**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Student & Malden Public Schools BSEA No. 2206355**

**RULING ON MALDEN PUBLIC SCHOOLS’ MOTION TO DISMISS**

This matter comes before the Hearing Officer on the Malden Public Schools’ (Malden or District) *Response to Parent’s Hearing Request/Motion to Dismiss* (*Response/Motion*), which was filed with the BSEA on February 22, 2022. As grounds for its *Response/Motion*, Malden asserts that all the claims contained in Parent’s *Hearing Request* are beyond the two-year statute of limitations, and, therefore, are either time-barred or outside the jurisdiction of the BSEA. Additionally, Malden asserts that the BSEA is unable to grant the relief requested by the Parent. As such, Malden submits that all claims in the *Hearing Request* must be dismissed.

For the reasons articulated below, Malden’s *Response/Motion* is **ALLOWED** as to all claims contained in the Hearing Request, and this matter is hereby **DISMISSED** *with prejudice*.

**RELEVANT PROCEDURAL HISTORY**

On February 7, 2022, Parent filed a *Request for Hearing* against Malden, asserting that Malden failed to properly address bullying allegations and failed to provide a free, appropriate, public education (FAPE) to Student. The *Hearing Request* sought, as its only requested relief, “resolution in penal damages” for the “lack of care in addressing these issues not only for the bullying of her child but for the neglect of his educational issues ….” Although the *Hearing Request* asserts as to Student that “during the period of time [his] address was [in] … Malden MA”, Parent’s listed address is in Peabody, MA. On February 22, 2022, Malden filed its *Response/Motion*, discussed above.

On February 28, 2022 the parties participated in a Conference Call wherein they advised that they jointly agreed Parent would file any response she may have to the *Response/Motion* by March 7, 2022. This joint agreement was thereafter incorporated into my March 1, 2022, *Ruling on Joint Request to Postpone Hearing and to Establish Schedule to Respond to Motion to Dismiss*. To date Parent has not filed any further documents with the BSEA[[1]](#footnote-1). Neither party requested a Hearing on the *Response/Motion*. As neither testimony nor oral argument would advance my understanding of the issues involved, I issue this Ruling without a Hearing, pursuant to Rule VII(D) of the *Hearing Rules for Special Education Appeals*.

**RELEVANT FACTS**

In her *Hearing Request*, Parent alleges she sent emails to the Malden Police Department, the (then) Malden Mayor and the District between January 5, 2015, and September 23, 2015, relating to complaints of bullying and failure of the District to provide Student with agreed-upon educational supports. Parent also claims that various evaluations of Student conducted in a) November 2014 (by the District); b) September 14-18, 2015 (by an outside evaluator from Boston Children’s Hospital Outpatient (sic)); c) September 23, 2015, October 13, 2015 and November 3, 2015 (by a different named outside evaluator); d) March 17, 2016 and July 14, 2016 (by an outside speech and language evaluator at “Boston Children’s at Waltham”); and e) September 13, 2017 (by an outside unnamed private Neurologist in Peabody, MA) were improper and/or not appropriately considered by the Team. As a result, Parent asserts, Student’s special education eligibility was delayed. Finally, according to Parent “Currently, the City of Malden provides for the minor child to attend a school in Newton, Massachusetts but has informed the Plaintiff [Parent] that if she intended to moveout (sic) of the district, they would no longer provide services for the minor child”.

In its *Response/Motion*, Malden noted that Student withdrew from Malden on November 1, 2018, while attending the Learning Prep School pursuant to an IEP proposed by Malden. Student thereafter enrolled in the Peabody Public School District (Peabody). Pursuant to M.G.L c. 71 §5, commonly referred to as the “Move-In Law”[[2]](#footnote-2), Malden asserts that Peabody became both programmatically and fiscally responsible for Student’s special education no later than July 1, 2019, which date is more than 2 years prior to the filing of the Hearing Request.

**LEGAL STANDARD**

*1. Legal Standard for a Motion to Dismiss.*

Pursuant to Rule XVI(A) and (B) of the *Hearing Rules for Special Education Appeals*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. As these rules are analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure, hearing officers are generally guided by the federal court decisions in deciding such motions.

To survive a motion to dismiss, there must exist “factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief…”[[3]](#footnote-3).  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”[[4]](#footnote-4).  Motions to dismiss are decided based on the facts alleged in the *Hearing Request* and such documents attached or incorporated by reference to it as well as matters for which administrative notice may be taken[[5]](#footnote-5).

A two-pronged approach is used to analyze motions to dismiss[[6]](#footnote-6). First hearing officers “begin by identifying and disregarding statements in the [*Hearing Request*] that merely offer ‘legal conclusion[s] couched as ... fact[ ]’ or ‘[t]hreadbare recitals of the elements of a cause of action.’”[[7]](#footnote-7).  Once this is completed, “non-conclusory factual allegations in the [*Hearing Request*] must then be treated as true, even if seemingly incredible[[8]](#footnote-8). The party opposing the motion, therefore, must show “factual allegations … 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) ....”[[9]](#footnote-9).

*2. Jurisdiction of BSEA.*

20 USC §1415(b)(6), grants parties the right to file timely complaints (with the state educational agency designated to hear same) “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”[[10]](#footnote-10). Similarly, M.G.L. c. 71B §2A, establishing the BSEA, authorizes it to resolve special education disputes,

…  between and among parents, school districts, private schools and state agencies concerning: (i) any matter relating to the identification, evaluation, education program or educational placement of a child with a disability or the provision of a free and appropriate public education to the child arising under this chapter and regulations promulgated hereunder or under the Individuals with Disabilities Education Act, 20 U.S.C. section 1400 et seq., and its regulations; or (ii) a student's rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. section 794, and its regulations.

In those cases within the jurisdiction of the BSEA, the available remedies are also limited by the law. Regardless of how a claim is characterized, if it is, in essence, a claim alleging a failure to provide a FAPE to a student, punitive damages and tort-like compensatory damages are not available, “…because the windfall of such awards to IDEA plaintiffs would likely come at the expense of other educational benefits for other schoolchildren by diverting from them scarce educational resources”[[11]](#footnote-11). As the First Circuit recognized, “in choosing not to authorize tort-like monetary damages or punitive damages in cases under the IDEA, Congress made a balanced judgment that such damages would be an unjustified remedy for this statutorily created cause of action”[[12]](#footnote-12). Instead, the available damages under the IDEA involve “[a]wards of compensatory education and equitable remedies that involve the payment of money, such as reimbursements to parents for expenses incurred on private educational services to which their child was later found to have been entitled …”[[13]](#footnote-13).

*3. Statute of Limitations Applicable to BSEA Hearings.*

The IDEA requires that due process proceedings be commenced within two years of the date that a party knew or should have known of the actions forming the basis of its hearing request[[14]](#footnote-14). The only exceptions to this two-year limitation period are if a parent is prevented from filing a hearing request because of “(i) specific misrepresentations by the [district] that it had resolved the problem forming the basis of the complaint; or (ii) the [district]’s withholding of information from the parent that was required … to be provided …”[[15]](#footnote-15). There are no legal exceptions to this two-year limitation period for claims filed by Districts[[16]](#footnote-16).

With this legal authority in mind, I turn to Malden’s *Response/Motion*.

**APPLICATION OF LEGAL STANDARDS**

After reviewing the *Hearing Request* in the light most favorable to Parent, as I am required to do[[17]](#footnote-17), I am unable to find any allegations that are alleged to have occurred within the two years prior to its filing, (i.e., on or before February 7, 2020)[[18]](#footnote-18). All the emails referenced in the *Hearing Request* were sent by Parent in 2015, and the final educational evaluation she references was administered on September 13, 2017. Although Parent alleges that “currently” Malden would no longer provide services were she to move out of Malden, she does not identify specifically when Malden made this claim. And, when viewed in the context of the totality of the *Hearing Request*, which clearly identifies a Peabody, MA address for Parent, as well as Malden’s *Request/Motion* that indicates Student withdrew from Malden on November 1, 2018, I conclude that this allegation is also beyond the statutory timeframe. Moreover, I note that Parent’s Attorney confirmed during the Conference Call that he agrees all claims are beyond the statutory limitation period, and Parent did not file any response to Malden’s *Request/Motion*, despite agreement to extend her time to do so.

Additionally, Parent has not challenged Malden’s assertion that, based on the Move-In Law[[19]](#footnote-19), Student’s new district of residence, Peabody, became programmatically and fiscally responsible by July 1, 2019, beyond the two-year limitation period. Thus, Parent cannot raise any factual allegations relating to the identification, evaluation, educational program or educational placement of Student, that, even if “seemingly incredible”, could exist within the two years preceding the filing of the *Hearing Request*, for which Malden may be responsible[[20]](#footnote-20). Given this, Malden’s *Request/Motion* is ALLOWED as to all claims in the *Hearing Request*.

**ORDER**

Malden’s *Response/Motion* is **ALLOWED** as to all claims in the *Hearing Request*,and this matter is hereby **DISMISSED with prejudice**.

By the Hearing Officer,

/s/ *Marguerite M. Mitchell*
Marguerite M. Mitchell

Date: March 28, 2022

COMMONWEALTH OF MASSACHUSETTS

BUREAU OF SPECIAL EDUCATION APPEALS

EFFECT OF FINAL BSEA ACTIONS AND RIGHTS OF APPEAL

Effect of BSEA Decision, Dismissal with Prejudice and Allowance of Motion for Summary Judgment

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Similarly, a Ruling Dismissing a Matter with Prejudice and a Ruling Allowing a Motion for Summary Judgment are final agency actions. If a ruling orders Dismissal with Prejudice of some, but not all claims in the hearing request, or if a ruling orders Summary Judgment with respect to some but not all claims, the ruling of Dismissal with Prejudice or Summary Judgment is final with respect to those claims only.

Accordingly~~,~~ the Bureau cannot permit motions to reconsider or to re-open either a Bureau decision or the Rulings set forth above once they have issued. They are final subject only to judicial (court) review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. This means that the decision must be implemented immediately even if the other party files an appeal in court, and implementation cannot be delayed while the appeal is being decided. Rather, a party seeking to stay—that is, delay implementation of-- the decision of the Bureau must request and obtain such stay from the court having jurisdiction over the party’s appeal.

Under the provisions of 20 U.S.C. s. 1415(j), “unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement,” while a judicial appeal of the Bureau decision is pending, unless the child is seeking initial admission to a public school, in which case “with the consent of the parents, the child shall be placed in the public school program.”

Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child’s placement while judicial proceedings are pending must ask the court having jurisdiction over the appeal to grant a preliminary injunction ordering such a change in placement. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1st Cir. 1983).

Compliance

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau of Special Education Appeals contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the facts on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Elementary and Secondary Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

Rights of Appeal

Any party aggrieved by a final agency action by the Bureau of Special Education Appeals may file a complaint for review in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts. 20 U.S.C. s. 1415(i)(2).

An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

Confidentiality

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove\_School District v. Pulitzer Publishing*

*Company*, 898 F.2d 1371 (8th. Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

Record of the Hearing

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to federal law, upon receipt of a written request from any party, the Bureau of Special Education Appeals will arrange for and provide a certified written transcription of the entire proceedings by a certified court reporter, free of charge.

1. During the Conference Call, however, Parent’s counsel advised that he agreed with Malden’s conclusions that all allegations were untimely, and he did not oppose the *Motion*. He explained that he filed the *Hearing Request* due to the Middlesex Superior Court’s *Memorandum of Decision and Order on Defendants’ Motion to Dismiss Plaintiff’s Complaint* (April 16, 2020, Barry-Smith, J., 1881CV02654) (attached as Exhibit A to the *Request/Motion*), dismissing Parent’s Complaint for failure to exhaust administrative remedies with the BSEA prior to filing a civil action as required by 20 USC 1415(l). [↑](#footnote-ref-1)
2. M.G.L. c. 71B §5, the Move-In Law, provides, in relevant part,

… if a child with a disability for whom a school committee currently provides or arranges for the provision of special education in an approved private day or residential school placement, … or his parent or guardian moves to a different school district on or after July 1 of any fiscal year, such school committee of the former community of residence shall pay the approved budgeted costs, including necessary transportation costs, of such day or residential placement, … of such child for the balance of such fiscal year …. [↑](#footnote-ref-2)
3. *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). [↑](#footnote-ref-3)
4. *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995). [↑](#footnote-ref-4)
5. See *Nollet v. Justices of the Trial Court of Mass.,*83 F. Supp. 2d 204, 208 (D.Mass. 2000), *aff'd,*248 F.3d 1127 (1st Cir. 2000); *In Re: Ludlow Public Schools*, BSEA No. 1603808, 115 LRP 58373 (Figueroa, 2015). [↑](#footnote-ref-5)
6. *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011). [↑](#footnote-ref-6)
7. ##  *Id., citing* [*Ashcroft v. Iqbal*](https://1.next.westlaw.com/Document/I90623386439011de8bf6cd8525c41437/View/FullText.html?originationContext=docHeader&contextData=(sc.DocLink)&transitionType=Document&needToInjectTerms=False&docSource=b54ca8a4c94a4fe89d4733814ecf644e), 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009) (quoting *Bell Atl. Corp.,* 550 U.S. at 555).

 [↑](#footnote-ref-7)
8. *Id., citing Iqbal,* 129 S.Ct. at 1951. [↑](#footnote-ref-8)
9. *Iannocchino* 451 Mass. at 636 quoting *Bell Atl. Corp.*, 550 U.S. at 555 (internal citations omitted); see also *Ocasio-Hernandez*, 640 F.3d at 12. [↑](#footnote-ref-9)
10. See also 34 CFR 300.507(a)(1); 603 CMR 28.08(3)(a), providing for the BSEA to hear “… any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law or the procedural protections of state and federal law for students with disabilities”. [↑](#footnote-ref-10)
11. *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 36 (1st Cir. 2006) [↑](#footnote-ref-11)
12. *Id.* at 37. [↑](#footnote-ref-12)
13. *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 124 (1st Cir. 2003); see 20 U.S.C. § 1412(a)(10)(C)(ii); *Diaz-Fonseca* 451 F.3d at 31 explaining that “[i]n fashioning appropriate relief, courts have generally interpreted the IDEA as allowing reimbursement for the cost not only of private school tuition, but also of ‘related services’, [defined in the IDEA as] ‘transportation, and such developmental, corrective, and other supportive services …. as may be required to assist a child with a disability to benefit from special education’”. [↑](#footnote-ref-13)
14. 20 USC 1415(f)(3)(C); 34 CFR 300.507(a)(2); 34 CFR 300.511(e). Massachusetts does not have a different limitation period for special education due process proceedings. [↑](#footnote-ref-14)
15. 20 USC 1415(f)(3)(D); 34 CFR 300.511(f). [↑](#footnote-ref-15)
16. *Id.* [↑](#footnote-ref-16)
17. *Iannocchino* 451 Mass. at 636 quoting *Bell Atl. Corp.*, 550 U.S. at 555 (internal citations omitted). [↑](#footnote-ref-17)
18. Additionally, even if the statute of limitations had not been determinative in the instant matter, I note that Parent’s sole requested relief of “penal damages” against the District, is not relief available in this forum for the reasons explained *supra. Nieves-Marquez*, 353 F.3d at 124; see 20 U.S.C. § 1412(a)(10)(C)(ii); *Diaz-Fonseca* 451 F.3d at 31, 37 and 37. [↑](#footnote-ref-18)
19. M.G.L. c. 71B §5 [↑](#footnote-ref-19)
20. M.G.L. c. 71B §2A; *Ocasio-Hernandez*, 640 F.3d at 12 *citing Iqbal,* 129 S.Ct. at 1951. [↑](#footnote-ref-20)