

COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS

Student v. Hampden-Wilbraham R.S.D.

BSEA # 1710699

**RULING ON HAMPDEN WILBRAHAM REGIONAL SCHOOL
DISTRICT'S MOTION TO DISMISS**

This case involves an eighteen-year old special education student (hereinafter, Student) who is enrolled in the Hampden-Wilbraham Regional School District (hereinafter, Hampden). Student currently receives special education services pursuant to an IEP which was accepted on October 21, 2016 and partially rejected on May 23, 2017.

On June 1, 2017, Student's Parents, (hereinafter, Parents) filed a Hearing Request requesting that the BSEA order Hampden to award Student credits for the first term of the 2016-2017 school year. Additionally, Parents sought an Order prohibiting the principal of Minnechaug Regional High School from attending any meetings pertaining to Student or from having any decision-making authority relative to Student's receipt of grades. Additionally, Parents sought to have Student's disability designation be changed to primarily emotional with a secondary disability in the area of health. Finally, they asked that Hampden be responsible for payment for a cognitive behavioral therapist to treat Student at least once per week until he graduates

On September 12, 2017 Hampden filed a Motion to Dismiss, arguing that the BSEA does not have jurisdiction over the awarding of credits or over determining whether the principal may participate in meetings pertaining to Student.

On September 29, 2017, Parents opposed the Motion to Dismiss. In their opposition they state that the BSEA has jurisdiction over any matter pertaining to a student on an IEP. They argue that they have provided the district with information pertaining to Student's diagnoses. They state that, "It is obvious that these disabilities can and will affect..." Student's daily functioning such as getting out of bed and going to school or being able to stay in school once he gets there.

FACTS¹

For purposes of this Ruling the following assertions are considered to be true and construed in favor of the party opposing dismissal, namely, Student.

1. Student is an eighteen year-old student who has been diagnosed with Generalized Anxiety Disorder with panic symptoms and Attention Deficit Hyperactivity Disorder, predominantly inattentive presentation.

¹ These factual findings are made for purposes of this ruling only.

2. During Student's first semester of the 2016-2017 school year he was enrolled at Minnechaug Regional High School (Minnechaug) in Wilbraham, Massachusetts.
3. Minnechaug's Handbook for Students and Families for the 2016-2017 school year contains Attendance Policies. Under the heading, Course Credit, it states the following. "To earn credit in a course, students must achieve a passing grade and meet the minimum attendance requirement. Students who EXCEED [emphasis in original] 10 absences in semester courses will lose course credit."
4. During the first semester of the 2016-2017 school year, Student was absent for twenty-five full school days, was tardy twelve times and was dismissed once. He was absent from his History of Pop Music class thirty-three times and from his U.S. History class thirty times.
5. During an October 21, 2016 Team meeting Student's father asked the psychologist who had completed a neuropsychological evaluation of Student whether Parents should force Student to attend on the days he was unable to attend and the psychologist said no.
6. Also on October 21, 2016, Student signed the Transfer of Rights for Individualized Education Program form indicating that as of September 9, 2017, Student's eighteenth birthday, he would represent himself in decision-making in relation to special education programs and services.
7. Student's IEP states that he meets the DSM-V criteria for Generalized Anxiety Disorder with Panic Symptoms and a history of Attention-Deficit/Hyperactivity Disorder, Predominantly Inattentive presentation. The Present Levels of Educational Performance B section identifies social/emotional needs and provides for regular meetings with an adjustment counselor. The IEP provides for goals in transitional skills, academics, and social emotional. There are direct services in his IEP in the area of academic skills with a special education teacher 10 x 85 minutes per cycle and social emotional services with an adjustment counselor 1 x 20 minutes every other week. There is no provision for a schedule modification for either a shorter day or a shorter year. The IEP was accepted in full on October 21, 2016.
8. On December 19, 2016, Parents met with Student's academic support teacher/school liaison, and the assistant principal to discuss a plan for Student to complete missing assignments during Christmas break. Student took and passed his final exams and completed his assigned work and earned 2 Bs and a C.
9. On January 5, 2017, Student's English teacher emailed Father and stated that she had been concerned when she saw Student that morning because he, "[D]id not look good and just seemed so down."
10. The Team convened on January 11, 2017. Those in attendance included Father, the principal, the education team leader, the academic support teacher/liaison, and Student's English teacher.

11. During the meeting, the principal stated that due to Minnechaug's Attendance Policies, Student would not be awarded credits for his first semester courses. The principal further stated that if Student made progress with his attendance and achieved passing grades in the spring and following fall semesters at Mt. Tom, he would revisit the first semester credits and Student could graduate in January 2018.
12. Student began attending Mt. Tom Academy on February 8, 2017.
13. Jacob's Team convened on May 18, 2017 to review Student's progress. His attendance was at 85%, he was doing well academically and socially, and he was demonstrating leadership qualities. The principal reiterated his decision to hold Student's credits in abeyance pending continued progress in his attendance and academics.
14. On May 23, 2017, Parents partially rejected Student's IEP. They rejected the fact that "PLEP A [was] not accommodating [Student's] disability relating to attendance." They also rejected PLEP B as being not complete and rejected the schedule modification section that did not provide for a shorter day and shorter year.
15. On June 1, 2017, Parents filed the instant Hearing Request².

FINDINGS AND CONCLUSIONS

1. Standard for Ruling on A 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 as such hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim. Specifically, what is required to survive a motion to dismiss "are factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief."³ 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."⁴ 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). . ."⁵

In determining whether to dismiss a claim, a hearing officer must consider as true all facts alleged by the party opposing dismissal. The hearing officer should not dismiss the case if the facts alleged, if proven, would entitle the non-moving party to relief that the BSEA has authority to grant. *Caleron-Ortiz v. LaBoy-Alvarado*, 300 F.3d 60 (1st Cir. 2002); *Ocasio-Hernandez v.*

² Parents Hearing Request included a request that Student be allowed to return to Minnechaug Regional High School, but they withdrew that request during the pre-hearing conference on July 24, 2017.

³ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008)

⁴ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

⁵ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

Fortunato-Burset, 640 F.3d. 1 (1st Cir. 2011). A motion to dismiss will be denied if “accepting as true 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, supra*. The factual allegations must be sufficient to “raise a right to relief above a speculative level on the assumption that the allegations in the complaint are true (even if doubtful in fact.)” *Bell Atlantic v. Twombly*, 550 U.S. 554, 555 (2007).

The entire case may be dismissed only if the Hearing Officer cannot grant any relief under federal⁶ or state⁷ special education statutes, or §504 of the Rehabilitation Act.⁸ See *Calderon-Ortiz, supra*; *Whitinsville Plaza Inc. v. Kotseas*, 378 Mass. 85, 89 (1979); *Nader v. Citron*, 372 Mass. 96, 98 (1977); *Norfolk County Agricultural School*, 45 IDELR, 26 (2005). Conversely, if the opposing party’s allegations raise the plausibility of a viable claim that may give rise to some form of relief cognizable under any one or more of these statutory provisions, the matter should not be dismissed. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).

Particular claims must be dismissed, however, on jurisdictional grounds, if they do not arise under the statutes referred to above. Unlike a court with general jurisdiction, the BSEA may consider only those claims for which enabling statutes and regulations provide express authority. See *Globe Newspaper Co. v. Beacon Hill Architectural Comm.*, 421 Mass. 570 (1996). Thus, MGL c. 71B§2A, the current Massachusetts enabling statute for the BSEA, limits its jurisdiction to the following:

[Resolution of] disputes between and among parents, school districts, private schools and state agencies concerning (i) any matter relating to the identification, evaluation, education program or educational placement of a child with a disability or the provision of a free and appropriate public education to the child arising under this chapter and regulations promulgated hereunder or under the Individuals with Disabilities Education Act...and its regulations; or (ii) a student’s rights under Section 504 of the Rehabilitation Act of 1973, 29 USC section 794, and its regulations.” (Emphasis supplied).

The state special education regulations implementing MGL c. 71B, 603 CMR 28.00 *et seq.*, track the applicable statutory language as follows:

(3) Bureau of Special Education Appeals: Jurisdiction. In order to provide for the resolution of differences of opinion among school districts, private schools, parents and state agencies, the [BSEA], pursuant to MGL c. 71B, §2A, shall conduct mediations and hearings to resolve such disputes...

(a) A parent or a school district...may request mediation and/or a hearing...on any matter concerning the eligibility,

⁶ Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et. seq*

⁷ M.G.L. 71B

⁸ 29 U.S.C. §794

evaluation, placement, IEP provision or special education in accordance with state or federal law, or procedural protections of state and federal law for students with disabilities...[or] on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act...

603 CMR 28.08(3).

The above-referenced Massachusetts statute and regulations are consistent with the pertinent federal provisions. The IDEA at 20 USC §1415(B)(6) and corresponding regulations at 34 CFR §§300.500-517, also permit parents and/or school districts to request mediations and/or due process hearings “relating to the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE to the child.” 34 CFR §300.507(a)(1).

With this framework in mind, I turn to the facts and arguments before me.

As noted above, the jurisdiction of the BSEA is limited. BSEA hearing officers do not have jurisdiction over all issues arising in a school setting that pertain to special education students, as Parents argue. There is nothing within the state or special education law or regulations that specifically provides hearing officers with jurisdiction over the awarding of credits or the application of attendance provisions to special education students. One BSEA decision addressed the issue of student promotion and found that the decision whether to promote a Student or not is a regular education issue, and thus beyond the jurisdiction of the BSEA. See *Student v. Greater Fall River Regional Vocational School District* (BSEA #01-3218) Similarly, the awarding of credits, which lead to a Student’s promotion from grade to grade, are not generally within the jurisdiction of the BSEA. However, the above description of BSEA jurisdiction states that the BSEA has jurisdiction over the provision of FAPE.

The IEP provides a roadmap for the provision of FAPE to a special education student. Therefore, if a Student’s IEP makes a provision regarding the award of credits to a Student, the issue of credits could come within the jurisdiction of the BSEA. That is not Student’s situation. Since there is nothing within his accepted IEP requiring that he be awarded credits in a way different from regular education students, the BSEA does not have jurisdiction over that issue.

Parents argue that Hampden was aware that Student has anxiety and depression that sometimes interferes with his ability to attend school. However, his accepted IEP, although including his diagnoses, does not include any indication that his disabilities impact his attendance. In the case of *Student v. Attleboro Public Schools* (BSEA #06-0034) the hearing officer found that , “[I]n order for Attleboro to have a responsibility to address, through special education services and placement, the behavior of lack of attendance, there must be a sufficient nexus between this behavior and Student’s special education deficits.” In that case, Student’s IEP stated that Student’s disabilities affected his ability to attend school and to complete his coursework. Additionally, the IEP included a goal to address his attendance issues. Thus, in that case, Attleboro had conceded the nexus between Student’s attendance difficulties and his special education needs and therefore accepted responsibility to address that issue through special education services. (*Id.*)

In the instant case, Hampden has not accepted the connection between Student's disability and any inability to attend school as shown by Student's IEP. Thus, Student's credits and attendance during the time that his IEP was accepted is not within the jurisdiction of the BSEA. Parents' claims with respect to the credits is dismissed with prejudice as beyond the jurisdiction of the BSEA.

However, on May 23, 2017, Parents' rejected the IEP and challenged the IEP's lack of accommodation relating to Student's attendance. Therefore, they may proceed with their claim that the IEP was inappropriate in that it did not provide for an accommodation for Student's attendance for the period from May 23, 2017 until Student turned 18, on September 9, 2017⁹. Similarly, Parents may proceed with their claims regarding whether Student requires a shorter day or shorter year for the time period delineated above. They may also challenge the appropriateness of the 10/21/16-10/20/17 IEP for the time period noted above including their challenge to Student's primary disability.

Parents' request that the principal of Minnechaug be prohibited from attending meetings pertaining to Student is dismissed as beyond the jurisdiction of the BSEA. Similarly, Parents' request that the Team be responsible for making determinations with respect to Student's grades is dismissed. Parents may proceed with their remaining claims consistent with this Ruling as explained above.

ORDER

Hampden's Motion to Dismiss is ALLOWED in part as explained above.

The hearing will proceed as scheduled on October 25 and 27, 2017 from 9:30 a.m. to 4:30 p.m. at the office of Catuogno Court Reporting, 446 Main Street, Worcester, MA

The Parties shall exchange and submit their proposed exhibits and witness lists by October 18, 2017.

By the Hearing Officer

Catherine M. Putney-Yaceshyn

Dated: October 13, 2017

⁹ Student elected to represent himself in special education proceedings beginning on his eighteenth birthday. Parents requested the hearing request, and thus may only represent Student's interests until his eighteenth birthday, absent a change in Student's election to represent his own interests.