COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

SPECIAL EDUCATION APPEALS

In Re Student
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Chicopee Public Schools
&

Mass. Dept. of Elementary &
Secondary Education
(DESE)

BSEA No. 1608986

RULING ON MOTIONS TO DISMISS OF MASS. DEPT. OF ELEMENTARY AND SECONDARY EDUCATION AND CHICOPEE PUBLIC SCHOOLS

The instant case involves an 18-year old special education student (Student) who is a resident of Chicopee but who at all relevant times has been confined to a inpatient psychiatric hospital operated by the Massachusetts Department of Mental Health (DMH). On May 4, 2016 Student filed the instant *Hearing Request* with the Bureau of Special Education Appeals ("BSEA"). In his *Hearing Request*, Student asserts claims against both the Chicopee Public Schools (Chicopee or CPS) and the Department of Elementary and Secondary Education (DESE). Student filed on his own behalf with respect to his claims against Chicopee. Student brought his claims against DESE on behalf of himself and "all similarly situated students entitled to special education services [who] are confined in facilities operated by [DMH], the Department of Youth Services ("DYS"), Massachusetts Hospitals[1] and jails in the Commonwealth."

Student's *Hearing Request* contains claims for relief for alleged violations of rights secured by the Individuals with Disabilities Education Act (IDEA claims), Section 504 of the Rehabilitation Act (§504 claims), the Americans with Disabilities Act (ADA claims), the Fourteenth Amendment of the U.S. Constitution and the Massachusetts Declaration of Rights (constitutional claims).

The relief sought by Student falls into two categories. Within the first category Student seeks compensatory and prospective special education services. He seeks compensatory services to make him whole for alleged failures by DESE and Chicopee to implement an IEP with which Student entered the DMH facility as well to promulgate

1 It is unclear what Student is referring to by the term "Massachusetts Hospitals" but this has no bearing on this *Ruling.*

an appropriate successor IEP in a timely manner. Additionally Student seeks an order for prospective services.

As to the second category of relief Student seeks findings and conclusions from the BSEA that DESE's alleged policies and practices for delivery of special educational services to students similarly situated to Student contravene its obligations under §504 of the Rehabilitation Act, the ADA, and the U.S. and Massachusetts Constitutions. Student seeks an order from the BSEA (1) certifying a class of all students residing in institutions and served by DESE pursuant to MGL c. 71B §12 and (2) directing DESE to implement changes in its policies and procedures to ensure that institutionalized students with disabilities receive appropriate special education services.

On May 27, 2016, DESE filed a *Motion to Dismiss* Student's *Hearing Request*. ("DESE *Motion*"). Chicopee filed a *Partial Motion to Dismiss* shortly thereafter. Student filed an *Opposition* to DESE's and Chicopee's *Motions* on July 21, 2016. DESE and Chicopee filed *Responses* to Student's *Opposition* on, respectively, August 1 and 2, 2016.

PERTINENT FACTUAL AND LEGAL BACKGROUND

For purposes of this *Ruling* the following assertions are considered to be true and construed in favor of the party opposing dismissal, namely, the Student.

1. Student is an eighteen year-old individual with disabilities. There is no dispute that Student is eligible for special education and related services pursuant to applicable federal and state law. There also is no dispute that Student is a resident of Chicopee, and that the CPS is the Local Education Authority (LEA) responsible for providing Student's special education services. For reasons discussed below, CPS currently shares this responsibility with the DESE's division of Special Education in Institutional Settings (SEIS).

2. Student moved to Chicopee on or about September 28, 2015. At that time he had an accepted IEP from his prior residence in New Jersey (hereafter, the New Jersey IEP) which covered the period from September 2015 to September 2016. To date, this is Student's last accepted IEP. This IEP provided for counseling services as well as various accommodations within a private day school placement for students with emotional disabilities. Parent and Student allege that the New Jersey IEP also called for a full, grade level, college-preparatory academic curriculum, including physics and foreign language courses.[2]

3. Student enrolled in the CPS on or about September 28, 2015. The parties dispute whether Student's Parent informed CPS about the New Jersey IEP at the time of

[2] DESE disputes that the New Jersey IEP required these academic subjects, and claims that the only service called for in the IEP was counseling. Clearly there is a factual dispute between and among the parties over the terms of the New Jersey IEP.

enrollment. There is no dispute that Parent did provide CPS with a copy of this IEP by approximately October 22, 2015.

4. On or about November 17, 2015, Student was hospitalized at the Worcester Recovery Center and Hospital (WRCH) which is a DMH facility located in Worcester, MA. Student has remained confined to the WRC continuously since that date pursuant to court orders of commitment. Student's most recent court order of commitment extends until August 2017.

5. Although WRCH has an adolescent unit which contains a school program operated by SEIS for school-aged students, Student has been confined to an adult unit for nearly all of his tenure at WRCH because of his mental health status and related behavior. Unlike the adolescent unit, the adult unit does not have an established school program. Educational services to the few eligible students housed on the adult unit are provided via individual tutoring from SEIS and/or school district staff.[3]

6. Accordingly, on or about January 12, 2016, SEIS staff began providing 1:1 tutoring to Student in English and Math. Beginning April 4, 2016, tutoring was increased to three hours per week.

7. In March 2016, WRCH staff convened a "systems meeting" attended by representatives from Student's clinical team at WRCH and DMH as well as from SEIS and CPS. Parent/Student contend that this "systems meeting" did not meet the criteria for a Team meeting pursuant to the IDEA and MGL c. 71B. Subsequent to the systems meeting, CPS generated a document purporting to be a proposed IEP covering the period from March 23, 2016 to March 22, 2017. Parent has rejected this IEP.

8. To date, Student has received varying amounts of individual tutoring from instructors provided by CPS and/or SEIS but has not participated in a classroom setting or received a full complement of grade-level college preparatory coursework.

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3 DESE, through SEIS, is responsible for overseeing special educational services for eligible students housed in facilities operated by DMH, DYS, and the Departments of Public Health (DPH), and Corrections (DOC) as well as the Massachusetts Hospital School, and county jails and houses of correction. SEIS and each eligible student's LEA divide responsibilities for delivering special education services pursuant to 603 CMR 28.06(9) and 603 CMR 28.10. Under these regulations, the LEA of residence is responsible for evaluating the student, convening Team meetings, issuing IEPs and monitoring progress. SEIS is generally responsible for implementing the IEP within the institutional setting, usually within an in-house classroom program operated and staffed by SEIS and/or contracted personnel. SEIS also must maintain communication with each student's LEA. If SEIS cannot provide a specific IEP service (*e.g.,* because it does not have necessary providers on its staff), the LEA is responsible for providing or subcontracting for the service. 603 CMR 28.06(9)(c).

ISSUE PRESENTED

At issue is whether Student has failed to state a claim for which relief may be granted on the basis that (1) Student does not have a viable claim under the IDEA or MGL c. 71B; (2) the BSEA lacks jurisdiction or authority to (a) certify a class of all students residing in institutions and served by DESE pursuant to MGL c. 71B §12; (b) make findings of fact and rulings of law that DESE's policies and practices violated the rights of Student and class members under §504 of the Rehabilitation Act, the ADA, and the U.S. and Massachusetts Constitutions and (c) direct DESE to implement changes in its policies and procedures to ensure that institutionalized students with disabilities receive appropriate special education services.

Position of DESE

DESE argues that Student has failed to state a claim for which relief can be granted under federal or state special education statutes because the academic course work he seeks is not a special education service required by his last accepted IEP. The only special education service listed in the IEP is counseling, which has been made available to Student through WRCH staff. DESE argues that what Student actually seeks is an order changing his placement within WRCH to the adolescent unit so that he can attend the SEIS school program. The BSEA has no authority to issue such an order; Student's placement within WRCH is a clinical decision that is beyond the jurisdiction of the BSEA. Finally, DESE argues that the BSEA has no jurisdiction to certify a class of students or order class-wide relief.

Position of Chicopee Public Schools

Chicopee adopts DESE's position and also argues that the BSEA lacks jurisdiction over Student's claims under §504, Title II of the ADA, and the U.S. and Massachusetts Constitutions.

Position of Student

Student contends that the statutory grant of authority to the BSEA is sufficiently broad to encompass ADA and federal and state constitutional claims, so long as those claims relate to the "identification, evaluation, education program or placement" of Student. As to the claim for class certification, Student argues that the denial of FAPE allegedly suffered by Student arises not from particular animus to Student but from systemic policies and procedures of DESE that may affect all students who are similarly situated. Allowing the BSEA to grant class-wide relief would benefit all such students, thereby effectuating the IDEA's fundamental purpose of ensuring that all eligible children receive a FAPE. There is nothing in the applicable statutes that prohibits the

BSEA from granting class-wide relief under appropriate circumstances, and the instant case provides just such a circumstance.

Finally, Student's hearing request is not a disguised attempt to challenge the clinical judgment of WRCH in placing Student on an adult unit. Rather, Student seeks the "nearest approximation" of the program set forth in his IEP appropriate to his current setting.

FINDINGS AND CONCLUSIONS

1. Standard for Ruling on A Motion to Dismiss

The BSEA may dismiss a claim if the non-moving party fails to state a claim upon which relief may be granted. *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3), *Hearing Rules for Special Education Appeals*, Rule XVIIB. These provisions are analogous to Rule 12(b)(6) of the Federal and Massachusetts Rules of Civil Procedure. While not directly applicable to proceedings before the BSEA, hearing officers at the Bureau look to this rule for guidance when ruling on motions to dismiss.

In determining whether to dismiss a claim, a hearing officer must consider as true all facts alleged by the party opposing dismissal. The hearing officer should not dismiss the case if the facts alleged, if proven, would entitle the non-moving party relief that the BSEA has authority to grant. *Caleron-Ortiz v. LaBoy-Alvarado*, 300 F.3d 60 (1st Cir. 2002); *Ocasio-Hernandez v. Fortunato-Burset*, 640 F.3d. 1 (1st Cir. 2011). A motion to dismiss will be denied if "accepting as true well-pleaded factual averments and indulging all reasonable inferences in the plaintiff's favor…recovery can be justified under any applicable legal theory." See *Caleron-Ortiz, supra*. The factual allegations must be sufficient to "raise a right to relief above a speculative level on the assumption that the allegations in the complaint are true (even if doubtful in fact.)" *Bell Atlantic v. Twombly*, 550 U.S. 554, 555 (2007).

The entire case may be dismissed only if the Hearing Officer cannot grant any relief under federal[4] or state[5] special education statutes, or §504 of the Rehabilitation Act.[6] See *Calderon-Ortiz, supra; Whitinsville Plaza Inc. v. Kotseas*, 378 Mass. 85, 89 (1979); *Nader v. Citron*, 372 Mass. 96, 98 (1977); *Norfolk County Agricultural School*, 45 IDELR, 26 (2005). Conversely, if the opposing party's allegations raise the plausibility of a viable claim that may give rise to some form of relief cognizable under any one or more of these statutory provisions, the matter should not be dismissed. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).

4 Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et. seq*

5 M.G.L. 71B

6 29 U.S.C. §794

Particular claims must be dismissed, however, if they do not arise under the statutes referred to above. Unlike a court with general jurisdiction, the BSEA may consider only those claims for which enabling statutes and regulations provide express authority. See *Globe Newspaper Co. v. Beacon Hill Architectural Comm.*, 421 Mass. 570 (1996). Thus, MGL c. 71B§2A, the current Massachusetts enabling statute for the BSEA, limits its jurisdiction to the following:

> [Resolution of] disputes between and among parents, school districts, private schools and state agencies concerning (i) any matter relating to the identification, evaluation, education program or educational placement of a child with a disability or the provision of a free and appropriate public education to the child *arising under this chapter and regulations promulgated hereunder or under the Individuals with Disabilities Education Act…and its regulations; or (ii) a student's rights under Section 504 of the Rehabilitation Act of 1973, 29 USC section 794, and its regulations."*

(Emphasis supplied).

The state special education regulations implementing MGL c. 71B, 603 CMR 28.00 *et seq*., track the applicable statutory language as follows:

> (3) Bureau of Special Education Appeals: Jurisdiction. In order to provide for the resolution of differences of opinion among school districts, private schools, parents and state agencies, the [BSEA], pursuant to MGL c. 71B, §2A, shall conduct mediations and hearings to resolve such disputes…
>
> (a) A parent or a school district…may request mediation and/or a hearing…on any matter concerning the eligibility, evaluation, placement, IEP provision or special education in accordance with state or federal law, or procedural protections of state and federal law for students with disabilities…[or] on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act…

603 CMR 28.08(3).

The above-referenced Massachusetts statute and regulations are consistent with the pertinent federal provisions. The IDEA at 20 USC §1415(B)(6) and corresponding regulations at 34 CFR §§300.500-517, also permit parents and/or school districts to request mediations and/or due process hearings "relating to the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE to the child." 34 CFR §300.507(a)(1).

Finally, the BSEA has consistently determined that its jurisdiction is confined to making determinations under federal and state special education statutes and §504 of the Rehabilitation Act. See, for example, *Rulings on Motions to Dismiss* in *Noel & Holyoke Public Schools*, BSEA No. 1606558 (Byrne, August 29, 2016); *Oriel & Holyoke Public Schools*, BSEA No. 1606711 (Byrne, August 29, 2016); and cases cited in both of these rulings, including *In Re: Springfield Public Schools & Xylia*, 18 MSER 373 (Byrne, 2012). Moreover, "due to the administrative exhaustion requirements established by the First Circuit in *Frazier v. Fairhaven School Committee*, 276 F.3d 52 (1st Cir. 2002), even when the BSEA does not have the authority to award the relief sought [such as damages] a hearing officer must determine whether the claim presented is 'IDEA-related' so as to implicate both the statutory obligation to provide FAPE and the expertise of the administrative fact finding agency." *Noel & Holyoke*, supra, citing *Xylia*, supra. See also *CDBE*, 17 MSER 143 (Crane 2011) Put another way, even if the BSEA is required to find facts that ultimately will be used in a bid for relief that the BSEA cannot grant, the hearing officer must do so within the confines of the BSEA's express authority, namely, application of the IDEA, MGL c. 71B and/or §504. *Id*.

2. **Claims Under the IDEA, MGL c. 71B, and §504**

Student claims, *inter alia*, that DESE and CPS have denied Student a FAPE because they allegedly failed to implement a "stay put" IEP from New Jersey. Student further alleges that DESE and CPS have failed to evaluate Student and develop a successor IEP for Student. DESE and CPS deny these allegations. The parties appear to dispute the interpretation of the New Jersey IEP as well as whether this IEP was or could have been implemented within the confines of the WRCH. The parties also dispute whether the "systems meeting" held in March 2016 was a properly-constituted Team meeting and whether the rejected IEP that was issued after that meeting was appropriate. These disputed matters cannot be resolved by a review of the parties' respective allegations and arguments. Rather, they are appropriate for adjudication by the BSEA after an evidentiary hearing.[7]

Student's claims stemming from federal and state special education statutes and §504 fall squarely within the jurisdiction and authority of the BSEA. If Student proves his claims, the BSEA is authorized by statute and case law to provide compensatory and/or prospective educational services. For the foregoing reasons, DESE's and Chicopee's *Motions to Dismiss* claims brought pursuant to federal and state special education statutes as well as §504 of the Rehabilitation Act are DENIED.

3. **Claims for Class Certification and Relief**

Student requests that the hearing officer certify a class of all special education-eligible students residing in institutions who are served by DESE pursuant to MGL c.

7 In this vein, DESE's characterization of Student's position as an attempt to overturn the clinical judgment of WRCH staff is simply an argument which may or may not be supported by evidence at a hearing, and does not justify dismissal of Student's special education and § 504 claims.

71B §12 (2); make findings of fact and rulings of law with regard to this class; and direct DESE to implement changes to its policies and procedures accordingly.

As noted above, BSEA jurisdiction is limited. Nothing within the grants of authority to the BSEA under 20 USC §1415(B)(6), MGL c. 71B, §3, or 603 CMR 28.08(3) permits the BSEA to go beyond resolving the dispute between individual parties. The issue of class certification and the related issue of the BSEA's authority to address systemic claims have been addressed in two recent BSEA rulings in other cases. With respect to class certification, hearing officer Raymond Oliver dismissed Parents' claims related to systemic class-wide claims not related to the individual student, stating that the above-cited statutes and regulations repeatedly refer to "*a child* with a disability, the child, the student, all in the singular, individual form." *In Re Springfield Public Sch*ools, *Ruling on Motion to Dismiss*, 19 MSER 294, 295. (Oliver 2013). The *Springfiel*d ruling goes on to state the following

> Unlike the federal courts (see Rule 23 of the Federal Rules of Civil Procedure) the BSEA has no statute, regulation or rule providing for class action claims…has never engaged in class wide fact finding and does not have the experience, expertise, or institutional capacity to provide administrative fact finding on class action claims which could be of assistance to the federal court in any potential subsequent class action litigation. *Id*.

The issue of systemic claims was addressed by hearing officer William Crane in *In re Greater New Bedford Regional Vocational Technical High School ("GNBRVT")*, *Ruling on [Motions]*, 19 MSER 220, at 223 (Crane, 2013). Guided by that case, I conclude that any facts that I may find in the instant case, based on the evidence produced at a hearing, are limited to what is necessary to determine whether CPS and/or the DESE have fulfilled their respective obligations to provide the named individual Student with FAPE; that is, whether or not DESE and CPS have complied with, and are complying with, federal and state special education laws as well as §504 of the Rehabilitation Act. See *GNBRVT*, *supra*, citing *Roe ex rel. A.L. v. Johnson*, 2012 WL 3561919 (D. Mass. 2012). Such findings must relate to the foundational issue of whether the individual Student in this case has received FAPE during the relevant time period and whether Student and Parent had legally-adequate opportunities to participate in developing Student's IEP.

If either CPS or DESE violated relevant statutory or regulatory provisions, appropriate relief must be crafted to reflect the educational deprivations that such violations caused the individual Student. As such, if the evidence supports a finding that Student has been denied a FAPE, I may consider whether policies and procedures

of DESE and/or CPS have contributed to this denial.[8] I may not, however, make findings, or order relief, as to a broader class which includes persons who do not have disputes before the BSEA and, therefore, have not presented evidence as to whether and how these policies and procedures have affected their rights to a FAPE. See *GNBRVT*, *supra*, at 222-223.

For the reasons stated above, Student's claims for class certification and class-wide relief are DISMISSED.

4. **Claims under ADA, U.S. Constitution and Massachusetts Declaration of Rights**

The limited jurisdiction of the BSEA does not extend to claims brought under the ADA, the U.S. Constitution, or the Massachusetts Declaration of Rights. See *In Re GNBRVT*, *supra*. Not only does the BSEA lack specific statutory authority over such claims, it also lacks both expertise and experience in these areas of the law to evaluate and adjudicate such claims.

The judicial limitation on the jurisdiction of the BSEA has arisen in the context of the First Circuit's requirement that parents who seek tort-like damages from school districts must exhaust the BSEA's administrative hearing process if their cases are "rooted in" the IDEA, even if the BSEA cannot award the remedy sought. *Frazier v. Fairhaven School Committee*, 276 F. 3d 52 (1st Cir. 2002) as reaffirmed by Judge Woodlock in *Bowden v. Dever*, 8 MSER 90 (D. Mass. 2002) and *CDBE Public Schools v. Massachusetts Bureau of Special Education Appeals*, et al., Civil Action No. 11-10874DPW slip op. (D. Mass. 2012).

When determining that the BSEA's exhaustion requirement did not apply to tort and constitutional claims the court in *Bowden* stated that "*Frazier* suggests that a claim asserted under non-IDEA law may still be subject to the exhaustion requirement if the IDEA procedures either can provide some meaningful relief or a superior record on which the court could make its determination." *Bowden*, 8 MSER at 92. The Court went on to comment that exhaustion would not provide the benefits of "meaningful relief" or a "superior record" as to the tort and bodily integrity claims in that case, pointing out that exhaustion would "neither provide appropriate relief nor does it offer any particular expertise. In fact, courts are the traditional and more expert arbiters of questions of tort and constitutional law." *Id*., at 93.

Similar considerations apply to the ADA, which were addressed *In Re Springfield Public Schools*, 20 MSER 37 (Crane, February 2014). In that case, Hearing Officer

8 The evidence may show that DESE's and/or CPS' policies and procedures contravene applicable special education statutes or regulations, have not caused denial of FAPE in Student's particular case. Conversely, the evidence may show that DESE and/or CPS policies and procedures fully comply with applicable law, but that Student was denied a FAPE nonetheless, for one or more of a variety of reasons. Such reasons might include but not be limited to inadequate or inappropriate evaluations or IEP goals, lack of qualified staff or non-implementation of legally-adequate policies.

Crane dismissed the student's ADA claims, reaffirming the statutory limitations of BSEA authority to matters related to provision of FAPE and stating that "[t]he BSEA's jurisdiction does not explicitly extent to the ADA," which, unlike the IDEA and §504, contains no FAPE requirement. *Id*. at 38, 39.

Moreover despite certain similarities in §504 and the ADA, the two statutes "are sufficiently different so that one may not simply impute [BSEA] jurisdiction [over] the ADA on the basis of the BSEA's jurisdiction over §504." *Id*., at 38. Finally, the ruling in the *Springfield* case notes that the BSEA has no particular expertise with the procedural requirements of the ADA, such as, for example, the mandatory interactive process to modify policies and practices. *Id.* at 39.

Based on the foregoing, Student's constitutional and ADA claims are DISMISSED.

ORDER

The *Motions to Dismiss* of DESE and Chicopee are ALLOWED IN PART and DENIED IN PART.

Specifically, Student's claims for class certification and relief as well as claims under the ADA, the U.S. Constitution and the Massachusetts Declaration of Rights are DISMISSED. Claims brought under the IDEA, MGL c. 71B, and §504 of the Rehabilitation Act survive the *Motions to Dismiss* and may be pursued at a hearing on the merits.

By the Hearing Officer

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Sara Berman

Dated: