

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

In Re: Student v.
Braintree Public Schools

BSEA # 1400815

**RULING ON BRAINTREE PUBLIC SCHOOLS MOTION TO DISMISS PARENT'S
REQUEST FOR HEARING**

On October 24, 2013, Braintree Public Schools (Braintree) filed a Motion to Dismiss Parents' Request for Hearing in the above-referenced matter pursuant to Rule XVII (B)(3). Braintree sought to dismiss with prejudice any non-IDEA and 504 claim made by Parents arguing that: a) the Hearing Officer's "authority to make findings of fact and conclusions of law and award relief is jurisdictionally limited" and because b) there is no private right of action pursuant to Chapter 69¹ §1 of the Massachusetts General Laws.

Parents filed an Opposition to Braintree's Motion and Argument to Dismiss on October 30, 2013.

FACTS²:

Student is a fifteen-year-old resident of Braintree who has been diagnosed with Asperger's disorder and Attention Deficit Hyperactivity Disorder (ADHD).

Student possesses high average expressive language skills and superior nonverbal reasoning skills. His difficulties are in the areas of organization, focus on tasks and social skills, specifically, establishing and maintaining relationships with his peers in school and in the community.

Student's Team convened on May 3, 2012 to discuss Student's three year re-evaluation. The result of the meeting was a recommendation to continue Student's placement at the Pathways to Success Program for the remainder of his eighth (8th) grade. For ninth grade (2013-2014),

¹ Even though Parents are correct that Braintree mentions "Chapter 60 Section1" in this area, it is clearly a typographical error as in the preceding paragraph Braintree states, "...Petitioner has raised claims alleging violations of the Individuals with Disabilities Education Act IDEA and Section 504 of the Rehabilitation Act of 1973 Section 504, as well as claims pursuant to MGL chapter 71B, and MGL Chapter 69." A similar typographical mistake is made elsewhere in Braintree's discussion but the discussion specifically states and addresses Chapter 69.

² The Facts recited herein are stated for purposes of this Ruling only as they represent a summary of the facts relied on by the parties. However, most of the contextual facts and reasonable inferences that can be drawn from the aforementioned facts are in dispute, as well as Parents' view of the "scope and meaning" of those facts.

the Team recommended that Student attend the Communication, Organization & Academic Support Training Program (COAST) at Braintree High School. Parent accepted the proposed IEP and placement on May 17, 2012.

The 2012-2013 IEP called for Student to receive speech and language services, academic support from a special education teacher during most of the school day, and consultation by both the speech and language therapist and the special education teacher. This IEP proposed to address goals in writing, behavior, organization and social pragmatics.

Student attended the COAST program for the 2012-2013 school year. The COAST program is an inclusion-based model in which students receive small group support for study skills and transition planning. The program helps students deal with academic, social and emotional problems. Students in this program receive daily check-ins from the staff to assist them in the areas of organization and transition. Adaptive physical education is offered to those who need it. A school psychologist/counselor provides psychoeducational strategies for students in the COAST program, and a speech and language pathologist works with them on pragmatic language skills. Additionally, Student receives study skills supports.

During the 2012-2013 school year, Student took five (5) honors and advanced honors courses. The lowest grade in his report card was a B-. According to Braintree, he also made progress toward his IEP goals. Parents however, assert that he received failing grades in a number of classes during the 2012-2013 school year, and stress that the educational style at Braintree forced Student to rely on his auditory skills, which is a great weakness for him.

Student underwent an independent neuropsychological evaluation with Dr. David Presnall on May 2, 2013. Dr. Presnall administered testing which indicated that Student possessed average to superior academic ability (full scale IQ of 114 in the WISC IV). The testing also showed a 51 point discrepancy between Student's Perceptual Reasoning and Working Memory scores in the WISC. Dr. Presnall found that Student presented with weak auditory processing skills which interfered with Student's ability to acquire and retain information despite his strong conceptual abilities. Emotionally, he presented with "social awkwardness, insecurity, and difficulties in empathic relating that characterize many adolescents with Asperger's disorder". His communication style was found to be "direct, abrupt and poorly modulated".

On June 18, 2013, Braintree completed a Transition Assessment. The previous summer (2012) Student had also completed the Massachusetts General Hospital Aspire Transitions Exploration program. Student's Team convened on June 21, 2013 to review Dr. Presnall's independent evaluation, transition planning and extended school year services. The Team incorporated portions of Dr. Presnall's testing information into Student's IEP, and recommended participation in an extended school year program to prevent social regression. The Team further agreed that Student required additional support to address concerns in organization, executive functioning and social pragmatics. To address those concerns, the IEP contains goals in writing, academic support and social pragmatics.

Parents state that Student's IEP is vague, the IEP does not mention Student's potential and the goals have no bearing on his possible potential. Similarly, Parents state that the benchmarks have no relationship with what Student can do. Regarding transitional services Parents state that no functional transitional assessment has been performed and that the IEP does not offer transitional planning to address Student's lack of functionality in the community. The IEP also does not address Student's social and emotional needs appropriately according to Parents.

The IEP resulting from the June 2013 Team meeting offered Student continued placement at the COAST partial inclusion program at Braintree High School for the 2013-2014 school year, Student's tenth grade. Parents accepted the extended school year services but rejected the rest of the IEP and placement. According to Parents, there is great discrepancy between Student's intellect and his current level of performance.

At Parents' request, Student's Team reconvened on August 16, 2013, to further review Student's plan. Parents proposed an out-of-district placement which the rest of the Team rejected as being too restrictive for Student.

Braintree asserts that the proposed IEP and placement at COAST are appropriate and reasonably calculated to offer Student a FAPE in the least restrictive environment.

Parents assert that Student requires a "residential therapeutic placement in a setting where he cannot retreat to his room and isolate himself once school is over". They served Braintree with a ten-day notice of their intention to place Student at Glenholme School in Connecticut and request for full public funding of said placement as well as all future costs without restrictions. Parents also seek reimbursement of the cost of tutoring services they provided Student over the past three years, and two years of compensatory services. Parents also seek "findings and rulings" for violations not articulated in their Hearing Request which may become evident at Hearing, as well as findings of Braintree's violations under the IDEA, Section 504, MGL c71b, MGL c69 §1, and Massachusetts Special Education Regulations and Guidance Memoranda including Transitional Services. Lastly, Parents seek findings regarding Braintree's "deliberate indifference, gross misjudgment, and animus" toward Student for failure to provide appropriate educational programs and transitional services that allowed Student to reach his full potential.

Braintree's Position:

Braintree asserts that the standard adjudicatory rules of practice and procedure, 801CMR 1.01(7)(g)(3) and Rule XVII B4 of the *Hearing Rules for Special Education Appeals* set the standards regarding Motions to Dismiss including Motions to dismiss for failure to state a claim upon which relief can be granted. See *In Re: Norfolk County Agricultural School*, BSEA # 06-0390 (Berman, 2006)³ ("A hearing officer may dismiss a case if he or she cannot

³ The rule and the standard used in deciding motions to dismiss at the BSEA are analogous to those set out in Rule 12(b)(6) of the Federal and Massachusetts Rules of Civil Procedure.

grant relief under either the Federal or state special education statutes or the relevant portions of Section 504 of the Rehabilitation Act.”). Braintree further states that if the Hearing Officer finds that there is no doubt that the “plaintiff can prove no set of facts in support of his claim which would entitle him to relief” the motion to dismiss may be granted.

Braintree states that the BSEA’s ability to make findings of fact and conclusions of law and award relief is jurisdictionally limited to the “identification, eligibility, evaluation, placement, IEP, or provisions of special education”. M.G.L. c.71B,§ 2A; 603 CMR 28.08(3)(a).

Braintree argued that since the BSEA lacks authority to issue monetary damages, it should not act as a court of general jurisdiction in making findings of fact with respect to its non-IDEA and Section 504 claims, or determine whether the non-IDEA claims are valid and or fashion a remedy if appropriate. In making this argument, Braintree relies on the decision in *C.B.D.E. v. Massachusetts Bureau of Special Education Appeals*, No. 11-10874-DPW.2012 WL 4482296 (D. Mass., September 27, 2012), which noted the limited scope of the BSEA’s fact finding for purposes of exhaustion in cases involving damages.⁴ Braintree explained that in *C.B.D.E.* the Hearing Officer limited the scope of fact-finding to determinations entirely within IDEA and Section 504, determinations regarding alleged public school violations under IDEA and Section 504, and the impact those violations had on Student. Braintree explained that

In Re: C.B.D.E. decision represents a retreat for the BSEA from a broader scope of fact-finding in favor of a limited approach targeting facts explicitly related to IDEA and 504-based claims. In acknowledging this retreat, the Hearing Officer opined, “I found nothing within First Circuit case law that requires a broader scope of fact-finding, and I noted the more limited fact-finding consistent with what the First Circuit in *Frazier* found to be appropriate...” id.

To the extent that Parents seek determinations regarding Braintree’s alleged “deliberate indifference, gross misjudgment and animus” toward Student as well as alleged violations pursuant to M.G.L. 69 and “any other federal law and regulation”, Braintree asserts that those fall outside the expertise and scope of the BSEA’s fact-finding authority and are findings that should more properly be entered by a jury. See *In Re: Student v. Maple School District*, BSEA #12-7653 (2013).

Lastly, Braintree asserts that claims under Chapter 69 of the Massachusetts General Laws must be dismissed because said statute does not confer a private right of action. *Loffredo v. Center for Addictive Behaviors*, 462 Mass. 541, 544 (1998).

⁴ *C.B.D.E.* at p.5, footnote 9.

Parents' Position:

Parents state that Braintree's Motion to Dismiss fails under Rule 12(B)(6) of the Massachusetts Rules of Civil Procedure because Braintree did not file its Motion within twenty (20) days of receipt of Parents' Hearing Request as required under the aforementioned Rule 12(b)(6). According to Parents, since the motion was filed outside the twenty day limit, it more likely resembles a Motion for Summary Judgment, and as such is subject to Rule 56 of the Massachusetts Rules of Civil Procedure. According to Parents, Braintree does not state in its motion that it is intended as a Rule 56 Motion.

Parents further assert that in conformance with Rule 56, Motions for Summary Judgment must be supported by affidavits or other materials showing that the factual statements are true. Parents argue that Braintree did not file affidavits or other documents, and also did not provide any statement that affidavits were unavailable consistent with Rule 56f. Since Parents deny the scope and meaning of the facts stated by Braintree and assert that there are genuine issues of material fact, they argue that Braintree's motion must be dismissed as a matter of law.

Parents also dispute Braintree's interpretation of Judge Woodlock's determination in *CBDE* case stating that the matter was remanded to the BSEA for findings and rulings for exhaustion purposes, as to deliberate indifference, gross misjudgment and animus by Mashpee Public Schools toward the student in that case. As such, Parents assert that the BSEA must enter findings of fact and rulings of law for purposes of Parents ability to exhaust administrative remedies under Section 504 in order to preserve their damages claims at a later time.

Braintree's Motion to Dismiss appears to have typographical errors confusing the numbers 69 and 60. Parents argue that if Braintree was challenging claims allegedly filed by Parents under "Chapter 60 §1" instead of Chapter 69 §1, Braintree's Motion should be denied in full because Parents never raised claims under "Chapter 60 §1".

Parents also argue that Chapter 69 §1⁵ issues should not be dismissed because the standard has been integrated into the requirements of special education law in that: a) each goal of a child's IEP must be designed to develop the Student's potential and that progress be measured in light of the student's individual potential (consistent with 603 CMR 28.00(3) and 603 CMR 21.01 (17)); b) development of a student's full potential is also an integral part of transitioning planning.

⁵ Parents' Hearing Request state at page 4 "it is clear that Braintree cannot provide the type of services that Student needs to make effective progress and to achieve his full potential pursuant to regulations and Massachusetts General Laws chapter 61 section 1".

Legal Framework:

The Rule XVII of the *Hearing Rules For Special Education Appeals* and the *Standard Adjudicatory Rules for Practice and Procedure*⁶ authorize dismissal of cases in whole or in part when the party requesting the BSEA hearing fails to state a claim upon which relief can be granted.⁷ These Rules are similar to the Federal and Massachusetts Rules of Civil Procedure which also allow dismissals when a party fails to state a claim on which relief can be granted.⁸

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.”⁹ In the context of a motion to dismiss, all factual allegations must be accepted “as true and [the Hearing Officer must] draw all reasonable inferences in the plaintiff’s favor.”¹⁰ Legal conclusions, however, are not entitled to a presumption of truth because, while legal conclusions may “provide the complaint’s framework, they must be supported by factual allegations.”¹¹ 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/her claims.¹²

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 forerunners¹³, and upon consideration of the law and the legal arguments proffered by the Parties as well as Parents’ Hearing Request, I find that Parents’ allegations regarding non-IDEA, MGL c. 71B, and Section 504 matters,

⁶ 603 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.”).

⁷ 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”).

⁸ FED. R. CIV. P. 12(b)(6); MASS. R. CIV. P. 12(b)(6).

⁹ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007).

¹⁰ *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.”).

¹¹ *Ashcroft*, 129 S. Ct. at 1940.

¹² *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.”).

¹³ *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 state a facially plausible legal claim.” *Ocasio-Hernandez v. Fortuño-Burset*, 640 F.3d 1, 8-9 (1st Cir. 2011).

fall outside the scope of authority of the BSEA and as such fail to raise the plausibility of a right to relief.

Recent First Circuit case law create a more complex situation regarding the Motion to Dismiss standard at the BSEA. As eloquently articulated by Hearing Officer Byrne in *In Re: Xylia*, BSEA 12-0781 (November 26, 2012),

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 for the factual records at the administrative level and 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 Woodlock recently reaffirmed that in this Circuit any IDEA-based claim 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 [in the context of this motion] 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.¹⁴ *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.

In addressing the administrative exhaustion requirement under *Frazier*, in *Bowden v. Dever*, No. 00-12308-DPW, 2002 WL 472293 (D. Mas. March 20, 2002) Judge Woodlock explained that

¹⁴ 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.

... 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.

There are, however, exceptions to the administrative due process exhaustion as further explained in *Xilia*. Those instances contemplate situations where: the special education expertise of the Hearing Officer is not necessary to establish the petitioner's claims¹⁵; where the student solely seeks money damages for tort-like injuries falling outside federal statutory claims¹⁶; or instances where there is no indication of a dispute within the context of the IDEA or Section 504¹⁷. Thus, exhaustion at the administrative level is not necessary in the aforementioned instances. *Xilia* at 6.

The analysis *supra* makes it clear that so long as the petitioner articulates claims that assert violations of a student's right to FAPE, that is, claims that are IDEA and/ or Section 504 related, implicating the school district's responsibilities under the statute, the BSEA Hearing Officer must hear those claims.¹⁸ Moreover, when the petitioner articulates the plausibility of the existence of IDEA and/ or Section 504 related claims, the matter cannot be dismissed even if the ultimate recourse is only available in a different forum.

Conclusions:

Parents' first argument is that the Motion to Dismiss should be denied because it did not strictly comply with the 20-day requirement of a typical Rule 12 (b)(6). Additionally, Parents argued that since it did not include affidavits or documents, Braintree's Motion also failed to meet the requirements of Rule 56. Neither argument is persuasive.

Rule XVII. B of the *Hearing Rules for Special Education Appeals* imposes no limitation on when a Motion to Dismiss may be filed by a Party. Moreover, it specifically allows filing of Motions to Dismiss for jurisdictional issues. Said Rule states,

B. By Request of a Party

Any party may file a motion or request to dismiss a case for:

¹⁵ *Dr. Franklin Perkins School v. King Philip Regional School District*, 25, Mass. L. Rptr. 549 (2009 Mass Super).

¹⁶ *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108 (1st Cir. 2003); *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13 (1st Cir. 2006).

¹⁷ See *Hague v. Massachusetts Department of Elementary and Secondary Education*, No. 10-30138-DJC, U.S. Dist. LEXIS 112235 (D. Mass. Sept. 12, 2011).

¹⁸ I note that in its response to Parents' Hearing Request/counterclaim, Braintree claimed its "right to a jury trial on Parents' legal claims for monetary damages and for all other claims so triable." Given Braintree's assertion that in the event the BSEA's Decision is appealed, Braintree will request a trial by jury, the likely result is that the labor-intensive task of entering findings on Parents' damages claims will have proven to be futile. In a trial by jury the Hearing Officer's findings of fact would be set aside. The result is that the likely lengthier hearing will have come to a great expense to the parties further delaying the determination of FAPE for Student. This exercise in futility would seem to run counter to the stringent timelines involved in IDEA cases at the administrative level.

1. lack of jurisdiction;
2. failure of the opposing party to prosecute or proceed with the case;
3. failure of the opposing party to follow or comply with the Rules or any Hearing Officer order;
4. failure to state a claim upon which relief may be granted; or,
5. the clear failure of the opposing party to establish a viable claim for relief after presentations of its evidence.

The hearing Officer may allow a motion or request to dismiss with or without prejudice [Rule XVII. B of the *Hearing Rules for Special Education Appeals*].

Administrative proceedings are generally more informal processes than judicial proceedings. While Rule 12(B)(6) may limit the period of time during which a motion to dismiss may be requested in court, the BSEA Rules place no such restrictions on parties. Braintree is also not challenging the BSEA's jurisdiction over MGL c.71B claims. As such, Parents' timeliness argument must fail.

Next, Parents assert that Motions for Summary Judgment must be supported by affidavits and cite a host of cases to support their position in this regard. Braintree however, did not file a Motion for Summary Judgment but rather a Motion to Dismiss. As such, Parents' arguments in this regard are irrelevant to this ruling.

Turning to Parents' request for findings of fact and rulings of law in regard to alleged transgression by Braintree involving "deliberate indifference, gross misjudgment and animus" toward Student, neither Parents' Hearing Request nor the Opposition to Braintree's Motion to Dismiss mention that they are seeking damages for any specific, alleged transgression by Braintree. In fact, Parents only mention the possibility of future claims for damages in their Opposition to Braintree's Motion to Dismiss.

Parents' Hearing Request is overly general, argumentative and lacking in the level of specificity that would make it possible to ascertain what exactly it is that they are claiming other than allegations of failure by Braintree to offer an appropriate IEP and placement, a claim that falls squarely within the BSEA's jurisdiction. Parents allege that Student received failing grades and that transition services are inadequate, again without pointing to any specific marking period or school year. Moreover, Parents seek two years of compensatory services regarding IEPs that were allegedly accepted by Parents and implemented by Braintree.

Parents' Hearing Request further seeks for the BSEA to make

... findings of fact and rulings of law that Braintree did violate Massachusetts regulations and laws as well as any federal law and regulation that the facts

would support that may be presented at a hearing even if not fully articulated herein.

Parents' request is contrary to the IDEA. 20 U.S.C. 1415(f)(3)(B) specifically requires that

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).

In this regard, Parents are not permitted to wait until evidence is presented at Hearing, as Parents' attorney suggests, to ascertain what additional violations may be raised unless they first specifically stated them in their Hearing Request. As such, to the extent that Parents' relief as articulated in item #6 of their Hearing Request relates to "hypothetical claims" not articulated in Parents' Hearing Request, those are DISMISSED as contrary to the requirements of IDEA.¹⁹

However, Parents claim' for findings and rulings regarding Braintree's alleged "deliberate indifference, gross misjudgment and animus" is a different matter. In its current state, Parents' Hearing Request is too vague and points to no specific alleged act by Braintree giving rise to such grave allegations. While poorly articulated and lacking in the degree of specificity required under the IDEA, the Hearing Request raises the plausibility of a viable claim that may lead to award of damages. As such, and consistent with *Frazier* and its progeny, Braintree's Motion to Dismiss in this regard must be dismissed. Therefore, by the close of business on December 3, 2013, Parents are ordered to submit a much more clear and comprehensive list of the specific transgression they allege give rise to their claim of "deliberate indifference, gross misjudgment and animus" as well as the specific time period during which these alleged transgressions occurred.

Turning to Parents alleged violations pursuant to M.G.L. c.69 §1, Braintree is correct that no private right of action is conferred under said statute. In their Opposition argument, Parents are attempting to elevate the standard of FAPE in Massachusetts to the "maximum feasible standard", a standard that was supplanted by the IDEA's FAPE standard in 2002. 603 CMR 28.01(3)²⁰. In their efforts to do so, they are searching beyond the plain meaning of M.G.L.

¹⁹ If they wished to have additional viable claims added, Parents would have to seek leave to file an amended Hearing Request with Braintree having the opportunity to respond. See Rule I G of the *Hearing Rules for Special Education Appeals*.

²⁰ "The purpose of 603 CMR 28.00 is to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential in the least restrictive environment in accordance with applicable state and federal laws" 603 CMR 28.01(3). See also 603 CMR 28.01(17) defining the term "progress effectively in the general education program" to mean that the student must make "documented growth in the acquisition of knowledge and skills, including social/ emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the student, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district. The general education program includes preschool and early childhood programs offered by the district, academic and non-academic offerings of the district, and vocational programs and activities".

71B and the Massachusetts Special Education Regulations, taking M.G.L. c. 69 §1 out of context, and using it to create a different standard. There is no dispute that in the delivery of programs and services, school districts are responsible to meet their obligations within the standards delineated in the aforementioned M.G.L. 71B, IDEA and the regulations promulgated under those statutes. Parents M.G.L. 69 §1 is DISMISSED with PREJUDICE as not conferring a private right of action.

ORDERS:

1. Parents may proceed with regard to all IDEA and Section 504 claims.
2. By the close of business on December 3, 2013, Parents shall submit a list of the specific transgression they allege give rise to their claim of “deliberate indifference, gross misjudgment and animus” as well as the specific time period during which these alleged transgressions occurred.
3. Parents’ relief as articulated in item #6 of their Hearing Request (relating to claims that may or may not arise at Hearing which were not specifically articulated in Parents’ Hearing Request) is DISMISSED without PREJUDICE.
4. Parents’ claim pursuant to M.G.L. 69 §1 is DISMISSED with PREJUDICE.

So Ordered by the Hearing Officer,

Rosa I. Figueroa

Dated: November 26, 2013