

**COMMONWEALTH OF MASSACHUSETTS
SPECIAL EDUCATION APPEALS**

In Re: Student v.
Westwood Public Schools

BSEA # 10-1162

**Westwood Public Schools' Motion To Dismiss Parent's Hearing Request
With Prejudice and/or Motion for Summary Judgment and
Mother's Motion to Require the District to Allow the Parent to Audiotape
the Team Meeting**

On September 17, 2009, Westwood Public Schools (Westwood) filed a Motion to Dismiss Parent's Hearing Request with Prejudice and or Motion for Summary Judgment alleging that the issue raised by Mother in her request for hearing was moot. Since according to Westwood, Mother could not legally obtain the relief sought, Westwood moved for summary judgment in its favor.

According to Westwood, Mother initially alleged that she was unable to locate an evaluator who accepted the rate offered by Westwood. After the hearing request was filed, Westwood forwarded to Parents eight possible evaluators who agreed to the rates established by Westwood and met the necessary criteria. Mother then argued that Westwood's delay in providing the names of possible evaluators as well as the criteria regarding administration of the evaluations was a violation of her rights under 34 CFR 300.502 and 603 CMR 28.04(5)(e).

Father responded on September 28, 2009, supporting Westwood's Motion to Dismiss and corroborating the information presented by Westwood regarding the Resolution session. He asserts that he also received information regarding possible evaluators and wishes for Ms. Beth Ann Miles to conduct the evaluations as soon as possible. Father has had an opportunity to meet with Ms. Miles and believes that had she commenced the evaluation at the beginning of the school year, as offered by Westwood, the evaluation would now be underway. He states that he is a very involved father who has attended all of Student's IEP meetings and has Student's best interest at heart. He seeks dismissal of the BSEA action initiated by Mother and wishes for Ms. Miles to commence the evaluations. In his opinion, the delays are hurting Student. Father seeks dismissal of Mother's request for hearing.

Parents share joint legal custody.¹

¹ The Parents' Separation Agreement dated November 18, 2008 states in pertinent part:

The Parties will share legal custody as set forth below:

Each party will have full access to ... [Student's] medical, therapy and educational records and will be authorized to consult with providers and educators subject to the children's privilege and right to confidentiality. Father will take responsibility for arranging to obtain all school records, report cards, progress reports, notices, etc. from the school directly. Each

Following granting of a one day extension to file a response, Mother's response was received on September 29, 2009. Mother challenges Westwood's claims of mootness and request for summary judgment stating that Westwood has been able to present evidence and she has not. Mother claims that she has not had an opportunity to provide additional evidence, obtain evidence through the discovery process and elicit testimony of witnesses. She states that the rate selected by Westwood and the ten hour limitation on the evaluation are arbitrary and she wishes to present evidence with regard to this at hearing. Mother states that some of the options presented by Westwood are entities who do not operate independently from the school districts. She asserts that the rate and number of hours to conduct the evaluation should be determined by the evaluator and not Westwood. She states that there was a delay in the School District's provision to her of the list of evaluators who would accept the District's criteria for conducting the evaluation.

Also on September 29, 2009, Mother filed a Motion to Require the District to Allow the Parent to Audiotape the Team Meeting originally scheduled for the morning of September 30, 2009. Mother claimed to have a handicapping condition that required her to tape the meeting and alleged that the District's refusal to permit her to audiotape the meeting constituted discrimination and was an act of retaliation against her.

Westwood objected to Mother's motion on October 1, 2009, because it fell outside the scope of the issues raised by Mother in her request for hearing. Additionally, addressing the substantive portion of Mother's allegations, Westwood responded that Mother had not provided any proof of having a handicapping condition; that Father had objected to having the meeting taped; and that the District had agreed to provide a scribe and to give Mother a transcript as soon as it was ready. Westwood further relied on a Question and Answer provided by OSEP regarding audio-taping team meetings.

This issue was never raised by Mother in her request for hearing, something that Mother attempted to cure by filing a Motion to Amend her Prior Motion and to Clarify her Response to the District's Motion, on October 6, 2009. Mother requests this amendment too late in the process of her original request for hearing and has provided no documentation to substantiate a disability. Therefore, I hereby **DENY** Mother's Motion to Amend her Prior Motion. If Mother wishes, she may file a separate hearing request to address new issues. This Ruling addresses solely the issues raised by Mother in her Request for Hearing dated August 10, 2009.

party will give the other notice of any "joint legal custody" decision to be made. A joint legal custody decision is a major decision regarding either child's welfare, including matters of education, medical care and emotional, moral, and religious development. The party informed of the decision will respond within [three (3) days] unless the situation requires a more immediate response. If an immediate response is required, notice will be given by telephone or voice mail. Otherwise, the parties will communicate and consult by e-mail. If the parties do not come to an agreement [Mother] will have the responsibility to make legal custody decisions unless or until the Court orders otherwise.

FACTS²:

1. On February 4, 2009, Mother requested that Westwood fund an independent evaluation for her son.
2. On March 17, 2009, Westwood wrote to Mother providing her with the criteria regarding the selection of appropriate evaluators who accepted Westwood's entire criteria (i.e., up to ten hours for the evaluation, at a rate of \$62.70, by a qualified individual). In a letter dated March 23, 2009, Mother questioned Westwood's criteria. According to Mother, two of the evaluators suggested by Westwood refused the referrals and the third, Laura Dudley, was a recent former employee of Westwood and therefore, Mother questioned how "independent" her view would be.
3. On July 28, 2009, Mother informed Westwood that she had been unable to locate an evaluator who agreed to the rates offered by Westwood.
4. On August 4, 2009, Westwood provided Parents a list of five Boston hospitals who may be able to conduct the evaluations. According to Mother, she contacted the hospitals to no avail.
5. Mother filed a request for hearing on August 10, 2009 requesting that Westwood fund an independent social skills evaluation and a functional behavioral assessment for Student at the "going rate". In her hearing request, Mother further alleged that Westwood had authorized \$670 for both evaluations, and that she had been unable to find evaluators who accepted these rates.
6. Invoking the "unique circumstances" exception to 603 CMR 28.04(5)(a), Mother requested a rate higher than normally accepted.³ Mother further requested that the evaluators determine the scope of the evaluations and that they be allowed sufficient hours to complete the various components of the evaluations, including, but not limited to, observations and interviews.
7. In her request for hearing, Mother also alleged procedural misconduct on Westwood's part which was addressed via separate Ruling issued on September 2, 2009. She argued that, Westwood's delay in providing her the

² The facts contained herein are based on the motions and responses submitted by the Parties as well as documents submitted since the hearing request was filed. Since no additional exhibits were submitted by the Parties, I have taken administrative notice of all the relevant submissions contained in the administrative file. Also, the facts delineated in the Ruling issued in the case at bar on September 2, 2009 are hereby incorporated by reference.

³ "Unique circumstances of the student may justify an individual assessment rate that is higher than that normally allowed." 603 CMR 28.04(5)(a).

names of evaluators who accepted the rate offered by Westwood constituted unique circumstances.

8. Student is an eligible fifth grade resident of Westwood who has been diagnosed with Asperger's Syndrome.
9. Westwood offered information regarding alternative evaluators at the Resolution Session held on or about August 25, 2009 in which both Mother and Father participated. These were: Wediko Children's Services (Wediko), and Walker School Partnership. As a third option, Westwood offered to have "Ms. Beth Anne Miles, a newly hired Westwood employee who is a Board-Certified ABA Specialist to conduct both assessments." According to Westwood, "this option would permit a comprehensive evaluation by a Westwood Public Schools specialist who would be accessible for consultation to [Student's] Team as appropriate during the 2009-2010 school year."
10. On August 28, 2009, Audrey Seyfert, Director of Student Services in Westwood, wrote to Parents summarizing the discussions during the Resolution Session. Mother had requested that Westwood fund a Social Skills Evaluation at \$2,250 to be conducted by Christine Blake and a Functional Behavioral Assessment by Cynthia Levine from Shriver Clinical Services who estimated the cost of her evaluation to be between \$1,190 and \$1,369. Westwood declined to fund the aforementioned evaluations because the cost was excessive and did not conform with the rates set by the state for those evaluations.⁴ Westwood offered Mother three possible options mentioned in Paragraph 7.
11. Father supported the option of having Ms. Miles conduct the evaluation as soon as the 2009-2010 school year began. In his letter dated September 25, 2009, he stated that Mother had agreed to allow Ms. Miles to conduct the evaluations but later she changed her mind.
12. During a conference call with this hearing officer on August 28, 2009, Westwood restated its offer to have Ms. Miles complete the evaluation at the beginning of the 2009-2010 school year, and agreed to convene Student's Team by the end of September 2009. Westwood further agreed to preserve Mother's right to request an independent evaluation if she still desired one after Ms. Miles completed hers. In exchange for the offer, Westwood requested that Mother withdraw her request for hearing but agreed that

⁴ In a Ruling issued on September 2, 2009, Westwood was already informed that no rate has been established by the Executive Office of Administration and Finance regarding the evaluations sought by Parent. In light of the lack of guidance by the aforementioned office, a reasonableness standard would apply. Since this was already explained in a previous ruling, I decline to review this issue again and instead adopt the previous finding.

should Mother file another request for hearing following Ms. Miles evaluation, it would waive the resolution session and agreed to proceed to hearing on or before the automatic hearing date set by the BSEA. The school's offer was delineated in a letter forwarded to Mother on August 31, 2009. Parent rejected the offer on September 2, 2009.

13. A Ruling denying Westwood's Motion to Dismiss with Prejudice and granting its' Request to Postpone the Hearing Date was issued on September 2, 2009.
14. Since September 2, 2009, Westwood provided Parents with information regarding approximately seven possible qualified evaluators who met Massachusetts Certification criteria pursuant to 603 CMR 28. All seven evaluators accepted the rate offered by Westwood, and agreed that the two evaluations could be conducted in ten hours. All of the evaluators are duly credentialed and are not affiliated with, nor are they employees of Westwood.
15. Via letter dated September 9, 2009, Westwood forwarded the email from Denise Rizzo, M.S. Ed., BCBA, President of RCS Learning Center, agreeing to complete an independent functional behavioral and social skills assessment. The evaluation would likely last ten hours at a rate of \$62.70 per hour.
16. On September 11, 2009, via separate letters, Westwood submitted additional letters by Laura L. Dudley, MA, BCBA; Marcia J. Berkowitz, Ed.M, M.Ed., Director of Special Education at ACCEPT Education Collaborative; Amy Gordon, M.Ed. Co-Director of Build-A-Bond Social Skills Group; James Earley, Ed. D. Managing Director Walker Partnerships (Walker), all of whom agreed to complete the FBA and social skills assessment at the rate of \$62.50 per hour, estimating that the evaluations would require approximately ten hours.
17. On September 15, 2009, Maria Colarusso, Administrator of Student Services at The Education Cooperative (TEC), wrote to Audrey Seyffert stating that a Board Certified Behavior Analyst clinician in her organization was available to conduct the evaluation. Ms. Colarusso agreed to conduct the Social Skills and Functional Behavior Assessment at a rate of \$62.70 per hour for up to 10 hours. The evaluations would include: observation, review of the records, interviews, and assessment and the report.
18. On September 16, 2009, Westwood forwarded an additional letter from Edward J. Zadavec, Psy. D. Associate Director of Wediko, dated September 14, 2009, agreeing to accept an individual referral for the evaluations sought by Mother. Dr. Zadavec stated that "the rate for functional behavioral

assessments and social skills assessments is typically about \$ 400 each, excluding time required for meeting attendance.” He went on to state that he would be able to conduct the evaluation within two weeks and would generate a report within four weeks of completing the assessment.

19. During a conference call on September 18, 2009, Mother indicated that she would not pursue any of the eight evaluation options presented by Westwood and requested that the matter be scheduled for hearing. Mother stated that unique circumstances still existed which allowed her to obtain independent evaluations.
20. Mother asserts that she has not had an opportunity to fully investigate the seven options presented by Westwood and cannot make a commitment to any of them.

MOTION TO DISMISS:

Both the *Standard Adjudicatory Rules of Practice and Procedure*⁵ governing BSEA proceedings, and Rule 17 B of the *Hearing Rules for Special Education Appeals*, provide that a Hearing Officer may allow a motion to dismiss if the moving party fails to state a claim upon which relief may be granted. It is under these rules that Westwood moves to have this case dismissed with prejudice as to the issue of funding of the independent evaluation sought by Mother. This Ruling is issued in consideration of applicable laws, regulations, the facts and arguments proffered by the Parties.

As explained in a previous Ruling in this matter, issued on September 2, 2009, motions to dismiss are analogous to Rule 12(b)(6) of the Federal and Massachusetts Rules of Civil Procedure.⁶ The Federal Courts have explained that motions to dismiss under Federal Rule of Civil procedure 12 (b)(6) may be allowed when it is beyond doubt that the plaintiff can prove no set of facts in support of his/her claim which would entitle him to relief.⁷ In the context of a motion to dismiss, all well-pleaded factual averments must be accepted as true and all reasonable inferences must be accepted in the

⁵ 801 CMR 1.01(7)(g)3.

⁶ See *In Re: Norfolk County Agricultural School*, BSEA # 06-0390 (Berman, 2006),
... A BSEA 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. Since this rule is analogous to Rule 12(b)(6) of the Federal and Massachusetts Rules of Civil Procedure, BSEA hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim. Specifically a motion to dismiss should be granted only if the party filing the appeal can prove no set of facts in support of his or her claim that would entitle him or her to relief that the BSEA has authority to order. That is, a hearing officer may dismiss a case if he or she cannot grant relief under either the federal or state special education statutes or the relevant portions of Section 504 of the Rehabilitation Act.

⁷ *Judge v. City of Lowell*, 160 F.3d 67, 72 (1st Cir. 1998) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

plaintiff's favor. If recovery may be justified under any applicable legal theory, then the motion to dismiss must be denied. *Calderon-Ortiz v. LaBoy-Alvarado*, 300 F.3d 60 (1st Cir. 2002).

Here, dismissal is appropriate if Westwood can prove that the facts regarding availability of qualified evaluators to perform Mother's desired evaluations at a reasonable rate, do not support Mother's claim that unique circumstances exist warranting a rate greater than that offered by Westwood. In deciding this motion, all pertinent allegations offered by Mother, as well as the facts outlined in the Fact section in this Ruling must be considered to be true, and all reasonable inferences must be drawn in Mother's favor.

In her hearing request, the issue raised by Mother was that she was entitled to funding above rate setting rates because she could not locate a provider to complete the evaluations at the rate set by Westwood. In the request for hearing Mother stated that unique circumstances existed because she had not been able to secure an evaluator that accepted the criteria established by Westwood, that is: (a) up to 10 hours for the evaluation, (b) at a rate of \$ 62.70 per hour. In her response to Westwood's Motion of September 22, 2009, Mother added that unique circumstances existed because Student has Asperger's Syndrome, warranting a higher rate. She also argued that Westwood's delay in providing her the names of evaluators willing to abide by the criteria set by Westwood constituted unique circumstances.

Westwood asserts that Mother cannot prove the existence of "unique circumstances" that would entitle her to a rate greater than the rate offered by Westwood, and asserts that Westwood has fulfilled its legal obligation by providing Mother at least eight different alternatives regarding qualified evaluators within the meaning of 603 CMR 28.04(5)(a).

Westwood disputes that unique circumstances exist justifying funding over the rate set for the evaluation requested by Mother because (a) it has provided Mother with information regarding the availability of numerous evaluators that agree to meet Westwood's criteria, and (b) Mother has not provided any justification for the existence of unique circumstances.

First, I address the issue regarding the criteria established by Westwood. As explained in the Ruling issued on September 2, 2009, there is no rate set for the type of evaluation sought by Mother, so the question of the criteria set by Westwood turns on a *reasonableness* standard examined in consideration of the circumstances herein. In light of the information submitted by Westwood and the number of qualified evaluators or entities that have agreed to the criteria set by Westwood, Mother's claim that the criteria has prevented her from securing an evaluation would seem to be without merit.

Mother takes issue with the fact that the responsibility to contact the different potential evaluators suggested by Westwood fell on her. According to her, most of the places she

contacted did not accept the rate offered by Westwood. Mother concedes that at the Resolution Session on August 25, 2009, she was referred to Walker, Wediko and Ms. Miles, who had been recently employed by Westwood. Mother states that Walker told her that they did not perform Independent Educational Evaluations, Wediko did not respond and Ms. Miles had been recently employed by Westwood and therefore, was not independent.

Regarding Ms. Miles, Westwood conceded that since she was a highly-qualified, recently-employed individual, Westwood agreed to have her conduct the evaluation and still preserved Mother's right to an independent evaluation if she disagreed with the results of Ms. Miles' evaluations. I note for the record that Father, who supports Westwood's Motion to Dismiss/Summary Judgment, met with Ms. Miles and was agreeable to having her conduct the evaluations.

Mother asserts that most of the evaluators or entities presented by Westwood were unable to perform the evaluations or pursuant to 34 CFR 300.502(a)(3)(i) were "disqualified by law." Regarding Laura Dudley, Mother questions her independence as she was a former employee of Westwood (although Mother was scheduled to speak with her on or about September 29, 2009). Of the evaluators proposed by Westwood after August 25, 2009, Mother states that three of those had already been provided, the following four (ACCEPT, Build-A-Bond, Walker and TEC) performed evaluations for districts but not for the general public; three of the four indicated that the scope of the evaluation may not be determined by the Mother, and the fourth offers Independent Evaluations to districts but refuses contacts which come directly from parents, thereby distinguishing between evaluations initiated by the districts and those initiated by parents. As for Wediko, Mother states that it has never returned her calls. Lastly, Mother states that RCS provided her with two quotes, one on July 8, 2009 which calls for 14 to 18 hours for the Functional Behavioral Assessment portion of the evaluation at a rate of \$110 per hour⁸, and a second quote submitted by Nicole Socucie of RCS in September which calls for an approximately ten hour long evaluation at a rate of \$62.70 per hour. Mother reasons that if the evaluation conducted by the district takes a certain number of hours, the outside evaluation would take longer because the outside evaluator would have less knowledge of the student than a district's employee.⁹ This argument is speculative in nature and unpersuasive as Mother has presented no set of facts or documents to support this conclusion. Mother also states that she continues to seek information from the aforementioned evaluators.

Westwood argues that since it has provided seven to eight possible qualified evaluators, who are able to perform the evaluation sought by Mother while meeting Westwood criteria, Mother will not be able to meet her burden of persuasion at hearing, and states that the issue is therefore moot. The problem with Westwood's position is that the standard on a Motion to Dismiss is not whether Mother can meet her burden of

⁸ Parent did not submit a copy of this document.

⁹ The evaluation conducted by the District took approximately eight hours.

persuasion at hearing, the issue is whether there is any claim upon which relief can be granted.

Relying on *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990) and *Jordan by & through Jones v. Indiana High Sch. Athletic Ass'n, Inc.*, 16 F.3d 785, 787 (7th Cir. 1994) Westwood argues that a live controversy must continue to exist at all stages of review for the case to be justiciable, not just on the date in which the action was initiated. It states that when a forum or court can no longer affect the rights of litigants in the matter before them, the case becomes moot, and the court or forum's determination would simply become "an opinion advising what the law would be upon a hypothetical set of facts." *North Carolina v. Rice*, 404 U.S. 244, 246 (1991). *Brown v. Bartholomew Consolidated School Corporation*, 442 F. 3rd 558 (9th Cir. 2006). Westwood's argument that a mootness standard applies here is unpersuasive.

In applying the aforementioned criteria to the case at bar, Westwood is correct that the sole issue here is whether unique circumstances exist to justify funding greater than that offered by Westwood. Westwood maintains that Mother has not provided any basis or explanation to support her allegation that "unique circumstances" exist warranting a higher rate. In this regard, Westwood is correct. Mother has stated that Student's diagnosis of Asperger's Syndrome warrants such a finding, but having a diagnosis of Asperger's Syndrome alone does not rise to the level of "unique circumstances" within the meaning of 603 CMR 28.04(5)(a). Asperger's Syndrome is a specific disability of Student, but it isn't *per se* a "unique circumstance" in the context of the Massachusetts regulations¹⁰. However, for purposes of a Motion to Dismiss, Mother does not need to prove that she can meet the burden of persuasion at Hearing but rather that she *could*. Mother asserts that if given the opportunity, she can prove "unique circumstances" to justify award of a higher rate, because she has not served discovery or presented testimony, affidavits or physical evidence. She argues that, on this basis alone Westwood's Motion to dismiss should be denied.

Based on the foregoing, Westwood's Motion to Dismiss is denied.

SUMMARY JUDGMENT:

Westwood argues that it is entitled to judgment as a matter of law because there are no genuine issues of material fact in dispute.¹¹ In the context of an IDEA case, summary

¹⁰ "(5) Independent education evaluations. Upon receipt of evaluation results, if a parent disagrees with an initial evaluation or reevaluation completed by the school district, then the parent may request an independent education evaluation.

(a) All independent education evaluations shall be conducted by qualified persons who are registered, certified, licensed or otherwise approved and who abide by the rates set by the state agency responsible for setting such rates.¹⁰ Unique circumstances of the student may justify an individual assessment rate that is higher than that normally allowed." (Emphasis added). 603 CMR 28.04(5)(a).

¹¹ See *Zelda v. Bridgewater-Raynham Public Schools and Bristol County Agricultural School*, BSEA #06-0356 (Byrne)("Summary judgment is proper when the pleadings, sworn discovery responses, and affidavits

judgment is appropriate “when the parties agree on all operative facts, supporting that agreement with documents and affidavits, and present a question of law for decision.” *Zelda v. Bridgewater-Raynham Public Schools and Bristol County Agricultural School*, BSEA #06-0356 (Byrne). As is the case with motions to dismiss, all evidence and inferences must be viewed in the light most favorable to the non-moving party, that is, in the case at bar, Mother. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *In Re: Norfolk County Agricultural School*, BSEA # 06-0390 (Berman).

Regarding Summary Judgment, unlike a Motion to Dismiss, once the moving party has met its burden, the non-moving party must then “go beyond the pleadings and by [its] own affidavits or by the depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue for trial”¹². Applying this principle to the case at bar, Westwood carries the burden of production which shifts to Mother only after Westwood meets its burden. In this regard, I find that Westwood has met its burden and therefore, the burden shifts to Mother.

For purposes of the Motion for Summary Judgment Mother should have submitted the letters, affidavits and other physical evidence that support her position as the record contains nothing other than her arguments disputing the facts presented by Westwood . It is not clear to me that Mother, a pro se litigant, knew that she should have attached the letters from evaluators she received and/or affidavits to her Motion Opposing Summary Judgment. Nevertheless, in a motion for summary judgment, the evidence must be examined in the light most favorable to the non-moving party (Mother), and all reasonable inferences must be drawn in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986). Furthermore, if a genuine factual conflict exist, a trial will be needed to resolve the disputed fact which holds the potential to alter the outcome of the case. *Calero-Cerezo v. U.S. Dep’t of Justice*, 355 F.3d, 6, 19 (1st Cir. 2004). In her response Mother makes reference to having obtained information through telephone conversations, to waiting for individuals to return telephone calls to her, and to having letters that call for rates higher than what has been offered by Westwood. She challenged the independence of the evaluators proposed by Westwood and also requests time to gather additional information. The facts disputed by Mother are material to the final determination and as such, these facts would necessitate a hearing to ascertain whether Mother’s contentions have merit. Even if, as Westwood asserts, Parent were unable to prevail at Hearing, for the purpose of Summary Judgment she has met her burden. At this juncture, Summary Judgment would be premature.

Lastly, Mother argued that Westwood’s delay in providing the names of possible evaluators and the criteria for administration of the evaluations was a violation of her rights under 34 CFR 300.502 and 603 CMR 28.04(5)(e) that amounted to a denial of

show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law on those undisputed facts.”)

¹² *Celotex Corp. v. Catrett*, 477 U.S. 242, 248-50 (1986). See also, *Nat’l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995).

FAPE. According to Mother, the alleged delay tactics involve the decision by Westwood as to whether special circumstances existed justifying a higher rate. She claims that the decision was within the purview of Westwood's administration and not the Team. Westwood understands this claim to imply that an alleged delay in providing Mother with names of evaluators somehow constitutes unique circumstances entitling her to the higher rate; an argument Westwood submits is without legal merit. In this sense, Westwood moves for judgment as a matter of law. An alleged delay in providing names of evaluators that accepted the rates offered by Westwood does not constitute "unique circumstances" resulting in an automatic win for Mother. Westwood has never disputed Mother's entitlement to proceed with an independent evaluation for Student and the only "delay" was the approximately twenty-one school days it took Westwood to respond and provide her with its criteria for the evaluation. As already discussed in the Ruling of September 2nd, while unnecessary delays are discouraged there is no state or federal timeline establishing a response date. Furthermore, this delay does not rise to the level of a denial of FAPE. Regarding delays beyond that point, the evidence shows that Mother did not notify Westwood that she was having difficulties securing an evaluator until July 28, 2009 (received by Westwood on July 30, 2009) and thereafter, Westwood acted diligently, continuing to provide a number of alternatives from August 4, 2009 through mid-September 2009.

While not pertinent to my determination, I would like to address two other arguments offered by Mother:

Mother disputed that even if there were at least seven evaluators that would accept the rates offered by Westwood, none had actually committed to accepting all of the criteria established by Westwood. She requested that Westwood fund a Social Skills Evaluation at a rate of \$2,250 and a Functional Behavioral Assessment at an estimated cost of between \$1,190 and \$1,369 but provided no criteria, explanation or support for her position that unique circumstances exist to warrant the aforementioned amounts. This is especially troublesome for Mother's case since she must overcome the District's evidence showing that qualified individuals are able to perform the evaluation at a much lower rate. The disparity between the District's criteria and what Mother seeks, without supporting evidence, renders the amounts sought by Mother to be unreasonable.

Mother also argued that pursuant to guidance offered by OSERS, if a district wishes to restrict Mother's selection of an evaluator to those included in the list provided by the district, the list must be exhaustive, which she interprets as including "all possible" evaluators in a given region. In making this assertion Mother relies on two letters offering guidance on the issue of independent evaluations published by OSERS prior to the effective date of IDEA 2004¹³; those are: *Letter to Mr. Young* of 3/20/03¹⁴ and

¹³ "Disclaimer: Letters issued prior to December 3, 2004, may not be consistent with the IDEA, as revised by P.L. 108-446. Letters issued prior to August 14, 2006 may not be consistent with the final regulations for Part B published on that date at 71 Federal Register 46540."

Letter to Dr. Parker of 2/20/04. Neither of these is persuasive. In contrast with *Letter to Young*, Westwood is not requiring Mother to use one of the evaluators it suggested. In contrast to *Letter to Parker*, Westwood has not limited Mother to the evaluators on the list nor has Westwood claimed that it has the ultimate authority in choosing the independent evaluator.

In closing, I address a concern raised by Father. In his submission, as well as during the telephone conference call held with the Parties on September 18, 2009, Father communicated his desire to have Ms. Miles proceed with the evaluation of Student. Since Parents share joint custody, should Father sign a consent form for the evaluation with Ms. Miles, Westwood may proceed with the evaluation while it continues to defend in Mother's case. No further Motions to Dismiss or for Summary Judgment will be entertained. The Parties will be contacted by the BSEA to Advance the Hearing date.

ORDER:

1. Westwood's Motion to Dismiss with Prejudice is hereby **DENIED**.
2. Westwood's Motion for Summary Judgment is hereby **DENIED**.

So Ordered by the Hearing Officer,

Rosa I. Figueroa

Dated: October 7, 2009

¹⁴ "...Thus, there is nothing in IDEA that would prohibit a public agency from publishing a list of examiners that meet the agency criteria as set out in 34 CFR §300.502(e)(2), and the qualifications of examiners per 34 CFR §300.532 (g)-(j).

Further, this Office believes it is not inconsistent with IDEA for the district to maintain, and require parents to use, a list of qualified examiners that meet the same criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an IEE. Specifically, if the child's needs can be appropriately evaluated by the persons on the list *and* the list exhausts the availability of qualified people within the geographic area specified, then an agency can restrict parents to selecting from among those persons on the list. If such a list is maintained and parents are required to use it, the LEA must include in its policy that parents have the opportunity to demonstrate that unique circumstances justify selection of an IEE examiner who does not meet the agency's qualification criteria and do not appear on the agency's list of examiners." *Letter to Young*, OSERS 3/20/2003.