

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
SPECIAL EDUCATION APPEALS

In Re: Student v.
Weymouth Public Schools

BSEA # 1409137

Ruling on Weymouth Public Schools' Motion to Dismiss

On September 9, 2014, Weymouth Public Schools (Weymouth) filed a Motion to Dismiss in the above-referenced matter on the grounds that there was no longer a case or controversy regarding Student's placement and asserting that the BSEA lacked jurisdiction over the remaining issues alleged by Parent.

Parent objected to dismissal via email on September 30, 2014, well beyond the period for responding established under the Hearing Rules for Special Education Appeals.¹ In rendering this Ruling I am however, taking her objection into account. As such, this Ruling is issued in consideration of all of pleadings, and arguments made by the Parties.

Facts:

The facts delineated below are assumed to be true for purposes of this Ruling only.

1. Student's eligibility to receive special education services (due to a diagnosis of Asperger's Disorder, ADHD and bi-polar disorder) is not disputed. At the time of the Hearing request he was a resident of Weymouth, Massachusetts where he lives with Parent.

¹ Rule VII C of the Hearing Rules for Special Education Appeals provides that
Written Motions must be served on all parties and the Hearing Officer simultaneously. The party (ies) filing the motion must submit a signed statement that he/she has sent a copy of the motion to the opposing party (ies). The statement must indicate the method (e.g., fax, mail, hand-delivery) by which the copy was sent. Any party may file written objections to the allowance of the motion and may request a hearing on the motion within seven (7) calendar days after a written motion is filed with the Hearing Officer and the opposing party, unless the Hearing Officer determines that a shorter or longer time is warranted. [Emphasis supplied].

Weymouth could argue that since Parent's Opposition was not received until 21 days following receipt of the Motion to Dismiss, technically, the case should be dismissed. Weymouth however, made no such challenge and therefore, I do not hold Parent's delay against her for purposes of this Motion. Parent however, is advised that moving forward she will be held responsible for the terms and responsibilities delineated in the Hearing Rules for Special Education Appeals, a second copy of which is attached to this Ruling for ease of reference.

2. Between the fall of 2012 and June 2014, Student attended the TLC program at a middle school in Weymouth. The TLC program serves students with emotional needs.
3. According to Parent, the turnover of the staff during the first years in middle school impacted Student negatively and compromised him "medically" due to failure to administer medication regularly. This also resulted in Student missing necessary tutoring. As a result, Parent filed a complaint with OCR.
4. With parental encouragement, Student lost 50 pounds during the 2013 summer and started the 2013-2014 school year feeling positive about himself and interested in interacting with peers and joining after-school programs. In the late fall, Student became increasingly withdrawn at home, engaged in picking behaviors that caused bald spots on his scalp. He stopped attending after-school programs and began regaining the weight he had lost.
5. Parent had Student's physician change his medications during this time.
6. During mid-winter, Student reported to Parent and his therapist that he was being bullied at school and that the bullying had worsened. According to Parent, Student reported the bullying to staff but when nothing was done, the bullying got worse. When Parent brought her concerns to Weymouth staff, the staff opined that it was not as serious as Parent and Student reported.
7. Student and the peer who reportedly was bullying him were together in mainstream classes.
8. On or about April 9, 2014, Student had a five day suspension for assaulting his favorite teacher. According to Parent, upon arriving at home that day, Student displayed heightened anxiety and stated that he was in pain because he had reportedly "been harmed during the incident." Student reported to his therapist that he was having a meltdown due to unclear expectations and for having being punished. When he attempted to take space by going to the quiet room, he was blocked by the teacher and they started shoving each other.
9. Parent attempted to contact school personnel and on April 11, 2014, spoke to Mr. Amoroso (a teacher) and informed him of her desire to file an incident report. Parent was told she could not do so because Student had attacked the teacher first. Parent had Student seen by a doctor the following day and Parent informed Weymouth that she would not send Student to school until he was provided a safety plan that addressed Student's meltdowns and also the bullying.
10. Parent returned Student to school following the spring break so that he could participate in MCAS and in other special education school-based evaluations. The experience was again overwhelming to Student and Parent again kept him home.

11. On or about May 3, 2014, Parent received a behavior plan for Student and a Bullying Prevention Plan. Parent worked with the guidance counselor (whom she trusted) on a re-entry plan.
12. On or about June 4, 2014, upon returning from a field trip, a classmate made a comment about Student's body and the student who was reportedly bullying Student threatened his life. According to Parent, Student's attempts to file a sexual harassment and bullying incident report were thwarted by Weymouth.
13. On or about June 20, 2014, the school nurse called Parent to inform her that Student and another student had gotten into a physical altercation over shutting off a computer and calling each other names. Student was being treated with ice to the back.
14. On June 27, 2014, Parent filed a Hearing Request² with the BSEA raising concerns that Weymouth was allowing Student to be "bullied and abused" and stating that the unsafe environment made it difficult for Student to focus on his self-control and proper socialization.
15. Parent sought out-of-district placement for Student in a "safe environment".
16. On July 14, 2014, the Parties participated in a Resolution Session, agreeing upon several steps toward resolution. Specifically, the Parties agreed that:
 - a. Parent and Student will visit Weymouth High School over the summer to meet with staff who will work directly with [Student] in the Therapeutic Learning Center [(TLC)].
 - b. The District will work to schedule [Student] so that he is not in classes with the student who was allegedly bullying him.
 - c. The District will conduct assessments to address Parent's concern regarding [Student's] anxiety and question of an Autism diagnosis. The District proposed the following assessments:
 - i. Psychiatric consultation by Dr. Bostic;
 - ii. Autism Diagnostic Observation Schedule testing (ADOS).
 - d. The District will continue to communicate regularly with [Student's] medicating psychiatrist given the number of medication changes reported by Parent.
17. Thereafter three telephone conference calls were held with the Hearing Officer on August 1, August 29 and September 5, 2014. At each call, Weymouth provided a status update responsive to the issues raised by Parent in her Hearing Request and additional issues raised by Parent during the telephone conference calls.

² As part of the Hearing Request involving Student, Parent attached numerous other documents pertaining to a Hearing Request for student's sibling which I am not considering.

18. During the telephone conference call with the Hearing Officer on August 1, 2014, in response to Parent's concerns Weymouth was ordered to:
 - a. Send Parent a short description of Dr. Bostic's qualifications.
 - b. Arrange for Parent and Dr. Bostic to have a conversation so he could explain his role.
 - c. Confirm a date/ time for Parent to meet the new TLC teacher.
 - d. Send Parent [Student's] schedule.
19. Following the telephone conference call, Weymouth forwarded to Parent Dr. Bostic's qualifications and Dr. Bostic contacted Parent to discuss the proposed evaluation and answer Parent's questions.
20. Parent, Student, Student's grandfather, the Dean of Students, the new TLC teacher, the former TLC teacher and Weymouth's Director of Special Education met at Weymouth High School on August 20, 2014. There was agreement that Student would not be in the same classes as the alleged bully as well as discussion regarding what Student should do if he encountered the alleged bully in the hallways and how to access adult support if he were bothered.
21. At the end of the August 20, 2014 meeting Parent agreed to allow Student to attend the High School for the 2014-2015 school year.
22. Student initiated the 2014-2015 school year at the proposed program in Weymouth High School.
23. During a telephone conference call with the Hearing Officer on August 29, 2014, Parent confirmed that she was no longer seeking out-of-district placement for Student. She again raised additional concerns that had not been raised in her Hearing Request or the previous conference call. Specifically, Parent opined that Student would get lost on the first day of school because he did not know where to go when he got off the bus, and noted that the schedule she received did not include social opportunities for Student. The Hearing Officer ordered Weymouth to have a staff member meet Student at the bus on the first day of school and escort him to his first class, and that a staff member contact Parent to inform her of what social opportunities Student had in his schedule.
24. Weymouth's transportation coordinator confirmed that because Student received special transportation per his IEP, a staff member meets him and the other students in the van when they arrive in school to bring them in the building. Also, The TLC teacher contacted Parent and discussed the social opportunities which would be available to Student throughout his day.
25. On September 5, 2014, the Parties participated in another conference call with the Hearing Officer. Again, Parent raised issues not mentioned in the previous calls or

the Hearing Request. Parent notified the Hearing Officer that in the first week of classes, Student was placed in a class with the student who had bullied him the previous year. Parent had called the Dean of Students to discuss it but the Dean had not yet returned her call. After realizing the glitch regarding the two students being in the same regular education class, Weymouth changed the schedules so that they would no longer be together. Weymouth was ordered to ensure that the Dean returned Parent's call, that a staff person work with Student to update his Safety Plan, that a paraprofessional assist Student between classes to address Parent's report that he was getting lost in the building and to forward another consent form to Parent so that Dr. Bostic could proceed with his evaluation. Weymouth's counsel then made an oral Motion to Dismiss based upon the reasons stated in the instant written Motion. The process regarding what a Motion to Dismiss entailed and what Parent would need to do was explained by the Hearing Officer to Parent.

26. At Parent's request, Student was placed on a bullying safety plan which was shared with Parent and which Parent attached to her Objection to the Motion to Dismiss.

Legal Framework:

The Parties do not dispute the jurisdiction of the BSEA over motions to dismiss involving failure to state a claim upon which relief may be granted, pursuant to Rule 17B of the *Hearing Rules for Special Education Appeals*. See also 801 CMR 1.01(7)(g). These motions are akin to a Rule 12(b)(6) Motion of the Federal Rules of Civil Procedure.

In considering motions to dismiss, the Hearing Officer will 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, after considering as true the allegations made by the opposing party (in the instant case Parent) and drawing all reasonable inferences in her favor, 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 the motion to dismiss may be allowed.

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's Hearing Request raised two main issues, the appropriateness of Student's placement in Weymouth and the need for a safety plan to address bullying in-district. As a remedy, Parent requested that Student be placed out-of-district in a safe environment and she also requested implementation of a safety plan to ensure Student's safety.

In its Motion, Weymouth argued both that there is no current dispute regarding placement and that during numerous telephone conference calls the Parent raised additional concerns, not contained in her Hearing Request, over which the BSEA lacked jurisdiction. According to Weymouth, Parent is no longer seeking "out-of-district placement that offered a safe environment", Student is currently attending Weymouth High School, and as such there is no longer a case or controversy.

Parent's opposition to the dismissal asserts that her Hearing Request raised "everything" from Student being bullied while Weymouth's staff failed to provide adequate interventions, to Student not receiving an appropriate education that addressed his Autism diagnosis, and then goes on to state that

The district [is] not providing my child the same education opportunities as other students because of his race/ color along with him being hurt by staff not trained to handle the symptoms of Autism and a the fact that [Student's] doctors have exhausted his medication options in order for him to function in school.

Parent further challenged Weymouth's allegations that it has complied with all of Parent's concerns, stating that she received frequent emails from Student's teacher regarding Student's day to day performance which reflect that Student is struggling to keep up and that he is failing most of his classes. She further notes that Student is not interacting appropriately with his classmates, is withdrawn, stressed and continues to be the victim of bullying. Parent asserted that in her original Hearing Request she asked that the BSEA oversee Weymouth's actions regarding provision of services to Student. Parent also requested that the BSEA ensure that Weymouth stops falsifying information designed to harass and make her look bad. Parent states that Weymouth's actions resulted in Court and the Department of Children and Families (DCF) involvement with the family.³ Lastly, Parent's Objection makes a request that the BSEA remain involved until all evaluations and

³ According to Parent, a case with the DCF was opened in April 2014, and there was no finding of abuse or neglect on her part, however she accepted the supports offered by DCF to her family. The case was closed in August 2014 according to Parent, because DCF saw the race/ color discrimination against her by Weymouth.

recommendations by Dr. Bostic (an expert hired by the District) are met by Weymouth. If the District fails to do so, then Parent wishes to proceed to Hearing.

Weymouth argued that the only relief requested by Parent in the Hearing Request was that Student be provided an out-of-district placement that was safe, but did not argue that Student's IEP was inappropriate or that he was not receiving a FAPE. Moreover, during the August 20th meeting, Parent's concerns regarding Student's transition into the high school (a placement to which she agreed) were addressed. At the end of the meeting Parent stated that she felt comfortable with Student attending Weymouth High School. As such, Weymouth reasons that the case should be dismissed.

While it is true that during each telephone conference call Parent has continued to raise new concerns not initially stated in her initial Hearing Request, and more importantly, that part of the original relief sought (an out-of-district placement) is no longer an issue, careful review of her Hearing Request shows that she sought a safe environment for Student and in her Opposition to the Motion, she continued to challenge Student's safety at the high school. Whether Parent is ultimately able to prove her allegations, Parent has raised the plausibility of a viable claim pursuant to *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

Furthermore, a close review of the Hearing Request shows that Parent challenged the District's ability to implement Student's IEP properly and further notes that the District's alleged prolonged failure to provide Student with a safe learning environment and staff changes prevented Student from focusing on his self-control, education and socialization (despite successful periods such as during the summer of 2013). Parent's Hearing Request notes that bullying was at the center of Student's difficulties throughout the 2013-2014 school year, and that she did not receive the "Bullying Prevention Plan" until May of 2014. Whether or not Parent were to prevail at Hearing, the threshold question here is whether she has a viable claim, and it would appear that she does.

Regarding Weymouth's contention that Parent's remaining claims fall outside the jurisdiction of the BSEA, I turn to 603 CMR 28.08(3) for guidance.

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.

Weymouth asserts that it has complied with every directive issued by the BSEA during the numerous telephone conference calls despite that some related to matters not having been raised in the original Hearing Request. Relying on the language defining the scope of the *Hearing Rules for Special Education Appeals*, Weymouth stresses that the BSEA was created "to ensure the due process rights of students with disabilities, parents and public schools when a dispute arises concerning a student's educational program that cannot be resolved locally" (emphasis supplied). It states that all of the concerns raised by Parent at this point may be, and in fact are, more properly resolved at the District level. Specifically, issues such as Parent/ Student/ teacher meetings, receipt of copies of Student's schedules prior to the start of the school year, explanation of social opportunities, staff member meeting the Student at the bus on the first day of class, staff returning phone calls to Parent, Student needing assistance navigating the building, or avoiding the alleged bully in the hallways, are all part of the day-to-day issues with which the school deals regularly and fall outside the purview of the BSEA. While I agree with Weymouth that the role of the BSEA is not to micromanage the day-to-day operations of the school district, and further agree that in this particular case, the majority of Parent's allegations fall within the aforementioned category, her concerns regarding possible bullying may result in a denial of FAPE to Student and, as a result, the BSEA would have jurisdiction over this issue.

Parent's most recent request is for the BSEA to monitor Weymouth to ensure it provides Student with the safe, enriching educational environment to which he is entitled. The BSEA is not a policing agency and it lacks the type of enforcement authority Parent seeks. As stated above, the BSEA's jurisdiction is limited to "resolving disputes", not overseeing the day-to-day occurrences in the delivery of education and at this point there is no indication to whether there will in fact be any dispute regarding Dr. Bostic's evaluation, the Team's determinations regarding same, or potential implementation of his recommendations. As such, this potential issue is simply not ripe for Hearing.

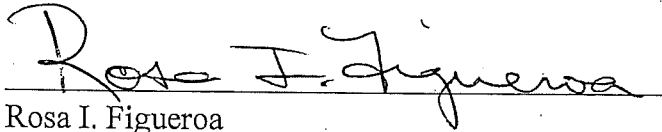
Also, contrary to Parent's assertion in her Opposition to this Motion, Parent's Hearing Request for this child⁴ makes no mention whatsoever of any racial discrimination (over which the BSEA lacks jurisdiction) and her concerns regarding the staff's ability to handle autism relate to the staff involved with him the previous year. As such, the issue of racial discrimination is not before the BSEA, and her claim regarding the training of the staff last year appears to be moot.

⁴ In the documents attached to her Hearing Request involving Student she does mention this issue regarding Student's sibling.

In sum, Weymouth's Motion to Dismiss is therefore, **GRANTED** as to the issue of an out-of-district placement for Student for the 2014-2015 school year and racial discrimination, and **DENIED** as to the issue of bullying and a "safe learning environment".

A Hearing date on the remaining limited issues will be set and if prior to the Hearing, there is any disagreement regarding Dr. Bostic's evaluation, Parent may amend her Hearing Request to include this issue consistent with the *Hearing Rules for Special Education Appeals*, understanding that the timelines may be tolled to accommodate the procedures set out in IDEA 2004.

So Ordered by the Hearing Officer,

A handwritten signature in cursive script, reading "Rosa I. Figueroa", written over a horizontal line.

Rosa I. Figueroa

Dated: October 2, 2014