

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

---

In Re Student  
&

Boston Public Schools  
&

BSEA No. 2008568

Mass. Dept. of Elementary &  
Secondary Education  
(DESE)

---

**RULING ON MOTION TO DISMISS OF MASS. DEPT. OF ELEMENTARY AND  
SECONDARY EDUCATION (DESE)**

The instant case involves a 19-year old special education student (Student) who is a resident of Boston, who at all relevant times has been in the legal and physical custody of the Department of Youth Services (DYS), initially on detention status, and subsequently, as a committed youth. On March 13, 2020 Student filed the instant *Hearing Request* with the Bureau of Special Education Appeals (BSEA) in which he asserted claims against both the Boston Public Schools (Boston or BPS) and the Massachusetts Department of Elementary and Secondary Education (DESE).

Student's hearing request alleged, among other things, that Student has been denied a free, appropriate public education (FAPE) during his time in DYS custody. The relevant portions of Student's claim for relief included (A) an appropriate placement and Individualized Education Program (IEP), (B) provision of all special education services in his most recently accepted IEP for the duration of time in DYS custody; and (C) compensatory services corresponding to time Student "spent and/or will spend not receiving FAPE."

On March 30, 2020, DESE sought dismissal of all of Student's claims against it in a *Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted*. In its *Motion*, DESE asserted, first, that DESE had no obligation to provide the services that Student alleged that he had been denied, and, second, that Student failed to allege specific acts or omissions on the part of DESE that denied Student a FAPE.

On April 17, 2020, Student and BPS each filed an *Opposition* to DESE's Motion. Both parties argued that the BSEA has jurisdiction over DESE as the ultimate guarantor of FAPE for Student pursuant to relevant statutes, and, further, that Student's hearing request alleged substantive and procedural violations on the part of DESE which resulted in a deprivation of FAPE.

### **PERTINENT FACTUAL BACKGROUND**

For purposes of this *Ruling* the following assertions are considered to be true and construed in favor of the parties opposing dismissal, namely, the Student and BPS

1. Student is a nineteen- year-old individual with disabilities. There is no dispute that Student is eligible for special education and related services pursuant to applicable federal and state law. There also is no dispute that Student is a resident of Boston, and that BPS is the Local Education Authority (LEA) responsible for providing Student's special education services. For reasons discussed below, BPS currently shares this responsibility with the DESE's Division of Special Education in Institutional Settings (SEIS).<sup>1</sup>
2. Student moved to Massachusetts from Puerto Rico in 2015 and enrolled in the Boston Public Schools (BPS) in or around October 2015. Shortly thereafter, BPS conducted special education evaluations. In March 2016, BPS found Student eligible for an IEP based on an emotional impairment. Initially Student was placed in a substantially separate classroom at Brighton High School. Subsequently, in March 2017, BPS placed Student at McKinley Preparatory High School, first for an extended evaluation and then, for the 2017-2018 school year (tenth grade), as a full time student. Parent and Student allege that Student did not make effective progress at McKinley Prep.
3. Student's native language is Spanish. When Student entered BPS, the District designated him as a "Level 1" ELL student, because he had scored "zero" on tests of English proficiency. Five years later, in January 2020, testing revealed that Student's English was at a "Level 2" for oral language and "Level 1.5" for literacy and overall English language skills. A score of "4" is considered proficient. Student alleged that his lack of English proficiency, and what he experienced as insufficient language support, made him feel isolated and frustrated, and contributed to the lack of progress referred to above.
4. On or about February 16, 2018, Student was detained in a DYS facility. On or about April 23, 2019, Student was committed to DYS, with anticipated release in July 2020. On information and belief, Student has been in the physical custody of DYS since he was first detained in February 2018, and has been housed in various DYS residential facilities since that time.

---

<sup>1</sup> For purposes of this Ruling, "DESE" and "SEIS" will be used interchangeably.

5. Since entering DYS custody, pursuant to applicable law, Student has received instruction from the Special Education in Institutional Settings (“SEIS”) consistent with his IEP developed by Boston. SEIS is a program within DESE which is charged with overseeing and providing educational services to eligible students in facilities operated by several state agencies, including DYS.
6. In May 2018, Boston proposed an IEP for Student covering May 11 2018 - May 10, 2019. Student accepted the proposed service delivery grid, which included over 5.5 hours per day of services from a special educator, as well as monthly counseling from a Spanish speaking counselor and access to a Spanish-speaking paraprofessional during academic classes. Student partially rejected the IEP based on inadequate frequency of Spanish language counseling.
7. Student alleges that throughout his tenure in DYS custody, SEIS failed to provide him with all of the services contained in his fully-accepted service delivery grid and failed to provide him with access to a Spanish-speaking paraprofessional from May 2018 forward. The record does not disclose a “NSS letter” from SEIS to Boston which would have notified BPS of SEIS’ inability to provide Student with one or more services set forth in his IEP, such that BPS would be required to provide the service.
8. Student further alleges that he did not make effective educational progress while in DYS custody.

### **ISSUE PRESENTED**

At issue is whether Student has failed to state a claim for which relief may be granted with respect to DESE on the basis (1) that DESE had no obligation to provide the services that Student alleged that he had been denied, and, (2) that Student failed to allege specific acts or omissions on the part of DESE that denied Student a FAPE.

### **Position of DESE**

Student has failed to state a claim as to DESE for which the BSEA may grant relief. DESE acknowledges that its Office of SEIS shares responsibility with local school districts and host agencies for providing special education services to eligible students in state agency custody. It argues, however, that the type and amount of service to be provided by SEIS/DESE is solely within the discretion of DESE, based on available resources. Student has alleged neither abuse of such discretion by DESE, or other violation of DESE’s statutory or regulatory obligations. Further, while Student alleged that he received “only limited services” under his IEP and did not make effective progress, Student has not specified which services were not delivered and has not identified which of the purportedly missing services were the responsibility of DESE, as opposed to BPS or DYS.

## **Position of Boston Public Schools**

Boston acknowledges state regulatory language that grants discretion to DESE on the amount and type of special education services it provides in institutional settings, but argues that federal regulations and guidance make clear that DESE has ultimate responsibility for ensuring that eligible students in such settings receive a FAPE, even if that responsibility is shared with LEAs and/or other agencies. Moreover, even if DESE is only required to provide services to the extent it has available resources to do so, in this case, evidence exists that DESE failed to follow its own policy requiring it to notify BPS in writing that it lacked resources to provide Student with all of his IEP services. For these reasons, DESE is properly a party in this matter.

## **Position of Student**

Both federal and state statutes and regulations make clear that DESE, as the federally-designated State Education Agency (SEA), has ultimate responsibility for ensuring provision of FAPE to all eligible children in the state, including those in DYS custody. The state regulations that give discretion to DESE on provision of services to incarcerated youth establish an administrative structure for allocating responsibility among agencies, but do not relieve DESE of its overarching responsibility under federal and state to ensure FAPE to these students. Student alleges that DESE failed to provide or ensure provision of all of the services in his accepted IEP while he was in DYS custody; since DESE was the ultimate guarantor of such services, it should remain as a party in this matter.

## **ANALYSIS AND RULING**

### **1. Standard for Ruling on A Motion to Dismiss**

The BSEA may dismiss a claim if the non-moving party fails to state a claim upon which relief may be granted. *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3), *Hearing Rules for Special Education Appeals*, Rule XVIIIB. These provisions are analogous to Rule 12(b)(6) of the Federal and Massachusetts Rules of Civil Procedure. While not directly applicable to proceedings before the BSEA, hearing officers at the Bureau look to this rule for guidance when ruling on motions to dismiss.

In determining whether to grant a motion to dismiss, a hearing officer must consider as true all facts alleged by the party or parties opposing dismissal. The hearing officer should not dismiss the case if the facts alleged, if proven, would entitle the non-moving party relief that the BSEA has authority to grant. *Caleron-Ortiz v. LaBoy-Alvarado*, 300 F.3d 60 (1<sup>st</sup> Cir. 2002); *Ocasio-Hernandez v. Fortunato-Burset*, 640 F.3d. 1 (1<sup>st</sup> Cir. 2011). A motion to dismiss will be denied if “accepting as true well-pleaded factual averments and indulging all reasonable inferences in the plaintiff’s favor...recovery can be justified under any applicable legal theory.” See *Caleron-Ortiz, supra*. The factual allegations must be sufficient to “raise a right to relief above a

speculative level on the assumption that the allegations in the complaint are true (even if doubtful in fact.)” *Bell Atlantic v. Twombly*, 550 U.S. 554, 555 (2007).

Dismissal is appropriate only if the hearing officer cannot grant any relief under federal<sup>2</sup> or state<sup>3</sup> special education statutes, or §504 of the Rehabilitation Act.<sup>4</sup> See *Calderon-Ortiz, supra*; *Whitinsville Plaza Inc. v. Kotseas*, 378 Mass. 85, 89 (1979); *Nader v. Citron*, 372 Mass. 96, 98 (1977); *Norfolk County Agricultural School*, 45 IDELR, 26 (2005). Conversely, if the opposing party’s allegations raise the plausibility of a viable claim that may give rise to some form of relief cognizable under any one or more of these statutory provisions, the matter should not be dismissed. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).

**2. The BSEA has jurisdiction to adjudicate claims against DESE in the instant case, and Student’s hearing request states a claim as to DESE for which the BSEA may grant relief.**

The state statute governing the jurisdiction of the BSEA, MGL c. 71B§2A, sets forth its jurisdiction as follows:

[Resolution of] 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...and its regulations; or (ii) a student’s rights under Section 504 of the Rehabilitation Act of 1973, 29 USC section 794, and its regulations.”  
(Emphasis supplied)

The state special education regulations implementing MGL c. 71B, *i.e.*, 603 CMR 28.00 *et seq.*, track the applicable statutory language as follows:

(3) Bureau of Special Education Appeals: Jurisdiction. In order to provide for the resolution of differences of opinion among school districts, private schools, parents and state agencies, the [BSEA], pursuant to MGL c. 71B, §2A, shall conduct mediations and hearings to resolve such disputes...  
(a) A parent or a school district...may request mediation and/or a hearing...on any matter concerning the eligibility, evaluation, placement, IEP provision or special education in accordance with state or federal law, or

<sup>2</sup> Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et. seq*

<sup>3</sup> M.G.L. 71B

<sup>4</sup> 29 U.S.C. §794

procedural protections of state and federal law for students with disabilities...[or] on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act...

603 CMR 28.08(3).

The above-referenced Massachusetts statute and regulations are consistent with the pertinent federal provisions. Specifically the IDEA at 20 USC §1415(B)(6) and corresponding regulations at 34 CFR §§300.500-517, also permit parents and/or school districts to request mediations and/or due process hearings “relating to the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE to the child.” 34 CFR §300.507(a)(1).

As Boston and Student point out in their memoranda, the IDEA charges DESE, as the SEA for Massachusetts, with ultimate responsibility for provision of FAPE to eligible students, including those in state custody. As such, DESE may be held liable if it neither delivers such services itself, through SEIS, nor ensures that other agencies (such as LEAs) provide special educational services to which students may be entitled. 20 USC § 1412(a)(1)(A); (a)(11). Student’s hearing request alleges that DESE failed to deliver or ensure delivery of special education services set forth in Student’s accepted IEP, and DESE disputes this allegation. Such dispute falls squarely within the purview of the BSEA’s jurisdiction as set forth above.

Moreover, the applicable state regulation, 603 CMR 28.06(9), does not immunize DESE from potential liability if a student in state agency custody, for whose special education services DESE is ultimately responsible, does not receive FAPE. The relevant portions of this regulation provide as follows:

**(9) Educational Services in Institutional Settings.** 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.

(a) Decisions about admission to and discharge from institutional facilities are within the authority of institution administrators, not the school district. However, school districts are not relieved of their obligations to students in such settings. School districts are responsible for students in institutional settings in accordance with 603 CMR 28.10. 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.

(b) Non-educational services such as residential, medical and clinical services shall be provided by the state agency that controls the facility. The provision of such services shall be governed by the state agency in accordance with applicable laws, interagency agreements, or agency policies.

(c) 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 28.10(3)(c)1 and 2, to implement the student's IEP by arranging and paying for the provision of such services.

(d) The responsible school district shall coordinate with the Department and ensure that the student receives an evaluation, an annual review, and special education services as identified by the Team at a Team meeting convened by the responsible school district. The Department shall participate in Team meetings for any student receiving special education services in an institutional setting. To the extent that special education services are provided by the Department in such facilities, the Department will make every effort to provide services consistent with the student's IEP and available resources.

This regulation, supplemented by guidance documents issued by DESE and an interagency agreement between DESE and DYS<sup>5</sup>, outlines procedures for allocation of responsibilities among DESE, DYS, and a student's LEA, including the requirement for DESE to notify the LEA if it cannot provide all of a student's IEP services such that the LEA becomes responsible for doing so. The regulation creates an administrative structure for delivery of special education services, and makes clear that a student's LEA continues to have duties to the student, while in state custody. This regulation cannot and does not, however, relieve DESE of its ultimate responsibility, under both federal and state law, to ensure delivery of FAPE to eligible students in DYS custody, including Student. See, e.g., *OSERS Dear Colleague Letter*, December 5, 2014, p. 6; *Gradsby v. Grasmick*, 109 F. 3d 940, 952 (4<sup>th</sup> Cir. 1997). This conclusion is consistent with prior BSEA rulings in similar cases. See, e.g., *Student v. Boston Public Schools & DESE*, BSEA No. 2006658 (Figueroa, June 17, 2020); *In Re Chicopee Public Schools & Mass. Dept. of Elementary & Secondary Education (DESE)*, BSEA No. 1608986 (Berman, March 20, 2017).

DESE's argument that Student did not provide sufficient detail as to the missing services for which DESE/SEIS allegedly was responsible does not establish grounds for dismissal. The hearing request alleges that Student received no services during some or all of his period in detention, missed some of his services while on committed status, and did not have access to a Spanish-speaking paraprofessional from May 2018 forward. The hearing request further alleges that Student's records do not contain a

---

<sup>5</sup> See Technical Assistance Advisory SPED 2012-1 (8/3/2018); DYS and DESE Agency Coordination Process for DYS youth eligible for Special Education, Detention and Commitment (Updated, August 2017)

copy of the NSS letter that SEIS would be required to send to Boston if SEIS could not fulfill all of the terms of Student's IEP such that BPS would be required to fill the gaps. I find that these allegations in the hearing request are sufficient to state a claim against DESE. Determination of the type and amount of services omitted, as well as which entity—DESE or Boston—was responsible for delivering them, is a factual matter to be determined at a hearing. As such, dismissal of claims against DESE is not warranted.

### **CONCLUSION AND ORDER**

Student's hearing request has stated claims against DESE for which relief may be granted by the BSEA. The *Motion to Dismiss* of DESE is DENIED.

By the Hearing Officer<sup>6</sup>

*/s/ Sara Berman*

---

Sara Berman

Dated: August 10, 2020

---

<sup>6</sup> The hearing officer gratefully acknowledges the assistance of BSEA Law Clerk Alison Sexson in researching and drafting this ruling.