

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

In Re: Student v.
McAuliffe Regional Charter Public School

BSEA # 1404110

Ruling on McAuliffe Regional Charter Public School's Motion to Dismiss

On March 26, 2014, McAuliffe Regional Charter Public School (MRC) filed a Motion to Dismiss in the above-referenced matter. MRC sought to have the BSEA dismiss most, if not all of Parent's claims. MRC argued that the Bureau of Special Education appeals (BSEA) lacks subject matter jurisdiction to address Parent's complaints pertaining to the Annual Report Special Education Parent Advisory Council and public records. Regarding Parent's claim for compensatory services, MRC argued that Parent had waived this right by failing to raise this issue in previous BSEA Hearings. Moreover, according to MRC the issue of compensatory services had been resolved by Program Quality Assurance at the Massachusetts Department of Elementary and Secondary Education and The Office for Civil Rights.

Parent did not submit a response to MRC's Motion to Dismiss.

This Ruling is issued in consideration of all of the submissions made by the Parties including Parent's Hearing Request and the Amended Hearing Request as well as MRC's submissions and arguments. I have also taken administrative notice of Parent's three previous cases before the BSEA, portions of which I have incorporated into the Facts and Conclusions section of this Ruling.

Issues:

1. Whether the BSEA has jurisdiction to address Parent's request for an order to revise the Annual Report Special Education Parent Advisory Council to address the formation of a parent's Special Education Parent Council;
2. Whether the BSEA has jurisdiction to address Parent's request for an order to revise the rules and regulations applicable to student records;
3. Whether Parent is entitled to compensation for a speech and language evaluation, and services which according to him, were not provided by MRC during the 2012-2013 school year.

Facts:

1. In June 2012, Student graduated from MRC.
2. At the time of graduation, Parent/Student and MRC agreed that Student was owed several language sessions which were to be made up because the speech and language pathologist had been absent frequently. In addition to Student's regularly scheduled speech and language sessions, MRC attempted to schedule additional sessions but Parent refused to have Student pulled out of her academic courses. Student's additional speech and language sessions were therefore scheduled during her study hall period.
3. Parent brought his complaint to Program Quality Assurance (PQA) at the Department of Elementary and Secondary Education (DESE). PQA responded that MRC should use as many study hall sessions as possible to compensate Student for the missing sessions prior to graduation. MRC followed PQA's plan and the complaint was closed.
4. On December 9, 2013, Parent filed a Hearing Request with the Bureau of Special Education Appeals seeking: \$496.00 reimbursement for a speech and language evaluation which MRC had allegedly failed to conduct in three years; \$125.00 for private speech and language therapy (to be paid at market rate not state rate); and to have the official 2012-2013 Board of Trustees complaints corrected so that it reflected that MRC had been investigated by the Office of Civil Rights (OCR) regarding Student, reflect that the complaint had been settled by providing compensatory services to Student, to have the revised report posted on the school's website and distributed pursuant to 603 CMR 1.09(1) and to provide Parent with the receipt from the receiving parties as proof of completion.
5. In addition to seeking reimbursement, Parent claimed that Student had been pulled from English Language Arts to receive compensatory speech and language services without the IEP being modified or amended, and that MRC had failed to disclose Parent's complaint to the OCR when it submitted its annual report to DESE.
6. On December 18, 2011, MRC agreed to pay for an independent speech and language evaluation at the then current state rate. Since the filing of Parent's Hearing Request, Parent provided the necessary documents to support reimbursement and MRC has agreed to pay parent \$460.00
7. When MRC learned of Parent's concern regarding the omission of his complaint to OCR, it sought input from DESE. DESE responded that the omission was not improper.
8. Parent filed a complaint against MRC with OCR on September 28, 2012.
9. On March 26, 2013 Thomas J. Hibino, Regional Director OCR wrote to Parent regarding an investigation on whether MRC had denied Student a FAPE by failing to

provide Student speech and language services as delineated in Student's IEP, for the period from late March through mid-June 2012. OCR explained that prior to reaching a compliance determination MRC voluntarily agreed to resolve the complaint by reimbursing Parent for eight (8) hours of speech and language services or arrange for Student to receive eight (8) hours of compensatory speech and language services.

10. On August 18, 2013, Parent made a public records request seeking the following documents:
 - Annual Report for 2012-2013;
 - Legal expenses spent on Student from March 1, to August 1, 2013;
 - Copies of meeting notes and attendance for Special Education Parent Advisory Council meetings for the 2012-2013 school year;
 - Billing records for "Dr. Green" [sic] regarding [Student] from September 1, 2012 to June 30, 2013.
11. MRC responded to Parent's record request on August 30, 2013 and on September 1, 2013. MRC provided Parent with a copy of the annual report as well as copies of legal bills in response to the request (Parent attachment 3 of Hearing Request received at the BSEA on January 23, 2014). Regarding the request for "billing records" for Dr. Greenstein, pertaining to Student, MRC explained that it did not have them. MRC also explained that it did not have meeting minutes for a special education parent advisory council.
12. Barry Barnett, Coordinator of Federal Programs, Charter School Office at DESE, informed Parent on September 30, 2013, that while he was correct that pursuant to 603 CMR 1.10, the annual reports generated by charter schools should include an accounting of complaints received by the board of trustees, MRC did not have to report Parent's complaint because Parent had filed his complaint with OCR and not with the MRC's Board of Trustees. DESE found MRC's annual report for the 2012-2013 school year to be correct.
13. On January 23, 2014, the BSEA receive Parent's Amended Hearing Request which included allegations that during 2012-2013, MRC had failed to hold a special education parent advisory council meeting. According to Parents, MRC had not conducted a parent workshop or created an active special education parent advisory council¹, and had not complied with the student record regulations. Specifically, Parent's proposed resolution was:
 - Provide procedures that outline the need for a parents' rights training seminar, who will organize it and who will finance it.
 - Provide proof of training by presenting procedure training attendance sheet.

¹ MRC noted that Student had graduated prior to the 2012-2013 school year.

-Provide procedures that outline the need and function of a parent's Special Education Parent Council according to 603 CMR 28:07(4).
-Provide procedures that define what student records are, who has access to them, how they are controlled and timeline requirements. Procedure must also meet state and federal requirements.
Provide proof of training by presenting procedure training attendance sheet.

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 such as when the moving party fails to state a claim upon which relief may be granted as MRC claims. See also 801 CMR 1.01(7)(g). The BSEA has also held that these motions are akin to a Rule 12(b)(6) of the Federal Rules of Civil Procedure. In considering 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). Then, only if relief cannot be granted under the 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 opposing party (in the instant case Parent) and drawing all reasonable inferences in their favor may the motion to dismiss be granted.

However, consistent with *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), if the opposing party's 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:

In the instant case, Parent seeks an order to revise the annual report and procedures regarding the need and function of a parent's Special Education Parent Council and student/state records. Parent also seeks compensation for a speech and language evaluation, and speech and language services which according to him, were not provided by MRC.

I first turn to MRC's challenge regarding the BSEA's jurisdiction to address Parent's claims pertaining to the Annual Report Special Education Parent Advisory Council and public records as falling outside the purview of the BSEA as set forth in 603 CMR 28.08(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 (10/25/2007).

MRC further states that it reported Parent’s concern regarding the annual report directly to the Charter School Office at DESE and according to it, DESE determined that the report was properly filed and that MRC need not take any corrective action nor was it required to file an amendment.

Regarding the Parent Advisory Council, MRC notes that Parent’s complaint related to the 2012-2013 school year, a year after Student had graduated from MRC. MRC argues that Parent is precluded from raising allegations following Student’s graduation and further raises questions as to how a Parent Advisory Council would impact Student’s individual right to special education. Lastly, MRC disputes that 603 CMR 28.07(4) confers any individual right for which the BSEA would be able to grant relief.²

It is clear that the BSEA’s grant of authority does not extend to the type of general policy sought by Parent involving the Annual Report Special Education Parent Advisory Council or the public records law. Both of these fall outside the purview of the BSEA. As MRC correctly argues, consistent with 603 CMR 1.10(4), the proper forum for raising concerns regarding annual reports or special education advisory councils is DESE. More properly, those concerns should be brought directly to the Charter School Office within DESE. The record shows that Parent’s claims were already addressed by DESE, and DESE determined that MRC’s Annual Report was proper and required no corrective action.

Therefore, as to those, MRC is correct that Parent failed to state a claim for which relief can be granted. 603 CMR 28.08(3). MRC’s Motion to Dismiss the aforementioned claims is **GRANTED** and Parent’s claims in this regard are **DISMISSED with Prejudice**.

Regarding Parent’s claim relative to student records, MRC noted that Parent’s August 18, 2013 request for records was framed as a public records request, not a student record’s request. MRC asserts that it responded to Parent’s request providing him the annual report and the billing records. MRC explained that it did not have minutes from the special education parent advisory council and that its contract with Dr. Greenstein did not include

² Pursuant to 603 CMR 28.07(4), the Parent Advisory Council is responsible for, “advising the district on matters that pertain to the education and safety of students with disabilities; meeting regularly with school officials to participate in the planning, development, and evaluation of the school district’s special education programs.”

references to any specific student.³ MRC argued that although Parent was referring to this records request, in the case at bar he instead framed it as a student record request mischaracterizing the document. MRC further argued that Parent's requested documents do not meet the criteria of a "student record", 'transcript' or 'temporary record' because they do not 'individually identify' the Student nor do they bear any level of 'importance to the educational process' for this individual Student". 603 CMR 23.02. As a public record request, MRC argued that the BSEA was not the proper forum for such disputes and further stated that the request fell outside the jurisdictional boundaries of the BSEA. I agree. As such, Parent's claim regarding public records and/or the student record's request is **GRANTED** and Parent's claims in this regard are **DISMISSED with Prejudice**

Turning to Parent's claim for compensatory speech and language services and for a speech and language evaluation allegedly not provided by MRC, MRC argued that Parent had waived this right by failing to raise this issue in previous BSEA Hearings. MRC also argued that the issue of compensatory services had been raised by Parent with PQA at DESE and OCR and stated that the issue had been resolved in both forums. For all three reasons, MRC sought dismissal of this claim.

According to MRC, Parent's issues regarding Student's speech and language services arose in the winter of 2012 after which he only raised his complaint with PQA and OCR but never with the BSEA although he filed two other Hearing Requests: BSEA #1402591 and BSEA #1300761. MRC interprets Parent's conduct as abusive to MRC because MRC now has to defend its position in a third and separate proceeding before the BSEA when all issues could have been disposed of the first time Parent filed. MRC argued that dismissal of this claim "would advance the interest of forcing litigants to plea all of their known claims thereby promoting judicial efficiency."⁴

³ Parent filed a complaint with the Attorney General on this issue which complaint resolved in a manner favorable to MRC.

⁴ MRC argued that

A parent's right to bring claims to hearing under M.G.L. c.30A is not absolute. "Under appropriate circumstances the statutory right to an adjudicatory hearing may be waived." Alexander Cella, Massachusetts Practice: Admin. Agency Proceedings, Section 414 (1986). Indeed, the rules of civil procedure require plaintiffs to bring all of their known claims at one time or face dismissal. Mass. R. Civ. P. 12(b)(9)). "On any given claim, plaintiff may only pursue defendant in one action. Courts do not favor the shotgun approach to litigation; nor the splitting of claims, a condition Rule 12 (b)(9) seeks to prevent." Smith and Zobel, Rules Practice, §12.17, 2d ed. (2006)(internal footnotes omitted). The claim splitting "doctrine presupposes that a claimant has had an opportunity to assert his claims against a given defendant, and either has failed to assert those claims or has asserted the claims and had them adjudicated adversely." *Day v. Kekorian*, 61 Mass. App. Ct. 804, 811 (2004).

I note that in the case at bar Parent is *pro se* and may not have understood the advantages of bringing all claims together. This has now been explained to him during a telephone conference call and in this Ruling. He was also offered the opportunity to Amend his initial Hearing Request to add any and all remaining issues regarding Student's education before the BSEA.

Review of the record shows that MRC's allegations are correct with regard to Parent having raised the issues before PQA and OCR, however, having done so in no way bars Parent from proceeding on said issue before the BSEA. Furthermore, since Parent did not raise this issue in his previous BSEA Hearings, he is not barred from doing so now. While Parent's multiple filings may be an inefficient use of administrative resources, he is not barred from bringing this issue now. I note that during a telephone conference call on January 6, 2014, Parent was granted an extension of time to file an Amended Hearing Request to raise all remaining issues falling within the purview of the BSEA that he may have against MRC. Parent filed an Amended Hearing Request on January 23, 2014 and therefore, this filing presumably concludes all of Parent's claims against MRC.

Also, the record shows that on December 18, 2011, MRC agreed to pay Parent \$460.00 as reimbursement for the independent speech and language evaluation, purportedly the then current state rate. Therefore, as soon as Parent receives the money, the reimbursement issue will be resolved leaving only the issue of the Student's right to speech and language services outstanding.

Parent therefore, may proceed to Hearing only on the issue of the speech and language services. All other issues, raised in the original Hearing Request and the Amended Hearing Request, are either, resolved or DISMISSED with Prejudice consistent with this Ruling.

So Ordered by the Hearing Officer,

Rosa I. Figueroa

Dated: April 25, 2014