

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

In re: Xander<sup>1</sup>

BSEA #1703303

**RULING ON MENDON-UPTON REGIONAL SCHOOL DISTRICT'S MOTION TO  
DISMISS**

This matter comes before the Hearing Officer on the Motion of the Mendon-Upton Regional School District (hereinafter "MURSD" or "the District") to Dismiss the Hearing Request filed by Parents on behalf of Xander. The Motion to Dismiss was filed on November 2, 2016. Parents did not file a response. A telephonic Motion Session was held on December 1, 2016, during which the parties offered oral arguments. For the reasons set forth below, MURSD's Motion to Dismiss is hereby ALLOWED.

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

On October 27, 2016 Xander's Parents filed a Hearing Request with the Bureau of Special Education Appeals ("BSEA") against MURSD alleging that the District had improperly refused to accommodate their request to reassign their five year-old son to a teacher other than the one to whom he had been assigned initially.<sup>2</sup> Xander, who began kindergarten this fall in a general education classroom, receives speech services through an Individualized Education Program. According to Parents, they met with the Principal of Xander's school on August 18, 2016, and with the District Superintendent on August 22, 2016 to express their concerns about the teacher to whom Xander had been assigned. Both times the District refused to transfer Xander to another class. In their *Hearing Request*, Parents request specifically "that Principal [] and Superintendent [] are reprimanded and that our son is a student who deserves a quality education rather than to be perceived as a financial restraint on the school and district." They appear to request, also, that the BSEA order the District "to place our son with a teacher who is patient and compassionate with students who have IEPs."

On November 2, 2016, MURSD filed the instant Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted. In its Motion, the District argues that the basis of the *Hearing Request* is the assignment of Xander's general education teacher, and Parents seek relief in the form of a reprimand of the Superintendent and Principal. As Parents assert no procedural or substantive violations of Xander's right to special education, the BSEA is without jurisdiction to hear the matter.

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<sup>1</sup>"Xander" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

<sup>2</sup>On November 1, 2016, Mendon-Upton Regional School District ("MURSD" or "the District"), through counsel, notified the BSEA that it had received the BSEA's Notice of Hearing but had not received a copy of Parents' *Hearing Request*. Pursuant to the District's request, the BSEA provided counsel for MURSD with a copy of the *Hearing Request* on November 1, 2016 and recalculated the Notice of Hearing based on that date.

## DISCUSSION

### A. 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. Specifically, what is required to survive a motion to dismiss “are factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”<sup>3</sup> 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.”<sup>4</sup> 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). . . .”<sup>5</sup>

### B. BSEA Jurisdiction

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 any issue involving the denial of the free appropriate public education guaranteed by Section 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 504 of the Rehabilitation Act of 1973. . . .”<sup>6</sup>

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, teachers, or service providers, the BSEA is not always the proper forum to resolve these complaints. This is particularly true in the absence of any allegation that the child

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<sup>3</sup>*Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

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

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

<sup>6</sup>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.”

has been deprived of access to a Free Appropriate Public Education (“FAPE”). As stated by Hearing Officer Sara Berman in her Ruling on Pentucket Regional School District’s Partial Motion to Dismiss<sup>7</sup>:

“It is well-established that schools, and not parents, have the discretion to assign disabled students to particular classrooms (including general education classrooms) so long as the IEP of a child with disabilities can be implemented in the chosen classroom. Moreover, hearing officers may not second-guess a school’s choice of personnel, provided the staff persons at issue have the professional credentials and qualifications required by statute and regulation, and are appropriately qualified to implement the IEP services.”

Bearing this in mind, I now examine the allegations in this case.

### C. Application of Standards

In their *Hearing Request*, Parents focus on two things: first, their displeasure with the teacher to whom Xander was assigned due to her “terrible reputation with her students, primarily energetic young boys,” and second, the refusal by both the Principal and the Superintendent “to accommodate [their] request to move [Xander] to another teacher.” Parents allege that these two individuals were dismissive of and unresponsive to their concerns.

During the Conference Call that took place on December 1, 2016, Parents expressed concern that should their son not be treated well by his teacher, he may shut down, and this would impede his progress in speech. They clarified that they are no longer seeking to have Xander assigned to a different teacher.<sup>8</sup> They also explained that they do not believe he needs accommodations or services in addition to the one 30-minute session per week of speech he receives pursuant to his accepted IEP. Through the BSEA, Parents seek to have the Principal and the Superintendent reprimanded for their refusal to give Parents a say in their son’s education.

Taking as true Parents allegations, as I must to evaluate a Motion to Dismiss,<sup>9</sup> I am unable to ascertain a claim properly within the jurisdiction of the BSEA. Even if the facts are exactly as Parents describe them, Parents have not alleged that the refusal of the Principal or the Superintendent to assign Xander to a different teacher impacted his ability to access FAPE or to make effective progress. They have not, in fact, made a single allegation concerning Xander’s “eligibility, evaluation, placement, IEP, provision of special education in accordance with state

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<sup>7</sup>BSEA #10-6783 (Berman 2010).

<sup>8</sup>During the Conference Call held on December 1, 2016, Parents expressed their belief that it would be detrimental to reassign Xander to a different teacher at this point in the school year. Because they did not withdraw this claim formally, I address it below.

<sup>9</sup>*Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. at 407.

and federal law, or procedural protections of state and federal law.”<sup>10</sup> Furthermore, even if it were appropriate given the facts of the case, the relief Parents seek – a rebuke of school officials for their failure to accede to Parents’ demand for a general education teacher other than the one to whom their son was assigned – is beyond the scope of BSEA jurisdiction.

## CONCLUSION

Upon consideration of Mendon-Upland Regional School District’s Motion to Dismiss and the arguments of the Parties, I find that the allegations raised, and relief requested, by the Parents fall outside of the scope of the BSEA’s jurisdiction.

## **ORDER**

The District’s Motion to Dismiss is hereby ALLOWED.

The Hearing has been cancelled, and the matter is hereby DISMISSED.

By the Hearing Officer:

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Amy M. Reichbach  
Dated: December 5, 2016

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<sup>10</sup> 603 CMR 28.08(3)(a).