

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

Pavel¹

&

BSEA #1606776

Holyoke Public Schools

RULING ON HOLYOKE PUBLIC SCHOOLS' MOTION TO DISMISS

This matter comes before the Hearing Officer on the Motion of the Holyoke Public Schools (hereinafter "Holyoke") to Dismiss the Parent's Hearing Request. The Parent opposes the Motion. At issue are tort and civil rights claims arising from the alleged abuse and neglect of the Student by teachers and staff in his special education program, as well as the alleged failure of Holyoke to properly supervise its staff and program.

On February 26, 2016 the Parent filed a Request for Hearing at the BSEA alleging that her son, Pavel, had suffered significant physical and emotional harm at school due to the negligent and intentional actions of Holyoke Public School personnel. The Parent sought an Order finding that she is entitled to recover damages for the violation of Pavel's due process rights under 42 U.S.C. § 1983, 42 U.S.C. §12131-12165, 20 U.S.C. § 1681, and M.G.L. c. 12, §11 H, for Holyoke's negligence, and for Parent's loss of consortium, based on Holyoke's knowing and willing failure to take adequate steps to ensure Pavel's safety.

The matter was set for Hearing on March 31, 2016. After several postponements were granted for good cause this action was consolidated with seven other Hearing Requests involving similar circumstances and identical requests for relief. Holyoke filed a Motion to Dismiss the consolidated appeals on May 26, 2016. The Parents in the consolidated appeals filed an Opposition to Holyoke's Motion to Dismiss on June 24, 2016. While the Parents present identical legal claims stemming from substantially similar circumstances, the underlying facts differ sufficiently among the eight students that individual factual findings are warranted.

¹ "Pavel" is a pseudonym used by the Hearing Officer to protect the privacy of the Student in documents available to the public.

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).

Furthermore, due to the administrative exhaustion requirements established by the First Circuit in *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52 (1st Cir. 2002), even when the BSEA does not have the authority to award the relief sought, a hearing officer must determine "whether the claim presented is 'IDEA-related' so as to implicate both the statutory obligation to provide FAPE and the expertise of the administrative fact finding agency". See *In Re: Springfield Public Schools and Xylia*, 18 MSER 373(2012).

FACTUAL BACKGROUND

The few facts pertinent to resolution of the Motion to Dismiss are set out in the Parent's Hearing Request and are not in dispute. As required I view these facts in the light most favorable to the Party resisting dismissal, the Parent.

1. The Student is 12 years old and a resident of Holyoke. He has Post-Traumatic Stress Disorder and Attention Deficit Disorder. At all relevant times Pavel has been eligible for special education through the Holyoke Public Schools. During the 2014-2015 and 2015-2016 Pavel attended the Therapeutic Intervention Program ("TIP"), a substantially separate in-district special education program, located in the Peck-Lawrence School. (Hearing Request)
2. The Parent alleges that while attending TIP during the 2014-2015 and 2015-2016 school years Pavel was subjected to physical assault by Holyoke Public School staff. In particular she alleges that Peck School staff threw Pavel onto the floor, restrained him, and twisted his arm causing injuries that required emergency medical attention. Further the Parent alleges that Holyoke staff routinely locked Pavel in a small room where he would engage in self-injurious behaviors. (Hearing Request)
3. The Parent asserts that, as a result of the assault and abuse by the Peck School staff, Pavel suffered significant bruising and scratches as well as significant emotional injury resulting in trauma, frustration, anger and frequent crying. The Parent also asserts that she has suffered emotional distress, anguish and loss of consortium as a direct and proximate result of the actions of Holyoke Public School staff. (Hearing Request)
4. The Parent is seeking money damages from Holyoke due to alleged violations of Pavel's rights under 42 U.S.C. § 1983; 42 U.S.C §§ 12131-12165; Title IX, 20 U.S.C §1681; the Massachusetts Civil Rights Act, and M.G.L. c. 12 §11 (I). She is also seeking money damages

to compensate Pavel for injuries allegedly resulting from Holyoke's negligence and for her loss of consortium based on Holyoke's knowing and willful failure to take adequate steps to ensure the Student's safety. The Parent makes no claims pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*; Section 504 of the Rehabilitation Act, 29 U.S.C §794; M.G.L. ch. 71B; or any of the regulations promulgated thereunder. The Parent is not seeking through this action, any current or compensatory special education services from Holyoke. (Hearing Request and Parent's Opposition to Motion to Dismiss)

ISSUE

Whether a student seeking only monetary damages for physical and emotional injuries stemming from abuse and neglect by school personnel, must exhaust the administrative dispute resolution procedures available to him under the IDEA, even though he makes no claims under, and seeks no relief authorized by, the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*; Section 504 of the Rehabilitation Act, 29 U.S.C §794; M.G.L. c 71B; or any of the regulations promulgated thereunder.

SCHOOL POSITION

Holyoke argues that the BSEA is an administrative dispute resolution agency of limited, statutorily defined, jurisdiction. The Parent does not assert any claim recognized by the IDEA, Section 504 of the Rehabilitation Act of 1973, or the Massachusetts Special Education Law M.G.L. c. 71B, the only statute under which the BSEA operates.

The BSEA lacks jurisdiction over the Parent's hearing request. Based on relevant case law and BSEA decisions, this case is not one in which exhaustion of the BSEA administrative process is required or available. Specifically, the alleged events (abuse, neglect, negligent supervision) giving rise to the hearing request do not stem from the Student's status as a child with a disability pursuant to relevant federal and state statutes, the relief sought by the Parent is not available pursuant to the federal or state special education statutes or Section 504 of the Rehabilitation Act, and the BSEA has no particular fact-finding expertise with respect to the Parent's tort and civil rights claim. Therefore exhaustion at this administrative level is futile.

PARENT POSITION

According to relevant First Circuit precedent, exhaustion of BSEA administrative remedies may be required in cases where the initial claim arises in the context of a child's special education program, even if the BSEA lacks authority to grant the only relief sought by the moving party. As the Student's claims arose in a special education context and are arguably related to his status and a student with a disability and to his attendance in a public school-based special education program, the Parent cannot risk dismissal of her claims in federal court without first pursuing the administrative process before the BSEA.

DISCUSSION

While reconciliation of the IDEA's exhaustion requirement with the limited jurisdiction of the BSEA is not fully complete, analysis of hearing requests presenting this issue has settled into a predictable groove. The BSEA is the administrative agency charged with addressing parental complaints concerning "any matter relating to the identification, evaluation, or educational placement... or the provision of a free appropriate public education to..." a student with a disability. 20 U.S.C. §1415 (b) (6). M.G.L. c 71B § 3. A party "aggrieved" by the disposition of a BSEA due process hearing may appeal to state or federal court but only after exhausting all administrative procedures available under the IDEA. 20 U.S.C. §1415 (1) ²

As an administrative agency with statutorily circumscribed authority the BSEA has no jurisdiction of the Student's constitutional law and common-law tort claims. Proper treatment of statutory claims that arise "in the context of" a student's special education program or are linked, however weakly, to a student's IDEA-eligible status is more nuanced. Courts in this jurisdiction have indicated that exhaustion of administrative remedies available under the IDEA may be required, even where the relief sought by the petitioner is not within the BSEA's authority to grant, when a petitioner's claims are "IDEA-based". *Frazier v. Fairhaven School Committee*, 276 F.3d 52 (1st Cir. 2002); *Bowden v. Dever*, No. 00-12308-DPW, 202 WL 472293 [8 MSER 90] (D.Mass. March 20, 2002); *CBDE v. Massachusetts BSEA*, No.11-10874- DPW, WL 4482296 (D.Mass Sept. 27, 2012)³ Relying on the courts' analysis and directions in those cases the BSEA developed a three prong inquiry to evaluate whether claims involving statutes other than the IDEA, Section 504, and M.G.L. c. 71B, may properly be entertained by the BSEA. When determining the viability of such claims at the BSEA the Hearing Officer considers:

First, is the event giving rise to the student's claim "related" to the student's status as a student with disabilities or to the discharge of the school's obligations under the IDEA, Section 504 and/or MGL c. 71B?

Second, is the relief the student is seeking available in a claim rooted in the IDEA, Section 504 and/or MGL c. 71B? And

² 20 USC §1415 (l) provides: "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the American with Disabilities Act of 1990 [42USC§12101 *et seq.*], Title V of the Rehabilitation Act of 1973 [29 USC §79.0 *et seq.*], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter." Subsections (f) and (g) refer to the administrative due process system required under the Individuals with Disabilities Education Act ("IDEA").

³ See also: *Nieves-Marques v. Puerto Rico*, 353 F3d 108 (1st Cir. 2003); *Diaz-Fonseca v. Puerto Rico*, 451 F 3d. 13 (1st Cir. 2006); *Payne v. Peninsula School Dist.*, 653 F.3d. 863 (9th Cir. 2011) for a discussion of exhaustion principles applicable to the IDEA in various circuits; *Tristan v. Socorro Ind. Sch. Dist.*, 902 F.Supp 2d 870 (W.D. Tx, 2012) discussing concerns about differential treatment of claims by students with and without disabilities; *Deshotel v. W. Baton Rouge Parish Sch. Bd.*, 2011 U.S. Dist. LEXIS 125969 (M.D. La. 2011). But see: *Honig v. Doe*, 484 U.S. 305 (1988); *McCormick v. Waukegan Sch. Dist. No. 60*, 374 F.3d 564 (7th Cir. 2004); *Taylor v. U.S. Treasury Dept. IRS*, .127 F.3d 470 (5th Cir. 1997).

Third, does this administrative due process agency have a Particular expertise in assessing and determining the factual basis of the student's claim so as to develop a useful administrative record for a judicial review?

Springfield Public Schools and Xylia, 18 MSER 373 (2012).

The BSEA has used that test consistently since 2013, without modification or clarification from an appellate court, to determine whether the complaint of an IDEA-eligible student which asserts injuries arising in an educational context and requests relief under non-IDEA-related statutes, must be presented in the first instance to the BSEA. *In Re: Maynard Public Schools*, BSEA 1609900, Ruling on Motion to Dismiss Appeal, August 8, 2016, (Oliver); *Boston Public Schools and Eric A*, 22 MSER 19 (2016 Figueroa); *Winthrop Public Schools and Beatrice and Charlie*, 20 MSER 232 (2014 Reichbach); *Georgetown Public Schools*, 20 MSER 200 (2014 Berman); *Springfield School District*, 20 MSER 37 (2014 Crane). Each ruling discusses a different factual or legal aspect of the IDEA's exhaustion requirement and provides a sensitive and intelligent appraisal of the usefulness of exhaustion principles in the context of an IDEA administrative due process proceeding.

Turning to the limited facts presented in this matter, and viewing them in the light most likely to favor retention of jurisdiction for exhaustion purposes, I make the following findings:

1) The Parent presents a variety of statutory civil rights and due process statutes claims as well as common law and constitutional claims. She asserts that her claims arise from, and are founded in, facts related to physical and emotional injuries her son suffered at the hands of Holyoke Public School employees. She does not assert any violation of the IDEA. She does not assert any violation of Section 504. She does not assert any violation of M.G.L. c. 71B. She does not complain that Holyoke failed to discharge its obligations under those statutes to provide her son with a free appropriate public education. She does not complain that as a direct or proximate result of his disabilities her son was treated differently in any way than other similarly situated students without disabilities were treated by Holyoke Public School employees. There is nothing in the facts recited by the Parent in the Hearing Request or in the Opposition to the Motion to Dismiss to distinguish this matter from a general complaint of assault, breach of custodial duty of care and/or negligent supervision as would be available to any Holyoke Public Schools student regardless of disability status. See: *Georgetown* and *Boston*, *supra*. Other than mere attendance in a Holyoke Public School special education program the Parent has not demonstrated, or argued, any link between her son's IDEA status and the conduct complained of.⁴ Therefore I find that the Parent has not met the first analytical prong necessary to maintain this action at the BSEA.

2) The Parent is seeking money damages for violation of the Student's civil and due process rights, for negligence and for loss of consortium. She does not seek an award of "damages" related to a violation of the IDEA, Section 504, or M.G.L. c. 71B. She does not articulate any

⁴ While the Hearing Request could have been framed differently to more explicitly involve the special education program's disciplinary and behavior management practices and the Student's IEP, thereby concretely implicating the IDEA in this action, it was not. See e.g., *Franklin v. Frid*, 7 F.Supp. 2d 920 (W.D. Mich. 1998).

desired relief that is authorized by those statutes. She does not seek a change in her son's IEP or special education placement. She does not seek an award of compensatory education nor reimbursement of parental expenses associated with delivering special education services the school ought to have provided but did not. She does not seek a declaration that Holyoke failed to provide Pavel with a free appropriate public education. The relief she requests is that typically associated with tort claims and is not available to any claimant either in an administrative due process system or through a judicial appeal under the IDEA, Section 504, or M.G.L. c. 71B.⁵ I find that the relief sought by the Parent is not "rooted" in the IDEA and therefore that the Parent has not met the 2nd prong of the *Xylia* exhaustion test.

3) Finally the BSEA does not have particular expertise in assessing and determining the actual basis of the Parent's claims for purposes of developing a useful administrative record for judicial review. As Hearing Officer Berman concluded in *Georgetown*:

[T]he BSEA has no particular expertise in the areas addressed in the instant case—assault and battery, violation of constitutional rights to bodily integrity, negligent supervision, loss of consortium, emotional distress, and violation of various civil rights statutes—either with respect to hearing and analyzing the facts surrounding the events themselves or in assessing the monetary value of any injuries that Parents might prove.

In Re: Georgetown Public Schools, 20 MSER 200, 203 (2014); See also: *Springfield Public Schools and Xylia*, 18 MSER 373, 377 (2012) (concluding that the BSEA has no expertise in assessing claims of personal injury and correlating damages.)

CONCLUSION

After careful consideration of the facts alleged in the Parent's pleadings, viewing them in the light most favorable to presentation and continuation of any potential statutory claims, as well as the thoughtful arguments of counsel for both parties and the applicable precedent in this jurisdiction, I find that Pavel's claims for relief do not require exhaustion of the administrative remedies available to him as a student with disabilities under the IDEA and, therefore, that dismissal is appropriate. First, the hearing request does not state a claim on which the BSEA could, with its limited statutory jurisdiction, offer any form of relief, or provide a credible measure of expertise. In particular, the Student has not set out a claim that is sufficiently related to any violation of the IDEA or Section 504 to bring it within the administrative dispute resolution procedures set out in the IDEA. Second, heeding the directions and cautions of courts which have considered the IDEA's exhaustion provision, I am persuaded that exhaustion is not required in this matter because Pavel's claim for money damages due to the tort of negligent supervision is not causally connected to his status as a student with disabilities nor to the failure of the School to meet its statutory obligations under the IDEA, Section 504 or M.G.L.c. 71B. The claims the Student does present, as well as the relief he requests, fall outside the administrative exhaustion parameters established by the *Frazier* court. This result places Pavel

⁵ See: *P.R. v. Cent. Tex. Autism Ctr. Inc.*, 2009 U.S. Dist. LEXIS 43303 (W.D. Tx 2009) (no provision in IDEA that addresses non-educational tort-based allegations).

on the same footing with respect to his constitutional, statutory and tort claims as any similarly situated non-disabled student in the Holyoke Public Schools.

ORDER

As there are no IDEA-related issues before the BSEA, Holyoke's Motion to Dismiss is GRANTED.

By the Hearing Officer

Lindsay Byrne
Dated: August 29, 2016