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

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In Re: Ashburnham-Westminster R.S.D.

&. BSEA #2303703

Student

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RULING ON PARENTS' MOTION TO DISMISS

On October 31, 2022, the Ashburnham-Westminster R.S.D. ("School" or "District") filed a hearing request with the BSEA in which it alleges that the frequency, severity, and duration of Student's disability-related behaviors are too severe for Student to remain in his current placement, that Student's maladaptive behaviors prevent him from accessing his educational programming and jeopardize his safety, and that Student requires an out-of-district placement in order to receive a free, appropriate public education (FAPE). The School further alleges that following a Team meeting held on September 19, 2022, it requested Parents' consent to send referral packets to seven out-of-district programs, but that Parents consented to only one such referral, refused to visit the single program to which a packet had been sent and stated that they did not believe Student needed a change in placement. The relief sought by the District is "an order allowing it to pursue all of the out-of-district schools listed in the consent sent to Parents as well as any others that the Parents and District agree to and an order for placement at an out of district placement designed to meet the needs of students with [Student's] profile." A hearing in this matter is scheduled for March 2 and 3, 2023.

On December 22, 2022, the parties attended a pre-hearing conference with the undersigned hearing officer and agreed to several terms, which were memorialized in a *Memorandum from Prehearing Conference* dated December 23, 2022. In pertinent part, the parties stipulated that "Parents agree to allow the District to send unredacted referral packets to potentially appropriate out of district day placements…" There is no dispute that Parents provided the requisite consent, that the District sent unredacted packets to six potential placements (in addition to the referral previously sent to the single program referenced above), that to date, one program has invited Parents to tour its facility, and that none of the programs to which referrals were sent has accepted Student.

On February 17, 2023, Parents filed the above-referenced *Motion to Dismiss* the School's hearing request, asserting the following: (1) they had "done all that has been requested of us…which was to allow the District to send out [Student's] information packet to 7 special education schools. We complied with that request" as well as with a request to visit schools that had offered tours; (2) no school had accepted Student and "all requests of us have been fulfilled," such that "there appears to be no basis on which to have a hearing;" (3) Student's behavior has improved and his time away from learning has decreased since the hearing request was filed, and (4) the School failed to hold a resolution meeting.

The School filed its *Opposition* to Parents' *Motion to Dismiss* on February 21, 2023, arguing that despite having allowed the referrals, Parents' *Motion* does not address the School's request for an order for an out of district placement in addition to the consented-to request for an order allowing the school to pursue referrals. The School also asserts that Parents have stated that some of the schools in question are located too far away from Student's home and thus cannot be considered, and disputes Parent's claim that Student's behavior has improved.

For reasons discussed below, Parents' *Motion to Dismiss* is GRANTED as to the request for "an order allowing it to pursue all of the out-of-district schools listed in the consent sent to Parents" in or about September 2022, and DENIED as to the School's other claim for relief, namely, an order for placement in an out-of-district placement designed for students with Student's profile.

DISCUSSION

Parents' *Motion to Dismiss* appears to be based on two grounds: first, that the underlying dispute has been rendered moot by Parents having consented to the School issuing referral packets and, second, that the District has failed to state a claim upon which relief can be granted both because no outside placement has yet accepted Student and because Student's behavior that prompted the hearing request has improved. For reasons discussed below, neither of these grounds warrants dismissal.

Mootness

The authority and jurisdiction of the BSEA extends only to current, live disputes between parties over "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free, appropriate public education to such child…" 20 USC §1415(b)(6)(A); 34 CFR §300.507(a)(1); MGL c. 71B, §2A(i); 603 CMR 28.08(3). Neither courts nor the BSEA may adjudicate matters where there is no live controversy between the parties such that the case becomes moot. See, *e.g., Thomas R.W. ex rel Pamela R. v. Mass. Dept. of Education*, 130 F. 3d 477 (1st Cir. 1997), and cases cited therein; *In Re Middleboro Public Schools, Ruling on Motion for Summary*

Judgment, BSEA No. 1908178 (Berman, 2019). In the context of a BSEA proceeding, a hearing request may be dismissed as moot if the party against whom the hearing request was filed grants all of the relief sought in the hearing request. *In Re: Littleton Public Schools, Ruling on Parents' Motion for Summary Judgment and School's Motion to Dismiss,* BSEA No. 2009921 (Berman, 2020)

In the instant case, Parents assert that the "live controversy" between the parties ended when they agreed to allow the District to send referral packets to potential outside placements, and, as such, their hearing request became moot. As the District points out in its *Opposition* to the *Motion to Dismiss*, however, the relief sought in the hearing request includes not only an order allowing referrals, but also an order for an out-of-district placement, which would require a finding that Student requires such placement in order to receive a FAPE. There is no evidence that the parties have reached agreement as to this claim, which, thus, continues to constitute a "live controversy." As such, the School retains the right to an evidentiary hearing on this issue. The *Motion to Dismiss* is GRANTED as moot with respect to the limited issue of allowing the School to pursue all of the out-of-district schools listed in the consent sent to Parents, but DENIED as to the remaining claim.

Failure to State a Claim On Which Relief May Be Granted

According to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3), and the *Hearing Rules for Special Education Appeals*, Rule XVIIB, the BSEA may dismiss some or all of a hearing request if the party opposing dismissal fails to state a claim upon which relief may be granted. These provisions are analogous to Rule 12(b)(6) of the Federal and Massachusetts Rules of Civil Procedure. While Rule 12(b)(6) is not directly applicable to proceedings before the BSEA, hearing officers at the Bureau look that Rule for guidance when evaluating motions to dismiss.

In determining whether to grant a such a motion, 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 party opposing dismissal 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).

Dismissal is appropriate only if the hearing officer cannot grant any relief under federal and state special education statutes (the IDEA and MGL c. 71B) or

§504 of the Rehabilitation Act. (29 USC §794) 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 allegations of the party opposing dismissal 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).

In the instant case, in addition to arguing that the School's claims are moot, Parents argue that the hearing request should be dismissed because to date, no out-of-district placement has accepted Student, and because the behavior that originally prompted the hearing request has improved. I construe Parents' arguments as an assertion that the School has failed to state a claim on which relief could be granted, and conclude that these arguments do not warrant dismissal of the School's hearing request.

With respect to the first argument, the School's pursuit of an order for an out-of-district placement is predicated on its claim that Student needs a change in placement to receive a FAPE. The School's claim is cognizable under the IDEA, and, therefore, is not subject to dismissal. The absence of an available program at the time of hearing does not invalidate this claim. If the School meets its burden of proof at hearing, then the hearing officer could order the School to take whatever actions might be necessary to ensure Student's receipt of FAPE given the circumstances, such as, for example, monitoring the status of referrals and placing Student in the first appropriate opening when it becomes available, and/or expanding the scope of the placement search to include additional referrals.

Further, Parents' assertion, disputed by the School, that Student's behavior has improved to the point that he does not need a change in placement is, at present an unproven allegation that does not warrant dismissal of the hearing request prior to the hearing. Rather, the parties' respective positions must be evaluated during the hearing process. As such, the School has the right to proceed to hearing and present evidence in support of its claims, and Parents have the right to present evidence to the contrary.

Lastly, Parents argue that the School failed to convene a resolution meeting. The IDEA mandates resolution meetings only in cases where the due process hearing is requested by a parent. 20 USC §1415(f)(1)(B); 34 CFR §300.510. Here, where the School is the party initiating the due process hearing, no resolution meeting or resolution period is required under the IDEA.

CONCLUSION AND ORDER

For the reasons stated above, the Parents' *Motion to Dismiss* is GRANTED as to the School's request for an order allowing the School to send referrals to the out-of-district placements referred to in the hearing request. The *Motion to Dismiss* is DENIED as to the School's request for a determination that Student requires an out-of-district placement to receive a FAPE and an order for an out-of-district placement. The parties shall proceed to hearing on March 2 and 3, 2023 on the surviving claim and request for relief.

By the Hearing Officer,

/s/ *Sara Berman*

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Sara Berman
Dated: February 23, 2023