

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

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In re: Rafael<sup>1</sup>

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BSEA #1609348

Norton Public Schools

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**RULING ON SCHOOL'S MOTION TO DISMISS**

This matter comes before the Hearing Officer on the Motion of the Norton Public Schools ("School") to dismiss the claims set forth in the Amended Hearing Request filed by the Parent. The Parent filed an initial hearing request at the Bureau of Special Education Appeals ("BSEA") on May 2, 2016, containing a lengthy description of the Parties' history as well as allegations against the School dating back to 2013. The School filed a Response to the Parents' Hearing Request on May 18, 2016, along with a Motion to Dismiss and, in the alternative, a Motion for a More Definite Statement of the basis for the Parents' hearing request. A conference call was held on May 31, 2016 after which the Hearing Officer issued an Order granting the Parties' Joint Request to Postpone the Hearing and the Parents' Request to Extend to June 10, 2016 the time in which to respond to the School's Motion to Dismiss and for a More Definite Statement. The Order also required the Parties to submit written status updates on June 25, 2016. On June 10, 2016, the Parents filed an Amended Hearing Request and an Opposition to the School's Motion to Dismiss. A conference call was held on June 23, 2016 during which the Parties agreed to hold a Prehearing conference on August 2, 2016. On June 28, 2016, the School

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<sup>1</sup> "Rafael" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in the documents available to the public.

filed a Motion to Dismiss the claims in Parents' Amended Hearing Request. The Parties clarified their positions and arguments on issue limitation, dismissal and exhaustion during the Prehearing Conference on August 2, 2016. For the reasons set forth below, the School's Motion to Dismiss is hereby Granted in part.

### FACTUAL HISTORY<sup>2</sup>

Rafael is a nine-year-old boy with Autism and a Seizure Disorder. Rafael has attended Norton Public Schools as an in-district student receiving special education and related services since he was three years old.

The Parties have a lengthy history of disagreements about the proper special education services and placement for Rafael. The last BSEA action preceding this one was filed by the Parents in December 2014 and assigned BSEA docket# 14-4277. That due process proceeding resulted in a private settlement agreement and the withdrawal of all parental claims then pending before the BSEA.

The Settlement Agreement in BSEA# 14-4277 was signed on May 4, 2015. It covered the period of the remainder of the 2014-2015 school year, the summer of 2015, and the 2015-2016 school year. The Agreement provides that during the period from May 4, 2015 to June 30, 2016, Rafael would attend an in-district substantially separate special education program. The Agreement states that, throughout the 2015-2016 school year, the School would implement the Individualized Education Program bearing the date July 1, 2015. Paragraph 12 of the Settlement Agreement recites:

This Agreement is a legally binding contract between the parties and may only be enforced by an action brought before a court of competent jurisdiction.

The Agreement further explicitly releases all of the parties' prior and pending claims against each other (Settlement Agreement Paragraph 7)

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<sup>2</sup> The facts are taken primarily from the Parents' Hearing Request, pleadings and Motions. They are, for the most part, not in dispute. For the purposes of this Ruling, all are viewed and presented in the light most favorable to the Parents as they oppose dismissal of each of their claims, and are subject to revision on presentation of evidence in the due process hearing.

On September 22, 2015 the Parents consented to an early three year evaluation. A Team meeting was held on November 16, 2015 to discuss the results of the re-evaluation. On November 23, 2015 the School proposed an Amendment to the July 1, 2015 IEP then being implemented. The proposed Amendment would have increased the time and frequency of Rafael's occupational therapy services as recommended by the Occupational Therapist who had conducted the then most recent evaluation. The Parents rejected the proposed Amendment in full on January 15, 2016.

5. After a Team meeting on December 14, 2015 the school proposed a new IEP for Rafael which incorporated the recommendations arising from the three year re-evaluation. That IEP bears the dates 12/14/15 to 6/30/16. The Parents' January 20, 2016 response to that proposed IEP is unclear due both to the language used and to the incomplete/illegible attachments. Therefore, the December 2015 proposed IEP is considered rejected.

6. Throughout the course of the 2015-2016 school year the School continued to implement the July 1, 2015 IEP as Rafael's "last accepted IEP."

7. The Parents claim that, beginning in early March 2016, the occupational therapy services outlined in Rafael's IEP were not provided to him. It is not clear from the language of the Parents' Amended Hearing Request to which IEP the Parents are referring.

In late April 2016, the home-based special education services outlined on the July 2015 IEP were discontinued or disrupted as a result of a disagreement between the Parents and the contracted service provider, RCS, about the use of videotaping equipment during home education services.

The School proposed an Individualized Education Program for Rafael on May 31, 2016. The new IEP provides for Rafael's placement at the BICO Collaborative during the 2016-2017 school year. The Parents assert that the proposed 2016-2017 IEP is both procedurally and substantively deficient.

On June 14, 2016, Rafael fell off a swing and broke his arm at school. The Parents assert that Rafael was entitled to receive his extended school year special education program ("ESY") at home in accordance with a physician's order. The School claims that the "doctor's note",

signed by a nurse practitioner, did not adequately set out the basis for a home-based extended school year program.

### PARENTS' POSITION

The Amended Hearing Request, filed by the Parents on June 10, 2016, asserts that the School has engaged in discriminatory practices against students with disabilities and that, with respect to Rafael's individual educational experience, the School has not complied with applicable state and federal laws and regulations including: 20 U.S.C. 1400 et seq. ("IDEA"); 29 U.S.C. 794, Section 504 of the Rehabilitation Act of 1973 ("Section 504"); M.G.L. c71B; the Americans with Disabilities Act ("ADA"), 42 USC 1983 (Section 1983), Article CXIV of the Massachusetts Constitution, the Massachusetts Civil Rights Act, and Title IX of the Education Act Amendments of 1972 ("Title IX"). The Parents also contend that Rafael has suffered emotional and physical harm due to the School's commission of "tort law violations" such as intentional infliction of emotional distress and negligence. The Parents' Amended Hearing Request includes a lengthy recitation of factual allegations dating back to July 2013. The Parents acknowledge that the Parties' May 4, 2015 Settlement Agreement limits presentation of some of the issues set out in the Amended Hearing Request but assert that all potential statutory and common law claims must be raised at the BSEA in order to meet administrative exhaustion requirements.

### SCHOOL POSITION

The School seeks dismissal of claims made under the ADA, Section 1983, the Massachusetts Constitution, the Massachusetts Civil Rights Act and Title IX as well as all claims that could be construed as common law torts including intentional infliction of emotional distress and negligence. The School asserts that the BSEA does not have jurisdiction of actions that do not involve any allegation of violation of the IDEA or related statutes pertaining to the public education of students with disabilities. The School contends that the Parents fail to argue or establish any connection between their claims under those statutes and the School's obligation to provide a free appropriate education to Rafael. Further the School asserts that the BSEA does not have jurisdiction to consider common law tort claims. Finally the School seeks dismissal of any claims in the Parents' Amended Hearing Request that are precluded by the Parties' May 4, 2015 Settlement Agreement.

## LEGAL FRAMEWORK

### I. Legal 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 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 hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim. Specifically, to survive a motion to dismiss, a party must assert “factual allegations plausibly suggesting . . . an entitlement to relief.”<sup>3</sup> In determining whether this burden has been met the Hearing Officer must take the Parents’ allegations, and any inferences that may reasonably be drawn from them, as true, even if the allegations are doubtful in fact. The “[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). . . .”<sup>4</sup> In the special education context plausible claims supported by Parents’ factual allegations will be considered to the extent they may give rise to some form of relief under special education law.

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 state<sup>5</sup> and federal law,<sup>6</sup> 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. . . .”<sup>7</sup>

### II. Parents’ Specific Legal Claims

#### A. Statutory Claims other than IDEA, Section 504 and M.G.L. ch.71B

The Parents’ Amended Hearing Request sets out claims under various statutes over which the BSEA has no explicit jurisdiction. The School asserts the non-IDEA related claims should be

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<sup>3</sup> *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (internal citation and quotation marks omitted).

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

<sup>5</sup> See M.G.L. c. 71B; 603 CMR 28.00.

<sup>6</sup> See 20 U.S.C. 1401; 29 U.S.C. 794 (Section 504 of Rehabilitation Act); 34 CFR 300; 34 CFR 104.

<sup>7</sup> 603 CMR 28.08(3)(a).

dismissed *ab initio*; the Parents argue that they must be presented to the BSEA to meet administrative exhaustion requirements. Exhaustion of administrative remedies available under the IDEA is generally required prior to seeking judicial relief for claims brought under unrelated statutes that seek relief that is also available under the IDEA.<sup>8</sup> 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.”<sup>9</sup>

Courts in this jurisdiction have observed, however, that not all claims advanced by a student with a disability against a school district are subject to exhaustion requirements.<sup>10</sup> 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.<sup>11</sup> Furthermore, exhaustion of the IDEA’s administrative process is not required when the student is seeking solely money damages for tort like injuries not subsumed in a federal statutory claim;<sup>12</sup> nor is exhaustion required where there are no factual allegations to indicate that a dispute exists concerning the individual student’s eligibility under the IDEA or Section 504 or the School’s procedural and substantive responsibilities under the IDEA or Section 504.<sup>13</sup> Finally, where the fact finding necessary to establish the plaintiff’s claims does not require any particular expertise in special education, exhaustion is not mandatory.<sup>14</sup>

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<sup>8</sup> “Before filing a civil action under such laws seeking relief that is also available under the IDEA, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under the IDEA” 20 U.S.C. 1415(l). subsections (f) and (g) describe the IDEA’s administrative due process hearings.

<sup>9</sup> *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 (2<sup>nd</sup> 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”).

<sup>10</sup> *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”).

<sup>11</sup> See *Cave v. East Meadow Union Free School Dist.*, 2008 514 F.3d 240, 247 (2<sup>nd</sup> 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).

<sup>12</sup> *Nieves-Marques v. Puerto Rico*, 353 F.3d 108 (1<sup>st</sup> Cir. 2003); See also *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13 (1<sup>st</sup> Cir. 2006).

<sup>13</sup> *Hague v. Massachusetts Department of Elementary and Secondary Education*, No. 10-30138-DJC, U.S. Dist. LEXIS 112235 (D. Mass. Sept. 12, 2011).

<sup>14</sup> *Dr. Franklin Perkins School v. King Philip Regional School District*, 25 Mass. L. Rptr. 549 (Mass Super 2009).

Courts in this jurisdiction have taken a practical view of the IDEA's administrative exhaustion requirements. When a petitioner's claims are "IDEA-based", and the development of a factual record at the administrative level would be helpful to a court later considering those related claims, exhaustion may be necessary. *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) Nevertheless, the BSEA lacks statutory authority to make factual findings and draw legal conclusions that could support relief that is available only under those statutes.<sup>15</sup> Following the guidance of the courts the BSEA uses a three pronged inquiry to determine whether to exercise jurisdiction over statutory claims not directly related to the IDEA and for which there is no explicit authorization for BSEA action<sup>16</sup>:

1. Is the event giving rise to the claim related to the student's status as a student with a disability?

The Amended Hearing Request sets out a lengthy set of factual allegations which form the basis of all the Student's claims of wrongdoing, on which he seeks factual findings and for which he seeks administrative, equitable, financial and declaratory relief. All of the allegations concern Rafael's experience as an IDEA-eligible student and the School's provision of special education and related services to him. The Amended Hearing Request does not separately state factual allegations that might fall solely within the orbit of a non-IDEA- related statute, and none could be discerned after a careful reading of the Request.

2. Is the relief sought available under the IDEA?

The Amended Hearing Request sets out claims seeking relief available under the IDEA: provision of a free appropriate public education, compensatory education for any failure to deliver appropriate special education services and reimbursement for parental expenses incurred as a result of providing special education and/or related services when the school was obligated to but did not. The Student also seeks an award of "damages" under a variety of other statutes. This relief, presumably a financial award, is not available under the IDEA. Similarly an "award" of a free appropriate public education is not available as relief under the ADA, 42 U.S.C. 12101

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<sup>15</sup> See discussion in *In Re: Springfield School District*, 20 MSER 37 (2014) which dismissed the petitioner's ADA claims.

<sup>16</sup> *In Re: Springfield Public Schools & Xylia*, 18 MSER 373, 375 (2012)

*et seq.*; 42 U.S.C. 1983; 20 U.S.C. 1681 (Title IX); Article CXIV of the Massachusetts Constitution; M.G.L. c. 12 Section 11H (the Massachusetts Civil Rights Act).

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?

The Parents seek to develop a factual record of Rafael’s experience as a student with disabilities in Norton. This record is, of course, required in order to obtain a finding on their claims that Norton failed to discharge its obligation to propose and provide a free appropriate public education for him. It may be of some use in other proceedings to obtain “damages” under statutes that authorize that remedy should the Parents prevail at the BSEA. While the BSEA has the experience and expertise necessary to construct a hearing record concerning the substantive and procedural obligations of a school district with respect to an individual student, administrative proceedings under the IDEA do not wholly conform to the evidentiary and representational standards expected in a judicial setting.

Based on the answers above I find that the factual allegations set out by the Parents in the Amended Hearing Request are limited in scope to those expected to support a claim under the IDEA which, if proven, would entitle the Student to the relief available under the IDEA. With the exception of the Parents’ claim under Title IX, all of the Parents’ statutory claims arise from the same set of facts, from Rafael’s status as an IDEA-eligible student and from the actions taken by the School to carry out its IDEA-related responsibilities. The equitable, declaratory and administrative relief properly sought by the Parents at the BSEA is inextricably intertwined with their additional requests for relief not available under the IDEA but authorized by other statutes. The findings made by the BSEA may aid a court with proper statutory jurisdiction in assessing the viability of those non-IDEA related claims. In particular, while the BSEA does not entertain stand-alone ADA claims,<sup>17</sup> here many of the facts alleged and to be developed will be as relevant to the resolution of an ADA claim as they are to claims under the IDEA, Section 504 and M.G.L.c. 71B. Because, at this early juncture, the facts and the law to be determined under these complementary but not entirely overlapping statutes are inextricably intertwined with one another, the development of a factual record common to all may be warranted. Therefore, the “IDEA-based” statutory claims set out by the Parents in their Amended Hearing Request under

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<sup>17</sup> *In Re; Springfield School District*, 20 MSER37 (2014).



the ADA and Section 1983 will be permitted to continue at the BSEA to the extent they are not barred by operation of the Settlement Agreement. Without explicit authorization to consider or take any action with respect to those statutes, however, it will be necessary for a court to determine the import of the BSEA's "IDEA-based" fact-finding for resolution of those claims.

The Parents' Title IX claim, however, may be dismissed. Even viewing all possible facts and permissible inferences in the light most favorable to continuation of the Parents' action there are no allegations, nor any undisputed pertinent facts, presented in the Amended Hearing Request that could reasonably be construed to support a claim of sex-based discrimination. Further, the set of facts necessary to support a Title IX claim would not be "rooted" in the IDEA. The BSEA has no statutory authority to conduct administrative hearings under Title IX. Nor does the BSEA have any particular expertise in assessing and determining Title IX claims.

The Parents' claim under the Massachusetts Civil Rights Act may also be dismissed. There is no private right of action under that statute. M.G.L. c.12 Section 11H.

B. Parents' Constitutional Claims

As an administrative dispute resolution agency with limited statutory reach constitutional claims may not properly be entertained by the BSEA. Therefore the petitioners' claims under Article CXIV of the Massachusetts Constitution must be dismissed.

C. Claims Involving Settlement Agreement

There is no consensus about whether privately negotiated settlement agreements may properly be considered, interpreted and enforced by the BSEA. Nonetheless, if the issue presented is purely one of contract law, Hearing Officers have uniformly determined that the BSEA does not have subject matter jurisdiction as it has no particular expertise in interpreting and applying contract law<sup>18</sup> and has no authority to grant general contractual relief. Here the Parties' Agreement specifically provides that claims arising prior to the date of the Settlement Agreement, May 4, 2015, are extinguished. The Agreement further specifically provides that claims arising during the term of the Agreement that concern the obligations of the Parties towards each other under the Agreement must be presented to a Court. The language is clear and capable of only one interpretation. The BSEA may not entertain any Parent claims that arise

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<sup>18</sup> See *In Re: Milford Public Schools*, 21 MSER 219, 221 (2015); *Israel v. Monson*, 16 MSER 296 (2010).

from events occurring before or during the term of the May 4, 2015 Settlement Agreement. To obtain relief for any alleged violations of the Settlement Agreement the Parents must seek recourse in court.

D. Tort Claims

The BSEA is an administrative dispute resolution agency with a statutorily circumscribed sphere of jurisdiction which does not extend to claims sounding in tort. Therefore, any claims in the Parents' Amended Hearing Request that can be fairly characterized as a common law tort are dismissed.

CONCLUSIONS AND ORDER

Having considered the facts set out in the Parents' Amended Hearing Request in the light most generous to their proper recitation and most favorable to continuation of this administrative action, as required, the following Orders are entered:

1. All claims arising before June 30, 2016 are DISMISSED as they are not properly before the BSEA jurisdiction having been waived according to the unambiguous terms of the Parties' May 4, 2015 Settlement Agreement.
2. All claims that purport to be common law torts, including claims of negligence and intentional infliction of emotional distress, are DISMISSED for lack of jurisdiction.
3. Any claim made under Title IX is DISMISSED for failure to state a claim upon which relief can be granted.
4. Any claim made under the Massachusetts Civil Rights Act, M.G.L. c. 12 Section 11H is DISMISSED for failure to state a claim upon which relief can be granted.
5. Any claim made under Article CVIX of the Massachusetts Constitution is DISMISSED for failure to state a claim upon which relief can be granted.
6. To the extent that the Parents' claims under the ADA and Section 1983 are based on the same facts, events, circumstances, inferences and arguments as those legitimately presented under the IDEA, Section 504 and M.G.L. c. 71B, while they may differ in scope and clearly seek different relief, the BSEA will develop a factual record that may be useful, with abundant caution, for review in later proceedings under those statutes. While the BSEA has no authority

to make pertinent findings under laws other than the IDEA, Section 504 and M.G.L.c.71B, presentment here should satisfy the IDEA's exhaustion requirements as interpreted by courts in this jurisdiction.

7. The Hearing will be held on September 26 and 27, 2016 at 10:00 a.m. at the BSEA. An Amended Hearing Issue list consistent with this Ruling will be issued shortly. Proposed exhibits and witness lists shall be exchanged and submitted to the Hearing Officer on or before September 21, 2016. Subpoena for the attendance of any witness must be requested no later than September 15, 2016.

By the Hearing Officer <sup>19</sup>

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Lindsay Byrne

Dated: August 30, 2016

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<sup>19</sup> The Hearing Officer gratefully acknowledges the able assistance of BSEA Intern Danielle Lubin in the preparation of this Ruling.