

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

In Re: Student v. Boston Public Schools

BSEA # 2112292

**RULING ON BOSTON PUBLIC SCHOOLS' MOTION TO DISMISS A CLAIM FOR
LACK OF JURISDICTION/MOTION TO NARROW THE ISSUES FOR HEARING**

This matter comes before the Hearing Officer on the Boston Public Schools' (District) *Motion to Dismiss a Claim for Lack of Jurisdiction/Motion to Narrow the Issues for Hearing* (Motion) which was filed with the BSEA on July 12, 2021.¹ On August 4, 2021, Parent responded to the Motion.

The District seeks dismissal of one of Parent's claims. Specifically, the District disputes that retention is a special education matter that should be heard and ruled on in a BSEA hearing. As grounds thereof, the District argues that the issue of promotion/retention, as it relates to Student, fails to raise an issue of a free and appropriate public education (FAPE) as it does not implicate placement. The District further asserts that both the Department of Elementary and Secondary Education's (DESE) April 27, 2021 Guidance on In-Person Learning and Student Learning Time² and the District's May 11, 2021 Superintendent's Temporary Guidance Memorandum warn against retention. In response, Parent argues that Student's most recent IEP proposes a change in placement to a more restrictive setting, thereby implicating the issue of FAPE.³ Parent also argues that Student's retention is directly linked to the services that Student should have been receiving but was not.

For the reasons set forth below, the District's *Motion* is hereby **DENIED**.

¹ The document filed by the District on this date was entitled "Boston Public Schools' Response to Request for Hearing." (Response). The Response included an argument that retention is not an issue appropriately before the BSEA. During the Pre-Hearing Conference held on July 29, 2021, however, the District asked that its Response also be viewed as a Motion to Narrow the Issues for Hearing. Via email filed after the Pre-Hearing Conference on July 29, 2021, the District also requested that their Motion to Narrow the Issues to be treated as a Motion to Dismiss the claim for lack of jurisdiction. The timelines for the *Motion* were therefore calculated using the July 29, 2021 date.

² See <https://www.doe.mass.edu/covid19/on-desktop.html> ("As we stated last spring heading into the 2020-21 school year, DESE discourages retaining students at the prior grade level. This includes students of first grade age whose parents/guardians may have kept them home from kindergarten this year; these students should be placed in the first grade in the fall, even if they chose to remain unenrolled for kindergarten").

³ In her *Parent's Opposition to Boston Public Schools' Motion to Dismiss*, Parent alleged that Student's IEP, as amended in June 2021, "indeed proposed a change in placement from the Beethoven to Mission Hill K-8, Early Childhood, in a K1 inclusion classroom, which is a change in school and a more restrictive placement." However, following a conference call which took place on August 5, 2021, Parent clarified that Parent "believed the proposed placement was a K1 inclusion classroom and a changed placement based on statements from the school psychologist in the team meeting. However, it became clear [during the conference call] that the proposed placement is for a K2 seat in an inclusion classroom."

RELEVANT PROCEDURAL HISTORY:

On June 29, 2021, Parent filed a Request for Hearing alleging, in part, that Student has not been provided a FAPE in the least restrictive environment (LRE); that retention is a special education matter appropriately argued at the BSEA; and that retention in the least restrictive general education classroom in Student's community school constitutes FAPE in the LRE.

On July 12, 2021, the District responded that the IEPs developed for 2020-2021 and 2021-2022 school years, respectively, were reasonably calculated to provide Student with a FAPE in the LRE. In addition, the District asserted that the BSEA has no jurisdiction over the issue of retention in this case.

ISSUE:

Whether, in this matter, promotion/retention is an issue which may be addressed by a BSEA Hearing Officer as part of a due process proceeding challenging an IEP proposed by Boston?

RELEVANT FACTS:

For the purposes of this *Motion*, I must take the assertions set out in the Parent's Complaint as true. These facts may be subject to revision in subsequent proceedings.

1. Student (DOB 8/27/2016) is a special education student residing in Boston, Massachusetts. He has been diagnosed with Autism Spectrum Disorder, ADHD-Combined Type, and Social Pragmatic Communication Disorder.
2. Student was referred for a special education evaluation in October 2019 and found eligible for special education under the categories of Developmental Delay and Autism Spectrum Disorder. An IEP dated 11/25/2019 to 11/24/2020 included goals in the areas of Occupational Therapy and Self Regulation Skills. Services included Applied Behavior Consultation (2x60min/month), direct readiness skills (5x200min/5-day cycle) and self regulation skills (5x60min/5-day cycle) in the general education classroom, and direct pull out occupational therapy (1x30min/5-day cycle). The IEP excluded goals and services to target social communication deficits. Door-to-door transportation was proposed. Placement in an inclusive⁴ early childhood program at the Haley Elementary, Early Childhood program was also proposed.⁵ Parent rejected the placement and partially rejected the IEP.⁶
3. In the fall of 2020, Student transitioned to grade K1 at Beethoven Elementary School. At that time, due to the COVID-19 pandemic, the District offered Student remote instruction

⁴ At the pre-hearing conference, the parties explained that "inclusion" classrooms in the District are different from general education classrooms; inclusion classrooms are co-taught and include additional personnel or push in support from special educators. They embed special education and social-emotional supports and include both general education students and a significant number of students with IEPs. Parent refused an inclusion classroom for Student and he was enrolled in a general education classroom instead at Beethoven Elementary School, which is his community school.

⁵ Subsequently, as an alternative to Haley, the Roosevelt was offered for placement.

⁶ Parent rejected both the Haley and the Roosevelt due to the class size at both programs.

only. At Parent's expense, Student also attended Foundations for Social Understanding⁷ program (FUSE) which provided Student with in-person instruction.

4. On November 24, 2020, the Team re-convened to develop Student's annual IEP for the period 11/24/2020 to 11/23/2021. Goals in the areas of Occupational Therapy, Self Regulation, and Readiness Skills were proposed. Services included Applied Behavior Consultation (2x60min/month), direct readiness skills (5x200min/5-day cycle) and self regulation skills (5x60min/5-day cycle) in the general education classroom, and direct pull out occupational therapy (1x30min/5-day cycle) and readiness skills (5x240min/5-day cycle). Extended school year services were also proposed. The IEP offered placement in an inclusive early childhood program at Haley Elementary School, Early Childhood program. Subsequently, as an alternative, the District offered Mission Hill K-8 School, Early Childhood program as a placement.
5. Parent partially rejected the IEP for failing to offer appropriate services for a student with autism, such as direct ABA and speech and language services to target social pragmatics. She also rejected the placement at Haley and the alternative placement at Mission Hill.
6. Parent found the IEP lacking because it did not include all the supports and services recommended by Parent's independent evaluators, Dr. Rafael Castro and Sara Markowitz. Parent also wanted Student to remain at Beethoven.
7. At Parent's request, in January 2021, Student was observed by a District speech and language therapist. The findings were inconclusive.
8. Student continued to attend FUSE when the District transitioned to hybrid instruction.
9. On March 26, 2021, while attending school in Boston under the hybrid learning model, Student was left on the school bus for a significant length of time. On April 1, 2021, he was assaulted by a monitor on the bus.
10. Due to the bus incidents, Student began to suffer from significant anxiety. As a result, Parent began to transport Student to and from school. Eventually, Student returned to riding the bus to school, but Parent transported Student home. The District did not conduct a functional behavioral assessment⁸ or a trauma assessment. In response to the bus incidents, Parent requested that Student receive direct ABA services and counseling, but neither was provided.
11. On March 5, 2021, Student was found ineligible for COVI-19 Compensatory services.
12. On April 26, 2021, the District returned to full in-person instruction and Student attended K1 in person, full time, ending his attendance at FUSE.
13. The Team reconvened on June 18, 2021. At that time, Parent requested that Student be retained in his current K1 general education class with his current teacher. Parent asserted that that the inclusion classroom is too restrictive because it includes twenty students, five of whom have IEPs.
14. During the June 2021 meeting, the speech and language therapist noted that during her observation of Student in a small setting of four children, she did not observe much interaction. Based on teacher reports, ongoing parent concerns and weaknesses in the social/pragmatic domain noted in Student's neuropsychological evaluation, she proposed

⁷ Student was first enrolled at FUSE in January 2020 by Parent.

⁸ Based on the documents submitted by the District, on March 30, 2021, in response to Parent's rejection of Student's 2019 evaluations and request for an independent evaluation, the District proposed to reassess Student in the areas of academic, psychological, speech and language, occupational therapy, applied behavior analysis and functional behavior assessment. The documents do not include Parent's response to the proposal.

to add direct speech and language service (1x30) in the area of pragmatic skills. November 2020 IEP was revised on June 18, 2021 to include goals targeting occupational therapy and self-regulation as well as communication and classroom expectations.

15. During the June 2021 meeting, the Team refused to discuss retention but continued to propose an inclusion classroom for grade K2.
16. Beethoven Elementary School does not have an inclusion K2 classroom. Student would need to transition to a different elementary school within the District if he were to move to the proposed K2 inclusion classroom.⁹
17. Parent asserts that Student lags behind in many of his skills, including his attention, social pragmatic and self-regulation skills. Based on Student's report cards, Student made limited progress in his social emotional skill development during the 2020-2021 school year.
18. Parent further argues that although DESE and the District's Superintendent discouraged retention of students, including Kindergarten students, the Superintendent also urged that retention decisions be based on a lack of evidence of meeting or exceeding the essential standards. Parent submits that there are no clear standardized benchmarks for student readiness in grades K1-K2.
19. In addition to his disabilities, Student has a late August birthday, making him younger and less mature than his peers.

RELEVANT LEGAL STANDARDS:

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."¹⁰ 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."¹¹ These "[f]actual allegations must be enough to raise a right to relief above the speculative level."¹²

2. BSEA Subject Matter Jurisdiction

⁹ At the Hearing Officer's request, the parties participated in a conference call on August 5, 2021. As a result of the conference call, Parent filed a Clarification on Grade and Placement Proposed for Student by Boston, and the District submitted Student's IEPs and N1 statements.

¹⁰ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

¹¹ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

¹² *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

20 U.S.C. § 1415(b)(6) grants the Bureau of Special Education Appeals (BSEA) with 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.”¹³ 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 procedural protections of state and federal law for students with disabilities.”¹⁴ 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.”¹⁵

a. BSEA Jurisdiction Over Retention/Promotion Issues

The Individuals with Disabilities in Education Act (IDEA) does not address retention and promotion of students with disabilities.¹⁶ In general, an issue solely concerning a decision to promote or retain a student is a general education decision which would not be subject to a due process proceeding before the BSEA.¹⁷

However, the Office of Special Education Programs (hereafter, OSEP) has clarified that “there may be FAPE issues that have a direct impact upon retention and promotion decisions, and these issues can be the basis for a hearing request.”¹⁸ In order for a parent to bring a claim concerning a district's wrongful retention or promotion of a student with a disability, the parent must be able to frame his complaint as a dispute about identification, evaluation, educational placement, or denial of FAPE.¹⁹ For instance, if a student has not been receiving IEP services specifically designed to assist him in meeting the promotion standards, the student could challenge the lack of services as a denial of FAPE.²⁰ In addition, although “a retention or promotion decision is not

¹³ See 34 C.F.R. §300.507(a)(1).

¹⁴ 603 CMR 28.08(3)(a).

¹⁵ *In Re: Georgetown Public School*, BSEA #1405352, 20 MSER 200 (Berman, 2014).

¹⁶ See *Letter to Anonymous*, 35 IDELR 35 (OSEP 2000) (concluding that the federal special education statute does not address standards for retention or promotion, essentially leaving it to individual states to determine how this issue should be addressed).

¹⁷ See *In Re: Greater Fall River Regional Vocational School District*, BSEA# 01-3218, 7 MSER 275 (Figuroa, 2001); *Letter to Anonymous*, 35 IDELR 35 (OSEP 2000) (“[i]n general [OSEP] does not view retention and promotion decisions that are separate from placement decisions as being the sole basis for a due process hearing request”).

¹⁸ See *Letter to Anonymous*, 35 IDELR 35 (OSEP 2000).

¹⁹ 34 CFR 300.507(a)(1); and 34 CFR 300.507(a)(2); see also *Schaes v. Katy Indep. Sch. Dist.*, 252 F. Supp. 2d 364, 366 (S.D. Tex. 2003) (where parents challenged a district’s decision to have student receive educational services in the fifth rather than in the sixth grade but did not challenge the educational services themselves, the court found that the challenge did not involve an educational placement decision under the IDEA and hence “did not fall within the IDEA or raise an issue justiciable in this federal district court”).

²⁰ See *Atlanta Independent School System*, 2104051, 77 IDELR 297 (SEA GA, 2020).

synonymous with a placement decision for IDEA purposes,”²¹ in *Laura and Boston Public Schools (Ruling)*, Hearing Officer William Crane found that “Boston’s decision to retain Student [could not] be considered as separate from a placement decision, and that its decision to retain Student ha[d] significant implications with respect to Student’s receipt of FAPE.” Hearing Officer Crane thus concluded that he had jurisdiction over the subject of retention/promotion in that matter.²² Similarly, in *In Re: Wachusett Public School District and Miles*, the parent asserted that “[Miles] need[ed] retention in kindergarten specifically because of his disabilities—developmental delay and speech impairment” and that placement “in first grade, . . . [would] prevent him from progressing effectively.” Hearing Officer Joan Beron found that the parent had “stated a FAPE issue that [might] have a direct impact upon the retention and promotion decisions [and was thus] entitled to present this claim at hearing.”²³ Although the IDEA does not specifically address whether hearing officers may order promotion or retention as a relief in IDEA proceedings, the IDEA empowers courts and hearing officers²⁴ to grant the relief that they determine to be appropriate.²⁵ Hence, retention or promotion may be within the scope of the relief ordered by a hearing officer.

²¹ *Letter to Anonymous*, 35 IDELR 35 (OSEP 2000) (explaining that unlike retention decisions, placement decisions “are to be made by a group of persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. The group also must include the parents unless the public agency documents its inability to obtain parental participation. In addition, when determining the educational placement of a child with a disability, the public agency must ensure that the child is not removed from education in age-appropriate regular classrooms solely because of needed modifications to the general curriculum”) (internal citations omitted).

²² *Laura and Boston Public Schools (Ruling)*, BSEA #03-1154, 9 MSER 85 (Crane, 2003). In the subsequent Decision, Hearing Officer Crane explained that because federal and state special education laws and regulations do not address the issue of retention, pursuant to the policies and actions of a particular school district, the decision may fall within the responsibility of general education rather than be considered part of a special education dispute under the jurisdiction of the BSEA. However, in that matter, the student’s proposed IEP called for her to be placed at the Mary Lyon School for the 2002-2003 school year, but because Mary Lyon did not go past the 8th grade, the student could not be placed at Mary Lyon for the 2002-2003 school year unless she were retained in the 8th grade. As a result, he concluded that in that dispute “the retention/promotion decision [was] intertwined with, and [could not] be separated from, Student’s special education placement decision by the IEP Team [because the] state special education regulations make clear that a dispute about ‘any matter concerning [a student’s] . . . placement’ falls within the jurisdiction of a BSEA Hearing Officer.” *In Re: Boston Public School and Laura*, BSEA #03-1154, 9 MSER 210 (Crane, 2003).

²³ BSEA #03-5677, 9 MSER 172 (2003)

²⁴ See *Forest Grove Sch. Dist. v. T.A.*, 2009 WL 1738644, *8, n.11, and *10 (2009) (in an IDEA dispute, the authority of a Hearing Officer and the authority of a Court are concurrent with respect to the equitable remedy of reimbursement); *Cocores v. Portsmouth, N.H. Sch. Dist.*, 779 F. Supp. 203, 206 (D.N.H. 1991) (“Given the importance the IDEA places on protections afforded by the administrative process, this court finds and rules that the hearing officer’s ability to award relief must be coextensive with that of the court. To find otherwise would make the heart of the [Act’s] administrative machinery, its impartial due process hearing less than complete”), quoting *Manecke v. School Bd. Of Pinellas County*, 762 F.2d 912, 919 (11th Cir. 1985), cert. denied, 474 U.S. 1062, 106 S.Ct. 809, 88 L.Ed 784 (1986) (footnote and internal quotations omitted); *Ivan P. v. Westport Bd. of Educ.*, 865 F.Supp. 74, 84 (D.Conn. 1994) (“logical to infer that a hearing officer should have the same equitable discretion as the district court”); *B.B. ex rel. Brunes v. Perry Tp. School Corp.*, 2008 WL 2745094, *12 (S.D.Ind. 2008) (“IHO [Impartial Hearing Officer] has the broad authority to award remedial relief that is necessary to address violations of the IDEA”).

²⁵ See 20 USC 1415(e)(2) and 34 CFR 300.516(c)(3); see also *Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985).

APPLICATION OF LEGAL STANDARDS:

In evaluating the District's *Motion to Dismiss a Claim for Lack of Jurisdiction/Motion to Narrow the Issues for Hearing* 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 of the claim at issue if these allegations plausibly suggest an entitlement to relief.²⁶ To decide whether the issue of retention is properly before me, I must first decide whether Parent's claim concerning the district's wrongful promotion of Student implicates a dispute about identification, evaluation, educational placement, or denial of FAPE.²⁷ In the instant matter, I find that it does.

In the Request for Hearing, Parent alleges that Student failed to receive a FAPE in the LRE during the 2020-2021 school year, in part, because the IEP did not include key accommodations and services to target his social pragmatic and social-emotional needs. Specifically, Parent alleges that, despite recommendations from independent evaluators, the District failed to provide Student with a functional behavioral assessment, a trauma assessment, direct ABA services, counseling, and speech and language/social pragmatic supports and services. As a result, Student did not receive a FAPE during grade K1 and cannot now receive a FAPE by being promoted to grade K2.

In response, the District asserts that the retention/promotion claim is improperly before the BSEA because it does not implicate a placement decision. The District contrasts the present matter with *Laura and Boston Public Schools* where promotion did, in fact, implicate a placement decision. The District distinguishes the present matter, arguing that neither Student's retention in a general education grade K1 classroom (as advocated by Parent) nor his promotion to a general education grade K2 classroom will result in his removal from Beethoven. Instead, because Beethoven does not have an inclusion grade K2 classroom, the only circumstance under which Student's placement would change is if Parent were to accept, or the Hearing Officer were to order, the inclusion services and placement proposed by the District (i.e., K2 inclusion classroom).²⁸ Hence, according to the District, the issue of retention or promotion in this matter does not implicate placement or FAPE and must be dismissed for lack of BSEA jurisdiction.

I find the District's argument unpersuasive because Parent's FAPE claim is directly linked to her argument for retention. Specifically, Parent challenges the decision to promote Student to grade K2 on the grounds that Student's goals and services were inappropriate in grade K1. Parent asserts that the District's failure to offer Student the appropriate services during the 2020-2021 school year resulted in the Student's failure to acquire the requisite skills necessary to be successful in K2. In other words, according to Parent, because the District failed to provide Student a FAPE in the 2020-2021 school year, Student's entitlement to FAPE would be compromised by his promotion in the 2021-2022 school year. Therefore, I find that the claim regarding retention is appropriately before me as it directly implicates a dispute regarding a denial of FAPE.²⁸

²⁶ See *Iannocchino*, 451 Mass. at 636.

²⁷ 34 CFR 300.507(a)(1); and 34 CFR 300.507(a)(2); see also *Schares*, 252 F. Supp. at 366.

²⁸ See *Atlanta Independent School System*, 2104051, 77 IDELR 297 (SEA GA, 2020).

ORDER:

Accordingly, the above-referenced matter will proceed as follows:

1. The issues for Hearing are:
 - a. Whether the IEPs and placements proposed for the 2020-2021 and 2021-2022²⁹ were reasonably calculated to provide Student with a FAPE in the LRE; and
 - b. If not, whether retention in the general education classroom at Beethoven Elementary School constitutes FAPE in the LRE for the 2021-2022 school year.
2. If either party disagrees with the issues outlined in this Ruling, it must file a written motion outlining the dispute and request an immediate conference call.
3. The Hearing will take place via Zoom on August 20 and September 14, 2021. It will begin at 9:00AM each day.³⁰
4. Exhibits and witness lists are due by the close of business on August 13, 2021. They should be sent to the Hearing Officer at [...] **and** to the Court Reporter,...at [...].
5. The email addresses for all participants must also be provided to Mr. Loos at aloos@doriswong.com. If either party desires a practice Zoom session, please notify the Hearing Officer in writing.

Should the parties reach a settlement agreement prior to the Hearing, the moving party shall submit a withdrawal of the Hearing. Failure to appear at the Hearing may result in dismissal of the matter with or without prejudice.

So Ordered by the Hearing Officer,

/s/ Alina Kantor Nir

Alina Kantor Nir

Dated: August 10, 2021

²⁹ Although the Request for Hearing sought a finding that Student has been denied FAPE since his initial IEP in January 2019, during the pre-hearing conference, Parent clarified that the Hearing should focus on the 2020-2021 and 2021-2022 school years only.

³⁰ The BSEA is currently not holding in-person Hearings due to the COVID-10 pandemic. If the situation remains the same by the Hearing dates, the Hearing will proceed virtually as scheduled unless either party files a motion to postpone and it is granted for good cause. Additional details regarding the virtual proceeding will be disseminated to the Parties as the Hearing Dates approach.