

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

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

**BSEA # 2209242**

**RULING ON MARSHFIELD PUBLIC SCHOOLS' MOTION TO DISMISS / MOTION  
FOR SUMMARY JUDGMENT**

This matter comes before the Hearing Officer on *Marshfield Public Schools' Motion to Dismiss/Motion for Summary Judgment/Response to Parent's Request for Hearing/Response to Parent's Motions (the Motion)*<sup>1</sup> filed on April 21, 2022. Marshfield Public Schools (Marshfield, MPS, or the District) asserts that

“Marshfield moves for dismissal as the claims raised in the Parent’s Request for Hearing have already been litigated, are beyond the jurisdiction of the Bureau of Special Education Appeals, or moot .... In the alternative, to the extent the Bureau of Special Education Appeals believes that a Motion to Dismiss is not the proper vehicle for the arguments, Marshfield respectfully requests that the Bureau of Special Education Appeals grant its Motion for Summary Judgment, as there is no remaining issue of material fact to litigate with respect to special education services provided by Marshfield to [Student], except relative to the COVID compensatory claims.”

On May 2, 2022, Parent filed *Parent's Opposition to MPS/MHTL's<sup>2</sup> Motion to Dismiss/ Motion for Summary Judgment (Opposition)*. Parent argues that

“[i]n regard to Defendant Marshfield Public Schools’ (MPS) Motion for Summary Judgment, such must be denied as MPS has failed to issue a statement of material facts, but to the extent that they suggest facts within the body of their Pleading, Plaintiffs generally deny them. The material facts are in dispute, and the proper forum for disputing such facts in a due process hearing. Plaintiffs demand the right to a full due process hearing with the opportunity to call and examine and cross-examine witnesses on all of their claims. In regard to MPS's Motion to Dismiss, Plaintiffs demand the right to a full due process hearing with the opportunity to call and examine and cross-examine witnesses on all of their claims.”

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<sup>1</sup> The District submitted 19 exhibits with their *Motion*.

<sup>2</sup> MHTL refers to Murphy, Hesse, Toomey & Lehane, LLC.

Neither party has requested a hearing on the *Motion*.<sup>3</sup> 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 set forth below, the District’s *Motion* is hereby ALLOWED, in part, and DENIED, in part.

**PROCEDURAL HISTORY AND RELEVANT FACTS:**

1. Student is a seventeen year old twelfth grade student who currently attends Middlebridge School in Rhode Island, where she was unilaterally placed by Parent on January 23, 2020. (*Hearing Request; Motion, Exhibit D*)
2. On December 26, 2019, Parent filed a Request for Hearing with the BSEA (BSEA No. 20-05814) alleging, in part, that:
  - a. The District’s January 2020 and February 2020<sup>4</sup> IEPs did not offer Student a free and appropriate public education (FAPE) in the least restrictive environment (LRE); (*Motion, Exhibit C*)
  - b. The District’s “actions toward [Parent and Student] over the past year or so have been so extreme, inappropriate and harmful [such that they amount to] punitive actions against [Student] by the District, which when viewed cumulatively and in relation to the Child’s medical condition, effectively deny the Child her right to FAPE...”; (*Motion, Exhibit C*)
  - c. School staff “used their official authority or influence for the purpose of intimidating, [and] threatening Parent” and made “retaliatory, false, misleading and omission-riddled filings with state agencies; (*Motion, Exhibit C*)
  - d. The District should be ordered to reimburse Parent for Student’s residential placement at Middlebridge School as well as provide compensatory services for home/hospital tutoring services that were terminated by the District; (*Motion, Exhibit C*)

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<sup>3</sup> In her *Opposition*, Parent stated, “Plaintiffs have not requested an evidentiary motion hearing on this matter. Neither has MPS. Plaintiffs intend to set forth all facts and prove all claims at a full administrative due process hearing, at which witnesses are called, examined, and cross-examined in relation to all claims, and not just select claims heard out of context.” (*Opposition*)

<sup>4</sup> Subsequent to Parent’s December 2019 filing, the Team convened and revised the IEPs. In *Ruth v. Marshfield Pub. Sch.*, Hearing Officer Ray Oliver summarized the procedural history of BSEA No. 2005814 as follows:

“The instant case is the fifth (5th) BSEA appeal involving this Parent and this school system. Marshfield Public Schools (MPS) initially filed against Parent on July 19, 2019 in BSEA #2000680. MPS withdrew this appeal on August 14, 2019. However, MPS then refiled against Parent on August 15, 2019 in BSEA #2001880. Parent filed against MPS on August 29, 2019 in BSEA #2002450. MPS withdrew its appeal (BSEA #2001880) on October 21, 2019. Parent withdrew her appeal (BSEA #2002450) on November 7, 2019. All the above cases were assigned to Hearing Officer Amy Reichbach and all have been closed.

MPS then filed an appeal against Parent on November 8, 2019 in BSEA #2004535 and this appeal was assigned to Hearing Officer Raymond Oliver. Parent then filed against MPS on December 27, 2019 in BSEA #2005814 and this appeal was also assigned to Hearing Officer Oliver. MPS withdrew its appeal (BSEA #2004535) on January 30, 2020. Thus, the only case remaining open, and the subject of this decision, is BSEA #2005814, *Ruth v. Marshfield Public Schools*.”

- e. The District should be ordered to pay damages for loss of consortium and intentional infliction of emotional distress and other tortious acts; and (*Motion*, Exhibit C)
  - f. The District was not complying with discovery requests, was withholding Student's education records, and was redacting non-privileged information that the District deemed damaging to its defense. (*Motion*, Exhibits G, H, I)
3. On September 4, 2020, Hearing Officer Ray Oliver concluded that both the IEP for the period from 1/7/20 to 1/6/21, with placement in-District (but reflecting the District's intention to propose Student's actual placement in a neighboring school system) (January 2020 IEP) and the IEP for the period from 2/11/20 to 1/6/21, with placement in-District (but also proposing to send the IEP and referral packets to two nearby collaborative placements) (February 2020 IEP) offered Student a FAPE in the LRE. He denied Parent compensatory services and reimbursement for Middlebridge School (2020 BSEA Decision). (*Motion*, Exhibit A)
  4. On December 3, 2020, Parent filed in the Massachusetts Superior Court appealing, among other things, Hearing Officer Oliver's findings in the 2020 BSEA Decision. Parent argued the following causes of action:
    - a. Denial of a FAPE;
    - b. Malicious prosecution;
    - c. Malicious abuse of process;
    - d. Malicious defamation;
    - e. Fraudulent misrepresentation and/or omission of material fact and/or records;
    - f. Denial of due process;
    - g. Deceit;
    - h. Retaliation;
    - i. Discrimination;
    - j. Abuse of power;
    - k. Threat of additional malicious bad faith prosecution
    - l. Due process violations;
    - m. Intentional infliction of emotional distress/intentional mental distress;
    - n. Loss of consortium/interference with advantageous relations;
    - o. Assault;
    - p. Violation of civil rights;
    - q. Gross negligence;
    - r. FERPA violations against Child;
    - s. Defamation;
    - t. Improper disclosure of personally identifiable information; and
    - u. Withholding requested records from [Parent] which were material to [Parent's] case and hearing preparation."

The District removed the case to federal court on December 21, 2020. The matter was assigned to Judge Leo Sorokin. (*Motion*, Exhibits B, D, E)

5. In federal court, Parent moved to compel production of documents from the District, which when produced, Parent found to be incomplete. (*Motion*, Exhibit J, K)
6. Parent also moved the Court for a preliminary injunction, specifically requesting the Court to "enter an order naming the Child's current school (Middlebridge School) as her

‘stay put’ (‘pendency’) placement.”<sup>5</sup> (*Motion*, Exhibit L) The District argued that Marshfield High School is Student’s stay put placement as this was the last accepted IEP placement.<sup>6</sup> (*Motion*, Exhibit M)

7. The Court stayed all claims and proceeded only on the claim for judicial review of the BSEA decision. Parent moved for summary judgment. The District and the BSEA opposed the summary judgment motion with the District filing a cross motion for summary judgment. (*Motion*, Exhibit B)
8. On February 8, 2022, the U.S. District Court issued an order entitled *Order on Pending Motions* (*Doc. Nos. 42, 54, 56, 64, 67, 99, 102, 105, 108*), Civil No. 20-12259-LTS (D. Mass. February 8, 2020) granting summary judgment in favor of the District as to the claims that involved an appeal of the BSEA decision, Specifically, the U.S. District Court:
  - a. Held that the District did not engage in any FAPE violations;
  - b. Held that Parent failed to show entitlement to compensatory services;
  - c. Rejected Parent’s ‘concealment of evidence’ claim, asserting that Parent failed to show how the allegedly withheld documents would change the Court’s conclusion that the 2020 IEPs provide FAPE in the LRE.<sup>7</sup>
  - d. Denied Parent’s Motion for Summary Judgment seeking stay-put at Middlebridge School, because

“Middlebridge was not an appropriate placement under the IDEA for [Student]. Moreover, IDEA provides that ‘during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child[.]’ 20 U.S.C.A. § 1415(j). Here, the parties have not agreed to M.F.’s placement at Middlebridge—instead, C.F. unilaterally placed her daughter there”;
  - e. Refused to remand the matter to the BSEA, stating that

“[a]lthough the BSEA hearing officer did not address the claims that Marshfield discriminated and retaliated against [Parent] and [Student], no remand is required for two reasons. First, Parent has such claims pending

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<sup>5</sup> This matter is captioned *C.F. v. Amy Scolaro, et. Al.*, Civil No. 20-12259.

<sup>6</sup> The District also asserted that “even assuming *arguendo* that Marshfield is not available, a fact which the District [did] not concede, the stay put would be a full inclusion program at a public high school for the services in the last accepted IEP.” (*Motion*, Exhibit M) The BSEA also opposed Parent’s Motion for Preliminary Injunction arguing that Parent has failed to demonstrate that Middlebridge is Student’s stay put placement or that the BSEA decision is likely to be reversed. (*Motion*, Exhibit N)

<sup>7</sup> As to this holding, the Court explained:

“Parent’s arguments that such documents would have made the hearing officer ‘take[] a different perspective on witness/evidence credibility . . . or removed [Marshfield’s] decision-making power over the Child’s education’ among other remedial actions are not persuasive. As the BSEA hearing officer described, the parties submitted thousands of pages for the hearing, and these documents adequately showed what the documents Parent seeks to admit show: that the relationship between the parties was ‘toxic, malignant and beyond repair.’ Parent does not demonstrate how these documents would have changed the officer’s determination that the 2020 IEPs provided FAPE in the LRE, particularly when the documents Parent seeks to admit largely pertain to Marshfield’s actions and/or inactions, and the 2020 IEPs largely pertain to FAPE at nearby schools. Parent has not been “materially prejudiced” accordingly.” (*Motion*, Exhibit B) (internal citations omitted)

in this case that are not addressed in this decision and are not dependent upon the resolution by the BSEA. Additionally, the evidence of alleged prior discrimination and retaliation by Marshfield does not bear upon whether the 2020 IEPs to be implemented in another school system offered Student FAPE in the LRE. This is why even assuming, without deciding, that the discrimination and retaliation claims could in some circumstances prevent FAPE in the LRE, the fact that the BSEA hearing officer did not address these claims in its decision does not prejudice Parent”; and

- f. Denied Parent’s request for a protective order because Parent failed to “sufficiently explain with evidence why a protective order is necessary at this time, i.e., how Marshfield is allegedly continuing to “misus[e]/improperly disseminat[e] Plaintiffs’ confidential information.” (*Motion*, Exhibit B)
9. On March 30, 2022, the U.S. District Court further ordered that “now [that the Court has] resolved [the BSEA appeal claim and grant[ed] the BSEA’s request ... to enter a separate and final judgment on that claim,” the Court “VACATE[S] the stay on the remaining claims.” (*Motion*, Exhibit F)
10. On April 9, 2022<sup>8</sup>, Parent filed *Parent’s Refiled and/or Amended Administrative Law Due Process Hearing Request (Hearing Request)* in this matter. Parent asserted that “to the extent necessary to preserve and enforce Plaintiff’s rights in this matter on issues before or after 4/9/2020, [Parent] renew[s] [her] 12/2019 pled hearing request (incorporated by reference herein) on issues for which administrative remedies have not been exhausted and/or on issues regarding which a miscarriage of justice has occurred. In any event, it should be noted that [Parent’s] statute of limitations date back 2 years from when the [Parent] knew or should have known of the activity that forms the basis for the cause of action. It should also be noted that MPS and their agents have prevented [Parent] from gaining such knowledge.”
11. In addition, Parent made the following claims<sup>9</sup>:
  - a. Denial of a FAPE:
    - i. Denial of a FAPE in the LRE due to the District’s failure to revise Student’s IEP to accommodate for COVID-19, including failure to “consider, communicate, and/or propose how [the District] intended to make [the] 1/2020 and/or 2/2020 ‘proposed’ [IEPs] and/or Placements appropriate in light of the pandemic, and/or did not timely reconvene a Team meeting to consider the child’s needs in light of the same, which

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<sup>8</sup> Parent’s original request for hearing in the instant matter was amended and refiled on same date.

<sup>9</sup> Parent’s claims have been synthesized for clarity, as the Hearing Request is replete with redundancies. Parent’s Hearing Request also included additional motions. For instance, Parent requested that her matter be granted accelerated status. The District opposed the request. Parent also motioned the BSEA for access to records and a protective order. At Parents’ request, the motions were scheduled for a motion session on April 28, 2022. On April 27, 2022, Parent withdrew her motions without prejudice. Parent also requested a settlement conference with the Director of the BSEA, but the District declined to participate. Because the settlement conference process is voluntary, no settlement conference was held. On May 2, 2022, Parent filed another Hearing Request with the BSEA alleging that Marshfield Public Schools failed to provide Parent with Student’s education records. The matter has been assigned to this Hearing Officer.

- denied the Child a FAPE and/or which denied Plaintiff her right to participate in the Child’s educational decision making”;
- ii. Failure of the IEP proposed for the period from 1/6/2021 to 1/5/2022 to offer Student a FAPE in the LRE<sup>10</sup>; and
  - iii. Failure of the IEP proposed for the period from 1/3/2022 to 1/2/2023 to offer Student a FAPE in the LRE<sup>11</sup>;
- b. Denial of procedural safeguards relative to the January 25, 2021 and January 3, 2022 Team meetings, including:
- i. Denial of access to student records in advance of the meetings;
  - ii. Improper notice of the January 6, 2021 Team meeting;
  - iii. Refusal to consider and discuss Parent’s concerns at both Team meetings;
  - iv. Presence of opposing counsel at the Team Meetings; and
  - v. Failure to invite Student’s current providers to both the January 25, 2021 and the January 3, 2022 Team Meetings
  - vi. Denial of access to student records<sup>12</sup>;

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<sup>10</sup> This claim is derived from Parent’s claim that

“MPS did not provide adequate advanced notice to Parent of the 1/6/2021 Team Meeting; allowed their counsel to be a participant in the educational planning and decision making regarding the Child’s special education programming and placement; did not timely or appropriately convene a meeting with Parent; and did not appropriately allow parent to address for Team consideration parent’s legitimate parental concerns regarding the child’s special education needs and records access and information security regarding the same; MPS did not timely propose an IEP/placement; MPS unlawfully convened a Team Meeting prior to affording Plaintiff parent with the complete education record access Parent had requested; MPS refused to investigate Parent’s concerns about historic / ongoing disability-based/disability-advocacy-based bias / bullying /retaliation / discrimination / hostility and has failed to appropriately address the same for Team Meeting, IEP, and stay put, in-district, proposed placement purposes.” (Hearing request)

<sup>11</sup> This claim is derived from Parent’s claim that

“MPS did not did not appropriately allow parent to address for Team consideration parent’s legitimate parental concerns regarding the child’s special education needs and records access and information security regarding the same; MPS refused to investigate Parent’s concerns about historic / ongoing disability-based/disability-advocacy-based bias / bullying / retaliation /discrimination / hostility and has failed to appropriately address the same for Team Meeting, IEP, and stay put, in-district, proposed placement purposes.” (Hearing Request)

<sup>12</sup> Parent “claims that on numerous occasions since 4/9/2020 – current (at least), Plaintiffs have learned that Plaintiff(s) have not been provided with requested education records access regarding the Child, in violation of the IDEA and/or student records access in violation of state student records laws. This has denied the Student a FAPE and denied Parent the right to meaningful participation in the special education process/ monitoring (which also further denied the Child a FAPE).” (Hearing Request) Parent’s access to records claim is reiterated throughout the Hearing Request. For instance:

“[Parent] further request[s] that the BSEA order MPS and/or its agents to immediately make available for inspection all education records, security videos, or other records that are relevant to Parent’s instant and/or prior hearing request(s), education, in-district stay put/prospective/proposed placement(s) risk assessment. Clearly, where procedural safeguards, including parental access to student records, are deemed an essential component of FAPE, such safeguards should be treated as encompassed in 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...’. As such, the alleged failure of a school district to implement these safeguards may be the proper subject for a due process hearing, particularly when a parent alleges that such failure has deprived a child of FAPE or prevented meaningful parental participation in the Team process. MPS’s failure to provide her with educational records in a timely manner has directly impeded her ability to meaningfully participate in the Team process.

- c. Failure to maintain confidentiality of Student’s student record<sup>13</sup>;
  - d. Concealment of evidence;
  - e. Creation of “a pervasively hostile, retaliatory, discriminatory, biased environment against Plaintiffs on the basis of the Child’s disability and/or on the basis of Parent’s disability-based advocacy”<sup>14</sup>;
  - f. Failure to conduct a timely and appropriate disability-based/disability-advocacy-based bullying investigation based on Parent’s claims, and/or to provide Parent with access to inspect the records of that investigation;
  - g. Denial of “a safe stay put [sic] placement”;
  - h. Failure to maintain Student in Middlebridge School during the pendency of the instant dispute as Student’s stay-put placement<sup>15</sup>;
  - i. Denial of meaningful parental participation;
12. For relief, Parent requested that the BSEA:
- a. Order that the District “conduct a review without delay of plaintiffs’ allegations of bad acts (which Plaintiffs have alleged repeatedly since 2018 and which MPS refuses to appropriately, timely, and with fidelity investigate and address)”;
  - b. Order the District “and/or its agents to immediately make available for inspection all education records, security videos, or other records that are relevant to Parent’s instant and/or prior hearing request(s), education, in-district stay put/prospective/proposed placement(s) risk assessment”;
  - c. Issue a “protective order requiring that the child’s educational records and any other sensitive information/evidence/records be partitioned from access by

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Parent asserts that without access to her Child’s records, she is unable to assess the appropriateness of the Child’s progress stay put and/or prospective placement(s), make meaningful decisions about the adequacy of the Child’s Stay Put and/or proposed programming/placement, evaluate the Child’s susceptibility to bullying, evaluate the appropriateness of staff responses to disability-based/advocacy-based bullying/harassment, the appropriateness and/or reasonableness of MPS’s educational decisions/recommendations, the appropriateness of MPS’s disability-based risk assessments and related actions, the appropriateness and accuracy of the information provided by MPS and/or its agents to any prospective placement(s) and/or upon which such prospective placement(s) may have relied in evaluating the appropriateness of their own program(s) in light of the unique needs of the individual child; the likelihood that the Child may be directly and/or indirectly victimized....” (Hearing Request)

Parent also requested a “pre-hearing discovery master at public/MPSD expense to ensure that Plaintiffs obtain timely and complete access to all of the Child’s education records; or alternatively, a default judgment in Plaintiffs favor granting plaintiffs the maximum relief available under the IDEA and § 504 and state special education laws, including but not limited to refunding the child’s full private placement costs at Middlebridge School plus travel expense.” (Hearing Request) The Hearing Officer is unclear as to what “a pre-hearing discovery master at public/MPSD expense” entails and treats this request as another request for access to education records.

<sup>13</sup> Parent requested that “the BSEA issue a protective order requiring that the child’s educational records and any other sensitive information / evidence / records be partitioned from access by Amanda Benard, Amy Scolaro, MHTL Counsel, Jeffrey Granatino, Erin Wiggan, Nancy McLellan, Robert Keuther.” In addition, Parent “request[ed] that MPS be ordered to reclaim, and secure from access, from MHTL agents and the agents named herein all information / records regarding Plaintiffs that MPS may in the future receive and/or have historically already received.” (Hearing Request) This request appears to relate back to an incident in February 2019 where personally identifiable information was shared by District staff with a non-District employee. (*Motion*, Exhibit G)

<sup>14</sup> Parents alleges that “MPS has engage in Disability-/Disability-Advocacy-Based Bullying, Intimidation, Harassment, Retaliation, and/or Discrimination by MPS and/or their agents.” (Hearing Request)

<sup>15</sup> Parent argued that the District cannot be the stay-put placement since MPS “caus[ed] itself to become and remain unavailable placement by function of their dangerously discriminatory/retaliatory placement.” (Hearing Request)

Amanda Benard, Amy Scolaro, MHTL Counsel, Jeffrey Granatino, Erin Wiggin, Nancy McLellan, Robert Keuther”;

- d. Order that the District “reclaim, and secure from access, from MHTL agents and the agents named herein all information / records regarding Plaintiffs that MPS may in the future receive and/or have historically already received”
- e. Order that Parent be “granted full access to all education / student records”; and
- f. Order that that the District “compensate Plaintiffs for the cost of their unilateral placement of the Child at Middlebridge School for all time periods relevant to this matter, and order that additional funds be placed into trust/escrow for summer services and the 2021-2022 academic year, so that the Child’s education is not immediately further interrupted.”

*(Hearing Request)*

13. On April 21, 2022, the District filed the instant *Motion* to dismiss all of Parent’s claims save for those “relative to the COVID compensatory claims,” asserting that:
  - a. The BSEA has “no jurisdiction over claims of violations of Massachusetts student records regulations and Family Educational Rights Privacy Act, harassment, fraud, or retaliation”;
  - b. Parent’s request for hearing “on claims that arose from 2018 to 2020, inclusive, must be dismissed under the principles of res judicata and collateral estoppel as they have been adjudicated by the BSEA and U.S. District Court or are being reviewed by both the BSEA and the U.S. District Court”;
  - c. The statute of limitations excludes claims prior to April 8, 2020<sup>16</sup>;
  - d. Parent’s request for stay-put placement at Marshfield is barred by collateral estoppel and res judicata;
  - e. “There is no genuine issue of material fact remaining in this case”; and
  - f. Parent “has no reasonable expectation of proving the essential elements” of her case as to any of the claims raised.

*(Motion)*

14. On May 2, 2022, Parent filed her *Opposition* to the District’s *Motion*, asserting that all claims, including retaliation and discrimination, were properly before the BSEA.<sup>17</sup>

*(Opposition)*

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<sup>16</sup> The District asserts that Parent “cannot claim that she did not know about claims, when she raised them in her earlier hearing request.” *(Motion)*

<sup>17</sup> Specifically, Parent argues that the

“BSEA admitted to the US District Court in their 2021 pleadings that Plaintiffs’ prior 12/2019 administrative due process claims of retaliation and discrimination were properly before the BSEA, that BSEA erred in failing to find those fact and conclude the law on those facts, but that Plaintiffs were not prejudiced by the same. To the extent that Plaintiffs have re-asserted further consequences of disability-/advocacy-based retaliation and discrimination that deprives the Child of a FAPE in the LRE, deprives Plaintiff(s) of their individual right to inspect the Child’s educational records, and deprive(s) Plaintiff(s) of their individual rights to meaningfully participate in the educational planning and decision making, it should be noted that MPS and BSEA assured the US District Court that Plaintiffs would not be prejudiced by failing to return the prior case to the BSEA for adjudication on those claims, and that the BSEA cannot deny Plaintiffs the right to assert such claims in relation to the most recent 2+ years unless the BSEA is going to be honest with the US District Court that such prior BSEA error does in fact prejudice Plaintiffs.” *(Opposition)* Parent adds that “[o]n 4/29/2022, Plaintiffs filed a Rule 60(b) pleading with the US District Court. Regardless of that outcome, the BSEA cannot prejudice Plaintiffs.” *(Opposition)*



## LEGAL STANDARD:

### 1. *Legal Standard for Motion to Dismiss and Motion for Summary Judgment*

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, which require the fact-finder to make a determination based on a complaint or hearing request alone.

Unlike a motion to dismiss, which requires the fact-finder to make a determination based on a complaint or Hearing Request alone, evaluation of a motion for summary judgment permits the fact-finder to go beyond the pleadings to assess evidence.<sup>18</sup> Pursuant to 801 CMR 1.01(7)(h), summary decision may be granted when there is “no genuine issue of fact relating to all or part of a claim or defense and [the moving party] is entitled to prevail as a matter of law.”<sup>19</sup> As with motions to dismiss, in determining whether to grant summary judgment, BSEA hearing officers are guided by the Federal and Massachusetts Rules of Civil Procedure, herein Rule 56, which provides that summary judgment may be granted only if the “pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there are no

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Moreover, Parent requests:

“if the BSEA feels as though Plaintiffs' hearing request is insufficient, then Plaintiffs request the right to amend their pleading accordingly to whatever extent BSEA feels as though the pleading is insufficient. However, Plaintiffs note that Federal Rule of Civil Procedure 8(a) requires a complaint to contain a short and plain statement of the claim showing that the pleader is entitled to relief so as to give the defendant fair notice of the claim and the ground upon which it rests. Further, Plaintiffs note that Plaintiffs Hearing Request complies with the very basic submission requirement outlined by the BSEA's own Hearing Request form.” (*Opposition*)

In addition, Parent argues that it was

“error for BSEA to Rule, in 4/2022 without a full fact-finding hearing, that MHTL's 11/8/2019 email chain (or other MHTL conduct in dispute) reflects truth of the matter asserted when the evidence was being offered as some proof that education records were being withheld and concealed by MHTL and that at a fact finding hearing with testimony and the right to call, examine, and cross-examine witnesses, MHTL would be called and Plaintiffs expect that MHTL will provide inculpatory testimony against themselves and their client, MPS. The BSEA, however, used the 11/8/2019 email chain as though it was true of the matter asserted therein, in violation of Plaintiffs due process rights.”

(*Opposition*)

<sup>18</sup> Rule 12(b) of the Federal Rules of Civil Procedure addresses these circumstances as follows:

"If, on any motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

<sup>19</sup> 801 CMR 1.01(7)(h).

genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law."<sup>20</sup>

The party seeking summary judgment must first demonstrate, with the support of its documents (pleadings, affidavits, and other evidence), that there is no genuine issue of fact relating to the claim or defense. The moving party bears the burden of proof, and all evidence and inferences must be viewed in the light most favorable to the party opposing summary judgment.<sup>21</sup> In response to a motion for summary judgment, the opposing party “must set forth specific facts showing that there is a genuine issue for trial.”<sup>22</sup> An issue is genuine if it “may reasonably be resolved in favor of either party.”<sup>23</sup> To survive this motion and proceed to hearing, the adverse party must show that there is “sufficient evidence” in her favor that the fact finder could decide for her.<sup>24</sup> In other words, the evidence presented by the non-moving party “must have substance in the sense that it [demonstrates] differing versions of the truth which a factfinder must resolve at an ensuing trial.”<sup>25</sup> The non-moving party’s evidence will not suffice if it is comprised merely of “conclusory allegations, improbable inferences, and unsupported speculation.”<sup>26</sup>

In its recent guidance, *Letter to Zirkel* (OSEP, 2022), the Office of Special Education Programs (OSEP) advised that

“[w]henver a due process complaint is received under 34 C.F.R. §§ 300.507 or 300.532, the parents or the local educational agency involved in the dispute must have an opportunity for an impartial due process hearing, consistent with the procedures in 34 C.F.R. §§ 300.507, 300.508, and 300.510. 34 C.F.R. § 300.511(a). Among the rights IDEA affords parties to any hearing conducted pursuant to §§ 300.507 through 300.513 or §§ 300.530 through 300.534, or an appeal conducted pursuant to § 300.514, is the right to present evidence and confront, cross-examine, and compel the attendance of witnesses. 34 C.F.R. § 300.512(a)(2).

IDEA does not address procedures for dismissal of due process hearing requests outside of the context of the sufficiency of the complaint. In other words, the only provision in IDEA or its implementing regulations that contemplates summary dismissal is when the due process complaint is insufficient. To the extent any summary proceedings in a hearing on a due process complaint - other than a sufficiency determination - limit, or conflict with, either party's rights, including the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, we believe such proceedings can be used only when both

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<sup>20</sup> *Id.*

<sup>21</sup> *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252 (1986); see also *In Re: Westwood Pub. Schl.*, BSEA # 10-1162 (Figueroa, 2010); *In Re: Mike v. Boston Pub. Sch.*, BSEA # 10-2417 (Oliver, 2010); *Zelda v. Bridgewater-Raynham Pub. Sch. and Bristol Cty Agricultural Sch.*, BSEA # 06-0256 (Byrne, 2006).

<sup>22</sup> *Anderson*, 477 U.S. at 250.

<sup>23</sup> *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 581 (1st Cir. 1994).

<sup>24</sup> *Anderson*, 477 U.S. at 249.

<sup>25</sup> *Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989).

<sup>26</sup> *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990).

parties consent to use the summary process (e.g., cross-motions for summary judgment).”<sup>27</sup>

However, *Letter to Zirkel* is intended for guidance only and is neither precedential nor binding. Specifically, OSEP

“note[s] that Section 607(d) of the IDEA prohibits the Secretary of the Department from issuing policy letters or other statements that establish a rule that is required for compliance with, and eligibility under, IDEA without following the rulemaking requirements of Section 553 of the Administrative Procedure Act. Therefore, based on the requirements of IDEA Section 607(e), [OSEP’s] response is provided as informal guidance and is not legally binding. [*Letter to Zirkel*] represents an interpretation by [OSEP] of the requirements of IDEA in the context of the specific facts presented and does not establish a policy or rule that would apply in all circumstances. Other than statutory and regulatory requirements included in the document, the contents of [the] guidance do not have the force and effect of law and are not meant to bind the public. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. Further, ... OSEP responds to these matters, generally, and not in the context of any specific due process complaint or State complaint that may be pending or resolved.”<sup>28</sup>

Neither Massachusetts nor the First Circuit has addressed whether a hearing officer may issue a dispositive ruling in a due process hearing. Nevertheless, in Massachusetts, the BSEA Hearing Rules “are governed by 603 CMR 28.00, federal due process procedures ..., the Massachusetts Administrative Procedure Act, M.G.L. c. 30A,” and “the Formal Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01 *et seq.*” With regard to dispositive rulings, BSEA Hearing Rule XVI(B), 801 CMR 1.01(7)(g), and Rule 12(b)(6) of the Massachusetts and Federal Rules of Civil Procedure authorize a Hearing Officer to dismiss a case in response to a motion to dismiss. Similarly, Rule 56 of the Massachusetts and Federal Rules of Civil Procedure and 801 CMR 1.01(7)(h) allow for summary decision.<sup>29</sup>

In addition, in contrast to OSEP’s guidance, judges and hearing officers have held that motions to dismiss and motions for summary judgment are “proper mechanism[s] for the [hearing officer] to decide IDEA disputes.”<sup>30</sup> As one court explained,

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<sup>27</sup> *Letter to Zirkel*, 122 LRP 13029 (OSEP, 2022)

<sup>28</sup> *Id.*

<sup>29</sup> See 801CMR 1.01(7)(h) (“When a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he or she is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense. If the motion is granted as to part of a claim or defense that is not dispositive of the case, further proceedings shall be held on the remaining issues”).

<sup>30</sup> See, e.g., *Cheri Miller v. Charlotte-Mecklenburg Sch. Board of Education*, No. 320CV00493MOCDCCK, 2021 WL 3561226, at \*10, 12 (W.D.N.C. Aug. 11, 2021); *Smith v. Parham*, 72 F. Supp. 2d 570, 574 (D. Md. 1999) (“There are a whole host of motions that could arise in the course of a hearing, and it would be nonsensical to prevent an ALJ, who is vested with a great amount of authority, from ruling on motions as they arise”); *In Re: Molalla River Sch. Dist.*, 32 IDELR 52 (SEA OR, 2000) (the school’s motion to dismiss was granted on claims that could have been litigated in a previous hearing); *In re: Student with a Disability*, 116 LRP 36824 (IA, 2014) (“I find nothing within the statute, regulations, or rules precluding the grant of summary judgment when appropriate. Further, the administrative rules governing this proceeding explicitly allow the presiding administrative law judge to grant an appropriate request or motion to dismiss a due process complaint under a number of circumstances,

“[hearing officers] and ALJs are vested with the authority to regulate the course of a hearing, including the authority to conduct discovery, hear and rule on motions, issue orders regarding prehearing matters, and to make preliminary, interlocutory, or other orders as deemed appropriate.

... [A] parent's opportunity to be heard at an impartial due process hearing conducted under IDEA is predicated on their ability to survive pre-hearing dispositive motions allowed under the North Carolina Rules of Civil Procedure, such as a motion to dismiss or a motion for summary judgment. North Carolina's administrative system for due process is not unique in this regard. Summary judgment as a mechanism for pre-hearing relief is recognized by other states administering the procedural safeguards of the IDEA... In conclusion, summary judgment is not prohibited under the IDEA, and is permitted under both North Carolina law and OAH rules as a pre-hearing dispositive motion. Thus, Plaintiff was not deprived of any due process right to present evidence and cross-examine witnesses under 20 U.S.C. § 1415(h)(2) because her claims were properly dismissed by the ALJ through summary judgment before commencement of the scheduled due process hearing.”<sup>31</sup>

## 2. *Jurisdiction of the Bureau of Special Education Appeals*

20 U.S.C. § 1415(b)(6) grants the Bureau of Special Education Appeals (BSEA) 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."<sup>32</sup> In Massachusetts, a parent or a school district, "may request mediation and/or a hearing at any time on any matter<sup>33</sup> 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>34</sup> 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....<sup>35</sup> However, 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."<sup>36</sup>

BSEA jurisdiction extends to IDEA-based claims as well.<sup>37</sup> The First Circuit held, in a case addressing exhaustion of claims filed under 42 U.S.C. § 1983, that the BSEA is not deprived of

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including: when the issues raised are moot or the relief sought is beyond the scope of authority of the judge to provide. I conclude that a motion for summary judgment is an appropriate way for Respondents to make a request for dismissal of a due process complaint”)

<sup>31</sup> *Cheri Miller*, 2021 WL 3561226, at \*10, 12 ((internal citations omitted).

<sup>32</sup> See 34 C.F.R. §300.507(a)(1).

<sup>33</sup> Limited exceptions exist that are not here applicable.

<sup>34</sup> 603 CMR 28.08(3)(a).

<sup>35</sup> See 29 U.S.C. 794 (Section 504 of Rehabilitation Act); 34 CFR 104.

<sup>36</sup> *In Re: Georgetown Pub. Sch.*, BSEA #1405352, 20 MSER 200 (Berman, 2014).

<sup>37</sup> See *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 59, 64 (1st Cir. 2002).

jurisdiction by the fact that certain claims are not based directly upon violations of the IDEA, nor by the fact that the relief a complainant seeks cannot be awarded by the agency.

The IDEA's exhaustion requirement ensures that the BSEA is able to develop a factual record and apply its "specialized knowledge" in an IDEA-based claim.<sup>38</sup> The IDEA's exhaustion requirement "applies even when the suit is brought pursuant to a different statute so long as the party is seeking relief that is available under subchapter II of IDEA."<sup>39</sup>

However, in *Fry v. Napoleon Community Schools*, 137 S.Ct. 743, 752 (2017), the U.S. Supreme Court held that "exhaustion is not necessary when the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee – what the Act calls a 'free appropriate public education.'" Whether a claim is IDEA-based turns on whether the underlying claim is one of violation of the IDEA, or "where there are no factual allegations to indicate that a dispute exists concerning the individual student's eligibility under the IDEA or Section 504 or the discharge of the School's procedural and substantive responsibilities under the IDEA or [Section 504 of the Rehabilitation Act of 1973]."<sup>40</sup>

### 3. *Statute of Limitations*

Under the IDEA, a due process complaint is timely if filed within two years of the date that the parent or district knew or should have known about the action forming the basis for the complaint.<sup>41</sup> The two-year statute of limitations period does not apply to a parent if the parent was prevented from filing a due process complaint due to specific misrepresentations by the school district that it had resolved the problem forming the basis of the due process complaint; or the school district's withholding of information from the parent that was required under this part to be provided to the parent.<sup>42</sup> Although the analysis for § 504 and IDEA claims differs,<sup>43</sup> courts and the BSEA have applied this two-year statute of limitations to FAPE claims brought pursuant to § 504 because the two are intertwined.<sup>44</sup>

### 4. *Res Judicata and Collateral Estoppel*

Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action.<sup>45</sup> The three

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<sup>38</sup> *Id.* at 60.

<sup>39</sup> *Rose v. Yeaw*, 214 F.3d 206, 210 (1st Cir. 2000).

<sup>40</sup> *In Re Xylia*, BSEA # 12-0781 (Byrne 2012); see *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 29 (2006); *Frazier*, 276 F.3d at 64.

<sup>41</sup> 34 CFR 300.507(a)(2).

<sup>42</sup> See 34 CFR 300.511(f).

<sup>43</sup> Whereas to prevail on her IDEA claims Parent must establish that the District failed to provide Student with a FAPE in the LRE, to prevail on her claims pursuant to § 504, Parent must prove that during the relevant time period Student was disabled; she was "otherwise qualified" to participate in school activities; the District received federal financial assistance; and Student was "excluded from participation in or denied the benefits of the educational program receiving the funds, or was subject to discrimination under the program." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 274-75 (3rd Cir. 2014).

<sup>44</sup> See *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.2d 727, 736 (3rd Cir. 2009); *Blunt*, 767 F.3d at 274-75.

<sup>45</sup> *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *In Re Sonus Networks, Inc., Shareholder Derivative Litigation*, 499 F.3d 47, 56-57 (1st Cir. 2007); *Kobrin v. Board of Registration in Medicine*, 444 Mass. 837, 843 (2005).

elements of res judicata are (1) a final judgment on the merits in an earlier suit, (2) “sufficient identity” between the causes of action asserted in the earlier and later suits, and (3) “sufficient identity” between the parties in the two suits.<sup>46</sup> Moreover, under the doctrine of collateral estoppel, once an issue of fact or law necessary to a judgment has been decided, that decision may preclude relitigating the issue in an appeal on a different cause of action involving a party to the first case.<sup>47</sup> These doctrines both apply to a BSEA Hearing Officer’s decision regarding the merits of a special education dispute.<sup>48</sup>

Therefore, the central question here is which, if any, earlier and present claims are sufficiently identical so that they may not be relitigated – that is, whether any claims in the instant hearing request are identical to claims asserted in the earlier hearing request and are therefore barred by res judicata, or whether any present and earlier claims, although not identical, nevertheless derive from a “common nucleus of operative facts” and are barred because the parent could have brought these claims in the earlier action.<sup>49</sup> The First Circuit has held that “although a set of facts may give rise to multiple counts based on different legal theories, if the facts form a common nucleus that is identifiable as a transaction or series of related transactions, then those facts represent one cause of action.”<sup>50</sup>

The purpose of the doctrines of res judicata and collateral estoppel is to “prevent plaintiffs from splitting their claims by providing a strong incentive for them to plead all factually related allegations and attendant legal theories for recovery the first time they bring suit.”<sup>51</sup> These doctrines “relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.”<sup>52</sup>

#### **APPLICATION OF LEGAL STANDARDS:**

I note at the outset that this Ruling is being issued pursuant to BSEA Hearing Rule XVI(B), 801 CMR 1.01(7)(g) and (h), and Rules 12(b)(6) and 56 of the Massachusetts and Federal Rules of Civil Procedure.<sup>53</sup>

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<sup>46</sup> *Gonzalez-Pina v. Rodriguez*, 407 F.3d 425, 429 (1 st Cir. 2005); *Breneman v. U.S. ex rel. F.A.A.*, 381 F.3d 33, 38 (1 st Cir. 2004).

<sup>47</sup> See, e.g., *Allen v. McCurry*, 449 U.S. at 94.

<sup>48</sup> See *Kobrin*, 444 Mass. at 844 (“final order of an administrative agency in an adjudicatory proceeding ... precludes relitigation of the same issues between the same parties, just as would a final judgment of a court of competent jurisdiction”).

<sup>49</sup> *Breneman v. U.S. ex rel. F.A.A.*, 381 F.3d 33, 38 (1 st Cir. 2004); *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 755 (1 st Cir. 1994). Although 34 CFR 300.513(c) permits a parent to file a “separate due process complaint on an issue separate from a due process complaint already filed,” the application of res judicata can be appropriate in considering multiple administrative actions brought under IDEA. 34 CFR 300.513(c) does not bar the application of res judicata to essentially similar multiple actions.

<sup>50</sup> *Apparel Art Int’l, Inc. v. Amertex Enters., Ltd.*, 48 F.3d 576, 583-84 (1st Cir. 1995).

<sup>51</sup> *Id.*

<sup>52</sup> *Allen v. McCurry*, 449 U.S. at 94.

<sup>53</sup> See also, e.g., *Cheri Miller*, 2021 WL 3561226, at \*12; *Parham*, 72 F. Supp. 2d at 574.

In evaluating the District's *Motion to Dismiss* under the legal standard set forth above, I take the Parent's allegations in her Hearing Request<sup>54</sup> as true as well as any inferences that may be drawn from them in her favor, and deny dismissal if these allegations plausibly suggest an entitlement to relief.<sup>55</sup> Here, considering as true all facts alleged by the party opposing dismissal (in this case, Parent), I find that Parent's claims asserting a "a pervasively hostile, retaliatory, discriminatory, biased environment" and seeking an order to investigate the District's "bad acts" including fraud, retaliation and harassment" must be dismissed for lack of subject matter jurisdiction. (*Hearing Request*) Parent's claims seeking an order requiring that "the child's educational records and any other sensitive information / evidence / records be partitioned from access by Amanda Benard, Amy Scolaro, MHTL Counsel, Jeffrey Granatino, Erin Wiggin, Nancy McLellan, Robert Keuther" and an order "secur[ing] from access, from MHTL agents and the agents named herein all information / records regarding Plaintiffs that MPS may in the future receive and/or have historically already received" must also be dismissed for lack of subject matter jurisdiction as well. My reasoning follows.

As discussed in the **LEGAL STANDARDS** section *supra*, not every disability-based claim is subject to the IDEA's exhaustion requirement.<sup>56</sup> Here, Parent has asked the BSEA to order an investigation into the District's acts of fraud, harassment and retaliation; however, the Hearing Officer has no authority to award such relief.<sup>57</sup> Because these claims call for relief unavailable at the BSEA, they do not fall within the BSEA's limited jurisdiction.<sup>58</sup> While these allegations may be related to Student's education, they are not IDEA-based and are therefore not subject to the exhaustion requirement.<sup>59</sup> Therefore, Parent's claims of fraud, retaliation and harassment must be dismissed for lack of jurisdiction.

Additionally, the BSEA does not have any authority to enforce allegations of educational record violations under either state or federal laws, unless such claims are also FAPE-based. Thus, Parent's request to "partition" or "secure from access" Student's educational records to certain named persons must also be dismissed for lack of jurisdiction.<sup>60</sup> Although federal regulations provide that school districts must "permit parents to inspect and review any education records relating to their children that are collected, maintained or used by the agency under this

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<sup>54</sup> In evaluating the District's Motion to Dismiss, the Hearing Officer relies on Parent's Hearing Request alone.

<sup>55</sup> See BSEA R. XVI (B)(3); 801 CMR 1.01 (7)(g)(3).

<sup>56</sup> See, e.g., *In Re Xylia*, BSEA #12-0781 (Byrne 2012).

<sup>57</sup> See *Diaz-Fonseca*, 451 F.3d. at 31.

<sup>58</sup> See, e.g., *In Re Xylia*, BSEA #12-0781 (Byrne 2012).

<sup>59</sup> See *Fry*, 137 S. Ct. at 752; see also *Bowden ex rel. Bowden*, 2002 WL 472293 at \*5 (D.Mass. 2002) ("exhaustion argument does not extend to plaintiffs' . . . state tort claims. While these claims are premised on the same alleged conduct, they do not allege a FAPE violation") (internal citations omitted).

<sup>60</sup> Both FERPA and IDEA define education records as those records that are: 1) directly related to a student; and are 2) maintained by an education agency or institution or by a party acting for the agency or institution. See 34 CFR 99.3; 34 CFR 300.611(b). The IDEA incorporates FERPA's definition. See 34 CFR 300.611(b). Similarly, pursuant to 603 CMR 23.02, student records are defined as consisting of the transcript and the temporary record, including all information recording and computer tapes, microfilm, microfiche, or any other materials regardless of physical form or characteristics concerning a student that is organized on the basis of the student's name or in a way that such student may be individually identified, and that is kept by the public schools of the Commonwealth. The term as used in 603 CMR 23.00 shall mean all such information and materials regardless of where they are located, except for the information and materials specifically exempted by 603 CMR 23.04, specifically, personal files of school employees.

part...without unnecessary delay and before any meeting regarding an IEP or any hearing...or resolution session...and in no case more than 45 days after the request has been made...,”<sup>61</sup> there is no enforceable private legal right of action under FERPA for violations thereunder.<sup>62</sup> Rather, families who contend that the federal education record provisions have been violated can file with the "Student Privacy Policy Office" (SPPO),<sup>63</sup> which is the federal agency under FERPA that is charged with investigating, reviewing, and adjudicating violations of the Act.<sup>64</sup>

Furthermore, in Massachusetts, the student record regulations are promulgated to ensure parents' and students' rights of confidentiality, inspection, amendment, and destruction of student records and to assist local school systems in adhering to the law.<sup>65</sup> Contrary to the federal educational record laws, however, Massachusetts law provides private appeal procedures for parents and students who believe the state educational record laws have been violated, this through appeal to the superintendent of schools and thereafter the school committee.<sup>66</sup>

Hence, the BSEA is not the appropriate administrative agency to enforce Parent’s rights relative to her educational record violation claims. Parent may pursue such claims with SPPO or through the appeal process delineated in 603 CMR 23.09. Because the BSEA is not the appropriate forum in which to assert claims regarding FERPA and Massachusetts student records law,<sup>67</sup> all non-FAPE based educational record claims must be dismissed for lack of subject matter jurisdiction.

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<sup>61</sup> 34 CFR 300.613(a).

<sup>62</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287, 122 S. Ct. 2268, 2277, 153 L. Ed. 2d 309 (2002) (internal citations omitted) (“To begin with, the provisions entirely lack the sort of ‘rights-creating’ language critical to showing the requisite congressional intent to create new rights. ...FERPA’s provisions speak only to the Secretary of Education, directing that ‘[n]o funds shall be made available’ to any ‘educational agency or institution’ which has a prohibited ‘policy or practice.’ This focus is two steps removed from the interests of individual students and parents and clearly does not confer the sort of ‘*individual* entitlement’ that is enforceable under § 1983”); see 34 CFR 99.60(b)(1). Neither FERPA nor its regulations provide for the imposition of fines or the awarding of damages. Instead, SPPO provides technical directives for compliance to offending school districts. See 34 CFR 99.66(c).

<sup>63</sup> The SPPO replaced the Family Policy Compliance Office (FPCO) on January 6, 2019. Although FPCO no longer exists, Letters of Findings and guidance previously issued by FPCO are still valid under current federal laws and provide useful insight into student privacy rules and requirements.

<sup>64</sup> See 34 CFR 99.60(b)(1). Neither FERPA nor its regulations provide for the imposition of fines or the awarding of damages. Instead, SPPO provides technical directives for compliance to offending school districts. See 34 CFR 99.66(c).

<sup>65</sup> See 603 CMR 23.01.

<sup>66</sup> Pursuant to 603 CMR 23.05, the school principal is responsible for maintaining the privacy of student records maintained in her building. In addition, 603 CMR 23.09, in part, provides parents with specific appeal rights as follows:

“(1) In the event that any decision of a principal or his/her designee regarding any of the provisions contained in [the Massachusetts student record regulations] is not satisfactory in whole or in part to the eligible student or parent, they shall have the right of appeal to the superintendent of schools. Request for such appeal shall be in writing to the superintendent of schools.  
... (3) In the event that the decision of the superintendent of schools or his/her designee is not satisfactory to the appellant in whole or in part, the appellant shall have the right of appeal to the school committee. Request for such appeal shall be in writing to the chairperson of the school committee.”

<sup>67</sup> See *In Re: Student v. Taunton Pub. Sch. Dist.*, BSEA # 1304738 (Figueroa 2013) (“The BSEA lacks jurisdiction to order access to a student's record under the Family Educational Rights and Privacy Act (20 U.S.C. s.1232g(f)) or the Public Records law (M.G.L. c.66s.10) or the Student Records Regulations (603 CMR 23.09(1), (2) and (3))”).



Parent also seeks an order from the BSEA for immediate access to all education records. As explained above, the BSEA is not the agency charged with ensuring compliance with FERPA and/or 603 CMR 23.00, et seq. However, in her Hearing Request, Parent asserted procedural violations on the part of the District, including denial of access to education records, in general since April 9, 2020, and, specifically, prior to the January 2021 and January 2022 Team meetings; according to Parent, this denial on the part of the District impeded her ability to participate meaningfully in the IEP process. (*Hearing Request*) Where, as here, Parent asserts that without access to her child’s records, she is unable to make meaningful decisions about the adequacy of her child’s programming, the BSEA has jurisdiction over this claim to the extent that Parent alleges that such failure has deprived her child of FAPE or prevented meaningful parental participation.<sup>68</sup> Therefore, Parent’s claim that the District denied Parent meaningful participation by failing to provide her access to Student’s records since April 9, 2020, and prior to the January 2021 and the January 2022 Team meetings, survives the District’s *Motion to Dismiss*.

The District also seeks partial summary judgment on all of Parent’s claims that arose from 2018 to 2020, inclusive, on the grounds that they are barred under the principles of res judicata and collateral estoppel. In response, Parent argues that summary judgment “must be denied as MPS has failed to issue a statement of material facts, but to the extent that they suggest facts within the body of their Pleading, Plaintiffs generally deny them. The material facts are in dispute, and the proper forum for disputing such facts in a due process hearing.” (*Opposition*) Based on my review of the parties’ submissions and of the relevant statutes and regulations, I conclude that the District has demonstrated that there are no genuine issues of fact, and Parent has failed to show that there is “sufficient evidence” in her favor that the Hearing Officer could decide for her as to any claims that arose from 2018 to 2020.<sup>69</sup> My reasoning follows.

The District asserts that there is no “genuine issue for trial”<sup>70</sup> with regard to any of Parent’s claims that arose from 2018 to 2020 as most of Parent’s claims<sup>71</sup> have already been adjudicated, and are barred by res judicata, collateral estoppel, and the two-year statute of limitations.

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<sup>68</sup> See 603 CMR 23.09(5) (“Nothing in 603 CMR 23.00 shall abridge or limit any right of an eligible student or parent to seek enforcement of 603 CMR 23.00 or the statutes regarding student records, in any court or administrative agency of competent jurisdiction”); see also *In Re: Boston Pub. Sch.*, BSEA # 1900241 (Berman, 2018) (“where procedural safeguards, including parental access to student records, are deemed an essential component of FAPE, such safeguards should be treated as encompassed in ‘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...’. As such, the alleged failure of a school district to implement these safeguards may be the proper subject for a due process hearing, particularly when a parent alleges that such failure has deprived a child of FAPE or prevented meaningful parental participation in the Team process”).

<sup>69</sup> *Anderson*, 477 U.S. at 249.

<sup>70</sup> *Anderson*, 477 U.S. at 250.

<sup>71</sup> The District excludes from its *Motion to Dismiss/Motion for Summary Judgment* the following claims:

- a. That the District “did not consider or communicate with the Parent regarding the implications of the COVID-19 pandemic on Student’s 1/2020 and 2/2020 proposed IEPs”; and
- b. That the District “did not invite any representative from any other school that might be programmatically responsible for the Child to attend any team meeting on any matter, ever.” (*Motion; Opposition*)

Specifically, in the prior BSEA case (BSEA No. 20-05814), Parent alleged that the District’s “actions toward [Parent and Student] [during school years 2018-2019 and 2019-2020] have been so extreme, inappropriate and harmful [such that they amounted to] punitive actions against [Student] by the District, which when viewed cumulatively and in relation to the Child’s medical condition, effectively den[ied] the Child her right to FAPE....” Parent further asserted that the District “used their official authority or influence for the purpose of intimidating, [and] threatening Parent,” made “retaliatory, false, misleading and omission-riddled filings with state agencies,” and withheld Student’s education records. (*Motion*, Exhibits C, G, H, and I) In part, Parent sought reimbursement for Student’s January 23, 2020 unilateral residential placement at Middlebridge School, compensatory services for home/hospital tutoring services, and damages for loss of consortium, intentional infliction of emotional distress and other tortious acts. (*Motion*, Exhibit C) Hearing Officer Oliver concluded that the IEP covering the period 1/7/20 to 1/6/21 was appropriate and denied all of Parent’s claims. (*Motion*, Exhibit A)

In her December 3, 2020 appeal of the 2020 BSEA Decision, Parent again argued denial of a FAPE, malicious prosecution, malicious abuse of process, malicious defamation, fraudulent misrepresentation and/or omission of material fact and/or records, denial of due process, deceit, retaliation, discrimination, abuse of power, threat of additional malicious bad faith prosecution, due process violations, intentional infliction of emotional distress/intentional mental distress, loss of consortium/interference with advantageous relations, assault, violation of civil rights, gross negligence, FERPA violations against Child, defamation, and improper disclosure of personally identifiable information. Parent also alleged that the District “withheld requested records from [Parent] which were material to [Parent’s] case and hearing preparation.” (*Motion*, Exhibits B, D, and E) In addition, she moved the Court to “enter an order naming the Child’s current school (Middlebridge School) as her ‘stay put’ (‘pendency’) placement.” (*Motion*, Exhibit L) The Federal District Court has already entered partial summary judgment in this appeal, finding that the District’s IEPs offered FAPE in the LRE for the period 1/7/20 to 1/6/21; the Court also rejected Parent’s ‘concealment of evidence’ claim, dismissed her discovery allegations and denied Parent’s Motion for Summary Judgment seeking stay-put placement at Student’s unilateral placement at Middlebridge School. (*Motion*, Exhibit B)

The three elements of *res judicata*, discussed above, are clearly satisfied here with respect to BSEA No. 2005814, Civil No. 20-12259-LTS, and the matter pending before me now. It is undisputed that a final judgment on the merits was entered by Hearing Officer Oliver when he rendered the 2020 BSEA Decision. The Federal District Court has also issued a dispositive ruling on the special education related appeal claims as well.<sup>72</sup> There is “identity” between the parties in the 2020 BSEA matter, the Federal District Court BSEA appeal, and this matter,<sup>73</sup> as they all involve the same Plaintiff/Complainant Student (or Parent on behalf of Student) and Defendant/Respondent District. There is also more than “sufficient identity” among the causes of action asserted in the 2020 BSEA matter, the Federal District Court BSEA matter and this matter.<sup>74</sup> Here, Parent continues to base her claims for relief, in part, on procedural violations and District actions and/or inactions dating back to 2019, and presents exactly the

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<sup>72</sup> *Gonzalez-Pina*, 407 F.3d at 429.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

same set of facts and arguments as she did in her prior filings.<sup>75</sup> (Compare *Hearing Request* with *Motion* Exhibits C, D, G, H, and L) Parent has presented no facts showing that the claims in this matter have not been adjudicated or are not of the same “nucleus” as her prior claims.<sup>76</sup> Therefore, I find that all of Parent’s claims relative to the identification, evaluation and educational placement or the provision of FAPE to Student during school years 2018-2019 and 2019-2020, as well as all other claims for that period, including fraud, harassment, and retaliation were raised and disposed of (or are awaiting disposition by the Federal District Court) and, therefore, are barred from my consideration in this matter based upon the principles of res judicata and collateral estoppel. All claims for said time period which were not raised but could have been raised are similarly barred from litigation before me now.<sup>77</sup>

Even if the above claims were not barred from litigation by res judicata, they are barred by the statute of limitations. In her *Hearing Request* and *Opposition*, Parent asserts an exception to the statute of limitations<sup>78</sup>; she attempts to “renew [her] 12/2019 pled hearing request (incorporated by reference herein) ... on issues regarding which a miscarriage of justice has occurred” and on claims that the District and its “agents have prevented [Parent] from gaining such knowledge.” However, Parent raises an identical pattern of facts and claims in her April 9, 2022 Hearing Request (BSEA No. 2209242) as she did in her 2019 Hearing Request (BSEA No. 20-05814) and in her appeal (Civil No. 20-12259-LTS). Parent cannot, on the one hand, assert that she was prevented from gaining knowledge regarding violations and, on the other hand, file for due process on the violations she claims not to have known about at the time. Hence, I do not find that either of the exceptions to the statute of limitations applies in the present matter.<sup>79</sup> Thus, all claims grounded in District actions or inactions which took place more than two years prior to the filing of the current Hearing Request are barred by the statute of limitations and are dismissed.<sup>80</sup>

The District’s Motion for Partial Summary Judgment is therefore ALLOWED.

## CONCLUSION

Based upon the above, the issues remaining for Hearing are limited to the following:

1. Whether the District denied Student a FAPE in the LRE by failing to revise Student’s IEP to accommodate for COVID-19, including failure to “consider, communicate, and/or propose how [the District] intended to make [the] 1/2020 and/or 2/2020 ‘proposed’ [IEPs] and/or Placements appropriate in light of the pandemic, and/or did not timely reconvene a Team meeting to consider the child’s needs in light of the same, which

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<sup>75</sup> See, e.g., *Student v. Montachusett Regional Vocational Technical Sch*, BSEA # 1907993 (Figuroa 2019); *In Re: Harwich Public Sch. and Marshall*, BSEA # 06-4721 (Beron, 2007).

<sup>76</sup> *Anderson*, 477 U.S. at 250 (In response to a motion for summary judgment, the opposing party “must set forth specific facts showing that there is a genuine issue for trial”).

<sup>77</sup> See *In Re: Sutton Pub. Sch. and Neville*, BSEA # 07-7534 (Byrne, 2007) (“It is the opportunity to present those claims, not necessarily the actual presentation, that triggers issue preclusion. To conclude otherwise would permit parties to “shop” for potentially more favorable venues or decision makers and would render the concept of “finality” of a judgment meaningless”).

<sup>78</sup> See 20 USC 1415(f)(3)(D); 34 CFR 300.511(f).

<sup>79</sup> See 34 CFR 300.511(f).

<sup>80</sup> See 20 USC §1415(b)(6)(B); 34 CFR 300.507(a)(2).

denied the Child a FAPE and/or which denied Plaintiff her right to participate in the Child's educational decision making";

2. Whether the District's proposed IEPs for the periods from 1/6/2021 to 1/5/2022 and from 1/3/2022 to 1/2/2023, respectively, failed to offer Student a FAPE in the LRE;
3. Whether the District denied Parent meaningful participation in the IEP process by:
  - a. denying Parent access to student records in advance of the January 25, 2021 and the January 3, 2022 Team meetings;
  - b. failing to provide Parent with proper notice of the January 6, 2021 Team meeting;
  - c. refusing to consider and discuss Parent's concerns at both the January 25, 2021 and the January 3, 2022 Team meetings;
  - d. having opposing counsel attend at the January 25, 2021 and the January 3, 2022 Team Meetings; and
  - e. failing to invite Student's current providers to both the January 25, 2021 and the January 3, 2022 Team Meetings.

**ORDER:**

The District's *Motion to Dismiss/Motion for Summary Judgment* is ALLOWED, in part, and DENIED, in part. The hearing scheduled for May 26, 2022 will proceed on the issues delineated in the **CONCLUSION** section, *supra*. All other claims are dismissed with prejudice.

The parties are instructed to provide their availability to the Hearing Officer by close of business day on May 17, 2022 so that additional dates may be reserved for Hearing.

So ordered,

By the Hearing Officer,

s/ Alina Kantor Nir

Alina Kantor Nir

Date: May 13, 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 (1<sup>st</sup> 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 in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review. 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.