

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

In Re: Student

&

BSEA #1900241

Boston Public Schools

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This case concerns the alleged failure of the Boston Public Schools (Boston or BPS) to provide the parents of a special education student with the student's complete educational record and to do so in a timely manner.

PROCEDURAL HISTORY

On July 6, 2018, Parent filed a request for hearing with the BSEA in which she alleged that BPS had failed to respond to Parent's request for Student's educational records in the manner required by applicable law. Specifically, instead of providing Parents with Student's complete educational record within the timelines established by state and federal law, BPS forwarded the records to Parents in piecemeal fashion, over a lengthy period of time, well beyond the applicable deadlines for providing student records. Parent further alleged that as of the date of the hearing request, approximately one year after the original request for records, BPS still had not provided Parents with Student's complete educational record. Parents requested an order from the BSEA directing BPS to (1) "immediately provide [Student's] parents his complete student record [as of the date of the hearing request]"; and (2) "change its policies and practices to ensure that [Student's] parents and other parents in the district have access to complete student records within legally required timeframes"¹

On July 18, 2019, BPS filed a *Motion to Dismiss* the hearing request, asserting that the BSEA lacks jurisdiction over claims related to student records.

¹ The Hearing Request also sought a determination of "prevailing party" status with respect to an award of attorney fees as well as "such other relief as may be just," but these requests for relief are not relevant to the Motion for Summary Judgment.

Parent filed her *Opposition* to the *Motion to Dismiss* on July 25, 2018. After a telephonic motion session held on August 14, 2018, the *Motion to Dismiss* was denied. A memorandum of this *Ruling* was issued on October 29, 2018.

On January 7, 2019, Parent filed a *Motion for Summary Judgment (Motion)* on the following issues: (1) whether BPS failed to provide Student's educational record within the timeframe required by federal and state special education law, and (2) whether the documents provided by BPS in response to Parent's request failed to constitute Student's complete educational record, in violation of federal and state special education law. Parent asserted that as to the foregoing issues, there is no genuine issue of material fact and that she is entitled to summary judgment in her favor on her BSEA hearing request as a matter of law; however, she moved, in the alternative for summary judgment on an additional issue: (3) whether BPS' failure to provide Student's complete student record (including but not limited to IEPs, progress reports, school evaluations, N-1 forms) within required timelines denied Parent the opportunity and ability to be informed about her son's educational programming and progress and to effectively participate in the team process.²

On January 14, 2019, Boston filed an *Opposition to Parents' Motion for Summary Judgment and Cross Motion for Summary Judgment (Opposition and Cross Motion)* in which it contended that (1) the complete student record has been delivered to the Parent, rendering this issue moot, and (2) the BSEA lacks the authority to order the declaratory or systemic relief requested in Parent's hearing request.³ Finally, BPS argued that Parent's *Motion for Summary Judgment* should be denied because it contained factual allegations that were not raised or developed in their hearing request.

On January 24, 2019, Parent filed a *Response to BPS's Opposition to Parent's Motion for Summary Judgment and Cross Motion for Summary Judgment (Response to Opposition and Cross Motion)* in which she argued that BPS has not, in fact provided all of Student's educational records. Specifically, Parent alleged that while she cannot account for all missing records, she is aware of certain records that are missing and/or incomplete (annual review reports and some progress reports) and asserted that BPS has provided no evidence to the contrary. Parent concluded that summary judgment should be decided in her favor because there is no dispute as to the material facts alleged in the hearing request: that BPS failed to provide complete educational records and failed to meet applicable deadlines.

² Parent raised this issue for the first time in the *Motion for Summary Judgment*, and not in her initial hearing request; therefore, I will not address it further in this *Ruling*.

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BPS also reiterated the argument, from its *Motion to Dismiss*, that the BSEA lacks jurisdiction over claims involving student records. This issue was disposed of in the *Ruling* on Boston's *Motion to Dismiss*, and will not be revisited here.

Parent argued in the alternative that even if BPS were to have finally provided the complete education record as of November 2018, its claim of mootness fails because the situation leading to the hearing request is “capable of repetition yet evading review.” Specifically, Student has a severe disability and may be eligible for special education services from BPS until he turns 22, approximately twelve years from now. During this period of eligibility, Student will be subject to approximately twelve years’ worth of re-evaluations, IEP meetings and progress reports, multiple occasions for Parent to request his educational records, and many opportunities for repetition of the delays and other issues involved in the instant case.

Finally, Parent contended that the BSEA does, in fact, have the authority to order systemic relief, and that “fairness requires that the Hearing Officer do so in this case.” Parent based her argument on similar “reasoning for why the issue is not moot,” in that if BPS does not change its policies and practices for providing student records, Parent will face similar delays in obtaining Student’s records in the future. The parties presented oral arguments on their respective *Motions* on January 28, 2019.

On the same date as she filed the above-referenced *Response to Opposition and Cross Motion*, Parent filed a *Motion to Amend Hearing Request* (which was granted) and *Amended Hearing Request* for the stated purpose of “provid[ing] the Hearing Officer with greater specificity as to the issues for hearing, the facts, and the relief requested in light of BPS providing additional student records since the filing of the original Hearing Request.” The *Amended Hearing Request* alleged that multiple documents are still missing from the records that BPS provided to Parent in response to the original hearing request. The relief requested included, in pertinent part (1) an order directing BPS to immediately provide Parent with the complete student record, certified as such; (2) a finding that BPS failed to provide Student’s complete educational record within the required timelines in violation of Federal and state law; (3) an order requiring BPS to change its policies and practices with respect to Student to ensure that Parent has access to the complete educational record within legally required timeframes now and in the future, such as BPS designating a specific individual to verify efforts to compile [Student’s] complete record and verify that BPS has provided a complete set of records within a specific time frame; (4) an order requiring BPS to change policies and practices “to ensure that all parents of children with disabilities have access to complete student records within legally required timeframes.”

This *Ruling* on the parties *Cross Motions for Summary Judgment* encompasses the original hearing request only, and not the *Amended Hearing Request*. BPS filed a response to the *Amended Hearing Request* on February 8, 2019. This hearing on both hearing requests has been scheduled for May 1 and 2, 2019.

LEGAL FRAMEWORK

Summary judgment is available at the BSEA if “there is no genuine issue of fact relating to all or part of a claim or defense and [the moving party] is entitled to prevail as a matter of law...” 801 CMR 1.01(7)(h). In determining whether to grant summary judgment, BSEA hearing officers are guided by Rule 56(a) of the Federal Rules of Civil Procedure, which provides that summary judgment shall be granted if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Id.* See also *Rulings on Motions for Summary Judgment* in: *Zelda v. Bridgewater-Raynham Public Schools and Bristol County Agricultural School*, BSEA No. 06-0356 (Byrne, 2006); *In Re Westwood Public Schools*, BSEA No. 10-1162 (Figueroa, 2010); *In Re: Mike v. Boston Public Schools*, BSEA No. 10-2417 (Oliver, 2010); *In Re Bridgewater-Raynham Public Schools*, BSEA No. 1303762 (Figueroa, 2013).

Facts are considered “in the light most favorable to...the non-moving party.” *Xiaoyan Tang v. Citizens Bank, N.A.*, 821 F. 3d 206 (1st Cir. 2016), quoting *Perez-Cordero v. Wal-Mart P.R. Inc.*, 656 F. 3d 19, 20 (1st Cir. 2011). “An issue is ‘genuine’ if it can ‘be resolved in favor of either party,’ and a fact is ‘material if it ‘has the potential of affecting the outcome of the case.’” *Tang, supra*, quoting *Perez-Cordero, supra* at 25, and *Calero-Cezero v. U.S. Dept. of Justice*, 355 F.3d 6, 19 (1st Cir. 2004). The moving party has the initial burden of producing evidence that there is no dispute of material fact. Once the moving party has done so, the burden then shifts to the party opposing summary judgment to establish, via affidavits or other documents, specific facts showing that there is a “genuine issue for trial.” *Celotex Corp. v. Catrell*, 477 U.S. 242, 248-50 (1986); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249 (1986); *Kathleen Burns v. Johnson*, 2016 WL 3675157 (July 2016).

For either party to prevail on its respective *Motion for Summary Judgment* in the instant case, that party must demonstrate, through the documents submitted in support of its *Motion*, that “there is no genuine issue of fact relating to all or part of a claim or defense and [the party] is entitled to prevail as a matter of law...” 801 CMR 1.01(7)(h). Accordingly, for Parent to prevail, she must establish that there is no dispute that BPS failed to provide Student’s complete educational record in a timely manner. Similarly, Boston must show that there is no dispute that it has, in fact, provided the requested records, rendering the matter moot.

The pertinent substantive law in this case is found in federal and Massachusetts statutes, regulations and case law governing parental rights to view their children’s complete educational records. The relevant sources of law have been cited extensively in the parties’ submissions as well as in the *Ruling* on Boston’s *Motion to Dismiss*, and will not be revisited here beyond this brief summary as follows. Parents of children with disabilities are entitled to view

and/or receive copies of their children's complete educational records, and access to such records is a fundamental procedural safeguard under the IDEA and MGL c. 71B. Accordingly, public school districts are required to provide parents of eligible children with access to such records within specific timelines established by statute and regulation, as well as to provide parents with information on the types and locations of records maintained by the district.⁴ At issue in this case is whether Boston has complied with these requirements with respect to Student, and, if not, what constitutes an appropriate remedy.

UNDISPUTED FACTS

The following facts are not in dispute, and are derived from the original (not amended) hearing request, the Parent's *Motion for Summary Judgment*, Boston's *Opposition to Parents' Motion for Summary Judgment and Cross Motion for Summary Judgment*; Parent's *Response to BPS's Opposition to Parent's Motion for Summary Judgment and Cross Motion for Summary Judgment*; as well as all memoranda and exhibits accompanying these submissions.

1. At all relevant times, Student is and has been eligible for special education and related services, pursuant to the Individuals with Disabilities Education Act, (IDEA), 20 USC §1400 *et seq.*, and the Massachusetts special education statute, MGL c. 71B. The Boston Public Schools is the Local Education Authority (LEA) which is responsible for providing Student with special education programming in compliance with these statutes.
2. Student is ten years old and has significant disabilities, including autism, hearing loss, and medical conditions.
3. On or about July 14, 2017, Parent, through counsel, requested a copy of Student's entire student record from BPS.
4. BPS provided portions of Student's educational records in response to Parent's initial request and subsequent requests on various dates and times including, but not limited to, August 9, 2017, August 27, 2018, September 18, 2018, and October 18, 2018.
5. On November 9, 2018, BPS delivered a packet of records to Parent's counsel. Through the affidavit of Catherine Morrissey-Bickerton⁵, Boston

⁴ See, for example, 20 USC §1415 (b)(1); 34 CFR §§300.501(a); 300.507,300.613(a);300.616; MGL c. 71B, §2A(a); 603 CMR 28.03(3); 603 CMR 23.07(2); *Shaffer v. Weast*, 546 US 49, 60 (2005).

⁵ Ms. Morrissey-Bickerton was employed by BPS as an Assistant Corporation Counsel in the Office of Legal Advisor from approximately September 2017 to November 2, 2018, at which time she became the Senior Program Director of Mediation/Dispute Resolution for the BPS Office of Special Education. Ms. Morrissey-Bickerton was involved in searching for and locating Student's records at various sites within the BPS and forwarding them to Parent's counsel.

represented that this final packet, together with records that were provided previously, were, “to the best of [the affiant’s] knowledge, a complete and accurate copy of the Boston Public Schools’ student record of [Student.] “ (Affidavit of Catherine Morrissey-Bickerton)

ISSUE PRESENTED

The issues to be decided in this *Ruling* are (1) whether there is a dispute of material fact as to whether Boston provided Parent with a “complete and accurate copy of the Boston Public Schools’ student record” for Student within the timelines established by statute and regulation; and (2) whether there is a dispute of material fact as to whether the documents that Boston provided to Parent constitute Student’s complete educational record.

POSITIONS OF THE PARTIES

Position of BPS

As of November 9, 2018, BPS had provided Parent with a complete and accurate copy of Student’s educational record such that this matter is now moot. Further, the BSEA does not have the authority to grant remedies sought by Parent including what amounts to a declaratory judgment that BPS violated Parent’s rights or an order for systemic changes.

Position of Parent

There is no dispute that BPS’ response to Parent’s record requests was not timely. Boston did not deliver its final installment of Student’s record until November 9, 2018, approximately 21 months after Parent’s initial request in July 2017. Moreover, the record still is not complete. Parent has identified specific documents which are or appear to be missing, and argues that BPS may well be in possession of other records which Parent is not in a position to identify.

Moreover, even if BPS did provide the complete record, the matter is not moot because the situation that led Parent to file the hearing request is likely to be repeated. Finally, the BSEA does not lack authority to order systemic changes in appropriate circumstances, but even if it does lack such authority, it is not precluded from ordering a change in policy or practice with respect to this particular Student by, for example, directing BPS to keep Student’s records in a single location, designating an individual responsible for responding to record requests by Parent, and establishing a practice to certify completeness of the record.

CONCLUSIONS

Based on my review of the parties' submissions, I conclude that there is no dispute of material fact that BPS failed to provide Student's complete educational record within the legally required timelines. Parent first requested the records in July 2017, and repeated her request several times thereafter. BPS did not complete the process of forwarding records to Parent until November 2019, some nineteen months after the original request. Even assuming that BPS had provided the complete record as of that date, there can be no dispute that it failed to comply with the ten day deadline established by state regulations at 603 CMR 23.07(2) or the 45-day timeline set forth in 34 CFR 300.613. Parent's *Motion for Summary Judgment* is GRANTED as to this issue.

On the other hand, there is a dispute of material fact as to whether the record provided to Parent as of November 9, 2018 is complete. BPS has submitted the affidavit of Catherine Morrissey-Bickerton attesting that after an extensive search, to the best of Ms. Morrissey-Bickerton's knowledge, BPS had provided Parent with a complete and accurate copy of its educational record for Student by approximately November 9, 2018. Contrary to Boston's assertion, Parent contends that she has not received Student's complete record and alleges that there are multiple missing documents, including but not limited to annual review reports for 2013-2014 and 2016-2017 as well as progress reports.

The documents filed by the parties contain insufficient information to resolve this factual dispute, and an evidentiary hearing is required to determine, for example, whether the documents that Parent claims are missing ever existed in the first place, or whether they once existed but were lost or destroyed and thus cannot be located. Accordingly, Parent's *Motion for Summary Judgment* and Boston's *Cross-Motion for Summary Judgment* are DENIED with respect to this issue.

Within its *Opposition and Cross Motion*, BPS seeks dismissal of Parent's request for an order directing it to "change its policies and practices to ensure that [Student's] parents and other parents in the district have access to have access to complete student records within legally required timeframes." I will construe this portion of Boston's *Opposition and Cross Motion* as a motion to dismiss the Parent's request for systemic relief on the grounds that such relief cannot be granted by the BSEA under any set of facts alleged by Parent. *Standard Adjudicatory Rules of Practice and Procedure* at 801 CMR 1.01(7)(g) (3), *Hearing Rules for Special Education Appeals*, Rule XVIIB.

Within that framework, dismissal of the claim for systemic relief is appropriate, as follows. BSEA jurisdiction is limited by the statutes and regulations that create it.⁶ Nothing in those provisions permits the BSEA to resolve disputes between, or grant relief to, any person or entity other than the parties before it in an individual due process hearing. The lack of authority by the BSEA to order systemic changes that go beyond the scope of the individual

⁶ See, for example, 20 USC §1415(B)(6); MGL c. 71B, §2A; 603 CMR 28.08(3).

dispute before the hearing officer is well-established, having been addressed in numerous rulings in other cases. In one such case, *In Re Springfield Public Schools, Ruling on Motion to Dismiss*, 19 MSER 294, 295 (Oliver 2013), the hearing officer dismissed parents' claims for systemic relief, stating that the above-cited statutes and regulations repeatedly refer to "a *child* with a disability, the child, the student, all in the singular, individual form."

The BSEA also denied systemic relief in *In re: Greater New Bedford Regional Vocational Technical High School ("GNBRVT"), Ruling on [Motions]*, 19 MSER 220, at 223 (Crane, 2013). That case articulates the principle that any facts may be found in the instant case, based on the evidence produced at a hearing, are limited to what is necessary to determine whether Boston has fulfilled its obligations to Student under federal and state special education laws, and, if not, to determine what relief, if any, is appropriate with respect to the named Student. If relief is granted, it may possibly involve a change in how Boston manages Student's educational records. Ordering Boston to apply such a change system-wide, however, to children who are not involved in the current hearing, is beyond the scope of the BSEA's authority. See *GNBRVT, supra*, citing *Roe ex rel. A.L. v. Johnson*, 2012 WL 3561919 (D. Mass. 2012). For the foregoing reasons, the School's motion to dismiss this claim is GRANTED.

ORDER

Parent's *Motion for Summary Judgment* is GRANTED as to Issue No. 1 and DENIED as to Issue No. 2.⁷ Boston's *Cross-Motion for Summary Judgment* is DENIED as to Issue No. 1. Boston's *Motion for Summary Judgment*, construed as a *Motion to Dismiss* Parent's claim for systemic relief is GRANTED as to Issue No. 2.⁸

This matter will proceed to hearing on May 1 and 2, 2019, beginning at 10:00 AM at the office of the BSEA, 14 Summer Street, 4th floor, Malden, MA. The parties shall exchange and file proposed exhibits and witness lists no later than close of business on April 24, 2019. The BSEA will schedule a conference call with the parties to further define and clarify the issues for hearing.

By the Hearing Officer,

Sara Berman

Dated: March 15, 2019

⁷ Issue numbers correspond to numbering set forth in *Parent's Motion for Summary Judgment*.

⁸ Issue numbers correspond to numbering set forth in Boston's *Cross-Motion for Summary Judgment*.