

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

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

BSEA #1800970

**RULING ON SCHOOL DISTRICT'S MOTION TO DISMISS SPECIFIC CLAIMS  
ASSERTED IN STUDENT'S AMENDED REQUEST FOR HEARING**

This matter comes before the Hearing Officer on the Motion of the Worcester Public Schools (hereinafter "the District") to Dismiss Specific Claims Asserted in Student's Amended Request for Hearing Request ("Partial Motion to Dismiss" or "Motion"). The Partial Motion to Dismiss was filed on October 27, 2017. Student filed an Objection to the Motion on November 3, 2017. The Parties argued the Motion at a Pre-Hearing Conference on November 6, 2017; these arguments were recorded by a stenographer, who is in the process of producing a transcript. For the reasons set forth below, the District's Partial Motion to Dismiss is hereby DENIED in part and ALLOWED in part.

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

On July 31, 2017, Fernando filed a *Request for Expedited Hearing* with the Bureau of Special Education Appeals ("BSEA") against the Worcester Public Schools ("Worcester" or "the District") alleging that although he had enrolled in the District on March 29, 2017 at the age of eighteen (18), with an Individualized Education Program (IEP) from the Commonwealth of Puerto Rico, and Spanish is the primary language of both Fernando and his guardian, the District had failed to obtain Fernando's consent to continue a special education program for him; had provided an Evaluation Consent Form in English to his guardian only; and refused to complete its evaluation of him despite the return of the signed consent form on April 14, 2017. As a result of its refusal to complete timely evaluations and convene a Team meeting for the purpose of executing Fernando's choice to share decision making with his guardian, he alleged, Worcester had denied him a Free Appropriate Public Education (FAPE) under federal and state law. Furthermore, Fernando argued that the special education services that he was receiving at the time were sufficiently inadequate that harm to him was likely, and his educational program had been interrupted, such that his *Hearing Request* required expedited status. Among other things, Fernando requested findings and orders regarding procedural violations; disability discrimination; execution of his choice with respect to special education decision-making, completion of his reevaluation, and completion of his IEP; communications in the family's primary language; and compensatory services. He also requested "[a]ny and all other relief deemed appropriate pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., 34 C.F.R. Part 300, Chapter 766 of the Acts of 1972, M.G.L. c. 71B, 603 C.M.R. 28.00 et seq., Section 504 of the Rehabilitation Act of 1972, 29 U.S.C. 794, 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq."

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

On August 1, 2017, Worcester filed an *Opposition to Student's Request for Expedited Hearing*, and the BSEA sent a Notice of Hearing to the parties in which it denied Fernando's request for expedited status and scheduled the hearing for September 5, 2017. On August 2, 2017, Fernando filed a *Response* renewing his request for expedited status, and the District filed its own response reiterating its opposition. A Conference Call took place August 3, 2017, during which the parties argued their positions with respect to expedited status. It was determined that the matter would proceed on a non-expedited track as originally scheduled, and the District agreed to conduct Fernando's remaining assessments during the extended school year program rather than wait until school resumed in the fall.

On August 3, the District filed a *Motion to Continue* the hearing, to which Fernando filed an Opposition on August 10, 2017.<sup>2</sup> On August 14, 2017, Fernando requested an emergency conference call, alleging that the District had not timely communicated regarding the scheduling of his assessments; the same day, the District filed an opposition to that request, arguing that it had offered a time and location and attempted to arrange for additional testing times but was limited in being able to locate and arrange for bilingual assessments. A Conference Call took place on August 16, 2017 to address these issues.

Also on August 16, 2017, the District filed its *Response to Parent's Hearing Request*, arguing that it had properly assigned Fernando to the Life Skills Program at his neighborhood school, consistent with his IEP from Puerto Rico, upon enrollment in March 2017; sought and obtained his guardian's consent to conduct a comprehensive special educational assessment shortly thereafter; and proposed a timely Team meeting. It contended that any delay in completion of assessments was due to the fact that Fernando stopped attending school and declined to participate in the summer program.

On August 17, 2017, the undersigned Hearing Officer issued an order postponing the hearing to October 30, 2017, with Parent's agreement, to permit the District to complete its assessments of Fernando. A Pre-Hearing Conference was scheduled for September 28, 2017. At the request of the parties, the Pre-Hearing was later postponed to October 30, 2017 and the hearing postponed to December 7 and 8, 2017.

On October 10, 2017, Fernando filed a *Hearing Request Amendment* in which he alleged that Worcester had failed to offer him an IEP that is tailored to both his unique special education and language needs and is reasonably calculated to confer meaningful educational benefit; that the District failed to provide him with a FAPE during the 2017-18 school year; and that Worcester had violated his rights under the Americans with Disabilities Act of 1990 (ADA); Title VI of the Civil Rights Act of 1965 (ADA); and the Equal Educational Opportunity Act of 1974 (EEOA). Among other things, Fernando requested specific "tailored supports integrating his special and language needs that will enable him to access the curriculum, including, but not limited to . . . appropriate bilingual Spanish-English instruction. . . in all content areas by a

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<sup>2</sup> Also on this date, Worcester Public Schools (Worcester or "the District") filed an assented-to *Motion for Extension of Time to File Response to Hearing Request*. This Motion was allowed, and the District filed its *Response* on August 16, 2017.

qualified Spanish-speaking special education instructor . . . [and a] bilingual Spanish-English 1-1 aide.”<sup>3</sup>

On October 20, 2017, the District filed its *Response* to Fernando’s *Hearing Request Amendment*, and on October 27, 2017, it filed the instant *Motion to Dismiss Specific Claims Asserted in Student’s Amended Request for Hearing*, accompanied by a Memorandum in Support of its Motion. Worcester argued that the BSEA should dismiss Fernando’s claims involving violations of Title VI and the EEOA for lack of jurisdiction. In addition, the District asserted that many of Fernando’s claims in his *Amended Request for Hearing* “relate to Student’s objection to the sufficiency of [Worcester’s] provision of English Learner (EL) supports and services to Student at his placement in the Life Skills program at Burncoat High School,” and as such, are beyond the jurisdiction of the BSEA and should be dismissed.

On November 3, 2017, Fernando filed *Student’s Objections to Worcester Public Schools’ Motion to Dismiss Specific Claims Asserted in Student’s Amended Request for Hearing*. He contended that his special needs and his language needs are “integrated and inseparable;” that FAPE for him requires consideration of these dual needs; and that his “claim of discrimination based on his status as both an English Language Learner and as an individual with a disability is inextricably tied to his assertion of a continuing denial of FAPE.” Consequently, he argued, his Title VI and EEOA claims are blended with his claims under federal and state special education law, and the BSEA has the authority to award relief to enable the provision of a FAPE, including services that take into account his Limited English Proficient status. The parties supplemented their written submissions with oral arguments at a Motion Hearing held during the second part of the Pre-Hearing Conference, which took place on November 6, 2017.<sup>4</sup>

## DISCUSSION

### A. Standard for Ruling on Motion to Dismiss

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<sup>3</sup> Fernando also requested findings in support of, and an order that Worcester conduct, “a neuropsychological evaluation of [Fernando] by a qualified Spanish language evaluator to determine [his] unique language and learning needs.” The District, in an abundance of caution, interpreted this as a request for an Independent Educational Evaluation (IEE) and filed a *Hearing Request* of its own (BSEA #1803565) on October 20, 2017, challenging this request. On October 26, 2017, Fernando filed a *Motion to Dismiss* the District’s *Hearing Request* on the basis that he had requested a neuropsychological evaluation *by the District* as one form of relief, and had not in fact requested an IEE. After discussion and argument, the parties agreed to consolidate the two cases and defer any ruling on Fernando’s *Motion to Dismiss*.

<sup>4</sup> The Pre-Hearing Conference occurred on October 30, 2017. The parties addressed several issues, but arguments on the District’s *Partial Motion to Dismiss*, filed only one business day beforehand, were reserved. Among other things, the parties discussed the need for Fernando to amend his *Hearing Request* once more to include his guardian’s partial rejection, on October 26, 2017, of the IEP proposed by the District on September 28, 2017. Fernando filed his *Second Hearing Request Amendment* on November 3, 2017. The District filed an *Opposition to Student’s Second Hearing Request Amendment* on November 8, 2017. A telephonic motion session was held on November 15, 2017, and on the same date I issued an Order overruling Worcester’s objection and allowing the amendment.

Pursuant to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3) and Rule XVII(B) 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>5</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>6</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>7</sup>

The basis of the District’s *Partial Motion to Dismiss* is that the claims to which it objects are beyond the jurisdiction of the BSEA. First, it argues, the BSEA has no jurisdiction over Title VI and EEOA claims. Second, it asserts, to the extent Fernando seeks relief that reflects his needs, and vindicates his rights, as an English Language Learner, the BSEA may not order that relief.

#### B. BSEA Jurisdiction

The jurisdiction of the BSEA is limited to 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. . . .”<sup>8</sup>

#### C. “IDEA-Based Claims”

Earlier this year, in *Fry v. Napoleon Community Schools*, the United States Supreme Court affirmed, in the exhaustion context, that the BSEA is not deprived of jurisdiction over a particular claim by the fact that it does not explicitly allege violations of the IDEA.<sup>9</sup> More than a decade ago, in *Frazier v. Fairhaven School Committee*, the First Circuit Court of Appeals used the language “IDEA-based” to refer to those claims brought under other statutes that nevertheless require plaintiffs to “exhaust the administrative process available under the

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<sup>5</sup> *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

<sup>6</sup> *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

<sup>7</sup> *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

<sup>8</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.”

<sup>9</sup> See 137 S.Ct. 743, 755 (2017) (“examination should consider substance, not surface”)

IDEA.”<sup>10</sup> In *Fry*, the Supreme Court clarified that claims are not IDEA-based, and do not require exhaustion, “when the gravamen of the plaintiff’s suit is something other than the denial of the IDEA’s core guarantee” of FAPE.<sup>11</sup>

The *Frazier* Court discussed the rationale behind the exhaustion requirement. First, exhaustion “enables the [educational] agency to develop a factual record, to apply its expertise to the problem, to exercise its discretion, and to correct its own mistakes, and is credited with promoting accuracy, efficiency, agency autonomy, and judicial economy.”<sup>12</sup> The Court referred to the agency’s “specialized knowledge,” which, pursuant to the “IDEA’s administrative machinery,” it would be in a position to apply to the “initial evaluation of whether a disabled student is receiving a free, appropriate public education” in an IDEA-based claim.<sup>13</sup> Moreover “these administrative procedures also ensure that educational agencies will have an opportunity to correct shortcomings in a disabled student’s individualized education program.”<sup>14</sup>

Consistent with precedent, in 2012, in *In Re Xylia*, BSEA Hearing Officer Lindsay Byrne concluded that “[e]xhaustion of the IDEA’s administrative process is not required when the student is seeking solely money damages for tort like injuries not subsumed in a federal statutory claim . . . [n]or . . . where there are no factual allegations to indicate that a dispute exists concerning the individual student’s eligibility under the IDEA or Section 504 or the discharge of the School’s procedural and substantive responsibilities under the IDEA or Section 504.”<sup>15</sup>

#### D. Analysis

Based on *Fry*, whether the BSEA must hold a hearing at which a hearing officer develops a factual record and applies her expertise to the issues before her (in that context, in order to enable the plaintiffs to exhaust their claims before proceeding to court) turns on whether “the gravamen of [the] complaint charges, and seeks relief for, the denial of a FAPE.”<sup>16</sup>

By way of the jurisdictionally contested claims in the instant case, Fernando alleges that:

- a. Worcester has violated his rights under Title VI and its implementing regulations by willfully failing to inform Fernando and his guardian in Spanish of his rights, including the range of language services and other services available to support him; and by failing to take reasonable steps to provide them with a meaningful opportunity to participate in all aspects of his education by failing to translate some documents into Spanish, and by not translating other documents in a timely fashion.

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<sup>10</sup> 276 F.3d 52, 64 (1st Cir. 2002); see *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 29 (2006) (holding that exhaustion applied in a case “where the underlying claim is one of violation of the IDEA”); *Rose v. Yeaw*, 214 F.3d 206, 210 (IDEA’s exhaustion requirement is not limited to IDEA claims, as it “applies even when the suit is brought pursuant to a different statute so long as the party is seeking relief that is available under subchapter II of IDEA”).

<sup>11</sup> *Fry*, 137 S.Ct. at 748.

<sup>12</sup> 276 F.3d at 60 (quoting *Christopher W. v. Portsmouth Sch. Comm.*, 877 F.2d 1089, 1094 (1st Cir. 1989), internal quotation marks omitted).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 60-61.

<sup>15</sup> BSEA #12-0781, 18 MSER 373, 376 (Nov. 26, 2012).

<sup>16</sup> See 137 S.Ct. at 758.

- b. 276 F.3d 52, 64 Worcester has violated Fernando’s rights under the EEOA by discriminating against him and his guardian by denying him an equal education opportunity by failing to take appropriate action to overcome language barriers.

Furthermore, as relief related to these claims, Fernando seeks a declaration that Worcester discriminated against him on the basis of his disabilities and national origin in violation of Title VI and the EEOA, as well as an order that Worcester provide him “with an IEP with tailored supports integrating his special and language needs that will enable him to access the curriculum,” including appropriate bilingual instruction and a bilingual 1-1 aide.

There are essentially two different sets of claims being challenged by the District: those brought specifically under Title VI or the EEOA; and those implicating Fernando’s status as an English Language Learner, whether brought under those statutes or not. To determine whether any of these claims survives Worcester’s *Partial Motion to Dismiss*, I examine these categories separately, beginning with those implicating Fernando’s status as an English Language Learner.

1. *Fernando’s Claims for Services to Address Overlapping Special Education and English Language Learner Needs*

The District argues that Fernando seeks, in part, services that address his status as an English Language Learner (ELL). In its view, to the extent any of these services (bilingual education in all content areas, delivered by a qualified Spanish-speaking special education instructor; a bilingual 1-1 aide) are appropriate for Fernando, it is by virtue of his language needs, not his special education needs. For this reason, the BSEA could not order the District to provide them. Fernando, on the other hand, contends that because his language needs and his special education needs are intertwined, the services the District refers to as “ELL services” are within the jurisdiction of the BSEA to order as part of an integrated program that meets IDEA standards.

In evaluating the District’s Motion, I must take Fernando’s allegations as true, as well as any inferences that may be drawn from them in his favor, and deny the motion if these allegations plausibly suggest an entitlement to relief.<sup>17</sup> As both parties have acknowledged, this case involves complex issues that arise when a student requires both special education and ELL instruction. Teasing out whether any particular service is required for Fernando to receive a FAPE (and therefore is within the BSEA’s jurisdiction to order) will require careful consideration of expert testimony. Applying the aforementioned standard, I cannot determine that this is not an IDEA-based claim, and as such, I cannot allow the District’s Motion.

2. *Fernando’s Claims Under Title VI and the EEOA*

As enumerated above, Fernando filed claims pursuant to Title VI and the EEOA. To some extent, he claims violations that, if proven, might entitle him to relief under one of these statutes as well as the IDEA (i.e. a failure to provide required documents in his primary language). Although Fernando may be protected under all of these statutes, neither Title VI nor the EEOA addresses his status as a person with a disability. Title VI prohibits exclusion from participation in, denial of benefit of, and discrimination under federally assisted programs on the basis of race,

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<sup>17</sup> See *Twombly*, 550 U.S. at 557; *Iannocchino*, 451 Mass. at 636 (2008).

color, and national origin; it does not address disability discrimination.<sup>18</sup> The EEOA prohibits states from denying equal educational opportunity to any person on the basis of race, color, sex, or national origin<sup>19</sup> and requires districts to take appropriate action to overcome language barriers that impede equal participation by students in its instructional programs;<sup>20</sup> it does not address disability discrimination or equal educational opportunity on the basis of disability.

Recovery under each of these laws requires a plaintiff to prove several elements that are distinct from claims under federal or state special education law. The facts to be presented to the tribunal are not those in which special education hearing officers have any special expertise, nor do BSEA hearing officers have “specialized knowledge” of the body of law associated with Title VI or EEOA claims.<sup>21</sup> To the extent Fernando seeks relief under these statutes, he is not asking for findings regarding the appropriateness of the services Worcester is providing to him as an individual with a disability or the District’s failure to provide him with a FAPE. Pursuant to these statutes, he does not seek reimbursement for special education or related services, nor is he seeking an award of compensatory education for special education services he should have received but did not. As in *Xylia*, the “facts alleged [to support a Title VI or EEOA claim] cannot be logically connected to any denial of FAPE,” and “a reviewing court could not rely on the expertise or experience of an administrative hearing officer in this matter.”<sup>22</sup> Because I find that the gravamen of Fernando’s Title VI and EEOA claims do not “charge and seek relief for the denial of a FAPE,” and as such, are not “IDEA-based,” I must conclude that I have no jurisdiction over them.<sup>23</sup>

## CONCLUSION

Upon consideration of the facts alleged in the *Hearing Request Amendment* and the arguments made by the parties, I find that Fernando’s Title IV and EEOA claims are not properly before the BSEA. They are hereby dismissed. Insofar as Fernando seeks what the District refers to as “ELL services” under the IDEA, because I may find that those services are necessary for him to receive a FAPE, these claims are properly before the BSEA.

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<sup>18</sup> 42 U.S.C. sec 200 *et seq.*

<sup>19</sup> 20 U.S.C. § 1701 *et seq.*

<sup>20</sup> 20 U.S.C. § 1703(f).

<sup>21</sup> *Frazier*, 276 F.3d at 60.

<sup>22</sup> 18 MSER at 377 (“Factual findings centered on the Student’s IDEA experience would not provide useful information to a court considering an award of damages due to negligence”).

<sup>23</sup> See 137 S.Ct. at 758; 276 F.3d at 64.

**ORDER**

Worcester Public Schools' Partial Motion to Dismiss is ALLOWED IN PART and DENIED IN PART.

By the Hearing Officer:

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Amy M. Reichbach  
Dated: November 20, 2017