COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

Bureau of Special Education Appeals

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Student

& BSEA No. 1900241
Boston Public Schools

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MEMORANDUM OF PRIOR RULING ON MOTION TO DISMISS

On July 6, 2018, Parent filed a Request for Hearing with the BSEA in which she alleged that the Boston Public Schools (BPS, Boston, or School) had unlawfully failed to provide her with a complete copy of Student's education records as required by federal and state special education statutes and regulations as well as the Family Education Rights and Privacy Act (FERPA) and Massachusetts Student record regulations. Parent further alleges that she believes that the services and placement that BPS has provided to Student have not allowed him to make effective progress in the least restrictive environment. Without Student's complete educational record, however, Parent asserts that she is unable to fully understand Student's progress or lack of progress and thus cannot meaningfully exercise her due process rights.

On July 18, 2018, Boston filed a *Motion to Dismiss the Request for Hearing*, asserting that Parents had failed to state a claim on which relief could be granted because the BSEA lacks jurisdiction to hear and decide this matter. Parents filed their *Opposition* thereto on July 25, 2018. The parties argued their respective positions during a telephonic motion session held on August 14, 2018. At the conclusion of the parties' presentations, this Hearing Officer orally informed the parties that the *Motion to Dismiss* was DENIED. The following is a statement of written findings and conclusions in support of the prior ruling.

Under Rule 17B of the BSEA *Hearing Rules for Special Education Appeals*, as well as the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3) 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 hearing officer must consider as true all facts alleged by the party opposing dismissal and should not dismiss the case if those facts, if proven, would entitle the non-moving party to relief that the BSEA has authority to grant. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Ocasio-Hernandez v. Fortunato-Burset*, 640 F. 3d 1 (1st Cir. 2011). Put another way, a motion to dismiss will be denied if "accepting as true all 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 v. LaBoy-Alverado*, 300 F.3d 60 (1st Cir. 2002). The factual allegations must be sufficient to "raise a right to relief above a speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact.)" *Iannocchino v. Ford Motor Co*., 451 Mass. 623, 636 (2008), quoting *Bell Atlantic v. Twombly*, 550 U.S. 554, 555 (2007).

In the instant case, BPS asserts that the Hearing Officer cannot grant the relief sought by Parent because the BSEA lacks jurisdiction to hear this dispute. Specifically, Boston argues that Parent's complaint about its alleged failure to provide Student's education records falls outside of the statutory definition of the BSEA's jurisdiction because it does not directly involve "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…"[1] Rather, according to Boston, Parents may appeal their concern with Student's education records with the Superintendent and then with the School Committee, pursuant to a process set forth in the Massachusetts Student Record Regulations, 603 CMR 23.09.

Boston's argument is not supported by applicable law. As Parent states in her *Opposition* to the *Motion to Dismiss*, the right to view Student's complete educational record is one of the essential procedural safeguards guaranteed by the IDEA at 20 USC §1415(a)(1) and its implementing regulations, 34 CFR §§300.501; and 610-624.[2] These procedural safeguards include the right of parents to "examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a [FAPE] to such child" 20 USC Sec. 1415 (b)(1); *Shaffer v. Weast*, 546 US 49, 60 (2005). Specifically, 34 CFR 300.613 provides that school districts must "(a)…permit parents to inspect and review any education records relating to their children that are collected, maintained or used by the agency under this part…without unnecessary delay and before any meeting regarding an IEP or any hearing…or resolution session….and in no case more than 45 days after the request has been made…" *Id*. Additionally, pursuant to 34 CFR §300.616, school districts "must provide parents on request

[1] MGL c. 71B§2A(a); see also 20 USC §1415(b); 34 CFR 300.507(a); 603 CMR 28.03(3)
[2] This provision is explicitly incorporated into the Massachusetts special education statute at MGL c. 71B, §2A(a).

a list of the types and locations of education records collected, maintained, or used by the agency." *Id.*

A primary purpose of these procedural safeguards is to facilitate the parent-school collaboration envisioned by these statutes by enabling Parents to be informed and effective participants in the Team process as well as in the planning, developing, delivery, and monitoring of special education services. Such participation is embedded throughout the IDEA, MGL c. 71B, and corresponding regulations[3] and has been consistently emphasized by the courts. In *Bd.of Education of the Hendrick Hudson Central School District v. Rowley*, 458 US 176, 201 (1982), the Supreme Court stated "…Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process…as it did upon the measurement of the resulting IEP against a substantive standard." *Rowley*, 458 U.S. at 405-406. See also: *Roland M. v. Concord School Committee*, 910 F.2d 983, 994 (1st Cir. 1990); *Maine School Admin. Dist. No. 35 v. Mr. R.,* 32 F.3d 9, 12 (1st Cir. 2003). *In Re Framingham Public Schools and Quin,* 22 MSER 137 at 142 (Reichbach, 2016), and cases cited therein.

Clearly, where procedural safeguards, including parental access to student records, are deemed an essential component of FAPE, such safeguards should be treated as encompassed in "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…". As such, the alleged failure of a school district to implement these safeguards may be the proper subject for a due process hearing, particularly when a parent alleges that such failure has deprived a child of FAPE or prevented meaningful parental participation in the Team process.[4]

In the instant case, Parent claims that Boston's alleged failure to provide her with educational records in a timely manner has directly impeded her ability to meaningfully participate in the Team process. Parent asserts that without access to her child's records, she is unable to monitor or assess his progress, make meaningful decisions about the adequacy of his programming, or determine whether she should pursue a due process claim. She seeks an order from the BSEA directing Boston to provide her with the records at issue. For the reasons stated above, the BSEA has jurisdiction over this claim and, if Parent meets her burden of persuasion, the BSEA has the authority to grant her the

[3] See, for example, 20 USC §1414(d)(1)(b)(i).
[4] Boston relies on a BSEA ruling issued in 2002 (*In Re: Northborough Public Schools*, 8 MSER 301 (Putney-Yaceshyn, 2002)) in which the hearing officer dismissed a hearing request that was based solely on failure of the district to produce the student record. That ruling is inapplicable here because it does not reference the student records provisions contained in the IDEA and corresponding federal regulations.

relief requested.[5] As such, Parent's claims may be heard, and Boston's *Motion to Dismiss* must be denied.

CONCLUSION AND ORDER

For the foregoing reasons, the *Motion to Dismiss* of the Boston Public Schools is DENIED. As previously agreed by the parties, a pre-hearing conference is scheduled for **November 7, 2018** and a hearing is scheduled for **January 25, 2019**.

By the Hearing Officer,

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Dated: October 29, 2018

[5]As pointed out by Parent the Massachusetts Student Record Regulations state explicitly that nothing in those regulations precludes parents from seeking enforcement in "a court or administrative agency of competent jurisdiction." 603 CMR 23.09(5).