

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

**In Re:** Student v.  
New Bedford Public Schools

**BSEA # 1405888**

**Ruling on New Bedford Public Schools' Partial Motion to Dismiss and Motion for a More Definite Statement**

On March 10, 2014, New Bedford Public Schools (New Bedford) filed a Partial Motion to Dismiss and a Motion for a More Definite Statement in the above-referenced matter. New Bedford argued that Parents had failed to state claims for which relief could be granted; that Parents had asserted claims barred by the statute of limitations; and that Parents were not entitled to the requested relief.

Parents responded to New Bedford's Motions on March 17, 2014 objecting to the Dismissal.

**Facts:**

Prior to December 14, 2011, Student was a regular education student receiving no special education services whatsoever. Then, on December 14, 2011, Student sustained a Level 3 concussion while playing kick-ball (SE-A).

New Bedford held a Section 504 meeting on March 9, 2012 to review a private evaluation obtained by Parents. Student was found Section 504 eligible and a Section 504 accommodation plan was drafted. Parents accepted this plan on March 9, 2012 (SE-A).

New Bedford held another Section 504 meeting on May 17, 2012 and updated the previous Section 504 plan. Parents accepted this plan on May 17, 2012 (SE-B).

On November 1, 2012, New Bedford re-convened Student's Section 504 meeting and proposed an updated plan. Parents accepted this plan on November 13, 2012 (SE-C).

Thereafter, on April 30, 2013, New Bedford received a completed Massachusetts School Health Record for Student which showed that the entire examination was normal. According to the exam, "Student was able to participate fully in the school program, including physical education and competitive sports" (SE-D).

During the 2012-2013 school year Student received A's and one B+ in all of his courses (SE-E). A Scholarship Report Card for this period states that "Student makes poor use of class time" with D. Dixon in the Success Center (SE-E).

New Bedford held a Section 504 meeting on February 7, 2014, at which time the Team determined that Student continued to require accommodations and proposed an updated Section 504 plan for Student (SE-F). This plan offered preferential seating to address light sensitivity and visual difficulties so as to minimize headaches; frequent breaks in and outside the classroom; in-class strategies to reduce visual overstimulation; individual tutoring twice per week for one-and-a-half hours to address memory difficulties; and access to audio-books and a second set of books for the home. The plan noted that these accommodations were extended to taking MCAS and stated that there were lingering concerns regarding “fatigue, headaches and cognitive efficiency”. It stated that Student’s impairment did not “limit his academic progress substantially”.<sup>1</sup>

Student’s previous Section 504 plan (November 2012) remained in effect following the February 2014 meeting as Parents did not respond to the February 7, 2014 proposed plan.

Thus far, Student’s grades for the 2013-2014 school year are A’s and B’s (SE-G).

Parents’ Hearing Request was received at the BSEA on February 18, 2014. In it, Parents raised violations of the “child find” requirement under Section 504; intentional discrimination on the part of New Bedford “measured by deliberate indifference” (the district allegedly knew or had knowledge of the handicapping condition from Student’s physician since February 2012) and “gross misjudgment” or “bad faith”; failure to provide educational services and/or tutoring following Student’s accident through December 2012 thereby, allegedly denying Student a FAPE; procedural violations such as the Section 504 plan not having an expiration date; failure to include school personnel requested by Parent at the February 7, 2014 meeting; denial of vision services which act constituted “demonstration of animus, bad faith, gross misjudgment and deliberate indifference”; failure to include services or accommodations requested by Parents during the three Section 504 meetings they attended on March 9, 2012, May 17, 2012 and November 1, 2012; allegations that the district allowed bullying, hazing and harassment of Student; allegations that the district allowed Student to be “hit, beaten, hurt, harassed on an ongoing and continuous basis” which caused Student, as well as Parents, to be traumatized. Parents also alleged that as a result of a needed school transfer, Student’s position in the soccer team changed resulting in his inability to be soccer team Captain.

As a result of the alleged transgressions, Parents requested that the BSEA find:

- That the district did act with deliberate indifference, animus, gross misjudgment, and bad faith toward [Student] to the detriment of [Student] and his family in violation of 29 USC 794 and its regulations.
- Find that [Student] is owed two years of compensatory services for the negligence, non-action and actions of the New Bedford school district.

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<sup>1</sup> According to New Bedford’s attorney, the date for this meeting was selected and agreed to by her and attorney Michael Turner, Parents’ attorney.

- Order the district to fully implement the 504 plan and services and provide the necessary supplementary services including tutoring, counseling, academic support, physical therapy, and related [services] as he may require to meet his full potential pursuant to MGL c.61 §1.
- Award the [] family reimbursement for all costs that they have had to bear [owing] to the district's failure to provide tutoring, counseling, academic support, physical therapy, medical costs and related expenses.
- As the district cannot keep [Student] safe and provide for his needs order that of the district transfer [Student] to an appropriate school that can meet his needs at no cost to the family. [Parents' Hearing Request.]

In its' Response to Parents' Hearing Request, New Bedford asserts that it had provided Parents prior written notice regarding the issued alleged by Parents, and generally denied Parents' allegations. New Bedford specifically denied having committed any procedural and/or substantive violations amounting to a denial of FAPE and further asserted that any alleged violation on its part did not significantly deny Student a FAPE or Parents' the opportunity to participate in the educational decision-making process. Similarly, New Bedford denies any violation of Student's or Parents' civil rights and or deprivation of educational benefits. New Bedford also objected to any claims barred by the statute of limitations as well as claims regarding programs, services, placement to which Parents agreed and for which they provided consent. New Bedford also denied the reliefs sought by Parents.

### **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 this, when the moving party fails to state a claim upon which relief may be granted. See also 801 CMR 1.01(7)(g). The BSEA has previously 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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, Parents) and drawing all reasonable inferences in their favor, may the motion to dismiss be granted.

Furthermore, 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.

Lastly, 603 CMR 28.08(3)<sup>2</sup> establishes the limited subject matter jurisdiction of the BSEA but it specifically confers BSEA Hearing Officers jurisdiction over Section 504 claims. With this guidance, I turn to the Motions in the case at bar.

**Ruling:**

In its Partial Motion to Dismiss and Motion for a More Definite Statement, New Bedford sought to Dismiss any claim arising from Parents' allegations that the Section 504 accommodation plan was inappropriate as a matter of law. New Bedford drew similarities to the analysis involved in accepted, implemented and expired IEPs stating that Parents' challenges of accepted, implemented and expired Section 504 plans would require the BSEA Hearing Officer to engage in the type of "hindsight analysis" precluded by law. See *Christopher A. v. Stow Pubic Schools*, BSEA #90-1132 (Oliver, 1990), aff'd at *Amann v. Stow School System*, 982 F.2d 644 (1<sup>st</sup> Cir. 1992); see also *Roland M. v. Concord Sch. Committee*, 910 F.2d 983 (1<sup>st</sup> Cir. 1990). New Bedford argued that any allegation of inappropriateness should have been raised by Parents at the time the Section 504 plans were developed.

New Bedford argued that the only Section 504 plan subject to review was the February 2014 plan, to which Parents have not yet responded. It stated that Parents failed to assert any specific claim falling within (or extending beyond) the two-year statute of limitations applicable in IDEA cases, which according to New Bedford, was also applicable to Section 504 cases. See 20 U.S.C. §1415(f)(3)(D). New Bedford argued that said failure by Parents resulted in barring of all claims predating February 17, 2012 and any such claim should therefore, be dismissed.

New Bedford challenged the jurisdiction of the BSEA to adjudicate Parents' tort claims and stated that were the BSEA to take jurisdiction, to the extent that Parents' claims involved the appropriateness of previously accepted, implemented and expired Section 504 plans, those claims should be dismissed. If the BSEA agreed to hear those claims, New Bedford sought an Order for a more definite statement regarding Parents' claims of alleged "deliberate indifference, gross misjudgment, bad faith, gross negligence, and animus."

New Bedford further argued that with respect to claims that it acted with deliberate indifference, gross misjudgment, bad faith, gross negligence, and animus those should be dismissed because they are "vague and unsupportable". Similarly, New Bedford argued that

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<sup>2</sup> 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.

Parents claimed that New Bedford had violated “numerous state and federal bullying statutes” but failed to identify which statutes and provided no factual basis for their allegations. Therefore, those claims should be dismissed. However, were the Hearing Officer to allow Parents to proceed on those claims, New Bedford moved that Parents be ordered to provide a more definite statement.

New Bedford also argued that Parents’ allegations to the effect that they have “suffered emotional distress costing them thousands of dollars in medical and educational services” should be dismissed because Parents did not present any bills or information to support their claims regarding the alleged medical or educational service or the specific amount for which Parents sought reimbursement. Were the Hearing Officer to allow Parents to proceed on those claims, New Bedford sought an order for Parents to provide a more definite statement.

Parents’ Response and objection to the Dismissal provides absolutely no factual specificity and little new legal argument, rendering the submission unhelpful for purposes of the determinations I am called to make<sup>3</sup>, except with respect to the statute of limitations argument. Regarding the latter, Parents are correct that in a purely Section 504 matter that does not involve any IDEA claims, the statute of limitations is three years. Parents further argued that the statute of limitations in the instant case should be extended because New Bedford failed to provide Parents a complete and actual notice of their rights under Section 504 and because they allegedly “falsely misrepresented that the issues had been resolved” but the services were not delivered and the accommodations were not provided, to Student’s detriment. Lastly, Parents argued that in the alternative the issues herein occurred within the two year statute of limitations.

Parents are persuasive that since this is a purely Section 504 case with no IDEA claims, the three year statute of limitations is the applicable standard. The submissions demonstrate that all of the alleged transgressions occurred post Student’s accident of December 14, 2011. Therefore the time period alleged by Parents falls within three years from the date of Parents’ request for hearing. However, unless Parents can provide a more definite statement showing the plausibility of their allegation regarding misrepresentation (i.e., that issues had been resolved and that not all of the services/ accommodations were offered, resulting in a deprivation of FAPE to the Student), Parents’ claims prior to February 2014 will be dismissed with prejudice due to their acceptance and expiration of the previous plans. This issue is deferred until Parents provide a more definite statement as discussed below.

Parents’ argument in Part D, requesting that I deny New Bedford’s Motion for a More Definite Statement, is unpersuasive. Parents state that the BSEA Hearing Request Form is a two page form which limits the ability of the party requesting the Hearing to include more information. This argument is preposterous, especially when Parents did not even use the form when requesting the Hearing. The BSEA Hearing Request Form is offered as a guide.

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<sup>3</sup> Parents’ argument, in Part A, addresses the standards for summary judgment, but Petitioner raises no such argument rendering it irrelevant. Also, I do not understand what Parents mean by “The vague objections by New Bedford must fail as the 504’s which were agreed to were not caused” in Part C of their argument.

Its use is not mandated. The Form however, sets out the minimum parameters of what is to be included in a Hearing Request in order for the request to be properly processed at the BSEA. Parents' Hearing Request offers absolutely none of the specificity that would allow New Bedford or this Hearing Officer to ascertain which claims are viable.

Pursuant to 20 U.S.C. 1415(f)(3)(B)<sup>4</sup> the party requesting a hearing must articulate all of the issues in the Hearing Request with sufficient specificity to allow the opposing party to offer a response. A party cannot wait until the Hearing to decide which issues to litigate. See *In Re: Student v. Braintree Public Schools*, BSEA#1400815 (2013); *In Re: Student v. Marion Public Schools*, BSEA#1403573 (1/29/2014).

As will be explained in detail in the Order below, Parents will be required to provide specific statements as to each one of the allegations. Parents' Response is due by the close of business on April 23, 2014 and failure to do so may result in dismissal of said claims.

Lastly, New Bedford challenged Parents' allegations that New Bedford acted with "deliberate indifference, animus, and gross misjudgment". New Bedford cited to the limited jurisdiction of the BSEA and sought dismissal of the portion of the claim seeking monetary damages.<sup>5</sup> As I recently found in *In Re: Student v. Marion Public Schools*, BSEA#1403573 (1/29/2014),

The current law in Massachusetts makes it clear that even if the fact-finding regarding Parents' claims of "deliberate indifference, animus, and gross misjudgment" prove to be an exercise in futility, to the extent that Parents' claims arise from Marion's alleged violations of Student's rights under the IDEA and Section 504, as well as its impact on Student, those claims may be heard.

As in the aforementioned case, New Bedford is entitled to a more definite statement. Parents are reminded that they carry the burden of persuasion at Hearing pursuant to *Schaffer v. Weast*, 126 S.Ct. 528 (2005), and it is they, as the moving Party, who need to state each allegation with specificity.

The lack of specificity in both Parents' Hearing Request and Response to New Bedford's Motion render it impossible for me to rule on which claims can be dismissed. As such, this portion of the Ruling is deferred until Parents provide a more definite statement.

#### **ORDER:**

New Bedford's Motion for a more definite statement is **GRANTED**.

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<sup>4</sup> "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)." 20 U.S.C. 1415(f)(3)(B).

<sup>5</sup> See *In Re: Student v. Marion Public Schools*, BSEA#1403573 (1/29/2014).

By the close of business on April 21, 2014, Parents shall provide a more definite statement regarding: each one of their allegations regarding the District's transgressions including the dates of the alleged transgressions and the name of the individuals responsible for the alleged transgression; the specific services purportedly not offered; the specific periods of time during which the services were interrupted or not offered; documentation regarding specific expenses incurred by Parents on behalf of Student as well as the name of the private service providers and the types and periods of services offered; the specific instances of bullying and what they involved, dates on which this occurred, the responsible individuals, dates and names of individuals to whom the bullying was reported and their responses, as well as specificity regarding alleged "deliberate indifference".

Parents are further ordered to provide a more definite statement regarding New Bedford's alleged misrepresentation that issues had been resolved (i.e., what issues, when were the misrepresentations made and by whom) and that not all of the services/accommodations were offered (what services/accommodations were not offered and for what period of time), which resulted in a deprivation of FAPE to the Student. Failure to provide the more definite statement shall result in dismissal of those portions of Parents' claims.

Parents are also ordered to state the specific allegations and facts they claim give rise to the New Bedford's alleged disregard of the child find obligations, and explain the basis for their allegations that the district did so "knowingly, negligently and in bad faith", as well as provide the specific time period during which these specific alleged transgressions occurred. Parents are further ordered to provide specificity regarding any other allegations raised by them. Failure to do so may result in dismissal of the aforementioned claims.

All of Parents' Responses are due by the close of business on April 23, 2014. Failure to do so may result in dismissal of some or all of Parents' claims challenged by New Bedford.

So Ordered by the Hearing Officer,

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Rosa I. Figueroa  
Dated: April 7, 2014