

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

In RE: Rosalee ¹

&

BSEA # 15-02243

Quincy Public Schools and the Department of Mental Health

RULING ON DEPARTMENT OF MENTAL HEALTH’S MOTION TO DISMISS

This matter comes before the Hearing Officer on the Motion of the Department of Mental Health (hereinafter “DMH”) to Dismiss the Hearing request filed by the Parents on September 16, 2014. The Parents Oppose the Motion. The Quincy Public Schools (hereinafter “Quincy”) took no position on the Motion. The Hearing Officer took additional arguments during a conference call held on October 2, 2014.

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 (1st Cir. 2011); *In Re: Norwell Public Schools*, 18 MSER 354 (2012).

FACTUAL BACKGROUND

The following facts are not in dispute and are taken as true for the purposes of this Motion. These facts may be subject to revision in subsequent proceedings.

¹ “Rosalee” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

1. Rosalee is a 14 year old resident of Quincy. Rosalee is eligible for publicly funded special education pursuant to 20 U.S.C. §1401 et seq. and M.G.L. c. 71 B.
2. Rosalee has been a client of the DMH for approximately five years. During that time, among other services, DMH funded the residential portion of Rosalee's educational placements at private therapeutic schools.
3. Rosalee began attending Granite Academy in June 2013. At the same time Rosalee was placed by DMH at Granite House, a DMH contracted residential group home. An IEP developed by Quincy in November 2013, and accepted by the Parents in January 2014, called for Rosalee to attend Granite Academy. The IEP contains a reference to DMH residential services. On July 15, 2014 Rosalee was precipitously discharged from Granite House.
4. Rosalee attended the Plymouth STARR program between July 16, 2014 and August 14, 2014. She has lived at the Community Intervention Program (CIP) in Arlington, Ma, since August 14, 2014. CIP is a short term Evaluation and/or bridge residence operated by a DMH contractor. Residence there is typically approved on a week to week basis. Rosalee has continued to attend, albeit sporadically, the educational program at Granite Academy throughout the recent residential changes.
5. On September 16, 2014 the Parents filed a Hearing Request at the BSEA seeking a determination that Rosalee required an integrated, coordinated therapeutic residential special education program in order to receive a free appropriate public education. At the same time the Parents filed an "Emergency Motion for Stay Put Relief" seeking a BSEA Order compelling DMH to maintain Rosalee in a residential placement that provides a setting and services comparable to those previously provided by Granite House while the issue concerning Rosalee's appropriate future special education placement is resolved.
6. On September 23, 2014 DMH filed a Motion to Dismiss the Parents' BSEA Hearing Request asserting that the relief the Parents sought, maintenance of placement in a particular type and location of DMH-contracted residence, does not implicate Rosalee's special education rights and is more properly addressed through the DMH Fair Hearing process.

DISCUSSION

In addressing a Motion to Dismiss for Failure to State a Claim upon which a Relief can be Granted by the BSEA, the bar to continuation is set low. There need only be a plausible allegation that a student's special education services may be made appropriate, or may be rendered inappropriate, by the action or inaction of a public agency that owes a duty to that student. In Re: *Lexington Public Schools*, 19 MSER 18 (2013). While it is true, as DMH points out, that the bulk of the assertions and facts alleged in the Parents' Hearing Request concern the residential services provided by DMH to Rosalee, the Hearing Request also specifically references claims that Rosalee is not receiving and will not receive a free appropriate public education through the IEP offered by Quincy. See e.g.: Hearing Request p.2 FN 1. Reading the Hearing Request as a whole, the Parents are clearly seeking an "integrated, or at least tightly coordinated, residential placement" (Hearing Request p.5) as opposed to the day placement

designated on the current, now rejected, IEP developed by Quincy. The Parents' Hearing Request goes on to ask that DMH continue to provide a therapeutic residence similar to the Granite House which would permit Rosalee to attend Granite Academy on a day basis while the Parent and the school district work on resolving the parameters of Rosalee's educational needs and the extent of Quincy's responsibility to meet them. As relief the Parents seek a BSEA Order compelling the school district to develop a new IEP for Rosalee and/or to assume responsibility for residential services now provided by DMH. (Hearing Request p. 15 # 35, 36, 37) The allegations that Quincy is responsible for providing comprehensive residential special education services to Rosalee or, in the alternative, that DMH is responsible for providing coordinated residential services that would permit Rosalee to benefit from a less restrictive special education day placement, are sufficient to invoke the jurisdiction of the BSEA. In the same vein those allegations, if proved, would entitle the Parents to the type of relief the BSEA has the authority to grant. M.G.L. c. 71B§ 3; 603 CMR 28.08 (3)

DMH argues that insofar as the Parents seek to challenge the actions and decisions of DMH regarding the residential services provided to their daughter the appropriate avenue is the DMH Fair Hearing process. DMH points to the language in BSEA Rule 1. J concerning joinder which posits the existence of an alternate dispute resolution forum as one factor to consider when deciding whether an entity is a necessary party to a BSEA action. I note the existence of the DMH dispute resolution process and acknowledge that use of that process would be appropriate for some of the claims set out in the Parents' BSEA Hearing Request.² Nevertheless, nothing in the IDEA or MGL c. 71B requires a Parent to pursue or to exhaust a fair hearing process exclusive to another administrative agency responsible for providing services to an IDEA eligible individual when that individual has cognizable claims moving through the IDEA's dispute resolution process.³ Indeed, absent any state statutory directive to the contrary, the BSEA is the default mechanism for ensuring necessary interagency coordination when the special education rights of an IDEA eligible student are in controversy. 20 U.S.C. § 1412 (12) (A); 34 C.F.R. 300.142 (a).

Furthermore, I am not persuaded that the disputed facts presented in this matter require resolution in an alternate regulatory framework before the BSEA can fairly and completely determine Rosalee's current special education entitlements.

CONCLUSION

After careful consideration of the undisputed facts, viewed in the light most favorable to the Parents, and of the arguments of counsel for DMH and the Parents, it is my determination that the Parents' Hearing Request presents facts and claims implicating the responsibilities of both the Quincy Public Schools and DMH pursuant to the IDEA and M.G.L. c. 71B sufficient to survive the Motion to Dismiss. One of the forms of relief requested by the Parents, enforcement of "stay put", would require the BSEA to exercise its jurisdiction to compel DMH to provide certain "additional services" to Rosalee to ensure that she receives a free, appropriate public education.⁴ One of the alternate forms of relief sought by the Parents, an Order that Quincy

² 104 CMR 29.16.

³ *Concord-Carlisle Regional School District*, 19 MSER 104 (2013).

⁴ 603 CMR 28.08(3).

develop an IEP calling for a residential special education placement, would relieve DMH from its role and responsibility as the residential service provider to Rosalee. DMH remains however, at this juncture, a necessary party to this BSEA action as complete relief cannot be afforded to the Student without its participation in this action.⁵

ORDER

The Motion of the Department of Mental Health to Dismiss the Parents Hearing Request is DENIED.

By the Hearing Officer

Lindsay Byrne
Dated: October 8, 2014

⁵ BSEA Rule 1 J.