**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**SPECIAL EDUCATION APPEALS**

**In Re:** Student v. **BSEA #12-7653**

 Maple[[1]](#footnote-1) School District

**Ruling on Maple School District’s Motion To Dismiss**

On December 21, 2012, Maple School District (Maple) filed a Motion to Dismiss certain claims raised by Parent as outlined and discussed below. Maple argued that only those claims arising under the IDEA for residential placement and or directed employment assistance for the school year 2013-2014 should be heard, and the remaining claims dismissed with prejudice. For purposes of this Motion to Dismiss, Maple relied on the facts set forth in Parent’s Hearing Request. Maple noted its disagreement with the facts as alleged by Parent and reserved its right to contest those facts at hearing or through further dispositive motions. Maple’s right is hereby reserved.[[2]](#footnote-2)

Following a request for extension of time to file a response (which was granted) on January 15, 2013, Parent filed a Response to Maple’s Motion objecting to the Dismissal.

Thereafter, on January 22, 2013, Parent filed two Motions: a Motion to Sequester and a Motion for Court Reporter. Parents also revised their witness list.

The BSEA Hearing Rules and the Standard Adjudicatory Rules for Practice and Procedure[[3]](#footnote-3) 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]](#footnote-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]](#footnote-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]](#footnote-6) The hearing officer will accept all factual allegations “as true and draw all reasonable inferences in the plaintiff’s favor.”[[7]](#footnote-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]](#footnote-8) The question on a motion 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.[[9]](#footnote-9)

In this regard and following the “modern understanding” of Rule 12(b)(6) pursuant to *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and its forerunners[[10]](#footnote-10), some of Parent’s allegations, raise the plausibility of a factual dispute between the Parties, and as such, Maple’s Motion to Dismiss should only be granted in part, as explained below.

When the Hearing Request was filed by Parent on April 25, 2012, Student was an eighteen- year-old senior, who resided with Parent in “Maple”, MA.

**Specific Claims**:

1. Parent’s claims relative to fraudulent practices with respect to illegal assistance with MCAS testing and illegal assistance with an evaluation conducted by Ms. A[[11]](#footnote-11) should be dismissed as they are barred by the IDEA statute of limitations:

In the context of a BSEA proceeding the statute of limitations mandates that a hearing be brought

within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint. 20 USC 1415(f)(3)(C).

With this guidance in mind, Maple is correct that the authority of the BSEA is limited to claims arising out of the IDEA and §504 which fall within the two year statute of limitations applicable to those statutes. Maple asserts that Parents’ allegations that Student received improper assistance[[12]](#footnote-12) during an evaluation, and during the Biology MCAS, extend beyond the two year statute of limitations. As such, Maple states that those claims should be barred.

According to Parents at least two tests (conducted in May and June 2010), fall within the statute of limitations and are therefore not barred.

Review of relevant sections of the IDEA (20 USC §1415 (f)(3)(C) and (D)), establishing the statute of limitations for due process administrative proceedings, also provides two exceptions to the bar to proceed on claims that extend beyond the statute of limitations period.

Parents are able to show that s/he was prevented from requesting a hearing due to either specific misrepresentations by the school district that it had resolved the problem forming the basis of the hearing request or the school district’s withholding of information from the parent that was required to be provided under federal law. 20 USC §1415 (f)(3)(D)(i) and (ii). See also, Rule I.C. of the *Hearing Rules for Special Education Appeals*.

Parent contends (and Maple “vigorously” denies) that Maple withheld information that it was required to provide under federal law and that this prevented Parent from filing a Hearing Request in a timely manner.[[13]](#footnote-13)

In this context Parent’s claims are limited to the allegations of improper assistance during the MCAS and/ or the evaluation, and further limited to Student only.

Parent’s Response to Maple’s Motion alleges “wholesale fraud by the District on an ongoing basis”, as well as systemic problems regarding improper assistance to special education students, and states that Student was “within the timeline to bring the complaint regarding MCAS fraud” and award of a fraudulent high school diploma. BSEA hearings are jurisdictionally limited to address the rights of individual students and as such, systemic problems if any, are generally irrelevant to the provision of a free and appropriate public education to an eligible student. As such, any evidence regarding the allegation raised by Parent is limited to Student and no evidence regarding any alleged “practice or fraud and misrepresentation which is epidemic” will be heard unless Parent can show that said alleged practice had a direct impact on Student . Furthermore, no evidence will be heard from any witness who does not possess direct knowledge of the aforementioned allegations regarding Student. Parent is reminded that the standard for accepting evidence at a BSEA Hearing is relevance and reliability. Issues regarding other students, if any, are irrelevant to the case before me.

A BSEA hearing officer may provide such relief as the Hearing Officer “determines is appropriate”[[14]](#footnote-14) upon finding that a school district has violated a student’s right under the IDEA. If indeed Parent were to prevail regarding the allegations of improper assistance during the MCAS examination, the results of those MCAS will be set aside and Student will be required to retake them.

Parent may proceed with the claims regarding improper assistance extending beyond the two year statute of limitations if Parent can show that Maple withheld required information or otherwise prevented Parent from requesting a Hearing in a timely fashion.

Maple’s Motion to limit the scope of the Hearing on the basis of the statute of limitations is **DENIED in Part**.

1. Claims under M.G. L. Chapter 69, Section 1 because the statute does not confer a private right of action:

Maple asserts that Parents’ claims under M.G. L. Chapter 69, Section 1, should be dismissed because the statute does not confer a private right of action. Maple asserts that as a matter of law, courts do not presume that a private cause of action exists unless the statute specifically provides it and without some express legislative intent. In making this argument, Maple relies on the guidance offered by the Massachusetts Supreme Judicial Court in *Loffredo v. Center for Addictive Behaviors*, 426 Mass. 541, 544 (1998) explaining that the Supreme Judicial Court has

Been reluctant to infer a private cause of action from a statute in the absence of some indication from the Legislature supporting such an inference. [[15]](#footnote-15)

Nothing in Parent’s Response persuades me that a private course of action exists under M.G.L. Chapter 69.

Moreover, in weighing the merits of Parent’s claim, I note that M.G. L. Chapter 69, Section 1 and 1A establish duties and responsibilities pertinent to the Department of Elementary and Secondary Education (DESE), and any claim under Chapter 69 would be against DESE, but DESE is not a party to this proceeding. Furthermore, at no time since the request for Hearing was filed on April 25, 2012 did Parent move for joinder of DESE. Since Parent did not seek joinder of DESE in a timely fashion, and given the length of time this matter has remained open, the numerous continuances granted, and in light of the impending Hearing scheduled to begin on January 29, 2013, joinder this late in the process will not be considered even if Parent were to so request. As such, I decline to hear the merits or lack of merits of any possible claim under M.G. L. Chapter 69, Section 1.

Parent’s claim under M.G. L. Chapter 69, Section 1 is **DISMISSED without PREJUDICE** as to the DESE**.**

Maple is correct that Parents have failed to make a claim that the statute confers a private right of action against Maple, and since the matter before me involves only Maple and Parents, this claim is **Dismissed with Prejudice** as against Maple.

1. The exhaustion requirement of IDEA is confined to statutes specifically referenced in 20 U.S.C. § 1415 (1) which do not include claims under Section 1983 and Article 114:

Maple argues that there is no significant body of case law interpreting the IDEA exhaustion requirement, and the existing decisions relate to the exhaustion requirement to claims brought under either Section 504 or the ADA where violations of those statutes by public school districts and their employees have impacted students with disabilities. See *Frazier v. Fairhaven School Committee*, 276 F.3d 52 (1st Cir. 2002); *Bowden ex rel. Bowden*, 2002 WL 472293 (D. Mass. 2002); *City of Boston v. Bureau of Special Educ. Appeals*, 2008 WL 2066989, (D. Mass, 2002); *In Re: Bourne Public Schools*, BSEA # 02-3804 (2002); *In Re: CBDE Public Schools*, BSEA # 10-6854 (2012). Therefore, Maple states that the exhaustion requirement of IDEA is confined to statutes specifically referenced in 20 U.S.C. § 1415 (1) which do not include claims under Section 1983 and Article 114. Maple is generally correct. However, Parent’s Section 1983 claims seem to arise out of IDEA violations and to that extent, consistent with Judge Woodlock’s decision in *CBDE Public Schools, Plaintiff , v. Massachusetts Bureau of Special Education Appeals, and Jane Doe and John Doe, as Parents and Next Friend of Jill Doe, a minor, Defendants,* 59 IDELR 284, 112 LRP 48074 (9/ 27/ 2012), facts regarding the IDEA and §504 claims must be established at the administrative level[[16]](#footnote-16), this despite the fact that the BSEA lacks jurisdiction to fashion any remedy under Section 1983.[[17]](#footnote-17)

Maple’s Motion regarding Section 1983 claims is **DENIED as to IDEA and § 504 claims**.

1. The BSEA lacks authority to make findings of fact and conclusions of law regarding violations of 18 USC §§ 1341 and 1343:

Maple correctly states that the jurisdiction of the BSEA is set out in 603 CMR 28.08(3) and is limited to the resolution of disputes among school districts, parents, state agencies and private schools regarding

1. …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.

Nothing in the pertinent federal or Massachusetts laws and regulations grant the BSEA authority to hear matters concerning allegations of fraud or conspiracy pursuant to18 USC §§ 1341 and 1343. As such, Parents’ claims under 18 USC §§ 1341 and 1343 are **DISMISSED with Prejudice**.

1. Article 114 of the Massachusetts Constitution does not confer a private right of action:

Massachusetts Constitutional Amendment Article 114 provides that

No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth.

Although the First Circuit Court of Appeals has indicated that there “may” be a private right of action under Article 114, the Courts in Massachusetts have never held that Article 114 creates a private right of action where “a plaintiff may seek redress under an existing statute. *Kilburn v. Dep’t of Corr. State Treansp. Unit*, No. 07- P-812, 72 Mass.App.Ct. 1109, 2008 WL 2969698, at 3 (Mass. App. Ct. July 25, 2008) (unpublished). See also, *Layne v. Superintendent, Mass. Corr. Inst., Cedar Junction*, 406 Mass. 156, 159 n. 3, 546 N.E.2d 166 (1989). Accordingly, Maple states that since Parents’ Article 114 claims are indistinguishable from their ADA and §504 claims, the Article 114 claims should be dismissed.

Maple is correct that Article 114 of the Massachusetts Constitution does not confer a private right of action and that Parents’ ADA and §504 claims are substantially the same as the Article 114 claims. As such Parents’ claims under Article 114 of the Massachusetts Constitution are **Dismissed with Prejudice** for failure to state a claim for which relief can be granted.

1. The BSEA’s authority to make findings of fact and conclusions of law, and award relief is jurisdictionally limited.

As explained earlier in this Ruling, Maple is correct that the authority of the BSEA is limited to claims arising out of the IDEA and §504 which fall within the two year statute of limitations applicable to those statutes, with specific exceptions.

Parent argues that she needs to exhaust at the administrative level and that the BSEA should enter findings of fact with respect to the non-IDEA and non-§504 claims, to ascertain whether the claims are valid and to fashion appropriate remedies consistent with *CBDE Public Schools,* BSEA #10-6854 (Crane, 2012).. *CBDE Public Schools* [[18]](#footnote-18) explains that the scope of fact-finding for purposes of exhaustion in damages disputes should be limited to

The role and expertise of a BSEA Hearing Officer in resolving special education disputes. *Id.* at p.5, footnote 9.

As such, Maple argues that the BSEA’s scope of fact finding should be limited consistent with *Frazier*, to the Hearing Officer’s expertise to determine the obligations of the public school to an eligible student, and enter determinations regarding any violations under the IDEA and § 504 as well as their impact on Student.

In the case at bar, Parent seeks findings of fact to support money damages claims in a court with pertinent jurisdiction, which Maple argues go beyond the expertise of the BSEA and “fall outside the scope of the BSEA fact-finding authority”. Maple further raises concern of deprivation of its “constitutional right to a jury trial on the tort claims if the BSEA substitutes its judgment for that of a jury”. See *Com. v. Bellino*, 320 Mass. 635 (1947) (holding that the “substance of right to jury trial consists of elements tending to protect citizens against arbitrary power and ensure determination of fact issues by composite judgment of fairly numerous and representative body of impartial residents of county, selected at large, rather than by judgment of one person or small number of individuals).

Maple argues that the BSEA should decline to engage in fact-finding of non-IDEA and non-§504 claims in order to preserve Maple’s “sacred” right to a jury trial at a later time. I agree, and as such, Maple’s Motion to Dismiss in this regard is **Granted**.

I next address Parents’ Motion to Sequester witnesses during the Hearing, received on January 22, 2013. The BSEA does not sequester witnesses absent compelling reasons to do so. Parent’s arguments alleging MCAS fraud as the basis for sequestration is unpersuasive. Parents’ Motion to Sequester witnesses is **Denied without Prejudice**.

Parents’ Motion for Court Reporter is **Allowed.**

**ORDERS**:

1. The scope of the Hearing is limited consistent with the Rulings entered in sections a through f above.
2. Maple’s Motion to limit the scope of the Hearing on the basis of the statute of limitations is **DENIED in Part**.
3. Claims under M.G. L. Chapter 69, Section 1 are **Dismissed without Prejudice** **as to DESE** and **Dismissed with Prejudice as to Maple**.
4. Maple’s Motion regarding fact-finding by the BSEA regarding Parent’s Section 1983 claims involving improper assistance during evaluations and/ or MCAS testing is **DENIED.**
5. Parents’ claims under 18 USC §§ 1341 and 1343 are **DISMISSED with Prejudice**.
6. Parents’ claims under Article 114 of the Massachusetts Constitution are **Dismissed with Prejudice**.
7. Maple’s request that the BSEA decline to engage in fact-finding of non-IDEA and non-§504 claims is **Granted**.
8. Parents’ Motion to Sequester witnesses is **Denied without Prejudice**.
9. Motion for Court Reporter is **Allowed.**

So Ordered by the Hearing Officer,

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Rosa I. Figueroa

Dated: January 23, 2013

1. Maple is a pseudonym for the school district. [↑](#footnote-ref-1)
2. Maple also filed a separate Motion to Compel Discovery on January 18, 2013, and a Ruling on this issue was issued the same day. [↑](#footnote-ref-2)
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.”). [↑](#footnote-ref-3)
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”). [↑](#footnote-ref-4)
5. Fed. R. Civ. P. 12(b)(6); Mass. R. Civ. P. 12(b)(6). [↑](#footnote-ref-5)
6. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). [↑](#footnote-ref-6)
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.”); *Oscasio-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.”). [↑](#footnote-ref-7)
8. *Ashcroft*, 129 S. Ct. at 1940. [↑](#footnote-ref-8)
9. *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.”). [↑](#footnote-ref-9)
10. 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). [↑](#footnote-ref-10)
11. Ms. A is a pseudonym given to the special education teacher. [↑](#footnote-ref-11)
12. Parents’ allegations are that the assistance provided to Student went beyond the permissible accommodations delineated in Student’s IEP and/ or in test protocols. I note that during an investigation conducted by Maple on or about June 6, 2012, Student alleged that he had also received improper assistance with the English Language Arts (ELA) and Math exams. Maple denies any illegal assistance to Student during the MCAS and/ or during any evaluation. [↑](#footnote-ref-12)
13. There is a factual dispute between the Parties as to this issue, which for purposes of this Ruling must be resolved in favor of Parent. [↑](#footnote-ref-13)
14. 20 U.S.C. § 1415(i)(2)(c)(iii). *See also,* *Sch. Comm. of Town of Burlington, Mass. V. Dep’t of Educ. of Mass*, 471 U.S. 359, 370 (1985) (court finding appropriate relief may include retroactive reimbursement for private placement as well as a prospective injunction for private placement); *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 8 (1993) (“Finally, total reimbursement will not be appropriate if a court fashioning discretionary equitable relief under IDEA determines that the cost of the private education was unreasonable.”); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (“When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private education is warranted.”). [↑](#footnote-ref-14)
15. See also *All Brands Container Recovery, Inc. v. Merrimack Valley District. Co., Inc.*, 54 Mass. App. Ct. 297, 301 (2002) “(where statute provides no explicit private right of action but instead specifically tasks enforcement to multiple public authorities, no private cause of action exists.)” [↑](#footnote-ref-15)
16. The BSEA has limited jurisdiction over as quoted in section d of this Ruling. When parents raise a violation of FAPE 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-Foncesca v. Puerto Rico*, 451 F.3d 13, 19 (1st Cir. 2006). [↑](#footnote-ref-16)
17. See *CBDE Public Schools*, BSEA #10-6854 (Crane, 2012). [↑](#footnote-ref-17)
18. See, *CBDE Public Schools, Plaintiff , v. Massachusetts Bureau of Special Education Appeals, and Jane Doe and John Doe, as Parents and Next Friend of Jill Doe, a Minor, Defendants,* 59 IDELR 284, 112 LRP 48074 (9/ 27/ 2012). [↑](#footnote-ref-18)