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

In re: Yuri[1] BSEA #1703425

RULING ON FALL RIVER PUBLIC SCHOOLS' MOTION TO DISMISS

This matter comes before the Hearing Officer on the Motion of the Fall River Public Schools ("District") to Dismiss the Hearing Request filed by Parent on behalf of Yuri against Argosy Collegiate Charter School ("Argosy") and the District. Fall River's Motion to Dismiss was filed on November 14, 2016. Parent filed her Opposition on November 21, 2016. Argosy declined to file a Response to the District's Motion. A telephonic Motion Session was held on November 28, 2016, during which the parties offered oral arguments to supplement their written submissions. Argosy elected not to participate in the Motion Session. For the reasons set forth below, Fall River's Motion to Dismiss is hereby DENIED.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Procedural History

On November 1, 2016, Parent filed a *Request for Expedited Hearing* with the Bureau of Special Education Appeals ("BSEA") against Argosy and Fall River, alleging that both entities had denied thirteen year-old Yuri a free, appropriate public education (FAPE). Specifically, Parent alleged that Argosy had: (1) failed to timely develop and propose an Individualized Education Program (IEP) reasonably calculated to provide FAPE; (2) punished Yuri for disability-related behavior on two occasions; (3) failed to review and revise Yuri's IEP to address his behavioral needs after a manifestation determination meeting; and (4) failed to consider and timely determine at a June 6, 2016 Team meeting whether Yuri was in need of an out-of-district placement. She also alleged that in failing to propose alternatives to the Stone School, a placement within the school district of residence proposed by the Team and rejected by her, Fall River had violated Yuri's right to FAPE. Among other things, she sought compensatory services from both Argosy and the District and an Order for Yuri's Team to "to seek and propose an appropriate out-of-district day school specific placement which would provide student with appropriate services and accommodations that is able to provide student FAPE." Expedited status was denied,[2] and a Hearing was scheduled for December 6, 2016.

On November 14, 2016, Argosy filed its Response to Parent's Hearing Request.[3] On the same day, Fall River filed a *Motion to Dismiss* and Memorandum in Support Thereof, asserting

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1 "Yuri" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

2 Both Fall River Public Schools ("Fall River" or "District") and Argosy Collegiate Charter School ("Argosy") filed Oppositions to Expedited Status, Fall River on October 31, 2016 and Argosy on November 2, 2016.

3 As Argosy took no position with respect to Fall River's Motion, I will not discuss Argosy's Response at this time.

that any claim against it must be dismissed. Yuri has been enrolled at Argosy since Parent withdrew him from Fall River in June 2014, the District argues, and as he has not been withdrawn from Argosy or enrolled in Fall River to date, Parent cannot maintain claims against the District. Furthermore, the District contends, it has been ready, willing, and able to provide therapeutic services to Yuri at the Stone School, located within the District, since it proposed that placement following a Team meeting on or about September 9, 2016. As Parent has not accepted that placement, responsibility for Yuri remains with Argosy pursuant to Massachusetts regulations and as such, Fall River is not a proper party to the matter.

In her *Opposition* to the District's Motion, Parent argues that Fall River has an obligation, as Yuri's school district of residence and participant in his placement Team, to provide Yuri with FAPE by proposing an appropriate placement for him. She asserts that the District has failed to do so, because the one placement it proposed, the Stone School, cannot meet his needs. As a result, Fall River may be liable for compensatory services.

B. Parent's Allegations Relevant to Claims Against Fall River[4]

According to Parent, the student's Argosy Team met on August 10, 2016, at which time it determined that Argosy could not provide appropriate services for Yuri and that Yuri may require an out-of-district placement. Parent rejected Argosy's proposed IEP and the Team concluded its meeting without identifying a specific placement.[5] At this time, Argosy scheduled a placement meeting to which it invited a representative of Fall River. The District refused to attend a placement meeting until after it had begun the school year on September 7, 2016. A placement meeting was held on September 9, 2016, at which the placement team, including Fall River, determined that Yuri requires a day school. Fall River proposed its own program at the Stone School, and refused to discuss potential out-of-district placements.

Parents and Yuri's providers raised serious concerns regarding the Stone School, including the peer group and staffing model. As an alternative to placement at the Stone School, Fall River proposed an extended evaluation at the same location. Parent rejected both of these options on October 10, 2016. Since October 25, 2016, Yuri has been hospitalized at the Community-Based Acute Treatment unit of Child and Family Services Inc. in New Bedford, MA due to escalating anxiety and hallucinations.

II. DISCUSSION

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

4 These allegations are drawn from Parent's *Hearing Request*.

5 Argosy has been providing tutoring for Yuri until Parent consents to an appropriate out-of-district placement, pursuant to 603 CMR

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."[6] 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."[7] 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). . ."[8]

B. Massachusetts Regulations Regarding Program Schools and Out-of-District Placements

Massachusetts regulations set forth the procedure to be followed when a program school, including charter schools such as Argosy, determines that a student may need an out-of-district placement. In these circumstances, once the Team makes that determination, it is directed to conclude the meeting without identifying a specific placement type; notify the school district where the student resides (hereinafter "school district of residence" or "SDOR") within two days; schedule another meeting to determine placement; and invite representatives of the SDOR to participate in that meeting as members of the placement Team.[9]

Pursuant to the relevant regulation, placement Team convened by the program school, including representatives of the SDOR, is directed to first consider whether the SDOR has an in-district program that could provide the services recommended by the Team. If so, the program school is directed to arrange with the school district of residence "to deliver such services or develop an appropriate in-district program at the program school for the student."[10] Should the placement Team determine that the student requires an out-of-district program to provide the services identified on the student's IEP, the Team proposes such a program (out-of-district day or residential school).[11]

The regulation provides, further, that "[u]pon parental acceptance of the proposed IEP and proposed placement, programmatic and financial responsibility shall return to the school district where the student resides."[12]

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

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

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

9 See 603 CMR 28.10(6).

10 *Id.* at 28.10(6)(2).

11 See *id*. at 28.10(6)(3).

Bearing this in mind, I now examine the allegations in this case.

C. Application of Massachusetts Regulation to the Allegations

The language of 603 CMR 28.10(6) anticipates a collaborative process among charter school, school districts of residence, and parents, by which the placement Team determines either that the SDOR has an appropriate in-district program for the student and arranges for the SDOR to deliver services through its own program or in collaboration with the charter school; or that the student requires an out-of-district program, in which case the Team proposes such a day or residential school.[13] The regulation specifies, but only in the subsection regarding out-of-district placement (as opposed to the subsection regarding placement in a program offered by the school district of residence) that programmatic and financial responsibility returns to the residential district upon parental acceptance of the proposed IEP and placement.[14] The regulation does not address what happens should the placement Team propose a program, either within the SDOR or out of district, that Parent rejects. The Massachusetts Department of Elementary and Secondary Education has provided some guidance, specifying that in the event a charter school, SDOR and Parent are unable to agree on placement, the student is to be "educated in the last agreed-upon placement (at the charter school) until the dispute is resolved through the BSEA."[15] As such, it would appear that a school district of residence could avoid assuming financial and programmatic responsibility for a student simply by proposing an inappropriate in-district program and refusing to consider alternatives. This cannot the collaborative process anticipated by the regulation.

At this time, with no evidence before me, I am unable to determine whether the Stone School is appropriate for Yuri. It may be that to the extent compensatory services are owed, they are owed by Argosy rather than Fall River. At this stage in the matter, however, taking as true the allegations of Parent's *Hearing Request* and any inferences in her favor that may be drawn therefrom,[16] Parent has met her burden to raise "factual 'allegations plausibly suggesting' . . . an entitlement to relief" from the District.[17]

CONCLUSION

12 *Id*.

13 *Id*. at 603 CMR 28.10(6)(a)(2).

14 *Compare* 603 CMR 28.10(2) with 603 CMR 28.10(3).

15 Massachusetts Department of Elementary and Secondary Education Technical Assistance Advisory SPED 2014-5 (Aug. 22, 2014).

16 *Blank*, 420 Mass. at 407.

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

Upon consideration of Fall River Public Schools' *Motion to Dismiss* and the arguments of the Parties, I find that Parent has met her burden to defeat the Motion.

ORDER

The District's Motion to Dismiss is hereby DENIED.

A Pre-Hearing Conference will take place at 10:00 AM on December 16, 2016.

By the Hearing Officer:

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Amy M. Reichbach
Dated: December 9, 2016