**COMMONWEALTH OF MASSACHUSETTTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

In Re: Xylia [[1]](#footnote-1)

BSEA #12-0781

**RULING ON SCHOOL’S MOTION TO DISMISS**

This matter comes before the BSEA on the Motion of the Springfield Public Schools to Dismiss the Hearing Request filed by the Parent, and the Parent’s Opposition thereto styled as a Motion for an Evidentiary Hearing. The Parent filed an initial hearing request at the Bureau of Special Education Appeals (“BSEA”) on July 26, 2011 seeking an order for unspecified money damages for injuries her daughter suffered at school due to the negligent supervision of a public school teacher. The matter was set for hearing on August 29, 2011. Springfield Public Schools requested a postponement of the Hearing date and submitted a Response which disputed the facts set out in the Parent’s Hearing Request and asserted that the BSEA lacked jurisdiction to entertain the appeal. The Parties engaged in both informal and structured settlement negotiations over the course of the next year but were unable to reach a satisfactory resolution. During a conference call held on May 10, 2012 the hearing was set for August 22 and 23, 2012. On July 25, 2012 the Parties jointly requested a postponement and the Hearing was rescheduled to September 19 and 20, 2012. On September 4, 2012 the Parent filed a “Motion and Memorandum of Law in Support of Requesting the Hearing Officer to Conduct a Full Evidentiary Hearing, Develop a Record, Make a Determination of Any and All Violations of Law and a Determination Regarding the Amount of the Student’s Damages” . The Motion expanded the legal arguments in support of BSEA jurisdiction but did not offer any supplemental factual allegations or statutory claims. In Response, the School submitted a Motion to Dismiss on September 11, 2012 along with a request to postpone a hearing until after Rulings had been entered on the Parties’ Motions. The School’s Motion to Postpone was GRANTED. Pursuant to a conference call held on October 17, 2012 the Parties were given leave to file supplementary arguments in light of a relevant Decision issued by the U.S. District Court on September 27, 2012. *CBDE v. Massachusetts Bureau of Special Education*, No. 11-10874-DPW. 2012 WL 4482296 (D. Mass. September 27, 2012). Neither chose to do so.

ISSUE

The essential question presented here is whether this Student, who is seeking monetary damages as compensation for physical and emotional injuries stemming from the negligent supervision by a public school teacher, must exhaust the administrative dispute resolution procedures available to her under the IDEA because she is a student with disabilities? The answer turns on a mixture of law and fact.

FACTS

The few critical pertinent facts are not in dispute, though the Parties’ perspectives on them differ. Most of the contextual facts, and the reasonable inferences that can be drawn from them, are in dispute. For the purposes of this Ruling I will set out the facts as alleged in the Parent’s Request for Hearing, assuming they will be proved later.

1. Xylia is a 15 year old Springfield resident who has been identified with global developmental delays and associated difficulties acquiring age appropriate academic skills. She has received special education services through the Springfield Public Schools since beginning school. She had an accepted Individualized Education Program (“IEP”) during the 2009-2010 and 2010-2011 school years calling for “pull out” special education in all academic subjects. During those years Xylia did not exhibit any psychological or emotional difficulties and was not receiving any mental health treatment. Xylia was making effective educational progress.

2. In May 2009 Xylia was sexually assaulted by a classmate (“R”) while at recess on the school playground. The assault was observed by Springfield staff. The offending student was suspended for a time and then placed in a different classroom.

3. Xylia began the 7th grade year in the fall of 2009. The offending student “R” was placed in the same classroom Xylia attended full-time. In January 2010, “R” threatened Xylia and forced her to abandon a physical education class they were supposed to attend together. “R” then raped Xylia in the school auditorium. A few days later he repeated the act.

4. Xylia reported these events to her Parent who immediately contacted the Department of Children and Families (“DCF”). The Parent did not contact the School directly or report the assault to the police.

5. When the School learned of the rape and assault allegations through DCF it conducted an internal investigation, developed a safety plan for Xylia, and reconvened Xylia’s special education team to review her then current IEP. After meeting in March 2010 the Team proposed that Xylia attend a substantially separate classroom designed for students with specific learning disabilities, added counseling to the IEP, and provided for intensive monitoring during all transitions, non-special education classes, and unstructured time. The Parent accepted the proposed IEP with the exception of counseling services which she declined.

6. The School filed a Section 51A report with DCF. The School also notified the Springfield Police Department of the family’s allegations.

7. DCF conducted an investigation and concluded that one teacher negligently failed to supervise the actions of “R” and Xylia. DCF did not fault any other Springfield School staff or the Springfield School Department in general.

8. The outcome of the Police Department investigation is not known.

9. Xylia stopped attending school at the end of March 2010. Springfield provided home instruction and developed a re-entry plan. The Team reconvened in July 2010 and offered summer services as part of a school re-entry plan. The Parent declined.

10. Springfield then proposed that Xylia attend a substantially separate classroom program designed for students with social, emotional and behavioral support needs (“SEBS” class) beginning in the fall of 2010. Xylia did not return to school.

11. During the summer of 2010 Springfield requested parental consent to evaluate Xylia. Parent provided consent at the end of August 2010 and the evaluations were conducted during the fall of 2010.

12. The Team reconvened in December 2010 and developed an IEP which was substantially similar to the one proposed in the summer of 2010 calling for Xylia’s placement in a SEBS classroom.

13. There is no information concerning Xylia’s subsequent school history in the pleadings.

14. The Parent has never rejected any of Xylia’s IEPs nor has she requested a due process hearing until now.

PARENT’S HEARING REQUEST

The Parent alleges that, as a direct and proximate result of the failure of the teacher to perform her duty of maintaining Xylia’s safety in school during January 2010, Xylia has been adversely affected in all major spheres of her life. According to the Parent, Xylia now suffers from a major mental disorder, post-traumatic stress disorder, which causes her continual distress, impairs her social functioning, and prevents her from benefitting from school. The Parent seeks unspecified money damages due to Springfield’s negligence. The relief sought is set out in the Parent’s Hearing Request:

Therefore the family seeks an order finding them entitled to recover

damages for violation of [Xylia]‘s due process rights and 42 U.S.C. § 1982 (*sic[[2]](#footnote-2)*),

Springfield’s negligence, and loss of consortium based on Springfield’s knowing

and willful failure to take adequate steps to ensure [Xylia] ‘s safety stemming

from the assaults.

The family does not request any alteration to Xylia’s current special education services. The family does not allege that any previous special education service provided to Xylia, or proposed for her by Springfield, was in any way inappropriate or inadequate. The family does not allege that Springfield failed to implement any accepted services, failed to identify any needed service, or failed to abide by applicable special education or Section 504 procedures. The family does not allege that Springfield discriminated against Xylia on the basis of her disability or failed to accommodate her special needs in school in any way. The Parent does not seek any remedy authorized by the IDEA such as private school tuition reimbursement, compensatory education, or implementation of a particular related service. The Parent asserts only that the 1st Circuit Court’s holding in *Frazier v. Fairhaven* requires exhaustion of all administrative processes available under the IDEA before any possible claim involving an IDEA-eligible student against an educational service provider may be filed in federal court.

SCHOOL’S RESPONSE

The School asserts that the BSEA does not have jurisdiction of actions which seek solely money damages for claims of negligence against school districts that do not involve any allegation of violation of the IDEA or related statutes pertaining to the public education of students with disabilities.

MOTION TO DISMISS

Typically Motions to Dismiss are fairly straightforward. A Motion to Dismiss may be granted if the party requesting the hearing fails to state a claim for which relief is available through the BSEA. 801 CMR 1.01 (7) (g) (3); BSEA Hearing Rules XVII (B) (4). See also F.R.C.P. Rule 12 (b) (6) and M.R.C.P. Rule 12 (b) (6). In considering whether dismissal is warranted a hearing officer must accept all factual allegations set forth in the non-moving party’s hearing request as true. If those facts, proved at a hearing, would entitle the non-moving party to any form of relief from the BSEA, then dismissal for failure to state a claim is not appropriate. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Ocasio-Hernandez v. Fortunato-Burset*, 640 F.3d. 1 (1st Cir. 2011); *Doe v. Attleboro,* No.09-12127*,* 2011U.S. Dist. LEXIS 98235 (D. Mass. August 31, 2011) (not in official reporter).[[3]](#footnote-3)

In considering whether dismissal of a request for a special education hearing is appropriate the BSEA must also balance a relatively broad grant of primary jurisdiction under the IDEA[[4]](#footnote-4) and M.G. L. c. 71B[[5]](#footnote-5) with the IDEA’s requirement that a party set out with a degree of specificity in the initial hearing request the issues on which due process findings are sought and the facts that would tend to support those findings. [[6]](#footnote-6) At a minimum the requesting party must set forth sufficient plausible facts which would establish liability under the appropriate identified statute if proved at hearing. *Upshaw v. Andrade*, No. 10-11517, 2012 WL 996783 (1st Cir. August 17, 2011); cert. den. 132 S.Ct. 2687 (2012). *Hague v. Massachusetts Department of Elementary and Secondary Education*, No. 10-30138-DJC, U.S. Dist. 2011 LEXIS 112235 (D. Mass. Sept. 12, 2011).

The Motion to Dismiss standard is further complicated in this matter as it is embedded in a roiling context of shifting perspectives and requirements for developing appropriate factual records at the administrative level in disputes involving overlapping federal and state special education statutes. For example, it would seem from a plain reading of the applicable rules that if the BSEA does not have the authority to award the relief requested by the petitioning party then the BSEA should dismiss the appeal at the outset. Although tort-like money damages are not available under the IDEA, *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108 (1st Cir. 2003), the First Circuit has determined that petitioners seeking solely monetary damages for an IDEA-related claim must exhaust the IDEA administrative due process procedures before filing an action to recover those damages in federal court. *Frazier v. Fairhaven School Committee*, 276 F. 3d 52 (1st Cir. 2002). U.S. District Court Judge Woodlock recently reaffirmed that in in this Circuit any IDEA-based claims must first be presented for fact-finding at the administrative level, even if the Hearing Officer is not empowered to order any relief, before the federal court will take jurisdiction of the matter*. CBDE v. Massachusetts Bureau of Special Education Appeals*, No. 11-10874-DPW, 2012 WL 4482296 (D.Mass. September 27, 2012). Therefore the fact that the relief sought by the non-moving party is not available from the Bureau of Special Education Appeals is not automatically grounds for a Rule 12 (b) (6) dismissal in special education cases in this jurisdiction.[[7]](#footnote-7) *Frazier* and its progeny instruct that it is not the precise relief requested by the moving party that is critical in determining whether the exhaustion is required, but rather whether the claim presented is “IDEA-related” so as to implicate both the statutory obligation of the school to provide FAPE and the expertise of the administrative fact finding agency.

DISCUSSION

As stated above, it is important to note at the outset that courts in this jurisdiction have taken an expansive view of the reach of the IDEA’s exhaustion provision and of the usefulness of the IDEA’s administrative dispute resolution system.[[8]](#footnote-8) In *Frazier v. Fairhaven School Committee*, 276 F.3d 52 (1st Cir. 2002) the First Circuit found that a party seeking solely money damages not authorized by the IDEA by claiming due process violations arising in the context of special education under 42 U.S.C. 1983 nevertheless was required to exhaust the IDEA’s administrative remedies.[[9]](#footnote-9) Thereafter, courts in this jurisdiction have extended the reasoning in *Frazier* to disputes that involve the provision of special education to a student with disabilities even where the claim is based on an alleged violation of a statute other than the IDEA; (Consider *Boston v. Baker*, No. 06-11703-RWZ, 2009 WL 2066989 (D. Mass. September 12, 2011) which found that a claim under Section 504 of the Rehabilitation Act of 1973 is “sufficiently related to the public education of a disabled child under the IDEA to require adherence to its exhaustion requirements.); to claims arising out of allegations of psychological and physical abuse of students with disabilities by teachers as in *Bowden v. Dever*, No. 00-12308-DPW, 2002 WL 472293 (D. Mass. March 20, 2002), (“any aspect of the school’s treatment… that interferes with the provision of a free, appropriate education is within the scope of the IDEA’s administrative procedures”) and to those involving a class of similarly situated students rather than an individual student as in *Roe v. Johnson*, No. 11-11858-RWZ, 2012 U.S. Dist. LEXIS 115918 (D. Mass August 17, 2012.)

Nevertheless, courts in this jurisdiction have observed that not all claims advanced by a student with a disability against a school district require initial presentation to an administrative due process agency. Exhaustion of the IDEA’s administrative process is not required when the student is seeking solely money damages for tort like injuries not subsumed in a federal statutory claim. *Nieves-Marques v. Puerto Rico*, 353 F.3d 108 (1st Cir. 2003); *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13 (1st Cir. 2006). Nor is exhaustion required where there are no factual allegations to indicate that a dispute exists concerning the individual student’s eligibility under the IDEA or Section 504 or the discharge of the School’s procedural and substantive responsibilities under the IDEA or Section 504. *Hague v. Massachusetts Department of Elementary* *and Secondary Education*, No. 10-30138-DJC, U.S. Dist. LEXIS 112235 (D. Mass. Sept. 12, 2011). Finally, where the fact finding necessary to establish the plaintiff’s claims does not require any particular expertise in special education, exhaustion is not mandatory. *Dr. Franklin Perkins School v. King Philip Regional School District*, 25 Mass. L. Rptr. 549 (2009 Mass Super).

In a particularly instructive case, *Bowden*, *supra,* the Federal District Court considered whether exhaustion of administrative procedures is a prerequisite to federal court filing for all claims arising out of the alleged mistreatment of a student with disabilities by public school officials. Judge Woodlock noted:

The district and appellate courts in *Frazier* dismissed on exhaustion

grounds only those claims, though framed as violations of federal law

under §1983 or of §504 of the Rehabilitation Act of 1973, that “are…

rooted in an alleged violation of the IDEA” 122 F. Supp 2d 104, 111 (D. Mass 2000),

*aff’d*, 276 F.3d at 64. In fact, claims that were not related to “a free,

appropriate public education”, such as violations of Title IX based on alleged

sexual harassment and retaliation, were treated separately and were not

subject to IDEA exhaustion. 122 F. Supp. 2d at 111-14.

…

The IDEA does not require that all claims asserted by a disabled student

for events occurring in a school setting be channeled through the IDEA’s

administrative procedures. Rather, *Frazier* holds that a plaintiff must

exhaust administrative procedures with respect to any claim that asserts

a violation of the right to a FAPE. In addition, *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.

The court found that the IDEA’s exhaustion provisions did not extend to the plaintiffs’ 42 U.S.C. §1983 claim for bodily integrity nor to their state tort claim. It observed that although the conduct undergirding all of the plaintiff’s claims was the same, administrative resolution of claims not directly related to a violation of the IDEA’s guarantee of a free, appropriate public education was not warranted. Noting that courts in this jurisdiction have consistently opined that the single most important benefit of the IDEA’s administrative dispute resolution process is the development of a pertinent, organized and credible factual record by a fact finder who has expertise and experience in evaluating complex IDEA related claims and remedies, the court found:

Exhaustion of the IDEA administrative process would provide little benefit

because it can 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. Finally, as a matter of statutory interpretation,

the IDEA exhaustion provision does not apply because the tort and constitutional

claims are not claims for which relief is available in any sense under the IDEA.

(20 U.S.C. §1415 (1).)

*Bowden*, *supra* at 4.[[10]](#footnote-10)

The facts of the instant matter fit within the parameters described by Judge Woodlock in *Bowden*, *supra*, as not meeting the statutory purpose of administrative exhaustion, and outside the exhaustion parameters established by the First Circuit in *Frazier*. Taken together *Frazier* and its progeny in Massachusetts, in particular *CBDE*, *supra*, the most recent U.S. District Court decision to address the principle of exhaustion of administrative remedies under the IDEA, appear to require a three pronged inquiry whenever the IDEA’s exhaustion provision is a consideration.

First, is the event(s) giving rise to the student’s claim “related” to the student’s status as a student with disabilities or to the discharge of the school’s obligations under the IDEA, Section 504 and/or M.G.L. c. 71B?

Second, is the relief the student is seeking available in a claim rooted in the IDEA, Section 504 and/or M.G.L. c. 71B? And

Third, does this administrative due process agency have a particular expertise in assessing and determining the factual basis of the student’s claim so as to develop a useful administrative record for a judicial review?

Even when viewing all the factual allegations set out in the Student’s hearing request as true, drawing all permissible inferences from them in her favor, and taking the most generous view of her legal position in this jurisdiction, I find that the BSEA cannot properly entertain her claim. The instant matter is distinguishable from those cases in which the courts have found a connection between the IDEA-eligible student’s injury and the school’s IDEA responsibilities.

Only one of the Parent’s prayers for relief cites a federal statute: 20 U.S.C. § 1983. This is not, by itself, a law “protecting the rights of children with disabilities”. It is a procedural vehicle to enforce substantive rights accorded by other federal statutes. A Section 1983 claim cannot stand on its own. In the special education context 20 U.S.C. § 1983 may be used to enhance an otherwise viable claim under statutes that specifically provide civil rights and due process for students with disabilities such as the IDEA. It may not, however, provide the only basis for claims under related statutes such as Section 504 or the ADA. *M.M.R.Z. v. Puerto Rico*, 528 F.3d 9 (1st.Cir. 2008). As neither the Parent’s other claims for relief nor the facts set out in her hearing request implicate a federal statute specifically designed to address Xylia’s status as a student with disabilities, her Section 1983 claim is an insufficient basis on which to posit the jurisdiction of an IDEA dispute resolution administrative agency.

Furthermore, in her request for a hearing at the BSEA the Parent clearly states that she is seeking damages on behalf of herself and her daughter for the common-law tort of negligence. The basis of her tort claim is negligent supervision by a teacher, a violation of the teacher’s custodial responsibilities.[[11]](#footnote-11) The Parent does not assert that Springfield failed to provide, or that Xylia failed at any relevant time to receive, the free appropriate public education to which she is entitled under the IDEA. The Parent is not seeking any alteration in the special education services Xylia currently receives nor is she seeking a declaration that previously provided or offered special education or disability-related services were inappropriate or inadequate. The Parent is not seeking reimbursement for any special education or related services she provided to Xylia privately. The Parent is not seeking an award of compensatory education to make up for special education services Xylia should have received through Springfield but did not. In short the Parent is not alleging any violation of the IDEA or Section 504 and is not seeking any relief an IDEA administrative due process proceeding has the statutory authority to award. The claim of negligent supervision is not related to, or peculiar to, Xylia’s status as a student with disabilities. The claim is one available to any public school student regardless of disability status.

Second, since *Frazier*, courts have permitted claims for solely money damages to be presented at the administrative level when those claims are rooted in an alleged violation of the IDEA. Here the Parent is seeking monetary damages for the injuries Xylia suffered as a result of the School’s negligent supervision. She does not seek any “remedy” available under the IDEA, Section 504 and/or M.G.L. c. 71B**,** either in a quantifiable form such as retroactive reimbursement of expenses incurred by the Parent in providing substitute special education services, or in a declaratory form, such as an administrative finding that the School failed to properly meet its IDEA obligations with respect to Xylia. Similarly the Parent does not allege any deprivation of rights under any other federal statute for which relief authorized by the IDEA might be available. The Parent does not offer any plausible set of facts that could fairly be construed as a special education claim even if not identified as such in the pleadings.

Xylia’s claim of “negligent supervision” arises from her status as a public school student to whom a custodial duty of care is owed. The School has a primary obligation to keep all students in its care safe, and certainly safe from sexual assault. The Parent argued that in 2010 the School had a heightened responsibility to protect Xylia from the offending student as it had knowledge of a previous sexual assault in 2009. That may be true. The analytical difficulty for the Parent in this action, however, is that the School’s duty of care lies in Xylia’s general student status and in its knowledge of previous bad acts by a peer. Neither the duty of care owed to Xylia, nor its breach, is “related” to her status as an IDEA eligible student, to the implementation of her IEP, or to the School’s procedural responsibilities under the IDEA. There is no allegation that the School owed Xylia a heightened duty of care due to her disability, nor that it failed to implement a provision in her IEP related to her vulnerability as a student with a disability. The Parent’s pleadings do not demonstrate any logical link differentiating the custodial duty of care owed to Xylia as a special education student and that owed to any other regular or special education student in the school building. However disturbing we find the lack of supervision, and its attendant consequences, the Parent has not alleged any plausible connection between them and Xylia’s status as a student with disabilities nor an association with any deprivation of her special educational rights. After a careful examination of the Parent’s claims I find there is no demonstrable nexus between the provision of special education services to Xylia and her claim of negligence which could support a finding that she is making a claim “rooted” in the IDEA.

Finally, the Parent’s instant tort claim does not meet the elements identified by *Frazier* and its progeny as supporting the development of an administrative record prior to filing a federal court action. Those decisions instructed that exhaustion of administrative procedures is required when an IDEA-eligible student’s claim is “in some way” related to the denial of a free appropriate public education and where the specialized knowledge of the administrative agency can assist the court in understanding the student’s special education claim. Here, as discussed above, even with the most generous lens possible, the facts alleged cannot be logically connected to any denial of FAPE to Xylia. Also, while courts have typically welcomed the development of a factual record by a specialized administrative agency in complex special education claims, a reviewing court could not rely on the expertise or experience of an administrative hearing officer in this matter. Unlike judges in courts of general jurisdiction, few special education hearing officers have experience in the type of assessment and evaluation of claims of personal injury and calculation of any consequent financial damages that the Parent seeks here. Factual findings centered on the Student’s IDEA experience would not provide useful information to a court considering an award of damages due to negligence.

Furthermore, the development of a factual record concerning Xylia’s injuries and potential financial compensation brings to the fore other thorny considerations. There is the general concern that the standards for accepting evidence in administrative hearings, including in particular the routine admission of hearsay, would make the record developed here less useful to a reviewing court than would typically be the case in matters more closely aligned with the expertise of the administrative hearing officer. Another concern, hopefully unique to this matter, is the nature of the disputed factual allegations that provide the support for the Parent’s “negligent supervision” claim. At the center of those allegations is a non-party, non- participant minor with disabilities who is facing related juvenile criminal proceedings, raising a host of serious due process considerations for which this administrative agency is ill-equipped.

Finally, but not insignificantly, imposing an administrative fact finding process, with its attendant financial, time and emotional costs, for students with disabilities who advance claims sounding primarily in tort, but not for students without disabilities making identical claims, on the assumption that some attenuated, related IDEA claim might be raised on behalf of a student with disabilities, could itself create an inequitable burden and impermissible barrier to access to public facilities, i.e. courts, contrary to the ADA.

CONCLUSION

After careful consideration of the facts alleged in the Parent’s pleadings, viewing them in the light most favorable to any potential statutory claim she may have, as well as the thoughtful arguments of counsel for both parties and the applicable precedent in this jurisdiction, I find that Xylia’s claims for relief do not require exhaustion of the administrative remedies available to her as a student with disabilities under the IDEA and, therefore, that dismissal is appropriate. First, the hearing request does not present a claim on which the BSEA could, with its limited statutory jurisdiction, offer any form of relief, or provide a credible measure of expertise. In particular, the Student has not set out a claim that is sufficiently related to any violation of the IDEA or Section 504 to bring it within the administrative dispute resolution procedures set out in the IDEA. Second, heeding the directions and cautions of courts which have considered the IDEA’s exhaustion provision, I am persuaded that exhaustion is not required in this matter because Xylia’s claim for money damages due to the tort of negligent supervision is not causally connected to her status as a student with disabilities nor to the failure of the school to meet its statutory obligations under the IDEA, Section 504 or M.G.L. c. 71B. . The claims the Student does present, as well as the relief she requests, fall outside the orbit established by *Frazier*, *supra*.

ORDER

As there are no IDEA-related issues before the BSEA, the Parent’s Motion for an Evidentiary Hearing is DENIED and Springfield’s Motion to Dismiss is GRANTED.

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By the Hearing Officer Dated: November 26, 2012

Lindsay Byrne

1. “Xylia” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public. [↑](#footnote-ref-1)
2. The Parties and the Hearing Officer understood this to be a typographical error and that the Parent intended to set out a claim under 42 U.S.C. Section 1983. [↑](#footnote-ref-2)
3. In special education matters before the BSEA, arguments on Motions to Dismiss for lack of jurisdiction under F.R.C.P and M.R.C.P. Rule 12 (b) (1) are frequently indistinguishable from those advanced in Rule 12 (b) (6) Motions and are treated similarly. *Roe v. Johnson*, No. 11-11858-RWZ, 2012 U.S. Dist. LEXIS 115918 (D.Mass. August 17, 2012); *Hague v. Massachusetts* *Department of Elementary and Secondary Education,* No. 10-30138-DJC, 2011 U.S. Dist. LEXIS 112235 (D. Mass. September 12, 2011.). [↑](#footnote-ref-3)
4. The administrative due process agency has primary jurisdiction over disputes concerning “any matter relating to a the identification, evaluation or educational placement of the child or the provision of a free appropriate public education to such child”. 20 U.S.C. 1415 (b) (6). 34 C.F.R.§300.507. [↑](#footnote-ref-4)
5. The Massachusetts regulations clarifying the applicable language in M.G.L.c 71B Section 3 provide: “ (a) A parent or a school district, except as provided in 603 CMR 28.08 (3) (c) and (d), may request mediation and/or a hearing at any time on any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities. A parent of a student with a disability may also request a hearing 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 §§104.31-104.39. 801 CMR 28.08 (3) (a).” [↑](#footnote-ref-5)
6. “ The Party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b) (7)” . (Hearing Request) 20 U.S. § 1415 (f) (3) (B). [↑](#footnote-ref-6)
7. Compare *Payne v. Peninsula School District*, 653 F.3d 863 (9th Cir. 2011) which overruled a line of previously decided cases using an analysis similar to that employed in *Frazier*, *supra,* to hold that the IDEA’s exhaustion provision does not apply to matters in which the pleadings do not establish a claim for relief that is actually available under the IDEA. [↑](#footnote-ref-7)
8. For the reader’s reference the IDEA’s exhaustion provision is found at 20 U.S.C.*§1415(l). It* provides:

   “Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. § 12101 *et seq*.], title V of the Rehabilitation Act of 1973 [29 U.S.C. §79.0 *et seq.*], or other Federal laws protecting the rights of children with disabilities, *except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.” (*emphasis added). (subsections (f) and (g) refer to the administrative due process system required under the IDEA.

   The topic of exhaustion of administrative processes in general has been addressed previously by the BSEA. Both Hearing Officer Crane and Hearing Officer Oliver have written thorough and elegant analytical rulings discussing the parameters of the IDEA’s exhaustion provision. I cannot improve upon them and refer the interested reader to the original sources. *In Re: CBDE*, 17 MSER 43 (Crane 2011); *In Re: Mashpee Public Schools, 14 MSER 143 (Crane 2006); Jane v. Lexington Public Schools*, BSEA No. 08-3060, Ruling on Motion To Determine Scope of Hearing (Oliver, 8/19/2008 (unpublished)).. [↑](#footnote-ref-8)
9. For a discussion of monetary damages and the IDEA see: *Diaz-Fonseca v. Puerto Rico*, 451 F3d. 13 ( 1st Cir. 2006); *Nieves-Marquez v. Puerto Rico*, 353 F. 3d 108 (1st Cir. 2003) [↑](#footnote-ref-9)
10. Judge Woodlock’s discussion and application of the exhaustion provision of the IDEA in *Bowden*, *supra*, and subsequently in *CBDE*, No. 11-10874-DPW, 2012 WL 4482296 (D. Mass. September 27,2012) is consistent with the evolution of the treatment of this provision in other jurisdictions. In *Payne v. Peninsula School District*, 653 F.3rd 863 (9th Cir. 2011) the 9th Circuit wrote: “We hold that the IDEA’s exhaustion provision applies only in cases where the relief sought by a plaintiff in the pleadings is available under the IDEA. Non-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, even if they allege injuries that could conceivably have been addressed by the IDEA. We overrule our previous cases to the extent they state otherwise.” [↑](#footnote-ref-10)
11. M.G.L. c. 258 Sections 2, 3 provide that the state superior court has exclusive jurisdiction of actions claiming damages for the negligence of public employees. [↑](#footnote-ref-11)