

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

In Re: XiLi¹

&

BSEA #1802999

DESE

RULING ON DESE MOTION TO DISMISS

This matter comes before the Bureau of Special Education Appeals (“BSEA”) on the Motion of the Massachusetts Department of Elementary and Secondary Education (“DESE”) to Dismiss the Hearing Request filed by the Parent on September 27, 2018. At all times the Parent proceeded *pro se* and DESE was represented by Attorney Josh Varon.

I. PROCEDURAL HISTORY

1. The Parent filed a Hearing Request at the BSEA on September 30, 2018. The Request set out 40 allegations concerning events surrounding the Student’s residence in 2013 and 2014. It also set out an alleged chronology of the Parent’s actions and interactions with Natick Public Schools (“Natick”), Framingham Public Schools (“Framingham”), the Department of Education/Department of Elementary and Secondary Education (“DOE/DESE”), the Department of Children and Families (“DCF”) and the Massachusetts Juvenile and Superior Courts between June 2013 and 2016. The Parent did not set out any specific request for relief.

2. On October 3, 2017, pursuant to 20 U.S.C. §1415(b) (7), 34 CFR 300.508, DESE filed a challenge to the sufficiency of the Parent’s Complaint pointing out that it lacked a claim for relief, a statutorily required element.

3. On October 6, 2017 DESE filed a Motion to Dismiss the Parent’s Hearing Request for failure to state a claim on which relief could be granted. In addition DESE asserted that any viable claims set out by the Parent involved actions outside the statute of limitations period,

¹ “XiLi” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public. Derivative abbreviations replace names of family members.

and/or did not fall within the jurisdiction of the BSEA, and/or properly lay against entities other than DESE.

4. On October 4, 2017 the Parent offered the following Request for Relief:

“[A]n Order for unspecified money damages for injuries [Student] suffered at school due to the intentional infliction of emotional injury by school administrators as a result of an ongoing residency dispute to which the Defendant [DESE] was aware since October 2013 and failed to remediate.

5. A Prehearing Conference and Motion Hearing was held on October 17, 2017. The Parent was granted leave to Amend the Complaint to include her request for relief. The Parent was also ordered to provide to the BSEA, no later than November 13, 2017, copies of all administrative and judicial decisions and rulings involving the Student.

6. A Recalculated Notice of Hearing conforming to BSEA Rule 1G was sent to the Parties on October 30, 2017.

7. On October 23, 2017 the Parent submitted a 15 item “list of concerns to be heard by the BSEA” which alleged that due to public corruption issues arising in 2010, the Governor, the Secretaries of Education, the Office of Child Advocate, the Department of Mental Health (“DMH”) and the Department of Health and Human Services (“HHS”), and the Commissioners of DCF and DESE conspired to deny the Parent and Student civil rights, to harass them both on the basis of their disabilities and to cause wanton and reckless harm to a child under 14.

In addition, the Parent alleged DESE lacked policies to protect a child, failed to acknowledge the parental rights of both parents, permitted the school districts to harass the Parents and Student, conspired with school districts to engage in criminal action against the Parents and Student and failed to provide student with FAPE.

None of the documents ordered to be produced by the BSEA was attached to the Parent’s submission. On November 2, 2017 the Parent was advised that her October 23, 2017 submission did not conform to the Prehearing Order and reminded her of the November 13, 2017 due date.

8. On November 20, 2017 the Parent requested leave to file her response to the Prehearing Order late. Leave was granted and her submission accepted. In that letter the Parent stated that she sought the BSEA’s assistance:

to determine residency for our child [XiLi] in accordance to the custodial agreement so that [XiLi] can return to public schools and be safe from a hostile environment created and maintained by School committee and their agents who seek to exclude her under residency MGL c76§5 and MGL c 713§3.

The Parent continued to set out her chronology of a residency dispute with Natick beginning in 2006 and concluding with a Massachusetts Superior Court Ruling issued on March 27, 2017 which dismissed the Complaint filed by the Parent after finding she had no legal standing to challenge residency determinations, regulations or policies developed by DESE.² The Parent's submission concludes with a request for relief: "I need to know how residency is determined for regular education child, disabled child."

9. DESE filed a supplement to its original Motion to Dismiss on December 20, 2017.

II. FACTUAL BACKGROUND

For the purposes of this Motion I must take the assertions set out in the Parent's Complaint, as Amended, as true. Those that name or reasonably involve DESE are:

1. a) In October 2013 DOE/DESE was aware that Natick was not abiding by bullying prevention laws;
- b) In May 2014 DOE/DESE was aware that Natick was maintaining a hostile environment and that the Student was not making effective progress;
- c) In June 2014, DOE/DESE was aware that the Student felt retaliated against and was excluded from school in Natick;
- d) In August 2014, DOE/DESE was aware that Parent was concerned about residency decisions made by Natick;
- e) In August 2014, DOE/DESE violated regulations by permitting Natick to appeal an LEA assignment;
- f) In September 2014, DOE/DESE was aware that Natick was inflicting emotional distress on the Student;
- g) In October 2014, DOE/DESE "was complicit" with Natick amending the Student's records;
- h) In November 2014, DOE/DESE was aware that Student was refusing to attend school as a result of an ongoing residency dispute;
- i) In December 2014, DOE/DESE "was complicit" with Natick in denying the Student a free appropriate public education by barring a custodial parent from a school meeting;

² *Ms. X v. Mitchell Chester*, CA 1681 CV03303, Mass. Sup. Ct. (3/29/17). Note that the plaintiff's name in citation is a derivative pseudonym. Despite the BSEA's previous instructions this Ruling was not included in the Parent's submission.

- j) In February 2015, DOE/DESE “was complicit” in the emotional decompensation of the Student;
- k) In April 2015, DOE/DESE was aware that the Student felt bullied at school;
- l) In May 2015, DOE/DESE was aware that the Student was pulling out her hair;
- m) During June-October 2015, DOE/DESE was aware that the Student was being denied a free appropriate public education;
- n) In January 2016, DOE/DESE was “complicit” in participating in a Care and Protection matter in Juvenile Court;
- o) In March 2016, DOE/DESE was “complicit” in the placement of the Student in Gifford, a private special education day school;
- p) In June 2016, DOE/DESE was “complicit” in failing to appropriately amend the Student’s IEP;
- q) In September 2016-March 2017, DOE/DESE was “complicit” with Natick, Framingham and Gifford to induce absences to justify filing a 51A, to deny parental claims of residency, to inflict emotional distress and to deny the Student a free appropriate public education.

2. The Parent’s claims that DESE misinterpreted and misapplied the facts, law and policies regarding determination of Student residence between 2010 and 2017 were considered and resolved by Judge Henry of the Massachusetts Superior Court in the context of the Parent’s Complaint for Declaratory and Injunctive Relief. After review of the applicable statute and regulations, M.G.L. c71B §2A and 603 CM §28.10 (8) (9), Judge Henry held that the Parent lacked standing to challenge any action or inaction on the part of DESE concerning determination of Student residence as no private right of action exists. Judge Henry granted DESE’s Motion to Dismiss and entered a final judgment in its favor. *Ms X. v. Mitchell Chester*, CA 1681 CV03303, Mass. Sup. Ct. (March 27, 2017).³

3. On December 11, 2017 a Decision was issued in BSEA in #1707648, involving this Parent and Student and the two responsible school districts. The Hearing Officer set out the scope of the Decision as follows:

At issue in this case is whether the Natick and/or Framingham Public Schools (hereafter, respectively, “NPS” or “Natick and “FPS” or “Framingham”) violated Parents’ and Student’s procedural rights between approximately March 2015 and March 2016, and if so,

³ A derivative pseudonym is substituted in the case name to protect the privacy of the Student.

whether Student was denied a free, appropriate public education (FAPE) as a result. An additional issue is whether in March 2017, Parents actually or constructively rejected Student's previously-accepted IEP for the 2016-2017 school year, and, if so, whether that IEP was reasonably calculated to provide the Student with FAPE.

The foregoing formulation of the issues arose from Parents'[sic] original allegations, contained in their Hearing Request filed on March 16, 2017, that from 2013 forward, the Natick and Framingham Public Schools had engaged in criminal, tortious, and/or otherwise unlawful activities that deprived Parents of the opportunity to participate in the IEP process, deprived Student of FAPE and otherwise violated her civil rights, and caused Student pervasive and severe emotional injury. Parents sought "exhaustion of administrative remedies" enabling them to seek "monetary damages for injuries suffered by Student and the family".

The claims, time period, and requested relief set out in the Decision in BSEA #1707648 are identical to those set out in the Hearing Request filed by the Parent in the instant case BSEA #1802999. There is one difference: the Responding Parties in Decision #1707648 are the school districts: Natick and Framingham; the Responding Party in Hearing Request #1802999 is DESE.

After an evidentiary hearing in BSEA #1707648 Hearing Officer Berman made the following findings:

A. There was no denial of a free appropriate public education to the Student between March 2015 and March 2017.

B. The School Districts did not abridge the Student's or Parent's substantive or procedural special education rights between March 2015 and March 2017.

C. The 2016-2017 IEP providing for the Student's placement at the Gifford School was accepted by the Parent and fully implemented to the extent permitted by the Parent during that school year.

4. Throughout the 2017-2018 school year the Student has attended a private, non-special education, school at Parent election and expense. The Parent asserts that the Student is "thriving" in this placement.

III LEGAL FRAMEWORK

A. 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, or provision of special education in accordance with state and federal law, or the 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.

M.G.L.c. 71B; 603 CMR 28.08 (3); 20 U.S.C. §1415; 29 U.S.C. §794; 34 CFR 300.507-515; 34 CFR 104.

B. Statute of Limitations

The action(s) which forms the basis of the Hearing Request must have occurred no more than two years prior to the filing date.

20 U.S.C. §1415 (b)(6)(B); 34 CFR 300.507 (a)(2); *Shrewsbury Public Schools*, 22 MSER 166 (Berman 2016)

C. Claim/Issue Preclusion

At common law the doctrine of estoppel prevents relitigation of the same issue by the same person once a court has decided an issue of fact or law necessary to its judgment. *Martin v. Ring*, 401 Mass. 59 (1987) The preclusion applies not only to the parties to the original suit, but also to their privies and those for whom the original party acted as a “virtual representative.” *Ellis v. Ford Motor Co.*, 628 F. Supp. 849 (D. Mass 1986). Furthermore, where power or jurisdiction over a particular subject matter is delegated to a specialized tribunal, the facts established in a decision of that tribunal are binding and conclusive except on appeal. *Almeida v. Travelers Ins. Co.* 383 Mass. 226, 229 (1981). The purpose of estoppel and preclusion doctrines is to avoid repeated visits to matters already determined in a due process proceeding in order to relieve individuals and courts of the burden and expense of relitigation to a pre-ordained outcome.⁴

D. Exhaustion

The Parent’s Hearing Request and Amendment set out a variety of claims that fall outside the orbit of special education. Most are loosely attached to the Student’s eligibility for public school attendance. Some relate solely to the Parent’s asserted status as an individual with a disability.

A party seeking judicial relief under the IDEA must first go through to completion – “exhaust” - all the administrative due process procedures set out in the statute.⁵ A party making a disability-based claim under an unrelated statute must also exhaust the IDEA’s administrative due process procedures if they seek the type of relief that is available under the IDEA, eg. an award of compensatory education. Not every disability-based claim, however, is subject to the IDEA’s exhaustion requirement. *In Fry v. Napoleon Community Schools*, 137 S.Ct. 743, 752 (2017) the U.S. Supreme Court held that “exhaustion is not necessary when the gravamen of the plaintiff’s suit is something other than the denial of the IDEA’s core guarantee – what the Act

⁴ Moore’s Federal Practice, ¶10.405 (1984).

⁵ 20 U.S.C. 1415 (l) ; 34 CFR 300.516 (e).

calls a 'free appropriate public education'." In other words, if the party requesting an Order from the BSEA or a court is seeking a type of relief the BSEA lacks the authority to award, money damages for example, exhaustion of administrative procedures is not required.⁶

E. 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 hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim. Specifically, to survive a motion to dismiss, a party must assert "factual allegations plausibly suggesting an entitlement to relief."⁷ In determining whether this burden has been met the Hearing Officer must take the Parent's allegations, and any inferences that may reasonably be drawn from them, as true, even if the allegations are doubtful in fact⁸. . . The "[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). In the special education context plausible claims regarding the denial of substantive or procedural guarantees that are supported by Parent's factual allegations will be considered to the extent they may give rise to some form of relief authorized or contemplated by the IDEA.⁹

IV. CONCLUSIONS

After careful review of all the Parent's submissions, with the additional consideration and flexibility necessarily afforded to a *pro se* litigant, and close reading of the arguments raised by DESE, it is my determination that the Parent has failed to state a claim upon which the BSEA can grant relief. DESE's Motion to Dismiss the Parent's Hearing Request is well-founded and should be granted for the following reasons:

1. The IDEA's two year statute of limitations applies to all of the Parent's fact based claims against DESE. The Parent did not assert any circumstances which could implicate an exception. The Parent's Amended Hearing Request was processed on October 30, 2017. Therefore the BSEA may only consider claims arising after October 30, 2015. A generous look at the events alleged by the Parent in her original and supplemental hearing requests indicates that the residency-related actions of Natick, Framingham and DESE that form the factual basis of her complaints occurred well before October 30, 2015. Therefore, BSEA consideration of the Parent's residency-related claims is barred by the applicable statute of limitations. 20 U.S.C. §1415 (b)(6)(B).

⁶ *Bowden v. Bowden*, 2002 WL 472293 @*5 (D. Mass. 2002); See also: *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13 (1st Cir. 2006); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108 (1st Cir. 2003).

⁷ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008).

⁸ *Golchin v. Liberty Mutual Ins. Co.*, 460 Mass. 222, 223 (2001).

⁹ *Fry v. Napoleon Community Schools*, 137 S.Ct 743 (2017).

2. Furthermore, the Parent previously sought judicial assistance in resolving her residency-related complaints against DESE. The Massachusetts Superior Court determined that the Parent lacked standing to pursue those claims in court as the applicable statute and regulations do not permit parents to challenge DESE residence assignments. See ¶ II, sec 3 *supra*. *Ms. X v. Mitchell Chester*, CA 1681 CV 03303, Mass. Sup. Ct. (March 27, 2017) see also 603 CMR 28.10. The common law doctrine of estoppel – in this case *res judicata* and collateral estoppel – prevents BSEA consideration of the Parent’s residency-related claims as a Court in this jurisdiction considered and disposed of the same claims, arising from the same factual allegations against the same party. That ruling is binding on the BSEA.

3. Turning to claims that arguably survive dismissal at this juncture the Parent has alleged that DESE was “complicit” with Natick and Framingham in denying the Student a free appropriate public education between October 30, 2015 and the conclusion of the 2016-2017 school year. These arguments, and the factual allegations supposedly supporting them, have been presented to the BSEA, thoroughly considered, and disposed of. In *Natick and Framingham*, BSEA 1707648, 23 MSER 199 (2017) Hearing Officer Berman found that during all relevant time periods XiLi had been offered an appropriate IEP, that the IEP had been accepted and implemented, that the school districts had observed all procedural niceties, and that no denial of the Student’s right to a free appropriate public education under the IDEA and M.G.L. c71B had occurred. The Parent may not relitigate issues that have been conclusively decided. (See ¶ II, sec 3 and ¶ II, sec C) While DESE was not a party to BSEA 1707648 neither does it have primary responsibility for developing or implementing an appropriate special education program for an individual student. DESE’s only possible exposure to a parental claim of denial of a free appropriate public education would be failing to step into the shoes of an LEA that had fully abandoned its responsibilities to its IDEA-eligible students. That is not the case here. Moreover, DESE can not be “complicit” with an action that has been found not to have occurred. Therefore, I find that the common law doctrine of estoppel operates to bar my consideration of any Parental claims of DESE responsibility for denial of a free appropriate public education to XiLi during the 2015-2016 and 2016-2017 school years.

4. The Parent also claimed that DESE was “complicit” with DCF and the responsible school districts in participating in Juvenile Court proceedings concerning the Student’s welfare. This claim does not lie within the jurisdiction of the BSEA. (See ¶ III, sec A) *supra*.

5. The Parent claims that, as a result of its actions, inactions and “complicity”, DESE is responsible for intentionally inflicting emotional harm on the Student and the Parent, for bullying and harassing the Student and the Parent on the basis of their disabilities, and for maintaining a hostile educational environment. For these alleged wrongs the Parent seeks money damages and guidance on understanding DESE’s residency rules and policies. These parental claims do not fall within the BSEA’s limited jurisdiction. See ¶ IIIA. *Holyoke Public Schools*, 22 MSER 174 (2016); *Norton Public Schools*, 22 MSER 169 (2016); *Springfield Public Schools and Xylia*, 18 MSER 373 (2012). They do not articulate a cognizable claim of denial of a free appropriate public education. *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017). Furthermore, the Parent’s prayer for relief requests actions – the award of money damages and personal legal advice – that the BSEA is not statutorily authorized to award. *Diaz-Fonseca v. Puerto Rico*, 451 F.3d. 13, 31 (1st Cir. 2006).

After eliminating those factual assertions underlying the Parent's claims that fall outside the Statute of Limitations (§ II a-m), those underlying claims not within the BSEA's limited jurisdiction (§ II a-c, f, n-q), and those forming the necessary foundation of previous judicial (§ II d, e, h, q) and administrative (§ II m, o, p, q) decisions, no factual allegations remain on which a BSEA Hearing could properly be held. Furthermore the BSEA may not award any of the relief requested by the Parent. While an unusual action when a litigant is *pro se* I am constrained to find, for the reasons set out above, that the Parent has failed to state a claim at the BSEA for which the BSEA may award relief. In reaching this finding I note that the Parent has exhausted the administrative due process remedies available to her under the IDEA and M.G. L. c.71B.

ORDER

DESE's Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted is GRANTED.

This matter is DISMISSED.

By the Hearing Officer

Lindsay Byrne
Dated: January 31, 2018