

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

In re: Pembroke Public Schools v.
Student

BSEA #1911125

**RULING ON PARENT’S MOTION TO DISMISS PEMBROKE PUBLIC SCHOOLS’
REQUEST FOR HEARING**

On June 5, 2019, Parent filed a Motion to Dismiss the Hearing Request filed by Pembroke Public Schools (Pembroke), pursuant to 34 CFR 300.300.(4)¹ and 34 CFR 300.507.² Relying on these regulations, Parent argues, that, since “the IDEA does not provide the hearing officer with the power and authority to...[order] substitute consent,” then “substitute consent is not an allegation of a violation of any IDEA regulation and therefore the district[’]s case...does not meet federal standards.” The Parent further argues that a prior case filed by Pembroke against Parent (BSEA #1804120³), that was dismissed roughly 18 months ago, is applicable to this Motion to Dismiss.

On June 7, Pembroke filed a response in opposition to Parent’s Motion to Dismiss. Pembroke argues that the BSEA has both the authority and jurisdiction to resolve educational disputes pursuant to 20 U.S.C. 1401 *et. seq.* (IDEA) and 603 CMR 28.00, as well as G.L. c. 71B. According to Pembroke, school districts have not only a right, but an obligation, to request a special education hearing when a parent’s refusal of consent will result in the denial of a Free and Appropriate Public Education (FAPE) to the child. Pembroke asserts that “BSEA case law has repeatedly held that substitute consent is an appropriate remedy when parents fail to provide voluntary consent for the school district to implement appropriate IEPs.” Pembroke also argues that the previous Hearing Request was not dismissed due to insufficiency, but because Pembroke believed there was no longer a FAPE issue since Parent had conditionally accepted implementation of Pembroke’s proposed placement and service delivery model.

Facts:

1. Student is an 18-year-old resident of Pembroke. Student is currently in a residential placement at the Evergreen Center (Evergreen).
2. Student has been diagnosed with Autism and an Intellectual Disability. As such, Student has been found eligible to receive special education and related services.

¹34 CFR 300.300(4) states that if a “parent of a child who is home schooled or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation, or the parent fails to respond to a request to provide consent, the public agency may not use the consent override procedures (described in paragraphs (a)(3) and (c)(1) of this section).”

²34 CFR 300.507 states that a due process complaint must allege a violation.

³I take administrative notice of this matter.

3. Student entered Evergreen on or about August 1, 2017.
4. In September 2017, following a six week testing and assessment period at Evergreen, Student's Team convened, met to discuss the results and develop an IEP for the period from September 17, 2017 to September 17, 2018. The Team found that Student required a twenty-four hour program, twelve months per year (less scheduled vacations) and offered Student residential placement at Evergreen.
5. Evergreen's program offers a consultative model (indirect services) as opposed to pull-out direct services.
6. On September 27, 2017, Parent rejected the September 2017 IEP, citing a lack of direct services in the proposed IEP as the reason for her rejection. She however accepted the placement and consented to Student receiving services at Evergreen.
7. On November 10, 2017, Pembroke filed a Hearing Request with the BSEA, #1804120, seeking substitute consent for implementation of its proposed IEP at Evergreen.
8. Prior to the Hearing, Parent conditionally accepted implementation of the consultation model at Evergreen and then filed a Motion to Dismiss. Pembroke did not oppose the Motion and on January 23, 2018 the Motion was granted and the case dismissed.
9. In September 2018, Student's Team convened again for the annual review. Pembroke issued an IEP for the period from September 2018 to September 2019, offering Student continued placement at Evergreen and services consistent with Evergreen's consultative model.
10. In October 2018, Parent accepted the placement but rejected the IEP in full because of the lack of direct services in occupational therapy (OT), physical therapy (PT) and speech and language.
11. In February 2019, Parent filed a complaint with the Problem Resolution System (PRS) at the Department of Elementary and Secondary Education (DESE) alleging that Pembroke was not implementing the last-accepted IEP. Parent also requested compensatory services.
12. In April 2019, PRS entered a finding of noncompliance against Pembroke and ordered implementation of the last-accepted IEP with which it was presented, to wit: an IEP covering the period from October 2013 to October 2014. Pembroke appealed said finding and the matter is still pending before DESE's PRS.

13. In May 2019, Pembroke filed the instant case with the BSEA seeking substitute consent for implementation of Student’s IEP and a determination that its proposed IEP for the period from September 2018 to September 2019 offered Student a FAPE.⁴

Legal Standard for Motion to Dismiss:

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.”⁵ 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.”⁶ 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). . . .”⁷

Discussion:

In the case at bar, Parent seeks dismissal of Pembroke’s claims, on the basis that there is no alleged violation of the IDEA. Parent asserts that since the IDEA does not provide for “substitute consent,” Pembroke “does not have a violation to state as a claim against the parent.”

I note that the claims in Pembroke’s Hearing Request involve both, (a) allegations of parental actions and IEP rejections which impact its ability to offer Student a FAPE, and (b) a request for substitute consent to implement the rejected IEP. Pembroke’s Hearing Request specifically states its desire to obtain a determination that the IEPs it has proposed for Student for the periods from September 2017 through September 2019 offer Student a FAPE.

I first address Parent’s challenge regarding substitute consent.

Substitute Consent:

It appears that relying on 34 C.F.R. 300.300 Parent asserts that Pembroke may not request substitute consent for implementation of Student’s IEP. This subsection of the federal

⁴Pembroke’s Hearing Request states that Pembroke:

...seeks substitute consent to implement the IEP for [Student], a Pembroke special needs student, and for a determination that the Individualized Education Programs (IEPs) proposed from September 2017 to present are reasonably calculated to provide [Student] a free appropriate public education.

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

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

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

regulation addresses parental consent as does 603 CMR 28.07 of the Massachusetts Special Education Regulations.

In her argument Parent relies on 34 CFR 300.300(4) to argue that substitute consent cannot be implemented in this case. However, this section, as per its opening lines, is applicable only if the child is “home schooled or placed in a private school by the parents at their own expense.”⁸ Here, Student was not home schooled, and Pembroke is funding his private placement at Evergreen. Parent’s argument in this regard is inapplicable.

However, 34 C.F.R. 300.300 generally establishes the need for districts to obtain consent from parents for evaluations and implementation of placements. Generally, parental consent is required prior to initial provision of special education and related services and for initial evaluations. The federal regulations permit districts to use the override procedures in certain situations, such as for re-evaluation of eligible students. 34 C.F.R. §300.300 *et seq.*, does not specifically provide that school districts may use the consent override procedures with respect to a parent’s rejection of an IEP.

The Massachusetts Special Education Regulations authorize hearing officers to resolve disputes involving a parent’s failure to consent to a student’s re-evaluation or placement when the district believes that the parent’s lack of consent may prevent the student from receiving a FAPE. Specifically, 603 CMR 28.07(1)(b) provides that

If subsequent to initial evaluation and initial placement and after following the procedures required by 603 CMR 28.00, the school district is unable to obtain parental consent to a *reevaluation or to placement in a special education program* subsequent to the initial placement, the school district shall consider with the parent whether such action will result in the denial of a free appropriate public education to the student. If, after consideration, the school district determines that the parent’s failure or refusal to consent will result in a denial of a free appropriate public education to the student, it *shall* seek resolution of the dispute through the procedures provided in 603 CMR 28.08. [Emphasis supplied].

The regulation *supra* further provides that failure by the parent to be involved in the consideration does not preclude the school district from taking appropriate action consistent with 603 CMR 28.08⁹ to resolve the dispute, unless the parent revokes consent to all special education and related services, that is, rejects the student’s eligibility to special education services altogether as provided in 603 CMR 28.07(1)(a)(4). Thus, as its federal counterpart, I can find nothing in the Massachusetts Special Education Regulations granting the BSEA authority for consent override for implementation of IEPs or provision of services. The state override as written appears to be exclusively for re-evaluation and placements.

⁸34 CFR 300.300(4)(i)

⁹603 CMR 28.08 involves the Continuum of Options for Dispute Resolution including BSEA Hearings.

Given that the District's basis for seeking consent override fall outside the circumstances for which substitute consent is applicable, consistent with 34 C.F.R. 300.300, and 603 CMR 28.07(1)(b), Pembroke cannot plausibly raise a right to the relief it seeks in this regard from the BSEA. The BSEA does not have the authority to provide substitute consent for implementation of an IEP. As such, the District may not proceed with its claim. Parent's Motion to Dismiss regarding substitute consent for implementation of the IEP is **GRANTED**.

Jurisdiction of the BSEA and provision of FAPE:

In her Motion, Parent challenges the BSEA's jurisdiction to entertain Pembroke's case stating that Pembroke's Hearing Request does not allege a violation of the IDEA. Parent's presumption appears to be founded on a misunderstanding of the federal standards and ignores the Massachusetts Regulations clearly establishing the BSEA's jurisdiction to address determinations of the appropriateness of IEPs and denials of FAPE.

Turning first to the IDEA, pursuant to 20 U.S.C. § 1515(b)(6), the BSEA has jurisdiction over a timely complaint filed by a parent/guardian or a school district "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child."

The pertinent Federal Regulations, 34 C.F.R. §300.507(a)(1), states that

A parent or a public agency may file a due process complaint on any of the matters described in §300.503(a)(1) and (2) (relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to the child).

34 C.F.R. §300.503(a)(1) and (2), addressing prior notice by the public agency requires school districts to provide parents of disabled students notice before

- (1) [the public agency] proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
- (2) refuses to initiate or change the identification, evaluation or the educational placement of the child or the provision of FAPE to the child.

Together these two regulations clearly establish the right of both a public school district and a parent to file a due process complaint involving provision of FAPE to a disabled student.

In Massachusetts the BSEA is charged with the responsibility and authority of resolving disputes involving the provision of special education among parents/students, school districts and state agencies. Specifically, 603 CMR 28.08(3)(a) provides that

A parent or a school district, except as provided in 603 CMR 28.08(3)(c) and (d), may request mediation and/or a hearing at any time 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.

The scope of the BSEA's jurisdiction thus clearly includes the type of determinations sought by Pembroke in the instant case.

In order for Pembroke's Hearing Request to survive a Motion to Dismiss, Pembroke need only assert "factual allegations plausibly suggesting...an entitlement to relief."

In its Hearing Request, Pembroke asserts the appropriateness of the Evergreen's consultative model for Student. Pembroke further asserts that the Evergreen placement offers Student a FAPE. While accepting the placement, Parent has twice rejected the IEP in favor of a direct service model. Unable to resolve their dispute, Pembroke seeks a declaration that its proposed IEP is appropriate and is reasonably calculated to provide Student with a FAPE. Taking the District's allegations as true, as is required for purposes of evaluating a Motion to Dismiss, I find that Pembroke's pleadings articulate a sufficient basis as to why it may plausibly have a cause of action entitling it to some form of relief regarding provision of FAPE to Student.¹⁰ Pembroke may proceed with this claim before the BSEA. Parent's Motion to Dismiss in this regard is **DENIED**.

Lastly, in the Order and Ruling issued on June 21, 2019, the Parties were Ordered to submit their preferences for Hearing dates from among the options offered by the Hearing Officer. The parties' responses were due on June 25, 2019. By the deadline, only Pembroke's availability was received. As such, this matter will proceed as follows:

- 1) Exhibits and witness lists are due by the close of business on August 6, 2019.
- 2) **A Hearing will be held on August 13, 14 and 15, 2019, at 10:00 a.m., at the Offices of DALA/BSEA, 14 Summer St., fourth floor, Malden Massachusetts.** Parent's Advocate is expected to appear in person for the Hearing, consistent with the Order and Ruling issued on June 21, 2019.

ORDERS:

1. Parent's Motion to Dismiss regarding provision of Substitute Consent is **GRANTED**. The substitute consent issue is **DISMISSED**.
2. Parent's Motion to Dismiss regarding provision of FAPE to Student is **DENIED**. Pembroke may proceed with its FAPE claim.

¹⁰I note that once the BSEA decision is issued, if Pembroke is successful, it may need to proceed to a Court with pertinent jurisdiction to enforce said Decision.

3. The Hearing in this matter will proceed on August 13, 14 and 15, 2019 at 10:00 a.m., at the Offices of DALA/BSEA, 14 Summer St., fourth floor, Malden, MA. Parent's advocate is ordered to appear in person before the BSEA for all days of Hearing.

So Ordered by the Hearing Officer,

Rosa I. Figueroa
Dated: June 27, 2019