

**COMMONWEALTH OF MASSACHUSETTS  
BUREAU OF SPECIAL EDUCATION APPEALS**

**Student v. Marshfield Public Schools**

**BSEA # 2305747**

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

*PROCEDURAL HISTORY*

Parent, a licensed attorney, as noted in her Hearing Request and as noted by the U.S. District Court's February 8, 2022 Ruling filed a Request for Hearing on January 6, 2023.

On January 19, 2023, Marshfield Public Schools ("Marshfield") filed a Motion to Dismiss/Response to Parent's Request for Hearing. Parent submitted a response to Marshfield's Motion to Dismiss on February 21, 2023<sup>1</sup>.

*MARSHFIELD'S POSITION*

Marshfield moves for the dismissal of claims which have already been litigated, are beyond the jurisdiction of the BSEA, or are barred by res judicata and collateral estoppel. Marshfield also asserts that because the Parent fails to allege any claims for relief, the Hearing Request should be dismissed for failure to state a claim upon which relief may be granted with respect to those claims. It argues that any claims of discrimination, harassment, retaliation and hostile environment are barred due to lack of subject matter jurisdiction as well as res judicata and collateral estoppel principles. Further, Marshfield states that any claims with respect to access to student records are barred due to lack of subject matter jurisdiction as well as res judicata and collateral estoppel principles.

*PARENT'S POSITION*

Parent's position is difficult to ascertain from her response. It consists of twenty-eight pages, the first 18 of which are not responsive to Marshfield's motion.<sup>2</sup> The response further contains what appears to be a chronology of events that purportedly occurred between June 2019 and November 19, 2019. Parent argues that substantial and irreversible harm would occur if the BSEA granted Marshfield's Motion to Dismiss in any part and that little harm would result from the BSEA hearing all of Plaintiff's claims that have not been adjudicated, even if the BSEA cannot grant remedies that pre-date January 2021. Parent claims that the BSEA has jurisdiction over "disability-advocacy-based retaliation and discrimination against a disabled child and their family" citing to *In re: Ollie v. Springfield Public Schools* (BSEA #2004776) Further Parent

---

<sup>1</sup> The cover sheet states that it was faxed to the BSEA on February 20, 2023. However, February 20, 2023 was a holiday, and thus the BSEA offices were closed.

<sup>2</sup> The first 18 pages consist of paragraphs which appear to be selections from documents which pertain to Parent's allegations regarding retaliation and discrimination and appear to be dated between 2018 and 2019.

cites to a First Circuit case which instructs that a Hearing Request should be construed liberally when filed by a pro se litigant.

### *FACTS*<sup>3</sup>

The Parties to this matter have a lengthy history of litigation before the BSEA, the Massachusetts Superior Court, the United States District Court of Massachusetts, and as noted by Parent's recent pleadings, the First Circuit Court of Appeals. Student is an eighteen-year-old student who attended the Middlebridge School in Rhode Island pursuant to a unilateral placement made by Parent in or around January 2020. Marshfield was the school system responsible to provide special education services to Student. Before Middlebridge School, Student attended Marshfield High School, where she began as a ninth grader in September 2018. In response to a hearing request filed by Parent on December 27, 2019, Hearing Officer Raymond Oliver issued a decision, on September 4, 2020. The decision found that the IEPs proposed by Marshfield in January 2020 and February 2020 were reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment and that Marshfield was not financially responsible to reimburse Parent for placement at Middlebridge. It further held that Marshfield did not owe any compensatory services to Student. In addition, the Decision held that Marshfield's proposed January 2020 IEP, proposing placement at a neighboring school system "would be appropriate to address her [Student's] special education needs so as to provider FAPE in the LRE." See *In re: Ruth v. Marshfield Public Schools*, BSEA #2205814.

Parent appealed the decision to the Massachusetts Superior Court on December 3, 2020. Marshfield removed the case to federal court on December 21, 2020. On February 8, 2022, the U.S. District Court granted Marshfield's Motion for Summary Judgment holding that Marshfield did not engage in any FAPE violation and the Parent failed to show entitlement to compensatory services. (See Exhibit A, *C.F. v. Scolaro, et. Al*, No. 20-12259-LTS (D. Mass. Feb. 9, 2022.)) The Parent also raised claims of discrimination, hostility and retaliation by the District before the U.S. District Court. The Court declined to remand the aforementioned issues to the BSEA, stating that Mother had such claims pending in this case before the court that are not addressed in the BSEA decision and are not dependent upon the resolution by the BSEA.

On April 9, 2022, Parent filed a Request for Hearing with the BSEA. The District filed a Motion to Dismiss and Partial Motion for Summary Judgment in response. On May 13, 2022, Hearing Officer Alina Kantor Nir granted in part Marshfield's Motion to Dismiss and partial Motion for Summary Judgment, dismissing Parent's claims of discrimination, hostility, and retaliation as well as claims regarding failure to provide student records. The claims were dismissed based on lack of subject matter jurisdiction and on principles of res judicata and collateral estoppel. (See Exhibit B, *In Re: Student v. Marshfield Public Schools*, BSEA #2209242 (Kantor Nir, 2022).) Parent's Hearing Request further raised claims that allegedly occurred from 2018 to 2020 involving fraud, discrimination retaliation, concealment of evidence, and denial of FAPE in the LRE for the period from January 7, 2020 to January 6, 2021. Those claims were dismissed on the basis of res judicata collateral, estoppel, and statute of limitations. On September 13, 2022, Parent withdrew the remaining claims from her April 9, 2022 Request for Hearing.

---

<sup>3</sup> The facts are established for purposes of this Ruling only.

On January 6, 2023, Parent filed the instant case. Parent alleged procedural violations regarding the January 6 2021 Team meeting including providing inadequate notice to Parent and Student; the attendance and participation of district counsel at the meeting; and denial of Parent's/Student's right to participate and provide input at the meeting. The Parent alleged the proposed IEP was not reasonably calculated to allow Student to make effective progress; and the IEP did not identify the least restrictive environment. Parent alleged "the prior/proposed IEP fails to address my child's Special Education (sic) needs in a private school setting and/or in a Covid-19 remote/hybrid education setting." Parent alleged Marshfield "failed to adequately and comprehensively address investigate and address its own direct and indirect disability-related discrimination and retaliation (including but not limited to Bullying/Cyber-bullying) by its Staff against my child dating back to 12/2018 which has created a hostile learning environment for my child (directly and indirectly)." Parent further alleged that Marshfield never invited out-of-district public school personnel to attend Student's Team meetings. She alleged that Marshfield cut and pasted the prior 2020-2021 IEP into the 2021-2022 IEP without Parent's participation. Parent additionally claimed that Marshfield refused to address her questions regarding whether Marshfield Public Schools is a safe, non-hostile, non-retaliatory pendency placement and/or prospective placement for Student. She claimed that Marshfield has not allowed Parent timely access to student records and that Marshfield issues documents to Parent "in a method that Parent cannot access -- DocuSign. Parent alleged that an IEP proposed on or about December 2021 or January 2022 was not reasonably calculated to meet Student's needs. She alleged that Marshfield did not schedule a Team meeting at a mutually agreeable time, did not invite participants from another public school and terminated that meeting instead of answering Parent's questions about Marshfield had done to ensure the educational environment at Marshfield was non-discriminatory, non-hostile, and non-retaliatory. She alleged that the 2022 IEP was cut and pasted from the prior 2020 IEP. Parent claimed that she should be reimbursed for the costs of unilaterally placing Student at the Middlebridge School. Parent alleged that Student "has not satisfied Massachusetts/DESE requirements (including but not limited to the transition requirements) for secondary education and special education."

### LEGAL STANDARD

Under the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3) and Rule 17B of the *BSEA Hearing Rules for Special Education Appeals*, a BSEA hearing officer may allow a motion to dismiss if the party requesting the appeal fails to state a claim on which relief can be granted.<sup>4</sup> Since this rule is analogous to Rule 12(b)(6) of the Federal and Massachusetts Rules of Civil Procedure, BSEA hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim.<sup>5</sup> Specifically, a motion to dismiss should be granted only if the party filing the appeal can prove no set of facts in support of his or her claim that would entitle him or her to relief that the BSEA has authority to order. That is, a hearing officer may dismiss a case if he or she cannot grant relief under either

---

<sup>4</sup> The undersigned is aware of the guidance recently issued by OSEP with respect to Motions to Dismiss. (*See Letter to Zirkel*, 122 LRP 13029 (OSEP, 2022)) The letter is intended for guidance only and is neither precedential nor binding. Neither Massachusetts nor the First Circuit has addressed whether a hearing officer may issue a dispositive ruling in a due process hearing.

<sup>5</sup> See, for example, *In Re: Inessa R. v. Groton Dunstable School District*, BSEA No. 95-3104 (Byrne, November 1995)

the federal or state special education statutes or the relevant portions of Section 504 of the Rehabilitation Act, after considering as true all allegations made by the party opposing dismissal and drawing all reasonable inferences in his/her favor. See *Calderon-Ortiz v. LaBoy-Alverado*, 300 F.3d 60 (1<sup>st</sup> Cir. 2002);<sup>6</sup> *Norfolk County Agricultural School*, 45 IDELR 26 (December 28, 2005).

### *JURISDICTION OF THE BSEA*

The BSEA has jurisdiction to consider only those claims for which it is expressly delegated authority by its enabling statutes and regulations, and not inconsistent with them. *Globe Newspaper Co. v. Beacon Hill Architectural Comm.*, 847 F.Supp. 179 (D. Mass. 1994) “The IDEA and conforming Massachusetts law give the BSEA authority to determine the respective rights and obligations of publicly funded agencies and parents/students in the implementation of federal and state special education statutes.” *In Re: Monson Public Schools*, 110 LRP 49101 (August 23, 2010). The BSEA has jurisdiction over (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 appropriate public education to the child arising under this chapter and regulations promulgated hereunder or under the Individuals with Disabilities Education Act, 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. M.G.L. ch. 71B§ 2A(a)(1). 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>7</sup>

### *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>8</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>9</sup> Although the analysis for § 504 and IDEA claims differs,<sup>10</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>11</sup>

---

<sup>6</sup> A motion to dismiss will be denied if “accepting as true all well-pleaded factual averments and indulging all reasonable inferences in the plaintiff’s favor, if recovery can be justified under any applicable legal theory. *Id*

<sup>7</sup> *In Re: Georgetown Pub. Sch.*, BSEA #1405352 (Berman, 2014).

<sup>8</sup> 34 CFR 300.507(a)(2).

<sup>9</sup> See 34 CFR 300.511(f).

<sup>10</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>11</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

## *RES JUDICATA AND COLLATERAL ESTOPPEL*

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>12</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>13</sup>

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>14</sup> The three 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>15</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>16</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>17</sup> These doctrines both apply to a BSEA Hearing Officer’s decision regarding the merits of a special education dispute.<sup>18</sup>

Therefore, the central questions here are 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>19</sup> or whether 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 sufficiently identical to claims asserted in the earlier hearing request and are therefore barred by res judicata.

---

<sup>12</sup> *Id.*

<sup>13</sup> *Allen v. McCurry*, 449 U.S. at 94.

<sup>14</sup> *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *In Re Sonus Networks, Inc., Shareholder Derivative Litigation*, 499 F.3d 47, 56-57 (1 st Cir. 2007); *Kobrin v. Board of Registration in Medicine*, 444 Mass. 837, 843 (2005).

<sup>15</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>16</sup> *Apparel Art Int’l, Inc. v. Amertex Enters., Ltd.*, 48 F.3d 576, 583-84 (1st Cir. 1995).

<sup>17</sup> See, e.g., *Allen v. McCurry*, 449 U.S. at 94.

<sup>18</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>19</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 (1st 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.

## *ANALYSIS/CONCLUSION*

Marshfield argues that Parent's claims of discrimination, harassment, retaliation, and hostile environment are barred by subject matter jurisdiction as well as res judicata and collateral estoppel principles. Parent alleges that Marshfield has failed to investigate and address direct and indirect disability related discrimination and retaliation and that Marshfield has included staff members on Student's Team who allegedly previously participated in retaliation and discrimination against Student. She further states she was denied the right to raise questions about what steps Marshfield Public Schools has taken to ensure that its schools provide a non-hostile, non-discriminatory, and non-retaliatory environment. Parent's claims are herein Dismissed with prejudice based on lack of subject matter jurisdiction, res judicata, collateral estoppel, and the statute of limitations. My reasoning follows.

Parent's claims regarding discrimination and retaliation are pending in the U.S. District Court. In his February 8, 2022 Order, Judge Leo Sorokin declined to remand said issues of retaliation and discrimination to the BSEA, noting that Parent had the same claims pending in District Court. Further, the BSEA has already ruled with respect to Parent's claims regarding discrimination and retaliation. In the Ruling issued by Hearing Officer Kantor Nir on May 13, 2022, Parent's claims in this regard were dismissed with prejudice. As the hearing officer stated, "I find that all of Parent's claims ... including fraud, harassment, and retaliation were raised and disposed of (or 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." I adopt the reasoning of Hearing Officer Kantor Nir in her May 13, 2022 Ruling. (*In Re: Student v. Marshfield Public Schools*, BSEA #2209242, pp 18,19 (Kantor Nir, 2022).

Although in the instant matter Parent's Request for Hearing does not allege specific facts regarding claims of discrimination and retaliation, Parent's Opposition to Marshfield's Motion to Dismiss includes nineteen pages of excerpts from purported emails and a chronology of events that allegedly occurred between 2018 and 2019. Even if the issues were not precluded by res judicata and collateral estoppel, they would be barred by the statute of limitations as described above. The events alleged by Parent occurred between 2018 and 2019. She filed her most recent Request for Hearing on January 6, 2023. Thus, as set forth above, in order to be viable, Parent's claims would have had to be filed with the BSEA by 2020 and 2021, respectively. For the foregoing reasons, Parent's claims with respect to discrimination and retaliation are dismissed *with prejudice*.

Parent's Request for Hearing states that Marshfield has not allowed Parent timely access to all education records and that Marshfield "issues documents to Parent in a method that Parent cannot access -- DocuSign." The Hearing Request does not include specific facts to support Parent's claim such as when Parent was allegedly denied access and what if any harm occurred as a result. Hearing Officer Kantor Nir has ruled in a previous matter involving the instant parties that the BSEA does not have jurisdiction over claims with respect to accessing student

records. See *In Re: Student v. Marshfield Public Schools*, BSEA #2209242 at 16, “the BSEA is not the appropriate administrative agency to enforce Parent’s rights relative to her educational record violation claims.”; and, “Because the BSEA is not the appropriate forum in which to assert claims regarding FERPA and Massachusetts student records law, all non-FAPE based educational record claims must be dismissed for lack of subject matter jurisdiction.” *Id.* at 16. This claim regarding educational records is thus barred based upon the principles of res judicata and collateral estoppel (as the BSEA has already dismissed this claim), as well as lack of subject matter jurisdiction and as such is dismissed *with prejudice*.

Parent’s claims with respect to not being permitted to ask questions regarding whether Marshfield Public Schools is a safe, non-hostile, non-retaliatory pendency placement and/or prospective placement fails to state a claim on which relief can be granted, as there is no allegation that Marshfield Public Schools has been proposed as Student’s placement for any of the relevant timeframe. This claim is dismissed *with prejudice*.

With respect to Parent’s claim regarding Marshfield’s alleged failure to address Student’s needs in a Covid-19 setting, this issue is barred by the statute of limitations. Parent’s Hearing Request contains a section which appears to be excerpted and cut and pasted from a letter rejecting the January 6, 2021-January 1, 2022 IEP, which the Hearing Request states was written on January 1, 2021, and previously provided to Marshfield. In this purported letter, item #6 states that “The prior/proposed IEP fails to address my child’s special education needs in a private school setting and/or in a Covid-19 remote/hybrid education setting.” The reference to the prior/proposed IEP in a letter dated January 9, 2021 would have been to the IEP for the period from January 2020-January 2021 and is thus barred by the statute of limitations.

Parent’s claims regarding alleged procedural violations at the January 6, 2021 survive the Motion to Dismiss. Parent may raise these procedural issues including the allegation of inadequate notice to Parent and Student; the attendance and participation of district counsel at the meeting; and the alleged denial of Parent’s/Student’s right to participate and provide input at the meeting. Parent may also raise the issue of whether out of district personnel were invited to participate in team meetings. Although Marshfield’s Motion to Dismiss includes exhibits which it argues disproves some of Parent’s allegations, the determination of whether a claim survives a Motion to Dismiss is made solely on the Hearing Request, and not additional evidence.

Parent’s claims that the proposed IEP was not reasonably calculated to allow Student to make effective progress may also proceed, as may her claims for reimbursement for the IEP period from January 6, 2021 through January 5, 2022.

Parent’s claims with respect to the IEP proposed on or about December 2021 or January 2022 and the procedural issues raised with respect to the Team meeting (the meeting not being scheduled at a mutually agreeable time, Marshfield not inviting participants from another public school, and the IEP being allegedly cut and pasted from a prior IEP) may proceed. Parent’s claim with respect to not being permitted to ask questions about what Marshfield had done to ensure the educational environment was non-discriminatory, non-hostile, and non-retaliatory is dismissed with prejudice as discussed above with respect to the January 2021 Team meeting.

Parent’s claim with respect to reimbursement for Student’s Middlebridge placement beyond the January 2021- January 2022 is dismissed *without prejudice*. Parent’s Hearing Request fails to specify the time period for which she seeks reimbursement for the Middlebridge placement. Her request for relief states that Marshfield should be ordered to reimburse Parent for the cost of Student’s unilateral placement since January 2021. However, her Hearing Request does not provide any specific end point for Student’s attendance and hence reimbursement. The Hearing Request does not state when (or if) Student graduated from Middlebridge. If Parent wishes to proceed on the issue of reimbursement for the IEP term beginning in January 2022, she must amend her Hearing Request to include the specific time period for which she is seeking reimbursement.

Parent’s claim that, “The Child has not satisfied Massachusetts/DESE requirements (including but not limited to the Transition requirements for secondary education and special education” is dismissed *without prejudice* for failure to state a claim on which relief can be granted. I am not able to ascertain what Parent is alleging from this broad and non-specific allegation. Parent may Amend her Hearing request to provide sufficient detail regarding what specific requirements she alleges Student has not satisfied and clarify when or if Student received her high school diploma.

Finally, although not raised by Marshfield, Student turned 18 during the summer of 2022. Both 20 USC §1415(m) and 603 CMR 28.01(15) provide that parental rights and educational decision-making transfers to the student when s/he turns eighteen years of age. Similarly, 34 CFR 300.520(a)(1)(ii) provides that when the student reaches the age of majority “[a]ll rights accorded to parents under Part B of the Act transfer to the child.” Student has not signed the Request for Hearing. She has not furnished written documentation of her decision to have Parent make her educational decisions for her.

The BSEA Hearing Request Form provides a section where a party identifies who is requesting the Hearing. It includes the following:

**II. Person Requesting Hearing:**

1. Name of Person Requesting Hearing:

2. Please check one:

- |  |  |   |
|--|--|---|
| <input type="checkbox"/> Parent  | <input type="checkbox"/> Attorney for school         | <input type="checkbox"/> Educational Surrogate Parent*                            |
| <input type="checkbox"/> Student (if 18 or older)  | <input type="checkbox"/> Attorney for parent/student | <input type="checkbox"/> Guardian*  |
| <input type="checkbox"/> School District   | <input type="checkbox"/> Advocate for parent/student | <input type="checkbox"/> Person appointed by court to make educational decisions* |
| <input type="checkbox"/> Individual with whom the student lives and who is acting in place of parent |  |   |

In her Hearing Request, Parent placed an x in the box beside Parent and placed an x in the box beside Student. Additionally, it appears as though she deleted the phrase, Attorney for parent/student, replaced it with “Parent is Attorney,” and checked the box beside it. (See



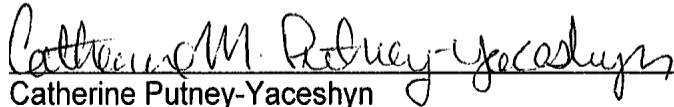
Parent's Hearing Request Form, page 1.) Conversely, her response to Marshfield's Motion to Dismiss includes citations to cases which state that when a Parent proceeds pro se a Hearing Request should be construed liberally and that our judicial system "zealously guards the attempts of pro se litigants on their own behalf." (See Parent's Opposition to Marshfield's Motion to Dismiss, pgs. 26-27.) Further, although Parent states that she is an attorney in her Hearing Request, she has not signed any correspondence as attorney for Student. Whether or not Parent is appearing in this matter as a pro se parent or as attorney for the Student has an impact on which issues she has standing to bring, and thus must be clarified before this matter can proceed to Hearing. Parent shall immediately inform the Hearing Officer in writing as to what capacity she is appearing in this matter.

### ORDER

Marshfield's Motion to Dismiss is ALLOWED in part and denied in part. The issues delineated above will be heard by the BSEA. The claims that have been dismissed *without prejudice* may be refiled pursuant to a sufficiently detailed Amended Hearing Request with the BSEA. All other claims are dismissed *with prejudice*.

The Parent shall inform the Hearing Officer in writing whether she is appearing as a pro se party or an attorney by the close of business on March 15, 2023.

So ordered by the Hearing Officer,

  
Catherine Putney-Yaceshyn

Dated: March 14, 2023

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.