

# COMMONWEALTH OF MASSACHUSETTS

## Division of Administrative Law Appeals

### Bureau of Special Education Appeals

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In RE: Paloma <sup>1</sup>

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BSEA #1408394

Masconomet Regional School District

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#### RULING ON SCHOOL'S MOTION TO DISMISS

This matter comes before the BSEA on the Motion of the Masconomet Regional School District (hereinafter "Masconomet") to Dismiss the Hearing request filed by the Student on May 12, 2014. A Hearing on the Motion, and the Student's Opposition thereto, was held on August 21, 2014. At the Motion Hearing it became clear that there is very little agreement about the facts forming the basis of the Student's Hearing Request. Furthermore, the Student seeks findings on and remedies for alleged violations of both the IDEA, 20 U.S.C. § 1400 et seq. and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") dating back more than three years from the time of filing. There are currently two different statutes of limitation for these complementary and often overlapping statutes. Therefore a precise determination of the facts, and the applicable law, is necessary before any claim can be dismissed on statute of limitations grounds.

#### LEGAL STANDARD

A Motion to Dismiss may be granted if the party requesting the hearing fails to state a claim for which relief is available through the BSEA. 801 CMR 1.01 (7) (g) (3); BSEA Hearing Rules XVII (B) (4). See also F.R.C. P. Rule 12 (b) (6) and M.R.C.P. Rule 12 (b) (6). In considering whether dismissal is warranted a hearing officer must accept all factual allegations set forth in the non-moving petitioner's hearing request as true. If those facts, proved at a hearing, would entitle the non-moving party to any form of relief from the BSEA, then dismissal for failure to state a claim is not appropriate. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Ocasio-Hernandez v. Fortunato-Burse*, 640 F.3d 1 (1<sup>st</sup> Cir. 2011); *In Re: Norwell Public Schools*, 18 MSER 354 (2012).

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<sup>1</sup> "Paloma" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

UNDISPUTED FACTS:

1. Paloma entered the 9<sup>th</sup> grade at Masconomet Regional High School (“Masconomet”) in the fall 2010 as a regular education student. At the Parent’s request a special education evaluation was conducted by Masconomet. A Team meeting was held on November 18, 2010 which resulted in a finding of ineligibility for special education services. Masconomet held a Section 504 meeting on December 8, 2010 at which Paloma was determined to be eligible for Section 504 accommodations. A Section 504 Plan was developed for the 2010-2011 academic year. Paloma followed an honors level curriculum and earned excellent grades.

2. Paloma returned to Masconomet for the 10<sup>th</sup> grade 2011-2012 school year. Paloma’s anxiety increased and her grades in her honors level courses decreased. Her attendance faltered. The School held a Section 504 meeting on November 29, 2011 which resulted in a Section 504 Plan for the 2011-2012 school year.

3. Paloma asserts that she was the victim of bullying throughout the 2011-2012 school year.

4. Paloma asserts that as a result of the bullying and the failure to implement grading policies appropriate for her acknowledged disability she earned failing grades in two of her seven regular education courses.

5. In the summer of 2012 Paloma enrolled in Masconomet’s regular education summer program and earned passing grades in the two previously failed courses.

6. Paloma, then 18 years old, attended the Hamilton-Wenham Regional High School as a “school choice” student during the 2012-2013 school year. She continued to reside within the Masconomet Regional School District. Hamilton-Wenham developed a Section 504 Plan for Paloma for the 2012-2013 school year. On May 6, 2013 Hamilton-Wenham removed Paloma from its enrollment rolls due to non-attendance.

7. The Family moved out of state in July 2013. The Family returned to Massachusetts in July 2014.

8. On May 12, 2013 the Student filed a Hearing Request at the BSEA seeking compensatory relief for alleged violations of the IDEA, Ch. 766, and Section 504 by the Masconomet Regional School District and the Hamilton-Wenham Public Schools. On August 14, 2014 the BSEA dismissed the Student’s claims against the Hamilton-Wenham Public Schools.

## STUDENT'S CLAIMS<sup>2</sup>

1. The Student asserts that Masconomet violated the “child find” provisions of the IDEA<sup>3</sup> and of Ch. 766<sup>4</sup> by failing to evaluate whether she was eligible for special education services during the 2011-2012 school year, during the summer of 2012, and during the 2012-2013 school year. The Student further asserts that Masconomet’s abrogation of its “child find” obligation is a continuing violation of the Student’s procedural rights which led directly to a denial of a free appropriate public education to her during the 2010-2011, 2011-2012 and 2012-2013 school years.

2. The Student asserts that Masconomet violated Section 504 by failing to evaluate her for special education services when her academic performance faltered during the time she was covered by a 504 Plan: December 2010 until she left the Masconomet district.<sup>5</sup>

3. The Student asserts that Masconomet violated Section 504 by failing to implement her agreed upon Section 504 Plans during the 2010-2011 and 2011-2012 school years which led directly to a denial of a free appropriate public education to her.

4. The Student asserts that Masconomet violated Section 504 by failing to modify its grading policy to accommodate her disability resulting in grades of fail or incomplete that would not have been awarded to students without disabilities in similar circumstances and that denied her a free appropriate public education. In particular the Student objects to grades awarded in January 2012 and June 2012.

5. The Student asserts that Masconomet failed to implement her 504 Plan, to carry out its “child find” obligations and to ensure that she received a free appropriate public education during the period May 6, 2013 when she was removed from the enrollment rolls at Hamilton-Wenham Public Schools until July 2013 when she left the Commonwealth.

6. The Student seeks an award of compensatory educational services and reimbursement for educational, medical and transportation costs associated with self help measures taken by the Parent as a result of Masconomet’s violations of the IDEA and Section 504.

## SCHOOL ARGUMENTS

Masconomet seeks dismissal of the Student’s claims on statute of limitation and jurisdictional grounds. Masconomet argues that all of the Student’s “child find” claims are subject to the IDEA’s two year statute of limitations. It points out that the facts asserted as the basis for relief under the IDEA and under Section 504 are identical, and the statutory obligations under those statutes are so substantially similar, that the intertwined claims cannot be untangled. Application of the IDEA’s 2 year statute of limitations would serve the purpose of both statutes

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<sup>2</sup> The claims recited here are found in the Student’s Second Amended Hearing Request filed with permission on August 1, 2014.

<sup>3</sup> 20 U.S.C. §1412 (a) (b).

<sup>4</sup> M.G.L. c. 71 B § 3.

<sup>5</sup> 34 CFR § 104.35.

and promote administrative efficiency. Therefore, Masconomet argues, the BSEA should entertain only those of the Student's "child find" claims that arose on or after May 11, 2012.

Alternatively Masconomet argues that if the three year statute of limitations applied in Massachusetts to stand alone Section 504 claims is found to be appropriate here to the Student's failure to implement, failure to evaluate and child find claims, the Student's claims should be barred as she had accepted and never challenged, and Masconomet had implemented, Section 504 Plans which had expired prior to the time the Student filed a BSEA appeal.

Masconomet also argues that the Student can obtain no relief from it for any claims arising during the 2012-2013 school year, the time in which she was enrolled as a "school choice" student in the Hamilton-Wenham High School. During the period of her enrollment in Hamilton-Wenham that district had full programmatic and fiscal responsibility for Paloma under the applicable school choice and special education regulations. Furthermore, the family has reached a settlement with Hamilton-Wenham which was originally a party to this action. Permitting an evidentiary showing on claims concerning this period of time would be inefficient and potentially prejudicial. Permitting any sort of relief would be inequitable and contrary to the plain language of the applicable "school choice" regulations. Therefore any claims covering that time should be dismissed.

Masconomet also contends that there was no automatic reversion to Masconomet responsibility when Paloma's enrollment at Hamilton-Wenham was terminated in May 2013. In the alternative Masconomet claims it was unaware that Paloma was not attending Hamilton-Wenham High School in May and June 2013 and therefore that it cannot held responsible for any neglect of its IDEA and/or Section 504 obligations during that time.

Finally Masconomet asserts that the Student's claims for relief exceed, in scope and in type, the relief the BSEA is authorized to award.

### STUDENT'S RESPONSE

In Opposing the School's Motion to Dismiss the Student argues that Section 504 confers additional and alternative rights to services and accommodations distinct from those available to individuals found eligible for IDEA services. The Student contends that the three year statute of limitations applicable to Section 504 actions should be applied to her claims. This would permit her to reasonably assert Section 504 claims concerning child find, failure to evaluate and failure to implement dating back to May 11, 2011. Further, the Student argues that her claims are premised on a "continuing violation" of her Section 504 rights and therefore that she should be permitted to present all connected evidence concerning those claims regardless of the dates of that evidence.

The Student points out that the plain language of M.G.L. c 71B places primary responsibility for the implementation of IDEA and Section 504 on the school district in which the student resides. The Student argues that this primary responsibility is not shifted to "program schools" under 603 CMR 28.10 (6) when a resident student avails herself of some of the program school's benefit, but is retained, at least in guarantor status, by the school district of residence.

Therefore Paloma’s claims that Hamilton-Wenham violated her Section 504 rights while she attended high school there may also be asserted against Masconomet.

Finally the Student points out that those of her requests for relief that exceed the BSEA’s capacity to order are asserted for fact-finding and notice purposes. Dismissal of those portions of this action is premature.

## DISCUSSION

The School’s Motion to Dismiss, and the Student’s Opposition thereto, raise interesting statute of limitation questions. Among them is whether it remains reasonable for the BSEA to impose a three year statute of limitations, a term borrowed from the Massachusetts personal injury statute, on Section 504 claims, while subjecting IDEA claims based on and arising out of identical facts to a two year statute of limitations.<sup>6</sup> Another issue brought forward in the Parties’ memoranda is the scope of the “continuing violations” doctrine in the context of mixed IDEA/Section 504 appeals. In a different, but equally important, vein the Parties disagree on the scope of responsibility a public school district retains when a resident student attends a “program school”.

These are intriguing and challenging legal issues. The facts necessary to address them reasonably and responsibly are, however, undeveloped. Inquiries into the application of statutes of limitation and explorations of unsettled areas of special education law are intensely fact dependent. Dismissal on the grounds advanced by Masconomet, at this juncture, is therefore disfavored.

To thwart the School’s Motion to Dismiss the Student need only identify the statutory basis of her claims, to assert sufficient plausible facts to provide notice to the School of the basis of those claims, and to persuade the BSEA that those facts, if proved, would entitle her to some form of relief the BSEA is authorized to award.<sup>7</sup> The Student has done so in this matter. The Student has asserted that she was, or ought to have been, covered by the protections of the IDEA and/or Section 504 by reason of a disability known to the School, and that the School failed to take appropriate action consistent with its obligations under those statutes while the School had an obligation to do so. The Student has offered plausible facts in support of her claims: that she was a resident of the Masconomet School District (undisputed); that she had a disability (undisputed); that the School knew of her disability (undisputed); that the School took action and/or failed to take action which affected her rights under the IDEA and Section 504, eg. finding of ineligibility for IDEA services; development of Section 504 Plans, at a minimum (undisputed). The Student has, therefore, stepped over the “low bar” as required to defeat a Motion to Dismiss on Rule 12 (b)(6) grounds.

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<sup>6</sup> See discussions at: *P.P v West Chester Area School District*, 585 F.3d 727(3<sup>rd</sup> Cir. 2009); *Bright v. Tustin Unified School District*, 513 F.3d 925 (9<sup>th</sup> Cir. 2013); *Estrada v. San Antonio Independent School District*, 2014 U.S. App. Lexis 13978 (5<sup>th</sup> Cir. 2014); *KH v. New York City Dept. of Education*, No. 12-V-1680 (E.D. N.Y 2014).

<sup>7</sup> I note also that appellants may need BSEA fact finding in order to comply with the exhaustion requirements of a potential reviewing court.

ORDER

Masconomet's Motion to Dismiss is DENIED.

By the Hearing Officer

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Lindsay Byrne  
Dated: October 10, 2014