

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

In Re: Student v.
Quincy Public Schools

BSEA# 1904761

**Ruling on Quincy Public Schools' Motion to Dismiss
Parent's Hearing Request**

On December 3, 2018 Parent requested a non-discipline related Expedited Hearing in the above-referenced matter pursuant to Rule IIC1b ii of the MA *Hearing Rules for Special Education Appeals*. In her request Parent alleged that Student, a seventeen year-old student who presents with multiple disabilities, was in need of a therapeutic residential placement to address his behavioral, social, emotional and academic needs. Student takes psychotropic medication. He presents challenges with uncontrolled behaviors, and engages in physical and verbal aggression. Student has been without residential placement since September 14, 2018, when he was discharged from Becket Family Services at Mount Prospect Academy in New Hampshire (Becket). According to Parent, Student desperately needs residential placement to address his increasing aggressive episodes that can result in harm to himself and/or others.

Parent concedes that while Quincy has agreed to the type of placement required by Student and has sent referral packets to 766 approved schools as well as to other schools identified by Parent and her educational consultant, it has not located an alternative program consistent with Student's accepted IEP. The current IEP covers the period from April 5, 2018 to April 4, 2019. Parent questions the extensiveness or rigor of Quincy's search for an appropriate placement.

Parent notes that since Student's termination from Becket, he has been living at home and attending Seaport Academy as a temporary arrangement. However, Student's behavior at Seaport Academy and at home has begun to deteriorate. While conceding that finding the appropriate placement for Student is "particularly difficult", Parent argues that Student requires immediate placement in an all-male residential placement to appropriately address his deficits.

On December 5, 2018, Quincy contested the granting of expedited status in this matter. Quincy argued that Student was attending Seaport Academy until an alternative residential placement agreeable to the Parties was located, and noted that the Parties were working collaboratively to locate the appropriate placement. The same date Quincy requested a telephone conference call and a postponement of the initial Hearing date.

Following a telephone conference call on December 7, 2018, Parent withdrew her request for expedited status, instead requesting that the case be placed on the regular calendar and also requested that the Haring of December 10, 2018, be postponed.

All of the Parties' requests were granted via Order issued on December 10, 2018, and new Hearing dates were scheduled via a separate Order issued on December 14, 2018. The Hearing in this matter was to proceed on February 13, 2019.

On December 10, 2018, Quincy filed a Motion to Dismiss and Response to Parent's Hearing Request. Relying on Rule XVII of the Hearing Rules for Special Education Appeals, Quincy argued that Parent had failed to state a claim upon which relief could be granted.

In its Motion to Dismiss Quincy argued that Student had been enrolled at Seaport Academy on October 15, 2018 while a residential placement was being located. Quincy did not dispute Student's diagnoses or his need for, or right to, residential placement consistent with his IEP. Quincy argued that its efforts to locate an appropriate residential program for Student were ongoing, noting that it had sent placement applications to schools within Massachusetts and in Connecticut, Maine, New Hampshire, Vermont and Virginia, but the schools approached had rejected Student. Quincy acknowledged its continued obligation and willingness to continue its search until placement for Student was secured.

Quincy further argues in its Motion that at Seaport Academy, Student's interim placement, his attendance placement was at approximately 94% and he had attained passing grades during the first term. According to Quincy, Student was progressing educationally. Quincy noted that it would resubmit applications to some of the same placements it had previously identified as they would consider the update on Student's more current status.

Quincy argued that since there was no dispute between the Parties regarding Student's areas of need or entitlement to a therapeutic residential placement, and considering that the BSEA lacked jurisdiction to order a private residential school to accept Student, there was no live controversy. Quincy asserted that in essence the BSEA would be ordering Quincy to do that which it was already doing voluntarily on Student's behalf. While Quincy shared in Parent's frustration that Student had not yet been accepted to any of the programs identified thus far, Quincy actively continued its search. It however, found no need for the BSEA's involvement given that it had already acquiesced to Parent's desired remedy: to locate an appropriate residential placement for Student. As such, Quincy requested that Parent's Hearing Request be dismissed.

Parent filed an Opposition to Quincy's Motion to Dismiss on December 21, 2019, on the grounds that Quincy had not demonstrated that it had shown diligence in its search for permanent placement for Student. Parent further argued that during the months following

Student's discharge from Becket, while residing at home, he had proven to be a danger to Parent and a younger sibling and had to be hospitalized as a result of aggressive behavior. At the time of filing of her opposition to the Motion to Dismiss, Student was still hospitalized but it was anticipated that he would return home upon being discharged, once again creating an unsuitable situation for his family. Furthermore, Parent remained concerned that Student's remaining period of eligibility was being wasted. Parent argued that due diligence in finding an appropriate, viable residential placement is essential to Student's receipt of FAPE and questioned Quincy's diligence in finding a suitable residential placement. Lastly, Parent argued that Quincy's search should extend beyond the state of Massachusetts especially as Student's emotional stability continued to deteriorate without the benefit of 24 hour residential support.

On January 22, 2019, the Parties participated in a telephone conference call with the Hearing Officer during which the status of the case was discussed. Quincy noted that the Parties continued to work collaboratively trying to locate a residential placement for Student, and noting that Quincy had extended its search to neighboring states.

Relying on their continued collaborative work, on January 23, 2019, Quincy requested another postponement of the Hearing, which request was unopposed by Parent. Later the same date, Quincy's attorney copied the BSEA on an email from Erin J. Perkins (Quincy) forwarded to Parent's attorney, listing potential placements to which Quincy had, or would be, forwarding packets on behalf of Student in the states of Massachusetts, Rhode Island, Connecticut, New Hampshire and New York.

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."¹ 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."² 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). . ."³

¹ *Tannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

² *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

³ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

In the case at bar, BSEA jurisdiction is grounded in the IDEA⁴, M.G.L. c.71B⁵, 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 based on Quincy’s failure to offer Student residential placement consistent with the last accepted IEP.

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).⁶ With this guidance I turn to consideration of the case at bar.

III. Discussion:

Here, Quincy seeks dismissal of Parent’s claim, on the basis that the Parties agree that Student is entitled to residential placement and that Quincy is working collaboratively with Parent in trying to locate an appropriate residential school for Student. The Parties further concede that Student is particularly difficult to place.

In her Request for Hearing Parent alleges that Quincy has not demonstrated that despite having been placed on notice since September 6, 2018 that Student’s placement at Becket would be terminated, Quincy failed to conduct a diligent search of appropriate placements as a result of which, to date, Student remains without residential placement. Student’s behavior at Seaport Academy and at home has been increasingly poor, and Parent fears that without immediate placement, he will continue to deteriorate. Given his age, Student does not have long before his entitlement ends.

In the context of a Motion to Dismiss, accepting as true Parent’s factual assertions and drawing all reasonable inferences in her favor, I find that Parent has raised the plausibility of

⁴The 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).

⁵Massachusetts 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).

⁶Denying 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).

a viable claim in asserting that Quincy has not been diligent in its search as a result of which to date Student remains without residential placement. Parent's claim may give rise to some form of relief consistent with the IDEA, including joinder of DESE as the ultimate guarantor of provision of a free, appropriate, public education to eligible students. At this stage, without the benefit of a Hearing on the merits, this matter may not be dismissed. As such, Quincy's Motion to Dismiss is **DENIED**.

So Ordered by the Hearing Officer,

Rosa I. Figueroa

Dated: January 29, 2019