

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

In re: Student v.
Boston Public Schools

BSEA #1503625

RULING ON BOSTON PUBLIC SCHOOLS' MOTION TO DISMISS

On November 18, 2014 Parents requested a Hearing in the above-referenced matter. Boston Public Schools (Boston) then filed a Motion to Dismiss on November 24, 2014 and on December 1, 2014 Parents filed an Opposition to Boston's Motion.

On December 4, 2014, Parents requested to be heard orally which request was granted on December 5, 2014. The Parties argued the Motion during a telephonic session held on December 8, 2014.

Upon consideration of the Parties submissions and their oral arguments, Boston's Motion to Dismiss is DENIED as explained below.

Facts:

The following facts are assumed to be true for purposes of this Ruling only:

1. Student is a sixteen year old resident of Boston, Massachusetts. He has been diagnosed with ADHD, anxiety, mood disorder and learning disabilities. The possibility of a Pervasive Developmental Disorder (PDD) NOS diagnosis has been raised. He also has a history of trauma and school failure.
2. Student underwent a neuropsychological evaluation on April 22 and May 28, 2013 with Carol A. Leavell, Ph.D., ABPP/AACN, Board Certified Clinical Neuropsychologist. The report notes that according to Mother, Student does not understand his behavior and the consequences of his behavioral choices. The report notes that Student had not taken his medication (15 mg. Adderall) on the days he was tested. He was accompanied by his intensive care coordinator to the evaluation (PE-2).
3. Dr. Leavell noted that during the evaluation,

[Student's] behavior was extremely variable, and his investment in the testing session ranged from poor operative

to extremely limited. At times he presented as cooperative; and even friendly, helpful and invested. He then, with no clear antecedents, would exhibit with a high level of 'testing' behavior and negative and threatening comments directed towards myself. He was also frequently restless and demonstrated very loud and even screeching voices. [Student] furthermore intermittently complained of fatigue, and repetitively requested to know how long the testing would continue. Nevertheless, with a great deal of effort and support it was possible -- to help him maintain himself in the testing situation for the entire testing day. Consequently, most likely these test results continue to be an underestimation of his overall cognitive functioning, but are likely to be a good indication of his current capacity and adjustment (PE-2).

4. Based on the evaluation results, Dr. Leavell recommended participation in a highly therapeutic private setting with small group and one-to-one assistance that had an extremely high mental health presence and offered a behavioral management program. The program should offer multimodal individual, group and family-based interventions, and be one designed for children presenting with emotional dysregulation secondary to autism spectrum disorder to address Student's behavioral and learning disability issues. The program should be a twelve month model inclusive of summer programming for consistency. It should also offer opportunities for vocational development. Dr. Leavell noted that optimally,

There would be on-site opportunities for a structured after school program with a responsible adult supervision for increased socialization, fostering of vocational interests and homework completion. If not, they should be provided with such a program in another setting.

An important component to this type of placement would be the availability of a residential treatment service "on the premises", or that the program have a close association with a residential treatment program. This would allow for a smooth transition (to and from) the residential component, in the event that this level of intervention is needed (PE-2).

Dr. Leavell recommended numerous other in-class accommodations. She also recommended that a speech and language evaluation be conducted to assess his communication skills and more specifically, his higher-level reasoning ability. She opined that Student would benefit from psychopharmacological support to address his extreme emotional variability, restlessness and moodiness. Lastly, Dr. Leavell also recommended home consultation and parental training and assistance as well as the involvement of outside agencies such as the Department of Mental Health (DMH) and the Department of Developmental Disabilities (DDS) (PE-2).

5. On February 6, 2014, Parent filed an Expedited Hearing Request seeking private day placement for Student. This matter was BSEA #1405546¹, assigned to Hearing Officer William Crane. Expedited status was denied on February 7, 2014 and the matter was scheduled under the regular calendar.
6. On or about February 27, 2014, Boston agreed to fund a private day placement and referral packets were forwarded on March 10, 2014, to the numerous Massachusetts approved special education private schools in which Parent was interested. Said schools were: RCS Learning Center, Seaport, Dearborn Academy, Merrimack Special Education Collaborative, and Chamberlain International School (SE-A).
7. On April 11, 2014 Boston and Parent entered into a “legally binding” settlement agreement calling for Boston’s placement of Student at a private day placement for one year through August 2015. The Agreement further stated that if the start date of said placement was delayed, Boston would fund the placement for one year from the start date. On the fourth paragraph of the introduction the Parties conveyed their intention to

Resolve the dispute regarding [Student’s] educational placement by mutual agreement, expeditiously and without the time, cost and uncertainty of litigation...

In full consideration of the mutual promises and covenants contained herein, the sufficiency of which is hereby acknowledged, the Parties agree...

to twelve contractual terms, delineated thereafter (SE-A). Both Parties were represented by the same attorneys that now represent them in the instant case and both Parties acknowledged in the agreement that they entered into said agreement freely and voluntarily (see paragraph 7, SE-A).

¹ This Hearing Officer takes administrative notice of the previous case, BSEA #1405546.

8. At paragraph number 5 the Agreement provided that

In the event that Student does not complete his placement at the placement as outlined above for any reason, and [Student] and his Parents continue to reside in Boston, then, upon notice by the parents or the placement to Boston, Boston shall have the right and responsibility to convene a Team meeting and develop an IEP for Student, make referrals to alternative private day schools on student's behalf, and to otherwise provide Student and his Parent with all the rights afforded to students with special needs who reside in Boston (SE-A).

9. In Paragraph 1, the agreement contained a comprehensive release specifically stating

This Agreement is entered into in full settlement of any and all claims which the Parent and/ or Student have or might have or assert against Boston, its officers both elected and appointed, its agents, employees, and/or arising out of any and all obligations which Boston had or now has to provide a free appropriate public education to student, both substantively and procedurally, including but not limited to the provision of regular and special education and/ or related services for any and all periods since he became enrolled as a student in Boston on to and including the date of this agreement; without limiting the foregoing, the Parents specifically acknowledge that they waive all rights against Boston which might have accrued to them on their own behalf or to Student under M.G.L. c. 30A, 71, 71B, 76, 231 and 258, 20 U.S.C. §1400 et seq., 20 USC §1983, Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and any and all other related acts, laws, and regulations of to the date of this agreement (SE-A).

10. The Agreement was signed by Mother on April 11, 2014 and by Boston on April 14, 2014 (SE-A). Prior to the Agreement, Student's last agreed upon IEP, accepted by Parent on June 28, 2013, covered the period from October 2012 through October 2013, and called for Student to receive services at a separate public day program,

namely, McKinley Middle School. This IEP purports to address Student's emotional disability in a therapeutic small class setting with a strong behavioral component (SE-1).

11. After the Agreement was signed, Student was accepted to Chamberlain International School. Boston forwarded Parent a placement page calling for Student to attend the aforementioned school. Student's day placement was scheduled to begin on May 14, 2014 (SE-B). Parent accepted this placement on May 13, 2014.
12. On May 13, Student was arrested and placed in the custody of the Department of Youth Services (DYS).
13. On or about July 4, 2014, a Juvenile Court Judge agreed to waive the bail and release Student to a therapeutic residential program as a condition of bail/ release prior to trial.
14. On July 31, 2014, Chamberlain retracted its acceptance of Student to the day program instead indicating that as a result of his "current profile" he would only be accepted as a residential student.
15. On August 1, 2014, Student filed an Expedited Hearing Request against Boston seeking residential placement and alleging that Boston was denying Student a FAPE by failing to provide him residential placement. The case was granted expedited status on August 4, 2014. This matter, BSEA # 1500993, was assigned to Hearing Officer Ann Scannell.
16. Boston filed its response to the Hearing Request relying on the Settlement Agreement and Release that would preclude claims prior to the execution of the Agreement as an affirmative defense. Boston further asserted that prior to filing of the Hearing Request, Parent had not notified Boston that Student required residential placement.
17. The Parties participated in a Pre-hearing conference on 2014, with the intention of sharing information and ascertaining whether they could reach resolution of the case. On August 21, 2014, Parent withdrew her Hearing Request so as to obtain additional information regarding Student's functioning and needs.
18. Student's Team convened on August 28, 2014 at which time Boston stated its position that if Student required residential placement, the residential portion would be the responsibility of a different agency. Parent asserts that all of Student's treatment

team, including the clinical and program staff at DYS, agree that he required a highly therapeutic residential placement with ongoing psychotherapeutic support (a psychiatrist and a doctoral level psychologist). Boston indicated that if the matter went to Hearing again, Boston would be seeking to join the Department of Mental Health (DMH).

19. Student underwent a neuropsychological evaluation on October 9 and 10, 2014 with Barbara Bruno-Golden, Ed.D., neuropsychologist. Dr. Bruno-Golden who found that

[Student] requires the development and implementation of a comprehensive neurobehavioral educational program. This program should be provided in the 24 hour, seven days a week residential treatment program in an effort to stabilize his behavior. This is essential for [Student] in order to allow him the opportunity to successfully access his educational curriculum commensurate with his intellectual peers (PE-3).

20. The report of said evaluation was discussed at a Team meeting in October 2014, at which time the Team proposed to forward referral packets to therapeutic day programs.
21. On November 18, Parent Requested an Expedited Hearing in the instant matter, which expedited status was denied. In the request Parent sought to resolve two issues: whether Boston is obligated to provide Student residential placement in order for Student to receive a FAPE; and, 2) whether Student is entitled to compensatory and prospective services while he is detained by DYS.
22. November 24, 2014, Parents filed a Motion for Reconsideration of Expedited Status to which Boston Objected on November 28, 2014. Parents' Motion for Reconsideration was based on the fact that Student was at a DYS facility where his educational needs were not being met and his mental health and behavior had deteriorated.
23. While at the DYS facility, Student has been hospitalized for banging his head against the wall, which still occurs on occasion. Student has required to be restrained on multiple occasions and in late November 2014, he bit a staff member who was trying to restrain him. Unless Student is residentially placed, he will remain in DYS facility

where, Parent asserts, his mental health and behavior continues to deteriorate in an environment that does not meet his needs. Student has been found incompetent to stand trial and the Juvenile Court Judge will not release him except to a residential placement.

24. An Order denying Reconsideration of the Expedited Status was issued on November 28, 2014.

25. Boston continues to agree to fund a private therapeutic day program for Student and has sent out additional referral packets.

Conclusion:

I. 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 as such hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim upon which relief can be granted.

Specifically, what is required to survive a motion to dismiss “are factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”² 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.”³ 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). . . .”⁴

In light of the above, only if the Hearing Officer cannot grant relief under federal or state special education law (20 U.S.C. §1400 et seq. or M.G.L. 71B), or relevant portions of Section 504 (29 USC 794), may the case may be dismissed. See *Calderon-Ortiz v. LaBoy-Alverado*, 300 F.3d 60 (1st Cir. 2002); *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 89 (1979); *Nader v. Cintron*, 372 Mass. 96, 98 (1977); *Norfolk County Agricultural School*, 45 IDELR, 26 (December 28, 2005).

² *Iannochino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

³ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

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

I. Discussion:

In its Motion to Dismiss, Boston argues that the Settlement Agreement between the Parties precludes Student from seeking residential placement through a BSEA Hearing. Boston asserts that prior to Student's detention in DYS, the Parties had entered into a Settlement Agreement whereby Boston had agreed to fund a private day placement for Student starting on May 14, 2014. On May 13, 2014, before the start date at his private placement, Student was arrested and held in a DYS pre-detention facility where he remains to date. According to Boston, Student's need for residential placement is not its responsibility because of the Agreement. Boston further states that if Student requires residential placement this portion of the placement is the responsibility of a different agency as it is not an educational need. Boston states that it remains committed to funding a private day placement as soon as one becomes available and as soon as Student is released by the Juvenile Court Judge. Boston further argues that the array of services available to Student while he remains in DYS custody is different from those available to him were he. According to Boston, disregard of the Agreement would be against public policy and would have a chilling effect on future settlements. As such it seeks Dismissal of the case.

Student disagrees that the Agreement precludes this action and argues that the Agreement specifically contemplated that

In the event that [Student] [did] not complete his placement at "the placement" as outlined above for any reason, and [Student] and his Parents continue to reside in Boston, then, upon notice by Parents or "the placement" to Boston, Boston shall have the right and responsibility to convene a Team meeting an develop an IEP for [Student], make referrals to alternative private day schools on [Student's] behalf, and to otherwise provide [Student] and his Parents with all rights afforded to students with special education needs who reside in Boston (SE-A).

Parent argues that the DYS detention has made it impossible for Student to complete his private day placement and therefore, he is entitled to the procedural and substantive rights afforded to all eligible students under the IDEA. Parent argues that Boston has failed to provide Student the agreed upon placement and has denied him his rights under the statute. Furthermore, according to Parent, since his detention at DYS there have been changes in Student's educational circumstances and needs, in part due to Boston's failure to offer Student the services to which he is entitled while at DYS. The most recent neuropsychological evaluation provides new information not previously available to the Team, recommending Student's participation in a residential program, which, according to Parent, Boston is responsible to provide. Student argues that disregard of the newly obtained

information as well as the language in the Agreement mentioned above, is against public policy and denies Student a FAPE.

Both parties cited to numerous BSEA Rulings addressing Motions to Dismiss and distinguished the facts therein from the facts in the instant case. It is clear that there are factual disputes between the parties stemming from their interpretation of the terms of the Agreement, the alleged failure by Boston to offer agreed upon services to Student while at DYS and the newly available information regarding Student's deterioration and needs consistent with the parentally obtained neuropsychological evaluation.

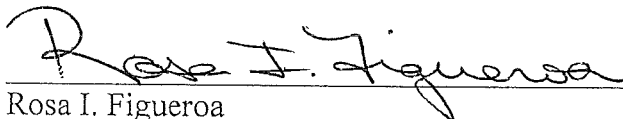
At this juncture within the context of a Motion to Dismiss, the question before me is whether Parent's claims may plausibly lead to a remedy available at the administrative level. In evaluating Parent's complaint and taking as true all of the allegations and drawing all inferences in Parent's favor, I can only conclude that Parent is entitled to a Hearing. As such, Boston's Motion to Dismiss is DENIED. Such Ruling is made without passing judgment on the merits of the substantive case before me or predetermining the final outcome.

Lastly, during the telephone conference call on December 8, 2014, the Parties were provided with possible Hearing dates in January and early February 2015. Boston was available for both and Parent was given until December 9, 2014 to convey its availability and preference for Hearing. In light of Parent's confirmation, this matter will proceed to Hearing as scheduled below.

ORDERS:

1. Boston's Motion to Dismiss is **DENIED**.
2. Exhibits and Witness lists are due by the close of business on February 4, 2015.
3. A Hearing will be held on February 11, 12 and 13, 2015, at 10:00 a.m., at the Offices of DALA/ BSEA, One Congress Street, Boston Massachusetts 02114.

By the Hearing Officer,



Rosa I. Figueroa

Dated: December 15, 2014