

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

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

**BSEA # 2208440**

**RULING ON PARENT’S MOTION TO REOPEN THE RECORD**

This matter comes before the Hearing Officer on the January 9, 2023 *Parent’s Motion to Reopen the Record (Motion)* seeking “to reopen the record for Student v. Springfield Public Schools because of new evidence” suggestive of perjury by Springfield Public Schools’ (Springfield or the District) staff witnesses.<sup>1</sup> According to Parent, the new evidence impacts the credibility of said witnesses and should be considered by the Hearing Officer in her Decision.

On January 10, 2023, the District filed Springfield Public Schools’ *Motion in Opposition to Parent’s Motion to Reopen the Record* asserting, in part, that BSEA Hearing Rules do not allow for a motion to reopen the record; that it is unclear what “new evidence” Parent is referencing in her *Motion*; and, that Parent’s *Motion* inaccurately characterizes the testimony of District witnesses relative to the Executive Functioning Goal.

As testimony or oral argument would not advance my understanding of the issues involved, this Ruling is being issued without a hearing pursuant to Bureau of Special Education Appeals Hearing Rule VII(D).<sup>2</sup>

For the reasons set forth below, Parent’s *Motion* to allow submission of additional evidence to demonstrate perjury and to impeach the credibility of District staff witnesses is hereby DENIED.

**PROCEDURAL BACKGROUND AND RELEVANT FACTS:**

The procedural history of this matter is complex, so it is recounted here only to the extent it is relevant for purposes of deciding this *Motion*. A public hearing was held on November 22, and 28, and December 21, and 22, 2022 in the above-referenced matter. The record closed on December 22, 2022 after the parties presented their oral closing arguments. The issues before the undersigned Hearing Officer were as follows:

1. Whether the District conducted an Individualized Education Plan (IEP) meeting without Parent in attendance on April 11, 2022?
  - a. If the answer to (1) is yes, did the District deny Parent meaningful participation in the IEP process?
  - b. If the answer to (1)(a) is yes, what is the appropriate remedy?

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<sup>1</sup> The *Motion* was filed by Parent’s Advocate on behalf of her client.

<sup>2</sup> On January 11, 2023, Advocate emailed the undersigned Hearing Officer and District’s Counsel stating, “If more information is needed[, I] would ask for a motion hearing.” The Hearing Officer allowed Advocate to submit additional information. Both parties submitted addendums to their motions which reiterated their positions.

2. Whether Springfield ignored the recommendations of the Student Stabilization and Diagnostics Center (SSDC) when drafting the IEP for the period from August 26, 2022 until June 23, 2023?
  - a. If the answer to (2) is yes, did the District deny Parent meaningful participation in the IEP process?
  - b. If the answer to (2)(a) is yes, what is the appropriate remedy?
3. Whether Springfield made a unilateral placement during the IEP meetings on June 26, 2022, August 17, 2022, September 29, 2022, October 20, 2022, and/or October 31, 2022?
  - a. If the answer to (3) is yes, did the District deny Parent meaningful participation in the IEP process?
  - b. If the answer to (3)(a) is yes, what is the appropriate remedy?
4. Whether Springfield failed to conduct a Title IX investigation relative to an incident which took place on or about September 2021?
  - a. If the answer to (4) is yes, did the District deny Student a free, appropriate public education (FAPE)?
  - b. If the answer to (4)(a) is yes, what is the appropriate remedy?
5. Whether the IEP proposed for the period from November 9, 2021 until April 12, 2022 and/or the IEP proposed for the period from August 26, 2022 until June 23, 2023 were/are reasonably calculated to offer Student a FAPE in the least restrictive environment (LRE)?
  - a. If the answer to (5) is no, what is the appropriate remedy?
6. Whether the District failed to implement Student's IEP dated from November 9, 2021 until April 12, 2022 and/or the IEP dated IEP for the period from August 26, 2022 until June 23, 2023?
  - a. If the answer to (6) is yes, did the District deny Student a FAPE?
  - b. If the answer to (6)(a) is yes, what is the appropriate remedy?

Evidence presented at Hearing demonstrated that Parent requested an Executive Functioning Goal be added to the IEP for the period from August 26, 2022 until June 23, 2023 (August 2022 IEP). According to testimony of District staff, Mr. Seth Menkel, Evaluation Team Chair for the Frederick Harris Elementary School, Dr. Mary Ann Morris, Chief of Special Education and Related Services for the District, and Karen Freedman, Special Education Supervisor, software limitations prevented Mr. Menkel from selecting the title "Executive Functioning Goal" in the drop down menu. However, they also testified that Student's executive function deficits were addressed in the August 2022 IEP in the present levels of educational performance and in each of the proposed goals which targeted, in part, self-regulation, organization in the classroom, peer interactions and communication.

On January, 9, 2023, Parent filed the instant *Motion* asserting that she has discovered "new" evidence demonstrating that the District "does write IEP's [sic] titled executive functioning for students who require executive functioning goals." Parent submitted "photos [as] evidence that Springfield's witnesses [sic] testimony was not true, and in [her] opinion" their testimony

constituted “perjury by those witnesses.” The photos reflected a redacted Administrative Data Sheet for an IEP listing the school district as the Springfield Public Schools and a goal entitled Executive Functioning Skills. Parent asserted that “this new information should take away from district’s credibility” and “request[ed] [that] this information is considered [by the Hearing Officer] in the decision.”

## LEGAL STANDARDS:

Rule XII(B) of the BSEA Hearing Rules states, “The Hearing Officer’s decision is the final decision of the BSEA and is not subject to further agency review. Motions to reconsider or to reopen a hearing once a decision has been issued are not permitted.” The First Circuit has recognized that “once the record is closed, a [fact-finder], absent waiver or consent, ordinarily may not receive additional factual information of a kind not susceptible to judicial notice unless it fully reopens the record and animates the panoply of evidentiary rules and procedural safeguards customarily available to litigants.”<sup>3</sup> Pursuant to Massachusetts regulations, “[a]t any time after the close of a hearing and prior to a decision being rendered, a [p]arty may move to reopen the record if there is new evidence to be introduced.”<sup>4</sup> The regulation defines new evidence as “newly discovered evidence which by due diligence could not have been discovered at the time of the hearing by the Party seeking to offer it.”<sup>5</sup>

“The fact-finder has discretion to grant a motion to permit additional evidence to be introduced after the record has been closed.<sup>6</sup> “When determining whether to reopen the evidentiary record, a Hearing Officer must consider a strong policy preference for predictability and finality of proceedings.”<sup>7</sup> As the First Circuit has recognized, “[t]he state has a strong interest in maintaining a stable trial format with a definite end as well as a beginning.”<sup>8</sup> Therefore, a district court’s decision to reopen the record “turns on flexible and case-specific criteria.”<sup>9</sup> These criteria include “whether (1) the evidence sought to be introduced is especially important and probative; (2) the moving party’s explanation for failing to introduce the evidence earlier is bona fide; and (3) reopening will cause no undue prejudice to the non-moving party.”<sup>10</sup> Even in the context of criminal law, a moving party must show that the “proffered evidence is of such importance to the achievement of a just result that the need for admitting it overrides the presumption favoring enforcement of the state’s usual trial procedures.”<sup>11</sup> Evidence is considered to be “of such importance” if its admission would alter the outcome of the case.<sup>12</sup>

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<sup>3</sup> *Lussier v. Runyon*, 50 F.3d 1103, 1105–06 (1st Cir. 1995).

<sup>4</sup> 801 CMR 1.01(7)(k).

<sup>5</sup> See *Id.*

<sup>6</sup> *Kerr v. Palmieri*, 325 Mass. 554, 557 (1950); see *Blaikie v. Callahan*, 691 F.2d 64, 65, 68 (1st Cir. 1982) (it is “within the sound discretion of the judge to admit material evidence offered by a party after he has rested”).

<sup>7</sup> *In re: Quin (Ruling on Motion to Reopen Evidence)*, BSEA #1605247 (Reichbach, 2016).

<sup>8</sup> *Blaikie*, 691 F.2d at 65.

<sup>9</sup> *Davignon v. Hodgson*, 524 F.3d 91, 114 (1st Cir. 2008); see *Anderson v. Brennan*, 911 F.3d 1, 13 (1st Cir. 2018).

<sup>10</sup> *Anderson*, 911 F.3d at 13 (internal citations omitted).

<sup>11</sup> *Blaikie*, 691 F.2d at 68.

<sup>12</sup> 29 CFR § 102.48(d)(1) (“In a motion to reopen the record, a party must state briefly the additional evidence sought to be adduced; explain why it was not presented previously; and state that, if adduced and credited, it would require a different result”); see *N.L.R.B. v. Challenge-Cook Bros. of Ohio, Inc.*, 843 F.2d 230, 232 (6th Cir. 1988) (affirming board’s refusal to reopen the record and receive further evidence, as it appeared that such evidence would not have changed the result of the case).

## APPLICATION OF LEGAL STANDARDS:

Here, the Hearing Officer has agreed to entertain Parent's *Motion* as a Decision has yet to be issued in the matter.<sup>13</sup> Parent asks the Hearing Officer to reopen the record to consider "new information" which impacts the "district's credibility." Specifically, she offers evidence to show that in contradiction of the testimony of Mr. Menkel, Ms. Freedman and Dr. Morris, the District "does write IEP's [sic] titled executive functioning for students who require executive functioning goals." For the reasoning articulated below, Parent's *Motion* is denied.

I note at the outset that the documentation which Parent seeks to introduce is not "new evidence"; "due diligence" at the time of Hearing could have easily made the information offered by Parent now, almost three weeks after the close of the record, discoverable at such time.<sup>14</sup> As one court has said, "[t]he time for testing of proof is the time of [hearing]."<sup>15</sup>

There may be circumstances where the production of information such as that provided by Parent may diminish the credibility of a witness (or witnesses). This is not such a case. The proffered evidence is neither "especially important [nor] probative,"<sup>16</sup> and the offered inconsistency does not go to the central facts of the matter. Specifically, the District's decision not to title a goal "Executive Functioning Skills" (whether by necessity or choice) is not material to any of the issues in this matter (see *supra*).<sup>17</sup>

In addition, even if the "new information" produced by Parent compromises the credibility of District staff, such impact is limited. In making credibility findings, the undersigned Hearing Officer must consider all of the evidence.<sup>18</sup> Findings of fact, and the resulting conclusion of law, are not merely a matter of according credibility to different witnesses but rather are the product of assessing the record as a whole and relying not only on the credibility of witness' testimony but also on the documentary evidence in the record.<sup>19</sup> Here, the limited "new information" offered by Parent fails to provide substantial evidence of inconsistencies. Absent a finding of

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<sup>13</sup> See BSEA Hearing Rule XII(B).

<sup>14</sup> 801 CMR 1.01(7)(k).

<sup>15</sup> *Locklin v. Switzer Brothers, Inc.*, 299 F.2d 160, 169 (9th Cir. 1961), *cert. denied*, 369 U.S. 861, 82 S.Ct. 950, 8 L.Ed.2d 18 (1962); see *Charles P. Young Co. v. D.C. Dep't of Emp. Servs.*, 681 A.2d 451, 456 (D.C. 1996) ("to reopen a hearing merely because one [party] failed to thoroughly investigate the circumstances, facts, and other pertinent information related thereto, is an insufficient basis for granting the request") (internal quotations omitted). On the last day of Hearing, the parties had the opportunity to, and did, present rebuttal evidence. No rebuttal evidence was presented on whether the IEP software could accommodate an Executive Functioning Skills goal.

<sup>16</sup> *Anderson*, 911 F.3d at 13.

<sup>17</sup> See *Traylor v. Pickering*, 324 F.2d 655, 658 (5th Cir. 1963) (the new evidence does not "show[] that a key witness committed perjury in relating a material fact").

<sup>18</sup> See *Coggon v. Barnhart*, 354 F. Supp. 2d 40, 59 (D. Mass. 2005) ("In the discharge of his duties, the [hearing officer] is to weigh the evidence, resolve the material conflicts in the testimony, and determine the case accordingly") (internal citations omitted).

<sup>19</sup> See *Amaral v. Comm'r of Soc. Sec.*, 797 F. Supp. 2d 154, 162 (D. Mass. 2010) (affirming the hearing officer's negative credibility determination because it was "based on substantial evidence," and the hearing officer "made his negative credibility finding after considering all of the evidence in the record"); see also *In re Curry*, 450 Mass. 503, 519, 880 N.E.2d 388, 401 (2008) ("credibility determinations will be upheld unless we are satisfied with certainty that a credibility finding was wholly inconsistent with another implicit finding") (internal quotations and citations omitted).

numerous inconsistencies as to the merits of the claims, any adverse credibility finding would be circumscribed as to the specific fact of the software’s limitation in titling IEP goals.<sup>20</sup> As such, even if I were to find staff testimony regarding the specific “fact” of the software’s limitations to be not credible, my adverse credibility finding would be limited to Parent’s specific claim regarding the District’s ability to name a goal with particular specificity; that is, in assessing the record as a whole, in this case, I find that there is sufficient additional evidence upon which I may rely in assessing the witnesses’ credibility. Hence, in the absence of more substantial and repetitive inconsistencies, my credibility findings, as a whole, would not be substantially altered if I were to admit Parent’s “new” evidence into the record. Further, I cannot say that my consideration of Parent’s “information” would require me to reach a different result in the case. Therefore, Parent’s *Motion* must be denied.<sup>21</sup>

**ORDER:**

Parent’s *Motion* in this matter is DENIED.

So Ordered by the Hearing Officer,

/s/ Alina Kantor Nir

Alina Kantor Nir, Hearing Officer

Dated: January 13, 2023

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<sup>20</sup> See *Johnson v. Bos. Pub. Sch.*, 201 F. Supp. 3d 187, 203 (D. Mass. 2016), aff’d, 906 F.3d 182 (1st Cir. 2018) (“when read in context, the Hearing Officer’s adverse credibility finding may be limited to Plaintiff’s allegations of racial discrimination and possible molestation, which were uncorroborated by any evidence of record. Those accusations, moreover, were not directly relevant to the central issue presented in this IDEA appeal.... Accordingly, even assuming that the Hearing Officer based her credibility finding on improper considerations, Plaintiff has not persuasively demonstrated that this credibility determination adversely affected the Hearing Officer’s decision on the merits of the Plaintiff’s IDEA claim”).

<sup>21</sup> *N.L.R.B.*, 569 F.2d at 365 (supporting “the Board’s refusal to reopen the record [because the] evidence produced by Decker was merely impeaching, and, “where the new evidence only suggests that a witness might be less credible, the interest in finality outweighs the slight possibility of injustice to a party” especially where the new evidence does not “require[] a different result”); see *State v. Shatten*, No. 2019-000825, 2021 WL 5826749, at \*1 (S.C. Ct. App. Dec. 8, 2021) (where defendant argued that the trial court abused its discretion by refusing to reopen the record to admit a document defendant wished to use to impeach the credibility of the State’s witness, the court affirmed the district’s court’s decision not to reopen because the defendant “could have moved to admit the document during cross-examination of the State’s witness if she had brought the document to trial”); see also *In re Est. of Bennoon*, 2014 IL App (1st) 122224, ¶ 64, 13 N.E.3d 236, 247 (trial court did not err when it denied the petitioner’s motion to reopen proofs because the “new evidence ... did not go to the foundations of the respondent’s case but only served to impeach the credibility of the respondent’s witnesses”); *H.T.S. v. R.B.L.*, No. A07-0561, 2007 WL 4305174, at \*3 (Minn. Ct. App. Dec. 11, 2007) (“to prevail on a motion to reopen the record, the movant must demonstrate a strong probability that the proffered evidence will render a different result”); see also *In re: Quin (Ruling on Motion to Reopen Evidence)*, BSEA #1605247 (Reichbach, 2016) (“I find that to the extent the length of the conversation that occurred on November 20, 2015 is relevant to my ultimate decision, reopening the evidence would not alter the outcome of this case”).