

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

In re: Tantasqua Regional School District

BSEA #1509595

RULING ON TANTASQUA REGIONAL SCHOOL DISTRICT'S PARTIAL MOTION TO DISMISS

Parent filed the *Hearing Request* in this matter with the Bureau of Special Education Appeals ("BSEA") on May 28, 2015. On June 16, 2015 Tantasqua Regional School District ("District") filed its Response to the Parent's Hearing Request. Also on that date, the District filed its *Partial Motion to Dismiss* ("District's *Motion*"). Parent filed her *Opposition* to the District's *Motion* on June 29, 2015. For reasons discussed below, the District's *Motion* is DENIED.

PERTINENT FACTUAL BACKGROUND

For purposes of this *Motion* only the following assertions are considered to be true and construed in favor of the party opposing dismissal, namely, the Parent.

1. Student is 15 years old and currently in the eighth grade at Tantasqua Regional Junior High School (hereinafter "TRJHS"). He carries a number of diagnoses, including learning disorders and ADHD/Adjustment Disorder with mixed disturbance of emotions and conduct.
2. Student began receiving accommodations under a §504 plan during his second year of kindergarten and started receiving special education services under an Individualized Education Program (IEP) in the first grade.
3. In April 2013, at the end of Student's sixth grade year, the District determined that he was no longer eligible for an IEP after a number of school-based evaluations, though he continued to receive services as an exercise of his stay-put rights.¹ At this time, the District found Student eligible for accommodations under § 504 and implemented a behavioral support plan. Parent accepted both the § 504 plan and behavior plan in July 2013.

¹ Though Parent did not formally contest this finding of no eligibility, she did express her disagreement verbally. As a result, special education services continued under Student's last accepted IEP through the end of the 2012-2013 as well as during the 2013-2014 school year.

4. Student transitioned to TRJHS for seventh grade during the 2013-2014 school year. He continued to receive accommodations under his § 504 plan and special education services under his stay-put IEP.
5. Student's behavior² resulted in increasing disciplinary action during the seventh grade, which included 5.5 days of in-school suspension, suspension from riding the bus to school,³ loss of recess, silent lunches, and office detentions. Parent reports that Student was "defeated" by mid-year, making statements which included "I don't belong here, I don't belong anywhere" and "I wish I were dead."
6. Parent alleges that in April 2014 the TRJHS Vice Principal informed Parent that the District would be notifying the police of Student's behaviors in accordance with its bullying/discipline policy. In response, Parent filed a complaint with the Office for Civil Rights of the U.S. Department of Education (OCR) alleging that the District had discriminated against Student on the basis of his disability.⁴
7. On April 15, 2014, Parent requested the District to re-evaluate Student's special education eligibility and the District agreed. The District completed its evaluations before the end of the school year.
8. In June 2014 the Team convened to consider the evaluations, found Student eligible for special education, and proposed a new IEP dated 8/27/2014 to 8/25/2015. This IEP incorporated Student's § 504 accommodations and included behavioral services. The proposed IEP for the 2014-2015 school year called for placement in a substantially separate classroom with built-in behavioral support, located in a public alternative school program. Parent accepted this IEP in part, assenting to the substantially-separate classroom; however, Parent rejected the proposed "alternative setting" and the lack of extended school year (ESY) services. Parent later unilaterally placed Student in a private school in Vermont.
9. In a letter dated November 17, 2014, OCR notified Parent that it was "closing the Complaint as resolved."⁵ The letter states that upon review of "extensive emails, the Student's discipline records, and relevant IEP and 504 documents," OCR found that the District did not deny the Student "a free appropriate public education by failing to evaluate him in violation of 34 C.F.R. Section 104.35(a) and 28 C.F.R. Section 35.130." The letter further provides that the District "properly evaluated" Student, and that since "the District considered the

² Reported behaviors include argumentativeness, uncooperativeness, and bullying.

³ Bus suspension lasted from March 2014 through the end of the 2013-2014 school year. Student used "regular" and not "special" transportation.

⁴ This Complaint was withdrawn by Parent in May 2014 on the recommendation of her Advocate after the District agreed to reevaluate Student's eligibility for special education services. The Complaint was later reopened.

⁵ This letter is attached to the District's *Motion* as Ex. 1.

Student's behaviors throughout the year and decided [after the Complaint was filed] that [Student] was eligible for IEP services and addressed the issue of whether he could be subjected to discipline," OCR considered the allegation resolved.

10. Parent filed a Hearing Request on May 28, 2015, alleging, among other things, that the District "violated § 504 of the Rehabilitation Act by failing to provide a FAPE pursuant to [Student's] § 504 plan during the 2013-2014 school year; that the District "violated federal special education law by failing to 'find' [Student] as a child/student in need of special education services during the 2013-2014 school year"; that the District improperly suspended and/or changed [Student's] placement as a result of disciplinary actions for conduct that was related to [Student's] disability in violation of § 504..."; and that Student is owed compensatory services for the District's failure to conduct requested evaluations in a timely manner "and/or convene [Student's] team and provide a FAPE for [Student] since at least November 4, 2013."

POSITIONS OF PARTIES ON DISTRICT'S MOTION TO DISMISS

Position of District

Certain claims in the Hearing Request--namely, allegations that the District violated "Child Find" during 2013-2014, that Student is owed compensatory services for alleged failure to conduct timely evaluations, or that the District violated Student's rights under Sec. 504 during the 2013-2014 school year--duplicate those examined and resolved by OCR. Because OCR closed Parent's complaint after a thorough investigation without making any findings against the District, Parent is barred from subsequently litigating such claims before the BSEA.

Position of Parent

Parent is not barred from bringing issues before the BSEA that have been the subject of a prior OCR complaint. The District cites no legal authority in support of its assertions; moreover, a recent BSEA ruling on this issue concludes that issues and claims resolved by OCR can be raised in a subsequent BSEA appeal.

DISCUSSION

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 its *Motion*, the District argues that because certain legal claims asserted in the Parent’s Hearing Request duplicate those previously raised in the OCR Complaint, the BSEA is precluded from adjudicating these claims because they have been “examined and resolved by an agency of competent and concurrent jurisdiction.”⁶

Specifically, the District’s *Motion* asserts that the following allegations were “examined and resolved” by OCR: 1) that the District “violated § 504 of the Rehabilitation Act by failing to provide a FAPE pursuant to [Student’s] § 504 plan during the 2013-2014 school year”; 2) that the District “violated federal special education law by failing to ‘find’ [Student] as a child/student in need of special education services during the 2013-2014 school year”; 3) that the District “improperly suspended and/or changed [Student’s] placement as a result of disciplinary actions for conduct that was related to [Student’s] disability in violation of § 504...”; and 4) that Student is owed compensatory services for the District’s failure to conduct requested evaluations in a timely manner “and/or convene [Student’s] team and provide a FAPE for [Student] since at least November 4, 2013.”⁷

The District’s position is not supported by citations to any legal authority and in fact is contrary to a recent BSEA ruling on this issue. In her *Ruling on [School’s] Motion to Dismiss* in the matter of *Student v. McAuliffe Regional Public Charter School*,⁸ Hearing Officer Rosa Figueroa concluded that a parent’s having raised certain issues

⁶ OCR is responsible for ensuring equal access to education by enforcing various civil rights laws, including § 504 of the Rehabilitation Act of 1973.

⁷ In its *Motion*, the District points to a number of other claims beyond those reproduced here, some of which are brought under the Individuals with Disabilities Education Act (IDEA) rather than § 504 of the Rehabilitation Act of 1973. As its November 14 letter makes clear, OCR does not enforce the IDEA. Since Parent’s IDEA claims could not possibly be duplicative as argued by the District, such claims have been omitted from this ruling.

⁸ BSEA No. 1404110 (Figueroa, April 2014)

with OCR and PQA in no way precluded that parent from litigating the same issues before the BSEA.

On the other hand, OCR's *Complaint Processing Manual* (CPM), which outlines OCR's procedures for investigating discrimination complaints, making findings as to whether a respondent has violated applicable regulations, developing corrective action plans where indicated and dismissing claims at various stages when appropriate, states that OCR will close complaint allegations where "***the allegations filed with OCR have been resolved by another federal, state, or local civil rights enforcement agency or through a recipient's internal grievance procedures, including due process proceedings.***" CPM at 110(a)(2), p. 12 (emphasis in original). While OCR's internal process may allow a decision by the BSEA to preclude later claims before OCR, there is no legal authority for the converse.

Moreover, even apart from the BSEA ruling referred to above, OCR did not appear to "resolve" the issues listed in the District's *Motion*. The sole legal issue considered by OCR was "whether the District denied the Student a free appropriate public education by failing to evaluate him in violation of 34 CFR Section 104.35(a) and 28 C.F.R. Section 35.130."⁹ Although OCR conducted interviews and reviewed documents from the District, it did not issue detailed findings on this narrow legal issue; rather, it ascertained "credible information indicating that the allegations" of the District's failure to evaluate Student had been resolved, prompting OCR to close the case. See CPM at 110(e), p. 12. Even if OCR had made detailed findings on the narrow legal issue before it, such findings would not have been broad enough to cover the full scope of Parent's claims.

For the reasons stated above, the results of OCR's investigation have no preclusive effect in the instant case.

⁹ These regulations respectively govern evaluation and placement under § 504 and prohibit discrimination under the Americans with Disabilities Act.

CONCLUSION

For the reasons discussed above, the District's *Partial Motion to Dismiss* is DENIED.

By the Hearing Officer,

Dated: July 21, 2015

Sara Berman¹⁰

¹⁰ The Hearing Officer gratefully acknowledges the contribution of BSEA Law Clerk Sean Feener in researching and drafting this *Ruling*.