

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

In Re: Greater New Bedford Vocational Technical High School v.
Student

BSEA #1600355

Ruling on Greater New Bedford Vocational Technical High School’s Motion to Dismiss

On July 22, 2015, Greater New Bedford Vocational Technical High School (GNBVTHS) filed a Motion to Dismiss seeking dismissal with prejudice of certain counterclaims raised by Parents in the above-referenced matter relating to “a pattern and practice of discrimination” with regard to disabled and minority students.¹ According to GNBVTHS, systemic claims as well as all other non-IDEA and Section 504 claims raised by Parent must be dismissed because:

- A. The BSEA lacks authority to make findings of fact and conclusions of law regarding violations relating to student admission policies which allegedly show a “pattern and practice of discrimination”; and
- B. The BSEA hearing officer’s authority to make findings of fact, conclusions of law and award relief is jurisdictionally limited.

GNBVTHS argues that with the exception of claims arising under the IDEA, Section 504 and M.G.L. c.71B which fall within the scope of GNBVTHS’ Hearing Request and within the statute of limitations, all other Parents’ claims should be dismissed.

Parents responded to the Motion on August 11, 2015, objecting to GNBVTHS’ requests and noting that the BSEA has authority to make findings of fact and conclusions of law relating to policies showing a pattern and practice of discrimination based on disability, and arguing that Parents have a right to raise such claims at the BSEA as they fall under MGL c.71B and Section 504. Lastly, Parents noted that GNBVTHS did not deny Parents’ allegations of discrimination in their submission and as such Parents assert that said discrimination should be taken as true.

¹ GNBVTHS requested to be heard on its Motion but said request is denied since a Hearing on the Motion would not advance the Hearing Officer’s understanding of the Parties’ positions regarding their submissions. This Ruling is therefore based on the arguments and submissions offered.

Facts:

The facts delineated below are lifted from the Parties' submissions and are relied on solely for the purpose of this Ruling.

1. Student is a Caucasian, 16 year old resident of New Bedford who will be entering twelfth grade in September 2015. He has been attending GNBVTHS since ninth grade.
2. As a result of an independent evaluation conducted in 2013, Student received a diagnosis of organizational impairment, atypical attention deficit disorder, autism spectrum disorder and communication disorder NOS. He possesses normal verbal and non-verbal intelligence and demonstrates strengths in reading.
3. In May of 2013 Student was found eligible to receive special education services due to autism and a communication disorder. GNBVTHS developed an IEP covering the period May 17, 2013 to May 16, 2014. This IEP offered Student speech and language services (1x30), monthly individual counseling, weekly social skills group with the adjustment counselor, academic support in ELA, and a one-to-one aide throughout the day. The IEP also offered consultation for the one-to-one aide by the adjustment counselor and by the speech therapist.
4. Student did well academically during 10th and 11 grades, he passed his MCAS exams, excelled in the Information Technology shop, and according to GNBVTHS, has been an active participant in his school program. He also has continued to become more independent.
5. During the 2013-2014 school year, Student's one-to-one aide reported that Student was demonstrating skills sets at the same level as his peers, and not requiring regular prompts/ redirection to follow along in class or to take notes independently. As such, he recommended fading his support and having Student access traditional as opposed to special transportation. Student also desired to ride on the regular bus.
6. During the 2014-2015 school year the Parties engaged in mediation and participated in meetings to resolve their differences, including fading of the one-to-one aide.
7. By agreement of the Parties, Elizabeth Swibble of Southeastern Massachusetts Education Collaborative (SMEC) conducted a transitional assessment of Student in 2015.
8. Student's Team met on April 8, 2015 to review his transitional assessment, progress and further assess his need for continued one-to-one aide support. In anticipation of the meeting, Student's teachers were asked their opinion regarding the need for continued individual aide support and all recommended fading of this service.
9. Based on the Team's discussions and relying on The Department of Elementary and Secondary Education's March 2014 *Technical Assistance Advisory SPED 2014-3: Identifying the need for Paraprofessional Support*, GNBVTHS proposed an IEP for

the period April 8, 2014 through April 7, 2016, which included fading of the paraprofessional and offering Student access to regular (as opposed to special) transportation for the remainder of the school year. Parents rejected both of these offers and did not respond to the IEP placement offer.

10. GNBVTHS filed a Hearing Request on July 10, 2015, to resolve the differences between the parties.
11. Parents responded to the Hearing Request on July 17, 2015, asserting numerous counter claims some of which GNBVTHS seeks to have dismissed, namely, Parents' allegations that:

- 6) The Voc Tech has a pattern of discrimination as they reject students with disabilities as only 10% of the students are noted to have disabilities compares to 22% of students in surrounding towns.

- 7) The Voc Tech does not accept students who are minority classification for example per the DOE data sheet student %:

- A. Hispanic Voc Tech 18.4, New Bedford 34.5.

- B. African American Voc Tech 9.3, New Bedford 11.7

- C. Caucasian Voc Tech 68.6, New 46.3.

- 8) The Voc Tech has a clear pattern and practice of discrimination if you are a special education student, or not white, or both.

- 10) given the facts to be brought for a hearing it will be clearly apparent that the Voc Tech does not take children who are in need of services so they can be self-sufficient and live in the community unless they will have a strong possibility to the college bound versus the child who will just need a job to survive.

GNBVTHS further noted that Parents did not request any specific relief regarding the aforementioned counterclaims.

DISCUSSION:

I. Legal Standards

Consistent with 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*, hearing officers may grant motions to dismiss if the party requesting the hearing (or raising counter-claims within the context of an existing Hearing Request) fails to state a claim on which relief can be granted. See *In Re: Norfolk County Agricultural School*, BSEA #06-0390, (Berman, 2006). 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. *Id.* As previously noted in *In Re: Lincoln-Sudbury Regional School District, Ruling on Lincoln-Sudbury Regional School District's Motion To Dismiss/Motion for Summary Decision*, BSEA #1502427 (January 14, 2015), what is required to survive a motion to dismiss “are factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”² 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.”³ 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)”⁴.” See *In Re: Lincoln-Sudbury Regional School District, Ruling on Lincoln-Sudbury Regional School District's Motion To Dismiss/Motion for Summary Decision*.

With this guidance I turn to the issues and arguments in the case at bar. Here, GNBVTHS argues that Parents’ counter claims 6, 7, 8 and 10,⁵ must be dismissed with prejudice on the ground that the BSEA does not have jurisdiction over claims involving a “pattern of practice of discrimination”.

Parents however argue that the BSEA does not lack authority to enter findings of fact and conclusions of law regarding policies which show a pattern of practice of discrimination based on disability and the Student asserts that he was discriminated against on the basis of his disability. Parents argue that as a result of the discrimination practices GNBVTHS did not provide Student with appropriate services in contravention of the IDEA, Section 504 and M.G.L. c. 71B, and that its actions against Student were not simple error.

GNBVTHS argues that the BSEA lacks jurisdiction over claims asserting discrimination regarding School admissions policies.⁶ In this regard, GNBVTHS is correct that to the extent that those policies are equally applicable to regular education and special education students, the BSEA lacks authority to interfere with them. Parents however, appear to argue that the policies are discriminatory on the basis of race *and disabilities*.

Pursuant to 603 CMR 28.08(3), the jurisdiction of the BSEA is limited to disputes involving school districts, private schools, parents and state agencies, consistent with G.L. c. 71B, §2A⁷,

² *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

³ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

⁴ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

⁵ These numbers refer to the issues as framed in Parents’ Response to Greater New Bedford’s Hearing Request.

⁶ I note that GNB further argues that Parents lack standing to assert such claims.

⁷ Under Massachusetts law, the BSEA is charged with the responsibility of providing 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

... On 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 of appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973, as set forth 34 CFR §§104.31-104.39. 603 CMR 28.08(3).

However, nothing in the aforementioned regulation or within state or federal law grants the BSEA jurisdiction over general claims of systemic discrimination or “patterns and practice of discrimination” as Parents request. BSEA Hearing Officers have only the power expressly granted, by the statutes and regulations that establish the agency and determine its roles and responsibilities.⁸

GNBVTHS further argued that Student lacked standing to challenge administrative policies because he was in fact accepted for admission to Greater New Bedford Vocational Technical School and because he is Caucasian. In this regard, GNB correctly argued that a, “plaintiff seeking to invoke a federal court’s jurisdiction must show that he has ‘suffered or is threatened by injury in fact to a cognizable interest’”. *Donahue v. City of Boston*, 304 F.3d 110, 115 (1st Cir. 2002) citing *Save Our Heritage, Inc., v. Fed. Aviation Admin.*, 269 F. 3d 49, 55 (1st Cir. 2001). Student therefore, cannot argue that he was adversely impacted by GNB’s admission policies by reason of race or exclusion on the basis of his disabilities as he was accepted to the vocational school. As such, GNBVTHS argued, since Parents’ counterclaims 6, 7, 8 and 10 assert claims regarding admission policy and discrimination, they should be dismissed on the basis of lack of jurisdiction and lack of standing.

Lastly, GNBVTHS argued that a BSEA Hearing Officer’s authority to make findings of fact and reach conclusions of law and award relief is also limited jurisdictionally. Relying on *In Re: C.B.D.E. Ruling on Motion to Dismiss*, BSEA 310-6584 (Crane, Feb. 24, 2011), GNBVTHS anticipated Parents’ likely argument that the BSEA should act as a court of general jurisdiction in making findings of fact regarding Parents’ non-IDEA and Section 504 related claims to determine whether the claims were valid, and if appropriate, fashion a remedy.

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.” M.G.L. c. 71B, § 2A(a).

⁸ Cf. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 378 (1994) (discussing limited jurisdiction of federal courts).

In Re: C.B.D.E. made it clear that the scope of fact-finding for purposes of exhaustion regarding damages should be limited to the “role and expertise of a BSEA Hearing Officer” that is, the resolution of special education disputes, in fact a retreat from a previous broader scope approach.⁹

In their response to GNBVTHS’s Motion, Parents simply noted that *In Re: C.B.D.E.* and *Frazier* were not applicable to the instant case because Student in the case at bar is not seeking money damages. Parents asserted the jurisdiction of the BSEA to hear IDEA and Section 504 claims, thus opposing GNB’s Motion and requesting to have all of their claims heard in their entirety.

Upon careful consideration of the documents and arguments offered by the Parties, I find GNBVTHS’s arguments that: (a) the BSEA lacks jurisdiction to hear claims not arising under the IDEA and Section 504, and (b) the Student lacks standing regarding admission policies discrimination arguments persuasive and as such, hereby GRANT GNBVTHS’s Motion to Dismiss Parents’ counterclaims 6, 7, 8 and 10 WITH PREJUDICE. I further find that Student’s IDEA and Section 504 claims (including Parents’ allegations that GNBVTHS may have discriminated against Student on the basis of his disability following his admission to the program), may proceed to Hearing.

ORDER:

1. GNBVTHS’s Motion to Dismiss certain counterclaims advanced by Parents WITH PREJUDICE is GRANTED. Claims 6, 7, 8 and 10 are DISMISSED with PREJUDICE consistent with this Ruling.
2. Student’s IDEA and Section 504 claims, including Parents’ allegations of disability related discrimination against Student following his admission to the program may proceed.

So Ordered by the Hearing Officer,

Rosa I. Figueroa

Dated: September 2, 2015

⁹ In his Ruling, Hearing Officer Crane noted that he found “nothing within First Circuit case law that requires a broader scope of fact finding, and noted the more limited fact-finding consistent with what the First Circuit in *Frazier* found to be appropriate...” *In Re: C.B.D.E.*, p.5, footnote 9. Accordingly, the Hearing Officer in that case limited the scope of fact-finding to determinations of whether the public school district violated its obligations under the IDEA and Section 504, and the impact said violations had upon Student.