

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

In re: Student v.
Boston Public Schools &
Department of Elementary and Secondary Education

BSEA # 2006658

**RULING ON THE DEPARTMENT OF ELEMENTARY AND SECONDARY
EDUCATION'S MOTION TO DISMISS**

On March 28, 2020, Parent filed a Hearing Request in the above-referenced matter. Thereafter, on April 1, 2020, the BSEA received the Department of Elementary and Secondary Education's (DESE) Motion to Dismiss as a party on the basis that Parent's Hearing Request had failed to raise a claim upon which relief could be granted.¹

On April 6, 2020, Parent filed an Opposition to DESE's Motion and requested a Hearing on the Motion, which request was granted via Order issued on April 13, 2020, scheduling the Motion Session for April 27, 2020. Boston Public Schools (Boston) also filed an Opposition to DESE's Motion on April 17, 2020.

The Motion Session was held on April 27, 2020. This Ruling is issued in consideration of the documents and oral arguments proffered by the Parties.

Facts:

The facts appearing herein are considered to be true for purposes of this Ruling only.

1. Student is a 15 year-old, ninth grade student resident of Boston, Massachusetts. She has been diagnosed with Post Traumatic Stress Disorder (PTSD), Attention Deficit Hyperactivity Disorder (ADHD) and Disruptive Mood Dysregulation Disorder and has been found eligible to receive special education services under the categories of health and emotional impairments.
2. Her claim involves alleged denials of a free, appropriate public education (FAPE) by Boston and DESE/SEIS during intermittent periods of time between September of 2018 and March of 2019 while she was in the physical custody of the Department of Youth Services (DYS), and later when she was committed to DYS between July of

¹ The BSEA may entertain a Motion to Dismiss for failure to state a claim upon which relief may be granted pursuant to Rule XVI(B)(4) of the Hearing Rules for Special Education Appeals and Rule 7 of the Formal Rules of Adjudicatory Rules of Practice and Procedure.

2019 and March of 2020. Student has since been released to the community and is currently attending JRI Anchor Academy (through remote learning because of the COVID 19 emergency). JRI is a private day school in Massachusetts.

3. Specifically regarding DESE, Parent's Hearing Request challenges Student's receipt of FAPE while in DYS custody, claiming denial of FAPE and violation of procedural protections, as a result of which Student seeks compensatory services.
4. Prior to her commitment to DYS she was a student at the McKinley South End Academy, Boston, Massachusetts, where she received specially designed instruction, accommodations and modifications to the curriculum under a partially accepted IEP covering the period from 2018 to 2019. Parent had accepted the proposed program and services, but had rejected the placement on or about July 8, 2018, alleging that Student had failed to make effective progress while at McKinley since she entered said placement in 2017.
5. The partially accepted IEP offered Student 344 minutes daily services delivered by a special education teacher, 40 minutes daily of counseling services by a guidance counselor and 45 minutes services per week from a therapist. This IEP also offered Student extended school year services.
6. Student entered the physical custody of the DYS on or about September 26, 2018.
7. Between September 26, 2018 and July 19, 2019, she was detained and released from DYS numerous times resulting in her missing approximately 61 school days, including extended school year services (ESY). Parent asserts that during the period of time that Student was in DYS custody, Student was not offered any educational services.
8. Between December 26, 2018 and January 25, 2019, Student was hospitalized at Cambridge Health Alliance. DESE asserts that it is not responsible for Student's education during the periods of her hospitalization.
9. Student was committed to DYS on or about July 19, 2019 and released to the community on March 19, 2020. Parent states that during the period of her commitment Student received minimal educational and related services.
10. Student alleges that during the time that she was in the physical custody/and or committed to DYS, SEIS and Boston denied her a FAPE. Parent asserts that Student did not receive the special education services to which she was entitled during the approximately 61 days that she was in the physical custody of DYS, and further asserts that Student only received limited services while committed to DYS.
11. According to Parent, SEIS policy calls for SEIS to issue a non-SEIS Service letter to the District responsible for Student's education and no such letter appeared in the

records released by Boston to Parent. Parent further asserts that DESE, by way of SEIS, violated Student's procedural rights by failing to provide Parent with progress reports while Student was being educated by SEIS/DESE.

12. Boston convened Student's IEP Team on November 12, 2019. SEIS staff was present at this meeting. No IEP progress reports were provided at this meeting. During the meeting Parent raised numerous concerns regarding Student's struggles with self-regulation and progress toward meeting her IEP goals.
13. Following the November 2019 IEP meeting Boston issued an IEP covering the period from November 12, 2019 to November 11, 2020 which IEP included a weekly Team consultation in addition to direct services under part C of the service delivery grid in the areas of social emotional, mathematics and behavior. This IEP reduced the type and frequency of services to Student despite available evidence to support a reduction in services.
14. Sometime between mid-November 2019 and February of 2020 Student underwent an educational/ psychological evaluation.
15. Student's Team reconvened on May 3, 2020, including SEIS staff, to discuss Student's evaluation results. At this meeting, the SEIS teacher informed the Team that Student was receiving special education services only twice a week in ELA and twice a week in math. No other services had been provided between early November 2019 and Student's discharge home sometime around March 19, 2020.

Position of the Parties:

DESE/SEIS's Position:

DESE asserts that Student's Hearing Request fails to state a claim upon which relief can be granted because it involves services that fall outside the array of services available through SEIS in the DYS education program, and it fails to state specific allegations regarding SEIS' alleged failure to fulfill its obligation toward Student.

In its Motion, DESE argued that in Massachusetts the responsibility to educate disabled students in institutional settings is divided among SEIS, the host agencies and the school district. See 603 CMR 28.06(9).

DESE states that pursuant to the Massachusetts Special Education Regulations, "the Department shall retain the discretion to determine based upon resources, the type and amount of special education and related services that it provides" while the LEA, herein Boston, retains responsibility for whatever services SEIS does not provide in DYS facilities. 603 CMR 28.06(9) and (10). The district's responsibility for students in institutional settings includes referral, evaluations and provision of services. DESE asserts that whatever services may be owed Student are solely Boston's responsibility.

While not challenging the BSEA's general jurisdiction to address disputes among the present parties regarding Student's education, DESE states that the BSEA lacks authority to order relief contrary to Department regulations, or to direct SEIS use of resources absent an abuse of discretion.

Addressing the period of time involving Student's hospitalization at Cambridge Health Alliance, DESE argues that neither the statute nor the regulations require SEIS to provide special education services in non-institutional settings such as during hospitalizations. Its responsibility for provision of special education services is limited to "facilities operated by or under contract with the Department of Mental Health, the Department of Youth Services, County Houses of Corrections, or the Department of Public Health." 603 CMR 28.06(9); see also MGL c.71B §12. Cambridge Health Alliance is not operated by or under contract with any of the Massachusetts agencies in which SEIS operates. Provision of services during that period of time (assuming that Student was available to receive an education) would have been the responsibility of Boston, not SEIS.

DESE asserts that SEIS complied with its federal and state obligations to provide services to Student while she was committed to DYS.

Parent's Position:

Regarding DESE/SEIS, Parent asserts that consistent with federal law, 20 USC §1401(32) and 20 USC §1412(a)(11), DESE, the state education agency in Massachusetts, is ultimately responsible to ensure that Massachusetts school-aged disabled students, receive a FAPE. Relying on 20 USC §1412(a)(11)(A) Parent argues that "this oversight requirement includes ensuring that all programs administered by any other state or local agency are under the general supervision of individuals in the state and meet the educational standards of the SEA", which responsibility cannot be abdicated because it is ultimately responsible to ensure that every school-age individual within its jurisdiction is offered a FAPE.

Parent further asserts that DESE had a particular obligation to offer Student a FAPE during the time that she was committed to a DYS facility as well as during the periods of time that she was in DYS custody because it is the Massachusetts agency charged with the responsibility for the administration of special education services for students in state institutional settings, such as DYS. See 20 USC §1412(a)(12), 34CFR 300.154 and MGL c.71B §12.

According to Parent, DESE through SEIS was responsible for the administration of special education services in DYS institutional settings consistent with 20 USC §1412(a)(12), including its oversight, and DESE failed to fulfill its procedural and substantive obligations toward Student resulting in a denial of FAPE.

Parent asserts that even if Student was committed to a DYS facility, she was entitled to receive all accepted services delineated in her IEP's Service Delivery Grid (which services she did not receive) and DESE/SEIS was responsible to ensure that those services were

provided. Parent further argues that because of this denial of FAPE, the BSEA has authority to order that DESE provide services to Student.

Lastly, Parent argues that in the context of a motion to dismiss all alleged facts must be taken in the light most favorable to the non-moving party, which in the context of this hearing means that it must be assumed that Student was denied a FAPE as claimed in Parent's Hearing Request, and that the extent of DESE responsibility in this respect is a question of fact to be decided at Hearing. Dismissal of DESE is thus unwarranted and DESE's Motion should be denied.

Boston's Position:

Boston asserts that in her pleadings Parent cited a failure to provide educational services and procedural violations as the basis for alleging that DESE failed to provide Student with a FAPE; claims that fall squarely within the jurisdiction of the BSEA.

According to Boston, DESE is ultimately responsible for a student's education when that Student is in DYS custody. Boston argues that DESE's failure to comply with its own policies resulted in a denial of FAPE to Student and therefore, DESE should be a Party to this action. Boston joins Parent in her objection to allowing dismissal of DESE/SEIS at this juncture.

Legal Standards:

I. Jurisdiction of the BSEA:

The Parties in the instant matter concede that consistent with 20 U.S.C. § 1515(b)(6) in Massachusetts the BSEA has been charged with jurisdiction over timely filed complaints 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."² See 34 C.F.R. §300.507(a)(1)³.

The Parties further concede that in Massachusetts, the BSEA's authority to resolve disputes involving the provision of special education also extends to state agencies. See M.G.L. c71B. The governing regulation, 603 CMR 28.08(3), specifically provides that

² 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. 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, as set forth in 34 CFR 104.31-104.39. 603 CMR 28.08(3)(a). See also, M.G.L. c71B.

³ "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. §300.507(a)(1).

The jurisdiction of the Bureau of Special Education Appeals over state agencies, however, shall be exercised consistent with 34 CFR §300.154(a). The hearing officer may determine, in accordance with the rules, regulations and policies of the respective agencies, that services shall be provided by the Department of Children and Families*, the Department of Developmental Disabilities*, the Department of Mental Health, the Department of Public Health, or any other state agency or program, in addition to the IEP services to be provided by the school district.

Therefore, it is clear that the Massachusetts Special Education Regulations expressly charge the BSEA with the responsibility to resolve education-based disputes between parents, school districts and state agencies, including DESE. In matters involving state agencies the BSEA’s jurisdiction must be consistent with the regulations promulgated under the governing statutes of those agencies. 603 CMR 28.08(3).

II. Motion to Dismiss-Standard:

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.”⁴ 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.”⁵ 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). . .”⁶

Discussion:

Pursuant to the legal standards stated above, in the context of a Motion to Dismiss, Parent’s/Student’s Hearing Request need only assert “factual allegations plausibly suggesting . . . an entitlement to relief” in order to overcome DESE/SEIS’s Motion to Dismiss.⁷

⁴ *Iannochino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

⁵ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

⁶ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

⁷ DESE argued that the analysis regarding whether it should be released as a party was akin to the analysis in a joinder motion. I note that in the context of a motion to dismiss the burden of proof is with the party filing the motion, which in the instant case is DESE, whereas if this were a joinder motion, the burden would have been with Parent or Boston depending on the party seeking the joinder. This distinction is relevant in the case at bar, since

Therefore, taking as true Parent's allegations (as required for purposes of evaluating a Motion to Dismiss), I find that Parent/Student has met the above-noted standard regarding their IDEA claims and that therefore DESE's Motion to Dismiss must be Denied.

20 USC 1412(a)(12), 34 CFR 300.154 and M.G.L. c.71B §12 require that states receiving federal funds ensure the provision of special education services to students in certain state institutions. M.G.L. c.71B §12 provides that

The [D]epartment [of Elementary and Secondary Education] shall establish and maintain a school department for school-age children in each institution under the control of the departments of mental health, developmental services, public health and youth services which provides support and care for resident children with a disability, acting jointly with the department which has control over the particular institution.

Pursuant to the aforementioned statutes and regulations, state agencies are responsible to implement interagency agreements to ensure that IDEA eligible students committed to institutions such as a DYS facility continue to receive special education services. See *In Re: DESE and DYS*, BSEA #10-0669 (Scannell, 7/24/2012).

603 CMR 28.06(9) further states

The department shall provide certain special education services to eligible students in certain facilities operated by or under contract with the Department of Mental Health, the Department of Youth Services, County Houses of Corrections or the Department of Public Health... the Department shall retain the discretion to determine based upon resources, the type and amount of special education and related services that it provides in such facilities.

603 CMR 28.06(9)(a) specifically notes that school districts are not relieved of their responsibilities toward students in institutional settings in accordance with 603 CMR 28.10, noting that such students have "the same rights for referral, evaluation and the provision of special education in accordance with state and federal law as students in public schools. Moreover, 603 CMR 28.06(9)(c) states that

Where a student's IEP requires a type or amount of service that the facility does not provide, it shall remain the responsibility of the school district where the father, mother or legal guardian resides, except as

DESE carries the burden of proving that Parent raises no allegation in her Hearing Request plausibly entitling her to some form of relief.

provided in 603 CMR 38.10(3)(c) 1 and 2⁸, to implement the student's IEP by arranging and paying for the provision of such services.

As explained by DESE in its Motion, the responsibility to educate disabled students in institutional settings in Massachusetts is divided among SEIS, the host agencies and the school district. See 603 CMR 28.06(9).

Pursuant to the Massachusetts regulatory framework the particular institution (herein SEIS) and the responsible school district must coordinate services to ensure provision of special education in accordance with the student's IEP and to the extent that special education services are provided by the Department in such facilities. 603 CMR 28.06(9)(d). Specifically 603 CMR 28.06(9)(d) charges the Department with the responsibility to "make every effort to provide services consistent with the student's IEP and available resources."

Lastly, 603 CMR 28.06(9)(c) mandates that

Where a student's IEP requires a type or amount of service that the facility does not provide, it shall remain the responsibility of the school district where the father, mother or legal guardian resides, except as provided in 603 CMR 38.10(3)(c) 1 and 2, to implement the student's IEP by arranging and paying for the provision of such services.

The regulations, *supra*, taken together require that eligible students in institutional settings such as DYS continue to receive the services delineated in their IEPs to the extent possible, and specifically notes that this be achieved through coordination between the Department/facility and the school district where the student resided prior to entering the institutional setting. While contingent on available resources, the responsibility to ensure provision of FAPE for students in institutional settings such as DYS facilities⁹ and the discretion to determine the type and amount of special education and related services provided therein rest with DESE.

In the instant case, Parent and Boston allege that DESE failed to comply with its own policies and regulations concluding that said failure resulted in a denial of FAPE to Student. According to Parent and Boston, DESE is responsible to provide written notice to the district. *Technical Assistance Advisory SPED 2012-1*, August 23, 2018, addressing certain IEP services not provided by the Department in DYS Institutional Settings. Parent asserts that "following identification of a special education student and after obtaining the student's IEP, SEIS is responsible for issuing a non-SEIS Services (NSS) letter specifying any type of services SEIS is unable to provide, including counseling services." According to Parent, no such letter was produced as part of a record request. Parent and Boston assert that under

⁸ This regulation provides that the responsible school district remains programmatically and financially responsible for the in-district services required by the eligible student while at the institutional facility. See 603 CMR 38.10(3)(c) 1 and 2.

⁹ See *USDOE Dear Colleague Letter* December 5, 2014 citing 34 CFR §300.2(b)(1)(iv).

DESE's policy, SEIS staff is responsible to review a student's IEP upon receipt and provide written notice to the school district regarding needed services that may not be available to SEIS based on resources, type or amount of services. DESE notification policy provides a sample letter to be used by SEIS. Boston argues that "DESE's policy imposes an affirmative action on the Department to provide written notice to the District" and notes that "such a policy addresses the pragmatic necessity to inform the District when DESE is unable to provide a service that is mandated under its own regulations".

Moreover, Parent asserts that prior to her commitment Student had spent approximately 61 days in DYS custody and during that time Student did not receive special education services.

I am persuaded by Parent's and Boston's argument that DESE/SEIS was required to fulfill a number of responsibilities to ensure that Student received a FAPE (to the extent possible) while in DYS custody/ commitment. Questions regarding whether DESE fulfilled these obligations (e.g., whether SEIS forwarded to Boston a written notice of unavailability of services, the timing of forwarding said notice if it was forwarded and its impact) are issues that need to be addressed at a hearing. These are procedural questions that may have resulted in a denial or an unnecessary delay of FAPE to Student. Assuming *arguendo* that DESE were found to have failed to comply with its own regulations and policies, including coordination, and that these alleged violations resulted in a denial of FAPE to Student, DESE may be ordered to remedy/and or oversee implementation of orders entered following a Hearing on the merits. Given the potential for such a findings, it would be premature to dismiss DESE as a party at this juncture.

DESE cannot abdicate its responsibility to ensure that FAPE is offered to students in SEIS facilities to the extent possible, whether by coordination with the LEA and or directly providing the needed service to the eligible student contingent on the available resources. I note however, that DESE is correct that any relief ordered regarding DESE/SEIS must be consistent with the rules, regulations and policies of the respective agency. 603 CMR 28.08(3).

Viewing the facts herein in the light most favorable to the allegations in Parent's Hearing Request, I conclude that Parent/Student have raised sufficient grounds for a plausible claim entitling them to some form of relief from DESE/SEIS. As such, it would be premature to dismiss DESE as a party and therefore, its Motion to Dismiss as a party is hereby DENIED.

Lastly, regarding Parent's claim that DESE should bear responsibility for services not provided to Student while she was hospitalized at Cambridge Health Alliance, or for an alleged failure to oversee provision of services while she was hospitalized, is not persuasive. I can find nothing in the regulations to support Parent's claim in this regard and it is likely that such claim against DESE, would result in a dismissal at the Hearing.

ORDER:

1. The DESE/SEIS' Motion to Dismiss as a Party is DENIED.

So Ordered by the Hearing Officer,

Rosa I. Figueroa
Dated: June 17, 2020