COMMOWEALTH OFF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Student v. **BSEA #** 2303901
Division of Administrative Law Appeals
[Edward McGrath in his capacity as Chief Magistrate] &
Bureau of Special Education Appeals
[Reece Erlichman in her capacity as Director,
Sara Berman in her capacity as Hearing Officer]

RULING ON THE DIVISION OF ADMINISTRATIVE LAW APPEALS' & BUREAU OF SPECIAL EDUCATION APPEALS' JOINT MOTION TO DISMISS

On November 4, 2022, Parent requested a Hearing in the above-referenced matter naming the Division of Administrative Law Appeals, Edward McGrath in his capacity as Chief Magistrate and the Bureau of Special Education Appeals, specifically, Reece Erlichman in her capacity as Director, and Sara Berman in her capacity as Hearing Officer, as respondents.

According to Parent, the Hearing Officer's actions, inactions and alleged failure to comply with a request for reasonable accommodations in BSEA #2203555 and # 2210887[1], deprived Parent and Student of a fair and impartial due process hearing, thus depriving Student of a FAPE. She further alleged improper bias regarding "the relationship between the BSEA and Murphy, Hesse, Toomey & Lehane." She also claims that DALA's and the BSEA's Directors were notified of the aforementioned allegations and took no action, which also constitutes a denial of FAPE. Parent seeks a finding and order that:

> 1) the BSEA denied Parent and Student their right to Impartial Due Process Hearing and [sic] provided Parent with a fair hearing;
> 2) procedures posted on the BSEA website for parents with disabilities rights to access a fair hearing;
> 3) or relief warranted I reserve my right to amend this section.

On November 14, 2022, DALA and the BSEA filed a joint Motion to Dismiss pursuant to Rule XVI.B.4 of the *Hearing Rules for Special Education Appeals*, for failure to state a claim upon which relief can be granted. DALA and the BSEA asserted that the BSEA lacks jurisdiction to hear and grant any relief in what in essence is, an action against itself and its employees. Respondents relied on a recent ruling in the matter of *In Re: Zeke and Pembroke Public Schools*, BSEA #2300305 (Reichbach, 8/28/2022), in which the Hearing Officer *sua*

[1] According to Parent, the Hearing in BSEA #2203555 and #2210887 was scheduled for November 14, 16, 17 and 21, 2022 at the time she filed the instant Hearing Request, and is now scheduled to proceed on January 17, 23, 24 and 25, 2023.

sponte dismissed the BSEA Director as a party upon concluding that she could not exercise jurisdiction over the BSEA or its employees.

Parent filed a Motion in Opposition to the BSEA and DALA's Motion to Dismiss on November 30, 2022,[2] raising a new concern by alleging that the BSEA failed to follow its own agency rules regarding hearing timelines, thus denying Student a FAPE (purportedly due to the impact that the hearing in BSEA #2203555 and #2210887, now proceeding in January of 2023, will have on Student). Parent asserts that under 20 USC 1415(b)(6) the BSEA has jurisdiction to hear "**any matter** relating to the identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education to such child". She reasons that this language grants the BSEA jurisdictional authority to hear the instant case noting that the instant matter requires adjudication at the administrative level. Lastly, Parent does not challenge this Hearing Officer's ability to be impartial.

Since a hearing on the Motion to Dismiss would not advance my understanding of the issues to be decided, this Motion is decided on submission of documents only.

Legal Standards:

1. Motion to Dismiss:

In evaluating the Parties' position regarding this *Motion to Dismiss*, I take as true "the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor."[3] *In Re: Zeke and Pembroke Public Schools*, BSEA #2300305 (Reichbach, 8/28/2022).

To survive a motion to dismiss, there must exist "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief…". *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

1. BSEA Jurisdiction:

20 U.S.C. § 1415(b)(6), establishes states' jurisdictional grant of authority to resolve special education matters raised within the two-year statute of limitations period filed by a parent/guardian or school district "with respect to any matter relating to the identification, evaluation, or educational placement of [a] child, or the provision of a free appropriate public education to such child."[4] *In Re: Zeke and Pembroke Public Schools*, BSEA #2300305 (Reichbach, 8/28/2022).

In Massachusetts, M.G.L. c. 71B § 2A and 2B provides for

---

[2] Parent was granted two extensions to file her response to the instant Motion to Dismiss.

[3] *Cf. Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

[4] See 34 CFR § 300.507(a)(1).

> …adjudicatory hearings, mediation and other forms of alternative dispute resolution …for resolution of disputes between and among parents, school districts, private schools and state agencies concerning: (i) any matter relating to the identification, evaluation, education program or educational placement of a child with a disability or the provision of a free and appropriate public education to the child arising under this chapter and regulations".

Pursuant to 603 CMR 28.08(3)(a), the applicable Massachusetts special education regulation, the BSEA is responsible for resolving disputes among parents, school districts, private schools and state agencies[5]. Said jurisdictional authority is exercised consistent with 34 CFR §300.154(a). Parents in Massachusetts may request hearings

> …on any matter 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.[6]

Legal Conclusions:

Parent in the instant matter seeks administrative relief against the DALA and the BSEA Directors, as well as the Hearing Officer in a matter pending before the BSEA, for alleged actions, inactions and conflict of interests that according to Parent, impacted delivery of a FAPE to Student. Parent argues that the special education statutes and regulations grant the BSEA authority to resolve "any matters." Parent's argument ignores the statutory and regulatory language which clearly limits the jurisdiction of the BSEA to specific disputes as among parents, school districts, private schools and state agencies that are responsible for the delivery of services to students. None of Parent's allegations concern the eligibility, evaluation, or placement of a child, the provision of a free appropriate public education to such child, or procedural protections for students with disabilities between these types of parties.[7]

The BSEA lacks jurisdiction to address claims against the Division of Administrative Law Appeals and its Chief Magistrate or the Bureau of Special Education Appeals its Director, any Hearing Officer or any other employee. Even taking as true Parent's claims against the DALA Director, the BSEA Director and the Hearing Officer and drawing all inferences therefrom in Parent's favor,[8] these claims fall outside the jurisdictional grant of authority of the BSEA. *In Re: Zeke and Pembroke Public Schools*, BSEA #2300305 (Reichbach, 8/28/2022). The BSEA is not the appropriate forum to hear Parent's claims. Therefore, any

---

[5] I note that the reference to "state agencies" is not a blank reference to *all* Massachusetts state agencies, but rather those responsible for provision of services to children.

[6] Parents may also request hearings involving alleged denials of a free, appropriate public education pursuant to Section 504 of the Rehabilitation Act of 1973, as set forth in 34 CFR §§104.31-104.39.

[7] See 34 CFR § 300.507(a)(1); M.G.L. c. 71B § 2B; 603 CMR 28.08(3)(a).

[8] See *Blank*, 420 Mass. at 407.

attempt by Parent to obtain resolution of her disagreement with DALA and BSEA administrators, and/or the Hearing Officer through the BSEA is futile.

Finally, I note that the source of Parent's concerns and allegations, BSEA #2203555 and #2210887, are currently pending before Hearing Officer Berman. Parent's claims must be ripe[9] before she may raise them at the appropriate time in the appropriate forum. Since BSEA #2203555 and #2210887 (the underlying case giving rise to her claims in the instant matter) are still open, it is premature to know which, if any, of her claims will survive after the final decision is issued. Thus, her claims in the matter before me are not yet ripe.[10] As stated by the First Circuit court of appeals in *Johnson v. General Electric*, 840 F. 2d 132, 136 (1st Cir. 1988), "it is unwise to encourage lawsuits before the injuries resulting from the violations are delineated, or before it is even certain that injuries will occur at all." Parent's claims are premature as the underlying hearing they relate to has yet to be heard.

I conclude that the BSEA lacks jurisdiction to hear Parent's premature claims. As in *Zeke*, since Parent cannot prevail in her claims, there is no need for a hearing, and no amendment of her *Hearing Request* can cure the deficits.[11] See *In Re: Zeke and Pembroke Public Schools*, BSEA #2300305 (Reichbach, 8/28/2022). Therefore, Parent's claims are dismissed with prejudice.

ORDER

For the reasons set forth above, this matter is **DISMISSED WITH PREJUDICE**.

By the Hearing Officer:

Rosa I. Figueroa

Dated: December 2, 2022

---

[9] The Doctrine of ripeness is "a Supreme court doctrine dictating that a case should not be decided before the necessity has arisen for it to be decided." *Black's Law Dictionary*, 2nd edition.

[10] "The timing of presentation of an issue to a court is so premature as to unnecessarily entangle the court in the resolution of an issue predicated upon a mere contingency". *Hudson County News Co. v. Metro Associates, Inc*., 141 FRD 386, 390 (D. Mass 1992).

[11] See *Chute v. Walker,* 281 F.3d 314, 319 (2002).

COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS

EFFECT OF FINAL BSEA ACTIONS AND RIGHTS OF APPEAL

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

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

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

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

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

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

Compliance

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

Rights of Appeal

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

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

Confidentiality

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove School District v. Pulitzer Publishing Company*, 898 F.2d 1371 (8th. Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

Record of the Hearing

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