

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

In Re: Student v.
Dennis Yarmouth Regional School District

BSEA# 1607923

Ruling on Dennis Yarmouth Regional School District's Motion to Dismiss

On April 4, 2016, Student/Parents filed a third Hearing Request regarding the same issues against Dennis Yarmouth Regional School District. Student/Parents first filed a Hearing Request on March 26, 2014 (BSEA #1407065), claiming that Dennis Yarmouth Regional School District ("DY" or "District") deprived Student of a FAPE. The case was dismissed without prejudice on July 22, 2014 when Student's/Parents' attorney failed to respond to an Order to Show Cause.

Student/Parents then filed a second Hearing Request two months later on September 18, 2014 (BSEA #1502345). DY then filed a Motion to Dismiss on September 26, 2014 and Parents responded to said Motion on October 1, 2014. Parents failed to respond to an Order issued by the Hearing Officer and at DY's request, an Order to Show Cause was issued on November 3, 2014. BSEA #1502345 was dismissed on December 5, 2014 when Student/Parents failed to respond to an Order to Show Cause. In April 2016, Student/Parents filed their third Hearing Request.

On April 7, 2016, following issuance of an April 5, 2016 BSEA Notice of Hearing, DY filed a Motion to Dismiss and Notice to Seek Attorney's Fees and a request for postponement of the Hearing. A telephone conference call was held on or about April 14, 2016, after which the BSEA received Student's/Parents' Statement of Clarification of Jurisdiction on April 15, 2016. Also, having granted Student's/Parents' request for an extension on the timeline for filing Student's/Parents' response to DY's Motion, Student's/Parents' Response to DY's Motion to Dismiss was received on April 25, 2016.

On May 4, 2016 DY filed a School District's Response to Parents' Opposition to District's Motion to Dismiss and on May 10, 2016, Student's/Parents' attorney supplemented its response by filing a Response to DY's Argument in Opposition to Plaintiff's Argument accompanied by four exhibits.

A Hearing on DY's Motion to Dismiss and Notice to Seek Attorney's Fees was held on May 10, 2016.

Following the Motion Session, the BSEA received additional documents referenced during the Motion Session or requested by the Hearing Officer. Student/Parents submitted documents on May 12, 2016, and DY filed a Response to Student's/Parents' May 12, 2016 filing on May 18, 2016.

In its Motion, DY seeks an order from the BSEA dismissing Student's/Parents' case with prejudice, asserting that Student's/Parents' claim is barred as it falls outside the applicable two-year statute of limitations consistent with the Individuals with Disabilities Education Act ("IDEA"). DY further argues that Student's/Parents' action is frivolous, so it reserves its right to seek attorney fees should this matter not be dismissed.

On April 25, 2016, the BSEA received Student's/Parents' response to the DY's Motion to Dismiss. Student's/Parents' response provided additional explanations in support of Student's position that none of her disputed claims should be dismissed. Specifically, Student/Parents argue that the claims are being brought by Student, who has now reached the age of majority, and therefore, the statute of limitations may not apply¹; even if it does, Student asserts that the statute of limitations was tolled until she reached the age of 18 in May 2014 and hence all of her claims are preserved by an April 2016 filing.

For purposes of this Ruling only, DY agreed to the Facts delineated by Student/Parents in the Hearing Request, but, reserved its right to dispute them at a Hearing on the merits if its Motions were denied. DY's right to dispute the facts at a Hearing on the merits is hereby **RESERVED**.

Upon consideration of the Parties' submissions received between April 4, 2016 and May 18, 2016 (as noted above), as well as having taken Administrative Notice of BSEA #1407065 and BSEA #1502345 (at DY's request), DY's Motion to Dismiss is **GRANTED IN PART**, and **DENIED IN PART**, as explained below.

Facts:

The facts delineated below are presumed to be true for the purposes of this Ruling only:

¹ Student's/Parents' attorney argues that since the language of the IDEA provides that the two-year statute of limitations period applies to "parent[s] or agenc[ies]", it might not apply to students (who have reached the age of majority) because they are not specifically listed in said provision.

1. Born on May 1, 1996, Student is in her first year in college, having graduated from Dennis Yarmouth High School (Dennis-Yarmouth) in June 2014. Student was enrolled in regular education honors level courses throughout high school while at Dennis Yarmouth, including honors level English, History, Science, Spanish, and Math. Her transcript indicates that she received A's and B's the first two years of high school, and A's, B's, and C's during her 11th and 12th grade years. Parents allege that Student's grades were inflated.
2. Student is described as a "bright, personable young lady who works extremely hard at her academic studies". During her senior year she "participated in competitive sports during all three seasons (field hockey, winter track and sailing)." She was also the editor of the high school yearbook. In April of 2013, she was "honored by the Yarmouth selectmen with a certificate of appreciation in recognition of outstanding service to the people of the town of Yarmouth."
3. Parents concerns over Student possibly having a learning disability were brought to DY's attention on several occasions starting in 2004. DY conducted special education evaluations in 2004 and in 2007, and both times found Student to be ineligible to receive special education services. She however, received accommodations through DCAPs and later through Section 504 Plans in 2013 and 2014.
4. On December 4, 2012, Parents arranged for Student to undergo a neuropsychological evaluation with Susan Brefach, Ed.D. Thereafter, they also arranged for Student to undergo a speech and oral/written language evaluation with Kathleen Grabowski, M.S.,C.C.C., on January 8, 2013. The evaluations showed that Student presented with Dyslexia and a language learning disability.
5. Parents forwarded the reports of their private evaluations to DY on or about March 2013.
6. On March 21, 2013, DY requested consent to complete a full evaluation of Student, but Parents denied consent marking the box labeled "I reject the proposed evaluation in full" and writing beside it "No test[s] are allowed". In a letter to the Superintendent dated April 23, 2013, Parents explained that they did not consent to the evaluation because she had already obtained independent evaluations.²

² While Parents use the term "independent evaluations", they are referring to the private evaluations obtained earlier that year.

7. Without its own evaluations but having received Parents' private evaluation reports, DY convened Student's Team on April 10, 2013, to discuss the evaluations of Ms. Grabowski and Dr. Brefach. Relying on the evaluations of the two private evaluators combined with teacher input, the Team agreed that Student presented with Specific Learning Disability in the area of language (Dyslexia), but determined that Student was not eligible for special education services because she was making effective progress in her five honors courses at DY.
8. At the April 10, 2013 Team meeting DY representatives suggested that Student take some non-honors courses instead of all honors courses, but Student did not want to and decided she would rather continue the honors classes and seek help when she needed it. By all reports, Student sought assistance from her teachers when she needed help.
9. Parents disagreed with the finding of no eligibility and on April 23, 2013, wrote to DY's Superintendent, Mr. Woodberry, stating their dissatisfaction with the Team's findings and noting that Student should have been found eligible for special education services based on the evaluations discussed at the Team meeting. Parents also notified the Superintendent that they would be hiring a tutor for Student, and expected DY to reimburse them for the costs. Parents sent a similar notice requesting funding for tutoring to the members of the School Committee also on April 23, 2013.
10. At the time, Parents did not request mediation, or a Hearing, with the BSEA.
11. On or about May 8, 2013, Parents and their advocate met with Superintendent Woodberry and DY's School Principal to discuss Parents' concerns and the Team's findings. The group discussed drafting a Section 504 plan to provide Student with accommodations and a plan was drafted for the period covering May 8, 2013 to June 26, 2013.³
12. The May 2013 Section 504 Plan offered accommodations such as "specific study guides for each test", "copy of classroom notes", and "no loss of credit on assignments, tests, or quizzes, due to misspellings." The Plan also noted that a reading and written language tutorial would be provided by DY.
13. Sarah H. Hewitt, Hewitt Literacy Consultant, was Student's reading and written language tutor starting in May 2013 and continuing through the summer of 2013 and

³ Student's 504 Plan, to be in effect from May 8 to June 26, 2013, included accommodations such as "specific study guide for each test", "copy of classroom notes", and "no loss of credit on assignments, tests, or quizzes, due to misspellings." The 504 plan was renewed on September 4, 2013 and was to be in effect from September 4, 2013 to June 27, 2014.

the 2013-2014 school year pursuant to the Section 504 Plan. Ms. Hewitt's tutorials focused on phonemic awareness, phonics, vocabulary, comprehension and writing with spelling as an area of focus. The record contains two reports (June 1 and August 28, 2013) authored by Ms. Hewitt noting Student's deficits, challenges and tutorial accomplishments. According to DY, it never received a copy of the aforementioned reports until Parents submitted them in the context of this Motion.

14. Student's Section 504 plan was renewed on September 4, 2013, and it remained in effect through June 27, 2014, the end of Student's twelfth grade. Parents did not contest either of the Section 504 plans when drafted or renewed in September 2013. Both plans were implemented as drafted.
15. During her senior year, Student continued to receive tutoring services and accommodations through a Section 504 Plan, due to a language-based disability/Dyslexia.
16. During the course of Student's senior year, Parent became concerned that she was not ready for college level courses and instead decided that Student should attend Brewster Academy for an additional year after graduation from Dennis-Yarmouth.
17. In the spring of 2014, Parent discussed with DY's High School Principal her plans to send Student to Brewster Academy, and requested that the District pay the tuition for the extra year. DY's High School Principal did not agree to this request, and later indicated the District's refusal in writing.
18. Student/Parents filed their first BSEA Hearing Request on this matter, BSEA #1407065, on March 26, 2014.
19. Student turned 18 years old, the age of majority, on May 1, 2014. By then, she was scheduled to graduate, as she had passed the MCAS and appeared to be meeting all local graduation requirements.
20. According to DY, Student applied to and was accepted through early admission to Assumption College and Worcester State University. She also applied to Westfield State, University of Vermont, University of New Hampshire, Middlebury College and Dartmouth College.
21. According to Parents, at some point between 2013 and 2014 Student took an "Accu-Placer test through her local community college and it was determined that she was so

far behind that she would need at least two un-credited courses in Basic English, starting at a very low level, before she would be considered eligible to take college level English or other content coursework” (Student’s/Parents’ Hearing Request).

22. Student graduated and accepted her diploma from Dennis Yarmouth in June of 2014, and then attended Brewster Academy for an additional year before going on to college.

23. After Student’s/Parents’ attorney failed to respond to an Order to Show Cause issued on June 3, 2014, BSEA #1407065 was dismissed without prejudice on July 22, 2014.

24. Student/Parents filed a second Hearing Request on September 18, 2014, BSEA #1502345. When Student’s/Parent’s attorney failed to respond and an order to show cause was issued on November 3, 2014. The case was dismissed without prejudice on December 5, 2014. On December 16, 2014, Student’s/Parents’ attorney filed a “Motion for Short Reconsideration”, but the request was denied by the Hearing Officer on December 22, 2014.

25. Student completed her year at Brewster Academy in 2015 and thereafter began attending college.

26. On April 6, 2016, a year and four months after the second dismissal, Student/Parent filed a third Hearing Request with the BSEA raising the same issues as the two prior Hearing Requests.

Legal Framework:

A. BSEA Jurisdiction

Pursuant to Massachusetts special education law and regulations, the BSEA has jurisdiction over requests for hearing filed by a “parent or school district . . . on any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state⁴ and federal law,⁵ 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 appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973. . . .”⁶

⁴ See M.G.L. c. 71B; 603 CMR 28.00.

⁵ See 20 U.S.C. 1401; 29 U.S.C. 794 (Section 504 of Rehabilitation Act); 34 CFR 300; 34 CFR 104.

⁶ 603 CMR 28.08(3)(a).

B. Standard for Ruling on Motion to Dismiss

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 hearing fails to state a claim on which relief can be granted. These rules are 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. For a claim to survive a motion to dismiss, it must contain factual allegations plausibly suggesting an entitlement to relief.⁷ 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.”⁸ 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). . . .”⁹ The hearing officer will consider the facts alleged in the pleadings and documents attached or incorporated by reference.¹⁰

Only if the Hearing Officer cannot grant relief 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), may the case be dismissed.¹¹ Conversely, if the opposing party’s allegations raise the plausibility of a viable claim that may give rise to some 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), the matter may not be dismissed.¹²

With this guidance I turn to the case at bar and consider the facts alleged in the complaint in the light most favorable to Student/Parents.

Discussion:

To survive a motion to dismiss, Student’s/Parents’ claim need only make “factual allegations plausibly suggesting . . . an entitlement to relief.”¹³ In determining whether she has met this burden I must take these allegations as true, as well as any inferences that may be drawn

⁷ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

⁸ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

⁹ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

¹⁰ *Nollet v. Justices of the Trial Court of Mass.*, 83 F. Supp. 2d 204, 208 (D.Mass. 2000).

¹¹ See *Calderon-Ortiz v. LaBoy Alverado*, 300 F.3d 60 (1st Cir. 2002); *Whitinsville Plaza Inc. v. Kotseas*, 378 Mass. 85, 89 (1979); *Nader v. Cintron*, 372 Mass. 96, 98 (1977); *Norfolk County Agricultural School*, 45 IDELR, 26 (December 28, 2005).

¹² *Ashcorft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).

¹³ *Iannocchino v. Ford Motor Co.*, 451 Mass. at 636 (internal citation and quotation marks omitted).

from them, even if the allegations are doubtful in fact.¹⁴ I will discuss each plausible claim raised by Student's/Parents' factual allegations, the applicable legal standards, and the application of such to determine whether they may give rise to some form of relief under special education law.¹⁵

Student/Parents' Specific Claims:

I. Whether DY denied Student a FAPE by failing to find her eligible for special education services:

Student's/Parents' claim asserts that Student was denied a FAPE because the District failed to find her eligible for special education services. Student's/Parents' claim alleges that the District ignored Parents' requests to find Student eligible, as well as ignored teacher comments and results of independent evaluations when determining that Student was not eligible. As possible options for relief, Student/Parents request reimbursements for private evaluations, tuition reimbursement for Student's year at Brewster Academy, private tutoring, and two years of compensatory education services.¹⁶

The allegations in Student's/Parents' Hearing Request do provide for plausible claims that may give rise to relief, and while a Hearing may be the appropriate vehicle for resolving these matters, some of Student's/Parents' claims are barred by the IDEA's statute of limitations, as discussed below, contrary to Student's/Parents' assertions.

Whether Student's/ Parents' Claims are Barred by the Statute of Limitations

The Individuals with Disabilities Education Act (IDEA) requires that parties filing appeals under the IDEA do so within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint.¹⁷ The IDEA provides two exceptions to the two year statute of limitations, when a parent was prevented from requesting the hearing due to:

- (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

¹⁴ See *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. at 223; *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. at 407.

¹⁵ (20 U.S.C. § 1400 et. Seq. or M.G.L. 71B) or Section 504 (29 U.S.C. § 479)

¹⁶ Student/Parents request two years of compensatory services "to allow Student to access the support she will need to continue to access college level content beyond Brewster Academy."

¹⁷ 20 U.S.C. § 1415(f)(3)(C). This statute of limitations was included, for the first time, within the IDEA as part of the 2004 amendments that became effective on July 1, 2005.

(ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent.¹⁸

In the instant case, Student/Parents contend in their Response to DY's Motion to Dismiss that, "the rules leave out the rights owed to children once they attain the age of 18 and are legally competent adults." Student/Parents further argue¹⁹ that because the IDEA specifically states that the statute of limitations applies to a "parent or public agency", but fails to include language regarding an "adult student",²⁰ adult students are not subject to the statute of limitations; according to Student/Parents, the rule is unclear.²¹ (Student/Parents do not claim that this matter falls under either of the statutory exceptions to the statute of limitations above.)

Student's/Parents' arguments are not persuasive. Federal and Massachusetts special education law and regulations are unequivocal that *all* rights accorded to parents transfer to the student when he or she reaches the age of majority, that is, 18 years of age.²² Adult students step into the proverbial shoes of the parent upon turning 18 and are entitled to the same rights that his or her parent had, prior to the students reaching the age of majority.

Because the rights accorded to an adult student under the IDEA mirror those of a parent, it is logical to conclude that the statute of limitations applies to an adult student in the same way that it applies to a parent, and unless that adult student can show that he or she falls within one of the two exceptions under the IDEA, they are bound by the same two years statute of limitations as parents. It is significant that Student is not claiming in the instant case that either exception to the statute of limitations applies to her.

Student/Parents submit nothing to support their claim that the IDEA statute of limitations is tolled until a student turns 18. Moreover, accepting this position would mean that a student would not be bound by any of the decisions his/her parents make while they are minors, that once a student turns 18 he/she could potentially "look back" an unlimited number of years. Other than the two express statutory exceptions, there is nothing in the law warranting tolling of the statute of limitations until the age of majority. See, *P.P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 736 (3rd Cir. 2009), a case addressing whether a Pennsylvania tolling

¹⁸ 20 USCS § 1415(f)(3).

¹⁹ Student also stated in her Hearing Request, that "the case law for cases such as this permits a person who brings forth claims within three years of turning 18, to seek compensation and reimbursement for any and all costs and expenses and emotional injury back to first grade." However, I fail to see any legal basis for this statement and Student's Hearing Request does not include any legal citations to support it.

²⁰ For the purposes of this case, the term "adult student" shall be construed to mean a student who has reached the age of majority (18 years old).

²¹ Student's Opposition to District's Motion to Dismiss states that "on its face, [the IDEA statute of limitations] is not clear that it applies to claims brought by students when the text of the rule addresses only the hearing request brought by parents and agencies. The rules leave out the rights owed to children once they attain the age of 18."

²² 603 CMR 28.07(5); 34 CFR §300.520; 20 U.S.C. §1415(m).

statute applied to a claim brought under the IDEA finding that “the IDEA has two specific exceptions to the statute of limitations. Tolling principles that affect the application of state statutes of limitations would presumably not affect the IDEA statute of limitations, with its express exceptions to the limitations period.”²³

As such, since Student’s/Parents’ Hearing Request was filed on April 4, 2016, and since neither of the exceptions provided in the IDEA is applicable, any alleged action that forms the basis of Student’s/Parents’ claim prior to April 4, 2014, will be barred.

Parents may bring forth any claim for alleged violations that occurred between April 4, 2014 and May 1, 2014, the date on which Student turned 18 years old. Since all rights²⁴ accorded to Parents transferred to Student²⁵ at the age of majority, Student may bring forth claims that occurred on or after May 1, 2014. (The record lacks evidence that Student delegated any rights to her parents.)²⁶

DY’s Motion to Dismiss claims prior to April 4, 2014, is GRANTED consistent with my reasoning above. Parents may proceed with their claim regarding allegations of deprivation of FAPE for the period from April 4, 2014 to April 30, 2014, and Student may proceed with her FAPE claims starting on May 1, 2014.

II. Whether DY fraudulently graduated Student by “passing her along” with manufactured grades.

Student/Parents also claim that DY fraudulently graduated Student by passing her along with manufactured grades. Student/Parents request that the BSEA find that the DY’s actions, regarding the alleged fraudulent manufacturing of grades, constituted a criminal conspiracy,

²³ “...If Congress believed parent participation to be important in the special education process, it would seem counteractive to allow parents to do nothing for their child when problems arise. Tolling essentially allows problems to persist for years without anything being done”, *P.P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 736 (3rd Cir. 2009), (explaining that the common law equitable tolling doctrine does not apply to the IDEA statute of limitations.) See also, Lynn M. Daggett, et al., *FOR WHOM THE SCHOOL BELL TOLLS BUT NOT THE STATUTE OF LIMITATIONS: MINORS AND THE INDIVIDUALS WITH DISABILITIES ACT*, 38 U. Mich. J.L. Reform 717, 718 (2005), “through an application of the Supreme Court’s guidance in this area, that a tolling rule for legal minors should not be read into the IDEA’s new statutes of limitation. Tolling for minors is inconsistent with congressional intent as evidenced by the pre-2004 amendments analysis, and further strengthened by the new amendments.”

²⁴ “All rights” accorded to parents under special education law covers educational decision making rights as well as litigation rights. See *Cf. Stanek v. St. Charles Cmty. Unit Sch. Dist. #303*, 783 F.3d 634 (7th Cir. 2015), when determining whether the signing of an Illinois “Delegation of Rights” form included litigation rights as well as educational decision making rights, the Court stated that the “IDEA is enforced, when necessary, through litigation, and we have no reason to think that the Illinois statute [regarding the delegation of rights] was intended to permit a child receiving IDEA benefits to give control over educational decisions to a parent but not allow the parent to follow through with litigation.”

²⁵ 603 CMR 28.07(5); 34 CFR §300.520; 20 U.S.C. §1415(m).

²⁶ 603 CMR 28.07(5), (A student who has reached the age of majority has the choice to share or delegate these rights with his or her parents, but that choice must be documented and witnessed by representatives of the school district)

violated RICO and ADA provisions, and gave rise to a §1983 action. Student/Parent assert that the BSEA must fact find on these issues so that they meet exhaustion requirements before proceeding to litigation in a court with pertinent jurisdiction.

Legal Framework for IDEA Exhaustion Requirements

Pursuant to the IDEA, exhaustion of administrative remedies at the BSEA is generally required prior to seeking judicial relief. The IDEA provides that before filing a civil action under such laws seeking relief that is also available under the IDEA, the procedures under 20 USC §1415 subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under the IDEA.²⁷ The exhaustion requirement applies not only to violations of the IDEA but also to appeals brought under a different statute “so long as the party is seeking relief that is available under subchapter II of IDEA.”²⁸ However, if a claim for relief is materially distinguishable from claims that could fall within the ambit of state and federal special education law, exhaustion may not be required.²⁹ It is not necessarily sufficient (for purposes of requiring exhaustion) that a claim is premised on the same alleged conduct as a FAPE violation.³⁰

Here, Student/Parents request that the BSEA grant relief by making findings of fact to satisfy exhaustion requirements, so that they may proceed to a court with pertinent jurisdiction. Student’s/Parents’ exhaustion argument relies on *Frazier v. Fairhaven School Committee*, 276 F.3d 52, 59 (1st Cir. 2002) a case in which the Court reasoned that exhaustion remained beneficial even if the administrative process could not grant the form of relief sought, because at a minimum it provided a “factfinder versed in the educational needs of disabled children” to hear the dispute and develop a factual record, which would ultimately be helpful to a court hearing a claim for damages.³¹ However, the Court in *Bowden ex rel. Bowden*, WL 472293 (D.Mass. 2002) made it clear that only those claims that are rooted in an alleged violation of the IDEA are subject to IDEA exhaustion.³²

²⁷ 20 USC § 1415(l).

²⁸ *Frazier v. Fairhaven School Committee*, 276 F.3d 52, 59 (1st Cir. 2002) (internal quotations and citations omitted). See also *Cave v. East Meadow Union Free School Dist.*, 514 F.3d 240, 245 (2nd Cir. 2008) (parents’ discrimination claim under 42 U.S.C. 1983 is subject to IDEA exhaustion requirements because the relief sought is available under the IDEA); *Bowden ex rel. Bowden*, 2002 WL 472293 at *5 (D.Mass. 2002) (“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”).

²⁹ See *Cave v. East Meadow Union Free School Dist.*, 2008 514 F.3d 240, 247 (2nd Cir. 2008) (parents’ discrimination claims under Section 504 are subject to IDEA exhaustion requirements because these claims are not materially distinguishable from claims that could fall within the ambit of the IDEA).

³⁰ *Bowden ex rel. Bowden*, 2002 WL 472293 at *5 (D.Mass. 2002) (“exhaustion argument does not extend to plaintiffs’ . . . state tort claims (Counts IX, X, and XII). While these claims are premised on the same alleged conduct, they do not allege a FAPE violation”).

³¹ *Frazier v. Fairhaven School Committee*, 276 F.3d 52, 59 (1st Cir. 2002).

³² *Bowden ex rel. Bowden*, WL 472293 (D.Mass. 2002).

Student's/Parents' allegations stemming from DY's alleged fraudulent grade manufacturing, criminal conspiracy, ADA, RICO and §1983 are clearly outside the jurisdiction of the BSEA. While these allegations may be related to Student's education, they are not rooted in an alleged violation of the IDEA or Section 504 of the Rehabilitation Acts of 1973 and are therefore not subject to the exhaustion requirement.

DY's Motion to Dismiss in this regard is **GRANTED**. Parents' claims regarding fraudulent grade manufacturing, criminal conspiracy, ADA, RICO and §1983 are **DISMISSED WITH PREJUDICE**.

III. Attorney's Fees

Together with its Motion to Dismiss, DY filed Notice of its intention to pursue attorney's fees against Student's/Parents' attorney if the case was not dismissed and it had to defend against the "frivolous claims" raised by Student/Parents.

The IDEA provides that a school may seek attorney's fees against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation.³³ DY argued that during a telephone conference call in BSEA #1502345, the Hearing Officer in that matter stated that "if ever there was a case for a school seeking fees, this might be the case".

Student/Parents' attorney is thus on notice that he may be responsible for covering DY's attorney's fees.

CONCLUSION

For the reasons stated above, I find that Student's/Parents' claims based on alleged actions prior to April 4, 2014, are barred by the IDEA statute of limitations. They may however, proceed with their claims regarding failure to provide FAPE for the period from April 4, 2014 through the end of the 2013-2014 school-year. Furthermore, Student's/Parents' claims regarding violations under the ADA, fraud, criminal conspiracy, RICO and §1983 are not subject to IDEA and/or Section 504 exhaustion requirements and are therefore, **DISMISSED with PREJUDICE**.

This matter shall proceed to Hearing on July 12 and 13, 2016 at 10:00 a.m., at the Offices of DALA/BSEA, consistent with the Order issued on April 15, 2016.

³³ 20 U.S.C. § 1415(i)(3)(B)(i)(II).

ORDER

1. DY's Motion to Dismiss Student's/Parents' claims prior to April 4, 2014 is hereby **GRANTED**.
2. DY's Motion to Dismiss Student's/Parents' claims starting on April 4, 2014 is hereby **DENIED**. Student/Parent may proceed to Hearing with their claims starting on April 4, 2014.
3. Student's/Parents' claims that fall outside the jurisdiction of the BSEA (regarding RICO, fraudulent manufacturing of grades, criminal conspiracy, ADA and §1983) are hereby **DISMISSED with Prejudice**.

By the Hearing Officer,

Rosa I. Figueroa

Dated: June 28, 2016