

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

In Re: Eric A. v.
Boston Public Schools

BSEA # 1604503

Ruling on Boston Public Schools' Motion to Dismiss

On December 10, 2015, Parents in the above-referenced matter filed a Hearing Request on their IDEA, 20 USC §1400 et seq., and M.G.L. c. 71B eligible minor child. Parents' Hearing Request asserts no IDEA claims or remedies falling within the purview of the Bureau of Special Education Appeals (BSEA). Rather, Parents' claims involve tort and civil rights claims against Boston Public Schools (Boston) for which Parents seek monetary damages. Parents have filed this BSEA appeal to fulfill administrative exhaustion requirements as a prerequisite for filing their civil suit.

Parents seek damages for the alleged physical, emotional and trauma suffered by Student while enrolled in Boston as well as the emotional distress, anguish and loss of consortium to Parents. Specifically, Parents seek an order granting them recovery of "damages for violations of Student's due process rights and 42 U.S.C. §1983, 42 U.S.C. §1231-12165, 20 U.S.C. §1681, and M.G.L. c. 12 §11H, for Boston's negligence and for Parents' loss of consortium based on Boston's knowing and willing failure to take adequate steps to ensure [Student's] safety stemming from the abuse". They also seek recovery of attorney's fees and costs for the aforementioned transgressions. Parents' Hearing Request however, does not state any desired remedy available through the IDEA, MGL c.71B or Section 504 of the Rehabilitation Acts of 1973.

On December 28, 2015, Boston Public Schools filed a Motion to dismiss asserting that Parents' Hearing Request does not raise any educational dispute between the Parties falling within the purview of the BSEA. Boston noted that Parents' Hearing Request was devoid of allegations regarding Student's education and instead seeks relief pursuant to statutes and regulations other than the IDEA over which the BSEA lacks jurisdiction. Moreover Boston asserted that the BSEA lacks enforcement mechanisms and cannot award the type of damages Parents and Student seek.

Parents filed an Opposition to Boston's Motion to Dismiss and a Memorandum of Law in Support Thereof on January 6, 2016, arguing that the First Circuit mandated the BSEA to conduct a full evidentiary hearing on the tort and civil rights actions brought by Parents in order to satisfy the exhaustion requirements at the administrative level.

FACTS:

For purposes of this Motion, I rely on the following factual assertions which are considered to be true for purposes of this Motion only. These facts are further considered in the light most favorable to Parents, the opposing party.

1. Student is a seventeen year-old resident of Boston, Massachusetts. He has been diagnosed with Autism Spectrum Disorder and Attention Deficit Hyperactivity Disorder. He also presents with a language disorder and an intellectual disability. Student is verbal and his reading abilities fall at approximately the fourth grade level.
2. During the relevant periods set out in Parents' Hearing Request (the 2013-2014) Student attended a substantially separate classroom at the Boston Community Leadership Academy (BCLA) and he received additional speech and language services.
3. According to Parents, during the 2013-2014 school year, Student was allegedly physically and sexually assaulted by a teacher's aide at the BCLA.
4. On December 20, 2013 the teacher's aide was observed to punch, hit, kick and straddle Student from behind in a bathroom. As a result of this assault, the teacher's aide was arrested the same day and charged with assault and battery by means of a dangerous weapon (shod foot). The teacher's aide was also charged with indecent assault and battery on a person with a disability. According to Parents, the teacher's aide had engaged in a pattern of physical and sexual abuse of Student at the BCLA.
5. As a result of the aggressions Student suffered physical and emotional injury and trauma, resulting in behavioral deterioration including increased instances of hitting, kicking and tics.
6. On December 10, 2015, Parents filed the instant Hearing Request seeking monetary damages from Boston and raised negligence and loss of consortium based on Boston's "knowing and willful failure to take adequate steps to ensure [Student's] safety".

DISCUSSION:

The *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3), applicable to the BSEA, and Rule XVIIB of the *Hearing Rules for Special Education Appeals* grant the BSEA jurisdiction over motions to dismiss where the party requesting a BSEA Hearing fails to state a claim upon which relief can be granted. The aforementioned provisions are analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

When evaluating motions to dismiss, the hearing officer must consider whether the complaint contains "enough factual material to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)". *Ocasio-Hearnandez v. Fortuño-Burset*, 604 F.3d 1, 8-9 (1st Cir. 2011). If after

“accepting as true all well pleaded factual averments and indulging all reasonable inferences in the [Parents’] favor..., recovery can be justified under any applicable legal theory” within the authority of the BSEA¹, then a motion to dismiss may be granted. See *Calderon-Ortiz v. LaBoy-Alvarado*, 300 F.3d 60, 63 (1st Cir. 2002).

Boston argues that in the case at bar, the BSEA lacks jurisdiction over the claims alleged by Student which involve negligence and tort claims and do not involve special education disputes.

Boston is correct that Parents’ Hearing Request seeks damages for the “assault, abuse, and neglect of [Student] as well as recovery of related attorney’s fees and costs.” The Hearing Request further seeks damages for violations of Student’s due process rights and 42 U.S.C. §1983, 42 U.S.C. §§1231-12165, 20 U.S.C. §1681, and M.G.L. c.12 §11H as a result of Boston’s negligence, and also due to Parents’ loss of consortium, none of which fall within the jurisdiction of the BSEA pursuant to 603 CMR 28.08(3)(a). Lacking in the Hearing Request are any claims involving Student’s education or allegations of a denial of FAPE. Similarly, the Hearing Request does not seek any educational relief falling within the purview of the BSEA.

Boston surmised that Parents had filed a Hearing Request with the BSEA to ensure that they satisfied the administrative exhaustion requirements contemplated in *Frazier v. Fairhaven School Committee*, 276 F.3d 52 (1st Cir. 2002), but noted Judge Woodlock’s analysis in *Bowden ex rel*, No. CIV.A.00-12308-DPW, 2002 WL 472293, at *3 (D.Mass. Mar. 20, 2002), that

Frazier holds that a plaintiff must exhaust administrative procedures with respect to any claim that asserts a violation of the rights to a FAPE. In addition, *Frazier* suggests that a claim asserted under non-IDEA law may still be subject to the exhaustion requirement if the IDEA and procedures either can provide some meaningful relief or a superior record on which the court could make its determination.

Here, Boston argued that administrative exhaustion was not necessary as the IDEA did not contain any procedure that could provide meaningful relief in light of Parents’ allegations, and the BSEA could not create a superior record. According to Boston, even *Frazier v. Fairhaven School Committee*, 276 F.3d 52 (1st Cir. 2002) contemplated that there would be

¹ The jurisdiction of the BSEA may be found at 603 CMR 28.08(3)(a) noting in pertinent part that the BSEA can decide

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 a free appropriate public education guaranteed by section 504 of the Rehabilitation Act of 1973, as set forth in 34 CFR §§104.31-104.39.

cases (such as the instant case), that may not be subject to the exhaustion requirement. Boston argued that exhaustion was not required “where the fact finding necessary to establish the plaintiff’s claims does not require any particular expertise in special education.” See *Dr. Franklin Perkins School v. King Philip Regional School District*, 25 Mass. L. Rptr. 549 (2009 Mass Super). Similarly, if the factual allegations lacked any indication that a dispute existed concerning a student’s eligibility under the IDEA or Section 504, or the discharge of the school’s procedural and substantive responsibilities consistent with the aforementioned statutes, IDEA did not impose any requirement for administrative exhaustion. *Hague v. Massachusetts Department of Elementary and Secondary Education*, No. 10-30138-DJC, U.S. Dist. LEXIS 112235 (D. Mass. Sept. 12, 2011).

Parents are however concerned that since the First Circuit has not yet voiced a definitive statement foregoing exhaustion at the administrative level for claims not involving a disabled student’s special education issues, this may pose a risk for dismissal with prejudice leaving Parents without any form of relief. They therefore argue that in light of *Frazier* and its progeny, they must continue to proceed through the BSEA hearing process to establish a record and for fact-finding on any claim involving a special education eligible student’s programming.² *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 62 (1st Cir. 2002); *Hatch v. Milford Sch. Dist.*, 2010 U.S. Dist. LEXIS 92339, at *7-8 (D.N.H. Sept. 2, 2010); *City of Boston v. BSEA*, 2008 U.S. Dist. LEXIS 39992, at *9 (D. Mass. Apr. 30, 2008); *Bowden v. Dever*, 8 MSER 90, 92-93 (D. Mass. 2002).

Boston correctly argues that the BSEA has previously considered cases similar to the instant matter. In *In Re: Springfield Public Schools & Xylia*, 18 MSER 373, 375 (Byrne, November 26, 2012), the Hearing Officer applied the three pronged inquiry developed in *Frazier*, and its progeny, that is

1. Is the event giving rise to the claim related to the student’s status as a student with a disability?
2. Is the relief sought available under the IDEA?
3. Does the BSEA have particular expertise in assessing and determining the factual basis of the student’s claim so as to develop a useful administrative record for judicial review?³

Applying the *Xylia* inquiry to the case at bar, it is clear that the *Frazier* standard has not been met.

² I note that Parents agree with the wisdom of eliminating the requirement that students with disabilities seek administrative relief first. This is especially so where a non-disabled student facing the same circumstances may proceed directly to court.

³ See Boston’s Motion at pages 3 and 4.

The factual claims raised by Parents involve the actions of a teacher's aide as against Student, allegedly causing harm to the student. Parents do not raise any claims involving deprivation of a free and appropriate public education. Similarly, the type of relief sought in Parents' complaint falls outside the aforementioned statutes. Parents do not seek alteration of Student's IEP as a result of inappropriate services, compensatory education, implementation of additional services or a change in placement. The Hearing Request states that Parents seek redress for the emotional distress, negligence and loss of consortium pertaining to Student or Parents. None of the aforementioned claims, or remedies, involves Student's particular disabilities, education or provision of specialized instruction. Instead, Parents only seek monetary damages. This relief is not available under the IDEA, and is available to any regular education student. As such, the expertise of the BSEA is not necessary. As Boston correctly argues, this case solely involves tort allegations and

courts are the traditional and more expert arbiters of questions of tort and constitutional law... as a matter of statutory interpretation, the IDEA exhaustion provision does not apply because the tort and constitutional claims are not claims for which relief is available in any sense under the IDEA. 20 U.S.C. §1415(1). *Bowden v. Dever*, 8 MSER 90, 92-93 (D. Mass. 2002); WL 472293, at *5.

Boston persuasively argues that in *Bowden*, as in the instant matter, plaintiffs alleged a violation of 42 U.S.C. §1983 and the Court did not find it necessary or appropriate to require administrative exhaustion. Parents, on the other hand, rely on that portion of *Bowden* requiring exhaustion for "any aspect of the school's treatment... that interferes with the provision of a free, appropriate education" as falling within the scope of the IDEA's administrative procedures.

Ultimately, the Court in *Bowden* dismissed the claims involving educational discrimination based on failure to exhaust at the administrative level, but retained the tort and constitutional claims, denying dismissal for failure to exhaust on those claims. The Court explained,

The IDEA does not require all claims asserted by a disabled student for events occurring in a school setting be channeled through the IDEA's administrative procedures. Rather *Frazier* holds that a plaintiff must exhaust administrative procedures with respect to any claim that asserts a violation of the right to a FAPE. In addition, *Frazier* suggests that a claim asserted under non-IDEA law may still be subject to the exhaustion requirement if the IDEA procedures either can provide some meaningful relief or a superior record on which the court could make its determination. *Bowden*, 8 MSER at 92.

As discussed above, IDEA procedures can neither provide meaningful relief or a superior record in the instant matter.

Lastly, Boston argued that other avenues of recovery are available to Student for his alleged injuries as a result of Boston's negligence, if any. M.G.L. c.258 §2 and §3 grant exclusive jurisdiction of actions involving damages resulting from the negligence of public employees, to the Massachusetts Superior Court. In the instant matter Parents and Student have filed a Notice of Tort claim with Boston's Mayor, Superintendent and Corporate Counsel (SE-1). Boston submits that this is the appropriate avenue for the plaintiffs given the remedies they seek and the superior court is the court with appropriate jurisdiction. Given the alternative relief and remedies available to Student and Parents in a more appropriate forum no harm will come to them from dismissal at the BSEA.

In light of the guidance offered by *Bowden*, and having failed to meet any of the three criteria articulated in *Xylia*, it is clear that the instant case does not meet the standard for retention of jurisdiction at the BSEA; it does not raise any claims amenable to the specific expertise of the BSEA; it does not involve any IDEA or Section 504 claims; and the BSEA lacks authority to grant the relief sought by Parents⁴. The case therefore must be dismissed.

CONCLUSION:

Having considered as true the factual allegations delineated in Parents' complaint⁵, and having drawn all inferences in Parents' favor, Boston is correct that the claims and relief sought by Parents fall outside the jurisdiction of the BSEA, and as such there is no plausible, viable claim giving rise to any form of relief under special education law (20 U.S.C. § 1400 et. seq. or M.G.L. 71B), or Section 504 (29 U.S.C. § 479). See *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 557 (2007)). As such, Boston's Motion to Dismiss must be **GRANTED** and the case is **DISMISSED WITH PREJUDICE**. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).

So Ordered by the Hearing Officer,

Rosa I. Figueroa

Dated: February 22, 2016

⁴ A case may be dismissed if relief cannot be granted under federal or state special education law (20 U.S.C. § 1400 et. seq. or M.G.L. 71B), or Section 504 (29 U.S.C. § 479). See *Calderon-Ortiz v. LaBoy Alvarado*, 300 F.3d 60 (1st Cir. 2002); *Whitinsville Plaza Inc. v. Kosteas*, 378 Mass. 85, 89 (1979); *Nader v. Cintron*, 372 Mass. 96, 98 (1977); *Norfolk County Agricultural School*, 45 IDELR, 26 (December 28, 2005).

⁵ The Hearing Officer will consider the facts alleged in the pleadings and documents attached or incorporated by reference. *Nollet v. Justices of the Trial Court of Mass.*, 83 F. Supp. 2d 204, 208 (D.Mass. 2000), *aff'd*, 248 F.3d 1127 (1st Cir. 2000). The allegations of the complaint must be taken as true and all inferences therefrom must be drawn in the plaintiff's favor, that is, in Parents' favor. See *Blank v. Chelmsford Ob/GYN, P.C.*, 420 Mass. 404, 407 (1995). Moreover, 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)..." *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).