

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

In re: Stewart<sup>1</sup>

BSEA #2101061

**RULING ON ACTON-BOXBOROUGH REGIONAL SCHOOL DISTRICT’S PARTIAL  
MOTION TO DISMISS AND PARENT’S MOTION TO JOIN THE TOWN OF ACTON**

This matter comes before the Hearing Officer on the *Partial Motion to Dismiss* (“*Partial MtD*”) filed by Acton-Boxborough Regional School District (ABRSD, or the District) on December 18, 2020, and Parent’s *Motion for Joinder of Town of Acton as a Party* (“*Joinder Motion*”), filed on January 5, 2021. Following an assented-to extension Parent filed her *Opposition* to the District’s *Partial MtD* on January 4, 2021. ABRSD filed its *Opposition* to Parent’s *Joinder Motion* on January 12, 2021. The Town of Acton, through Counsel, was served by both parties with the *Joinder Motion* but failed to respond, despite also receiving notice of a scheduled *Motion Session*. By email January 21, 2021, in response to an email sent by the Hearing Officer to all parties, Counsel for Acton indicated that Acton joined ABRSD in its *Opposition*; that Counsel did not represent Acton in the Bureau of Special Education Appeals (BSEA) matter; and that Acton did not plan to participate in the *Motion Session*.<sup>2</sup> The *Motion Session* was held by Zoom on January 22, 2021, during which the parties supplemented their written submissions with oral argument. A written transcript of the *Motion Session* was requested by Parent and produced to the parties.

For the reasons set forth below, ABRSD’s *Partial MtD* is ALLOWED in part and DENIED in part, and Parent’s *Joinder Motion* is DENIED *without prejudice*.

I. **FACTUAL BACKGROUND AND RELEVANT PROCEDURAL HISTORY**<sup>3</sup>

Stewart is a nine-year-old third grader who currently attends Conant Elementary School (Conant) in Acton, Massachusetts. Prior to Conant, Stewart attended Merriam Elementary School (Merriam), also in Acton. Stewart has been diagnosed with a social-emotional disability and is on an Individualized Education Program (IEP).

On October 29, 2020, Parent filed a *Hearing Request* claiming, in part, that Stewart<sup>4</sup> suffers from physical and emotional injury because of ABRSD’s discriminatory conduct as well

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<sup>1</sup> “Stewart” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

<sup>2</sup> Transcript of *Motion Session* (Tr.) at 39-40.

<sup>3</sup> The information in this section is drawn from the parties’ pleadings and is subject to revision in further proceedings.

<sup>4</sup> I note that Parent’s *Hearing Request* alleges discriminatory conduct by Acton-Boxborough Regional School District (ABRSD, or the District) against herself as well as her son. She recognizes, however, that she is not the subject of the complaint in the *Hearing Request* itself. Accordingly, I do not recount, or address, the claims she made on her own behalf regarding the District’s discrimination.

as the deprivation of a free, appropriate public education (FAPE) in the least restrictive environment (LRE). Specifically, Parent alleges that ABRSD discriminated against Stewart based on his disability, race, color, national origin, ethnicity, and English Language Learner (ELL) status. Parent asserts that Stewart was “chronically” bullied at school and that the District discriminated against him on the basis of his disability<sup>5</sup> when it violated its own bullying prevention and intervention policies and procedures by failing to investigate reports of bullying by a peer and by failing to convene Stewart’s IEP Team to address how the bullying may have affected his access to a FAPE. According to Parent, the District’s failure to intervene per protocol created a hostile environment for Stewart and caused his behavior to “deteriorate.”

Parent alleges that ABRSD punished Stewart for “manifestations of his disability” by requiring that on one occasion he clean up a classroom he disrupted during an emotional dysregulation prior to being able to resume his learning, and on another occasion prevented him from going to the bathroom until he had cleaned up an office he had similarly disturbed.

Parent further alleges that during an incident on January 9, 2020 (“January incident”), ABRSD violated a number of Stewart’s rights. Specifically, according to Parent, on that date, ABRSD “forced the separation” of Stewart from his parent when she attempted to pick him up; improperly and excessively used physical restraints; worked “in concert” with the School Resource Officer (SRO) to invoke Section 12<sup>6</sup> and admit Stewart to the hospital without Parent’s consent despite the availability of a less restrictive alternative (the mobile crisis team meeting the family at the home); and had school personnel accompany Stewart to the hospital without Parent’s consent.

Parent alleges two privacy violations. She asserts first, that the District unlawfully provided confidential information about Stewart to hospital personnel on the day of the January incident without prior authorization from one of his emergency contacts; and second, that the District provided confidential information to the Acton Police Department (APD), which APD thereafter published on its website.

Parent also contends that the District deviated from its own policies and procedures when it involved the SRO in non-criminal incidents involving manifestations of Stewart’s emotional disability and in investigating truancy concerns following the January incident.<sup>7</sup>

Finally, Parent alleges that the District prevented Stewart from learning in the LRE by having him spend considerable time outside the general education classroom, and by deviating from his IEP when it assigned a 1:1 aide in March 2020 without Parent’s consent or a Team meeting. Parent also asserts that the District’s unilateral institution of a 1:1 aide was, in part, retaliation for Parent’s discrimination claims.

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<sup>5</sup> In her *Hearing Request*, Parent asserts that the District’s failure to investigate the bullying complaint and abide by its own policies and procedures on this matter also amounted to discrimination based on Stewart’s English Language Learner (“ELL”) status, race, ethnicity, and color.

<sup>6</sup> M.G.L. c. 123, § 12.

<sup>7</sup> Parent also claims that the District’s involvement of the School Resource Officer (SRO) during instances of Stewart’s emotional dysregulation amounted to discrimination against Stewart and, during the January incident, his mother on the basis of race.

Parent contends that the actions above violated the following laws and their corresponding regulations: the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973 (Section 504), the Family Educational Rights and Privacy Act (FERPA), Title II of the Americans with Disabilities Act (ADA), Title VI of the Civil Rights Act of 1964, and the Due Process Clause of the 14<sup>th</sup> Amendment to the United States Constitution. Parent cites violations of 42 U.S.C. §§ 1981, 1983 and 1985; M.G.L. c. 71B, M.G.L. c. 93 § 102; M.G.L. c. 12 §§ H and I;<sup>8</sup> M.G.L. c. 71 § 37O and 37P; M.G.L. c. 76 § 5; M.G.L. c. 272 §§ 92A and 98; M.G.L. c. 123 §§ 12; and 603 CMR 23.00, 26.00, 28, and 49. Parent also argues that ABRSD's conduct amounted to intentional infliction of emotional distress, loss of consortium, false imprisonment, false arrest, and common law negligence in violation of M.G.L. c. 25. Finally, Parent argues that ABRSD's conduct contravened the District's Non-Discrimination Policy, Elementary School Handbook, Student Restraint Policy and Procedures, Bullying Prevention and Intervention Policy, and Memorandum of Understanding with the APD.

Parent requested the following relief:

1. A declaration of procedural and substantive violations in this matter;
2. A finding that the actions of the District, through its officers, agents, servants and employees violated the above laws, regulations, policies, memoranda, and handbook, among others, and supporting findings of fact;
3. An award of monetary damages;
4. An award of punitive damages;
5. A finding that Parent has exhausted her administrative remedies as to all claims;
6. Compensatory services for Stewart for the time ABRSD should have known he was not accessing a FAPE, specifically January through October 2020, at which time he enrolled in a different district;
7. An award of attorney's fees and costs.<sup>9</sup>

The matter was scheduled for hearing on December 3, 2020. Following an extension, on November 16, 2020, the District filed its *Response* to Parent's *Hearing Request*. ABRSD denied: that it had discriminated against Stewart; failed to adhere to its policies and procedures regarding bullying; made improper use of the SRO; or acted in a way that impeded Stewart's access to a FAPE. The District attached to its *Response* a copy of an investigation it had commissioned into Parent's allegations regarding the January incident.<sup>10</sup> ABRSD also contended that many of Parent's claims were outside the BSEA's jurisdiction and indicated that it would be filing a

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<sup>8</sup> This statutory provision is cited as appears in Parent's *Hearing Request*. I note that Chapter 12 of the Massachusetts General Laws is partitioned into numerical sections among which Sections "H" and "I" do not appear. In light of Parent's constitutional violation allegations and the parallel federal statutes cited, for exhaustion purposes I will assume Parent intended to cite to Section 11 sub-parts (H) and (I), which address violations of constitutional claims.

<sup>9</sup> I have consolidated the eight forms of relief Parent requested in her *Hearing Request* into the seven delineated here.

<sup>10</sup> See Attachment 4 to *Response to Hearing Request*. The investigation led to the issuance of a report, according to which ABRSD administrators and staff had responded to Stewart's behavioral dysregulation non-discriminately, reasonably, and in accordance with regulations. *Id.*

*Partial Motion to Dismiss* regarding those claims.<sup>11</sup> Also on November 16, 2020, Parent filed an assented-to *Motion to Postpone* this matter for a period of 90 days. I granted the postponement request, and the Hearing was scheduled for March 10 and 12, 2021. A *Motion Session* and a Pre-Hearing Conference were scheduled for January 8 and January 22, 2021, respectively.

On November 16, 2020, Parent filed a *Motion to Consolidate* the instant matter with a *Hearing Request* she had filed regarding Stewart's brother.<sup>12</sup> ABRSD did not file a written response to Parent's *Motion to Consolidate*, but during the Conference Call on November 25, 2020, the District indicated that in the interests of efficiency, it would be amenable to consolidation for limited pre-hearing purposes. On December 23, 2020, I issued a *Ruling* granting, in part, Parent's *Motion to Consolidate*, only for purposes of pre-hearing proceedings and only insofar as they a) involve common questions of law and fact, and b) the parties and tribunals concur in such consolidation.<sup>13</sup> Although both parties requested consolidation, I was unable to obtain a response from my sister Hearing Officer as to her position. The parties requested, and were granted, a continuance of the *Motion Session* for two weeks to permit me to ascertain her position. Ultimately, my sister Hearing Officer indicated that she did not concur with my *Ruling* on limited consolidation. As such, the two cases are proceeding separately.

In the meantime, on December 18, 2020, ABRSD filed its *Partial MtD*, seeking dismissal of claims requesting relief and/or factual findings related to statutes and regulations that do not pertain to special education rights and procedural safeguards and/or denial of a FAPE under Section 504; claims seeking relief for alleged violations of the school district's own policies, procedures, student handbooks and memoranda of understanding with the police department; claims related to accepted, implemented, and expired IEPs; and requests for Orders of monetary and punitive damages and/or attorney's fees and costs. The District asserted, further, that the APD is not a party to the action nor a part of ABRSD, and therefore claims related to the SRO, APD, and/or Town of Acton should be dismissed as beyond the scope of this action and the BSEA's authority.

In her *Opposition* to the District's *Partial MtD*, Parent argued that Stewart's claims arose in a special education context, are related to his status as a student with a disability, and are related to the discharge of the school's obligations under IDEA, Section 504, and M.G.L. c. 71B. Moreover, the BSEA has a particular expertise in developing useful administrative records for judicial review. Parent further asserted that ABRSD had failed to implement Stewart's IEP as written, that the District was on notice as to the inadequacy of the services in Stewart's IEP, and that Parent had constructively rejected the IEP several times prior to its expiration. Finally, according to Parent, the SRO had, at ABRSD's request, engaged in non-criminal interventions that were properly the duties of school personnel and said actions deprived Stewart of a FAPE.

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<sup>11</sup> In its *Response*, the District acknowledged that the SRO had been involved in de-escalating Stewart on January 7, 8, and 9, 2020, but denied that District personnel had utilized the SRO improperly. The District also suggested that Parent's claims regarding improper police conduct and involvement were allegations against the Town of Acton, not ABRSD, and thus, not properly before the BSEA.

<sup>12</sup> The matter involving Stewart's brother was assigned to Hearing Officer Rosa Figueroa.

<sup>13</sup> My Order specified that the two cases would proceed separately to evidentiary hearings and that a separate final decision would be issued for each student.

The parties appear to agree that Police Officer Tyler Russel served as the SRO at the Merriam School at all relevant times and that Officer Russel is an employee of and supervised by the APD. Neither party disputes that school personnel involved Officer Russel in behavioral interventions for Stewart on January 7, 8, and 9, 2020.<sup>14</sup>

On January 5, 2021, Parent filed her *Joinder Motion*, arguing that Acton should be joined pursuant to *Hearing Rule I(J)* because its subsidiary, the APD, is a necessary party due to the involvement of its SRO in the events underlying, in part, the present action.<sup>15</sup>

Parent asserted the following grounds for her *Joinder Motion*:

1. Acton's absence from the proceedings would prejudice Parent by preventing her from holding anyone responsible for actions taken by the SRO at the ABRSD's behest;<sup>16</sup>
2. To the extent that the SRO's participation in the District's behavioral interventions on January 7, 8, and 9, 2020 interfered with Stewart's access to FAPE and thus violated IDEA, exhaustion requires joining Acton;<sup>17</sup>
3. The BSEA has jurisdiction over and subject matter expertise in fact-finding for FAPE claims;
4. A fully developed factual record further requires Acton's participation since the BSEA is the only forum available to resolve all claims against the District and Acton prior to court;
5. Finally, if the BSEA fails to find that the SRO acted as an agent of the District, then the interests of Acton and ABRSD are not sufficiently aligned to dispose of the case in Acton's absence.

On January 12, 2021, ABRSD filed its *Opposition to Parent's Motion to Join the Town of Acton as a Party* ("Opposition"). The District argued that joinder is improper because the BSEA lacks the statutory authority under M.G.L. c 71B, § 2A to resolve claims against Acton or the APD. ABRSD maintains that Acton owed no statutory obligation to Stewart under IDEA, M.G.L. c. 71B and/or Section 504 since Acton "does not administer regional educational services, nor does it operate a public elementary or secondary program or activity for any ABRSD students." According to the District, because the IDEA, M.G.L. c. 71B and Section 504 circumscribe the BSEA's jurisdiction, the BSEA cannot properly order relief on Parent's claims

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<sup>14</sup> In its *Response to Hearing Request* and accompanying "Report of Investigation," the District acknowledged the SRO's involvement on all three occasions. See Attachment 4 to *Response to Hearing Request*.

<sup>15</sup> Though ABRSD is comprised of both the Towns of Acton and Boxborough, the Acton Police Department assigns ABRSD's SRO. See Ex. A to *Joinder Motion* (MOU), M.G.L. c. 71, §37P(b).

<sup>16</sup> Prior to the January 22, 2021 *Motion Session*, the District contended in both its *Partial MtD* and its *Opposition* that it was not responsible for the actions of the SRO.

<sup>17</sup> In her *Joinder Motion*, Parent alleges that on January 9, 2020, a different member of the APD went to Stewart's neighborhood looking for Stewart's brother to notify him about the incident at the school earlier that day. Parent also alleges that ABRSD directed the APD to send an officer to Stewart's home on January 17, 2020 for a truancy visit.

against Acton. Therefore, Acton is not a necessary party for the purpose of exhaustion.<sup>18</sup> Accordingly, ABRSD would have the BSEA conclude that Parent’s claims against Acton could be properly addressed in another forum and that the District alone is responsible for ensuring Stewart’s substantive and legal rights guaranteed under applicable law. Finally, the District made clear that its exclusive responsibility for providing Stewart a FAPE cannot be “conflate[d]” with the SRO’s actions on the ground that “[t]he Town of Acton retains exclusive administration, supervision and control over its police officers, including School Resource Officers.”

During the *Motion Session* on January 22, 2021, both parties supplemented their arguments regarding the *Partial MtD* and the *Motion for Joinder*.

As to the *Partial MtD*, during the *Motion Session*, ABRSD, through Counsel, reiterated its position that “any issues involving allegations of racial discrimination, of discrimination based on nationality, of [the District’s] failure to adhere to policies with respect to bullying or student records or ... the use of the SRO” are not “within the jurisdiction of the BSEA.”<sup>19</sup> The District also argued that the BSEA can only grant relief that is authorized by special education statutes and regulations which generally encompass orders for additional services, changes in placement, additional evaluations, and reimbursement for compensatory services obtained privately by the parents.<sup>20</sup> However, ABRSD conceded that FAPE-related claims of disability-based discrimination are within the purview of the BSEA, and that the Hearing Officer could make a finding that the SRO’s actions impacted Stewart’s rights to FAPE.<sup>21</sup> The District acknowledged that the SRO’s actions “all run[] directly to the Acton-Boxborough Regional School District” and, that, as a result, the Hearing Officer could “hold Acton-Boxborough responsible with respect to the actions of an SRO as to how it impeded a student’s right to FAPE.”<sup>22</sup> The District further acknowledged that Parent’s claims relating to the District’s failure to implement an accepted, expired accepted IEP are within the BSEA’s jurisdiction, as is the question whether Parent had constructively rejected the IEP during its term.<sup>23</sup>

During the *Motion Session*, Parent, through Counsel, characterized her claims as properly before the BSEA because they arose in the special education context, as they are related to Stewart’s status as a minor, disabled, ELL, Black student, and they are related to the discharge of the District’s obligations under IDEA, Section 504, and M.G.L. c. 71B.<sup>24</sup> She contended that the relief she seeks is available in claims rooted in IDEA, Section 504, and M.G.L. c. 71B, and that the “BSEA has a particular expertise in assessing and determining these precise factual issues that form the basis of the Student’s claims.”<sup>25</sup> Finally, she argued that the “gravamen of the Student’s complaints are FAPE” and asserted that although the BSEA may not be able to award

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<sup>18</sup> I address ABRSD’s additional arguments with regard to exhaustion in Parts II(A)(1)(b) (jurisdiction of the BSEA) and II(A)(2) (exhaustion analysis of SRO-related claims), below.

<sup>19</sup> Tr. at 16.

<sup>20</sup> Tr. at 7-8.

<sup>21</sup> Tr. at 7, 11.

<sup>22</sup> Tr. at 50.

<sup>23</sup> Tr. at 10, 11.

<sup>24</sup> Tr. at 13.

<sup>25</sup> *Id.*

every form of relief requested, the Hearing Officer “has the power to enter a finding that the school system violated the Student’s rights.”<sup>26</sup>

With regard to claims involving the SRO, Parent asserted that to the extent a school district utilizes an SRO to assist in or complete any school district responsibility, “the District has the responsibility to ensure that the SRO does not compromise the provision of FAPE to students.”<sup>27</sup> In reference to other allegations, such as those relating to violations of FERPA or school policies, Parent asserted that they “tie violations of [other] regulations into a 504 claim, because it is discrimination.”<sup>28</sup>

As to ABRSD’s contention that claims relating to an expired IEP should be dismissed, Parent argued that on several occasions prior to the IEP’s expiration, the District had deviated from the services she had accepted, which ABRSD was required to provide for Stewart. She also asserted that she had “constructively rejected the IEP several times, verbally, by act, and in writing prior to its expiration.”<sup>29</sup> According to Parent, the “very purpose of requiring a parent to reject the IEP while it’s still active is so that the School can be put on notice regarding the inadequacy of the services being provided and offer the opportunity to provide different services . . . . [The] Parent provided nearly a dozen or more notices to the School via email, in person and by withholding [Stewart] from his placement [...] that she was rejecting the IEP. . . . The . . . District itself noted the inadequacy of the IEP because it deviated repeatedly and substantially from the full inclusion program it was required to provide from October 4, [2019] as the student was not able to access his education in that format.”<sup>30</sup>

As to joinder, during the *Motion Session*, Parent, through Counsel, maintained that complete relief cannot be granted under *Hearing Rule I(J)* in Acton’s absence because “the School District relied so heavily on the police to fulfill the School’s educational responsibilities to the child.”<sup>31</sup> Likewise, Parent contends that the case cannot be disposed of in Acton’s absence because Acton has an independent interest in investigating the SRO’s responsibilities by virtue of the Town’s delegation of its educational responsibilities to the District.<sup>32</sup> As a result of this delegation, Acton possesses an independent interest in finding out more about the SRO’s “entanglement with the School’s day-to-day responsibilities.”<sup>33</sup> Parent also raised the risk of unfair prejudice that would result from finding the SRO’s involvement<sup>34</sup> deprived Stewart of a FAPE without also allowing Stewart to redress the deprivation.<sup>35</sup> For this same reason, Parent argues, the proper range of alternatives for fashioning relief requires joinder.

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<sup>26</sup> Tr. at 16.

<sup>27</sup> Tr. at 20.

<sup>28</sup> Tr. at 26, 31.

<sup>29</sup> Tr. at 17-18.

<sup>30</sup> Tr. at 19-20.

<sup>31</sup> Tr. at 36.

<sup>32</sup> *Id.*

<sup>33</sup> Tr. at 39.

<sup>34</sup> Parent argued in the alternative that the SRO’s actions were taken at the behest of ABRSD, and that they were within the SRO’s own discretion.

<sup>35</sup> Tr. at 37-38 (characterizing the risk of unfair prejudice as an “educational shell game, where the student is entitled to FAPE, but [where] the school, who has that responsibility, delegates it to the police and then argues that the police owe no duty of FAPE to the student . . .”).

ABRSD responded that joinder of Acton in this matter could create a “slippery slope”—incentivizing parents to join their towns in future actions against school districts.<sup>36</sup> Moreover, the District reiterated that ABRSD has exclusive responsibility for providing Stewart a FAPE and the BSEA’s limited jurisdiction does not allow relief to be granted against the Town. Therefore, excluding Acton would not inhibit complete relief.<sup>37</sup> Notably, ABRSD appeared to have changed its position on the issue of responsibility for a School’s improper use of an SRO if the SRO’s intervention, at the School’s behest, deprives Stewart of a FAPE. Though ABRSD disputes the underlying allegations, it conceded during oral argument that the District, which “is the one obligated to provide FAPE,” would also be the one to “answer for” the SRO’s involvement.<sup>38</sup> ABRSD qualified this concession by noting that joinder is not necessary to make a determination on this issue and that taking the testimony of the SRO and relevant officers, by issuing subpoenas for their attendance at hearing, would suffice.<sup>39</sup>

## II. DISCUSSION

Although some of the issues that inform my determination of the outcome of ABRSD’s *Partial MtD* and Parent’s *Joinder Motion* overlap, the relevant legal standards differ. As such, I address each motion in turn.

### A. Partial Motion to Dismiss

#### 1. *Legal Standards*

##### a. Legal Standard for Motion to Dismiss

Hearing Officers are bound by the *BSEA Hearing Rules for Special Education Appeals (Hearing Rules)* and the Standard Rules of Adjudicatory Practice and Procedure, 801 Code Mass Regs 1.01. Pursuant to *Hearing Rule XVII (A) and (B)* and 801 CMR 1.01(7)(g)(3), 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. These rules are analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure. As such, hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim. To survive a motion to dismiss, there must exist “factual ‘allegations plausibly suggesting (not merely consistent with)’ an

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<sup>36</sup> Tr. at 43.

<sup>37</sup> See Tr. at 41, 43-44.

<sup>38</sup> Tr. at 42 (“[I]f the Hearing Officer were to determine that the use of the SRO was improper . . . [and] at the behest, if you will, of the School District, then that is really the School District to answer for. The School District is the one who is obligated to provide FAPE.”) (statement of Attorney Brunt). See Tr. at 45 (“I do think you, as a Hearing Officer, could make a finding if, in fact, Acton-Boxborough improperly delegated that responsibility – if that’s a finding – improperly delegated that responsibility to SRO and that impacted FAPE. That is a factual record that you have the expertise to determine.”) (statement of Attorney Brunt).

<sup>39</sup> See Tr. at 43, Tr. at 44 (“The Hearing Office can make findings relative to the SRO and how Acton-Boxborough Regional School District used the SRO in relation to [Student’s] entitlement to FAPE, but not against the Town of Acton.”) (statement of Attorney Brunt).

entitlement to relief.”<sup>40</sup> In evaluating a motion to dismiss, 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.”<sup>41</sup> These “[f]actual allegations must be enough to raise a right to relief above the speculative level.”<sup>42</sup>

#### b. Jurisdiction of the BSEA

A claim can only survive a motion to dismiss, under the standards above, if it is properly before the BSEA. A claim is properly before the BSEA if a) the claim arises under M.G.L. c. 71B, the Massachusetts special education statute; 20 U.S.C. § 1400 et. seq., the federal special education statute, 29 U.S.C. § 794, Section 504 of the Rehabilitation Act of 1973, and/or the regulations promulgated pursuant to these statutes; or b) the claim arises under laws different from those enumerated but is “IDEA-based”<sup>43</sup> and thus subject to the IDEA’s exhaustion requirement.<sup>44</sup>

The first type of claim fits squarely within the BSEA’s jurisdiction, and the IDEA’s exhaustion requirement,<sup>45</sup> because the BSEA is the administrative agency in Massachusetts charged with hearing formal complaints on “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.”<sup>46</sup> A party seeking relief under the above-mentioned federal and state special education laws must “exhaust,” or complete all of the IDEA’s administrative due process procedures, before seeking relief in court.<sup>47</sup> Moreover, the relief the BSEA may grant for these claims is similarly circumscribed by the statutes and regulations governing special education. Monetary relief under the IDEA is limited to compensatory education and equitable remedies involving reimbursement for expenses undertaken by parents for educational and related needs of their children.<sup>48</sup> Hence, punitive damages are unavailable as a remedy.<sup>49</sup>

A body of law has developed to interpret the jurisdiction of the BSEA and its sister agencies in other states with respect to the second type of claim. In *Fry v. Napoleon Community*

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<sup>40</sup> *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

<sup>41</sup> *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

<sup>42</sup> *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

<sup>43</sup> *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 63 (1st Cir. 2002) (addressing arguments that the IDEA’s exhaustion requirement did not apply to a lawsuit seeking money damages pursuant to 42 U.S.C. § 1983 for a school district’s alleged frustration of a student’s right to a FAPE, the U.S. Circuit Court of Appeals for the First Circuit concluded that “plaintiffs who bring an IDEA-based claim . . . in which they seek only money damages, must exhaust the administrative process available under the IDEA”).

<sup>44</sup> 20 U.S.C. 1415 (I); 34 CFR 300.516(e). The exhaustion requirement is not absolute; parties “may bypass the administrative process where exhaustion would be futile or inadequate.” *Honig v. Doe*, 484 U.S. 205, 327 (1988). The IDEA’s exhaustion requirement, however, “remains the general rule, and a party who seeks to invoke an exemption bears the burden of showing that it applies.” *Frazier*, 276 F.3d at 59. In the instant matter, neither party makes such an argument.

<sup>45</sup> 20 U.S.C. § 1415 (I); 34 CFR 300.516(e).

<sup>46</sup> 20 U.S.C. § 1415(b)(6)(A); 603 CMR 28.08.

<sup>47</sup> See 20 U.S.C. § 1415 (I); 34 CFR 300.516(e).

<sup>48</sup> See *Diaz-Fonseca v. Commonwealth of Puerto Rico*, 451 F.3d 13, 19 (1st Cir. 2006).

<sup>49</sup> See *id* at 28 (“It is black letter law that punitive damages—indeed money damages of any sort—are not available in a private suit under the IDEA”); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 126 (1st Cir. 2003).

*Schools*, the United States Supreme Court clarified that the scope of the IDEA’s exhaustion requirement extends to lawsuits arising under other laws, typically antidiscrimination statutes, “when the gravamen of the plaintiff’s suit is . . . the denial of the IDEA’s core guarantee—what the Act calls a ‘free appropriate public education.’”<sup>50</sup> In *Frazier v. Fairhaven School Committee*, the United States Court of Appeals for the First Circuit referred to these claims as “IDEA-based.”<sup>51</sup> Essentially, a plaintiff cannot circumvent the IDEA’s exhaustion requirement, Section 1415(*I*), by bringing a FAPE-based claim under a non-IDEA statute or by requesting relief for said FAPE violation that is beyond the BSEA’s authority to grant.<sup>52</sup> “IDEA-based” claims must be exhausted before proceeding to court to ensure that the BSEA is able to develop a factual record and apply its “specialized knowledge” in such cases.<sup>53</sup> The exhaustion requirement also ensures “that education agencies will have an opportunity to correct shortcomings in a disabled student’s [IEP].”<sup>54</sup> The inquiry is thus not whether plaintiff requests relief available under the IDEA for her claim, which by Section 1415(*I*)’s very language she is not restricted to do,<sup>55</sup> but whether the “gravamen” of plaintiff’s suit is an “IDEA-based” claim.<sup>56</sup> As such, even when they are framed under statutes that might otherwise entitle a prevailing party to relief the BSEA cannot award, “IDEA-based” claims are properly before the BSEA.<sup>57</sup> If the BSEA determines that a FAPE violation has occurred, only the remedies under the IDEA are available.<sup>58</sup>

Under *Fry*, two questions may inform a tribunal’s determination whether the substance of the complaint concerns a denial of FAPE or instead addresses other disability-based discrimination: (1) Could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school, such as a public theater or library? (2) Could an adult at the school, such as an employee or visitor, have pressed essentially the same grievance? If the answer is yes, then exhaustion of administrative remedies is not

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<sup>50</sup> 137 S. Ct. 743, 748 (2017); see *Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 25 (1st Cir. 2019) (“What matters is not whether a ‘a complaint includes (or, alternatively, omits) the precise words [] ‘FAPE’ or ‘IEP,’” but rather whether a claim in fact ‘seeks relief for the denial of an appropriate education.’” (citing *Fry*)).

<sup>51</sup> *Frazier*, 276 F.3d at 63.

<sup>52</sup> *Fry*, 137 S. Ct. at 754; see *Bowden ex rel. Bowden*, No. 00-12308-DPW, 2002 WL 472293, \*4 (D. Mass. 2002) (concluding plaintiff’s ADA and Section 504 claims required exhaustion under IDEA because they contained allegations that defendant’s physical and psychological abuse interfered with student’s right to a FAPE).

<sup>53</sup> *Frazier*, 276 F.3d at 60; see *Fry*, 137 S. Ct. at 754 (noting that IDEA hearing officers have expertise in addressing FAPE-related claims); *In Re: Georgetown Pub. Sch.*, BSEA #1405352, 20 MSER 200 (Berman 2014) (recognizing that FAPE-related claims asserted under non-IDEA laws may be subject to the IDEA’s exhaustion requirement if the BSEA can “provide some meaningful relief or a superior record on which the court could make its determination”).

<sup>54</sup> *Frazier*, 276 F.3d at 19.

<sup>55</sup> 20 U.S.C. § 1415(*I*) (“Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], Title V of the Rehabilitation Act [including § 504], or other Federal laws protecting the rights of children with disabilities . . . .”) (emphasis added).

<sup>56</sup> *Fry*, 137 S. Ct. at 748.

<sup>57</sup> See *Diaz-Fonseca*, 451 F.3d at 19 (explaining that IDEA hearing officers may not award compensatory or punitive damages regardless of the cause of action invoked).

<sup>58</sup> See *Fry*, 137 S. Ct. at 753 (“The only relief that an IDEA officer can give . . . is relief for the denial of a FAPE”); *Diaz-Fonseca*, 451 F.3d at 19 (holding that where the essence of a claim is a denial of FAPE, no greater remedies than those authorized by the IDEA may be awarded, regardless of how the claims are characterized (ADA, Rehabilitation Act, Section 1983, etc.)), *Nieves-Marquez*, 353 F.3d at 125 (noting the “IDEA’s primary purpose is to ensure FAPE, not to serve as a tort-like mechanism for compensating personal injury”).

required.<sup>59</sup> The *Fry* Court also recognizes a plaintiff's prior invocation of the "IDEA's formal procedure to handle the dispute" as probative evidence that the "substance of [] plaintiff's claim concerns the denial of a FAPE."<sup>60</sup>

It is also important to note a third category of claims—a claim that is not IDEA-based and therefore not properly before the BSEA. This third category of claims can include disability and education-related claims. For example, in *In Re Beatrice and Charlie*, I found that the students' eligibility for, and receipt of, special education and related services did not transform their claims for money damages (pursuant to statutes other than the IDEA or Section 504) into "IDEA-based" claims.<sup>61</sup> Likewise, the United States Court of Appeals for the First Circuit in *Doucette v. Georgetown Public Schools* held that "the existence of the IEP does not alter the character of the child's section 504 claim."<sup>62</sup> As such, a school's conduct toward a student or an event that took place at school is not dispositive in determining whether the underlying claim concerns the denial of FAPE.<sup>63</sup> Because the only relief the BSEA can grant is relief for the denial of a FAPE, I must dismiss any claims that do not concern the denial of a FAPE, regardless of where they transpired and whom they involved.

### c. Accepted, Expired IEPs

Hearing Officers generally do not consider the appropriateness of an IEP that has expired where parents participated in its development, received notice of their options for rejecting the IEP and proceeding to a due process hearing, chose to accept that IEP, and did not reject in during its term.<sup>64</sup> However, "[t]o provide a free and appropriate public education to a student with disabilities, the school district must not only develop the IEP, but it also must implement the

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<sup>59</sup> *Fry*, 137 S. Ct at 747. Prior to *Fry*, in *In Re Xylia*, BSEA #120781, 18 MSER 373 (Byrne 2012) the BSEA developed and implemented a three-prong inquiry to evaluate whether the BSEA could exercise jurisdiction over claims involving statutes other than the IDEA, Section 504, and M.G.L. c. 71B. Hearing Officer Byrne held that a hearing officer must consider these questions: (1) is the event giving rise to the student's claim "related" to the student's status as a student with disabilities or to the discharge of the school's obligations under the IDEA, Section 504 and/or MGL c. 71B?; (2) is the relief the student is seeking available in a claim rooted in the IDEA, Section 504 and/or MGL c. 71B?; and (3) does this administrative due process agency have a particular expertise in assessing and determining the factual basis of the student's claim so as to develop a useful administrative record for a judicial review? See *In Re Beatrice & Charlie*, BSEA #1502412 and #1502413 (Reichbach 2014) (applying this analysis).

<sup>60</sup> *Fry*, 137 S. Ct at 757. The *Fry* Court further stipulates that this is a fact-intensive inquiry with the operative phrase being "formal proceedings," i.e., it "does not apply to more informal requests to IEP Team members or other school administrators for accommodation or changes to a special education program." *Id.* at n. 11. See *Doucette*, 936 F.3d at 24 (applying same analysis).

<sup>61</sup> *In Re Beatrice & Charlie*; see *Doucette*, 936 F.3d at 22 (noting that redress for harms under non-IDEA statutes caused by injuries unrelated to a FAPE were not subject to the exhaustion rule); *Diaz-Fonseca*, 451 F.3d at 29; *Frazier*, 276 F.3d at 59, 64.

<sup>62</sup> *Doucette*, 936 F.3d at 28.

<sup>63</sup> See *Fry*, 137 S. Ct. at 754-55 ("A school's conduct toward such a child—say, some refusal to make an accommodation—might injure her in ways unrelated to a FAPE, which are addressed in statutes other than the IDEA. A complaint seeking redress for those other harms, independent of any FAPE denial, is not subject to § 1415(l)'s exhaustion rule because, once again, the only "relief" the IDEA makes "available" is relief for the denial of a FAPE.")

<sup>64</sup> *In re: Jed & Westport Pub. Sch.*, BSEA #1302922, 19 MSER 106 (Oliver 2013); see *Doe v. Hampden-Wilbraham Reg'l Sch. Dist.*, 715 F. Supp. 2d 185, 195 (D. Mass 2010) (affirming BSEA's holding that "hearing officers are precluded from revisiting or re-opening accepted IEPs that have expired where parents participated in the development of the IEP").

IEP in accordance with its requirements.”<sup>65</sup> As such, claims involving implementation of an accepted, expired IEP are properly before the BSEA.

## 2. *Application to the Instant Matter*

In evaluating the District’s *Partial MtD* under the legal standard set forth above, I take the Parent’s allegations as true, as well as any inferences that may be drawn from them in her favor. I must deny dismissal if these allegations plausibly suggest an entitlement to relief.<sup>66</sup> Moreover, as explained above, the BSEA is limited in the relief it may grant. Therefore, irrespective of the relief Parent seeks for her claims that survive the District’s *Partial MtD*, the BSEA is limited to the following forms of relief: determinations of violations of special education laws within its jurisdiction to hear, determinations of FAPE violations for “IDEA-based” claims, compensatory education, and equitable remedies involving reimbursement for expenses undertaken by parents for educational and related needs of their children.<sup>67</sup> As such, the BSEA cannot award the attorney’s fees and costs, punitive damages, and non-equitable monetary damages that Parent seeks.<sup>68</sup>

In her *Hearing Request*, Parent asserted a host of claims under a litany of statutes. Although ABRSD did not enumerate in its written submission or oral argument which it sought to have dismissed, the District generally contends that I should dismiss particular categories of claims: claims seeking relief under any statutes and regulations that do not govern special education, procedural protections for students with disabilities and/or denial of a FAPE under Section 504; requests for factual findings related to any statutes and regulations that do not govern special education, procedural protections for students with disabilities and/or denial of a FAPE under Section 504; claims seeking relief for alleged violations of the school district’s own policies, procedures, student handbooks and memoranda of understanding with the police department; claims for any monetary and/or punitive damage relief; claims for any SRO actions,<sup>69</sup> APD actions and/or Town of Acton actions; claims for an order of attorney’s fees and costs; and claims related to accepted, implemented and expired IEPs.

Parent contends in her *Opposition* that because her claims arise "in the context of" Stewart’s special education program and are linked to his status as a student with a disability, the gravamen of [her] complaint charges, and seeks relief for, the denial of a FAPE."<sup>70</sup> As such, a Hearing Officer must hear all of Parent’s claims, develop a factual record, and apply her expertise to the issues before her in order to enable Parent to exhaust her claims before proceeding to court.

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<sup>65</sup> *Colón-Vazquez v. Dep’t of Educ.*, 46 F. Supp. 3d 132, 144 (D. P.R. 2014) (citing 20 U.S.C. § 1401(9)(D)).

<sup>66</sup> See *Iannocchino*, 451 Mass. at 636 (citation omitted).

<sup>67</sup> See *Diaz-Fonseca*, 451 F.3d at 13, 19.

<sup>68</sup> See *id.* at 28 (explaining that the IDEA precludes both punitive damages and general compensatory damages); 34 CFR 300.517(a)(1)(i) (in any action brought under the IDEA, only a court, not the BSEA, has the authority to award reasonable attorney's fees to a prevailing party who is the parent of a child with a disability); 603 CMR 28.08(3)(a).

<sup>69</sup> As discussed above, the District conceded during oral argument that I could hold ABRSD responsible for the actions of the SRO if the SRO, acting at the District’s behest, impeded Stewart’s right to a FAPE. Tr. at 50.

<sup>70</sup> See *Fry*, 137 S. Ct. at 748.

To determine which claims survive the District's *Partial MtD*, I must first decide which of Parent's claims assert the denial of a FAPE and thus must be exhausted before proceeding to court.<sup>71</sup> If the claim's "gravamen" is not the denial of a FAPE, then the claim is not "IDEA-based" and must be dismissed for lack of jurisdiction.<sup>72</sup> Claims that are "IDEA-based" proceed to the second part of the analysis: determination as to whether they make "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief" and therefore survive the District's *Partial MtD*.<sup>73</sup>

a. Claims under Special Education Laws and Regulations

Parent contends that several of the District's actions and inactions deprived Stewart of a FAPE in the LRE. Because these claims arise directly under federal (and state) special education laws,<sup>74</sup> and regulations promulgated thereunder, they are properly before the BSEA and Parent must exhaust all available administrative remedies before proceeding to court. Parent alleges that the District assigned a 1:1 aide without parental consent, failed to adequately investigate and respond to bullying concerns that impacted Stewart's ability to access the curriculum, improperly involved the SRO during Stewart's dysregulation, and improperly responded to Stewart's behavioral challenges by preventing him from returning to class following his dysregulation. Taking all allegations as true and drawing all reasonable inferences therefrom in the light most favorable to the Parent, I find that Parent's claims arising directly under special education law sufficiently allege an entitlement to relief within the BSEA's authority to grant: a finding that a FAPE violation has occurred and a corresponding award of compensatory educational services for the period in which Stewart was not accessing a FAPE.

Likewise, Parent's claims as to the implementation failure of an accepted, expired IEP are brought directly under the IDEA, which makes them *per se* IDEA-based and thus ripe for analysis with respect to the District's *Partial MtD*. To constitute a violation of FAPE, a District's failure to implement an IEP must be more than *de minimis*.<sup>75</sup> To prevail on her implementation claim, Parent must show that the District "failed to implement substantial or significant provisions of the IEP."<sup>76</sup> Parent alleges that when ABRSD placed Stewart with a 1:1 aide without her consent, involved the SRO in his behavioral interventions, and removed him from his general education classroom for substantial periods of time, the District interfered with Stewart's ability to receive the services on his IEP. Drawing all reasonable inferences therefrom in the light most favorable to Parent, I find that her allegations plausibly suggest an entitlement to relief for more than a *de minimis* violation of Stewart's IEP. Accordingly, Parent's claims as to the implementation failure of Stewart's 2019-2020 IEP survive dismissal.

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<sup>71</sup> See *Fry*, 137 S. Ct. at 748.

<sup>72</sup> *Fry*, 137 S. Ct. at 752; *Frazier*, 276 F.3d at 63.

<sup>73</sup> *Iannocchino*, 451 Mass at 636 (citation omitted); *Frazier*, 276 F.3d at 63.

<sup>74</sup> I note that Parent did not link her claims of a FAPE denial to a particular state or federal special education statute (or corresponding regulation).

<sup>75</sup> See *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000); *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008).

<sup>76</sup> *Bobby R.*, 200 F.3d at 349; see *Shank*, 585 F. Supp. 2d at 68 (internal punctuation and citation omitted) (material failure is "more than a minor discrepancy between the services a school provides to a disabled child and those required by the child's IEP.")

Parent further claims that her communication with the District between October 2019 and March 2020 put ABRSD on notice that she was dissatisfied with the IEP and, as such, the District should have interpreted this as a constructive rejection. To the extent Parent effectively rejected the 2019-2020 IEP during its term, this IEP is open to a challenge that it was not reasonably calculated to provide Stewart with a FAPE. Viewing these allegations broadly and in the light most favorable to the Parent, I cannot at this early stage dismiss Parent's claim. Parent should be given every reasonable opportunity to establish her version of the facts and, if she succeeds, to demonstrate whether the expired IEP was reasonably calculated to provide Stewart with a FAPE. Accordingly, this claim survives dismissal.

Parent alleges that the District discriminated against Stewart on the basis of disability in violation of Section 504. The BSEA's jurisdiction explicitly includes claims by a parent or student regarding "any issue involving the denial of the free appropriate public education guaranteed by Section 504 . . . as set forth in 34 CFR §§104.31-104.39."<sup>77</sup> Thus, to the extent they involve Stewart's access to a FAPE, Parent's Section 504 claims are properly before the BSEA for exhaustion. To prevail on this claim Parent must prove that Stewart is an otherwise qualified individual with a disability under Section 504, that he was excluded or denied benefits solely on the basis of his disability, and that ABRSD receives federal funding.<sup>78</sup> Taking all allegations as true, and making the informed inferences that ABRSD receives federal funding and that Stewart is an otherwise qualified individual with a disability under Section 504, I proceed with my determination as to whether Parent's factual allegations plausibly suggest that Stewart was excluded from, or denied the benefit of, a FAPE solely on the basis of his disability.

Proving discrimination under Section 504 "requires something more than a mere failure to provide the free appropriate education required by the IDEA."<sup>79</sup> To prevail on a Section 504 claim, the moving party also must prove that he was excluded from or denied the benefits of the educational program at issue based solely upon his disability.<sup>80</sup> In other words, the student must prove that "but for" the existence of the disability, the denial or exclusion would not have occurred.<sup>81</sup> Here, Parent makes numerous allegations of disability discrimination yet on no occasion does Parent allege that the sole basis for the District's discrimination was Stewart's disability. Parent consistently groups together allegations of disability discrimination with parallel assertions of discrimination based on Stewart's membership in other protected classes. For example, Parent argues with equal force that the District's failure to adequately follow up on reports of bullying amounted to discrimination based on Stewart's ELL status, vis-a-vis his inability and self-consciousnesses communicating in his second language, and his disability status, vis-à-vis his inability to self-advocate. Even viewed in the light most favorable to her, Parent has not alleged facts regarding causation, under this standard, that plausibly suggest an entitlement to relief from the BSEA. Therefore, Parent's disability discrimination claims, to the extent they arise under Section 504,<sup>82</sup> are dismissed.

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<sup>77</sup> 603 CMR 28.08(3).

<sup>78</sup> See *Adam v. Taunton Public Schools*, BSEA #1708888 (Reichbach 2018) (applying same analysis).

<sup>79</sup> *Bess v. Kanawha Cnty. Bd. of Educ.*, 2009 WL 3062974, \*10 (S.D.W. Va. 2009).

<sup>80</sup> See *Campbell v. Bd. of Educ. of the Centerline Sch. Dist.*, 58 F. App'x 162, 165 (6th Cir. 2003) (explaining elements of prima facie case for § 504 discrimination claim), *D.R. v. Mich. Dept of Educ.*, 2017 WL 4348818, \*9 (E.D. Mich. 2017) (applying same prima facie standard).

<sup>81</sup> See *Bess*, 2009 WL 3062974 at \*10.

<sup>82</sup> I note that in her *Hearing Request*, Parent did not link her claims of disability discrimination directly with their statutory bases.

b. FAPE-Based Claims under Non-IDEA Statutes

Parent alleges that the District's decision to assign Stewart a 1:1 aide constitutes retaliation.<sup>83</sup> Applying *Fry*, I find that a non-student could not bring this claim outside the school setting. Drawing all reasonable inferences from the pleadings in the light most favorable to Parent, I also find that Parent was not in a position to pursue the IDEA's formal procedures to address this issue because, for a significant period of time, the purpose of the aide was misrepresented to her, and once she learned about the 1:1 aide, she called the school and remedied the issue through informal channels.<sup>84</sup> As such, I find that to the extent Parent's retaliation claim concerns the denial of a FAPE, the BSEA has jurisdiction to hear the claim. Moreover, assuming all allegations are true, as I must at this early stage, I cannot dismiss Parent's claim that the assignment of a 1:1 aide to Stewart, a service neither proposed in an IEP or by the Team, nor accepted by Parent, constituted retaliation.

Parent alleges that the District unlawfully involved the SRO in a variety of non-criminal educational matters, including behavioral interventions during Stewart's episodes of dysregulation.<sup>85</sup> The SRO's alleged involvement in Stewart's behavioral interventions at the District's behest indicates a dispute "concerning . . . the discharge of the School's procedural and substantive responsibilities under the IDEA or Section 504" and thus is "IDEA-related."<sup>86</sup> Parent's claim also satisfies both prongs of *Fry* since (1) Stewart could not have brought the same claim if the SRO's conduct had occurred outside the school; and (2) an adult at the school could not have pressed the same grievance.<sup>87</sup> For this reason, the BSEA has "specialized knowledge" to apply in developing the factual record for this claim.<sup>88</sup> Accordingly, to the extent Parent contends that the actions taken by the SRO deprived Stewart's access to a FAPE, her claim is "IDEA-based" and thus requires exhaustion of all administrative remedies before proceeding to court.<sup>89</sup> Moreover, Parent's allegation that the District improperly involved the SRO in behavioral interventions during Stewart's dysregulation on January 7, 8, and 9, 2020 and, in so doing, interfered with Stewart's access to a FAPE plausibly suggests entitlement to relief for the denial of a FAPE and thus survives dismissal.<sup>90</sup> All other claims asserted with respect to the conduct of the SRO and/or APD neither arise under a special education law within

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<sup>83</sup> Similarly, Parent did not specify a statutory basis for her retaliation claim.

<sup>84</sup> See *Fry*, 137 S. Ct at 757.

<sup>85</sup> Parent alleges that the SRO's involvement contravened several of the District's policies and procedures, including its MOU with the Acton Police Department. Parent also cites M.G.L. c. 71, §37P (governing SROs) and M.G.L. c. 23, §12 ("Section 12" or involuntary hospitalization) under "Counts" in her *Hearing Request*.

<sup>86</sup> *In Re Xylia*.

<sup>87</sup> See *C.B. v. Sonora Sch. Dist.*, 54 IDELR 293 (E.D. Cal. 2010) (characterizing school involvement of police where a student with a disability clearly doesn't pose a threat of harm to himself or others as an IEP implementation failure requiring exhaustion of administrative remedies under the IDEA). Cf. *Spring Branch Indep. Sch. Dist. v. O.W.*, 961 F.3d 781, 798 (5th Cir. 2020) (finding police intervention is not dispositive of an IEP implementation failure and that in the instant case no such IEP violation occurred because the officer was involved only after all positive redirections on Student's IEP were exhausted and the officer-student interaction was limited to a handful of questions).

<sup>88</sup> *Frazier*, 276 F.3d at 60.

<sup>89</sup> See *Meekins v. Cleveland Cnty. Bd. of Educ.*, 2018 WL 2326129, \*5 (W.D.N.C. 2018) (dismissing student's FAPE claim that asserts improper involvement of school-based police officer in behavioral intervention for failure to exhaust administrative remedies).

<sup>90</sup> See *Iannocchino*, 451 Mass. at 636 (citation omitted).

the BSEA’s jurisdiction nor assert a FAPE-related concern, and thus must be dismissed for lack of jurisdiction.

Parent claims that the District violated its own policies and procedures regarding bullying prevention and intervention when it failed to investigate reports of bullying by a peer and to convene Stewart’s Team to address how the bullying may have affected Stewart’s access to a FAPE.<sup>91</sup> Because Parent’s bullying claim arises under internal policies and procedures, such as those set forth in the Elementary School Handbook, and state general education laws,<sup>92</sup> not special education laws, the *Fry* analysis is proper. As with the SRO-related claims discussed above, here, too, Parent asserts a claim that only a student could bring in a school setting.<sup>93</sup> Parent’s argument that her bullying claim is “IDEA-based” is buttressed by the fact that she invoked one of the IDEA’s formal procedures, the convening of a Team meeting, in an effort to resolve the dispute.<sup>94</sup> *Fry* instructs that such an invocation is probative evidence that the “substance of [] plaintiff’s claim concerns the denial of a FAPE.”<sup>95</sup> Accordingly, I find that Parent’s claim that the actions taken—or not taken—by District personnel, in response to reports of bullying, violated Stewart’s right to a FAPE is “IDEA-based.” As such, it must be exhausted.<sup>96</sup> Moreover, taking all allegations as true and viewing them in the light most favorable to Parent, I find that Parent’s allegations regarding the adverse impact of the bullying on Stewart’s willingness to attend school, and his behavior at school, plausibly suggest an entitlement to relief for a violation of a FAPE and thus survive dismissal.

#### c. Non-FAPE-Based Claims under Non-IDEA Statutes

To the extent Parent’s disability discrimination claims arise under statutes other than Section 504 and seek “relief for simple discrimination, irrespective of the IDEA’s FAPE obligation,” they are properly dismissed for lack of jurisdiction.<sup>97</sup> To the extent the same alleged misconduct by the District is found to violate these other disability antidiscrimination statutes, Parent’s exhaustion requirement will have been met. Accordingly, determining whether these disability discrimination claims survive the District’s *Partial MtD* would be superfluous.<sup>98</sup>

Parent’s claims that the District discriminated against Stewart based on his membership in protected classes other than disability are not “IDEA-based,” because a non-student in

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<sup>91</sup> Under “Counts” in her *Hearing Request*, Parent includes M.G.L. c 71, §370 (covers prohibitions on school bullying as well bullying prevention, intervention, and reporting plans) and 603 CMR 49.00 (corresponding regulations). Parent does not, however, link these counts to the allegations noted above.

<sup>92</sup> *Id.*

<sup>93</sup> See *T.K. v. N.Y. City Dept. of Educ.*, 810 F.3d 869, 876 (2016) (assuming, without deciding, that failure to address bullying of a student with a disability in the development of an IEP may constitute denial of a FAPE).

<sup>94</sup> *Fry*, 137 S. Ct. at 757.

<sup>95</sup> *Id.* The *Fry* Court further stipulates that this is a fact-intensive inquiry with the operative phrase being “*formal* proceedings,” i.e., it “does not apply to more informal requests to IEP Team members or other school administrators for accommodation or changes to a special education program.” *Id.* at n. 11. See *Doucette*, 936 F.3d at 24 (applying same analysis).

<sup>96</sup> See *T.K.*, 810 F.3d at 876.

<sup>97</sup> *Fry*, 137 S. Ct. at 756. Again, Parent did not specify which laws the District’s alleged conduct violated. Given the nature of the claim—disability discrimination—it bears mention that Parent cited additional federal and state disability antidiscrimination statutes in her *Hearing Request*, specifically Title II of the ADA and M.G.L. c. 272, §§ 92A, 98.

<sup>98</sup> See *id.*

Stewart's position could make the same claims. Thus these claims fail the second prong of *Fry*.<sup>99</sup> Indeed, Parent herself has demonstrated that these discrimination claims are inapposite to FAPE concerns by alleging the same claims, on her own behalf, against the District.<sup>100</sup> Moreover, Stewart's eligibility for, and receipt of, special education and related services does not automatically transform these school-based discrimination claims into a FAPE issue.<sup>101</sup> Nor does the BSEA have particular expertise in assessing and determining the actual basis of Parent's non-disability discrimination for purposes of developing a useful administrative record for judicial review of the alleged constitutional violations.<sup>102</sup> For these reasons, Parent's non-disability discrimination claims are not "IDEA-based" and are hereby dismissed for lack of jurisdiction.<sup>103</sup>

Parent alleges that the District unlawfully provided confidential information about Stewart to hospital personnel and the APD in violation of FERPA.<sup>104</sup> Even though a non-student could not make a FERPA allegation in a non-school setting, this speaks more to the nature of FERPA than the nature of the underlying claim.<sup>105</sup> That Parent did not invoke the "IDEA's formal procedures" to address her privacy concerns further suggests that the denial of a FAPE is not at issue.<sup>106</sup> For this reason, I conclude that Parent's FERPA claim is not "IDEA-based." This claim is hereby dismissed for lack of jurisdiction.

Parent asserts various tort claims, which she has not linked to any specific allegations of a denial of FAPE.<sup>107</sup> Parent bears the burden of demonstrating that her tort claims are "IDEA-based," and her broad summary of the District's alleged misconduct as amounting to "physical and emotional damages" does not meet this burden.<sup>108</sup> Moreover, the BSEA has no particular expertise to apply in producing a record regarding Parent's personal injury claims.<sup>109</sup> To the

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<sup>99</sup> *Doucette*, 936 F.3d at 29.

<sup>100</sup> See note 4, *supra*.

<sup>101</sup> See *In Re Beatrice & Charlie*.

<sup>102</sup> See *In Re: Georgetown* (Berman).

<sup>103</sup> Parent did not specify which of these claims she intended to bring under the statutes enumerated at the end of her *Hearing Request*. To the extent Parent intended to bring her non-disability discrimination claims under the following statutes and regulations, I find that the IDEA does not require exhaustion: Title VI of the Civil Rights Act of 1964; the Due Process Clause of the 14<sup>th</sup> Amendment to the United States Constitution; 42 U.S.C. §§ 1981, 1983 and 1985; M.G.L. c. 93 § 102; M.G.L. c. 12 §§ H and I; M.G.L. c. 76 § 5; and/or 603 CMR 26.00.

<sup>104</sup> Parent also listed 603 CMR 23.00, the Massachusetts regulation governing student records, under "Counts" in her *Hearing Request*, though she did not directly assert the regulation as the basis for her privacy violation claim.

<sup>105</sup> See *Doucette*, 936 F.3d at 29 (applying *Fry*).

<sup>106</sup> See *Fry*, 137 S. Ct at 757. Cf. *Doucette*, 936 F.3d at 29 (finding a prior BSEA hearing on alternative school placement was strong evidence that the substance of plaintiff's § 1983 claim concerned the denial of a FAPE).

<sup>107</sup> Parent asserted the following tort actions in her *Hearing Request*: intentional infliction of emotional distress, loss of consortium, false imprisonment, false arrest, and common law negligence in violation of M.G.L. c. 25.

<sup>108</sup> See *Schaeffer v. Weast*, 546 U.S. 49, 62 (2005) (holding that the burden of proof in an administrative hearing challenging an IEP falls on the party seeking relief).

<sup>109</sup> As Hearing Officer Berman concluded in *Georgetown*:

[T]he BSEA has no particular expertise in the areas addressed in the instant case—assault and battery, violation of constitutional rights to bodily integrity, negligent supervision, loss of consortium, emotional distress, and violation of various civil rights statutes—either with respect to hearing and analyzing the facts surrounding the events themselves or in assessing the monetary value of any injuries that Parents might prove.

*In Re: Georgetown*. See *Nieves-Marquez*, 353 F.3d at 125 (the "IDEA's primary purpose is to ensure FAPE, not to serve as a tort-like mechanism for compensating personal injury"); *In re: Xylia* (concluding that the BSEA has no expertise in assessing claims of personal injury and correlating damages).

extent Parent's tort actions are derivative of her "IDEA-based" claims or her claims arising under federal or state special education laws, the basis for her tort action would be preserved through exhaustion of those underlying claims on their own merit. To conclude otherwise would impede, rather than promote, several of the goals of the exhaustion requirement: "efficiency, agency autonomy, and judicial economy."<sup>110</sup> Accordingly, Parent's tort claims premised on violations of Stewart's non-IDEA rights are dismissed for lack of jurisdiction and may proceed to court.

Parent alleges the District's conduct violated its own policies and procedures.<sup>111</sup> To the extent these violations concern a deprivation of a FAPE, the BSEA has jurisdiction to hear them. Some of Parent's claims that are ripe for hearing before the BSEA, such as whether the District's failure to properly investigate reports of bullying deprived Stewart of a FAPE, might also constitute a violation of the District's own policies and procedures, but the latter determination is not one for the BSEA to make. Because Parent alleges no separate or additional basis for finding a deprivation of FAPE linked to these claims other than those delineated in Parts II(A)(2)(a) and (b) above, Parent's claims will be exhausted to the extent they are "IDEA-based." Parent's claims that are not "IDEA-based" are hereby dismissed for lack of jurisdiction.

## B. Joinder Motion

### 1. *Legal Standards*

The outcome of Parent's *Motion to Join the Town of Acton as a Party* is governed both by BSEA rules for joinder of additional parties and BSEA jurisdiction to grant relief. Pursuant to the BSEA *Hearing Rule I(J)*:

"Upon written request of a party, a Hearing Officer may allow for the joinder of a party in cases where complete relief cannot be granted among those who are already parties, or if the party being joined has an interest relating to the subject matter of the case and is so situated that the case cannot be disposed of in its absence. Factors considered in determination of joinder are: the risk of prejudice to the present parties in the absence of the proposed party; the range of alternatives for fashioning relief; the inadequacy of a judgment entered in the proposed party's absence; and the existence of an alternative forum to resolve the issues."

This mechanism is commonly used by parties to join state agencies that the BSEA may determine must provide services to a student in a matter before it. The extent to which the BSEA may order such services is set forth in Mass. Gen. Laws ch. 71B, § 3, which provides:

"The [BSEA] 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 mental retardation

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<sup>110</sup> *Frazier*, 276 F.3d at 60.

<sup>111</sup> Specifically, Parent alleges that ABRSD's conduct contravened the District's Non-Discrimination Policy, Elementary School Handbook, Student Restraint Policy and Procedures, Bullying Prevention and Intervention Policy, and Memorandum of Understanding with the Acton Police Department.

[now the department of developmental services], the department of mental health, the department of public health, or any other state agency or program, in addition to the program and related services to be provided by the school committee.”<sup>112</sup>

The District raises the issue that a municipality may not be joined in a matter before the BSEA. Before I reach this question, which implicates by the second prong of the joinder analysis, I begin with *Hearing Rule I(J)*. Then, I turn to the question whether joinder of Acton is within the BSEA’s statutory authority.<sup>113</sup>

## 2. *Application to the Instant Matter*

To decide whether joinder of Acton is proper under *Hearing Rule I(J)*, I consider the factors to determine whether complete relief may be granted in its absence and whether Acton has an interest related to the subject matter and is so situated that the case cannot be disposed of in its absence.

As to the first issue, the Parent contends that the District’s use of the SRO to fulfill its educational responsibilities to the child requires joinder for relief to be granted on Parent’s SRO-related FAPE claims.<sup>114</sup> In contrast, the District contends that the BSEA lacks the jurisdiction to order relief from the Town of Acton, and, as a consequence of that limited authority, complete relief necessarily cannot include relief from Acton.<sup>115</sup>

In the instant case, if the SRO, an employee of the APD (an Acton subsidiary), acted independently of the District when he took the actions challenged by Parent, then complete relief could not be granted in Acton’s absence on Parent’s FAPE claims. As Parent contends, and I agree, proceeding without Acton in such a situation would unfairly prejudice her. If I were to find at hearing that the SRO’s involvement deprived Stewart of a FAPE, Parent would have no opportunity to redress the deprivation.<sup>116</sup> Likewise, an alternative forum could not make Stewart whole regarding a FAPE violation. Alleged violations of FAPE must be presented to and decided by the BSEA under exhaustion principles as discussed in Part II(A)(1)(b), above.<sup>117</sup> Although these two factors cut in favor of joinder, application of these factors is impacted by the District’s recent change in position.<sup>118</sup> During oral argument, ABRSD departed from the position asserted in its *Partial MtD* and *Opposition* and conceded that the District, which “is the one obligated to

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<sup>112</sup> M.G.L. c 71B, § 3; see 603 CMR 28.08(3) (corresponding regulations).

<sup>113</sup> See M.G.L. c 71B, §3.

<sup>114</sup> Tr. at 36.

<sup>115</sup> See Tr. at 43-44.

<sup>116</sup> Tr. at 37-38 (characterizing the risk of unfair prejudice as an “educational shell game, where the student is entitled to FAPE, but where the[where] the school, who has that responsibility, delegates it to the police and then argues that the police owe no duty of FAPE to the student”).

<sup>117</sup> See *Meekins*, 2018 WL 2326129, \*5 (dismissing student’s FAPE claim that asserts improper involvement of school-based police officer in behavioral intervention for failure to exhaust administrative remedies).

<sup>118</sup> Through their pleadings, both parties have recognized on the record that the District involved the SRO in Stewart’s behavioral interventions on January 7, 8, and 9, 2020. See *In re: Norton Pub. Sch.*, BSEA #1504282 & #1504277 (Berman 2015) (denying joinder of a contracted service provider on the grounds that the District, not the service-provider, maintained responsibility for Student’s education and thus was the only party against whom complete relief could be granted).

provide FAPE,” would also be the one to “answer for” the SRO’s involvement.<sup>119</sup> For this reason, I conclude Parent would be able to obtain complete relief on her SRO-related FAPE claims in Acton’s absence.<sup>120</sup>

The second issue presented by *Hearing Rule I(J)* is whether the Town of Acton has an interest relating to the subject matter of the case and is so situated that the case cannot be disposed of in its absence.<sup>121</sup> Here, the alignment of interests is satisfied by the District’s interest in defending the SRO’s actions. If I were to find that the SRO acted improperly at the District’s behest, then ABRSD would be held responsible for a denial of a FAPE. If the District were to revert to the position asserted in its *Partial MtD* and *Opposition*, I would reconsider this issue.

I find Parent’s concerns about Acton’s absence as a potential impediment to the development of a full factual record unpersuasive. First, Parent may pursue her non-FAPE SRO-related claims in another forum. Second, Parent noted in her *Joinder Motion* that she would call the SRO as a witness in this case irrespective of my ruling on her motion. Likewise, the District suggested during oral argument that the SRO and/or other relevant officers could be subpoenaed to testify.<sup>122</sup> In brief, the factual record will not be adversely affected by Acton’s absence.

In this matter, the Town of Acton’s interests align with the District’s, and due to the District’s changed position, complete relief will be available to Parent in the event I find the SRO’s involvement amounted to a deprivation of FAPE. For these reasons, the Town of Acton is not a necessary party to the instant case pursuant to *Hearing Rule I(J)*. As such, I do not reach the question whether the BSEA has jurisdiction to order relief from the Town of Acton consistent with internal policies as set forth in M.G.L. c. 71B, §2A and 603 CMR 28.08(3).

### III. CONCLUSION

For the reasons above, the District’s *Partial Motion to Dismiss* is DENIED as to Parent’s claims seeking relief for the denial of a FAPE under statutes and regulations that govern special education and for her IDEA-based retaliation, response-to-bullying, and improper-SRO-involvement-in-behavioral-intervention claims. The District’s *Partial Motion to Dismiss* is GRANTED as to Parent’s claims seeking relief for privacy violations, disability and non-disability discrimination, torts, and policy and procedure violations to the extent these claims are not premised on a right created by the IDEA.

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<sup>119</sup> See note 38, *supra*.

<sup>120</sup> Parent’s non-FAPE claims against the SRO may be resolved appropriately in another forum. See discussion at Part II(A)(1)(b) of this Ruling, *Jurisdiction of the BSEA*. Indeed, the Parent has already filed a MCAD action for her non-FAPE claims. See *Joinder Motion* at 5, n. 5.

<sup>121</sup> The Town of Acton, through Counsel, was served by both parties with the *Joinder Motion*, but failed to respond, despite also receiving notice of a scheduled *Motion Session*. By email dated January 21, 2021, Counsel for Acton indicated that Acton joined ABRSD in its *Opposition*; that Counsel did not represent Acton in the BSEA matter; and that Acton did not plan to participate in the *Motion Session*.

<sup>122</sup> See Tr. at 43-44 (“The Hearing Officer can make findings relative to the SRO and how Acton-Boxborough Regional School District used the SRO in relation to [Student’s] entitlement to FAPE, but not against the Town of Acton.”).

Parent's *Motion to Join the Town of Acton* is denied. This denial is *without prejudice*. In the event ABRSD reverts to the position it maintained in its written *Opposition* (i.e., that the Town of Acton bears sole responsibility for the SRO's involvement in Stewart's behavioral interventions on January 7, 8, and 9, 2020, and has no statutory obligations to the Stewart) and Parent consequently refiles for joinder, I would reconsider this determination.

## **ORDER**

1. Parent's *Motion to Join the Town of Acton* is **DENIED** *without prejudice*.
2. The District's *Partial Motion to Dismiss* specific claims is **GRANTED, in part**.
3. The following issues remain for hearing:
  - (A) Whether Acton-Boxborough discriminated against Stewart in violation of § 504 of the Rehabilitation Act of 1973, through
    1. failure to follow policies and procedures to investigate and address bullying concerns beginning on or about October 22, 2019 through January 2020;
    2. changes in Stewart's IEP services (addition of 1:1 aide, removal from general education classes) without parental consent between January and March 2020;
    3. involvement of the SRO in responding to Stewart's dysregulation in January 2020; and/or
    4. imposition of inappropriate consequences and punishment (i.e., cleaning the classroom, removal from classroom, disallowing bathroom use, preventing access to mother) for manifestations of Stewart's disability (i.e., behavior dysregulation) between December 2019 and January 2020.
  - (B) Whether Acton-Boxborough denied Stewart a FAPE in violation of the Individuals with Disabilities Education Act by
    1. failing to implement an accepted, expired IEP dated March 28, 2019 to March 27, 2020 through
      - a. use of the SRO in response to Stewart's dysregulation in January 2020;
      - b. alteration of IEP services without the consent of his parent/guardian (i.e., assignment of 1:1 aide, pull-out from general education classes) between December 2019 and March 2020;
      - c. failure to utilize positive behavior interventions and instead imposing inappropriate consequences and punishment (i.e., cleaning the classroom, removal from classroom, disallowing bathroom use, preventing access to mother) on Stewart between December 2019 and January 2020.

2. failing to follow policies and procedures to investigate bullying concerns between October 2019 and January 2020; and/or
3. failing to address bullying concerns by convening an IEP meeting and reviewing the IEP and changes that were needed, if any, thereto between October 2019 and January 2020.

(C) Whether Parent rejected the IEP dated March 28, 2019 to March 27, 2020

1. If the answer to (C) is “yes,” whether Stewart’s IEP dated 3/28/2019-3/27/2020 was reasonably calculated to provide Stewart with a FAPE in the LRE;

(D) If the answer to (A), (B) or (C)(1) is yes, what is the appropriate remedy?

4. The matter will proceed to Pre-Hearing Conference on April 12, 2021 and Hearing on May 11, 12, 13, and 14, 2021.

By the Hearing Officer<sup>123</sup>:

*/s/ Amy M. Reichbach*

Dated: March 12, 2021

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<sup>123</sup> The Hearing Officer gratefully acknowledges the diligent assistance of legal intern Harper Weissburg in the preparation of this Ruling.