

The only telephone conversation with the Hearing Officer that took place on or after Parents’ March 11th letter and before the School District’s April 17th letter was the March 21, 2002 telephone conference call with the Hearing Officer and the parties. During that conference call, the School District’s attorney noted Parents’ March 11th letter requesting independent evaluations and stated that the School District is responding with a standard letter pertaining to independent evaluations. In other words, instead of the School District stating to the Hearing Officer and Parents that it was requesting the BSEA to resolve this issue, the School District stated that it was responding to the Parents through Mr. Philpott’s letter dated March 21, 2002 (discussed above in part C2 of this Ruling).

During this conference call, the Hearing Officer then stated his understanding that the School District would have the responsibility to make a request to the Hearing Officer that there be included (in the list of disputed issues to be addressed in the Hearing) any refusal by the School District to pay for an independent evaluation. The next communication by the School District to the Hearing Officer regarding this issue was the School District’s April 17th letter.7

For these reasons, neither the telephone conference calls with the Hearing Officer and the parties nor the School District’s letter of April 17th provide timely notice to the Parents and the Hearing Officer so as to meet the relevant regulatory language of 603 CMR 28.04(5)(d) (“pay for the independent educational evaluation or within five school days, proceed to the Bureau of Special Education Appeals”).

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7 I also note that the March 21st telephone conference call took place more than five school days after the receipt of Parents’ March 11th letter. All of the referenced telephone conference calls were informal (off the record) although several of the calls (including the March 21st call) were tape recorded by the Hearing Officer at Mother’s request.
4. Conclusion.

Certain procedural violations may call for analysis or consideration of the harm to the parties, with discretion exercised by the Hearing Officer in fashioning a remedy. Neither party has argued that I should engage in such an analysis in the present dispute, nor do I believe it would be appropriate to do so. The applicable regulations (603 CMR 28.04(5)(d)) contain within it the remedy (public funding of the evaluation) for failure to proceed in a timely manner to the BSEA. I also note that Hearing Officers in other jurisdictions have determined that failure to comply with requisite procedures relevant to an independent evaluation may result in a Hearing Officer’s ordering the school district to pay for that evaluation.

For these reasons, I conclude that having failed to comply with the procedural requirements contained within 603 CMR 28.04(5)(d), the School District now has no choice but to pay for the independent psychological evaluation.

D. Order

For these reasons, Parents’ Motion is ALLOWED. The School District shall pay for the independent psychological evaluation, subject to the limitations described in 603 CMR 28.04(5)(a).

By the Hearing Officer,

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William Crane
Dated: May 24, 2002

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8 See, e.g., In Re: Wachusett Regional School District, BSEA # 00-3759, 6 MSER 257, 268-269 (2000).
9 See also the United States Department of Education’s comments regarding analogous federal regulations (34 CFR 300.502(b) (school district must pay for the independent evaluation or initiate a hearing “without unnecessary delay”): “if a public agency does not [request a hearing on the evaluation issue], it must provide the IEE [independent educational evaluation] at public expense”, 64 Federal Register 12607, column 3 (March 12, 1999).
10 The Basis School, Inc., 32 IDELR 187, Ariz. SEA (2000); Harwood Union High School/Washington West Supervisory Union, 27 IDELR 908, Vt. SEA (1998); Dare County Public Schools, 27 IDELR 547, NC SEA (1997).