

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

In Re: Student v. Lawrence Public Schools and DESE

BSEA # 2107071

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

This matter comes before the Hearing Officer on the Department of Elementary and Secondary Education's (DESE) *Motion to Dismiss (Motion)* which was filed with the BSEA on April 21, 2021. As ground for its *Motion*, DESE asserts that Parent has failed to serve DESE in accordance the Hearing Officer's Order dated March 26, 2021 as well as the BSEA Hearing Rules; that even assuming Parent's alleged facts as true, Parents has failed to state a claim against DESE upon which relief can be granted; that Parent's Hearing Request does not specify the nature of her child's inability to access a FAPE or the way in which the remedy addresses the underlying complaint; and that the BSEA lacks authority to grant monetary damages. DESE also notes that Parent, having moved to Massachusetts from Puerto Rico, may be under the false assumption that DESE has a similar role in Massachusetts as the Puerto Rico Department of Education which assumes responsibility for all special education services.

Neither Parent nor the Lawrence Public Schools (District) has filed a response.

For the reasons set forth below, DESE's *Motion* is hereby **ALLOWED**. **Parent's claims against DESE are hereby DISMISSED WITHOUT PREJUDICE.**

RELEVANT PROCEDURAL HISTORY:

On February 26, 2021, Parent filed a Hearing Request in the above-referenced matter. During a conference call on March 22, 2021, it became apparent that Parent failed to serve DESE, an intended party to the appeal. The BSEA sent a copy of the Parent's Hearing Request to the DESE on March 26, 2021. Thereafter, , all Parties, including DESE, were served with a recalculated Notice of Hearing reflecting that the DESE was a named party, and that the matter was scheduled for Hearing on April 28, 2021.

On April 2, 2021, the Hearing Officer issued an order scheduling a pre-hearing conference.

On April 5, 2021, counsel for DESE informed the Parties that Parent had yet to serve DESE with the Hearing Request. DESE objected to proceeding without having been formally served; as grounds for its objection, DESE cited BSEA Hearing Rules requiring service by the opposing party¹ and indicated that it did not wish to establish a precedent to the practice of being made a party to a dispute without proper service. Nevertheless, acknowledging Parent's pro se status,

¹ In contrast to the BSEA's having sent a copy of the Parent's Hearing Request to the DESE.

DESE agreed to discuss these issues at a Pre-hearing Conference which the Hearing Officer was attempting to schedule.

A Pre-Hearing Conference was scheduled for April 16, 2021 with the intention of clarifying the issues for Hearing. Parent did not attend. As such, *Ruling and Order on Joint Motion of Lawrence Public Schools and DESE to Postpone the Automatic Hearing Date and Motion for Parent to Show Cause* was issued on April 20, 2021, defining the issues² for Hearing as follows:

- i. Whether the District complied with 603 CMR 28.03(1)(c)(2)³?
- ii. If I find that the answer is “no”, then whether the District’s failure to comply with said regulation resulted in a denial of a FAPE to Student.⁴

The Ruling also noted that “despite the imperfect service, DESE has been provided with sufficient, actual notice of the Hearing Request and the Hearing date.” The Ruling further noted that from the Hearing Request, it was unclear to the Hearing Officer what specific claims Parent wished to address against DESE.

RELEVANT FACTS:

For the purposes of this *Motion*, I must take the assertions set out in the Parent's Complaint as true.

Student is a 19-year-old resident of Lawrence, MA. He attends Lawrence High School (LHS). On February 26, 2021, Parent filed a Hearing Request. In it she alleges that on June 5, 2020, Student and Parent moved to Lawrence, MA from Puerto Rico, where he was receiving special education and related services. Student’s program in Puerto Rico did not provide him with a

² In her Hearing Request, Parent presented a host of factual allegations that point to the existence of a dispute concerning Student’s rights under the IDEA and the discharge of the District’s procedural and substantive responsibilities under the IDEA. Specifically, she asserted that the District failed to evaluate Student, implement the services in his IEP, and develop an appropriate IEP. She alleges procedural violations as well, including but not limited to the “timely” delivery of services and the opportunity to sign the Age of Majority Forms.

³ That regulations states as follows: “If a student found eligible in another state moves to Massachusetts, the new Massachusetts district of residence shall provide the student with a free appropriate public education, including special education services comparable to those in the IEP from the former state, in consultation with the parents, until the Massachusetts district determines if it will accept the finding of eligibility and/or the current IEP developed for the student in the former state of residence. If the Massachusetts district determines that the finding of eligibility and the IEP developed for the student continues to accurately represent the needs of the student, then the Massachusetts district shall continue to implement the IEP. If the Massachusetts district determines that a new evaluation is necessary to determine continued eligibility or services, or a parent or another person concerned with the child’s development requests an evaluation, the district shall immediately provide written notice to the parents as required under 603 CMR 28.04(1).”

⁴ There is no allegation in the Hearing Request that the District has proposed an IEP for Student for the 2020-2021 school year and that such IEP is not reasonably calculated to provide Student with a free and appropriate education (FAPE) in the least restrictive environment (LRE). Moreover, the District’s Response to the Hearing Request (Response) outlines the District’s unsuccessful attempts to hold a Team meeting and to develop an IEP. It does not appear from the pleadings that an IEP was developed, and the affidavits enclosed with the District’s Response indicate that the District has been implementing the accepted portions of Student’s IEP from Puerto Rico. Because Parent was not present for the pre-hearing conference, the Parties could not clarify whether Parent is alleging any denial of a FAPE other than what this Hearing Officer has articulated in this Ruling.

FAPE, and Parent participated in “administrative hearings with the Puerto Rico Department of Education.” Upon arriving in Lawrence, MA, Parent was told by the District that because Student was 19 years old, he could not attend school. On August 24, 2020, Parent met with Mr. Victor Caraballo Anderson, Head of School, and describes that meeting in her hearing request as follows:

[The District] presented us with the same options they presented us in Puerto Rico insisting that he skip grades, and we let them know that [Student] wanted to continue studying in each grade in order to complete the credits until 12th grade and go to university given that because of the mistakes made by the education professionals in Puerto Rico the student had not received an appropriate education with adequate support and services and that’s why he is in 10th grade and not at a university. I said that both the student and I want [Student] to continue studying in each grade until he reaches 12th grade because in spite of all his rights having been violated, he is pushing himself first to be with students that aren’t his age and second to obtain a very good grade, which despite his limitations and without timely services, since they took him out of the self-contained room where he was for nine years for no reason, he made honor roll two times.

Another meeting took place on August 26, 2020 with Parent, Student and Mr. James Parker, Zone 4 Special Education Director of the Lawrence Public Schools. At the meeting, Parent presented the District with Student’s special education documents from Puerto Rico. She was provided the Procedural Safeguards, and Student was registered for school. The District informed Parent that they had contacted the Department of Education in Puerto Rico for Student’s records and would be contacting Parent to develop the IEP. On or about that same time, Parent attempted to find legal representation to help her with the matter but was unsuccessful. She “decided to call for a mediation,” but the matter was not resolved.

Parent asserted that Student is not receiving a FAPE and asked for the following relief:

- 1) “200,000 dollars for all of the mistreatment, abuse of power, discrimination, emotional damage, and mismanagement of the case”;
- 2) that “the Department of Education take responsibility for offering [Student] a fair and appropriate education with all services in a timely manner and with all of the benefits that correspond to him”;
- 3) that “the Department of Education take responsibility if for some reason or another the student is not able to complete the fourth year of high school (12th grade) before 21 or 22 years of age, the Department of Education should be required to continue providing him his classes and studies with all of his special education services and assistance until he goes to or finishes 12th grade and goes to university”;
- 4) that “the Department of Education make up for the psychological, occupational therapy times that have not been offered to the student since he entered Lawrence High School, and order all of the types of evaluations that the student needs”;

- 5) that “the student be given a vocational evaluation and registered in the vocational rehabilitation program”; and
- 6) that “the transfer of rights since they never explained what that was to me in Puerto Rico, and they always put not applicable in the summary because in Puerto Rico the age of majority is 21 years old.”

LEGAL STANDARD:

1. 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 C.M.R. 1.01. Pursuant to Rule XVII A and B of the *Hearing Rules* 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 entitlement to relief.”⁵ The hearing officer must take as true “the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff’s favor.”⁶ These “[f]actual allegations must be enough to raise a right to relief above the speculative level.”⁷

2. Service.

BSEA Hearing Rule I(B) states that to “begin the hearing process, the party requesting the hearing (i.e., moving party) must send a written hearing request to the opposing party. At the same time, the moving party must send a copy of the hearing request to the BSEA.”⁸

Although the BSEA is not bound by the Federal Rules of Civil Procedure, Hearing Officers often look to them for guidance. Pursuant to the Federal Rules of Civil Procedure, a plaintiff must comply with Rule(4)(i)(1) for proper service. When timely service is not made under Rule 4, Rule 4(m) provides, that “if the plaintiff shows good cause for the failure [to effect proper service in a timely manner], the court must extend the time for service for an appropriate period.”⁹ Good cause may be found when the plaintiff’s failure to complete proper service in a timely fashion is related to (1) the actions of a third person, such as a process server; (2) a defendant evading service of process or engaging in misleading conduct; (3) the plaintiff acting diligently in trying to effect service or “some understandable mitigating circumstance”; and (4)

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

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

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

⁸ Sending the hearing request to the office of a school administrator, or to counsel for a party shall be deemed sufficient service.

⁹ Fed. R. Civ. P. 4(m).

the plaintiff proceeding *pro se* or *in forma pauperis*.¹⁰

The fact that a plaintiff is *pro se* “is not automatically enough to constitute good cause for purposes of Rule 4(m).”¹¹ “In determining what is and what is not good cause, the federal courts obviously are obligated to balance the clear intent of Rule 4(m) and the desire to provide litigants their day in court.”¹² “Insisting on a timely service of process and assuring litigants a just adjudication on the merits of an action are not inconsistent, but over-emphasis on either could lead to undesired consequences.”¹³ Good cause can be established in part “where a *pro se* litigant can show confusion on his part, either because of his unfamiliarity with the rules, or because of his reliance on the misleading advice of others.”¹⁴

However, even absent a showing of good cause, a court still has discretion to extend time to properly effect service under Rule 4.¹⁵ When proper service is not completed and there is no good cause to excuse improper service, a court's discretion to extend time for service is guided by three factors: (1) whether the party to be served received actual notice of the lawsuit; (2) whether the defendant would suffer prejudice; and (3) whether the plaintiff would be severely prejudiced if his complaint were dismissed.¹⁶ In addition, courts consider whether the plaintiff acted in bad faith or intentionally failed to adhere to the rules.¹⁷ Courts also consider whether the defendant received actual notice of the plaintiffs' claims.¹⁸

3. Jurisdiction of the BSEA.

a. Subject Matter Jurisdiction.

20 U.S.C. § 1415(b)(6) grants the BSEA jurisdiction over timely filed complaints by a parent/guardian or a school district “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.”¹⁹ In Massachusetts, a parent or a school district, “may request mediation and/or a hearing at any time on any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or

¹⁰ *McIsaac v. Ford*, 193 F. Supp. 2d 382, 383 (D. Mass. 2002) (quoting Wright & Miller, *Federal Practice and Procedure: Civil 3d* § 1137, at 342 (2002)).

¹¹ *Id.*

¹² *Id.* at 384.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Awadh v. Tourneau, Inc.*, No. 15-cv-13993-DJC, 2017 WL 1246326, at *3 (D. Mass. Feb. 17, 2017).

¹⁶ *Bell v. Rinchem Co., Inc.*, No. 14-cv-40177-TSH, 2014 WL 11290899, at *4 (D. Mass. Dec. 2, 2014) (citing *H & A Corp. v. United States*, No. 14-13783-MLW, 2015 WL 5610816, at *4 (D. Mass. Sept. 22, 2015)).

¹⁷ *Aly v. Mohegan Council-Boy Scouts of America*, No. 08-40099-FDS, 2009 WL 3299951, at *2 (D. Mass. Apr. 20, 2009).

¹⁸ *Evariste v. United States*, No. 19-CV-11996-DJC, 2021 WL 828380, at *2 (D. Mass. Mar. 4, 2021) (defendant had actual notice of claims, as evidenced by the filing of the motion to dismiss); *Payne v. Massachusetts*, No. 09-cv-10355-PBS, 2010 WL 5583117, at *4 (D. Mass. Nov. 18, 2010), *report and recommendation adopted*, No. 09-cv-10355, 2010 WL 5583111 (D. Mass. Dec. 10, 2010) (concluding that “the defendant received actual notice of [Plaintiff's] claims against it and was able to file a response to those claims, in the form of its motions to dismiss”).

¹⁹ See 34 C.F.R. §300.507(a)(1).

procedural protections of state and federal law for students with disabilities.”²⁰

The BSEA “can only grant relief that is authorized by these statutes and regulations, which generally encompasses orders for changed or additional services, specific placements, additional evaluations, reimbursement for services obtained privately by parents or compensatory services.”²¹ The First Circuit Court of Appeals has concluded that where the underlying claim is related to FAPE, only the remedies available under the IDEA are available.²² Monetary damages are limited to compensatory education and equitable remedies involving the payment of money for expenses paid by the parents for the educational and related needs of the student.²³ Hence, punitive damages are also unavailable as a remedy.²⁴

4. Role of DESE.

Section 1412(6) of the IDEA states that the “State educational agency²⁵ shall be responsible for assuring” that every child disabled within the meaning of the IDEA be provided with a “free appropriate public education.” Section 1412(6) imposes on the SEA the “primary responsibility for ensuring that local educational agencies comply with the requirements of the IDEA.”²⁶ Hence, the SEA may be held responsible for any failure to assure that all eligible students are provided FAPE and may also be held responsible for providing a student with the requisite special education services if there is no LEA available, able or willing to do so.²⁷ This does not mean “that any time a local agency trips up in that respect, the State agency is an absolute insurer required to make good the damage.”²⁸ To establish the SEA’s liability, a plaintiff must show either that the SEA was directly involved and responsible for the denial of FAPE, or that the State-established standards fail to provide due process despite approval by the Secretary of Education.²⁹ Because the LEA is responsible for direct provision of services under IDEA, including IEP development, failures in this area are normally attributable to the LEA.³⁰ In Massachusetts, state regulations delineate the role of the LEA as distinct from the SEA, and, in general, school districts are programmatically and financially responsible for eligible students

²⁰ 603 CMR 28.08(3)(a).

²¹ *In Re: Georgetown Public School*, BSEA No. 1405352, 20 MSER 200 (Berman, 2014); *see also Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 126 (1st Cir. 2003) (the “IDEA’s primary purpose is to ensure FAPE, not to serve as a tort-like mechanism for compensating personal injury”).

²² *See Diaz-Fonseca v. Commonwealth of Puerto Rico*, 451 F.3d 13, 19 (1st Cir. 2006) (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.)).

²³ *See id.*

²⁴ *See Nieves-Marquez*, 353 F.3d at 126.

²⁵ State Education Agency shall be referred to as SEA. In Massachusetts, DESE is the SEA.

²⁶ *Beard v. Teska*, 31 F.3d 942, 954 (10th Cir. 1994), *abrogated by Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep’t of Health & Hum. Res.*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) (citing *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir.1992) and *Town of Burlington v. Department of Educ.*, 736 F.2d 773, 787 (1st Cir.1984), *aff’d*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)).

²⁷ *See In Re: Massachusetts Department of Education*, BSEA #03-1785, 9 MSER 1 (Crane, 2003).

²⁸ *Id.*

²⁹ *Carnwath v. Grasmick*, 115 F. Supp. 2d 577, 582 (D. Md. 2000).

³⁰ *See* 20 U.S.C. § 1414(d)(1).

based on residency and enrollment.³¹ Where there is no evidence that the SEA was involved in the IEP process, notified of relevant decisions, asked to participate in a student's assessment or placement, or called upon to fund a student's education or to respond to complaints regarding a student's program, the SEA is not involved and bears no responsibility for denying a student a FAPE.³²

APPLICATION OF LEGAL STANDARD:

In evaluating the DESE's *Motion to Dismiss* 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, and deny dismissal if these allegations plausibly suggest an entitlement to relief.³³

1. Although Parent Failed to Serve DESE Properly, DESE Received Actual Notice of Parent's Claims.

DESE is correct that, to date, Parent has failed to serve DESE with a copy of the Hearing Request. Nevertheless, Parent is proceeding in the instant appeal *pro se*. Although said status does not grant her permission to disregard BSEA rulings and orders, it affords her additional leeway in navigating the litigious world of BSEA proceedings. Parent does not appear to be acting in bad faith but may lack clarity, especially in light of the fact that English is her non-primary language. In addition, as suggested by DESE in its *Motion*, Parent may be confused by the different role of DESE from that of the Puerto Rico Department of Education.³⁴

The core purpose of service in civil proceedings is: (1) to provide a court jurisdiction over the defendant, and (2) to put the party being sued on notice of the lawsuit. As previously articulated in the April 20, 2021 *Ruling and Order on Joint Motion of Lawrence Public Schools and DESE to Postpone the Automatic Hearing Date and Motion for Parent to Show Cause*, the purpose of service has been met in the instant matter despite its imperfections. DESE has been provided with sufficient, actual notice of the Hearing Request and the Hearing date.³⁵ DESE's request for dismissal on this ground is **DENIED**.

2. Parent's Claims for Monetary Damages Are Dismissed.

DESE is correct that the BSEA is limited in the relief it can offer, and monetary damages at the BSEA are limited to compensatory education and equitable remedies involving the payment of money for expenses paid by the parents for the educational and related needs of the student.³⁶

³¹ 603 CMR 28.08(1); see also *In Re: Massachusetts Department of Education*, BSEA #03-1785, 9 MSER 1 (Crane, 2003) (DOE is not held responsible for conducting appropriate evaluations, developing an IEP, or providing FAPE).

³² *Carnwath v. Grasmick*, 115 F. Supp. 2d 577, 585 (D. Md. 2000) (where Plaintiffs did not name State Defendants until they initially filed suit in court, the court found that State Defendants were not involved, and therefore, bore no responsibility for denying the student FAPE).

³³ See *Iannocchino*, 451 Mass. at 636.

³⁴ *McIsaac*, 193 F. Supp. 2d at 384.

³⁵ See *Evariste v. United States*, No. 19-CV-11996-DJC, 2021 WL 828380, at *2 (D. Mass. Mar. 4, 2021) (defendant had actual notice of claims, as evidenced by the filing of the motion to dismiss)

³⁶ See *id.*

Punitive damages, as requested by Parent in the instant matter, are also unavailable as a remedy.³⁷ DESE's request for dismissal of Parent's claims for monetary relief is **ALLOWED**.³⁸

3. Parent's Claims Against DESE Are Dismissed for Failure to State a Claim Upon Which Relief May Be Granted.

It is undisputed that "a parent may file a due process complaint against an SEA and the hearing officer has the authority to determine, based on the individual facts and circumstances in the case, whether the SEA is a proper party at the due process hearing."³⁹ In the instant matter, DESE asserts that Parent has alleged no failure to monitor or ensure compliance with Massachusetts special education laws. DESE further alleges that the Hearing Request fails to demonstrate what elements of Student's IEP are deficient, to explain what remedy would ensure Student's access to FAPE and to clarify why DESE should be held responsible for any violations since "[d]issatisfaction with a student's special education program, without specific examples of a denial of FAPE, is not something for which DESE is responsible or can provide relief."

DESE is correct that Parent's Hearing Request fails to articulate a cause of action against DESE. In fact, I noted such in the April 20, 2021 *Ruling and Order on Joint Motion of Lawrence Public Schools and DESE to Postpone the Automatic Hearing Date and Motion for Parent to Show Cause*. In an effort to to define the issues for Hearing, I could not decipher from the facts alleged in the Hearing Request any claims which could be leveled at DESE. Even if taken as true, Parent's facts fail to suggest that DESE was in any way directly involved with or responsible for any allegations of a denial of FAPE, or that DESE failed to ensure compliance with State-established standards.⁴⁰ Parent asserted no facts suggesting that DESE was involved in the IEP process, asked to participate in Student's assessment or placement, or called upon to fund Student's education or to respond to complaints regarding Student's program.⁴¹ In the instant matter, I simply cannot find that the factual allegations set forth in Parent's hearing Request, regarding DESE "raise a right to relief above the speculative level."⁴² As such, I find that Parent's claims against DESE should be dismissed without prejudice. DESE's *Motion* is **ALLOWED**.

ORDER:

³⁷ See *Nieves-Marquez*, 353 F.3d at 126.

³⁸ See also *In Re: Department of Elementary and Secondary Education and XiLi*, BSEA #1802999, 24 MSER 14 (Byrne, 2018) (dismissing Parent claims that, as a result of its actions, inactions and "complicity", DESE was responsible for intentionally inflicting emotional harm for which Parent sought monetary damages since such claims did not fall within the BSEA's limited jurisdiction as they did not articulate a cognizable claim of denial of a free appropriate public education and sought relief that the BSEA was not statutorily authorized to award). I note that Parent's claims for monetary damages have already dismissed in the April 1, 2021 *Ruling On Lawrence Public Schools' Partial Motion to Dismiss For Lack of Jurisdiction and/or Failure to State a Claim*.

³⁹ *Letter to Anonymous*, 69 ISELR 189 (January 2, 2017).

⁴⁰ *Carnwath*, 115 F. Supp. 2d at 582.

⁴¹ *Id.* at 585 (where Plaintiffs did not name State Defendants until they initially filed suit in court, the court found that State Defendants were not involved, and therefore, bore no responsibility for denying the student FAPE).

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

For the reasons set forth above, DESE's *Motion* is hereby **ALLOWED**. **Parent's claims against DESE are hereby DISMISSED WITHOUT PREJUDICE.**

By the Hearing Officer,

s/ Alina Kantor Nir

Alina Kantor Nir

Date: April 26, 2021