

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

In re: Student v:
Lincoln-Sudbury Regional School District

BSEA #1502427

**RULING ON LINCOLN-SUDBURY REGIONAL SCHOOL DISTRICT'S
MOTION TO DISMISS/MOTION FOR SUMMARY DECISION**

The Hearing Request in this matter was filed with the Bureau of Special Education Appeals (BSEA) on September 22, 2014. On October 2, 2014 Lincoln-Sudbury Regional School District (Lincoln-Sudbury) filed its Response to the Parents' Hearing Request and on October 7, 2014 Lincoln-Sudbury filed a written request for postponement. Following a telephone conference call held on October 14, during which Parties agreed to allow this Hearing Officer to attempt to frame the issues for Hearing consistent with Parents' Hearing Request, and during which the District's request for a postponement was granted, the Hearing Officer issued an Order on November 9, 2014 framing the issues presented (hereinafter the "Framing Order"). She invited Parents to review the issues as she had summarized them and inform her in writing by November 25, 2014 as to the accuracy of her Framing Order in reflecting their concerns.¹ Parents' response, received on November 20, 2014, conceded that issues ten (10) and thirteen (13) "are not within the jurisdiction of the BSEA and that therefore, they are not issues for hearing." Parents also noted that they did not wish to have issue nine (9) considered by the BSEA.² The School filed its own response to this Hearing Officer's Framing Order on November 25, 2014.³

¹ This Hearing Officer outlined thirteen issues she had gleaned from the Parents' twenty-three page Hearing Request and noted at the outset that issues ten (10) through thirteen (13) appeared to fall outside the purview of the BSEA's jurisdiction. These issues, as well as others contested in the Motion filed by the School, will be discussed in more detail below. Discussion of those issues as to which there is no pending Motion to Dismiss will await further proceedings.

² See Part III(c) for further discussion of issue 9. The Parents also, possibly pursuant to this Hearing Officer's statement in her Framing Order that she would seriously consider a Motion to Dismiss with respect to issues ten (10) through thirteen (13), filed a Motion to Dismiss dated November 20, 2014, in which they requested that she dismiss issue nine (9) because they "do not wish to have the BSEA consider whether the Student is entitled to" the relief requested, as well as issues ten (10) and thirteen (13). The School also filed a Response to Parents' Motion to Dismiss on December 5, 2014 in which it noted that it did not oppose Parents' Motion to Dismiss but requested that the dismissal of the issues it addressed be with prejudice.

³ Several discovery issues have been brought to the attention of the Hearing Officer through the filing of written requests and Motions. Because they are not relevant to the resolution of the Motion to Dismiss/Summary Decision, the discovery issues are omitted from this procedural history and will be disposed of via a separate Ruling.

On December 5, 2014, Lincoln-Sudbury filed a Motion to Dismiss/for Summary Decision, accompanied by a Memorandum in Support of the Motion. On December 11, 2014, Parents filed a Response to Lincoln-Sudbury's Motion, which this Hearing Officer construes as an Opposition to the District's Motion to Dismiss/Motion for Summary Decision. Lincoln-Sudbury then filed a Supplemental Memorandum in Support of its Motion to Dismiss/for Summary Decision on December 18, 2014. For the reasons below, Lincoln-Sudbury's Motion is ALLOWED IN PART, and DENIED IN PART.

Facts:

The following facts, taken from Parents' *Hearing Request*, are assumed to be true for purposes of this Ruling only.

1. On Sunday, September 30, 2012, Student (at the time a sophomore attending Lincoln-Sudbury Regional High School) was injured during varsity field hockey practice when she was hit by another student's hockey stick.
2. Student's parents were called to pick her up. No ambulance was called.
3. As a result of this accident, Student suffered severe loss/damage of three teeth, mouth injuries, and a concussion.
4. The concussion was diagnosed by Student's pediatrician on October 5, 2012. Student's pediatrician advised physical and mental rest.
5. On October 5, 2012, Parents communicated the diagnosis of concussion and need for rest by email to the field hockey coach, guidance counselor, and Student's teachers. They sent a second email, again communicating the need for rest as advised by Student's pediatrician, on October 9, 2012.
6. Also on October 9, 2012 Parents requested a copy of a "Head Injury Report Form" from the school. They requested the form again by email to the field hockey coach on November 1, 2012, but never received the form.
7. Student returned to school on October 15, 2012.
8. Upon her return to school, Student "experienced cognitive difficulties including fatigue, slow processing speed, confusion, inability to attend and other concussion

symptoms that prevented her from keeping up with current class work and unable to make-up the weeks of missed learning and work.”

9. At no time after her return to school was Student referred for an Individualized Education Program or a 504 Plan. The School did not provide a written graduated reentry plan.
10. At the end of First Quarter, Student received incompletes in six subjects.
11. On November 8, 2012, Student informed her guidance counselor of “her continuing symptoms and the difficulties she was experiencing upon her return to school including that her teachers had not provided needed directions and supports.”
12. Some time between November 20 and November 26, 2012, Parents wrote to the guidance counselor “of their concerns regarding [Student]’s difficulties and lack of teacher responsiveness, communications, guidance and support.”
13. On November 27, 2012, the guidance counselor and Student held a meeting attended by some of Student’s teachers and her Housemaster. Both before and after this meeting, Student “had to individually and independently make arrangements with each of her teachers as [the District] did not define or provide a plan or consistent set of modifications and accommodations across all of her classes.”
14. By the end of Second Quarter on January 16, 2013, Student had cleared four of her six incompletes from First Quarter. Two incompletes remained.
15. Between January 28 and June 24, 2013, Parents made “multiple, explicit requests” for Student’s “504/IEP eligibility. Although Housemaster Crawford and Superintendent/Principal Carpenter acknowledged Parents['] requests, the school did not provide a consent form for evaluation, a notification of a Section 504 evaluation and results and actions taken, a notice of procedural rights or notification that [District] disagreed with Parents’ request for a referral and would not conduct an evaluation.”
16. Parents assert that at some point between May and June, 2013, the guidance counselor “described [Student] as being highly anxious [at meetings with her math teacher, guidance counselor, housemaster, and incoming math department coordinator/head] and on 5/24/13 recommended that Parents seek therapeutic counseling for her so that

she could deal with the stress. [Lincoln-Sudbury] did not offer or provide such counseling or a plan to address [Student]'s stress."

17. On May 20, 2013 Parents sent the housemaster and the guidance counselor "an email requesting an emergency meeting to put [Student] on a 504 plan." On May 21, 2013 parents wrote another email to the housemaster, copied to the guidance counselor, stating that the Student "needed a plan following her concussion and that a 504 plan should have been put in place the past fall. Parents again requested a 504 evaluation and that [the Housemaster] send them all relevant school information on the process."
18. On May 24, 2013 a meeting took place with the guidance counselor, Housemaster, and several individuals involved with the math department, including Student's teacher. At the meeting, Parents once again requested an evaluation of Student "to identify her deficits in math and other academic areas and any cognitive impairments likely due to her concussion." Although the Housemaster "maintained that [Student] was no longer disabled by the end of First Semester and that a 504 plan was not possible as her disability was in the past, she agreed to move forward with an evaluation." Also at that meeting recommendations were made that Student be tutored by a special education math tutor and receive therapeutic counseling for stress.
19. On June 5, 2013 the Superintendent/Principal "wrote that the House office was forwarding [Student] for a '504/IEP pre-referral.'"
20. During the summer of 2013, Parents arranged and paid for private math tutoring for Student.
21. On August 28, 2013 Student started her junior year at Lincoln-Sudbury Regional High School.
22. On September 3, 2013 Student was accepted at Lawrence Academy.
23. On September 3, 2013 Parents sent a letter to the Superintendent/Principal of the District stating their intent to enroll student at Lawrence Academy.
24. Student began attending Lawrence Academy on September 9, 2013, the first day of school at Lawrence Academy. In the meantime, Parents called her in absent each morning at the Lincoln-Sudbury Regional High School.

25. On or about September 9, 2013, the District's Student Service Director sent a letter to Parents with a Notice of Proposed School Action (N1 form), a Consent for Evaluation Form, and a Notice of Procedural Safeguards.
26. On September 24, 2014, Parents sent a letter to the Superintendent/Principal, copying the Student Services Director, disenrolling Student from the District.
27. As of June, 2014, Student achieved a 4.07 grade point average at Lawrence Academy (reflecting higher weighting of honors grades).

Discussion:

I. Legal Standards

The District styled its Motion a Motion to Dismiss/for Summary Decision.⁴ Most of its Motion and the supporting memorandum it submitted, however, address the standard for dismissal of Parents' claims rather than the standard for summary decision. Because Parents in this case are *pro se*, I decline Lincoln-Sudbury's invitation to go beyond the scope of the Motion to Dismiss at this early stage in the case.⁵ Moreover, there appear to be genuine issues of material fact.

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."⁶ In evaluating the complaint, the hearing officer must take as true "the allegations of the complaint, as well as such inferences as may

⁴ Pursuant to 801 CMR 1.01(7)(h), Summary Decision is available to parties when there is no genuine issue of fact relating to all or part of a claim or defense and the moving party is entitled to prevail as a matter of law. This rule of administrative practice is modeled after Rule 56 – Summary Judgment – of both the Massachusetts and Federal Rules of Civil Procedure. The party seeking summary judgment bears the burden of proof, and all evidence and inferences must be viewed in the light most favorable to the party opposing summary judgment. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252 (1986).

⁵ Given that the burden would shift to the Parents as the nonmoving party to produce evidence to show that a genuine issue exists for hearing, if the District were able to demonstrate in the first instance that there is no genuine issue as to any material fact, the distinction between the two types of Motions is not insignificant. The potential for confusion, when a Motion to Dismiss contains arguments that Summary Decision should be granted as to some of the issues in the Parties' initial submissions, is too great.

⁶ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

be drawn therefrom in the plaintiff's favor."⁷ 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). . ."⁸

Lincoln-Sudbury argues that issues 1, 9, 10, 11, 12, and 13⁹ must be dismissed with prejudice on the ground that the BSEA does not have jurisdiction over them. It also claims that issues 7, 8, and 9 must be dismissed with prejudice for failure to state a claim.¹⁰

The Parents concede that issues 10 and 13 are not within the jurisdiction of the BSEA, and they indicate their intention to withdraw issue 9 from consideration before the BSEA. They however, assert that issues 1, 7, and 8 are properly before the BSEA.

I address each issue in turn, beginning with those on which the parties agree, followed by others that are at least arguably beyond the jurisdiction of the BSEA and finally discussing the additional issues raised in the District's Motion.

II. Issues of BSEA Jurisdiction

BSEA jurisdiction is limited, such that Hearing Officers have only the power expressly granted, by the statutes and regulations that establish the agency and determine its roles and responsibilities.¹¹ Pursuant to Massachusetts law, the BSEA provides adjudicatory hearings to resolve "disputes between and among parents, school districts, private schools and state agencies concerning: (i) any matter relating to the identification, evaluation, education program or educational placement of a child with a disability or the provision of a free and appropriate public education to the child arising under this chapter and regulations promulgated hereunder or under the Individuals with Disabilities Education Act, 20 U.S.C. section 1400 et seq., and its regulations; or (ii) a student's rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. section 794, and its regulations." Mass. Gen. L. ch. 71B, § 2A(a). See 603 CMR 28.08(3)(a) (describing the issues on which parents and school districts may request hearings as matters "concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protection of state and federal law for students with disabilities [as well as] 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 through 104.39.")

⁷ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

⁸ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

⁹ These numbers refer to the issues as framed in this Hearing Officer's November 9, 2014 Framing Order.

¹⁰ As to issues 7 and 8 the District also argues that Parents' *Hearing Request* does not set out the required elements of these claims, that Parents made a concession during an October 14, 2014 conference call that is fatal to their claims, and that the "undisputed evidence available from Parents" undermines their claims. Even if this Hearing Officer were inclined to rule on Summary Decision, the District's argument falls short of establishing that there is no genuine issue of material fact. See 801 CMR 1.01(7)(h).

¹¹ *Cf. Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 378 (1994) (discussing limited jurisdiction of federal courts).

The parties agree that issue 10¹² and issue 13,¹³ as framed by this Hearing Officer, are beyond the scope of the BSEA's jurisdiction and have both requested that they be dismissed. In accordance with the parties' wishes and the law, issues 10 and 13 are hereby DISMISSED WITH PREJUDICE because they are not within the jurisdiction of the BSEA.¹⁴

Also, since Parents withdrew issue 9 and Lincoln-Sudbury did not oppose said withdrawal, issue 9 is also DISMISSED WITH PREJUDICE.

The District argues that issue 11, framed as "Whether Parents are entitled to compensation for alleged transgressions by school personnel under 105 CMR 201.00 concerning head injuries and concussions in Extracurricular Athletic Activities, including alleged failure to provide a written graduated re-entry plan," and issue twelve, framed as "Whether Lincoln-Sudbury failed to follow school policy regarding forwarding Warning Notifications to Parents when Student was at risk of receiving failing grades," are also beyond the scope of the BSEA's jurisdiction. The enforcement of 105 CMR 201.00 is, in fact, beyond the agency's jurisdiction as described above. Moreover, in the absence of any allegation that its action constituted discrimination on the basis of disability or perceived disability, determining whether the School failed to follow a school policy generally applicable to all students is beyond the scope of the BSEA's jurisdiction. As such, issues 11 and 12 are also DISMISSED WITH PREJUDICE.

III. Issues Requiring Further Factual Development

A. Issue One

The School also asserts that issue 1, framed as "Whether Lincoln-Sudbury complied with Student's physician's medical instructions regarding reentry to school following her concussion during the 2012-2013 school year," must be dismissed because Parents characterize it as part of issue 11, which is beyond the jurisdiction of the BSEA; because it is equally applicable to regular education and special education students in general; and/or because it is an issue of fact rather than a legal issue that may form the basis for a claim upon which the BSEA may grant relief.

¹² Issue 10 was framed by this Hearing Officer as follows: "Whether Parents are entitled to reimbursement for attorneys' fees, professional fees, or compensation for their time in pursuing the BSEA hearing request and/or any of their other attempts to penalize school personnel for alleged violations of 105 CMR 201.000 concerning head injuries and concussions through complaints filed with the Massachusetts Interscholastic Athletic Association (MIAA), the Division of Professional Licensure, Office of Prosecutions (against athletic trainer), or the Department of Public Health, Division of Health Professions Licensure regarding three school nurses?"

¹³ Issue 13 was framed by this Hearing Officer as follows: "Whether Lincoln-Sudbury must define and implement policies and procedures regarding student records and privacy?"

¹⁴ All dismissals throughout this Ruling are *with prejudice*, unless specifically noted otherwise.

Although an answer in the affirmative to this question would not, by itself, give rise to relief, the issue may be inextricably intertwined with resolution of other issues properly before the BSEA, such as whether the District knew or should have known of Student's continuing medical issues, physical or mental impairment, and whether Student's medical issues substantially limited her ability to learn (a major life activity).¹⁵ For this reason, the School's Motion to Dismiss issue 1 is DENIED.¹⁶

B. Issues Seven and Eight

Pointing to what it alleges are deficits in the Parents' allegations, and what it views as "the undisputed evidence currently available (from parents)," the District contends that issues 7 and 8 should be dismissed or, in the alternative, summary decision should be allowed as to these two issues. Issue 7 is framed as follows: "Whether Parents are entitled to reimbursement for their unilateral placement of Student at Lawrence Academy for her junior and senior years inclusive of transportation." Issue 8 reads, "Whether Parents are entitled to reimbursement for provision of the 2013 math summer tutoring for Student?" According to the District, Parents will be unable to establish either that Student is disabled (which would be fatal to both claims) or that they provided the requisite ten days' notice (which would be undermine the claim described in issue 7).

Whether Student is or was disabled as a result of the concussion she sustained in September 2012 and, as a result, should have been identified by the District and provided services pursuant to an IEP or a Section 504 plan, is the central question in this case. Moreover the Parents asserted, in their *Hearing Request*, that they provided more than ten days' notice. Though this Hearing Officer makes no assumptions about what they will or will not be able to prove in a hearing, the Parents have certainly stated allegations that, if true, could lead to affirmative answers to both of these questions. Their factual allegations do, therefore, state a plausible claim to relief.¹⁷ The School's Motion to Dismiss as to issues 7 and 8 is hereby DENIED. For the reasons just explained, in addition to those discussed in footnotes 5 and 6 and accompanying text, *supra*, the School's Motion for Summary Decision as to these issues is also DENIED.

Lastly, I note that the numerous submissions (15) by the Parties between December 5, 2014 and January 14, 2015, and the tone of same, make it evident that the situation between the Parties is quite contentious. Also, the Parties submissions offer a great deal of repetitive

¹⁵ These questions appear in the Framing Order as issues 2 and 3, which the School has not moved to dismiss at this time.

¹⁶ At Hearing, Parents will carry the burden of persuasion to show that this issue is connected to those properly before the BSEA.

¹⁷ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

information which does not advance this Hearing Officer's understanding of the issues but rather serves to confuse them. As such, from here forth, the Parties shall limit their submissions to one response each on filings requiring a response from the opposing Party. For submissions such as Closing Arguments, the Parties are limited to one submission on the date designated by the Hearing Officer. All submissions must adhere to the page limit set by the Hearing Officer and must be drafted in a font of 12.5 with regular margins and one and a half spacing between sentences. Any additional submission that does not comport with this Order will be disregarded.

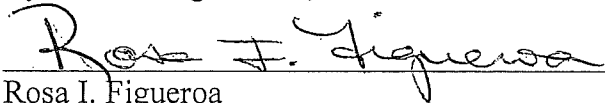
Conclusion:

For the reasons described above, the District's Motion to Dismiss//for Summary Decision is ALLOWED IN PART and DENIED IN PART.

ORDERS:

1. The District's Motion to Dismiss is **GRANTED** as to issues 10, 11, 12, and 13 as they appear in the November 9, 2014 Framing Order.
2. The District's Motion to Dismiss is **DENIED** as to issues 1, 2, 3, 4, 5, 6, 7 and 8 as they appear in the November 9, 2014 Framing Order.
3. Issue 9 appearing in the November 9, 2014, Framing Order is DISMISED as Parents withdrew said issue without objection.

By the Hearing Officer,



Rosa I. Figueroa

Dated: January 14, 2015