

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals
Bureau of Special Education Appeals

120 LRP 21862

In Re: Student v.
Blue Hills Regional Technical High School

BSEA # 2008213

**RULING ON BLUE HILLS REGIONAL TECHNICAL HIGH SCHOOL'S MOTION
TO DISMISS AND IN THE ALTERNATIVE MOTION TO NARROW THE SCOPE
OF THE HEARING**

On or about May 22, 2020, the BSEA received Parents'/Student's Hearing Request in the above-referenced matter, asserting that Student has not met her IEP and/or Transition Plan reading goals and therefore has been denied a FAPE and is not ready to graduate. On June 9, 2020 Blue Hills Regional Technical School (District) filed Response to the Hearing Request, **a Motion to Dismiss and in the alternative a Motion to Narrow the Scope of the Hearing.**

Following granting of an extension, on June 26, 2020, Parents/Student filed an Opposition to the District's Motion, which Opposition also Amended Parents'/Student's Hearing Request, in that: (a) it challenged Student's final IEP (the January to June 2020 IEP) on the basis of a denial of a free, appropriate public education (FAPE); and (b) the District failed to deliver direct remote reading services during the COVID-19 health emergency school closure, for which she is entitled to compensatory education.

This Ruling is issued in consideration of Parents'/Student's Hearing Request and the written arguments proffered by the Parties.

Facts:

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

1. **Student is an 18 year-old¹, twelfth grade student who is eligible to receive special education services under the category of specific learning disability.** She has been diagnosed with developmental coordination disorder, auditory processing disorder, dyslexia, communication impairments and executive functioning weaknesses.

¹ At the outset I note that per all submissions, Student is 18 years old, has thus reached the age of majority, and all rights have transferred to her, including the right to request and/ or pursue a BSEA Hearing. The record lacks information regarding the exact date on which she turned 18 and also lacks documentation noting her desire to share decision-making authority with Parents, and/ or her consent to have them proceed on her behalf. The District, however, has never raised this issue, leading me to believe that it is aware of Student's position in this regard and/ or is in possession of consent by Student to share decision-making authority with Parents. This omission however must be remedied forthwith, and will be addressed in the Order section of this Ruling.

2. Student entered twelfth grade under a fully accepted IEP covering the period from December 2018 through December 2019. Parents had also fully accepted the IEP covering the period from January 17, 2018 to January 16, 2019. Both of these IEPs contained Transition Plans which contemplate Student's graduation in June of 2020. Pursuant to the aforementioned IEPs Student has received specialized reading instruction to improve her reading skills.
3. The progress reports for Student's 2018-2019 and 2019-2020 indicate that Student was making steady progress toward meeting the goals and objectives in her IEPs. Parents however, assert that with respect to the reading and writing goals, Student was not meeting all of the objectives in her IEPs, and note that some of the objectives were removed without Student accomplishing them. Parents take particular issue with the goals delineated in Student's 2018-2019 IEP noting that by the end of the IEP period, Student had not met the reading goal in said IEP.
4. Since January of 2018, Student has received Lindamood Bell- LiPS (LMB-LiPS) reading instruction by a LMB-LiPS certified instructor (who is also a speech and language pathologist) selected by Parents.
5. Sometime during the fall or winter of 2019, Student underwent a three year re-evaluation.
6. On January 2, 2020, the Team convened to discuss the result of Student's evaluation and to promulgate an IEP for the remainder of her twelfth grade. Parents expressed great concern about Student's lack of progress as reflected in academic testing and the decline in scores on her speech and language evaluation results. Student's scores in the reading and writing evaluation fell in the below and significantly below average ranges. The speech and language evaluator noted significant discrepancy between Student's cognitive abilities and her total reading, basic reading, reading comprehension skills and fluency composites. The evaluator recommended that Student continue "with individualized reading instruction to support the development of her basic reading skills and to strengthen the strategies she has learned to this point".
7. The Team noted that Student had scored "proficient" on the MCAS and was expected to meet all state and local graduation requirements by June of 2020. Student received accommodations in the form of a reader to assist her during homework completion and during test taking, including SATs and MCAS. According to Parent, non-standard accommodations were provided for the 2016 English Language Arts MCAS.
8. Student's Transition Plan notes that she will be reading at grade level upon graduation.

9. At the January 2, 2020 Team meeting, Parents requested that the District conduct a transition assessment and the Team acquiesced to this request. Parents understood that this evaluation was a necessary step if they wanted to pursue services beyond graduation for Student.

10. Following the January 2, 2020 Team meeting, the District promulgated an IEP covering the period from January 2 to June 9, 2020, which IEP offered Student placement in a full inclusion program in-district. This IEP contained goals in the areas of reading, English, study skills and speech and language. The Service Delivery Grid offered the following services based on a 10 day cycle:
 - A. Consultation:
 - Speech and Language by the speech and language pathologist 1 x 15 minutes per 10 day cycle.
 - B. (no services under the B grid).
 - C. Direct Special Education Services outside the general education setting:
 - Reading by the reading intervention teacher, 2 x 90 minutes per 10 day cycle.
 - ELA, by the special education teacher, 10 x 45 minutes per 10 day cycle.
 - Academic support by the special education teacher, 2.5 x 45 per 10 day cycle.
 - Speech and language therapy by the speech and language pathologist, 1 x 30 minutes per 10 day cycle.

11. On January 21, 2020, Parents accepted the IEP and placement in full.

12. On March 4, 2020, the Team reconvened to discuss Student's Transition evaluation and Plan. Student's vocational interest in design was discussed and a recommendation was made for continued use of assistive technology in college. While noting no transition concerns in the traditional sense, Parents stated their desire to defer Student's diploma so that she could receive additional reading services prior to graduation. No new IEP was promulgated as a result of this meeting.

13. Student's Transition Plans in the 2017-2018 and 2018-2019 IEPs noted that Student

...should continue to receive instruction in a specialized reading program to develop the necessary skills to reach grade-level expectations.

This statement was discussed during the Team meeting on January 2, 2020 and the statement was subsequently removed from the Student's January 2, 2020 to June 9, 2020 IEP.

14. Via letter dated April 20, 2020, received by the District on or about April 29, 2020, Parents retroactively rejected the January 2020 IEP and stated their intention to have Student refuse her diploma. Parents assert that in rejecting the IEP and refusing the diploma Student is entitled to stay-put rights.
15. In conversations with District representatives, Parents requested that owing to the District's alleged failure to provide Student a FAPE, she be provided continuation of specialized reading instruction for one year, delivered by a qualified reading instructor, and utilizing a different program than the one previously delivered by the District.
16. No students in the District have received in-person instruction since initiation of the COVID-19 state health emergency closures. According to Parents, the District failed to deliver direct remote reading services during the COVID-19 health emergency school closures. Specifically, Student did not receive the two, ninety minute per ten day cycle, specialized reading instruction utilizing specialized materials. Parents assert that Student only received one Zoom session with a reading interventionist who was not trained in the program used prior to the school closure. Student is therefore, entitled to compensatory services for that period of time.
17. The Parties participated in Mediation on April 14, 2020, but were not able to reach resolution.
18. On May 22, 2020, the BSEA received Parents'/ Student's Hearing Request.
19. Parents are in the process of scheduling an independent evaluation for Student. They believe that Student continues to be in need of intensive specialized reading instruction using a research-based multisensory program delivered by a highly trained reading specialist.

Position of the Parties:

District's Position:

The District asserts that Parents'/ Student's claim should be dismissed because Parents fully accepted the proposed IEPs and therefore, they are barred from revisiting those IEPs.

According to the District Student has met all of her graduation requirements and should receive her diploma as planned in June 2020. The District cites to the Department of Elementary and Secondary Education's (DESE) Advisory #2018-2 to argue that Parents/ Student cannot refuse the diploma.

Moreover, the District asserts that to the extent that Parents/ Student allege that Student's IEP was not fully implemented due to the COVID-19 health emergency closures², the District notes that it has offered remote services to Student, including among other supports, access to a special educator (via a virtual reading coach program) since April 21, 2020. The District further alleges that it has offered Parents/ Student tutoring hours, equivalent to the 16.5 hours of reading services missed by Student since the closures, delivered by the reading instructor preferred by Parents. (Note that Parents/ Student now request an out-of-district instructor other than the one they had selected in 2018 and provided by the District.)

The District asserts that the applicable laws do not allow for the outcome sought by Parents/ Student and therefore, the case should be dismissed. In the alternative, the District states that the scope of the hearing be narrowed; only claims arising from April 29, 2020 (the date on which Parents/ Student rejected the IEP) to June 9, 2020 should be allowed.

Parents'/Student's Position:

Relying on recent District evaluation results, Parents/ Student assert that Student has not met her IEP and/or Transition Plan reading goals. Her reading test scores, falling in the poor and below average ranges, place her well below grade level expectations, and therefore Student has been denied a FAPE and is not ready to graduate.

In April 2020, Parents/ Student rejected the January 2020 IEP, and stated their intention of also having Student refuse her diploma so that she may receive a year's worth of reading instruction (approximately 100 to 200 hours) to address her reading deficits. Parents/ Student request that Student be provided a program different than the one implemented by the District up to this point, and that a different instructor, who is not a District employee, deliver the services.

Lastly, Parents/ Student assert that the District failed to deliver direct remote reading services during the COVID-19 health emergency school closures, in contravention of state guidelines that to the extent possible schools align remote services to a student's IEP. Student is therefore, entitled to receive compensatory education for the interruption in services.

Legal Standards:

I. Jurisdiction of the BSEA:

The Parties in the instant matter concede that consistent with 20 U.S.C. § 1515(b)(6), in Massachusetts the BSEA has been charged with jurisdiction over timely filed complaints by a parent/guardian or a school district "with respect to any matter relating to the identification,

² Parents/ Student did not raise this issue in the initial Hearing Request, but did so in the Parents'/ Student's Opposition/ Amendment to the Hearing Request.

evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.”³ See 34 C.F.R. §300.507(a)(1)⁴.

In Massachusetts, pursuant to 603 CMR 28.08(3)(a)⁵ 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 procedural protections of state and federal law for students with disabilities. A parent of a student with a disability may also request a hearing on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973, as set forth in 34 CFR 104.31-104.39. 603 CMR 28.08(3)(a). See also, M.G.L. c71B.

It is therefore clear that the Massachusetts Special Education Regulations expressly charge the BSEA with the responsibility to resolve education-based disputes between parents, school districts and state agencies. Additionally, pursuant to federal and state law, all rights under the IDEA and MGL c. 71B transfer to the student upon turning eighteen years old, that is, the date on which (s)he reaches the age of majority, including the right to request a hearing or mediation. See Rule I.A.1. of the *Hearing Rules for Special Education Appeals*. A student eighteen years old or older, may choose to share or delegate those rights with his/her parents.

II. Motion to Dismiss-Standard:

Pursuant to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3) and Rule XVII A and B of the BSEA *Hearing Rules for Special Education Appeals*, a hearing officer may allow a motion to dismiss if the party requesting the hearing fails to state a claim upon which relief can be granted. This rule is analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure and as such hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim. Specifically, what is required to survive a motion to dismiss “are factual ‘allegations

³ A parent or a school district, except as provided in 603 CMR 28.08(3)(c) and (d), may request mediation and/or a hearing at any time on any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities. A parent of a student with a disability may also request a hearing on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973, as set forth in 34 CFR 104.31-104.39. 603 CMR 28.08(3)(a). See also, M.G.L. c71B.

⁴ “A parent or a public agency may file a due process complaint on any of the matters described in §300.503(a)(1) and (2) (relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to the child). “ 34 C.F.R. §300.507(a)(1).

⁵ Except as provided under 603 CMR 28.8(c) and (d).

plausibly suggesting (not merely consistent with) an entitlement to relief.”⁶ In evaluating the complaint, the hearing officer must take as true “the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff’s favor.”⁷ These “[f]actual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . .”⁸

Discussion:

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

Therefore, taking as true Parents’/Student’s allegations (as required for purposes of evaluating a Motion to Dismiss and a Motion to Narrow the Scope of the Hearing), I find that Parents/Student have met the above-noted standard regarding their IDEA claims from January 2020 forward.

I note that Parents/Student seek one additional year of reading services to help Student become an independent reader in order to remedy the District’s alleged failure to deliver a FAPE. To the extent that Parents’/ Student’s claim is for compensatory services beyond graduation, they may proceed.

I begin my analysis with claims regarding services delivered to Student under fully accepted, implemented and expired IEPs, including the IEP under which Student started twelfth grade.

Numerous BSEA decisions and rulings have established that once a fully accepted and implemented IEP has expired, hearing officers are precluded from re-visiting those IEPs, as long as the parent had an opportunity to participate in the development of the IEP in question and received the notice of parental rights regarding IEP acceptance/rejection and dispute resolution options. The BSEA may only review the appropriateness of IEPs rejected during their term prior to expiration.⁹ As noted in *In Re: Student and Middleboro Public Schools Ruling on Motion for Summary Judgment*, BSEA #1908178 (Berman, 05/15/ 2019), compensatory relief is not available for the periods corresponding to fully accepted, implemented and expired IEPs.

In the instant case, Student began twelfth grade under an IEP that covered the first semester of her twelfth grade year, expiring in December of 2019. The Parties agree that said IEP had been fully accepted and implemented. Therefore, Parents/ Student may not raise any claims regarding services under said IEP. In this regard those claims are extinguished. The District’s Motion to Dismiss any claims prior to January 2020 is therefore, GRANTED.

⁶ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

⁷ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

⁸ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

⁹ See *In Re: Westport Community Schools*, 19 MSER 016 at 111 (Oliver, 2013) (Citations omitted)

The District is however, less persuasive in its argument that Parents’/Student’s claims regarding the IEP issued in January of 2020 may not be heard for the period from issuance of said IEP through April 2020 when Parents/Student allegedly rejected this IEP. I note that the record lacks evidence of any kind that would enable me to ascertain whether the accepted services in the January IEP were properly implemented, or whether the IEP was appropriate to meet Student’s needs. In the Hearing Request and Opposition to the District’s Motion/ Amendment to the Hearing Request, Parents/ Student specifically allege that the IEP denied Student a FAPE and that the services were not implemented in accordance with the IEP for the period following the COVID-19 health emergency and school closures.¹⁰ Given the underdeveloped record, it would be inappropriate to dismiss any of those claims without the benefit of a Hearing, including the issue regarding rejection of the IEP, and given the plausibility of a claim resulting in some form of relief, no claim stemming from the January 2020 IEP may be dismissed at this juncture. Therefore, the District’s Motion to Narrow the Scope of the Hearing must be DENIED.

Lastly, Parents’/ Student’s Hearing Request notes that they are rejecting “the IEP and diploma” and the Opposition states that they are invoking stay-put rights. The specific IEP being rejected is not mentioned in the Hearing Request, but the Opposition to the District’s Motion/ Amendment alludes to the January 2020 IEP only. The Hearing Request however, seeks relief equivalent to one year of services post-graduation. Since the issue regarding past, accepted and expired IEPs has been addressed *supra*, Parents/ Student may only proceed on their claims regarding the January 2020 IEP, making it improbable for them to obtain the length of duration of services sought even if they were to prevail on their challenge to the January 2020 IEP. Parents/ Student are reminded that they carry the burden of persuasion pursuant to *Schaffer v. Weast*, 546 U.S. 49, 126.S.Ct.528 (2005) at Hearing.

I next turn to the issue regarding rejection of the diploma.

Here, the District relies on a DESE Advisory to argue that since Student passed the MCAS and has otherwise completed the requirements for graduation she cannot refuse her diploma in June 2020. Said DESE Advisory #2018-2 provides that

A parent or student with decision-making authority may not unilaterally “refuse” a diploma for which all requirements have been met. They may, however, reject the final IEP on the basis that the student did not receive FAPE. If this occurs, the student and district have opportunities to resolve the disagreement through mediation or formal dispute resolution procedures under the IDEA. This includes filing a due process complaint

¹⁰ There appear to be contradictions between what is requested by Parents/ Student in their Hearing Request and what is requested in the Opposition to the District’s Motion filed by their advocate. I note that the first submission was filed by Parents/ Student as *pro-se*. Parents/ Student must provide clarity in this respect as noted later in this Ruling.

and requesting a hearing with the Bureau of Special Education Appeals (BSEA).

The aforementioned Advisory follows a long standing DESE policy that graduation determinations are a regular education decision, but, that the BSEA retains jurisdiction over allegations involving a denial of FAPE regarding rejection of the final IEP.

Pursuant to the IDEA and Massachusetts special education law, eligibility for special education services expires when an eligible student receives his/ her high school diploma (or equivalent), or when the student turns twenty-two years old, if he/ she has not previously received a diploma or equivalent. 20 USC §1412(a)(1)(A); MGL c. 71B, §§1 and 3. In *Pihl v. Mass. Dept. of Education*, 9 F.3d 184, 190 (1st Cir., 1993), the First Circuit explained that hearing officers may order a school to provide compensatory services to a student who has “aged out” of special education eligibility if the deprivation of FAPE leading to the award of compensatory services occurred while the student was still eligible. A hearing officer, however, lacks authority to extend eligibility past the award of a diploma or the student’s twenty-second birthday in the form of compensatory remedy. *In re: Dracut School Committee v. Bureau of Special Education Appeals, et al*, 737 F. Supp. 2d, 35, 54 (D. Mass. 2010).

In the instant case, Parents/ Student rejected the final IEP and invoked stay-put rights, preserving their procedural and substantive rights to address the FAPE allegations. Since the BSEA action was initiated prior to expiration of the rejected IEP and award of a diploma, even if Student graduated in June 2020, were she to meet her standard of persuasion at hearing and demonstrate that she was denied a FAPE, she would be entitled to compensatory relief. To the extent that Parents/ Student seek compensatory relief as opposed to an extension of Student’s eligibility, there is a live controversy which cannot be dismissed without a hearing.

Therefore, viewing the facts in the instant case in the light most favorable to the allegations in Parents’/Student’s Hearing Request and Opposition to the District’s Motion/Amendment of the Hearing Request, I conclude that Parents/Student have raised sufficient grounds for a plausible claim entitling them to some form of relief for the period from January 2 to June 9, 2020. As such, this matter may not be fully dismissed. To the extent that the District’s Motion to Dismiss relates to claims predating January 2020, the District’s Motion to Dismiss is GRANTED. The District is correct that Parents’ claim is limited to the IEP covering the period from January to June, 2020, but is not persuasive in limiting the claims to the period from April to June 2020, and therefore, the District’s Motion to Narrow the Scope of the Hearing is DENIED consistent with this Ruling.

Finally, I note that Parents’/Student’s Hearing Request and the Opposition to the District’s Motion, present a number of inconsistencies. Therefore, it is necessary that Parents/ Student file a formal Amended Hearing Request which clarifies their position. As Parents/ Student seek equitable relief, it is up to them to prove at hearing both, the entitlement to compensatory services and the nature and scope of those services.

ORDER:

1. The District's Motion to Dismiss claims pre-dating January 2020 is GRANTED.
2. The District's Motion to Narrow the Scope of the Hearing is DENIED. Parents may proceed on their claims involving the IEP covering the period from January 2 to June 9, 2020.
3. Parents/ Student shall submit a signed statement for the file noting Student's position regarding authorizing Parents to proceed on her behalf.
4. Parents/ Student shall submit a formal Amended Hearing Request.

So Ordered by the Hearing Officer,

Rosa I. Figueroa

Dated: July 6, 2020