

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

In Re: Student v.
Billerica Public Schools

BSEA # 1403000

Ruling on Billerica Public Schools' Motion to Dismiss

On January 23, 2014, Billerica Public Schools (Billerica) filed a Motion to Dismiss which Motion was verbally opposed by Parents during a telephone conference call on January 23, 2014. During the aforementioned telephone conference call Parents were granted an extension through the close of business on January 27, 2014, to file their written opposition to Billerica's Motion. Thereafter, Billerica requested to be heard in person on the Motion and the case was heard on January 31, 2014 at the Department of Elementary and Secondary Education in Malden, MA, before Hearing Officer Rosa I. Figueroa.

Those present during part or all of the Motion Session were:

Parents

Thomas Schiavoni, Esq.	Attorney for the Parents/Student
Debra Comfort, Esq.	Attorney for the Department of Elementary and Secondary Education
Michael Joyce, Esq.	Attorney for Billerica Public Schools
Judith Norton	Billerica Public Schools
Marcia Mittnacht	Department of Elementary and Secondary Education
John Bynoe	Department of Elementary and Secondary Education

In addition to the oral arguments, testimony in this case was taken from Marcia Mittnacht and John Bynoe.

Prior to initiating the Motion Session on January 31, 2014, an informal pre-hearing conference was held with the Parties during which the Parties were able to address all their concerns regarding the matter. The Parties informed the Hearing Officer that they had met to discuss Student's IEP. Parents alleged that they had not been able to respond to the IEP because it was missing the Section 504 plan. According to Billerica, the school nurse was working on this and was contacting the necessary individuals. Billerica agreed to forward the Section 504 plan to Parents early the following week (the first week in February) and Parents were instructed to accept or reject the IEP and Section 504 plan as soon as possible and to submit an Amendment to the Hearing Request stating any additional or remaining concerns regarding challenges to the IEP, the Section 504 plan and any issues regarding transportation as a special education related service. Said response was intended to further

narrow any remaining issues prior to the Hearing on the merits scheduled for February 25, 2014.

The Motion Session was held following said informal conference.

On February 13, 2014, Parents filed a written Opposition to Billerica's Motion to Dismiss. Parents stated their rejection of the proposed IEP program to the extent that it did not offer Student transportation to the Recovery High School in Beverly, MA and also rejected the proposed placement. Parents' submission contained three attachments dated February 10, 2014: Parents' comments on the IEP, a partial rejection of the program due to the Team's failure to provide transportation as a related service¹, and a rejection of the proposed placement at Billerica Memorial High School. Parents did not file an Amendment to their last Amended Hearing Request filed on January 8, 2014.

On February 14, 2014, Billerica filed an Opposition to Parents' submission stating that during the telephone conference call on January 23, 2014 Parents had been ordered to submit any written opposition to the District's Motion to Dismiss by 5:00 p.m. on January 27, 2014, and Parents did not submit anything in writing by said deadline. Thereafter, a Hearing on the Motion had been conducted on January 31, 2014 and Parents again made no written submissions prior to the Hearing on said Motion to Dismiss. Billerica argued that Parents' Opposition received on February 13, 2014 was untimely and should not be considered for purposes of Billerica's Motion to Dismiss. Lastly, Billerica argued that Parents' submission addressed issues that had not been previously raised in Parents' Request for Hearing or the Amended Request for Hearing dated January 8, 2014.

Parents' Opposition to Billerica's Motion to Dismiss is disregarded as being untimely for purposes of the Motion to Dismiss as it wasn't submitted by the January 27, 2014 deadline. However, to the extent that this document responds to the Hearing Officer's order on January 31, 2014 (i.e., that Parents respond to the proposed IEP and Section 504 plan and clarify their position regarding the remaining issues for Hearing) the document is accepted as notice that there are unresolved issues but not as an Opposition to Billerica's Motion to Dismiss or an Amended Hearing Request. Parents must file an Amended Hearing Request if they wish to formally raise issues regarding their partial rejection of the IEP issued in January 2014, as the information contained in their Opposition raises new issues not contained in either the original Hearing Request or the January 8, 2014 Amended Hearing Request.

This Ruling addresses only whether Billerica is responsible to offer Student transportation to the Recovery High School as a regular education issue.

¹ Attachment 2 stated in pertinent part: "Due to the instability of [Student's] life-threatening Type 1 diabetes, we reject the finding that he does not require transportation as a special education related service. We also reject the Team's recommended placement because an alternative appropriate program exists at Northshore Recovery High School where the goals and objectives of the IEP can also be implemented while substance abuse issues are concurrently treated".

FACTS:

1. Student is a seventeen-year-old resident of Billerica, Massachusetts, who has been found eligible to receive special education services as a result of Type 1 diabetes and social-emotional concerns. He also has substance abuse issues.
2. Parents filed a Hearing Request with the BSEA on October 15, 2013 and thereafter, amended the Hearing Request in January 2014 following their unilateral placement of Student at Recovery High School on or about January 2, 2014. Parents seek transportation for Student to Recovery High School and argue that said transportation is the responsibility of Billerica.
3. Student's most recent IEP issued in February 2014 calls for placement of Student at Billerica Memorial High School and does not offer transportation as a related service. On February 10, 2014, Parents rejected the placement portion of this IEP and also the Team's finding that Student does not require special transportation as a related service.
4. John Bynoe, Associate Commissioner, Department of Elementary and Secondary Education (DESE), explained that Recovery High Schools (RHS) are funded through a grant within the Department of Public Health (DPH). Funding for students at RHS is obtained through the per pupil amount designated for students within a school district, the foundation budget amount, which is paid by the district of residence for the particular student to RHS. According to Mr. Bynoe, the statute creating RHS in Massachusetts imposes no additional requirements on school districts.
5. RHS offer a general education, high school program to both regular and special education students who have also been diagnosed with Substance Abuse Disorder or dependency as defined by the Diagnostic and Statistical Manual of Mental Disorders IV-TR. RHS are responsible to implement the IEPs of eligible students and have been approved by DESE to do so. RHS must also offer students enrolled therein a structured recovery plan. M.G.L. c.71 §91.
6. According to Mr. Bynoe, the issue of transportation has only been addressed by DPH in a "Request for Response" in which DPH explained that students enrolled at RHS could have access to the sites through public transportation. The grant itself makes no mention regarding transportation and DESE has no monitoring responsibilities for RHS (Bynoe).
7. Marcia Mitnacht, State Director for Special Education, DESE, first learned about the case at bar through an email from the Department of Children and Families inquiring about financial and programmatic responsibilities by RHS. She responded that that RHS were not themselves school districts and therefore could not be assigned programmatic or financial responsibility for students enrolled therein. Instead, the Local Educational Agency (LEA or school district) continued to be programmatically

and financially responsible for any of its students attending RHS, including provision of related services under a student's IEP (Mittnacht).

Legal Framework:

Neither Party questions the BSEA's jurisdiction, pursuant to Rule 17B of the *Hearing Rules for Special Education Appeals*, to entertain motions to dismiss in instances when the moving party fails to state a claim upon which relief may be granted, as Billerica alleges in the instant matter. See also 801 CMR 1.01(7)(g). The BSEA has also held that these motions are akin to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In entertaining this type of motion the Hearing Officer may consider the facts alleged in the pleadings, documents attached or incorporated by reference in the complaint and matters of which judicial notice may be taken. *Nollet v. Justices of the Trial Court of Mass.*, 83 F. Supp. 2d at 204, 208 (D.Mass. 2000), *aff'd*, 248 F.3d 1127 (1st Cir. 2000). Also, all factual allegations in the complaint must be taken as true and all reasonable inferences must be drawn in the plaintiff's favor. *Langadinos v. Am. Airlines, Inc.*, 199 F.3d 68, 69 (1st Cir. 2000). Therefore, the instant Motion to Dismiss may only be granted if no relief can be afforded under federal or state special education law, or the relevant portions of Section 504 of the Rehabilitation Act of 1973, after considering as true the allegations made by the Parents and drawing all reasonable inferences in their favor. Consistent with *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), however, if the Parents' allegations raise the plausibility of a viable claim that may give rise to some form of relief under special education law or Section 504 of the Rehabilitation Act, the matter may not be dismissed.

Ruling:

First it is important to consider the statutory framework of Recovery High Schools in Massachusetts. M.G.L. c.71 §91 defines Recovery High Schools as

...a public or collaborative program for students diagnosed with Substance Abuse Disorder or dependency as defined by the Diagnostic and Statistical Manual of Mental Disorders IV-TR, that provide:

- 1) A comprehensive 4 year high school education, and
- 2) A structured plan of recovery.

M.G.L. c.71 §91 parts (c) and (e) address funding for RHS, providing that the school district must transfer the "state average foundation budget per pupil" for students meeting the established criteria² and imposes financial sanctions for failure to transfer the funds.

² "(1) the student is currently enrolled in the district or currently resides in the municipality in which the district is located; (2) the student is considered by a clinician, as defined by 105 CMR 164.0006, to be clinically appropriate, using the criteria for Substance Use Disorders as defined in the Diagnostic and Statistical Manual of Mental Disorders IV-TR; and; (3) the student meets all matriculation criteria as outlined by the sending district and the department of elementary and secondary education, with determination of academic eligibility based on existing documentation provided by the district. The district and the recovery high school shall arrange to confer a diploma when a student completes states and districts mandated graduation requirements." M.G.L. c.71 §91(b).

Additionally, part (c) calls for the Board of Education, in consultation with the DPH and the DMH, to promulgate rules and regulations, as necessary to implement this section.

M.G.L. c.71 §91 mandates that school districts transfer the state average foundation budget per pupil to fund a resident student who meets the relevant criteria's tuition at a RHS. However, as Billerica correctly argues, at this time, in contrast to the statutes addressing charter schools and vocational schools (M.G.L. c.71§89 and M.G.L. c74 §8A respectively), M.G.L. c.71 §91 makes no provision requiring school districts to provide or otherwise reimburse the RHS for transportation to said high schools.

Billerica argued that the BSEA lacks subject matter jurisdiction over the issue of transportation of Student to the RHS because Student does not require transportation as a matter of special education. According to Billerica, as a regular education issue, falling outside the scope of federal and state special education laws the BSEA lacks jurisdiction to order Billerica to offer Student transportation. See 603 CMR 28.08(3)³.

603 CMR 28.05, the special education regulation addressing transportation, states as follows:

(5)Transportation. The Team shall determine whether the student requires transportation because of his or her disability in order to benefit from special education.

(a) Regular transportation. If the student does not require transportation as a result of his or her disability, then transportation shall be provided in the same manner as it would be provided for a student without disabilities. In such case, the IEP shall note that the student receives regular transportation, and if the school district provides transportation to similarly situated students without disabilities the eligible student shall also receive transportation.

1. If regular transportation is noted on the student's IEP and the student is placed by the school district in a program located at school other than the school the student would have attended if not eligible for special education, the student is entitled to receive transportation services to such program.
2. If regular transportation is noted on the student's IEP and the student is enrolled by his or her Parents in a private school and receiving services under 603 CMR 28.03(1)(e), such student is not entitled to transportation services unless the

³ 603 CMR 28.08(3) limits the jurisdiction of the BSEA to resolving disputes among school districts, private schools, parents and state agencies consistent with 34 C.F.R. 300.154(a), over: "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 as well as issues involving the denial of a free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973, as set forth in 34 C.F.R. §§104.31-104.39". See *Student v. Blackstone-Millville Regional School District*, BSEA No. 08-0785 at 4-5.

school district provides transportation to students without disabilities attending such private school.

(b) **Special transportation.** If the team determines that the student's disability requires transportation or specialized transportation arrangements in order to benefit from special education, the team shall note on the student's IEP that the student requires special transportation. In such circumstances transportation is a related service.

1. The team shall determine necessary modifications, special equipment, assistance, need for qualified attendants on vehicles, and any particular precautions required by the student and shall document such determinations in the student's IEP. If specialized arrangements can be provided on regular transportation vehicles, the school district shall make such arrangements.

Billerica argued that 603 CMR 28.05 specifically leaves the determination of whether a student requires transportation as a related service to the Team. If the Team determines that it is not needed as a related service, Billerica asserts that the regulation provides that transportation will be provided as it would for any other student without disabilities.

603 CMR 28.05(b)(1)(iii) provides

(iii) the team shall specify if the student has a particular need or problem that may cause difficulties during transportation, such as seizures, a tendency for motion sickness, behavioral concerns, or communication disabilities.

2. If special transportation is noted on the student's IEP, the student is entitled to receive transportation services to any program provided by the public school and in which the student participates.
3. If special transportation is noted on the student's IEP and the student is enrolled by his or her Parents in a private school and receiving services under 603 CMR 28.03(1)(e), the school district's obligation to provide transportation shall be limited to transportation services within the geographic boundaries of the school district. 603 CMR 28.05(b)(1)(iii).

The Massachusetts Special Education Regulations is unequivocal that

In no event shall a school district allow transportation considerations to influence, modify, or determine the educational program required by any student in need of special education. 603 CMR 28.05(c).

According to Parents all of Student's special education and substance abuse issues can be appropriately addressed at RHS. They argue that the only thing standing in the way of Student's access to his education at the RHS is transportation. Parents have rejected the most recently offered IEP proposing placement at Billerica Memorial High School and the omission of transportation as a related service. Both of these issues however, form part of Parents' further amendment to the Hearing Request as discussed during the Pre-hearing conference on January 31, 2014.

The Parties are correct that RHS are *sui generis* and that this is a case of first impression for students attending RHS in Massachusetts. MGL c.71 §91 defines RHS as a public or collaborative program for students diagnosed with Substance Abuse Disorder who are in high school. While the statute defines RHS as a public or collaborative program, according to Ms. Mittnacht and Mr. Bynoe, DPH, not DESE oversees these institutions as they are funded through a DPH grant. Similarly, according to them, DESE does not monitor these programs. Ms. Mittnacht testified that RHS are not equivalent to a "district" within the context of special education law, and as such cannot be assigned programmatic or financial responsibility for students. Rather, that responsibility remains with the public school district where the student attending the RHS resides.

The statute also called upon the Board of Education, in consultation with DPH and DMH to promulgate rules and regulations "as necessary to implement this section", however, while approximately four RHS are in effect in Massachusetts, to date no rules or regulations have been developed leaving little guidance to issues such as responsibility for transportation. Ms. Mittnacht testified that while no prohibition existed regarding transportation of students to the RHS, she was aware of no mandate that it be provided. She was only aware of transportation mandates as a related service within the context of special education.

Moreover, while the statute defines RHS as a public or collaborative program, there is no guidance as to whether RHS are to be equated to "educational collaboratives" formed by local school committees and charter boards consistent with M.G.L. c.40 §4E. In the case of the educational collaboratives, transportation is provided by the sending district or coordinated and provided by the collaborative in their service area.

While the creation of RHS throughout Massachusetts is commendable, the lack of guidance and oversight regarding how to get an already fragile population to the RHS is regrettable. As in the case at bar, this oversight has a serious impact on Student's ability to access his/her education including his special education services.

However, as regrettable as it may be, Billerica is correct that the statute makes no provision requiring public schools to provide transportation to regular education students attending RHS. Here, although Student is an IDEA eligible student, unless his IEP specifically provides transportation services as a related service, he would be treated as any other regular education student and would therefore, not be entitled to transportation services. At present, Student's IEP makes no provision for special education and while Parents have rejected this

finding as well as the proposed placement, until such time as a Hearing on the merits results in a different finding, he is only entitled to transportation in the same manner as any other regular education student would be.

Billerica is correct that it is not responsible to offer Student transportation at this time. Also, without any regulation or further guidance equating RHS to educational collaboratives, Billerica cannot at this juncture be ordered to provide transportation, because at present the transportation sought is a regular education issue outside the purview of the BSEA.

Order:

Billerica's Motion to Dismiss is GRANTED with respect to Student's right to transportation as this is a regular education issue outside the purview of the BSEA. As such the dismissal is with prejudice.

Regarding Parents' partial rejection of the IEP promulgated in January 2014, since Parents have not filed an Amended Hearing Request they may not proceed to Hearing on February 25 and 28, 2014 as previously scheduled. However, since they have stated their intention to dispute the proposed placement and transportation as a related service, and have rejected the IEP indicating their intent, they shall file an Amended Hearing Request by the close of business on February 28, 2014 or this portion of the case will be dismissed without prejudice on the same date.

So Ordered by the Hearing Officer,

Rosa I. Figueroa

Dated: February 21, 2014