

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

**In Re: Pembroke Public Schools v. Student**

**BSEA # 2108690**

**RULING ON PARENT'S MOTION TO DISMISS**

This matter comes before the Hearing Officer on the Parent's *Motion to Dismiss (Motion)* which was filed with the BSEA on April 16, 2021. As grounds for her *Motion*, Parent asserts 1) that Pembroke did not cite a violation of the IDEA in its complaint; and 2) that Pembroke may not file a due process hearing request seeking substitute consent for implementation of an IEP. Parent concludes, therefore, that the hearing officer has no jurisdiction over the present matter, and the case must be dismissed with prejudice.

For the reasons articulated below, Parent's *Motion* is **ALLOWED, in part**.

**RELEVANT PROCEDURAL HISTORY:**

On April 6, 2021, Pembroke Public Schools (Pembroke) filed a Hearing Request asserting that Parent has fully rejected the IEP proposed by the District for the period from January 19, 2021 to January 18, 2022 (IEP), while accepting Student's placement at Evergreen Center School in Milford, Massachusetts. As such, Pembroke sought substitute consent to implement the IEP and for a determination that the proposed IEP is reasonably calculated to provide Student with a FAPE.

On April 16, 2021, Parent filed a *Response to the District's Due Process Complaint and Motion to Dismiss*. In it, Parent allege that Pembroke may not seek substitute consent to implement Student's IEP and that Pembroke has failed to cite a violation of IDEA in their complaint.

On April 20, 202, Pembroke filed its *Opposition to Parent's Motion to Dismiss (Opposition)* asserting that that Parent's *Motion* contains jurisdictional arguments and claims that fall outside the scope of Pembroke's Hearing Request; that Pembroke seeks to ensure that Student continues to receive a FAPE as the last proposed IEP for the period January 19, 2021 to January 18, 2022 was rejected by Parent on March 17, 2021; that if Parent were to succeed in obtaining a dismissal of the Hearing Request, Pembroke would have no venue to file its claim; and, that to avoid debate over the term "substitute consent" contained in the Hearing Request, Pembroke clarifies its position and prayer for relief as follows: the last proposed IEP offered to Student is designed to afford Student with FAPE.

**RELEVANT FACTS:**

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

1. Student is a Pembroke resident with special needs under the disability categories of autism and intellectual disability.
2. Student currently attends Evergreen Center School in Milford, Massachusetts (Evergreen).
3. Student has made significant progress at Evergreen but displays maladaptive behaviors which need to be reduced.
4. In January 2021, Pembroke proposed an IEP for the period from January 19, 2021 to January 18, 2022 with placement at Evergreen.
5. On March 17, 2021, Parent fully rejected the IEP while accepting Student’s placement at Evergreen.
6. Student is currently receiving services pursuant to a stay-put IEP.
7. On April 6, 2021, Pembroke filed a Hearing Request seeking substitute consent to implement the IEP and for a determination that the proposed IEP is reasonably calculated to provide Student with a FAPE.

#### **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 Code Mass Regs 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.”<sup>1</sup> 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>2</sup> These “[f]actual allegations must be enough to raise a right to relief above the speculative level.”<sup>3</sup>

##### *2. Jurisdiction of the BSEA.*

###### *a. Subject Matter Jurisdiction*

The IDEA affords an opportunity for *any party* to present a complaint--

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<sup>1</sup> *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

<sup>2</sup> *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

<sup>3</sup> *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

- (A) 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; and
- (B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.<sup>4</sup>

An impartial due process hearing is commenced with the presentation of such a complaint and is “conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.”<sup>5</sup>

Furthermore, IDEA’s implementing regulations specify that a “public agency” may file a due process complaint about a student’s identification, evaluation, placement, or services.<sup>6</sup> As used in the IDEA, the term “public agency” includes the following: a state educational agency; a local educational agency; an educational service agency; a nonprofit charter school that does not qualify as an LEA or ESA and is not a school of an LEA or SEA; and, any other political subdivision of the state responsible for providing education to students with disabilities.<sup>7</sup>

The IDEA further requires school districts to provide parents with prior written notice before

- (1) [the public agency] proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
- (2) refuses to initiate or change the identification, evaluation or the educational placement of the child or the provision of FAPE to the child.<sup>8</sup>

Together these regulations “establish the right of both a public school district and a parent to file a due process complaint involving provision of FAPE to a disabled student.”<sup>9</sup>

Although the First Circuit has yet to address the issue, the Fifth Circuit Court of Appeals has found that 20 U.S.C. §1415(b)(6)(B) does not impose a pleading requirement that all administrative complaints must allege a violation of the IDEA. In *Alief Indep. Sch. Dist. v. C.C. ex rel. Kenneth C.*, 655 F.3d 412, 415–16 (5th Cir. 2011), the Fifth Circuit disagreed with a district court’s holding that a school district could not recover attorneys’ fees in connection with its own administrative complaint; the district court had reasoned that 20 U.S.C. § 1415 requires states to provide “[a]n opportunity for any party to present a complaint ... which sets forth *an alleged violation* that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint [or

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<sup>4</sup> 20 U.S.C. § 1415(b)(6) (emphasis added).

<sup>5</sup> 20 U.S.C. § 1415(f)(1)(A).

<sup>6</sup> 34 C.F.R. § 300.507(a)(1).

<sup>7</sup> 34 C.F.R. § 300.33

<sup>8</sup> 34 C.F.R. §300.503(a)(1) and (2).

<sup>9</sup> *In Re: Pembroke Public Schools*, BSEA #1911125, 25 MSER 117 (Reichbach, 2019).

within a time limit set by state law],” and therefore, an administrative complaint that does not allege a “violation” of the IDEA could not serve as the basis of an “action or proceeding brought under this section” for purposes of 20 U.S.C. § 1415(i)(3)(B)(i).<sup>10</sup> According to the district court, the school district’s administrative complaint did not allege a “violation” of the IDEA, because it sought only (1) a declaratory judgment that the district had complied with the requirements of the IDEA and (2) a finding that the parents had presented their complaint for an improper purpose (which would not, in itself, be a “violation” of any provision of the IDEA).<sup>11</sup> The Court, however, concluded that

[r]eceipt by the state or local educational agency of a complaint under either § 1415(b)(6) or § 1415(k) triggers the availability of an impartial due process hearing, and its attendant procedural safeguards. Therefore, an impartial due process hearing invoked by any party, including a school district, is a “proceeding brought under § 1415.”<sup>12</sup>

In support of its conclusion, the Fifth Circuit reasoned that

§ 1415(b)(6)(B)—which sets time limits for filing an administrative complaint “which sets forth an alleged violation” of the IDEA—does not prevent a party from filing a complaint about any matter relating to a child’s IDEA entitlements without alleging a violation of the IDEA. Rather, this provision simply requires a party filing a complaint alleging a violation of the IDEA to do so timely. Reading the IDEA as a whole and giving meaning to all of its parts, we conclude that § 1415(b)(6)(B) provides for time limitations for filing complaints about IDEA violations, but that it does not impose a pleading requirement that every complaint by a party must allege an IDEA violation. Such a pleading requirement would directly conflict with the fact that the IDEA gives school districts the ability to file administrative complaints against parents—“for example, if they wish to change an existing IEP but the parents do not consent, or if parents refuse to allow their child to be evaluated.” *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). When a school district seeks an impartial due process hearing for such a purpose, it cannot allege a violation of the IDEA, because parents do not violate any provision of the IDEA by refusing to consent to a change in an IEP or to an evaluation of their child. Therefore, § 1415(b)(6)(B) cannot be read to impose a pleading requirement that all administrative complaints must allege a violation of the IDEA. Instead, we read that provision as setting time limits for filing complaints that do allege violations of the IDEA.<sup>13</sup>

As in the federal statute, Massachusetts special education law provides that

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<sup>10</sup> *Alief Indep. Sch. Dist. v. C.C. ex rel. Kenneth C.*, 655 F.3d 412, 415-6 (5th Cir. 2011).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 417 (internal quotations and citations omitted).

<sup>13</sup> *Id.* at 417-18.

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.<sup>14</sup>

In Massachusetts, the BSEA is granted the authority to resolve disputes involving the provision of special education among parents/students, school districts and state agencies.<sup>15</sup>

*b. Substitute Consent*

The IDEA's implementing regulations mandate that an LEA must seek informed consent from a parent prior to conducting an initial evaluation,<sup>16</sup> before the initial provision of special education and related services to the child,<sup>17</sup> and prior to conducting any reevaluation of a child with a disability.<sup>18</sup> The federal regulations permit districts to use the override procedures in certain situations, such as for re-evaluation of eligible students.<sup>19</sup> Federal regulations do not specifically provide that school districts may use the consent override procedures with respect to a parent's rejection of an IEP.

Similarly, Massachusetts law requires written parental consent before conducting an initial evaluation or making an initial placement of a student in a special education program; before conducting a reevaluation and before placing a student in a special education placement subsequent to the initial placement in special education; and before initiating extended evaluation services.<sup>20</sup>

Massachusetts law limits the availability of consent override to re-evaluation and placements:

If, subsequent to initial evaluation and initial placement and after following the procedures required by 603 CMR 28.00, the school district is unable to obtain parental consent to a reevaluation or to placement in a special education program subsequent to the initial placement, or the parent revokes consent to such reevaluation or placement, the school district shall consider with the parent whether such action will result in the denial of a free appropriate public education to the student. If, after consideration, the school district determines that the parent's failure or refusal to consent will result in a denial of a free appropriate public education to the student, it shall seek resolution of the dispute through the procedures provided in 603 CMR 28.08.<sup>21</sup>

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<sup>14</sup> 603 CMR 28.08(3)(a) (emphasis added).

<sup>15</sup> 603 CMR 28.08(3).

<sup>16</sup> See 34 C.F.R. §300.300(a).

<sup>17</sup> See 34 C.F.R. §300.300(b).

<sup>18</sup> See 34 C.F.R. §300.300(c)(i).

<sup>19</sup> See 34 C.F.R. §300.300(c)(ii).

<sup>20</sup> 603 CMR 28.07(1)(a).

<sup>21</sup> 603 CMR 28.08(3)(a).

Thus, neither federal nor state special education law confers authority on a hearing officer to provide “consent override for implementation of IEPs or provision of services.”<sup>22</sup>

## APPLICATION OF LEGAL STANDARD:

In evaluating the *Motion* under the legal standard for a Motion to Dismiss set forth above, I take Pembroke’s allegations as true, as well as any inferences that may be drawn from them in Pembroke’s favor and deny dismissal if these allegations plausibly suggest an entitlement to relief.<sup>23</sup>

### 1. The BSEA Has Jurisdiction Over Pembroke’s Hearing Request.

In her *Motion*, Parent alleges that Pembroke has failed to cite a violation of IDEA in its complaint. Specifically, she asserts that Parent’s rejection of the proposed IEP is not a violation of IDEA or state special education law, and that that IDEA “is clear that -a complaint for a due process hearing must cite a violation pursuant to 34 CFR 300.507.” She argues that because there is no violation alleged in Pembroke’s Hearing Request, “the hearing officer has no jurisdiction in this matter, and [the complaint] must be dismissed with prejudice.” Parent’s argument is part of a larger grievance against the BSEA for “allow[ing] such cases” to be heard in the past.

Parent’s argument fails on the merits. As articulated *supra*, both the IDEA and its implementing regulations and Massachusetts state regulations explicitly allow a public agency<sup>24</sup> including a school district<sup>25</sup>, to file a complaint 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.<sup>26</sup> In this case, Pembroke’s Hearing Request asserts that Student has made progress pursuant to his last-accepted IEP but still engages in maladaptive behaviors needing reduction. As such, it proposed a new IEP to offer Student a FAPE. Because Parent rejected the newly proposed IEP, Student is receiving services pursuant to a stay-put IEP which does not offer the same level of services that the Team believes he now requires. As a result, Pembroke seeks a finding that its proposed IEP is appropriate for Student. Clearly, this is a dispute relating to the “provision” of a FAPE.

Parent’s argument focuses on the word “violation” and the absence thereof in Pembroke’s Hearing Request; specifically, she asserts that parent does not violate any provision of the IDEA by refusing to consent to a change in an IEP and therefore schools may not file for a due process hearing under those circumstances. However, as discussed *supra*, the Fifth Circuit reaches a

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<sup>22</sup> *In Re: Pembroke Public Schools*, BSEA #1911125, 25 MSER 117 (Reichbach, 2019)(“Given that the District’s basis for seeking consent override fall outside the circumstances for which substitute consent is applicable, consistent with 34 C.F.R. 300.300, and 603 CMR 28.07(1)(b), Pembroke cannot plausibly raise a right to the relief it seeks in this regard from the BSEA” since “the BSEA does not have the authority to provide substitute consent for implementation of an IEP”).

<sup>23</sup> See *Iannocchino*, 451 Mass. at 636.

<sup>24</sup> 34 C.F.R. §300.503(a)(1).

<sup>25</sup> 603 CMR 28.08(3)(a).

<sup>26</sup> 20 U.S.C. § 1415(b)(6) (emphasis added).

difference conclusion, finding that “§ 1415(b)(6)(B) cannot be read to impose a pleading requirement that all administrative complaints must allege a violation of the IDEA. Such a pleading requirement would directly conflict with the fact that the IDEA gives school districts the ability to file administrative complaints against parents—for example, if they wish to change an existing IEP but the parents do not consent, or if parents refuse to allow their child to be evaluated.”<sup>27</sup> Moreover, the word “violation” as used in the statute is part of a clause and must be interpreted in that context; read as a whole, the provision sets a 2-year time limit for filing complaints that do allege violations of the IDEA rather than imposing a pleading requirement that every complaint by a party must allege an IDEA violation.<sup>28</sup>

Therefore, I find that the BSEA has jurisdiction over Pembroke’s Hearing Request.

2. *Although the BSEA Has No Authority to Grant Substitute Consent to Implement an IEP, Pembroke May Proceed to Hearing on the Claim That the Proposed IEP is Reasonably Calculated to Provide Student with a FAPE.*

In her *Motion*, Parent assert that Pembroke may not seek substitute consent to implement Student’s IEP. Parent is correct. Both federal and state law limit the ability of a Hearing Officer to order substitute consent to implementation of an IEP for that of a parent.<sup>29</sup> Because neither federal nor state special education law yields authority for a hearing officer to provide “consent override for implementation of IEPs or provision of services,”<sup>30</sup> Pembroke’s request for consent override to implement the proposed IEP or the provision of services must be dismissed, for it is not relief that can be granted by the Hearing Officer.

Nevertheless, in its Hearing Request, Pembroke seeks dual relief, requesting substitute consent to implement the IEP and for a determination that the proposed IEP is reasonably calculated to provide Student with a FAPE. Therefore, Pembroke’s claim that the proposed IEP is reasonably calculated to provide Student with a FAPE may proceed to Hearing.<sup>31</sup>

**ORDER:**

1. As outlined in this Ruling, the Parent’s *Motion to Dismiss* is **ALLOWED, in part.**

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<sup>27</sup> *Alief Indep. Sch. Dist.*, 655 F.3d at 417-18 (internal quotations and citations omitted).

<sup>28</sup> *Id.* 655 F.3d at 417-18.

<sup>29</sup> See 34 C.F.R. §300.300(c)(ii) and 603 CMR 28.08(3)(a).

<sup>30</sup> *In Re: Pembroke Public Schools*, BSEA #1911125, 25 MSER 117 (Reichbach, 2019)(“Given that the District’s basis for seeking consent override fall outside the circumstances for which substitute consent is applicable, consistent with 34 C.F.R. 300.300, and 603 CMR 28.07(1)(b), Pembroke cannot plausibly raise a right to the relief it seeks in this regard from the BSEA” since “the BSEA does not have the authority to provide substitute consent for implementation of an IEP”).

<sup>31</sup> In its *Opposition*, Pembroke asserts that to avoid debate over the term “substitute consent” contained in the Hearing Request, Pembroke clarifies its position and prayer for relief as follows: the last proposed IEP offered to Student is designed to afford Student with FAPE. Such a clarification would usually require the filing of an Amended Hearing Request. However, in its Hearing Request Pembroke asked both for substitute consent and a finding that its proposed IEP was appropriate. As a result, Pembroke need not file an Amended Hearing Request.

2. The Hearing may proceed on the following issue: whether Pembroke's proposed IEP for the period from January 19, 2021 to January 18, 2022 is reasonably calculated to provide Student with a FAPE.

By the Hearing Officer,

s/ Alina Kantor Nir

Alina Kantor Nir

Date: April 22, 2021