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

In Re: Greater New Bedford Regional Voc. Tech. **BSEA # 1308227**

RULING ON MOTION TO JOIN, MOTION TO DIMISS AND MOTION TO STRIKE

This ruling is issued by the Bureau of Special Education Appeals (BSEA) pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq*.), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL c. 71B), the state Administrative Procedure Act (MGL c. 30A), and the regulations promulgated under these statutes.

This dispute requires that I rule on Greater New Bedford Regional Vocational Technical High School's (GNBVT) Motion to Join, Motion to Dismiss and Motion to Strike.

I have concluded, pursuant to BSEA Hearing Rule VII(D), that oral argument would not advance my understanding of the issues and is unnecessary.[1]

INTRODUCTION

It is not disputed that Student lives with her Parents in New Bedford and that Student was a sophomore at GNBVT for the 2012-2013 school year, which was her second year at GNBVT. The proposed IEP for Student for the 2013-2014 school year would place Student back at the New Bedford High School. Parents seek to have Student continue at GNBVT for the 2013-2014 school year, and on May 16, 2013, they filed a Hearing Request with the BSEA for that purpose.

Parents' Hearing Request alleges that Student has a "central auditory processing disorder, emotional issues and borderline cognitive skills" and also suffers from PTSD. As a result of these disabilities, Parents take the position that Student requires a small class setting, extra academic support, modified curriculum and "a supported environment across all academic and vocational settings." The Hearing Request argues that these services and accommodations can and should be provided at GNBVT, but that GNBVT is taking the position that Student is no longer appropriate for GNBVT and thereby seeks to "dump" Student back to the New Bedford High School.

[1] Parents and Student are represented by attorney Michael Turner. GNBVT is represented by attorney Paige Tobin. New Bedford Public Schools is represented by attorney Catherine Lyons.

Parents' Hearing Request includes systemic claims—for example, that "GNBVT has a double standard of education, one for regular students and boot them out the door standard for children with disabilities." The Hearing Request alleges that this "double standard" is "supported by a system that denies access to vocational programs to children with disabilities …." Claims of discrimination are made under the Individuals with Disabilities Education Act, MGL c. 71B, Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, and accompanying regulations, as well as under Article CXIV of the Massachusetts Constitution.

Parents' Hearing Request seeks a variety of relief, including creation of a program for Student with "small classes in all subject areas in a language based format, modified, so that she can progress academically at her level as well as such a program for her vocational shop so she can achieve her potential and thus receive FAPE [i.e., a free appropriate public education] …." Parents also seek two years of compensatory services "for [GNBVT's] failure to provide FAPE."

On June 4, 2013, GNBVT responded to Parents' Hearing Request. Its response generally denies all allegations of wrong-doing and asserts that a proposed IEP developed by GNBVT for the 2013-2014 school year appropriately places Student back at New Bedford High School with a pre-vocational program, life skills and therapeutic support. GNBVT states that Student's IEP Team concluded that Student could not receive FAPE at GNBVT "because of her need to develop independent life skills". GNBVT believes that Student requires "an academic program which has therapeutic, social and life skills components woven throughout her day in a consistent setting." GNBVT seeks findings that it has acted appropriately and is not fiscally or programmatically responsible for Student for the 2013-2014 school year.

After filing its response to the Hearing Request, GNBVT filed a Motion to Join, Motion to Dismiss and Motion to Strike, which are the subject of the instant ruling.

MOTION TO JOIN

GNBVT has filed a Motion to Join for the purpose of requiring that the New Bedford Public Schools (New Bedford) be named a party to these proceedings. Parents and New Bedford have filed oppositions.

Pursuant to BSEA Hearing Rule I(J), joinder may be ordered upon a finding that (1) complete relief cannot be granted among the existing parties, or (2) the proposed party to be joined has an interest in this matter and is so situated that the dispute cannot be disposed of in its absence. Rule I(J) lists the following factors to be considered in determining whether to join a party: (1) the risk of prejudice to the present parties in the absence of the proposed party; (2) the range of alternatives for fashioning relief; (3) the inadequacy of a judgment entered in the proposed party's absence; and (4) the existence of an alternative forum to resolve the issues.

GNBVT is a "program school" as that term is used within the state special education regulations.[2] The state regulations further provide that GNBVT, as a program school, "shall have programmatic and financial responsibility for enrolled students".[3] It is not disputed that Student has been one of such enrolled students.

Relevant parts of these regulations further state that "when the Team determines that the student may need an out-of-district placement, the Team shall conclude the meeting … without identifying a specific placement type, and shall notify the school district where the student resides [i.e. New Bedford in the instant dispute] within two school days."[4] A Team meeting is then scheduled to determine placement, with representatives of the school district where the student resides participating in the meeting.[5]

The state regulations then provide that the Team must "first consider if the school district where the student resides has an in-district program that could provide the services recommended by the Team, and if so, the program school shall arrange with the school district where the student resides to deliver such services or develop an appropriate in-district program at the program school for the student."[6]

GNBVT alleges that it followed this regulatory directive by convening a Team meeting that determined that Student required an out-of-district placement in order to receive FAPE; the Team then re-convened at a later time with New Bedford representatives who informed the Team that New Bedford had a substantially-separate program at New Bedford High School that would be appropriate for Student. GNBVT further alleges that an IEP was developed that called for this placement, but that Parents have rejected this proposed IEP and placement.

From this, GNBVT argues that New Bedford should be a party in these proceedings so that, if needed, I may order relief in the form of services or placement from New Bedford.

The difficulty with this position is that Parents' Hearing Request makes claims only against (and seeks relief only against) GNBVT. Under the regulatory scheme explained above, New Bedford's services and placement are not relevant so long as Student is attending GNBVT and does not require an out-of-district placement. Parents do not seek relief against New Bedford because they take the position that Student can and should be appropriately served by GNBVT without the need for an out-of-district program and therefore without the need

[2] See 603 CMR 28.02(16) ("*Program school* shall mean the school in which the student is enrolled according to the provisions of M.G.L. c. 71, § 89 (charter schools); M.G.L. c. 74 (vocational schools); M.G.L. c.76, § 12A (Metco) or M.G.L. c. 76, § 12B (school choice), and shall not include schools approved under 603 CMR 28.09 or institutional school programs as described in 603 CMR 28.06(9).").
[3] See 603 CMR 28.10(6).
[4] See 603 CMR 28.10(6)(a).
[5] See 603 CMR 28.10(6)(a)(1).
[6] See 603 CMR 28.10(6)(a)(2).

for any services or other involvement of New Bedford. Parents' dispute is therefore entirely with GNBVT at this time and, for that reason, Parents oppose joinder.[7]

Similarly, GNBVT's response to the Hearing Request makes no claims against New Bedford and seeks no relief to be provided by it. GNBVT has proposed an IEP that would place Student back at New Bedford High School, but has nowhere claimed or even suggested that there is a disagreement between GNBVT and New Bedford regarding any part of this IEP.

I have no authority to order relief against a party, such as New Bedford, against which no claims have been made and against which no relief has been requested.[8] Thus, if New Bedford were joined, I would have no authority to order relief against it, and it would have no role in the dispute which, at this point in time, is solely between Parents and GNBVT.

This is not to say with certainty that New Bedford will be completely irrelevant to the instant dispute. In the event that as a result of an evidentiary hearing I were to agree with Parents that GNBVT is or can be made appropriate, that is the end of the dispute. But, if I were to determine that Student requires an out-of-district program (i.e., cannot be appropriately educated at GNBVT), then Student becomes the responsibility of New Bedford. If it then turns out that there is a dispute between Parents and New Bedford regarding the appropriateness of New Bedford's services or placement as reflected within the proposed IEP, Parents may need to file a new Hearing Request or amend their current Hearing Request explaining their dispute and making claims for relief. New Bedford would likely be a necessary party, and GNBVT may no longer need to be a party. In other words, there is no reason to join New Bedford until such time as it is determined whether GNBVT can appropriately educate Student and then whether Parents have a dispute regarding the appropriateness of New Bedford's services and placement as described in the proposed IEP.

For these reasons, I find that at this stage of the dispute, complete relief can be granted among the existing parties of Parents and GNBVT, and that the dispute can be disposed of in New Bedford's absence. Accordingly, joinder of New Bedford is not warranted under BSEA Hearing Rule I(J), and GNBVT's Motion to Join will be denied without prejudice.

MOTION TO DISMISS

BSEA Hearing Rules and the Massachusetts Executive Office of Administration and Finance Adjudicatory Rules of Practice and Procedure both provide that a Hearing Officer may allow a motion to dismiss if the moving party fails to state a claim upon which relief may be granted.[9] Similarly, the federal courts have concluded that a motion to dismiss under Federal

[7] In its Motion, GNBVT seeks to avoid this conclusion by pointing to and partially quoting one sentence in the Hearing Request where Parents make a general statement that is critical of all "sending schools" for GNBVT. This hardly consists of a claim against New Bedford.
[8] See 20 USC § 1415 (f)(3)(B); BSEA Hearing Rule I(B).
[9] BSEA Rule 17B; 801 CMR 1.01(7)(g)3.

Rules of Civil Procedure 12(b)(6) may be allowed if the court finds "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[10]

In order to satisfy the showing of an entitlement to relief, "a complaint must contain enough factual material to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."[11] A hearing officer must deny a motion to dismiss if after "accepting as true all well-pleaded factual averments and indulging all reasonable inferences in the [Parents'] favor…, recovery [can be justified] under any applicable legal theory …."[12]

GNBVT begins by asserting that the BSEA does not have jurisdiction over Parents' systemic discrimination claims. Parents allege that GNBVT is engaging in broad discriminatory practices, and I therefore consider my jurisdiction of these claims.

The BSEA's jurisdiction is limited to what can be found within state and the federal special education laws and their implementing regulations. When these authorities are read together, the BSEA jurisdiction may be understood as limited to (1) identification, eligibility, evaluation, placement, IEP, and provision of special education in accordance with state and federal law, (2) procedural protections of state and federal law for students with disabilities, and (3) a parent's claims regarding 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.[13]

I can find nothing within these grants of authority that would permit me, as a BSEA Hearing Officer, to go further than resolving the dispute between Student and GNBVT. Any findings and relief that I might order are limited to what is necessary to determine whether GNBVT in the past has complied with (and whether GNBVT currently and prospectively is complying with) state and federal special education laws with respect to Student; and if not, what relief should be ordered. However, this does not necessarily preclude my consideration of alleged systemic policies or practices.

In a relatively recent decision, the federal District Court in Massachusetts addressed this question. Plaintiffs had made class-wide claims for injunctive relief and took the position that exhaustion before the BSEA was not required because the BSEA lacked jurisdiction to award systemic relief. The Court disagreed: "Even if the BSEA lacks jurisdiction to grant

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[10] *Judge v. City of Lowell*, 160 F.3d 67, 72 (1st Cir. 1998) (quoting *Conley v.Gibson*, 355 U.S. 41, 45-46 (1957)).
[11] *Ocasio–Hernández v. Fortuño–Burset*, 640 F.3d 1, 8–9 (1st Cir.2011).
[12] *Caleron-Ortiz v. LaBoy-Alvarado*, 300 F.3d 60, 63 (1st Cir. 2002). See also *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 89 (1979); *Nader v. Citron*, 372 Mass. 96, 98 (1977).
[13] See 20 USC § 1415(b)(6) (a special education Hearing Officer has jurisdiction with respect to a "complaint . . . with respect to 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"); MGL c. 71B, s. 3 ("hearing officer shall order such educational placement and services as he deems appropriate and consistent with this chapter to assure the child receives a free and appropriate public education in the least restrictive environment"); 603 CMR 28.08(3).

systemic relief, however, it nevertheless may evaluate a parent's claim that systemic practices or procedures contributed to denying a student FAPE."[14]

The Court went on to explain that "the questions raised by the Complaint are not purely issues of law. Rather, plaintiff's claims hinge on whether [Boston] has, in fact, adopted the systemic practices and policies which plaintiff alleges are at the root of the harm". [15] The Court concluded that "BSEA consideration of plaintiff's claims would develop a factual record on the issues of whether the alleged systemic policies or practices in fact exist, and, if so, whether such policies contributed to or caused denial of plaintiff's right to FAPE. [Footnote omitted.]"[16]

In the instant dispute, Parents identify alleged systemic violations. But, they do not seek any systemic relief. Instead, Parents take the position that GNBVT's systemic policies or practices caused or contributed to alleged violations of Student's special education and discrimination rights. Their requested relief is limited to Student. For the reasons explained above by the federal District Court, I conclude that I must consider Parents' systemic claims for this purpose.

Accordingly, GNBVT's Motion to Dismiss will be denied with respect to Parents' systemic claims that can be shown to have caused or contributed to the alleged violations of Student's right to receive FAPE and to be free from discrimination under Section 504, as set forth within the Hearing Request.

GNBVT's Motion to Dismiss further argues that Parents' claims made pursuant to the Americans with Disabilities Act (ADA) and Article CXIV of the Massachusetts Constitution (Article CXIV) should be dismissed because the BSEA does not have jurisdiction to consider them.

Parents have also alleged violations of Section 504 of the Rehabilitation Act, and it is not disputed that I have jurisdiction over these claims. There is unlikely any difference between Parents' Section 504 claims and their ADA claims for purposes of the instant dispute before the BSEA.[17] Similarly, there is unlikely any difference between Parents' Section 504 claims

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[14] *Roe ex rel. A.L. v. Johnson*, 2012 WL 3561919, 3 (D.Mass. 2012). In reaching this conclusion, the Court cited to and relied upon a BSEA ruling in a previous dispute involving Boston (*In re: Boston Pub. Schs.*, 17 Mass. Spec. Ed. Rep. 69 at * 7, 18 (BSEA 11–4676) (Crane 2011)). The Court noted that in that BSEA ruling, the Hearing Officer determined that he lacked authority to order systemic relief, but had authority over "[p]arents' claims that Boston has certain systemic policies or practices and that these policies or practices caused or contributed to student's being denied FAPE".

[15] *Id.*

[16] *Id.*

[17] The case law construing Section 504 and the ADA is essentially interchangeable. The difference between the statutes lies in their applicability since Section 504 (but not the ADA) requires receipt of federal financial assistance. See *Calero-Cerezo v. United States*, 355 F.3d 6, 19 (1st Cir. 2004). See also *Bowden ex rel. Bowden*, 2002 WL 472293 at *6 (D.Mass. 2002) (noting that the ADA and the Rehabilitation Act provide largely the same protections and use the same standards, the court did not distinguish between claims under these statutes).

and their Article CXIV claims for purposes of the instant dispute before the BSEA.[18] I also note that, in contrast to Section 504, there is no express grant of jurisdiction to a BSEA Hearing Officer to address ADA claims or Article CXIV claims.[19] For these reasons, I will address Parents' Section 504 claims but decline to separately find facts under the ADA or Article CXIV, or to separately determine whether there was a violation of the ADA or Article CXIV.

In addition, GNBVT seeks dismissal of claims related to the state standardized assessment known as MCAS. Contrary to GNBVT's assertions, Parents' Hearing Request does not seek to challenge MCAS. Instead, it takes the position that GNBVT screens out lower-functioning student to maintain the required passing requirements under MCAS.

Finally, GNBVT takes the position that Parents may not pursue a discrimination claim relevant to GNBVT's admission practices. Parents' Hearing Request criticizes GNBVT's policies and practices with respect to admission, but their actual claims for relief appear to focus solely on addressing what GNBVT did or did not do after Student was admitted. As GNBVT correctly points out, Student was admitted to GNBVT, and Parents are therefore not in a position to make claims or seek relief regarding Student's admission.

For these reasons, I agree with GNBVT that any systemic complaint regarding its admission policies or practices is irrelevant to the specific claims regarding Student's rights, as set forth in the Hearing Request, and should be dismissed.

For these reasons, GNBVT's Motion to Dismiss will be allowed in part and denied in part.

MOTION TO STRIKE

GNBVT has filed a Motion to Strike for the purpose of striking certain paragraphs from Parents' opposition to GNBVT's Motion to Join. GNBVT takes the position that these paragraphs are either "baseless and unsubstantiated allegations" or not "remotely" relevant to the Motion to Join.

I find it unnecessary to consider GNBVT's Motion to Strike since I have not relied upon the paragraphs that GNBVT seeks to strike.

[18] Article CXIV of the Massachusetts Constitution provides: "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." It thus tracks language found within Section 504. Similarly to the ADA and in contrast to Section 504, Article CXIV does not require receipt of federal financial assistance (see footnote 17, above).

[19] See 603 CMR28.08(3)(a) (limiting the BSEA's jurisdiction to claims under special education law and Section 504).

ORDER

GNBVT's Motion to Join is DENIED without prejudice.

GNBVT's Motion to Dismiss is ALLOWED with respect to Parents' systemic claims regarding admission policies and practices, and with respect to any other systemic claims unrelated to the alleged violations of Student's right to receive FAPE and to be free from discrimination under Section 504, as set forth within the Hearing Request. The Motion to Dismiss is otherwise DENIED. However, I will not find facts under the ADA or Article CXIV, or determine whether there was a violation of the ADA or Article CXIV.

It is not necessary to address GNBVT's Motion to Strike, and I therefore decline to do so.

By agreement of the parties, the August 21, 22 and 23, 2013 hearing dates are POSTPONED. At any time, either party may request new hearing dates.

The conference call scheduled for August 1, 2013 is POSTPONED. A conference call will be scheduled to occur soon after the Settlement Conference that the parties are scheduling with BSEA Director Erlichman.

By the Hearing Officer,

William Crane
Dated: July 24, 2013