

**COMMONWEALTH OF MASSACHUSETTS**  
**BUREAU OF SPECIAL EDUCATION APPEALS**

**Student v. Minuteman Regional Vocational Technical School**

**BSEA # 1710814**

**RULING ON MINUTEMAN REGIONAL VOCATIONAL TECHNICAL SCHOOL'S  
MOTION TO DISMISS**

This case involves a 19-year old special education student (hereinafter, Student) who is enrolled in the Nashoba Regional School District (hereinafter, Nashoba) and received a certificate of completion from Nashoba in June 2016. Student currently receives transitional/lifeskills/vocational services pursuant to an IEP provided by Nashoba. Student resides within a town that is a member of the Minuteman Regional Vocational Technical School District (hereinafter, Minuteman)

Student's Parents, (hereinafter, Parents) filed a hearing request after Minuteman denied Student admission to its culinary arts program. Parents claim that the vocational services available at Minuteman are far superior to those offered by Nashoba and that because Student lives within the Minuteman district, Minuteman is obligated to provide her with special education services. Although they did not specifically raise claims under section 504, Parents referenced the BSEA's jurisdiction over 504 claims.

Minuteman filed a Motion to Dismiss, arguing that the BSEA does not have jurisdiction in this dispute because Minuteman does not have programmatic or fiscal responsibility for Student. It states that Minuteman has no obligations under the IDEA or M.G.L. c. 71B because Student is not and has never been enrolled at Minuteman. Further, it claims that the BSEA does not have jurisdiction over Minuteman's policies and practices, including its admissions policies, and that its admissions policy is non-discriminatory.

Parents opposed the Motion to Dismiss.

**FACTS<sup>1</sup>**

For purposes of this Ruling the following assertions are considered to be true and construed in favor of the party opposing dismissal, namely, Student.

1. Student is a nineteen year-old student with disabilities. The town in which she resides is a member of both the Nashoba Regional School District and Minuteman.
2. Student has been diagnosed with Pervasive Developmental Disorder.

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<sup>1</sup> These factual findings are made for purposes of this ruling only.

3. Student's Mother has a Limited Guardianship over her.
4. Student is enrolled at Nashoba.
5. Student received a certificate of completion from Nashoba in June 2016. She currently receives transition, lifeskills, and vocational services through an IEP provided by Nashoba.
6. Student has a strong interest in the culinary arts and desires to become a baker/restaurant owner. She has already attained skills in the area of culinary arts and has successfully worked in local restaurants and bakeries.
7. Student requires additional training and job opportunities to assist her in achieving her vocational goals and Nashoba has been unable to provide her with the type and degree of training and vocational work opportunities she requires.
8. Minuteman Career and Technical High School District is a public vocational and technical high school serving grades nine through twelve, inclusive, and organized pursuant to M.G.L. ch. 74.
9. Student's town of residence<sup>2</sup> is a member town of Minuteman.
10. Minuteman affords its students culinary training and vocational opportunities that are superior to those offered to Student at Nashoba. Minuteman offers a culinary arts program for in district eligible students that provides on-site training in baking and cooking. Its baking facilities are on the premises and provide more technically current equipment. It affords placement opportunities for students to work in bakeries, restaurants, and similar businesses to supplement their school-based vocational training.
11. Although Student lives in a member town, Minuteman has refused to accept Student.
12. When Parents approached Minuteman about enrolling Student in November 2016, its Director of Admissions stated that Minuteman had no obligation to provide services to students who have received a certificate of completion while they were not already enrolled at Minuteman.
13. Parents followed up on their query about enrolling Student at Minuteman with Minuteman's Director of Special Education this year, and were not provided with any legal authority for Minuteman's position.
14. In March 2017, Student, through her parents, applied on-line to become a student at Minuteman. On April 27, 2017, Minuteman's Director of Admissions notified Parents that Student would not be enrolled at Minuteman because she had already completed the twelfth

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<sup>2</sup> The town is not included in this Ruling to protect Student's privacy.

grade at Nashoba and Minuteman’s program was for students in grades nine through twelve. Therefore, Student was not eligible for admission to Minuteman. On May 5, 2017, after a further follow up request from Parents, the Director of Admissions failed to offer an explanation for denying admission to Student and did not provide Parents with the appeals forms for Parents to file an appeal of Minuteman’s refusal to enroll Student.

15. Minuteman’s Director of Admissions informed Father that Minuteman has provided transition/vocational training to post-secondary students who were previously enrolled at Minuteman.
16. The Department of Elementary and Secondary Education approved Minuteman’s Admission Policy in 2013.
17. Minuteman’s Admissions Policy indicates that “[a]ny 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, or 11<sup>th</sup> grade student who is a resident of the Minuteman Regional Vocational Technical School District (Acton, Arlington, Belmont, Bolton, Boxborough, Carlisle, Concord, Dover, Lancaster, Lexington, Lincoln, Needham, Stow, Sudbury, Wayland, and Weston<sup>3</sup>) who expects to be promoted into the grade they seek to enter by their local district is eligible to apply for fall admission or admission during the school year subject to availability of openings to Minuteman High School. Resident students will be evaluated using the criteria contained in this Admissions Policy. Priority for admission is given to [Minuteman member district] residents according to the District Agreement.”
18. Minuteman’s Amended Regional Agreement was approved by DESE on March 11, 2016.

## **FINDINGS AND CONCLUSIONS**

### **1. Standard for Ruling on A 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>4</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>5</sup> These “[f]actual allegations must be enough to raise a right to relief above the

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<sup>3</sup> Some of these towns are no longer part of the Minuteman district.

<sup>4</sup> *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008)

<sup>5</sup> *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . .”<sup>6</sup>

In determining whether to dismiss a claim, a hearing officer must consider as true all facts alleged by the party opposing dismissal. The hearing officer should not dismiss the case if the facts alleged, if proven, would entitle the non-moving party to relief that the BSEA has authority to grant. *Caleron-Ortiz v. LaBoy-Alvarado*, 300 F.3d 60 (1<sup>st</sup> Cir. 2002); *Ocasio-Hernandez v. Fortunato-Burset*, 640 F.3d. 1 (1<sup>st</sup> Cir. 2011). A motion to dismiss will be denied if “accepting as true 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, supra*. The factual allegations must be sufficient to “raise a right to relief above a speculative level on the assumption that the allegations in the complaint are true (even if doubtful in fact.)” *Bell Atlantic v. Twombly*, 550 U.S. 554, 555 (2007).

The entire case may be dismissed only if the Hearing Officer cannot grant any relief under federal<sup>7</sup> or state<sup>8</sup> special education statutes, or §504 of the Rehabilitation Act.<sup>9</sup> See *Calderon-Ortiz, supra*; *Whitinsville Plaza Inc. v. Kotseas*, 378 Mass. 85, 89 (1979); *Nader v. Citron*, 372 Mass. 96, 98 (1977); *Norfolk County Agricultural School*, 45 IDELR, 26 (2005). Conversely, if the opposing party’s allegations raise the plausibility of a viable claim that may give rise to some form of relief cognizable under any one or more of these statutory provisions, the matter should not be dismissed. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).

Particular claims must be dismissed, however, on jurisdictional grounds, if they do not arise under the statutes referred to above. Unlike a court with general jurisdiction, the BSEA may consider only those claims for which enabling statutes and regulations provide express authority. See *Globe Newspaper Co. v. Beacon Hill Architectural Comm.*, 421 Mass. 570 (1996). Thus, MGL c. 71B§2A, the current Massachusetts enabling statute for the BSEA, limits its jurisdiction to the following:

[Resolution of] 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...and its regulations; or (ii) a student’s rights under Section 504 of the Rehabilitation Act of 1973, 29 USC section 794, and its regulations.*”

(Emphasis supplied).

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<sup>6</sup> *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

<sup>7</sup> Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et. seq*

<sup>8</sup> M.G.L. 71B

<sup>9</sup> 29 U.S.C. §794

The state special education regulations implementing MGL c. 71B, 603 CMR 28.00 *et seq.*, track the applicable statutory language as follows:

(3) Bureau of Special Education Appeals: Jurisdiction. In order to provide for the resolution of differences of opinion among school districts, private schools, parents and state agencies, the [BSEA], pursuant to MGL c. 71B, §2A, shall conduct mediations and hearings to resolve such disputes...

(a) A parent or a school district...may request mediation and/or a hearing...on any matter concerning the eligibility, evaluation, placement, IEP provision or special education in accordance with state or federal law, or procedural protections of state and federal law for students with disabilities...[or] on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act...

603 CMR 28.08(3).

The above-referenced Massachusetts statute and regulations are consistent with the pertinent federal provisions. The IDEA at 20 USC §1415(B)(6) and corresponding regulations at 34 CFR §§300.500-517, also permit parents and/or school districts to request mediations and/or due process hearings “relating to the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE to the child.” 34 CFR §300.507(a)(1).

With this framework in mind, I turn to the facts and arguments before me.

First, Minuteman argues that Student’s claims must be dismissed because the BSEA has no jurisdiction over Minuteman in the present circumstances, since Minuteman has neither programmatic nor fiscal responsibility for Student. Parents’ recitation of the facts supports this argument. Student is enrolled at Nashoba. Student received a certificate of completion from Nashoba in June 2016, and currently receives transitional/lifeskills training from Nashoba pursuant to an IEP. Minuteman is a program school and is governed by the rules and regulations pertaining to vocational schools, M.G.L. c. 74. Massachusetts special education regulations state that school districts are programmatically and financially responsible for eligible students based on residency and *enrollment* [emphasis supplied]. 603 C.M.R. 28.10(1). Program schools, such as Minuteman, “[S]hall have programmatic and financial responsibility for *enrolled students* [emphasis added], subject only to specific finance provisions of any pertinent state law related to the program school.” Although Student lives within a district that is a member of the Minuteman school district, Student is not enrolled at Minuteman, and thus, Minuteman does not have programmatic and/or financial responsibility for the provision of special education services to Student. Nashoba, Student’s local education agency (LEA), where Student is enrolled, and the district in which Student resides, is obligated to provide Student’s special education services and provides her services pursuant to an IEP<sup>10</sup>. Minuteman does not have any obligations with respect to Student’s special education services.

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<sup>10</sup> Given that one of the parents is also acting as the attorney in this matter, the BSEA did not seek to join Nashoba sua sponte. Minuteman filed a conditional request that Nashoba be joined in the event that the Motion to Dismiss

Minuteman next argues that the BSEA does not have jurisdiction over Minuteman's policies and practices which are approved by the Massachusetts Department of Elementary and Secondary Education (DESE). M.G.L. c. 74 sets forth the rules and regulations governing vocational schools in Massachusetts. All policies, including admissions policies, utilized by vocational schools in Massachusetts must be approved by the Commissioner of DESE. Minuteman's Admissions Policy, effective January 2014, was approved by DESE in 2013. Additionally, DESE approved Minuteman's Regional Agreement and found it to be in compliance with Massachusetts law on March 11, 2016. The BSEA does not have jurisdiction over the legality of DESE approved policies and practices of vocational schools that do not involve the provision of a free appropriate public education to an enrolled student. There is nothing within the jurisdiction of the BSEA recited *supra* which would provide a hearing officer with the authority to determine the legality of vocational schools admissions policy unless it were found to be in conflict with the IDEA, 34 CFR §§300.500-517, M.G.L. ch. 71B, 603 CMR 28.00, or section 504 and 34 CFR § 104 as they relate to the provision of FAPE to a particular student.

Minuteman's Admissions Policy states that "an admission process is necessary in vocational technical schools where space is a limiting factor ... Therefore, a selection process is necessary." See Minuteman's Exhibit C. The Eligibility section of the policy states, "Any 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, or 11<sup>th</sup> grade student who is a resident of the [Minuteman district] who expects to be promoted into the grade they seek to enter by their local district is eligible to apply" for admission to Minuteman. (See Minuteman's Exhibit C.) Minuteman argues that even if the BSEA had jurisdiction over Minuteman's admission policies, its policy is non-discriminatory.

To the extent that Parents have raised a claim under § 504<sup>11</sup>, and to the extent that the BSEA has jurisdiction over a discrimination claim (as opposed to a claim regarding the denial of FAPE pursuant to Section 504) Parents are not able to make a prima facie showing that Minuteman's admissions policy discriminated against Student.

Section 504 of the Rehabilitation Act of 1973, 29 USC §794(a), is an anti-discrimination statute that provides that "no otherwise qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance." *Id.*, 34 CFR §104.4(b)(1). The BSEA is authorized by MGL c. 71B §2A and 603 CMR 28.08(3)(a) to adjudicate any issue involving the denial of a free, appropriate public education guaranteed by §504 of the Rehabilitation Act. To prevail on a claim under §504 in the public education context (in which we can assume the receipt of Federal funding), a parent must show that the student has a qualifying "handicap," that he or she was denied access to, or the benefit of, a program or activity of the public entity for which he or she is "otherwise qualified," on an equal basis to a person without a disability, and that such denial was based on his or her disability. *Id.* See also *In Re: Lincoln-Sudbury R.S.D. & Wallis*, 22 MSER 47, 56 (Byrne, 2016) Parents are not able to show that Student was otherwise qualified as she had completed all grades served by Minuteman

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was denied which Parents assented to. It is not necessary to rule upon the Motion to Join Nashoba, because the Motion to Dismiss is Allowed.

<sup>11</sup> Parents' hearing request does not specify a claim under § 504. It simply references § 504 in its recitation of the BSEA's jurisdiction.

and was not an enrolled Student, and thus not entitled to receive any services from Minuteman. Additionally, the facts asserted by Parents demonstrate that Student was not denied access to Minuteman due to her disability, but due to having received a certificate of completion (completing grades nine through twelve). To the extent that Parents sought to claim that Student has been denied a FAPE pursuant to § 504, I have already determined that Minuteman has no obligation to provide Student with a FAPE under the IDEA, and for the same reason, does not have any obligation to provide Student with a FAPE pursuant to § 504.

Parents argue that Minuteman has a responsibility to provide transition services to Student until she has reached the age of twenty two regardless of its admissions policy for younger students. Parents cite to various provisions of the state special education regulations, including 603 C.M.R. 28.06(4), which describes districts' obligations to older children. Their argument ignores 603 C.M.R. 28.10(1). Minuteman is a program school in which Student is not enrolled. Thus, despite the fact that Student resides within a member town, Minuteman is not obligated to provide special education services to Student. Nashoba, Student's LEA, and the district in which she is enrolled is obligated to provide her services that comply with state and federal special education law and regulations.

Because Parents have not been able to state a claim on which relief can be granted by the BSEA under state or federal special education law or regulation or under § 504, this matter is Dismissed *with Prejudice*.

### **ORDER**

*Minuteman's Motion to Dismiss* is ALLOWED.

By the Hearing Officer

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Catherine M. Putney-Yaceshyn

Dated: August 4, 2017