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

In re: Pedro[1] BSEA #1603251

RULING ON PLYMOUTH PUBLIC SCHOOLS' MOTION TO DISMISS

This matter comes before the Hearing Officer on the Motion of the Plymouth Public Schools ("Plymouth" or "the District") to Dismiss ("Motion to Dismiss"), filed on October 29, 2015 with its Response to the Hearing Request filed by the Parent on October 19, 2015. Hearing Officer Lindsay Byrne reserved argument on the Motion until the Hearing, which was scheduled to begin on December 8, 2015. In the meantime, the parties submitted exhibits for the Hearing. The parties argued the Motion on December 8, 2015 and were given through December 15, 2015 to supplement their arguments and exhibits. For the reasons set forth below, Plymouth's Motion to Dismiss has been converted to a Motion for Summary Decision, and it is hereby ALLOWED.

PROCEDURAL HISTORY

On October 19, 2015 the Parent of Pedro filed a Hearing Request with the Bureau of Special Education Appeals ("BSEA") against the District. As his proposed resolution of the problem, he stated: "I do not want Dan Harold or Dan Sylvester[2] to have anything to do with my child. I do feel that they should have their certificates revoked." The basis of his claim appears to be what he describes as the exercise of bad judgment as to the safety of children attending Indian Brook Elementary School, both his son specifically and all students generally, and bullying behavior by these two particular administrators toward the Parent.[3] A Hearing was scheduled for November 23, 2015 before Hearing Officer Lindsay Byrne.

[1] "Pedro" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

[2] Parent's documents refer to Dan Sylvester. The last name of the former Vice Principal at Indian Brook Elementary School is actually spelled Sylvestre. (S-15)

[3] The Hearing Request referred to several closed intakes without specifying the content of these intakes or the agency or office to which they had been made, referred to Mr. Harold as "a classic school house bully," and stated Parent's belief that the behavior of Mr. Harold and Mr. Sylvestre "would warrant dismissal." During the Conference Call on November 9, 2015 and the Hearing on the District's Motion on December 8, 2015, the Parent clarified the nature of his allegations.

On October 29, 2015, the District filed its Response to the Hearing Request, which also constituted its Motion to Dismiss.[4] In its Response, the District argued that the BSEA lacked jurisdiction over Parent's Hearing Request because the issues raised by Parent are not within the jurisdiction of the BSEA as delineated by federal law. Specifically, the District asserted, the BSEA does not have jurisdiction to discipline teachers or revoke their licenses, and the Individuals with Disabilities Education Act does not permit the BSEA to dictate the staffing of a child's educational services.[5]

Following a Conference Call that took place on November 9, 2015, the District filed a Motion to Postpone the initial Hearing Date. This Motion was allowed the next day by Order, which also specified that the District's Motion to Dismiss would be reserved for argument at Hearing, and the Hearing was scheduled for December 8, 2015. On November 18, 2015 the District filed a Motion to Shorten the Discovery Period, which was denied in part and allowed in part.[6] Exhibits were filed by both parties in advance of the December 1, 2015 deadline and on December 4, 2015 the matter was transferred administratively to Hearing Officer Amy Reichbach. On that date, this Hearing Officer issued an Order addressing outstanding discovery issues and specifying that the arguments on the District's Motion to Dismiss would be heard at the beginning of the Hearing.[7]

For the reasons discussed below, the Motion to Dismiss was converted to a Motion for Summary Judgment on December 8, 2015, with no objection from the parties. The parties determined that they would await a ruling on the Motion before proceeding further and a second day of Hearing was scheduled for February 2, 2016. The record was left open for one week to permit the parties to supplement the exhibits they had filed in light of the conversion of the Motion. The District submitted an additional document on December 14, 2015 in the form of a brief in support of its position, and the Parent submitted an additional document on December 15, 2015. The record closed on that date.

DISCUSSION

A. Legal Standards and Conversion to Motion for Summary Judgment

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.

[4] The District requested, in the alternative, that Parent be required to provide a more definite statement of his claims and requested relief. The additional detail appears to have been provided during the November 9, 2015 Conference Call.

[5] Response of the Plymouth Public Schools to Hearing Request and Motion to Dismiss Hearing Request.

[6] On November 18, 2015 the District also filed a Motion for Clarification, seeking clarification as to when its Motion to Dismiss would be heard and requesting the selection of an additional hearing date.

[7] The District had filed a letter on December 3, 2015 requesting further clarification regarding expected timelines for rulings on its Motion to Dismiss and its Discovery Motion.

In this case, because a ruling on the District's Motion to Dismiss was deferred until the hearing date, the parties had submitted their exhibits by the time they offered oral arguments on the Motion. Unlike a Motion to Dismiss, which requires the fact-finder to make a determination based on a complaint or Hearing Request alone, evaluation of a Motion for Summary Judgment permits the fact-finder to go beyond the pleadings to assess evidence. Rule 12(b) of the Federal Rules of Civil Procedure addresses these circumstances as follows:

> "If, on any motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

As explained above, the parties' exhibits had been submitted in advance of the hearing date and neither party objected to their consideration for purposes of deciding a pre-hearing motion. As such this Hearing Officer informed the parties that the Motion to Dismiss would be treated as a Motion for Summary Decision, and the parties were given an additional week beyond the date of arguments to submit further exhibits in light of the change in standard.[8]

Pursuant to 801 CMR 1.01(7)(h), a rule of administrative practice modeled after Rule 56 of both the Massachusetts and Federal Rules of Civil Procedure,[9] Summary Decision may be granted when 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." "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."[10] This means that "only disputes over facts that might affect the outcome of the [case] under the governing law would prevent summary judgment."[11] Moreover in determining whether a genuine issue of material fact exists, the fact-finder must view the entire record "in the light most flattering" to the party opposing summary judgment and "indulg[e] all reasonable inferences in that party's favor."[12]

In response to a Motion for Summary Judgment, the adverse party "must set forth specific facts showing that there is a genuine issue for trial."[13] To survive this Motion and

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[8] Compare FRCP 12(b)(6) (fact finder relies solely on pleadings to determine the facts for purposes of deciding a motion to dismiss) with FRCP 56 (fact finder looks beyond pleadings to consider material such as affidavits and other documents to decide a motion for summary judgment).

[9] Federal Rule of Civil Procedure 56 authorizes the entry of summary judgment whenever it appears that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."

[10] *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247-48 (1986).

[11] *Id*. at 248.

[12] *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 581 (1st Cir. 1994); *see Galloway v. United States,* 319 U.S. 372, 395 (1943).

[13] *Anderson*, 477 U.S. at 250.

proceed to hearing, the adverse party must show that there is "sufficient evidence" in his favor that the fact finder could decide for him.[14] "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted."[15] Moreover, if the law would not provide a remedy for a plaintiff even if all of his allegations are true, summary judgment may be allowed.[16]

In deciding this Motion, I rely on Exhibits 1-6 submitted by the Parent in advance of the Motion Hearing (P1-P6), and Exhibits 1-51 submitted by the District at that time (S1-S51), as well as the documents each party submitted during the week following the Motion Hearing.[17]

B. BSEA Jurisdiction

Although parents of students who receive special educational services pursuant to an Individualized Education Program ("IEP") or a 504 plan may have concerns about their children's schools or school districts, or their service providers, the BSEA is not always the proper forum to resolve these complaints.

Specifically, the BSEA has jurisdiction over requests for hearing filed by a "parent or school district . . . on any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities. A parent of a student with a disability may also request a hearing on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973. . . ."[18]

If a parent believes that a concern he has about a child's school, school district, or service providers impacts the child's access to a Free Appropriate Public Education (FAPE), he may file a complaint at the BSEA alleging as much. Bearing this in mind, I now examine the allegations and the relevant facts in this case.

C. Relevant Facts

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[14] *Id*. at 249.
[15] *Id*. at 249-50.
[16] *Cf. Ocasio-Hernández v. Fortuño-Burset*, 777 F.3d 1, 8 (1st Cir. 2015) (quoting *Rodriguez-Sanchez* v. *Municipality of Santa Isabel*, 658 F.3d 125, 130-31 (1st Cir. 2001) ("in order to defeat summary judgment, the plaintiffs have the burden of directing us to sufficient record evidence to 'create a triable issue'") (internal citation omitted).
[17] The District's submission is entitled "Supplemental Submission by the Plymouth Public Schools in Support of its Motion to Dismiss/Motion for Summary Judgment." Parent's submission, a copy of a photograph, has been labeled P-7.
[18] 603 CMR 28.08(3)(a). The preamble to the BSEA *Hearing Rules* explains BSEA jurisdiction as follows: the BSEA "has the authority to resolve educational disputes pursuant to Massachusetts state law M.G.L. c. 71B . . . and its implementing regulations, 603 CMR 28.00. The BSEA has jurisdiction to resolve educational disputes under federal law as well, in accordance with 20 U.S.C. 1401 et. seq. (the Individuals with Disabilities Education Act, 'IDEA'), 29 U.S.C. 794 (Section 504 of the Rehabilitation Act of 1973) and the regulations promulgated thereunder, 34 CFR 300 and 34 CFR 104 respectively."

The parties agree as to some of the facts in this matter and disagree as to others. Where there is disagreement, I draw from the evidence all reasonable references on behalf of the Parent.[19]

i. Pedro and his Plymouth Public Schools services

Pedro is a nine year old boy who attends the fourth grade at the Indian Brook School in Plymouth pursuant to a fully-accepted IEP. He has been diagnosed with autism. (S-1) On May 19, 2015 Parent requested that the District add to Pedro's IEP the following language: "Dan Harold and Dan Sylvester (*sic*) shall have no part of [Pedro]'s education from this day forward, either actively or passively." (S-4) The District declined to take action and informed the Parent of this decision. (S-5) On June 25, 2015, Pedro's parents signed his IEP. (S-1)

Pedro's father stated at the Motion Hearing that he filed the instant Hearing Request because there has been a breakdown in trust between himself and the District. He explained that he has no problem with the school, Pedro's teachers, or the services he receives. Rather he is concerned about his son's safety and the fitness of Dan Sylvestre, former Indian Brook Vice Principal, and Dan Harold, Indian Brook Principal, to work as educators. (Father)

ii. The bus incident

Sometime in the spring of 2014, Pedro's father contacted Plymouth Public Schools' transportation provider to lodge a complaint alleging that the bus driver responsible for driving Pedro's route to school had bullied his son. He then contacted Dan Sylvestre, Assistant Principal of Pedro's elementary school. Mr. Sylvestre investigated the claim, interviewing the student (not Pedro) who reported the alleged bullying to Pedro's father and viewing a "random sampling of videos over the time period." Mr. Sylvestre concluded that no bullying had taken place. Pedro's father was informed of this conclusion, then contacted the Plymouth Public Schools' Business Manager. Pedro's father and the Business Manager agreed that Pedro would remain on the same bus through the end of the school year and begin riding an alternative bus at the beginning of the 2014-2015 school year. He began riding the new bus as planned. (P-1)

In November 2014, Pedro's father filed a written statement of concern with the Massachusetts Department of Elementary and Secondary Education (DESE). Following an investigation, DESE concluded that noncompliance had occurred in that the District did not appear to have recorded a written report of the Parent's complaint regarding bullying, as required by the District's own Bullying Prevention and Intervention Plan. DESE also "found no basis for determining any bullying or harassment had occurred." (P-1)

[19] *See Galloway*, 319 U.S. at 395; *Maldonado-Denis*, 23 F.3d at 581.

Although the District found that no bullying of Pedro occurred on the school bus, even had Pedro been bullied, no allegations have been made involving the effect on Pedro of any bullying by the bus driver during the 2013-2014 school year. Parent did not assert that Pedro's school attendance was impacted, that Pedro is not making effective progress in his current placement, or that Pedro has been denied access to a Free Appropriate Public Education (FAPE) in the least restrictive environment (LRE).

iii. Principal's walk by Pedro's home

On July 17, 2015, Parent reported to the Plymouth Police Department that Indian Brook Principal Dan Harold had walked by his house the previous night. Parent believed that Mr. Harold was taunting him in response to his filing of a complaint with the state against Mr. Harold, and he described this incident as bullying. Mr. Harold, who lives within one mile of the Parent, stated that he was out walking with his wife. (P-2)

Mr. Harold's intentions are in dispute, but Parent has not asserted that this incident had any impact on Pedro, that Pedro is not making effective progress in his current placement, or that Pedro has been denied access to a FAPE in the LRE.

iv. Safety concerns at Indian Brook

On August 12, 2015, Parent filed a written statement of concern with the DESE alleging, as he did at the Motion Hearing, that the Indian Brook Principal had operated a chain saw near a District school bus (or buses) while students were exiting the bus.[20] Pedro's father expressed concern for students' safety. He also alleged that the intersection of the school and a state maintained road was unsafe for students, that a traffic light was required to make it safe, and that the Principal and/or other District officials had been unwilling to discuss installation of a traffic light at this location. (P-3)

The DESE declined to take action regarding Parent's concerns, stating that "the problem you have brought to our attention is not addressed under federal or state education laws or regulations." (P-3)

Whether Mr. Harold's operation of the chain saw created a safety hazard and whether a traffic light is required at the specified intersection are disputed issues. Parent has not asserted that his safety concerns have had any impact on Pedro, that Pedro is not making effective progress in his current placement, or that Pedro has been denied access to a FAPE in the LRE.

[20] At the Motion Hearing on December 8, 2015, the Principal, Mr. Harold, stated that he had utilized a chain saw to trim the trees by the entrance to Indian Brook Elementary School in order to make space for a memorial garden to help the community cope with the sudden death of a former student that had occurred several years earlier. Most of the work, he explained, had been completed before school opened for the day, but he and the custodian were still working when the buses arrived. (Harold)

D. Application of Legal Standards and Regulations to Parent's Hearing Request Demonstrates that the BSEA Lacks Jurisdiction

As the moving party in this matter, Parent bears the burden of proof.[21] The essence of the District's Motion is that the concerns the Parent outlined in his Hearing Request are beyond the scope of the BSEA's authority, and that the same is true of his requested relief.

To prevent entry of summary judgment against him, the Parent (as the party opposing summary judgment) must demonstrate not only that there is a genuine dispute as to facts between the parties, but that those facts are *material* – essentially, that they will affect the outcome of the matter. Applying this standard, I find that there exists no genuine dispute of material fact. Even if the facts are exactly as Parent describes them, the evidence before me does not support any claim that the BSEA may adjudicate. Parent has not alleged that the spring 2014 bullying incident, the Principal's walk by his home, the chain saw incident, or the absence of a traffic light at the specified intersection, have – alone or in combination – impacted Pedro's ability to access to a FAPE or his ability to make effective progress. He has not alleged that the involvement of either Mr. Sylvestre or Mr. Harold in his child's education would compromise FAPE or Pedro's ability to make effective progress. In fact, he has not made a single allegation concerning Pedro's "eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law."[22] Therefore any dispute regarding Mr. Harold's and Mr. Sylvestre's actions or inactions is not material, and summary judgment is appropriate.[23]

CONCLUSION

Upon consideration of Parent's Hearing Request, the District's Motion to Dismiss, the arguments of both parties and the relevant documents submitted by them, I find that there is no genuine issue of material fact that would preclude the entry of Summary Judgment for the District.

ORDER

Plymouth Public Schools' Motion to Dismiss is hereby converted to a Motion for Summary Judgment and ALLOWED. As such, the Hearing, scheduled for February 2, 2016, will not go forward.

[21] *Cf. Schaeffer v. Weast,* 546 U.S. 49, 62 (2005) (holding that the burden of proof in an administrative hearing challenging an IEP falls on the party seeking relief).
[22] 603 CMR 28.08(3)(a).
[23] Because there is no genuine dispute of material fact that would preclude entry of summary judgment, I do not address the District's contention that both state law and BSEA precedent prevent the BSEA from issuing an order regarding the ability of particular individuals to provide services to Pedro.

By the Hearing Officer:

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Amy M. Reichbach
Dated: January 14, 2015