

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

**In Re:** Student v.  
Lowell Public Schools

BSEA # 1410301

**Ruling on Lowell Public Schools Motion to Dismiss**

Parent requested a Hearing in the above- referenced matter on June 24, 2014. On July 1, 2014, Lowell Public Schools (Lowell) filed a Challenge to the Sufficiency of the Hearing Request and a Motion to Dismiss with Prejudice. Lowell's Motion to Dismiss was predicated on Rule XVII (B)(4) of the *Hearing Rules for Special Education Appeals*.<sup>1</sup> Via Ruling issued on July 3, 2014, Parent's Hearing Request was deemed Sufficient. Parent responded to Lowell's Motion to Dismiss on July 7, 2014 and thereafter, on July 14, August 5 and August 21, 2014, the Parties participated in telephone conference calls with the Hearing Officer without reaching a resolution. On August 26, 2014, Lowell renewed its Motion to Dismiss with Prejudice.

This Ruling is issued pursuant to the Individuals with Disabilities Education Act (20 USC §1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 USC §794), the state special education law (MGL ch. 71B), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under those statutes. Upon consideration of the submissions made by the Parties and the applicable law, Lowell's Motion to Dismiss with Prejudice is ALLOWED, as explained below.

**Facts:**

The following facts are assumed to be true for purposes of this Ruling only:

1. Student is a ten year old resident of Lowell who received his education at the J.G. Pyne Arts Magnet School in Lowell, Massachusetts through the end of third grade (2013-2014).
2. As a result of a speech and language evaluation completed on or about January 18, 2013, he was found eligible to receive special education services due to receptive, expressive and pragmatic language deficits.
3. In third grade Student was offered two hours of special education pull-out services for literacy and math (presumably under an accepted IEP).
4. The Team has reconvened three times (November 21, 2013, March 24, and May 21, 2014) over the past year. Due to Student's "continued struggle with language-based tasks and demonstrated increased frustration and work refusals" the Team recommended that for fourth grade Student receive services in its substantially-separate language-based

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<sup>1</sup> i.e., failure to state a claim under which relief can be granted.

program at the McAuliffe Elementary School (McAuliffe) in Lowell for Student's fourth grade. Parent accepted the services in the November 2013 and March 2014 IEPs but rejected the placement. However, Parent fully accepted the IEP and the placement promulgated following the May 21, 2014 Team meeting. This claim does not involve the appropriateness of the IEP or the placement.

5. The program at McAuliffe starts at 9:15 a.m.
6. Parent is employed in Lawrence, Massachusetts and must be at work at 9:00 a.m. and he is unable to change his work hours. Parent's work schedule is Monday to Friday, 9:00 a.m. to 5:00 p.m. Student's other school-age siblings are picked-up by the bus company at their home by 8:45 a.m.
7. With the change to the McAuliffe, the bus would be picking Student up at approximately 9:05 a.m.
8. Father requested that Student be picked up by 8:45 a.m. like the rest of his siblings.
9. Parent lives eight tenths of a mile from McAuliffe, which means that Student is one of the last ones to be picked up according to the bus route.
10. Lowell has created partnerships with many agencies and organizations that can provide before and after school care for students so as to address the unique needs of the families in its communities.
11. Lowell also allows parents to register pick up addresses with sitters<sup>2</sup>, at the YMCA or the Boys and Girls Club.
12. Deena Meli of Lowell had spoken to Parent about the different alternatives available for Student's pick up, specifically suggesting the CTI Early Morning Daycare and the 21<sup>st</sup> Century Before School Program, and also has suggested that Parent could place an ad at UMASS Lowell for a babysitter for before school care. Ms. Meli arranged for Student to have a spot at the 21<sup>st</sup> Century Before-School Program at the McAuliffe. Parent rejected this option because the 21<sup>st</sup> Century Program will not be in operation until October 2014 and it only runs Monday through Thursday, forcing him to make alternate arrangements between September and October and on Fridays.
13. Parents pay privately to have students attend the CTI program. 21<sup>st</sup> Century is grant-funded and free of charge to participating families.
14. Parent does not qualify under the low-income bracket that would otherwise qualify him for financial assistance to the programs suggested by Lowell, although Parent is the sole provider for his family of five and cannot afford additional childcare costs.
15. Due to parental financial constraints CTI, Boys and Girls Club, YMCA and babysitting are not options for Parent.
16. If the transportation company does not alter its bus route and schedule so that Student can be picked up by 8:45 a.m., he will not be able to attend the language-based program at McAuliffe because Parent cannot be late for work.
17. Lowell Public Schools is comprised of 28 schools that serve approximately 14,000 students. The district's zones, transportation routes, schedules and pick up times, and the start times of each of the school buildings are decisions falling within the purview of operational functions of the school personnel and Central Administration, with the support of the School Committee and City Council.

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<sup>2</sup> During the conference calls the option of having Parent drive all the children to a relative's address and wait with them in the car until they were picked up was explored, but Parent ultimately decided against this option. I note that this option would have involved coordination with three different buses at three different times.

18. By August 26, 2014, the first day of school, the Parties had not reached an agreement and Parent sent Student to his previous placement at the J.G. Pyne Arts Magnet School.

**Standard for Ruling on a Motion to Dismiss:**

As recently explained in a ruling addressing *Newton Public Schools Motion for Partial Dismissal*, in *In Re: Newton Public Schools*, BSEA #1408637 (August 19, 2014),

Pursuant to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3) and Rule 17B of the BSEA *Hearing Rules for Special Education Appeals*, a hearing officer may allow a motion to dismiss if the party requesting the appeal fails to state a claim on which relief can be granted. This rule is analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure and as such hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim. Specifically, what is required to survive a motion to dismiss “are factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”<sup>3</sup> In evaluating the complaint, the hearing officer must take as true “the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff’s favor.”<sup>4</sup> These “[f]actual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . .”<sup>5</sup>

**Ruling:**

The sole remedy requested by Parent in the case at bar is that the bus route be changed so that Student may be picked up by 8:45 a.m., enabling Parent to make it to his job on time. Parent has stated that if the pick up time is not changed, Student may not attend McAuliffe.

Lowell’s Motion to Dismiss notes that while Parent’s concerns are legitimate and it has tried to provide alternatives to resolve Parent’s predicament, Parent’s scheduling issues are ultimately not the responsibility of Lowell and Lowell cannot acquiesce to Parent’s request. Relying on Rule XVII (B)(4) of the *Hearing Rules for Special Education Appeals*, Lowell moves for dismissal of Parent’s claim on the basis that decisions regarding the operational functions of school personnel and Central Administration, with the support of the School Committee and City Council, fall outside the jurisdiction of the BSEA. Lowell states that the BSEA cannot order the reconfiguration of the location of the various special education programs it offers eligible students, nor can it mandate the district to change its placements, start times, order a

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<sup>3</sup> *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

<sup>4</sup> *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

<sup>5</sup> *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

school Principal or staff to report to school earlier to babysit a student, change bus routes or schedules, or require a special needs student to ride the bus unnecessarily.

The jurisdiction of the BSEA can be found in G.L. c. 71B §2A and in the Massachusetts Special Education regulations. Specifically, 603 CMR 28.08(3) grants Hearing Officers the authority "to provide for the resolution of differences of opinions" between school districts, parents, state agencies and private schools, in

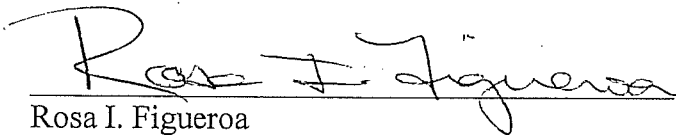
...any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities. A parent of a student with a disability may also request a hearing on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973, as set forth in 34 CFR 104.31-104.39 (603 CMR 28.08(3)(a)).

Lowell is correct that the authority of a BSEA hearing officer, pursuant to 603 CMR 28.08(3)(a), is limited and does not extend to issues such as determining bus schedules and bus routes, which are entirely within the purview of Lowell's administration. I further note that in the instant case, neither side is arguing that Student requires special transportation. Rather, the transportation concerns raised by Father have nothing to do with Student's special education. As such, Lowell's Motion to Dismiss with Prejudice is hereby GRANTED.

**ORDER:**

This matter is hereby DISMISSED with PREJUDICE.

So Ordered by the Hearing Officer,



Rosa I. Figueroa

Dated: September 4, 2014