

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

**In Re: Student & Haverhill Public Schools**

**BSEA No. 2301105**

**RULING ON HAVERHILL PUBLIC SCHOOLS' MOTION TO DISMISS**

This matter comes before the Hearing Officer on the Haverhill Public Schools' (Haverhill's or District's) *Motion to Dismiss (Motion)*, filed with the BSEA on September 1, 2022, seeking to have Haverhill dismissed with prejudice as a party to the matter. As grounds for its *Motion*, Haverhill asserts that Father (Father or Parent) has failed to state a claim upon which relief may be granted as the relief requested in the *Hearing Request* cannot be ordered against Haverhill, since Student no longer resides in Haverhill and is currently enrolled in the Methuen Public Schools (Methuen).

For the reasons articulated below, Haverhill's *Motion* is **DENIED**.

**RELEVANT PROCEDURAL HISTORY**

On August 2, 2022, Father filed a *Hearing Request* against Haverhill, challenging the decision made at a Team meeting held in Haverhill on June 9, 2022, finding that Student is no longer eligible for special education and related services. Father contends that he has sole educational decision-making authority for Student. He was not in attendance at this meeting due to a work challenge and had sought to have the meeting re-scheduled, but it was not. Mother was present at the meeting. Father does not agree with the decision to find student ineligible for special education and claims that Student's teachers also did not agree with this decision. Father's requested relief is "[t]o continue with the IEP program for a little longer."

On September 1, 2022, the District filed the *Motion* as its response to the *Hearing Request*<sup>1</sup> attaching various student records marked Exhibits A-G. A resolution session was held on September 2, 2022, but the parties were not able to reach a resolution. On September 12, 2022, the parties participated in another Conference Call, and agreed to stay a ruling on the *Motion* to provide Father time to explore Student's special education status with Methuen as a potential resolution of this matter. The parties were advised that at either of their request, the stay could be lifted whereupon a date for Father to file his response would be established<sup>2</sup>. A further Conference Call was scheduled for September 23, 2022.

During the September 23, 2022 Conference Call, Father confirmed his desire to proceed with the matter, and the parties agreed that Father would file his response by October 4, 2022. On

<sup>1</sup> Prior to this date the Parties had participated in an initial Conference Call held in accordance with the *Notice of Hearing* issued after receipt of the *Hearing Request*. As the District had not received a complete copy of the *Hearing Request*, the missing information was provided to the District, and a *Recalculated Notice of Hearing* was issued establishing September 1, 2022 as the deadline for the District to submit its response.

<sup>2</sup> This agreement was memorialized in my September 12, 2022 *Order*.

October 3, 2022, Father filed his *Response to the Haverhill Public Schools' Motion to Dismiss (Response)*. Father asserts that Student's current residence in Methuen is "irrelevant ... because the IEP meeting took place and a decision of no eligibility was made while he was still enrolled in Haverhill Public Schools". According to Father, Student was enrolled in Methuen on August 25, 2022. Father reiterates his concerns that the June 9, 2022 IEP meeting took place in his absence, and contends that the decisions made at that meeting should be "null and void" because he has sole legal and physical custody of Student and because these decisions were contrary to the recommendations of Student's teachers. Finally, Father argues that if the finding of ineligibility is overturned, as he is requesting, "[Student's IEP] would have transferred over to Methuen Public Schools without the need for further testing and wasted time." Father attached to this *Response* seven additional pages of unmarked records<sup>3</sup>.

Neither party requested a Hearing on the *Motion*. As neither testimony nor oral argument would advance my understanding of the issues involved, I issue this Ruling without a Hearing, pursuant to Rule VII(D) of the *Hearing Rules for Special Education Appeals*.

### RELEVANT FACTS

For the purposes of this *Motion*, I must take the assertions set out in the *Hearing Request* as true, supplemented by the District's undisputed assertions contained in the *Motion*, viewed in the light most favorable to Father<sup>4</sup>. These facts may be subject to revision in subsequent proceedings.

1. Father has held sole physical and legal custody of Student and his siblings for the past two years. Mother has supervised visitation with Student and has the right to view his educational records but does not have educational decision-making authority for him. (*Hearing Request; Motion, Exhibit E*).
2. During the 2021-2022 school year Student was in fifth grade at Silver Hill Elementary School in Haverhill, MA<sup>5</sup>, educated under an IEP dated 4/26/21 to 4/25/22<sup>6</sup>. (*Hearing Request; Motion, Exhibit F*).

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<sup>3</sup> These records consist of emails between Father and the District between June 9 and June 14, 2022, a copy of the personal meeting notes from Student's 5<sup>th</sup> grade teacher who attended the June 9, 2022 Team meeting and an August 2022 letter from Student's general education and special education teachers summarizing the June 9, 2022 Team discussions and why they feel Student should remain eligible for special education and related services.

<sup>4</sup> While typically motions to dismiss are reviewed by looking at the information contained within a *Hearing Request* only, taking as true all the facts contained therein and drawing all inferences in favor of the party filing the *Hearing Request* (*Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995)), given Parent's *pro-se* status, in issuing this Ruling I also considered the undisputed clarifying information provided by the District in its *Motion* (which was filed as its responsive pleading to the *Hearing Request*) and interpreted those in the light most favorable to Father, and further took note of the date of Student's enrollment in Methuen provided by Parent in his *Response*. See *Ahmed v. Rosenblatt*, 118 F.3d 886, 890 (1st Cir. 1997).

<sup>5</sup> Student resided with his Father in Methuen during this year, but Haverhill allowed Student to continue to remain enrolled in his Haverhill elementary school. (*Motion*).

<sup>6</sup> According to Exhibit F to the *Motion*, a proposed IEP issued on 4/25/22 was unsigned as of 6/14/22, and as such, the "stay put" IEP is the IEP dated 4/26/21 – 4/25/22. There is no information in the record at this time related to the proposed 4/25/22 IEP other than the District's acknowledgement of its existence and unsigned status.

3. On June 9, 2022, Haverhill convened a three-year re-evaluation Team meeting, that resulted in a finding that Student was no longer eligible for special education and related services. (*Hearing Request; Motion, Exhibit E*).
4. Father had a work challenge arise on June 9, 2022, and was unable to attend the Team meeting. He emailed Elizabeth Billings, Educational Team Facilitator, to request to postpone the meeting to the following day, but this request was not honored and the meeting was held without Father in attendance. Mother was present for the meeting. (*Hearing Request; Motion, Exhibit E*).
5. Student's teachers who attended the June 9, 2022 Team meeting did not agree with the finding of no eligibility. (*Hearing Request*).
6. Father was not in agreement with the finding of no eligibility and formally rejected this finding in writing on June 14, 2022 during or after a meeting he had with Ms. Billings. (*Hearing Request; Motion, Exhibit E*).
7. Student's educational progress and success during the past two school years are due to the services and supports he has been receiving from his IEP and the IEP is necessary for Student's continued progress. (*Hearing Request*).
8. On August 25, 2022, Student was enrolled in Methuen and is currently attending school in that district. (*Motion; Response*).

## LEGAL STANDARD

Pursuant to Rule XVI(A) and (B) of the *Hearing Rules for Special Education Appeals* and 801 CMR 1.01(7)(g)(3), a hearing officer may allow a motion to dismiss if the party requesting the hearing fails to state a claim upon which relief can be granted<sup>7</sup>. To survive a motion to dismiss, there must exist "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief..."<sup>8</sup>. 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"<sup>9</sup>.

In analyzing motions to dismiss, hearing officers "begin by identifying and disregarding statements in the [*Hearing Request*] that merely offer 'legal conclusion[s] couched as ... fact[ ]' or '[t]hreadbare recitals of the elements of a cause of action.'"<sup>10</sup>. "[N]on-conclusory factual allegations in the [*Hearing Request*] must then be treated as true, even if seemingly incredible"<sup>11</sup>. The party opposing the motion, therefore, must show "factual allegations ... enough to raise a

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<sup>7</sup> As these rules/regulations are analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure, hearing officers are generally guided by federal court decisions in deciding such motions.

<sup>8</sup> *Iannochino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

<sup>9</sup> *Chelmsford Ob/Gyn, P.C.*, 420 Mass. at 407.

<sup>10</sup> *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011), citing *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009) (quoting *Bell Atl. Corp.*, 550 U.S. at 555).

<sup>11</sup> *Id.*, citing *Iqbal*, 129 S.Ct. at 1951.

right to relief above the speculative level... [based] on the assumption that all the allegations in the [*Hearing Request*] are true (even if doubtful in fact) ....”<sup>12</sup>.

20 USC §1415(b)(6) grants parties the right to file timely due process complaints “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>13</sup>. Similarly, M.G.L. c. 71B §2A, establishing the BSEA, authorizes it to resolve special education disputes concerning,

... (i) any matter relating to the identification, evaluation, education program or educational placement of a child with a disability or the provision of a free and appropriate public education to the child arising under this chapter and regulations promulgated hereunder or under the [IDEA], 20 U.S.C. section 1400 et seq., and its regulations; or (ii) a student's rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. section 794, and its regulations.

For those matters within its jurisdiction the BSEA is also limited by law as to the remedies it can order. Punitive and tort-like money damages are not available.<sup>14</sup> Instead, the available remedies under the IDEA consist of “[a]wards of compensatory education and equitable remedies that involve the payment of money, such as reimbursements to parents for expenses incurred on private educational services to which their child was later found to have been entitled ...”<sup>15</sup>. Reimbursement for private educational expenses incurred by parents includes both private school tuition as well as reimbursement for “related services”<sup>16</sup>.

Finally, as has been broadly recognized by both the Courts and the BSEA, when a parent is proceeding *pro-se* with his due process claim, such as in this case, BSEA Hearing Officers must be mindful of that status when addressing requests for dismissal of the proceedings<sup>17</sup>. *Hearing Requests* filed by *pro-se* litigants should be construed liberally, and allegations contained in a *Hearing Request* are to be held to “less stringent standards than formal pleadings drafted by lawyers”<sup>18</sup>. “The policy behind affording pro se plaintiffs liberal interpretation [of their *Hearing Request*] is that if they present sufficient facts [to state a claim], the court may intuit the correct

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<sup>12</sup> *Iannochino* 451 Mass. at 636 quoting *Bell Atl. Corp.*, 550 U.S. at 555 (internal citations omitted); see *Ocasio-Hernandez*, 640 F.3d at 12.

<sup>13</sup> See 34 CFR 300.507(a)(1); 603 CMR 28.08(3)(a), providing for the BSEA to hear “... any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law or the procedural protections of state and federal law for students with disabilities”.

<sup>14</sup> *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 36, 37 (1st Cir. 2006); see *Frazier v Fairhaven School Committee*, 276 F.3d 52, 59 (1st Cir. 2002) noting without explanation that “... the array of remedies available under the IDEA does not include money damages.”

<sup>15</sup> *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 124 (1st Cir. 2003); see 20 U.S.C. § 1412(a)(10)(C)(ii); *Diaz-Fonseca* 451 F.3d at 31.

<sup>16</sup> *Diaz-Fonseca*, 451 F.3d at 31 (citations omitted); see 20 U.S.C. § 1401(26) (defining “related services” to include “transportation, and such developmental, corrective, and other supportive services (including ... psychological services ...) as may be required to assist a child with a disability to benefit from special education”).

<sup>17</sup> *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Ahmed*, 118 F.3d at 890; *In Re: Student v. Springfield Public Schools*, (Ruling), BSEA No. 2203555 22 MSER 109, (Berman, 2022); see *In Re: Easthampton Pub. Sch.*, (Ruling), BSEA No. 2203513 28 MSER 35, (Kantor Nir, 2022).

<sup>18</sup> *Haines*, 404 U.S. at 520; see *Ahmed*, 118 F.3d at 890.

cause of action, even if it was imperfectly pled<sup>19</sup>.” This principle aligns with “[o]ur judicial system [, which] zealously guards the attempts of pro se litigants on their own behalf” while not ignoring the need for compliance with procedural and substantive law<sup>20</sup>.

Guided by this legal authority, I turn to Haverhill’s *Motion*.

### APPLICATION OF LEGAL STANDARDS

After reviewing the *Hearing Request* liberally, and in the light most favorable to Father, as I am required to do given Father’s *pro-se* status<sup>21</sup>, I find that it sets forth sufficient facts to present both procedural and substantive challenges to the June 9, 2022 determination that Student is no longer eligible for special education and related services. This finding was made while Student was enrolled in Haverhill, by employees of the Haverhill Public Schools. Procedurally, the *Hearing Request* alleges the determination was improper as it was made without the involvement of the Parent with educational decision-making authority. Substantively, the *Hearing Request* also alleges the determination was improper as it was contrary to the recommendations of Student’s teachers, who were both in attendance at the Team meeting. Not only are challenges to a Team’s determination of eligibility (i.e., “identification”) squarely within the jurisdiction of the BSEA<sup>22</sup>, but these claims also pertain to actions and decisions made by Haverhill and Haverhill staff, during a time when Haverhill had both programmatic and fiscal responsibility for Student. Thus, unless another reason exists to support dismissal, dismissal of these claims is not appropriate.

Haverhill contends, however, that dismissal is warranted because “Haverhill cannot provide the Parent with the requested relief given that the Student does not reside in Haverhill and is not enrolled in the District.” Rather, according to Haverhill, only Methuen, “as the district of residence” has the ability to provide continued special education services to Student, as Parent is requesting. Although Haverhill is correct that Methuen is the current programmatic and fiscally responsible district for Student’s special education, as Student is now enrolled in Methuen, I do not agree that this status justifies dismissal of Haverhill from these proceedings. Father’s claims pertain solely to actions by Haverhill, while Student was enrolled in Haverhill<sup>23</sup>.

Contrary to Haverhill’s contention, a Hearing Officer is not limited to providing only the relief specifically requested by a party as to the claims raised in a *Hearing Request*<sup>24</sup>, particularly when a *Hearing Request* is filed by a *pro-se* Parent. Equitable remedies, including but not limited to compensatory services and/or training to school district staff, are always available, if a school district is found to have violated a student’s right to a FAPE. Thus, if after a Hearing on the

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<sup>19</sup> *Ahmed*, 118 F.3d at 890.

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

<sup>21</sup> See *Haines*, 404 U.S. at 520; *Ahmed*, 118 F.3d at 890; *Iannocchino* 451 Mass. at 636 quoting *Bell Atl. Corp.*, 550 U.S. at 555 (internal citations omitted).

<sup>22</sup> M.G.L. c. 71B §2A.

<sup>23</sup> Neither party has yet sought to join Methuen in this matter, although its presence may be required at Hearing. However, I note that the analysis in this *Ruling* applies to the pending dismissal request, which standard is different than the standard for joinder.

<sup>24</sup> See *Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369 (1985) holding that in deciding what type of available relief exists under the IDEA, “[a]bsent other reference, the only possible interpretation is that the relief is to be “appropriate” in light of the purpose of the Act.”

merits, I were to find that the June 9, 2022 finding of ineligibility was improper, on either substantive and/or procedural grounds, and if I were also to find that the procedural violations resulted in a denial of a FAPE to Student<sup>25</sup> I could order relief against Haverhill. In addition to overturning the June 9, 2022 Team decision, I could issue orders against Haverhill of an equitable nature to ensure Student is educationally compensated for any period of time he was denied a FAPE as a result of Haverhill's finding of no eligibility, and to ensure that appropriate training is implemented in Haverhill to remedy the identified procedural missteps<sup>26</sup>. Thus, as there is relief available that could be ordered against Haverhill if Father were to prevail on his claims at Hearing, Haverhill's request for dismissal on these grounds is unwarranted.

### ORDER

Haverhill's *Motion* is **DENIED** as to all claims in the *Hearing Request*, and this matter will proceed as follows:

1. The Hearing will take place on November 9, 2022, at the Bureau of Special Education Appeals, 14 Summer Street, 4<sup>th</sup> Floor, Malden, MA 02148. It will begin at 10:00 a.m.
2. The Parties will participate in a further Conference Call on October 17, 2022, at 3:00 p.m. The Parties are instructed to call the following phone number: 1-877-820-7831 at that time and enter the following passcode when prompted: 721959#.
3. Exhibits and witness lists are due by the close of the business day on November 2, 2022.

By the Hearing Officer,

/s/ Marguerite M. Mitchell

Marguerite M. Mitchell

Date: October 11, 2022

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<sup>25</sup> Procedural errors amount to a deprivation of a FAPE if “the procedural inadequacies – ... (II) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents’ child; ...” 20 U.S.C. §1415(f)(3)(E)(ii); 34 CFR 300.513(a)(2); see *Roland M.*, 910 F.2d at 994 holding that “[b]efore an IEP is set aside, there must be some rational basis to believe that procedural inadequacies ... seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits” (citations omitted); see *In Re: Nashoba Regional School District and Quinelle*, BSEA No. 2009112, 27 MSER 84 (Reichbach, 2021) (“In determining whether procedural violations amount to a deprivation of FAPE, courts focus on the degree to which school districts offered parents the opportunity to play an important participatory role.”).

<sup>26</sup> I also agree with Father that there is a substantive difference between Student being educated in Methuen under a stay put IEP rather than being educated under an established IEP resulting from a determination by me to overturn the ineligibility decision.