

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

In Re: Student v. Brookline Public Schools

BSEA #2202527

**RULING ON PARENTS' MOTION TO AMEND AND RETAIN THE PRESENT
HEARING DATES**

This matter comes before the Hearing Officer on *Parents' Motion to Amend and Retain the Present Hearing Dates (Motion)* filed with the BSEA on February 7, 2022. In it, Parents assert that “[i]n response to [the] Hearing Officer’s determination that the hearing request was insufficient . . .[,] the Parents now file an amended hearing request within fourteen (14) calendar days” of the Hearing Officer’s January 31, 2022 Ruling. Parents asked the Hearing Officer to maintain the “present timeline” for Hearing.¹ Also on February 7, 2022, Parents filed *Parents' Second Amended Request for Hearing*. On February 15, 2022, the District filed its *Objection to Parents' Second Amended Request for Hearing (Objection)*². In it, the District argued that the Hearing Officer “continue [to] deny” *Parents' Second Amended Request for Hearing*.

Neither party has requested a hearing on the *Motion*. Because neither testimony nor oral argument would advance the Hearing Officer’s understanding of the issues involved, this Ruling is issued without a hearing, pursuant to *Bureau of Special Education Appeals Hearing Rule VII(D)*.

For the reasons articulated below, the *Motion* is **ALLOWED**³.

RELEVANT FACTS AND PROCEDURAL HISTORY

The following facts are not in dispute and are taken as true for the purposes of this *Ruling*. These facts may be subject to revision in subsequent proceedings.

1. Student is a 16 year old, tenth grade student attending Brookline High School in Brookline, Massachusetts. She is receiving special education services in a full inclusion setting pursuant to an IEP for the period 3/4/2021 to 3/3/2022, under the disability categories of Health and Sensory. On September 20, 2021, Parents filed the instant appeal asserting, in part, that the District denied Student a free appropriate public education in the least restrictive environment by denying her remote access to her

¹ When Parents filed the *Motion*, the Hearing was scheduled to begin on February 28, 2022. However, on February 16, 2022, Parents filed an assented-to request to postpone the Hearing until March 14, 2022, which was granted for good cause.

² The *Objection* was filed together with the District’s *Response to Parents' Objection to Subpoena*. The latter is not addressed in this *Ruling* and is no longer at issue.

³ As discussed in detail in this *Ruling*, although Parents’ *Motion* is allowed, the Hearing Officer rejects Parents’ reliance on BSEA Hearing Rule I(G)(1) as the basis for its argument.

classrooms as well as to her paraprofessional. Parents also alleged that the District was discriminating against Student on the basis of her disability.

2. On October 22, 2022, Parents filed an Amended Request for Hearing.
3. On January 14, 2022, responding to the *Brookline Public Schools' Partial Motion to Dismiss Claims for Failure to State a Claim for Which Relief Can Be Granted*, Parents filed *Parents' Opposition to the Brookline Public Schools' Partial Motion to Dismiss Claims for Failure to State a Claim for Which Relief Can Be Granted* in which they asserted additional claims against the District.
4. On January 31, 2022, the Hearing Officer issued a Ruling allowing, in part, the District's oral motion to dismiss specific claims newly raised by Parents on January 14, 2022. Specifically, the Hearing Officer found that Parents had not raised any claims relative to the District's failure to provide Student with nursing services in either the Initial Request for Hearing or the Amended Request for Hearing. In addition, since the Hearing at that time was scheduled to begin on February 9, 2022, 7 business days from the day of the issuance of the Ruling, the claim that the District had not been providing Student with nursing services per her IEP was dismissed without prejudice.
5. On February 2, 2022, the Hearing Officer allowed a postponement of the Hearing for good cause, and the Hearing was rescheduled to begin on February 28, 2022.
6. On February 7, 2022, Parents filed *Parents' Second Amended Request for Hearing* and the instant *Motion*.
7. *Parents' Second Amended Request for Hearing* asserted that Student has not been receiving nursing services per her IEP⁴ and requested, in part, an Order that Parents "be reimbursed for the money expended in hiring a nurse to perform these services for the student"; that Parents "be fairly compensated for performing these services when a nurse was not available"; and that nursing services "be provided in the student's home by Brookline while the student is under medical restriction not to return to school."
8. Parents' *Motion* argued that:
 1. On January 31, 2022, the Hearing Officer in this matter ruled the Parents' claim that Brookline has not been providing Student with nursing services, was dismissed without prejudice stating that [the] original and amended hearing request [were] insufficient to include this claim.
 2. In response to [the] Hearing Officer's determination the hearing request was insufficient as described above the Parents now file an amended hearing request within fourteen (14) calendar days of the date of the Hearing Officer's determination.
 3. The Parents respectfully request that the present timeline and hearing dates be kept in place according to Hearing Rules for Special Education Appeals."
9. On February 15, 2022, the District filed its *Objection* arguing that "Parents' reliance on BSEA Hearing Rule I(G) is misplaced. The January [31], 2022 Order did not rule Parents' Hearing Request insufficient.... Thus, an amended hearing request under this rule is not applicable. Instead, Brookline would have to consent to the amendment, or the

⁴ *Parents' Second Amended Request for Hearing* fails to delineate the extent of missed services.

Hearing Officer would have to permit the amendment, which has already been attempted and denied on January 31, 2022.”

10. On February 16, 2022, Parents requested a postponement of the Hearing until March 14, 2022 to allow the parties to participate in a settlement conference on February 28, 2022. The request was assented-to by the District . The parties agreed to and requested the following dates and times for Hearing: March 14 (9:30AM to 5:30PM), 15 (9:00AM to 12:00PM), 21 (10:00AM to 5:30PM), and 25 (9:30AM to 5:30PM), 2022.

LEGAL STANDARD

The IDEA requires the party initiating a due process hearing to file a complaint and provide notice of this complaint to the other party and the state educational agency. In part, the complaint must include a description of issue(s), including facts relating to such issue(s) and a proposed resolution to the dispute, to the extent known and available to the party at the time.⁵ This provides the opposing party with notice as to the issues for hearing.

BSEA Hearing Rule I(G) allows the moving party to amend the Hearing Request under two circumstances:

- “1. In response to a Hearing Officer’s determination that a hearing request is insufficient, as described in E, above, the moving party may file an amended hearing request within fourteen (14) calendar days of the date of the Hearing Officer’s determination.
2. If the other party consents in writing, or the Hearing Officer grants permission. (The Hearing Officer may not grant such permission later than five (5) calendar days before the start of the hearing.)”

801 CMR 1.01(6)(f) further instructs that the “Presiding Officer may allow the amendment of any pleading previously filed by a Party upon conditions just to all Parties, and may order any Party to file an Answer or other pleading, or to reply to any pleading.” Because neither BSEA Hearing Rule I(G) nor 801 CMR 1.01 define “conditions just to all Parties,” I turn to the Federal Rules of Civil Procedure for guidance.

Rule 15 of the Federal Rules of Civil Procedure provides that “a party may amend its pleading [with] the court’s leave” and that “[t]he court should freely give leave when justice so requires.”⁶ Thus, the court has the discretion to grant or deny a request for leave to file an amended pleading, and leave to amend must generally be granted unless equitable considerations render it otherwise unjust.⁷ Amendments “may be denied on the basis of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the

⁵ See 34 CFR 300.508(b).

⁶ Fed. R. Civ. P. 15(a)(2).

⁷ *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962)

amendment, [and] futility of amendment.”⁸ In determining whether to grant a motion to amend, the Court must examine the totality of the circumstances and “exercise its informed discretion in constructing a balance of pertinent considerations.”⁹

BSEA Hearing Rule I(G) further states that whenever a Hearing Request is amended, new timelines for the entire process are thereafter calculated, as if the amended hearing request were a new request. The Rule also identifies that to the extent the amendment merely clarifies issues raised in the initial hearing request, the date of the initial hearing request shall be controlling for statute of limitations purposes. For issues not included in the original hearing request, however, the date of the amended hearing request shall be controlling for statute of limitations purposes.¹⁰

APPLICATION OF LEGAL STANDARD

In the instant matter, the District is correct that Parents’ reliance on BSEA Hearing Rule I(G)(1) is misplaced. The Order issued on January 31, 2022 did not address the issue of sufficiency and made no findings relating to the sufficiency of Parents’ initial Request for Hearing or their Amended Request for Hearing. Instead, the Hearing Officer relied on BSEA Hearing Rule I(G)(2) for authority to deny Parents’ request to amend their complaint again. At that time, the Hearing was scheduled to begin in 7 business days. Therefore, the Hearing Officer dismissed the claim relative to nursing services without prejudice.¹¹

However, in light of the Parents’ assented to request to postpone the Hearing in this matter until March 14, 2022 in order to participate in a settlement conference, I find that no undue delay or undue prejudice will result by allowing Parents’ *Motion* at this time.¹² Although the addition of the new claim would likely require additional discovery, it will not cause further delay as the parties have already agreed to postpone the Hearing by one month’s time.¹³ Therefore, the Parents’ *Motion* is ALLOWED.

CONCLUSION AND ORDER

For the reasons articulated above, Parents’ *Motion* is **ALLOWED**.

Because *Parents’ Second Amended Request for Hearing* raises a new issue for hearing ((i.e., failure to provide nursing services), BSEA Hearing Rule I(G) provides that “new timelines for the entire process [shall be calculated] as if the amended hearing request were a new request.” Here, the parties have agreed to and requested a postponement of the Hearing to the following dates and times: March 14 (9:30AM to 5:30PM), 15 (9:00AM to 12:00PM), 21 (10:00AM to

⁸ *The Hilsinger Co. v. Kleen Concepts, LLC*, 164 F. Supp. 3d 195, 198 (D. Mass. 2016) (internal quotations and citations omitted).

⁹ *Palmer v. Champion Mortg.*, 465 F.3d 24, 30–31 (1st Cir.2006).

¹⁰ BSEA Hearing Rule I(G).

¹¹ See *Castellucci v. U. S. Fid. & Guar. Co.*, 372 Mass. 288, 292, 361 N.E.2d 1264, 1266 (1977) (denial of a motion to amend was reasonable because when “trial is as imminent as it was in this case, a judge may give weight to the public interest in the efficient operation of the trial list and to the interests of other parties who are ready for trial”).

¹² See 801 CR 1.01(6)(f) and *Acosta-Mestre v. Hilton Int'l of Puerto Rico, Inc.*, 156 F.3d 49, 52 (1st Cir. 1998).

¹³ In contrast, see *Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922, 933 (1st Cir. 1983).

5:30PM), and 25 (9:30AM to 5:30PM), 2022. Their request for postponement is GRANTED for good cause. The Parties understand that this request extends the 45 day IDEA timeline and delays issuance of the Decision. Accordingly, the matter will proceed as follows:

1. The Hearing will take place via a virtual platform on March 14 (9:30AM to 5:30PM), 15 (9:00AM to 12:00PM), 21 (10:00AM to 5:30PM), and 25 (9:30AM to 5:30PM), 2022.
2. The Hearing will proceed on the following issues:
 - a. Whether the District unlawfully discriminated against Student in violation of Section 504 of the Rehabilitation Act of 1973 by marking her absent during the 2021-2022 school year;
 - b. Whether remote access to classes at Brookline High School was a reasonable accommodation for Student;
 - i. If the answer is “yes”, did the District unlawfully discriminate against Student in violation of Section 504 of the Rehabilitation Act of 1973 from September 1, 2021¹⁴ to October 25, 2021.
 - c. Whether by “refusing to use the same technology it used [during the 2020-2021 school year], including Zoom and the OWL”, the District failed to provide Student with a reasonable accommodation from October 25, 2021 to conclusion of the instant appeal;
 - i. If the answer is “yes”, did the District unlawfully discriminate against Student in violation of Section 504 of the Rehabilitation Act of 1973.
 - d. Whether the District failed to implement the accepted portions of the IEP for the period from March 4, 2021 to March 3, 2022 (the “IEP”) during the 2021-2022 school year by:
 - i. Failing to provide Student with:
 1. A paraprofessional from September 1, 2021 to October 25, 2021;
 2. An in-home paraprofessional from October 25, 2021 to the conclusion of the present appeal;
 3. Vision consultation services;
 4. Nursing services;
 5. The accommodations identified in the IEP; and/or
 - ii. Unilaterally changing Student’s group size in the Learning Center.
 - e. Whether the IEP was not reasonably calculated to offer Student a FAPE in the LRE because it:
 - i. Failed to propose remote instruction; and/or
 - ii. Was not amended to include additional accommodations and services for the school day and for extra-curricular and non-academic activities during Student’s medically necessary homebound instruction.
 - f. If the answer to (a), (b), (c), (d) and/or (e) is yes, then what is the appropriate remedy?
3. Exhibits and witness lists are due at by the close of business day March 7, 2022. Please send them to the Hearing Officer at 49 Camelot Drive, Shrewsbury, MA 01545.

The parties are reminded that all requests for postponements must be in writing and specify the reasons for requesting the postponement and the length of the postponement desired/agreed.

¹⁴ According to the Brookline Public Schools’ website, the first day of school was September 1, 2021.

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: February 17, 2022