

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

In re: Ryan¹

BSEA #2001219

**RULING ON NORTH MIDDLESEX REGIONAL SCHOOL DISTRICT'S PARTIAL
MOTION TO DISMISS**

This matter comes before the Hearing Officer on North Middlesex Regional School District's *Motion to Dismiss Relative to Disciplinary Issues and Related Request for Relief*, filed August 1, 2019, which focuses on the portions of Parents' *Hearing Request* that were granted expedited status. For the reasons set forth below, NMRSD's *Motion* is ALLOWED.

I. **BACKGROUND AND PROCEDURAL HISTORY**²

On July 30, 2019, Ryan's Parents filed a *Hearing Request* asserting a number of claims against NMRSD. Specifically, Parents alleged that the Individualized Education Programs (IEPs) proposed for Ryan from fall of 2018 to spring of 2020 failed to provide Ryan with a free appropriate public education (FAPE) in the least restrictive environment; that the District committed procedural violations by failing to evaluate and address "the student related services for his disability" or convene a timely Team meeting; that NMRSD denied Ryan a FAPE and/or denied Parents an opportunity to participate meaningfully in the Team process; that the District failed to document adequately "the Prior Written Notice when refusing to hold a reasonable parent requested [*sic*] for an IEP meeting following the multiple exclusionary discipline applied;" that the District failed to provide required positive behavioral supports after repeated use of exclusionary disciplinary actions "and was the disciplinary actions taken the same as for other students;" that the District failed to properly account for the emergency removal of Ryan on April 10, 2019 as a suspension and follow relevant state and federal reporting regulations; that NMRSD failed to act appropriately and in accordance with student and parent rights while conducting and immediately following the Manifestation Determination Review (MDR); that the manifestation entered was incorrect in finding that the incident "possession of a vape device and related paraphernalia" for which Ryan was disciplined was not a manifestation of his disabilities; and that the principal and/or special education director used "official authority or influence for the purpose of intimidating, threatening, delaying or coercing a person with the intent to interfere with a student with exceptional needs or parent advocating to obtain services or accommodations for that student."

Parents requested an Order reversing the findings of the MDR meeting regarding possession of a vape device and paraphernalia; proper accounting for the emergency removal executed on

¹ "Ryan" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

² The information in this section is drawn from the parties' pleadings and is subject to revision in further proceedings.

April 10, 2019, and the same finding that the underlying behaviors were a manifestation of Ryan’s disability; an Order that the District provide the additional related services and behavioral interventions Ryan requires; and an Order that NMRSD’s School Committee “review current district disciplinary policies for factoring in guidance provided by both the SEA and the U.S. Department of Education.”

On August 1, 2019, the Bureau of Special Education Appeals (BSEA) issued a Notice of Hearing bifurcating the claims. An Expedited Hearing limited to the issues regarding the manifestation determination was scheduled for August 15, 2019, and a Standard Hearing on the remaining issues was scheduled for September 4, 2019, both before Hearing Officer Catherine Putney-Yaceshyn.

On August 1, 2019, NMRSD filed the instant *Motion*. On August 2, 2019 the matter was transferred to the undersigned Hearing Officer for administrative reasons. On August 5, 2019 the District filed its *Response to Parents’ Hearing Request*, and Parents filed an *Objection to NMRSD’s Motion to Dismiss*. As the District’s *Motion* and Parents’ *Objection* is limited to the claims granted expedited status, I address only those issues in this *Ruling*.

The District asserts that Parents have not met a threshold requirement for BSEA jurisdiction over their claims related to school discipline. As Parents allege only that Ryan was suspended for 9 total days during the 2018-2019 school year, they have not stated a claim that NMRSD made a decision to change his placement by suspending him for more than 10 days in a school year, which would have triggered the right to a manifestation determination. The District’s decision to conduct a manifestation determination voluntarily, when it was not legally obligated to do so, does not give Parents the right to appeal of disciplinary decisions to which they were otherwise not entitled. Moreover, as a result of this manifestation determination, NMRSD subsequently removed 4 days of Ryan’s suspension from the record and offered compensatory services for those days.

Parents contend that Massachusetts state law permits additional review of school exclusions administered pursuant to M. G. L. c. 71, §§ 37H, 37H ½, and 37H ¾. Moreover, as the party that initiated a manifestation determination review meeting, the District must now provide all related protections. Finally, because both federal and state law permits school personnel to consider any unique circumstances on a case-by-case basis when determining whether a change of placement is appropriate for a child with a disability who violates a code of conduct, school districts should also be able to consider such circumstances in determining whether a change of placement has occurred. In this case, Parents assert, Ryan was excluded from school for a total of 9 days, including the emergency removal, but the District convened a manifestation determination only because it had already determined that Ryan’s suspensions constituted a change in placement.

As neither party requested a hearing, and as testimony or oral argument would not advance the Hearing Officer’s understanding of the issues involved, this Ruling is being issued without a hearing pursuant to Bureau of Special Education Appeals *Hearing Rule VII(D)*.

II. DISCUSSION

To decide whether to grant NMRSD's *Partial Motion to Dismiss*, I must consider both the standard for motions to dismiss and laws regarding manifestation determination reviews.

A. Standard for Motion to Dismiss

Pursuant to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3) and Rule XVI(B)(4) 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.”³ In evaluating a hearing request, 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.”⁴ 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). . .”⁵ To determine whether the *Hearing Request* in the instant matter fails to state a claim on which relief can be granted, I must consider the substantive law governing the relationship between school discipline and changes in placement for children with disabilities.

B. Substantive Standards Governing Disciplinary Changes in Placement and Manifestation Determination Reviews

The Individuals with Disabilities Education Act (IDEA) provides a number of protections for students with disabilities facing disciplinary action to ensure that they are not punished for conduct that is related to their disabilities and that they are able to continue to receive educational services.⁶ These protections are triggered by a change in placement.⁷

Federal regulations implementing the IDEA characterize the removal of a child with a disability from his current educational placement as a “change of placement” in two circumstances: where the removal is for more than 10 consecutive days; or where the child has been subject to a series of removals that constitute a pattern.⁸ To constitute a pattern, these removals must total more than 10 school days in a school year and be based on behavior that is

³ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

⁴ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

⁵ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

⁶ See 20 U.S.C. § 1415(k)(1)(C); *id.* at § 1415(k)(1)(E).

⁷ See, e.g., 20 U.S.C. § 1415(k)(1)(A) (permitting school personnel to consider unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct); *id.* at § 1415(k)(1)(D) (outlining services a child with a disability removed from his or her placement shall receive); *id.* at § 1415(k)(1)(E) (providing for a manifestation determination review within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct).

⁸ 34 C.F.R. § 300.536.

substantially similar to the child's behavior in previous incidents that resulted in the series of removals.⁹ Moreover, the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another must, together, suggest a pattern.¹⁰ Federal regulations permit a school district to consider unique circumstances, on a case-by-case basis, in determining whether a change in placement is appropriate for a child with a disability who violates a code of student conduct.¹¹

When a school district decides to change the placement of a child with a disability because of a violation of a code of student conduct by, for example suspending the child,¹² it must, within 10 days of that decision, convene a meeting with the parent and relevant members of the IEP Team to "review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine [whether] the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or . . . was the direct result of the local educational agency's failure to implement the IEP."¹³ If the answer to either of these questions is affirmative, the conduct is determined to be a manifestation of the child's disability, which triggers the Team's responsibility to conduct a functional behavioral assessment (FBA); implement, review, and/or modify a behavior intervention plan (BIP); and return the child to the placement from which he was removed, unless the parent and school district agree otherwise.¹⁴ Schools may remove a student to an interim alternative educational setting notwithstanding that the behavior may have been a manifestation of the child's disability in certain circumstances involving weapons, drugs, and serious bodily injury.¹⁵ Parents may request an expedited hearing before the BSEA if they disagree with any decision regarding a manifestation determination.¹⁶

As outlined above, these protections apply where a school district decides to change the placement of a child with a disability based on one or more disciplinary infractions. The IDEA contemplates that children with disabilities who violate codes of conduct may be removed from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 days, to the extent such alternatives are applied to children without disabilities.¹⁷ Nothing in the law prevents a school district from providing additional protections for children with disabilities by, for example, offering a manifestation determination review before a child has been suspended for 10 days during a school year. In fact, convening a Team meeting to discuss a child's disciplinary violations before an MDR is required may lead to changes in the IEP that prevent additional suspensions, and a school district should be commended for such proactive measures.

⁹ *Id.* at § 300.536(a)(2).

¹⁰ *Id.*

¹¹ *Id.* at § 300.530(a).

¹² 20 U.S.C. § 1415(k)(1)(B).

¹³ *Id.* at § 1415(k)(1)(E).

¹⁴ *Id.* at § 1415(k)(1)(F).

¹⁵ *Id.* at § 1415(k)(1)(G).

¹⁶ *Id.* at § 1415(k)(3)-(4); 24 C.F.R. § 300.532.

¹⁷ *Id.* at § 1415(k)(1)(B).

To the extent Parents rely on Massachusetts law regarding suspension and expulsion, specifically M.G. L. c. 71, § 37H ¾, I review briefly the relevant procedural protections it entails. Under M. G. L. c. 71, § 37H ¾, when a student is suspended or expelled for reasons other than those outlined in sections 37H and 37H ½, as Parents assert was the case with Ryan, Parents are entitled to both written notice and the opportunity to meet with the principal or her designee to discuss charges and the reason for the suspension or expulsion.¹⁸ If a decision is made to suspend or expel the student after the meeting, the principal must update the notification for the suspension or expulsion to reflect the meeting with the student.¹⁹ If the student is suspended or expelled for more than 10 school days for a single infraction or for more than 10 school days cumulatively for multiple infractions in any school year, Parents and student have the right to appeal to the superintendent, and they have attendant rights to notice and a hearing.²⁰

C. Application

For the purposes of this *Motion to Dismiss*, I must take Parents' allegations as true. As such, I assume that Ryan was suspended for a total of 9 days during the 2018-2019 school year, which includes the emergency removal on April 10, 2019. I also assume that the District failed to consider all relevant information at the manifestation determination review meeting held on April 25, 2019. As relief, Parents seek proper accounting of the emergency removal on April 10, 2019 as a suspension, and a reversal of the finding that "possession of a vape device and related paraphernalia" conduct was not caused by, nor did it have a direct and substantial relationship to, Ryan's disability.

In accordance with the laws outlined above, because NMRSD's suspensions of Ryan during the 2018-2019 school year did not exceed 10 days, they did not trigger Parents' right to a manifestation determination review or any corresponding right to appeal a decision arising from such review.²¹ The IDEA allows for discretion in determining whether a series of suspensions totaling 10 days constitutes a pattern, but the language is clear that 10 days is the threshold. In these circumstances, I am not persuaded by Parents' argument that the regulation allowing school personnel to consider "unique circumstances" in determining whether a change of placement is appropriate should also apply to a determination whether a change in placement has actually occurred. At the same time, there is nothing in the IDEA, its implementing regulations, or Massachusetts law that prevents a Team from convening before a student has been suspended for 10 days in a school year to consider an FBA; examine and, if appropriate, modify the student's IEP and BIP; and/or provide compensatory services for suspensions administered for behaviors that were manifestations of a student's disability. Such practice may not be used, however, to nullify suspensions in order to evade the threshold of 10 days that triggers procedural protections under state and federal law.

¹⁸ M.G.L. c. 71, § 37H ¾(c).

¹⁹ *Id.* at § 37H ¾(d).

²⁰ *Id.* at § 37H ¾(d)-(e).

²¹ See 20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.536; M.G.L. c. 71, § 37H ¾(d)-(e).

For the reasons above, taking as true “the allegations of the complaint, as well as such inferences as may be drawn therefrom” in Parents’ favor, I find that they have not plausibly suggested an entitlement to relief as to their expedited claims.²²

CONCLUSION

Upon consideration of Parents’ *Hearing Request*, the District’s *Partial Motion to Dismiss*, Parents’ *Objection* thereto, and the arguments of both parties, I find that the District has established that Parents failed to state a claim upon which relief can be granted. The District’s *Motion to Dismiss* is hereby ALLOWED as to Parents’ claims related to reversal of the District’s finding on April 25, 2019 that Ryan’s conduct relating to “possession of a vape device and related paraphernalia” was not a manifestation of his disability. Parents’ other claims survive.

ORDER

North Middlesex Regional School District’s *Motion to Dismiss Relative to Disciplinary Issues and Related Request for Relief* is allowed as to Parents’ claims seeking reversal of the District’s manifestation determination. The remainder of the matter will proceed as follows.

1. A Hearing Officer-initiated Conference Call will take place at 11:00 AM on August 15, 2019.
2. The Hearing will take place at 10:00 AM on September 4, 2019 at the BSEA, 14 Summer St., 4th Floor, Malden.
3. Witness lists and exhibits are due by close of business on August 27, 2019.

By the Hearing Officer:

Amy M. Reichbach
Dated: August 8, 2019

²² See *Blank*, 420 Mass. at 407; *Iannocchino*, 451 Mass. at 636 (internal citation omitted).