

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

In Re: Georgetown Public Schools

BSEA No. 1405352

RULING ON MOTION TO DISMISS OF GEORGETOWN PUBLIC SCHOOLS

INTRODUCTION

This case involves tort and civil rights claims asserted against the Georgetown Public Schools (Georgetown or School) by the parents of a minor child with disabilities based on alleged abuse and neglect of their child (Student) by a special education teacher, and on Georgetown's alleged failure to appropriately monitor and supervise this teacher.

Although at all relevant times the Student in this case has been eligible for special education pursuant to the IDEA, 20 USC Sec. 1400 et seq., and MGL c. 71B, as well as for protection from disability-based discrimination under Section 504 of the Rehabilitation Act, the Parents raise no claims arising under these statutes or implementing regulations. Further, they are seeking no special education or related services from Georgetown. Rather, Parents are seeking monetary damages for injuries allegedly suffered by the Student and the family and have filed the instant appeal to fulfill "exhaustion" requirements as a prerequisite for filing suit on their tort and civil rights claims.

PROCEDURAL HISTORY

On January 29, 2014 Parents filed a hearing request with the BSEA in which they allege that a special education teacher employed by Georgetown had assaulted, abused and neglected Student. Additionally, Parents allege that Georgetown had failed to adequately monitor or supervise this employee. Parents seek money damages for alleged physical and emotional injuries to Student as well as for emotional distress and loss of consortium for Student's family.

On September 16, 2014, Georgetown filed the instant *Motion to Dismiss* as well as a supporting Memorandum. Parents filed an Opposition to the School's Motion and supporting Memorandum on September 18, 2014. An evidentiary hearing has been scheduled for October 9, 2014.

ISSUE PRESENTED

At issue with respect to this *Motion* is whether the exhaustion principle as articulated by the First Circuit dictates that the Bureau of Special Education Appeals (BSEA) must conduct a full evidentiary hearing on Parents' tort and civil rights claims, or even has jurisdiction to do so.

Position of School

The BSEA lacks jurisdiction over the Parents' 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 Parents 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 Parents' tort and civil rights claims.

Position of Parents

The First Circuit has taken the position that 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. Parents agree that notwithstanding recent BSEA decisions and an opinion from the Sixth Circuit, as well as the "wisdom" of eliminating the exhaustion requirements in cases such as the instant matter; the First Circuit has not yet defined the parameters of this requirement. Parents, therefore, cannot risk dismissal of their claims in federal court without first pursuing the administrative process before the BSEA.

FACTS

For purposes of the *Motion*, the following factual assertions are deemed to be true, and are considered in the light most favorable to the party opposing the *Motion*, i.e., Parents.

1. Student is an eleven-year-old child with disabilities. At all relevant times Student was enrolled in the Georgetown Public Schools where he received special education services. Student's eligibility for such services pursuant to the IDEA and M.G.L. c. 71B as well as his rights pursuant to Section 504 of the Rehabilitation Act are not in dispute.
2. Parents allege that in or about February 2012, two classroom aides observed Student's special education teacher, M.W., place his hands around Student's mouth and throat, choking Student and also speaking to the child

in an abusive manner. On February 9, 2012, staff from Georgetown filed a report of suspected abuse and neglect of Student with the Department of Children and Families (DCF) pursuant to G.L. c. 119 sec. 51A ("51A Report"), based on M.W.'s actions towards Student. After investigation, DCF classified the report as "supported." (Hearing Request, p. 1; Ex. A).

3. Parents further allege that on other occasions prior to this incident M.W. had interacted inappropriately with Student and his classmates, and that M.W. intimidated and instilled fear in the children in his care. Parents allege that, Georgetown failed to adequately monitor, supervise, and/or protect children, including Student, from M.W. despite Georgetown's initial concerns about M.W.'s history at the time of his hire¹ and "ongoing concerns" about M.W.'s behavior during his employment. (Hearing Request, pp. 1-2).
4. According to Parents, Student suffered physical and severe emotional injuries, including injuries around his mouth, face, neck and shoulders as well as emotional trauma resulting in aggression, tantrums, incontinence, withdrawn behavior, nightmares, fear of going to bed, biting objects and eating dirt. (Hearing Request, p. 2).
5. Parents claim that "as a direct and proximate result of Georgetown's negligent and intentional actions and inactions leading to the incidents described above, [Student] sustained an invasion of his bodily integrity and the...family has experienced emotional distress and suffering...[which] has caused anguish, depression, and has greatly impacted their familial relationship causing loss of consortium..." (Hearing Request, p. 2).
6. Parents' sole requested relief is "an order finding them entitled to recover damages for violation of [Student's] due process rights and 42 U.S.C. Sec. 1983, 42 U.S.C. Secs. 12131-12165; Title IX, 20 U.S.C. Sec. 1681; the Massachusetts Civil Rights Act., M.G.L. c. 12 Sec. 11(l) and for Georgetown's negligence and loss of consortium based on Georgetown's knowing and willful failure take adequate steps to ensure [Student's] safety stemming from the assaults."
7. Parents do not seek any prospective or compensatory relief based on federal or state special education statutes or Section 504 of the Rehabilitation Act. They do not allege Georgetown has deprived Student of a FAPE. Parents do not allege that they have rejected Student's IEP(s) during the relevant time period, do not otherwise assert that Student's IEPs and/or placements have been inappropriate or have not been implemented, do not allege that Georgetown committed any procedural violations, and do not claim that Georgetown has violated Student's substantive or procedural rights under

¹ Parents allege that Georgetown hired M.W. after the district that previously employed him had either terminated him or declined to renew his contract.

Section 504. Parents do not seek reimbursement for any privately-obtained services. (*Id.*)

FINDINGS AND CONCLUSIONS

Standards for Motion to Dismiss

Under 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 BSEA 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.

Since this Rule is analogous to Rule 12(b)(6) of the Federal and Massachusetts Rules of Civil Procedure, BSEA hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim. Specifically, a hearing officer must consider as true all facts alleged by the party opposing dismissal and should not dismiss the case if those facts, if proven, would entitle the non-moving party to relief that the BSEA has authority to grant. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Ocasio-Hernandez v. Fortunato-Burset*, 640 F. 3d 1 (1st Cir. 2011).

Put another way, a motion to dismiss will be denied if “accepting as true all well-pleaded factual averments and indulging all reasonable inferences in the plaintiff’s favor...recovery can be justified under any applicable legal theory.” See *Caleron-Ortiz v. LaBoy-Alverado*, 300 F.3d 60 (1st Cir. 2002). The factual allegations must be sufficient to “raise a right to relief above a speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact.)” *Bell Atlantic v. Twombly*, 550 U.S. 554, 555 (2007).

In general, the BSEA’s sole jurisdiction and authority is to decide individual disputes between parents/guardians, school districts, and, sometimes, other entities such as state agencies, as these disputes concern the rights of children with disabilities under the IDEA, G.L. c. 71B, and Section 504 of the Rehabilitation Act.² Further, the BSEA can only grant relief that is authorized by these statutes and regulations, which generally encompasses orders for changed or additional services, specific placements, additional evaluations, reimbursement for services obtained privately by parents or compensatory services. The authority to grant such relief is well-settled.

Also well-settled is the BSEA’s lack of authority to award certain other types of relief, including money damages such as those sought in tort claims, since these damages are not an available remedy under the IDEA or M.G.L. c. 71B. *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108 (1st Cir. 2003). Since the

² See 34 CFR 104.31-104.39; 603 CMR 28.08(3)(a); MGL c. 7, Sec. 4H; *In re Lincoln-Sudbury Public Schools*, BSEA No. 11-2546.

sole relief sought by Parents in this case is damages, which the BSEA has no ability to award, the obvious response to the School's Motion would be to dismiss the Parents' hearing request on that basis. The First Circuit has decided, however, that parents who seek tort-like damages in IDEA-related actions must exhaust the administrative hearing process before the BSEA prior to filing their complaint in the U.S. District Court in cases rooted the IDEA, even if the BSEA cannot award the remedy sought. *Frazier v. Fairhaven School Committee*, 276 F. 3d 52 (1st Cir. 2002) as reaffirmed by Judge Woodlock in *Bowden v. Dever*, 8 MSER 90 (D. Mass. 2002) and *CDBE Public Schools v. Massachusetts Bureau of Special Education Appeals*, et al., Civil Action No. 11-10874DPW slip op. (D. Mass. 2012).

On the other hand, these cases do not stand for the principle that exhaustion is required in every case involving a disabled student. In *Bowden*, *supra*, the plaintiff parents alleged that their IDEA-eligible children had been physically and psychologically abused by their public school teachers and aides. The plaintiffs asserted multiple causes of action including claims of educational and disability-based discrimination, violations of constitutional rights to bodily integrity, and various tort claims (assault and battery, intentional infliction of emotional distress, loss of consortium). *Id.*, 8 MSER at 91. The court dismissed the claims relative to educational discrimination based on failure to exhaust the BSEA administrative process, but denied dismissal as to the tort and constitutional claims. In so doing the Court stated:

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.

The Court went on to comment that exhaustion would not provide the benefits of "meaningful relief" or a "superior record" with respect to the tort and bodily integrity claims, pointing out that exhaustion would "neither provide appropriate relief nor does it offer any particular expertise. In fact, courts are the traditional and more expert arbiters of questions of tort and constitutional law." *Id.*, 8 MSER at 93.

The BSEA has analyzed the exhaustion issues addressed by *Frazier*, *Bowden*, *CDBE*, as well as subsequent cases in Massachusetts and other

jurisdiction in several cases, including *In Re: Springfield Public Schools and Xylia*, BSEA No. 12-0781, 18 MSER 373 (Byrne, November 2012). As the School articulated in its *Memorandum*, the *Xylia* ruling puts forward a three-pronged test to determine whether the BSEA retains jurisdiction over tort-related claims:

- (1) whether “the event(s) giving rise to the student’s claim [is] ‘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 M.G.L. c. 71B...”
- (2) whether “the relief the student is seeking [is] available in a claim rooted in the IDEA, Section 504 and/or M.G.L. c. 71B...” and
- (3) whether the BSEA has “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”

Id., at 376.

As stated by the School, the instant case does not meet the criteria set forth in *Xylia* for the BSEA’s retention of jurisdiction. First, the events giving rise to the Student’s claims, the alleged assault of the Student by a School staff member and alleged negligent supervision of that staff member by Georgetown, are not related to the Student’s status as a child with disabilities, but rather to his “general student status.” *Id.*, at 377

Second, Parents make no claims that Georgetown violated Student’s substantive or procedural rights under IDEA, M.G.L. c. 71B or Section 504 and seek no relief that is available under these provisions.

Third, as in *Xylia*, the 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. Moreover, as stated in *Xylia* and in the School’s *Memorandum*, it is unclear how useful the administrative record of the BSEA would be at a subsequent trial in light of the fact that unlike a court, the BSEA process allows admission of hearsay evidence, and otherwise does not require adherence to the rules of evidence.³

³ See also *In Re Springfield Public Schools*, BSEA 1404388, 20 MSER 37 (Crane, February 2014). In that ruling, Hearing Officer Crane dismissed the student’s ADA claims, stating that the BSEA has no particular expertise to consider whether the school district in that case had complied with the interactive process to modify policies and practices that is mandated by the ADA. *Id.*, at 39.

CONCLUSION AND ORDER

For all of the foregoing reasons, exhaustion of procedures before the BSEA in the instant case is not appropriate. The Georgetown Public Schools' *Motion to Dismiss* the Parents' hearing request in its entirety and all claims for monetary damages therein is ALLOWED, with prejudice.

By the Hearing Officer

Dated: October 8, 2014

Sara Berman

EFFECT OF DISMISSAL

This Dismissal by the Bureau of Special Education Appeals is a final action and is not subject to further agency review. Because 20 U.S.C. s.1415(i)(2)(A) requires the Bureau decision to be final and subject to no further agency review, the Bureau cannot permit motions to reconsider or to re-open a Bureau decision once it is issued. Any party aggrieved by the Bureau decision may file a complaint in the U.S. District Court for the District of Massachusetts or in the Massachusetts Superior Court within ninety (90) days from the date of dismissal for review of the Bureau decision. 20 U.S.C. s.1415(i)(2)(B).