

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

In Re: Student v.
Hamilton-Wenham Regional School District

BSEA# 1707353

**Ruling on Hamilton-Wenham Regional School District's Partial Motion to Dismiss
Parents' Revised Counter Claim**

Following a second Pre-hearing Conference convened on October 12, 2017 at Parents' request, a Corrected Post Pre-Hearing Order was issued on October 19, 2017. The Order delineated the Parties' positions and clarified the issues for Hearing, among other Orders. I note that the Hearing Issues¹ were submitted in writing by Parents' Attorney who has been a zealous advocate for Student's position. Parents' Attorney had since withdrawn as counsel of record. In pertinent part, the aforementioned Order instructed the Parties as follows:

1. The Parties shall submit a list of the schools they are considering for Student by the close of business on October 19, 2017.
2. Parents shall, by the close of business on October 30, 2017, submit the list of outstanding issues for Hearing from among those listed and presented at the Pre-hearing Conference.
3. The deadline to supplement the exhibits and witness lists relevant to the issues is the close of business on November 21, 2017.
4. The Hearing will be held on November 28 and 29, 2017 at 10:00 a.m. at the Offices of DALA/BSEA, One Congress St., 11th floor, Boston, MA. If Parents intend to secure successor counsel, they shall do so well in advance of the aforementioned Hearing dates, as no further postponements of the Hearing will be granted.

¹ Parents' Issues for Hearing as submitted by then counsel were:

- A. [Student] requires a placement in a non-therapeutic school and referral packages from the District to apply to these schools, but [the] District sends documents indicating that he needs a therapeutic school. (Put another way, the rejected IEPs are not reasonably calculated to provide Student with a FAPE in the LRE appropriate to his needs).
- B. Parents' consent to distribution of documents to possible placements.
- C. Parental participation at team meetings.
- D. Tutoring while awaiting placement.
- E. [Student's] bullying and District's negligence in the way it was handled[.] (Those involved are continuing to target [Student].)

The Corrected Post Pre-Hearing Order of October 19, 2017, reflected understandings reached by the Parties.²

On October 30, 2017 Parents submitted a document reflecting *their* understanding of the issues for Hearing, namely:

1. Provide whatever accommodations necessary to allow Student to continue with his education, and support placement, chosen by [P]arent[s].
2. Pay for [Student] to attend a school adept at instructing students with language- based learning disabilities and executive function disorders; a school that does not contain the same group of students who bullied [Student], and is relatively close to home. A school that will not further stigmatize and isolate [Student], placing him with like peers.
3. Reimbursements, as previously outlined, for: interim educational programs, counseling, speech-therapy, testing, counseling services, tutoring and ongoing treatments with healing³.

Additionally, the record contains the issues delineated by Parents' former attorney as noted in the Corrected Post Pre-hearing Order, and a subsequent letter by Parents received on October 30, 2017.

² The Understandings of the Parties were:

1. Beverly Montgomery and Leslie Chapdlaine will meet on Monday October 16, 2017 at 10:00 a.m.
2. HW will include the standard referral letter, the IEP to be developed at the upcoming Team meeting and Beverly Montgomery's evaluation report in its referral packet to the private special education schools to which Parents consent. Parents intend to include the new IEP to be developed, Kathy Mosca's report, Beverly Montgomery and if they so choose, Leslie Chapdlaine's report. Parents further agree to complete any other forms required in the admission process to any private, charter or virtual school of their choice.
3. Parents will request advancement of Student's Team meeting currently scheduled for November. The Team meeting may occur at any time following the meeting between the two speech and language pathologists stated in #1. The Team meeting may convene on Thursday October 19, 2017 from 10:00 a.m. to 10:00 a.m. The Parties are advised to use the time productively. If the Team convenes on that day, HW will proffer its IEP by the close of business on October 23, 2017.
4. Upon completion of the proper forms, HW agrees to reimburse Parents for up to 10 hours a week of tutoring at the library with a licensed teacher. HW's agreement to refund Parents for tutoring is limited and intended for a short period of time through the Hearing in November 2017.

It was later brought to this Hearing Officer's attention that Beverly Montgomery and Leslie Chapdlaine did not meet on Monday October 16, 2017, as agreed, due to additional restrictions imposed by Parents which were not part of the Understanding of the Parties. At all times during the Pre-hearing conference it was contemplated that the two experts would meet alone but Parents later decided that one Parent had to be present and the meeting, and the meeting was canceled.

³ This Hearing Officer does not understand what "ongoing treatments with healing" means. Parents must explain what they mean by this by November 22, 2017.

On November 9, 2017, Hamilton-Wenham Regional School District (HW) filed a Partial Motion to Dismiss Parents' Revised Counter Claim pursuant to Rule XVII of the *Hearing Rules for Special Education Appeals*.⁴

The Parties participated in a telephone conference call on November 14, 2017 during which noon on November 17, 2017, was established as the deadline for Parents to request subpoenas and submit a response to HW's Partial Motion to Dismiss.

During the November 14, 2017 call Parents inquired about Discovery and were informed that Discovery had been exchanged by Attorneys and was deemed completed. Parents were instructed to request the documents submitted by HW from their former attorney.

Parents' Response to HW's Motion for Partial Dismissal was received on Friday November 17, 2017. In it, Parents requested that both issues sought to be dismissed by HW remain open as Parents' former attorney lacked authority to enter into any agreement on their behalf. Parents requested that the issue regarding alleged denial of FAPE to Student and Parents' consent to distribution of documents to possible placements remain open.

Also on November 17, 2017, HW submitted a "Motion to File Counter Claim to Parents' Counter Claim".⁵

On Monday November 20, 2017, HW filed a Hearing Request raising the same issues as in its Motion to File Counter Claim, and also requested to Consolidate its Hearing Request with BSEA #1707353. Since the content of the Motion to File the Counter Claim and HW's Hearing Request are in essence the same, the former is deemed moot.

This Ruling is issued in consideration of the Parties' submissions, including previous relevant submissions by Parents' former attorneys.

I. Facts

The facts delineated here have been lifted from Parents' Hearing Request and are presumed to be true for purposes of this motion only.

1. Student is a thirteen year old IDEA eligible student who first received special education services through HW in 2007 when he was three years old.
2. Parents assert that starting in fourth grade (2014) Student was subjected to a series of bullying incidents by peers, teachers, school administrators, coaches and the parents of peers, both in school and outside of school, including during recreational programs.

⁴ It appears that this Motion may have been mistitled.

⁵ It appears that this Motion also may have been mistitled.

3. In 2015, Dr. Peter Chubinsky, a psychiatrist, diagnosed Student with Post-traumatic Stress Disorder (PTSD) “secondary to bullying misdirected [a]nd ineffective [i]ntervention and [l]ack of emotional support by [the] school”.

4. In May 2015, Parents withdrew Student from his program at HW in an attempt to protect him from the effects of bullying and stigmatization. According to Parents, HW offered Student tutoring for the remainder of his fourth grade and promoted him to fifth grade.

5. During the fall of 2015, Parents enrolled Student at the Cutler School, a private regular education school in Rowley, Massachusetts where additional incidents allegedly exacerbated his anxiety and distrust of adults, resulting in Parents withdrawing him in November of 2015.

6. Parents immediately secured Catherine Mosca, a private tutor, to homeschool Student. Student also began receiving counseling services from Kathy Mullin, LICSW.

6. In February of 2016, Parents filed a complaint with the Office of Civil Rights (OCR) which investigation is ongoing, according to Parents.

7. In March of 2016, Parents enrolled Student at St. Johns Evangelist School in Beverly but again, more of the same incidents that had occurred before caused Parents to withdraw him from this school.

8. On March 20, 2016 HW forwarded a Team meeting invitation to Parents calling for a Team meeting on May 27, 2016. Parents requested that the date be changed but the Team was convened without them and an IEP was issued which IEP Parents rejected in full. Parents however, acquiesced to HW’s request to have Student undergo a neuropsychological evaluation.

9. In September 2016, HW agreed to offer Student tutoring through Hannah Gasenberg who had been a teacher at Landmark School in Beverly, MA. There was disagreement between Parents and the tutor over the tutor’s choice of reading assignment.

10. Parents and Ms. Harris of HW met on or about September 30, 2016, at which time they agreed that due to Student’s unique circumstances he required language-based instruction in a small group setting. The Parties agreed to have HW forward a referral packet to Landmark School inclusive of Student’s 11/26/2013 to 11/25/2014 IEP (Student’s last agreed upon IEP), and the report of the upcoming neuropsychological evaluation.

11. Parents disagreed with the results of the neuropsychological evaluation and specifically with the evaluator’s conclusion that Student presented with a “social pragmatic communication disorder”. Parents requested that the Team reconvene.

12. Student's Team met on November 14, 2016 and the school-based Team disagreed with Parents' opinions and input. HW offered Student a partial inclusion IEP which instructed Student outside the classroom for up to 25% of the day, and proposed placement at a school with some of the same students who had previously bullied Student.

13. On page 2 of what appears to be the N1 form, Kristen Spanger Flaherty, HW's Secondary Special Education Coordinator, noted that HW

...made clear that the district would certainly support a referral to an outside program which could meet Student's needs. The district maintains that position whether it be another public school program, approved private school or collaborative program. The proposed placement has been identified as the district MS until the Team is able to identify another program or placement agreeable to both the district and the family. (See pages 5 and 6 of Parents Hearing Request).

14. Dr. Chubinsky had recommended that Student not return to HW. He has also recommended that Student be tutored until a suitable placement be found.

15. In December 2016, Student's tutor, Ms. Gasenberg, stopped tutoring Student. Arrangements would be made by HW for a replacement tutor to initiate tutoring in January 2017. Parents requested that tutoring start earlier.

16. The parties participated in a BSEA mediation on January 25, 2017. Their agreement calls for Parents to investigate and apply to TECCA (a virtual school), HW to reimburse Parents for counseling, testing and speech therapy services, and further that "if and when parents identify a private placement for [Student], the Parents will notify the BSEA to schedule a mediation to develop a plan to facilitate the placement". Parents later decided against TECCA because they believed it would be too isolating for Student and instead requested that HW continue to offer tutoring services to Student.

17. On March 7, 2017, Parents filed a Hearing Request⁶ with the BSEA seeking that HW

- 1) Provide whatever accommodations are necessary to allow [Student] to continue with his education while he recovers from his PTSD, including tutoring and extended school-year services, such as participation in the Landmark School's summer camp;
- 2) Pay for [Student] to attend a school adept at instructing students with language-based learning disabilities and executive-functioning disorders; a school capable of dealing with Student's fragile emotional state; a school that does not contain the same group of students who

⁶ HW had previously filed a Hearing Request on February 7, 2017 on related issues which request was withdrawn on September 13, 2017. See BSEA # 1705083.

bullied [Student] and a school that is relatively close to [Student's] home, and the parents who have worked so hard to support him during these extremely difficult years, such as the Landmark School;

3) Reimburse [Parents] for:

- a) [Student's] counseling with Cathy Mullin, LICSW;
- b) [Student's] speech-therapy and speech and language testing;
- c) [Student's] counseling with Dr. Michael Tsappis and Jennifer Tsappis;
- d) [Student's] tutoring with Catherine Mosca;
- f) [Student's] testing and treatment with Dr. Chubinsky;
- g) [Parents'] attorney's fees and costs.

4) Award any other relief that is appropriate.

18. Parents' counsel withdrew his representation on October 16, 2017 after which on October 23, 2017, Parents wrote to the BSEA stating their awareness of HW's agreement to fund a placement for Student in September 2017 (including Landmark) or other placements. Parents however, believed that "reports and stigma have continued to be the issue" noting that they had been "coaxed into providing said reports, stating we should be 'transparent' and so they were all, previously distributed to Landmark, and others; i.e., IEP dated 11/14/2016,...neuro psych dated 8/2016 as well as SLP dated 7/2017. We have spent over a year undoing this constructed diagnosis that plagued [Student]." Parents' letter further raised concern over the lack of tutoring offered by HW and a desire that Student be educated amongst peers in an educational setting. Parents further acknowledged understanding of all other terms, Orders and deadlines memorialized in a Corrected Post-Pre-hearing Order issued on October 19, 2017.

19. Parents wrote again on October 30, 2017, further clarifying their issues for Hearing regarding Student's bullying and stating their belief that the manner in which HW handled those "set the stage" and "gave permission" for the abuse to continue against Student and the family. Parents allege that HW "constructed reports, and unwarranted diagnosis" prevented Student from attending any educational program, damaged his reputation and isolated Student. As remedies Parents sought for HWSD to:

- 1) Provide whatever accommodations necessary to allow [Student] to continue with his education and support placement, chosen by parent[s].
- 2) Pay for [Student] to attend a school adept at instructing students with language-based learning disabilities and executive function disorders; a school that does not contain the same group of students who bullied [Student], and is relatively close to home. A school that will not further stigmatize and isolate [Student], placing him with like peers.
- 3) Reimbursements, as previously outlined, for: interim educational programs, counseling, speech-therapy, testing, counseling services, tutoring and ongoing treatments with healing.

II. Legal Standards

Pursuant to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3) and Rule XVII A and B of the BSEA *Hearing Rules for Special Education Appeals*, a hearing officer may allow a motion to dismiss if the party requesting the hearing fails to state a claim upon 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.”⁷ 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.”⁸ 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). . .”⁹

Here, BSEA jurisdiction is grounded in the IDEA¹⁰ and M.G.L. c.71B¹¹, and Section 504 of the Rehabilitation Act of 1973, as the matter involves a dispute regarding the alleged denial of a free, appropriate, public education to Student. In order to withstand a motion to dismiss, the hearing officer must be able to grant relief consistent with those statutes and regulations. See *Calderon-Ortiz v. LaBoy-Alvarado*, 300F.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 (2005). However, if the facts raised by the party opposing the motion to dismiss (herein Parents) raise even the plausibility of a viable claim giving rise to some form of relief under any of the aforementioned statutes, the case may not be dismissed. See, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).¹² With this guidance I turn to the case at bar.

⁷ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

⁸ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

⁹ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

¹⁰ The IDEA expressly grants special education Hearing Officers jurisdiction over issues relating to “the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child”. 20 U.S.C. §1415(b)(6)(A).

¹¹ Massachusetts law, grants the BSEA jurisdiction to hold adjudicatory hearings to resolve “disputes between and among parents, school districts, private schools and state agencies concerning: (i) any matter relating to the identification, evaluation, education program or educational placement of a child with a disability or the provision of a free and appropriate public education to the child arising under this chapter and regulations promulgated hereunder or under the Individuals with Disabilities Education Act, 20 U.S.C. section 1400 et seq., and its regulations; or (ii) a student’s rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. section 794, and its regulations. M.G.L. ch. 71B, § 2A(a).

¹² Denying dismissal if “accepting as true all well-pleaded factual averments and indulging all reasonable inference in the plaintiff’s favor...recovery can be justified under any applicable legal theory”. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).

III. Discussion:

Parents' Response to HW's Motion for Partial Dismissal was received on Friday November 17, 2017. In it Parents requested that both issues sought to be dismissed by HW remain viable as Parents' former attorney lacked authority to enter into any agreement on their behalf.

Here, HW seeks partial dismissal of Parents' claims, specifically issues A and B of the issues submitted by Parents' former attorney. Parents in turn request to be heard on those issues (the alleged denial of FAPE to Student and Parents' consent to distribution of documents to possible placements).

Looking at HW's request in the light most favorable to Parents, and in consideration of the Hearing Request filed this day by HW, I find that both Parents and HW raise similar issues and that Parents may plausibly have a cause of action. Therefore, Parents may proceed with all the claims delineated in their former Attorney's statement of Hearing Issues. I note that careful consideration of Parents' later submissions reveal nothing different from the issues initially raised by former counsel. As such, HW's Motion to Dismiss is **DENIED**.

Regarding HW's November 20, 2017 Hearing Request, HW argued that to be able to proceed to Juvenile Court to secure a determination regarding Student's truancy and obtain the Court's assistance in securing Student's return to school, it was necessary for the BSEA to take testimony on Student's entitlement to a FAPE and make a determination as to the appropriateness of Student's proposed IEP.

With respect to HW's request to consolidate, since HW's Hearing Request and Parents' Hearing Request involve the same parties, substantially the same issues/subject-matter (that is provision of FAPE to Student, i.e., IEP and placement) and common questions of law, HW's request to consolidate is **GRANTED**. Both matters will be heard together.

ORDERS:

1. HW's Partial Motion to Dismiss is **DENIED**.
2. HW's Request to Consolidate is **GRANTED**

So Ordered By the Hearing Officer,

Rosa I. Figueroa
Dated: November 20, 2017