

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

In Re: Student v.
Taunton Public Schools District

BSEA # 1304738

**Ruling on Taunton Public Schools' Motion To Dismiss with Prejudice and
Objection to the Sufficiency of the Hearing Request**

On January 28, 2013, Taunton Public Schools (Taunton) filed a Motion to Dismiss with Prejudice and Objection to the Sufficiency of the Hearing Request in the above-referenced matter, relying on Rule I (E), and Rule XVII (B)(4) of the Hearing Rules for Special Education Appeals. Taunton argued that none of the issues identified by Parents in the Hearing Request falls within the jurisdiction of the BSEA. In the alternative, Taunton challenged the sufficiency of the Hearing Request, stating that Father had failed to identify any relief sought regarding Student's education.

Parents did not respond to Taunton's Motion.

Facts:

1. On August 10, 2011, the Bureau of Special Education Appeals (BSEA) received Parents' Hearing Request in a previous BSEA matter. This matter (BSEA #12-1212) was adjudicated on December 12, 2011, by Hearing Officer Lindsay Byrne, who addressed issues regarding alleged denial of FAPE and procedural violations. Hearing Officer Byrne's Decision considered Student's derived benefit from his educational program, and entered determinations regarding the appropriate IEP and placement for Student. The Decision also addressed Parents concerns regarding alleged harassment of Student's family, improper maintenance of information outside Student's records, discrimination, retaliation, challenges to the qualifications and certifications of Taunton's personnel, homeschooling and alleged denial of parental participation in the IEP process (Administrative notice of BSEA #12-1212).
2. Parents filed a civil action in Superior Court on or about December 1, 2011 (BRCV2011-01310), disputing some of the same issues raised in BSEA #12-1212 and specifically seeking that the Court

...grant [a] Court Order to the parents in order to receive the complete file which is known to contain harmful, slanderous, unlawful material in the past, and to be ordered copied by the parent free of charge as well as the name of the person who gathered the file past and present (SE-A).

3. In response to Parents' civil action, Taunton filed a Motion to Dismiss on January 6, 2012, which Parents opposed on January 14, 2012 (SE-A).
4. Via letter dated April 2, 2012, Taunton's attorney wrote to the Bristol County Civil Clerk's Office stating her understanding that at the conclusion on the March 20, 2012, Hearing on Taunton's Motion to Dismiss, Judge Kane wanted Taunton to provide Parents an additional opportunity to review their son's record and later report the status to the Court (SE-A). The following date, March 21, 2012, Taunton sent Parents a certified letter advising them that Student's record was available for review immediately, during school hours and requesting that Parents schedule the visit at least one day before they intended to review the record. The attorney advised Parents of her intention to submit a status report to the Court in early April. Parents left a voicemail message for Taunton on March 26, 2012 stating, among other things, that they were in receipt of Taunton's letter and had no intention of going to Taunton to look through any files. As of April 2, 2012 Parents had not availed themselves of the opportunity to review Student's records and Taunton requested that the Court enter a determination on its Motion to Dismiss or schedule the matter for further argument if it did not have sufficient information to enter a ruling (SE-A).
5. Judgment granting Taunton's Motion to Dismiss was entered by the Superior Court on April 12, 2012 (SE-A).
6. On December 10, 2012, Parents filed a complaint involving Taunton with the Program Quality Assurance (PQA) Division of the Massachusetts Department of Elementary and Secondary Education (SE-B). Following an investigation, interviews and a review of records, DESE's PQA issued a Closure Letter on January 14, 2013, concluding in large part that the concerns raised by Parents fell outside the jurisdiction of the DESE and would not be investigated. DESE did not substantiate Parents' allegations that they had been denied prompt access to Student's records when requested. DESE further noted that the student record regulations pertained solely to a student's record and what is kept in that record. Parents alleged that Taunton maintained separate files

...containing information regarding the parents' character. Specifically [asserting that] the District uses information in a separate file to characterize the student's parents as unfit caregivers and that information is shared with the Department of Children and Families ("DCF").

PQA similarly found that Parent's allegation that Taunton had forwarded threatening letters and contacted local police in an attempt to harass Student's family was found to be a local matter for which Parents should contact the School Committee or Taunton's Superintendent of Schools. Regarding Parents' allegations of a denial of FAPE, DESE's inquiries did not show that Taunton had violated any law, regulation or policy regarding Student's education, special education and services (SE-B).

7. On January 15, 2013, Parents filed a second Hearing Request with the BSEA on behalf of his son “[first name] [second name], [last name]”.¹
8. Student is a non-verbal disabled eligible minor who resides with Parents in Taunton.
9. The following is a verbatim reproduction of Parents’ Description of the Issues in their January 15, 2013, Hearing Request

The Student on October 20, 2011, had to be removed for his safety and had to be homeschooled due to neglect of the dist[ri]ct [illegible word] and neglect of his education.

The Superintendent refused to respond to the Parent’s Request for information that mandated under the law.

The Superintendent (Hackett) have lead and allow her staff to threaten, harass, slander and file false complaints (DFS)[sic] against this family that cause neglect of the Student education, and violates the law.

The Superintendent have [sic] ordered armed police to my house to unlawfully a[b]duct my non-verbal, disabled son.

10. The Proposed Resolution of the Problem section consisted solely of the word “Fair”.
11. The Hearing Request was processed by the BSEA on January 16, 2013, and a Notice of Hearing was issued scheduling the Hearing for the Student on February 19, 2013, a telephone conference call with the Hearing Officer on February 4, 2013, and providing the Parties with the deadlines regarding other pertinent IDEA required activity.
12. On January 25, 2013, Taunton’s attorney filed an appearance with the BSEA, a response to the Hearing Request and notice of Taunton’s intention to file a Motion to Dismiss and Challenge to the Sufficiency of the Hearing Request before the BSEA.
13. Taunton filed the above-referenced Motion to Dismiss and Challenge to the Sufficiency of the Hearing Request on January 28, 2013.²
14. Consistent with the activities listed in the Notice of Hearing, a telephone conference call was attempted on February 4, 2013, but Parents did not respond to attempts to reach them by phone.
15. On February 5, 2013, Taunton filed a request for postponement of the Hearing. Taunton requested that a Hearing date be set following issuance of a Ruling on its Motion to Dismiss.

¹ In the section of the Hearing Request Form requesting information regarding the school Student attends, Parents listed: “Home schooled (first name), Hopewell [second name]” what appeared to be the first and middle names of the son, which may in fact be the names of two separate children as explained later in this Ruling. Hopewell is the name of an elementary school in Taunton.

² Under Rule VII of the *Hearing Rules for Special Education Appeals*, a party on whom a Motion has been served has seven calendar days to file an objection to said motion and to request a hearing on the motion.

16. An Order was issued by the BSEA on February 6, 2013, granting the request for postponement. A second order was issued the same day encouraging Parents to respond to Taunton's Motion to Dismiss and extending the deadline for Parents to file their response through February 19, 2013.
17. Father contacted the BSEA by telephone on February 11, 2013 and verbally stated to a support staff that he was in agreement with Taunton's postponement request. However, on February 13, 2013, he wrote to the BSEA stating his objection to the postponement.
18. Parents did not file any objection or other response to Taunton's Motion to Dismiss and Challenge to the Sufficiency of the Hearing Request, and did not request a hearing on the motion. The record closed on February 19, 2013 for purposes of this ruling.

Conclusions of Law:

The BSEA Hearing Rules and the Standard Adjudicatory Rules for Practice and Procedure³ authorize the Hearing Officer to dismiss a case if the party requesting the appeal fails to state a claim upon which relief can be granted.⁴ Similarly, both the Federal and Massachusetts Rules of Civil Procedure provide that a motion to dismiss can be granted when a party fails to state a claim on which relief can be granted.⁵

In order for a complaint to survive a motion to dismiss, it must contain factual allegations that "raise a right to relief above the speculative level."⁶ The hearing officer will accept all factual allegations "as true and draw all reasonable inferences in the plaintiff's favor."⁷ Legal conclusions, however, will not be entitled to a presumption of truth. While legal conclusions may "provide the complaint's framework, they must be supported by factual allegations."⁸ This is further explained in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and its forerunners⁹, providing the "modern understanding" of Rule 12(b)(6). As such, the question on a motion

³ 603 C.M.R. 28.08(5)(b) ("Except as provided otherwise under federal law or the in the administrative rules adopted by the Bureau of Special Education Appeals, hearings shall be conducted consistent with the formal Rules of Administrative Procedures contained in 801 C.M.R. 1.00.")

⁴ BSEA Hearing Rule XBII (B)(4) ("Any party may file a motion or request to dismiss a case for . . . failure to state a claim upon which relief can be granted"); 801 C.M.R. 1.01(7)(g)(3) ("The Presiding Officer may at any time, on his own motion or that of a Party, dismiss a case . . . for failure of the Petitioner to state a claim upon which relief can be granted").

⁵ FED. R. CIV. P. 12(b)(6); MASS. R. CIV. P. 12(b)(6).

⁶ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007).

⁷ *Doe v. Boston Public Sch.*, 560 F.Supp.2d 170, 172 (D.Mass. 2008). *See also, Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009) ("To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."); *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011) ("Non-conclusory factual allegations in the complaint must then be treated as true, even if seemingly incredible.")

⁸ *Ashcroft*, 129 S. Ct. at 1940.

⁹ *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), which along with *Iqbal*, explains that "an adequate complaint must provide fair notice to the defendants and sate a facially plausible legal claim." *Ocasio-Hernandez v. Fortuño-Burset*, 640 F.3d 1, 8-9 (1st Cir. 2011).

to dismiss is not a matter of whether the plaintiff will prevail, but rather if the plaintiff should be given an opportunity to offer evidence in support of his claims.¹⁰ In this light, none of Parents' allegations can give rise to the plausibility of a factual dispute between the Parties if Taunton is to prevail in its Motion to Dismiss and Challenge to the Sufficiency of the Hearing Request. Considering the totality of the evidence and the material facts, it is clear that Taunton must prevail as a matter of law as explained below.

I initiate the analysis by examining Parents' Hearing Request which is the only submission actually made by Parents to date. With exception of issue number one, Parents' Hearing Request as drafted, makes it difficult to ascertain whether the allegations raised by Parents occurred solely in the past or whether their claims allege ongoing or current transgressions. As such, for purposes of this Motion, I assume that their claims refer to past and present allegations except where a specific timeframe is provided.

Parents' Hearing Request appears to raise the following issues:

- 1) Safety issues due to educational neglect in school requiring Parents to remove Student on October 20, 2011, and initiate home schooling.
- 2) Failure by Taunton's Superintendent to respond to Parents' Request for information as mandated under the law.
- 3) Allegations that Taunton's Superintendent allowed the staff to threaten, harass, slander and file false complaints with the Department of Children and Families (DCF) against Parents and Student.
- 4) Allegations that Taunton's Superintendent ordered armed police to Parents' home to unlawfully abduct Student who is a non-verbal disabled minor.

The BSEA has limited jurisdiction¹¹ to resolve special education disputes among parents, school districts and state agencies and private schools pursuant to 603 CMR 28.08(3), which states in pertinent part,

(a)...any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protection of state and federal law for students with disabilities ...[and] on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973, as set forth in 34 CFR §§ 105.31-104.39.

¹⁰ See *In re: Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1419 (3d Cir. 1997). See also, *L.X. ex rel. J.Y. v. Bayonne Bd. of Educ.*, No. 10-05698, 2011 U.S. Dist. Lexis 32952 (D.N.J. Mar. 29, 2011) (citing *Burlington*); *Doe*, 560 F.Supp.2d at 172 ("If the facts in the complaint are sufficient to state a cause of action, a motion to dismiss the complaint must be denied."); *Ocasio-Hernandez*, 640 F.3d at 12 ("In short, an adequate complaint must provide fair notice to the defendants and state a facially plausible legal claim."); *Sepulveda-Villarini v. Dep't of Educ. of Puerto Rico*, 628 F.3d 25, 29 (1st Cir. 2010) ("The make-or-break standard . . . is the combined allegations, taken as true, must state a plausible, not a merely conceivable, case for relief.")

¹¹ When a parent raises a FAPE violation under the IDEA, "no greater remedies . . . are made available by recasting the claim as one brought under 42 U.S.C. 1983, Title II of the ADA, or section 504 of the Rehabilitation Act." *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 19 (1st Cir. 2006).

As such, the BSEA can only hear disputes concerning the aforementioned issues and nothing more. See also M.G.L. c. 71B §2A¹². Additionally, the principles of *collateral estoppel* and *res judicata* apply to BSEA proceedings. As explained in *In Re: Marshall and Harwich Public Schools*, BSEA # 08-1670 (Crane, February 1, 2008),

The doctrines of *res judicata* and *collateral estoppel*, whose parameters have typically been developed within the context of litigation in court, apply equally to a BSEA Hearing Officer's decision regarding the merits of a special education dispute. The Supreme Court has noted that these two doctrines 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication,' and these underlying purposes apply equally to a BSEA proceeding."

I note that Parents did not contest any of the allegations made by Taunton, nor did they submit any response or documentation in support of their position or requests. Parents have submitted nothing other than their original Request for Hearing and an objection to postponement of the Hearing which was received seven (7) days after the request for postponement had been granted.

Regarding the four issues raised by Parents, in general, Taunton asserts that these issues fall outside the purview of the BSEA jurisdiction and/ or have already been heard and adjudicated in a previous BSEA decision (*Taunton Public Schools and Solomon*, BSEA # 12-1212 (Byrne, December 12, 2011)), by the Massachusetts Superior Court, DESE's PQA Division, or involve issues that should more properly be resolved by other state agencies.

Parents' first issue relates to alleged educational neglect dating back to October 20, 2011. Taunton argues that allowing Parents to proceed with claims that have been previously heard and adjudicated as against the same party would be a violation of the principles of *res judicata* and *collateral estoppel* which as discussed above, the BSEA recognizes. See *In Re: Marshall and Harwich Public Schools*, BSEA # 08-1670 (Crane, February 1, 2008).

Administrative notice of *In Re: Taunton Public Schools and Solomon*, BSEA # 12-1212 (Byrne, 12/12/2011) shows that said matter addressed issues number 1 and 2 in Parents' Hearing Request. In pertinent parts of the Conclusions in that Decision, Hearing Officer Byrne stated

7. The Parents stated that he could not trust Taunton Public Schools to implement [Student's] IEP or to keep him safe in school as [Student] had been

¹² The BSEA is responsible to hear cases "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, 20 U.S.C. §1400 et seq., and its regulations; or (ii) a student's rights under Section 504 of the Rehabilitation Act of 1973 [(Section 504)], 29 U.S.C. §794, and its regulations."

neglected and abused in prior Taunton classroom placements. There is no evidence in the record to substantiate the Parents' claims in this regard. The witnesses I observed at the hearing demonstrated genuine concern for and commitment to [Student's] education. I am persuaded by the evidence as a whole that they represent the rule rather than the exception in Taunton. Therefore, I find Parents' argument in this regard to be without merit.

...10. The Parents asserted that home schooling would be more appropriate for [Student] than placement in the Taunton Public Schools. All expert evaluators recommended that [Student] attend a school-based educational program in order to benefit from the expertise of the teachers and therapists, the consistency and intensity of interventions, the variety of educational communication and sensory equipment, the opportunities for practice and generalizations; and the exposure to both similarly situated and typically developing peers. There is no factual support for a home schooling program for [Student] in this record.

BSEA #12-1212 also involved Parents' concerns regarding releases of information, the second issue raised by Parents in the instant case. I find that Parents first and second issues were already adjudicated in BSEA #12-1212 and therefore, to the extent that any part of Parents' claims involve the issues and claims raised by Parents in BSEA #12-1212 (and/ or in the Massachusetts Superior Court¹³) allowing Parents to relitigate the same issues involving the same Parties before the same agency after final adjudication is legally impermissible. *In Re: Marshall and Harwich Public Schools*, BSEA # 08-1670 (Crane, February 1, 2008).

Regarding issues #3 and #4 in Parents' Hearing Request, to the extent that those same issues and claims were raised by Parents and addressed in BSEA #12-1212, those too are precluded for the period covered in that decision by the principles of *res judicata* and *collateral estoppel*. Reconsideration of the aforementioned issue for the period preceding December 2011 when the BSEA Decision was issued, is in violation of the principles of *res judicata* and *collateral estoppel*, and therefore said claim and issue is DISMISSED with PREJUDICE.

Furthermore, Parents' submissions to the Bristol County Superior Court state the same allegations as in issues #2, #3 and #4 in the instant case. In that case, Parent sought an Order for release of information to Parents including

... the complete file, any and all documentation requested concerning the [] and [] family in form of e-mails, iPhone messages, letters, and voicemails due to prior emails iPhone messages received by this parent previously shows the School Dist. in Taunton is communicating hateful and slanderous

¹³ See *Campbell v. Taunton Public School System, et. al.*, BRCV2011-01310 (April 12, 2012), denying Parents' complaint and entering judgment in favor of Taunton's Motion to Dismiss (Robert J. Kane, Justice) (SE-A).

communications, through social networking which is a violation of this family's Constitutional rights. This has caused the disabled child, as well as his little sister, to suffer in the Taunton Public Schools System.

Parents further elaborated and expanded on these allegations (i.e., failure to respond to requests for information; allegations of false accusation, threats, slander and harassment by the school district personnel which caused harm to the student and his family; and of involving DCF and the police) in their Opposition to Taunton Public Schools' Motion to Dismiss Parents' case in Superior Court. To the extent that the Superior Court already considered those issues and claims, those too would be barred by the principles of *res judicata* and *collateral estoppel* (SE-A; SE-B).¹⁴

I next turn to Parents' issues #2, #3 and #4, to the extent that Parents may be alleging continued violations following issuance of the previous BSEA decision and the Superior Court case, or to the extent that they may be raising these issues with the BSEA for the first time.

Parents' issue #2 alleges that Taunton's Superintendent failed to respond to Parents' request for information as mandated by law. BSEA jurisdiction to address release of information is limited to requests made in the context of discovery motions. The BSEA lacks jurisdiction to order access to a student's record under the Family Educational Rights and Privacy Act (20 U.S.C. §1232g(f)) or the Public Records law (M.G.L. c.66§10) or the Student Records Regulations (603 CMR 23.09(1), (2) and (3)).

Enforcement of the provisions of the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. §1232g(f)) fall solely within the authority of the Secretary of [the U.S. Department of] Education. Moreover, in *Frazier v. Fairhaven School Committee*, 276 F.3d 52, 68-69 (1st Cir. 2002) the First Circuit Court of Appeals held that FERPA "does not confer a private right of action upon either an aggrieved student or her parents."

The applicable state regulation governing student records provides, at 603 CMR 23.09(1), (2) and (3), that an appeal involving a student record dispute must first be brought before the superintendent for the particular district, and then to the school committee.

Lastly, the Massachusetts Public Records law, M.G.L. c.66§1 et seq., grants the custodian of the public record initial decision-making regarding disclosure. The same law provides that an appeal of said decision may be presented to the supervisor of records. Jurisdiction to order compliance with the statute is granted under the law to the state superior court and the Supreme Judicial Court. M.G.L. c.66§10.

¹⁴ Taunton states that Parents also raised issue #1 as well as #2, #3 and #4 with DESE PQA. In its Closure Letter dated January 14, 2013, DESE PQA found that Parents' claims regarding: denial of access to certain documents which were not part of Student's record; alleged school characterization of Parents as unfit caregivers and follow-up with DCF; and allegations that the District sent Parents threatening letters and contacted local police to harass Student's family, fell "outside the Department's jurisdiction and would not be investigated" (SE-B). This filing however, has no effect on the BSEA for purposes of *res judicata* and *collateral estoppel*.

Based on the foregoing analysis, nothing in 20 U.S.C. §1232g(f), M.G.L. c.66§10, or 603 CMR 23.09(1), (2) and (3) extends jurisdiction to the BSEA and as such, Parents' claims in this regard must be DISMISSED for lack of jurisdiction.

Parents' issue #3 involves allegations that Taunton's Superintendent allowed the staff to threaten, harass, slander and file false complaints with the Department of Children and Families (DCF) against Parents and Student. This issue falls outside the purview of the BSEA and would more properly be addressed by DCF and/ or by a Court having jurisdiction over DCF matters.¹⁵ Since the BSEA lacks jurisdiction to hear Parents allegations in this regard, this issue is DISMISSED with PREJUDICE.

Issue # 4 similarly involves matters over which the BSEA lacks jurisdiction. Here, Parents' allege that Taunton's Superintendent ordered armed police to Parents' home to unlawfully abduct Student (who is a non-verbal disabled minor). As this issue involves matters regarding law enforcement and child custody/care, it is far beyond the jurisdiction of the BSEA and as such must also be DISMISSED with PREJUDICE.

Taunton is correct that all of the issues raised by Parents in the instant case have either already been adjudicated by the BSEA and Superior Court, and/ or fall outside the jurisdiction of the BSEA. As such, Taunton's Motion to Dismiss with Prejudice is **GRANTED**.¹⁶

In its Motion, Taunton also raised the issue of whether the Hearing Request filed on January 15, 2013, was intended on behalf of one or two children. Taunton's Motion placed the BSEA on notice for the first time as to the possibility that the Hearing Request had been filed on behalf of the son, a child with special needs, and the daughter, a student who has not been identified as a child with a disability within the context of the Individuals with Disabilities Education Act (IDEA).

Parents' Request for Hearing does not specify that the request is made on behalf of two separate individuals, as it does not state Student 1 and Student 2. Rather, it simply states "first name second name, last name", which the BSEA understood to be the first, middle and last name of one child as opposed to two different children. According to Taunton, the second name belongs to a daughter¹⁷ of Parents who according to Taunton is not currently a child with a disability within the meaning of the IDEA or Section 504. Therefore, Taunton's position is that even if Parents' original intention was to file on behalf of both children, since the daughter is not a child with a disability, the BSEA would not have jurisdiction to hear claims regarding her.

¹⁵ Taunton notes that Parents raised this issue in their December 2012 complaint with PQA, but PQA found that the issue fell outside the DESE's jurisdiction and advised Parents to pursue it with DCF.

¹⁶ Taunton also challenged the sufficiency of Parents' Hearing Request but since Taunton's Motion to Dismiss is being granted, I need not address the sufficiency challenge.

¹⁷ Taunton spelled her name different.

I note that, at no time since the request for Hearing was filed and the Notice of Hearing issued for the son have Parents clarified that they intended to file on behalf of anyone other than their son who is an IDEA eligible student. To the extent that Parents' Hearing Request regarding the daughter involve the same issues raised by Parents in #2, #3 and #4 of the Hearing Request, these are **DISMISSED** with Prejudice.

Lastly, I note that the sole remedy stated in Parents' Hearing Request was simply that Taunton be "Fair", a reasonable request in which all matters pertaining to the education of children with disabilities is premised. Nothing in the record suggests otherwise. Fairness will continue to guide the Parties' dealings in this and any other process and/ or forum.

ORDER:

Taunton's Motion to Dismiss is hereby **GRANTED** and the matter is **DISMISSED WITH PREJUDICE** as to both children consistent with this Ruling.

The Parties are deemed to have exhausted their administrative remedies before the BSEA and can proceed to a court with pertinent jurisdiction if they so desire.

So Ordered by the Hearing Officer,

Rosa I. Figueroa

Dated: February 28, 2013