

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

In Re: Student v. Melrose Public Schools

BSEA # 2205685

RULING ON MELROSE PUBLIC SCHOOLS' MOTION TO DISMISS

This matter comes before the Hearing Officer on *Melrose Public Schools' Motion to Dismiss (Motion)* filed on August 29, 2022. Melrose Public Schools (Melrose or the District) asserts that Parents' "Request for Hearing contains specific allegations against the Melrose Public Schools commencing within the 2018-19 academic school year and continuing into January of 2020. The District is requesting dismissal of any claims which accrued prior to January 18, 2020, as those claims are beyond the two (2) year statute of limitations set for claims under the Individuals with Disabilities Education Act ("IDEA")."

On August 29, 2017, Parents responded via email¹ asserting, in part, that the District removed Student from special education "in 2019 into 2020" and did not inform Parents of their right to stay-put.

At Parents' request, the parties participated in a motion session which took place via a virtual platform on September 2, 2022 in the presence of a court stenographer.²

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

PROCEDURAL HISTORY AND RELEVANT FACTS:

For the purposes of this *Motion*, I must take as true the assertions set out in Parents' Complaint.

1. Student is a rising 8th grade student who is receiving special education services pursuant to the Neurological Disability category.
2. Student was found eligible for special education and related services in the second grade (2016-2017) pursuant to the Developmentally Delayed disability category.
3. In the spring of Student's 4th grade year (2018-2019), Student was removed from his IEP by the District.
4. According to Parents, they did not receive their procedural safeguards and were not aware of their stay put rights.

¹ Parents requested that the Hearing Officer take their "email as an objection to the schools [sic] motion."

² On September 2, 2022, the parties agreed that the Hearing Officer would not issue a ruling until after September 9, 2022 to allow the parties to continue to work towards resolving the dispute. On September 9, 2022, the parties informed the Hearing Officer that they could not resolve their differences. Although a discussion ensued regarding whether to allow the parties to submit additional exhibits and to convert the Motion to Dismiss into a Motion for Summary Judgment, in light of Parents' *pro se* status, the Hearing Officer declined to convert the *Motion*. As such, no extrinsic documents were entertained in issuing this Ruling.

5. In January 2019, Student was once again found eligible for special education services pursuant to the Developmentally Delayed disability category. In February 2020, a dyslexia disability category was added to Student's IEP.
6. Due to the COVID-19 pandemic, all schools, including Melrose, shut down in March 2020.
7. The 2020-2021 school year began in an all-remote model. Student struggled in that model but Parents' request to have Student attend in-person for "direct one-on one" was denied.
8. On January 19, 2022, Parents filed a Request for Hearing alleging that Student was improperly removed from an Individualized Education Program (IEP) during the spring of his 4th grade year (2018-2019), and that the Parents were unaware of their right to claim "stay put" services at that time; that, to date, Student has not been provided with needed Orton-Gillingham reading services; and that Student was owed compensatory services due to a "schedule" during the 2021-2022 school that resulted in a reduction of services; and that Student should be placed at Landmark School "or an equivalent school setting that will help bridge [Student's] 6 year gap in learning."

LEGAL STANDARDS:

1. Legal Standards for Motion to Dismiss

Hearing Officers are bound by the *BSEA Hearing Rules for Special Education Appeals (Hearing Rules)* and the Standard Rules of Adjudicatory Practice and Procedure, 801 Code Mass Regs 1.01. Pursuant to Rule XVII (A) and (B) of the *Hearing Rules* and 801 CMR 1.01(7)(g)(3), a hearing officer may allow a motion to dismiss if the party requesting the hearing fails to state a claim upon which relief can be granted. These rules are analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure. As such, hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim.

To survive a motion to dismiss, there must exist "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief."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 These "[f]actual allegations must be enough to raise a right to relief above the speculative level."⁵

2. Jurisdiction of the Bureau of Special Education

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."⁶ In Massachusetts, a parent or a school

³ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

⁴ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

⁵ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

⁶ See 34 C.F.R. §300.507(a)(1).

district, "may request mediation and/or a hearing at any time on any matter⁷ 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."⁸ 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...."⁹ 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."¹⁰

3. Statute of Limitations

The IDEA's statute of limitations states as follows:

“(C) Timeline for requesting hearing

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

(D) Exceptions to the timeline

The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to--

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.¹¹

APPLICATION OF LEGAL STANDARDS:

In evaluating the District's *Motion* under the legal standards set forth above, I take Parents' allegations in their Hearing Request as true, as well as any inferences that may be drawn from them in their favor, and deny dismissal if these allegations plausibly suggest an entitlement to relief.¹² Here, considering as true all facts alleged by the party opposing dismissal (in this case, Parents), I hereby DENY the District's *Motion*. My reasoning follows.

The District argues for dismissal of "any claims which accrued prior to January 18, 2020, as those claims are beyond the two (2) year statute of limitations set for claims under the Individuals with

⁷ Limited exceptions exist that are not here applicable.

⁸ 603 CMR 28.08(3)(a).

⁹ See 29 U.S.C. 794 (Section 504 of Rehabilitation Act); 34 CFR 104, *et seq.*

¹⁰ *In Re: Georgetown Pub. Sch.*, BSEA #1405352 (Berman, 2014).

¹¹ 20 USC § 1415(f)(3) (emphasis added).

¹² See BSEA R. XVI (B)(3); see also 801 CMR 1.01 (7)(g)(3).

Disabilities Education Act.” Specifically, Melrose asserts, “Based upon an application of the two year timeframe to the allegations as asserted in the Request for Hearing, the Parents should be barred from pursuing any compensatory claims related to the time period in which they allege that the Student was not receiving special education and/or related services through the District, as the Attorney concedes that the District was providing such services as of January 2020 and the Request for Hearing was not filed until at least January 18, 2022.”

The 2-year statute of limitations would not, however, apply if Melrose withheld “information from [Parents] that was required under this subchapter to be provided to [them].”¹³ The “required” information includes a notice of procedural safeguards that the school district must provide to parents at least once each year pursuant to 20 USC § 1415(d), as well as upon initial referral or parental request for evaluation, upon receipt of the first state complaint in the school year, upon receipt of the first due process complaint in the school year, in accordance with disciplinary procedures, and upon parental request.¹⁴ In addition, 603 CMR 28.05(2)(a)(2) provides that where “the Team determines that the student is not eligible [for an IEP], the Team chairperson shall record the reason for such finding, list the meeting participants, and provide written notice to the parent of their rights in accordance with federal requirements within ten days of the Team meeting.”¹⁵ The procedural safeguards notice must include a full explanation of IDEA procedural safeguards, including, but not limited to, the opportunity to present and resolve complaints through the due process complaint and state complaint procedures, availability of mediation, and the student’s placement during pendency of due process proceedings.¹⁶

Therefore, in order to meet the IDEA’s above-quoted part D(ii) exception to the statute of limitations, Parents must satisfy two requirements: first, that Melrose withheld information required to be provided under 20 USC § 1411 through § 1419, part B of the federal special education statute; and second, that “parent was prevented from requesting the [due process] hearing due to” Melrose’s withholding the required information.” Both prongs must be satisfied for the statute of limitations exception to apply. In considering this exception to the statute of limitations, Courts have found that failure to provide this notice of procedural safeguards implicates both requirements of this exception to statute of limitations, since the notice of procedural safeguards must, specifically, include information that advises Parents of their right to

¹³ 20 USC § 1415(f)(3).

¹⁴ See 34 CFR 300.504(a); see also See also *Administrative Advisory SPED 2001-4: Finding of No Eligibility for Special Education* which may be found at https://www.doe.mass.edu/sped/advisories/01_4.html.

¹⁵ See also *Administrative Advisory SPED 2001-4: Finding of No Eligibility for Special Education* which may be found at https://www.doe.mass.edu/sped/advisories/01_4.html (“Neither former regulations nor current regulations require written consent from a parent when the district makes a Finding of No Eligibility. The district must provide full written notice, however, when informing the parent of such a Finding. The parent, if he or she disagrees with the Finding, has the right to appeal the school district’s Finding of No Eligibility to the Bureau of Special Education Appeals (BSEA), or to use other dispute resolution mechanisms such as mediation or the Problem Resolution System (PRS) of the Department of Elementary and Secondary Education. When the Team makes a Finding of No Eligibility for a student who has been receiving special education services, the school district must continue to provide services if the parent disagrees with this Finding and appeals to the BSEA”).

¹⁶ See 34 CFR 300.504(c); see also *Administrative Advisory SPED 2001-4: Finding of No Eligibility for Special Education* which may be found at https://www.doe.mass.edu/sped/advisories/01_4.html (“Forms N 1 and N 2 must be mailed with a Parents’ Rights Brochure to meet federal requirements. The Parents’ Rights Brochure contains contact information for both the BSEA and the PRS”).

obtain a due process hearing and thereby contest a school district's actions.¹⁷ With regard to the statute of limitations,

“when a local educational agency delivers a copy of IDEA procedural safeguards to parents, the statutes of limitations for IDEA violations commence without disturbance. Regardless of whether parents later examine the text of these safeguards to acquire actual knowledge, that simple act suffices to impute upon them constructive knowledge of their various rights under the IDEA. Conversely, in the absence of some other source of IDEA information, a local educational agency's withholding of procedural safeguards would act to prevent parents from requesting a due process hearing to administratively contest IDEA violations until such time as an intervening source apprised them of their rights.”¹⁸

Here, whether Melrose “delivere[d] a copy of IDEA procedural safeguards” to Parents informing them of Student’s stay put rights when proposing to remove Student from his IEP in 4th grade is a question of fact that must be decided at hearing. However, taking as true Parents’ allegations that the District failed to deliver said “required information”, as well as any inferences that may be drawn from said allegations in Parents’ favor, I find that Parents have asserted “[f]actual allegations [sufficient] to raise a right to relief above the speculative level.”¹⁹ Therefore, I must deny dismissal of any claims which accrued prior to January 18, 2020.²⁰

ORDER:

The District’s *Motion to Dismiss* is DENIED.

So ordered,

By the Hearing Officer,

s/ Alina Kantor Nir

Alina Kantor Nir

Date: September 16, 2022

¹⁷ See *J.L. ex rel. J.L. v. Ambridge Area School Dist.*, 2009 WL 1119608, *13 (W.D.Pa. 2009) (finding that the school district's failure to provide the requisite notice of procedural safeguards tolled the statute of limitations). See also *School Dist. of Philadelphia v. Deborah A.*, 2009 WL 778321, *4 -5 (E.D.Pa. 2009) (focusing on the issue of whether the school district provided the requisite notice of procedural safeguards); *El Paso Independent School Dist. v. Richard R.*, 567 F.Supp.2d 918, 945 (W.D.Tex. 2008) (“When a local educational agency delivers a copy of IDEA procedural safeguards to parents, the statutes of limitations for IDEA violations commence without disturbance.”); *Evan H., ex rel. Kosta H. v. Unionville-Chadds Ford School Dist.*, 2008 WL 4791634, *7 (E.D.Pa. 2008) (“second exception to the limitation period provided by 20 U.S.C. § 1415(f)(3)(D) refers solely to the withholding of information regarding the procedural safeguards available to a parent under that subchapter”).

¹⁸ *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 945 (W.D. Tex. 2008).

¹⁹ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

²⁰ See BSEA R. XVI (B)(3); see also 801 CMR 1.01 (7)(g)(3).

.COMMONWEALTH OF MASSACHUSETTS
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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 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.