

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

In re: Alex¹

BSEA # 2305823

**RULING ON PARENTS' MOTION FOR SUMMARY JUDGMENT, DISMISSAL AND
PERMANENT INJUNCTION**

This matter comes before the Hearing Officer on Parents'² *Motion for Summary Judgment, Dismissal and Permanent Injunction (Motion)*, filed January 24, 2023, with respect to a *Hearing Request* filed by Phoenix Academy Charter Public High School, Chelsea, (Phoenix Academy, or the School) against Alex and Wakefield Public Schools (Wakefield, or the District). Phoenix Academy filed an *Opposition to Parent's Motion for Summary Judgment, Dismissal and Permanent Injunction (Opposition)* on January 25, 2023, and a telephonic *Motion Session* was held on February 27, 2023. For the reasons set forth below, Parent's *Motion* is hereby ALLOWED in part and DENIED in part.

I. **BACKGROUND**³

A. PROCEDURAL HISTORY

On January 9, 2023, Phoenix Academy filed a *Request for Accelerated Hearing* against Alex and Wakefield, requesting that the BSEA issue an Order allowing substitute consent for psychological and academic assessments of Alex; approving the School's denial of Parents' request for home educational services; and finding that the Individualized Education Program (IEP) proposed by Phoenix Academy is reasonably calculated to ensure that Alex receives a free, appropriate public education (FAPE). The School also requested that the BSEA determine that Phoenix Academy is not an appropriate educational setting for Alex, and order that he be placed in an alternative educational placement.

Also on January 9, 2023, the BSEA denied the School's request for accelerated status and scheduled a Hearing to occur on January 30, 2023.

On January 17, 2023, Parents filed a *Response to Phoenix Academy Charter Public High School Chelsea's Request for Accelerated Hearing*, on Alex's behalf. Although they did not file formal counterclaims, Parents requested that the BSEA order Phoenix Academy to, among other things: (1) provide home education to Alex without delay; (2) amend its attendance policy to accommodate students with higher medical needs; (3) accept a doctor's notes for medical

¹ Alex is a pseudonym chosen by the Hearing Officer to protect the student's identity in public documents.

² Alex's Mother submitted all documents on his behalf. The Ruling, however, refers to Parents, as two parents were listed on the *Hearing Request*.

³ Except where noted, the information in this section is drawn from the parties' pleadings and is subject to revision in further proceedings.

absences; (4) respect the psychologists' findings that Alex is not stable enough to be tested, and that when he is tested, it should be as recommended by his psychologist and his medical team to avoid causing him irreparable harm; (5) deny the School's request for substitute consent; (6) order the School to develop and have in place a Health Plan and follow a Safety Plan; (7) produce a complete copy of Alex's "IEP report with Parent's concerns attached;" (8) refrain from "disability-related degradation and use of demeaning words like abuse, aggression, and assault, and replace them with the correct disability descriptor commonly known as Psychogenic Seizure"; and (9) determine that the School failed to make a claim upon which relief can be granted.

On January 18, 2023, Wakefield filed its *Response to Phoenix Academy's Hearing Request*, asserting that the BSEA lacks jurisdictional authority as to both the District and Alex, given Parents' rejection of the initial IEP in its entirety. Moreover, according to the District, so long as Parents reject the initial IEP and/or placement, Phoenix Academy is solely responsible for the provision of general education and accommodations for him.

On January 23, 2023, Phoenix Academy filed an assented-to *Motion to Postpone* the Hearing, to permit the parties to continue settlement discussions, which it amended following the Conference Call on January 26, 2023, to add a mutually agreeable date.⁴

In the meantime, on January 23, 2023, Parents filed the instant *Motion*. Citing Alex's psychological evaluation, they argue that it is undisputed that he is too unstable to be evaluated at this time, and that further evaluation will cause him irreparable trauma. Furthermore, they assert, the School has missed the Individuals with Disabilities Education Act (IDEA)'s evaluation deadlines, an IEP meeting has already taken place, and the IEP has been rejected in full. As such, Phoenix Academy has no obligation to evaluate Alex further and cannot seek a decision from the BSEA regarding their refusal to consent to an initial evaluation or provision of special education and related services. Moreover, according to Parents, Alex has been making progress, but he requires home education while he is "in this unstable state and unable to go to school daily." Finally, Parents request that the BSEA order the School to "stop retaliation . . . by making complaints to DCF [the Department of Children and Families]" and asking for hearings because Parents rejected the proposed IEP.

In its *Opposition*, filed January 25, 2023, Phoenix Academy asserts that all issues referenced by Parents in their *Motion* are actually in dispute: whether Alex is too unstable to attend school in person; whether the School is obligated to provide home tutoring; whether the School is an appropriate educational placement for Alex given Parent's total rejection of the proposed IEP; and whether substitute consent for evaluation is appropriate. The School also contends that its employees were required by law to report to DCF their good faith belief that Alex was being neglected educationally.

During the Conference Call that took place January 26, 2023, Wakefield, through Counsel, indicated that the District would not be filing a response to Parents' *Motion*, but

⁴ On the same day, Parents filed a document entitled *Reply and Objection to Phoenix Academy Public Charter High School Chelsea's Assented-to Motion to Postpone Hearing Date (Amended)*. Parents disputed underlying facts included by the School in its postponement request but did not dispute the request itself. They also requested that the BSEA order Phoenix Academy to disclose written policies regarding home/hospital education.

reiterated its position, as expressed in its *Response*, that the BSEA lacks jurisdiction over the matter. During the call, the parties agreed that any further briefing by the parties on Parents' *Motion* would be due by close of business on February 17, 2023, and Parents were instructed that if they wanted to have the BSEA consider any of the contentions and/or claims they had raised in their *Response* or their *Motion*, beyond those brought by Phoenix Academy in its *Hearing Request*, they needed to file their own *Hearing Request* and request consolidation. This information was memorialized in an Order dated January 30, 2023.

On February 17, 2023, Phoenix Academy filed a *Memorandum of Law in Support of its Opposition to Parent's Motion for Summary Judgment (Memorandum)*, in which it raised several arguments to support its position that the BSEA may exercise jurisdiction over its *Hearing Request*. Phoenix Academy contends that it is unable to meet Alex's needs and keep him and others safe, given his minimal ability to communicate, the lack of meaningful evaluative data, and Parents' "rejection of the IEP and failure to engage in good faith in the IEP Team process." Where these factors prevent Alex from accessing a FAPE, the BSEA has the authority to determine whether Phoenix Academy is the appropriate placement for him. The relief it seeks – orders for changed or additional services and additional evaluations – is within the BSEA's authority to grant. Moreover, in the absence of an exercise of jurisdiction by the BSEA, Alex may suffer substantial harm, in that his eligibility may expire before he receives appropriate special education services and supports.

Specifically, according to the School, its claims are subsumed within the BSEA's broad jurisdiction over any matter relating to the identification, evaluation, education program or educational placement of a child with a disability or the provision of a FAPE to the child arising under the IDEA, Section 504 of the Rehabilitation Act of 1973, or Massachusetts General Laws c. 71B, § 2A. These include the availability of a substitute consent mechanism, which the BSEA has granted in other cases. While acknowledging that substitute consent is limited by Massachusetts law to situations where initial evaluation and initial placement have occurred, the School argues that "the lack of a parallel vehicle in the Massachusetts regulations to address" this situation, where Parents refuse consent and reject a proposed IEP, resulting in the inability of a student with significant disabilities to access the curriculum and make effective progress, "strongly supports the necessity of the BSEA invoking its broad general authority to resolve such matters." In the alternative, the BSEA has the authority to determine the appropriateness of Alex's placement because he receives services pursuant to a Section 504 Plan. Phoenix Academy also argues that the BSEA may exercise jurisdiction over its request for an order approving the School's denial of Parent's request for home tutoring, particularly as this would not be Alex's least restrictive educational environment.

In their *Brief in Support of the Motion for Summary Judgment, Dismissal, and Permanent Injunction*, also filed on February 17, 2023, Parents assert that Alex is a general education student who is not, and may never be, served under the IDEA; and that by requesting that the BSEA issue consent for an initial psychological evaluation and approve a fully rejected IEP, Phoenix Academy is essentially attempting to override Parents' rights to make educational decisions for their child. Although Parents continue to request dismissal of the School's *Hearing Request* as an invalid infringement on their rights and characterize it as harassment, and although they have not filed a *Hearing Request* of their own, Parents also argue that because they have submitted a valid home/hospital form, the BSEA should order Phoenix Academy to provide

home education and issue a permanent injunction against the school to prevent the filing of future hearing requests or 51a reports with DCF.

B. FACTUAL BACKGROUND

The following facts are not in dispute and are taken as true for the purposes of this Ruling. These facts may be subject to revision in subsequent proceedings.

1. Alex is a seventeen-year-old resident of Wakefield who has been enrolled at Phoenix Academy, a Commonwealth charter school, since January 17, 2022. He is accompanied at school by a privately-funded one-to-one “dog handler” due to anxiety and his refusal to attend School without the dog and dog-handler. Teachers and other school staff contend that Alex presents as non-verbal and has difficulty accessing the curriculum and engaging socially with peer and teachers. They have observed an increase in Alex’s aggressive behaviors since the beginning of the 2022-2023 school year.
2. Alex attended school in Wakefield from September 2021 to January 17, 2022 on a 504 Plan. This 504 Plan was developed by Wakefield, dated September 7, 2021, and identified vision and anxiety as the impairments impacting Alex’s major life activities. According to Parents, this 504 plan was based on a personalized educational plan (PEP) developed by Alex’s previous private schools, with some changes.
3. Wakefield sought parental consent for an initial special education evaluation, which Parents refused.
4. Prior to moving to Massachusetts, Alex lived with his family in Georgia. According to Parents, he received services and accommodations under a PEP at private school, as well as from private therapy providers.
5. In February 2022, almost immediately upon Alex’s enrollment in Phoenix Academy, staff noted that he required significant academic, social-emotional, and behavioral supports. The School sent Parents a consent form for special education evaluations in the areas occupational therapy (OT), physical therapy (PT), academic achievement, speech and language, psychological, and observations.
6. Parents initially refused to respond. According to Phoenix Academy, on June 15, 2022 Parents signed the consent⁵ but rejected the psychological assessment, and requested hearing and health assessments. Parents contend that they also consented to the psychological assessment on this date.
7. Alex’s speech and language assessment occurred in June and July of 2022. The report, dated August 5, 2022, included a recommendation for direct services (3 x 45 minutes/week). His PT and OT evaluations, which were conducted in August and October of 2022, respectively, revealed very low scores on the Beery-VMI and significant deficits in several areas. The evaluators recommended that Alex participate in

⁵ Parents contend that the School failed to meet its deadline to perform Academic Testing, to which they had consented on or about June 22, 2022.

a modified curriculum with supports to aid his ability to demonstrate functional independence at school. These evaluations were all discussed at the initial eligibility Team meetings in October and November, 2022.

8. In the meantime, based on Alex's behavior at school, teacher observations, and Parents' requests for additional information, Phoenix Academy continued to propose assessments in the areas of psychological, hearing, vision, augmentative and alternative communication, and a functional behavior assessment (FBA). According to the School, Parents refused to consent to these evaluations. Parents assert that Phoenix Academy missed its deadline to perform the psychological evaluation to which they had consented.
9. Given the ongoing disagreement regarding Alex's initial evaluation, the parties engaged in mediation and signed an agreement dated September 13, 2022. Phoenix Academy asserts that despite agreeing to psychological and other assessments, Parents have delayed, compromised, or interfered with test administration. Specifically, according to Phoenix Academy, the School arranged for an outside evaluator to complete the psychological assessment, but Parents would not allow the testing to occur unless at least one parent was present in the testing room; the evaluator refused to complete the evaluation this way due to concerns about validity. Parents contend that the School's contracted psychologist refused to evaluate Alex "based on his need for a service dog handler."
10. On October 20, 2022, Parents presented Phoenix Academy with an outside evaluation report, dated September 27, 2022, completed by Margaret Marino, PhD. Parents assert that they contracted with Dr. Marino "to move things along," in the absence of a school-provided psychological evaluation. Dr. Marino indicated that Alex's presentation was consistent with diagnoses including Intellectual Learning Disability (severe), Generalized Anxiety Disorder, and Developmental Disorder of Speech and Language. She recommended additional testing for further clarification of Alex's needs, and also recommended that he receive special education services and supports. Dr. Marino's report included, among other things, references to a previous assessment from November 8, 2021 that included diagnoses of Adjustment Disorder with Mixed Anxiety and Depression; Generalized Anxiety Disorder; and Developmental Disorder of Speech and Language, Unspecified. This outside evaluation report also referenced and included previous cognitive testing, conducted in 2014. Parents provided the 2014 report to the School with significant redactions.
11. Phoenix Academy convened an initial eligibility IEP Team meeting on October 17, 2022, which was continued on November 9, 2022. The Team reviewed the limited assessment information available, including Dr. Marino's outside evaluation, and determined that Alex was eligible for special education services under a primary disability category of communication and a secondary disability category of emotional.
12. On November 9, 2022, the Team proposed an initial IEP with goals in the areas of Expressive Language Skills; Receptive Language Skills; Social Language Skills; Emotional Regulation; Self-Advocacy; Academic Skills; and Independent Living Skills. Though Parents requested that the Team discuss placement at this meeting, Phoenix

Academy scheduled the placement portion of the meeting for November 28, 2022 so Wakefield could be invited and attend. School-based Team members expected to propose an out-of-district therapeutic placement.

13. In the meantime, Alex displayed increasingly aggressive and assaultive behaviors at school. Parents refused consent for an FBA until Alex was suspended for assaulting staff on November 8, 2022. Parents assert that they consented to an FBA to focus on Alex's recent anxiety attacks. Parents contend that the School was not following Alex's 504 Plan or Safety Plan fully, which resulted in both staff members and Alex getting hurt, and that Alex was suspended for having seizures although the School refused to develop a health plan related to those seizures.
14. Parents rejected the IEP in full prior to the placement Team meeting. According to Phoenix Academy, though the School offered a Team meeting to discuss Parents' concerns and rejection, Parents refused to meet. Parents assert that the School cancelled the placement meeting by email.
15. On December 1, 2022, Parents consented to vision and hearing assessments.
16. According to Parents, Alex is making progress in general education at or above grade level, and forms friendships gradually. They also assert that the School abruptly removed Alex's "expert 1:1 aide and service dog handler," which increased his panic attacks and seizures.
17. On December 12, 2022, Parents submitted a request for home and hospital services requesting home services for Alex until at least March 1, 2023 due to his anxiety. According to the School, Parents have not consented to communication between Phoenix Academy and the provider who signed the Home and Hospital form.⁶
18. As of the time the *Hearing Request* was filed, Alex was not attending school, and Parents had rejected all special education services. Parents assert that Phoenix Academy is an appropriate school for Alex, that he continues to make progress despite the "hostile school administration," and that he is on track to earning a high school diploma. Parents also contend that Alex is too unstable to undergo further assessments.

II. DISCUSSION

Parents' *Motion* requires examination of both legal standards and substantive law. I begin with the relevant laws, and then apply them within the context of Parents' *Motion*, which requests dismissal, summary judgment, and permanent injunction, in turn.

A. APPLICABLE SUBSTANTIVE LAW

1. *BSEA Jurisdiction*

⁶ In their *Brief* in support of the *Motion*, Parents assert that they have agreed to communication between the School and Alex's provider, but that Phoenix Academy failed to respond.

Under 20 U.S.C. § 1415(b)(6), the BSEA has jurisdiction over timely complaints 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.”⁷ In Massachusetts, parents 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.”⁸

2. *Evaluations, Provision of Services, and Consent*

A school district must conduct a “full and individual initial evaluation . . . before the initial provision of special education and related services to a child with a disability.”⁹ In Massachusetts, such evaluations, which aim to determine whether a child is a child with a disability and if so, to determine his educational needs, are to be conducted within 30 school working days of receiving parental consent.¹⁰

Informed parental consent is generally required before a school district may begin to evaluate a child.¹¹ Absent parental consent, in certain circumstances, a school district may file for hearing, seeking an order for “substitute consent” for an evaluation. In Massachusetts, “[i]f, after consideration, the district determines that the parent’s failure or refusal to consent [to a reevaluation] will result in a denial of” a FAPE to the student, the school district may, among other things, file a hearing request with the BSEA.¹² In such cases, the school district is essentially requesting that the BSEA override the absence of consent, permitting such evaluation to go forward.¹³ Federal special education regulations contain a similar provision, permitting a school district to pursue a reevaluation in the absence of parental consent through consent override procedures such as a due process hearing.¹⁴

Federal and state law diverge, however, as to initial evaluations. Under federal law, in the absence of parental consent a school district may, but is not required to, elect to pursue initial evaluation of a child through due process procedures, “except to the extent inconsistent with

⁷ See 34 CFR § 300.507(a)(1).

⁸ 603 CMR § 28.08(3)(a); see M.G.L. c. 71B § 2B (under its governing statute, the BSEA has the authority to provide “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”).

⁹ 20 USC § 1414(a)(1)(A).

¹⁰ Federal regulations provide for 60 days but permit states to establish different timeframes. 20 USC § 1414(a)(1)(C). In Massachusetts that timeframe is established by 603 CMR § 28.05(1).

¹¹ 20 USC § 1414(a)(1)(D)(i); 34 CFR § 300.300(a) (initial evaluation); § 300.300(c) (reevaluation); 28 CMR § 28:07(1)(a).

¹² 603 CMR § 28:07(1)(b). See *In Re ABC Public Schools*, BSEA #1303742 (Crane, 2013).

¹³ See 603 CMR § 28:07(1)(b). See also *G.J. v. Muscogee Cnty. Sch. Dist.*, 704 F. Supp. 2d 1299, 1304 (M.D. Ga. 2010) (citing *M.T.V. v. DeKalb Cnty. Sch. Dist.*, 446 F.3d 1153, 1159-60 (11th Cir. 2006)).

¹⁴ See 20 USC § 1414(a)(1)(D)(ii)(I); 34 CFR § 300.300(c). See also *G.J.*, 704 F. Supp. 2d at 1308-09.

State law relating to such parental consent.”¹⁵ Massachusetts law addresses these specific circumstances. According to 603 CMR § 28.08(3)(c), “[a] school district may not request a hearing on a parent’s failure or refusal to consent to initial evaluation.” In Massachusetts, therefore, in the absence of parental consent, a school district cannot proceed with a child’s initial evaluation and cannot seek a hearing to request that the BSEA grant substitute consent to proceed.¹⁶

Similarly, separate informed parental consent is required for a student to receive special education and related services.¹⁷ Where parents refuse such consent, federal law specifically provides that the school district “shall not be considered in violation of the requirement” to provide a FAPE, nor shall it be required to convene an IEP meeting or develop an IEP.¹⁸ Furthermore, under both federal and state law, where a parent “fails to respond to a request for, or refuses to consent to, the initial provision of special education and related services,” school districts are not permitted to file for hearing “to obtain agreement or a ruling that the services may be provided to the child.”¹⁹

B. ANALYSIS

Because a ruling in Parents’ favor on their *Motion to Dismiss* would end the inquiry, I begin with this analysis.

1. *Legal Standard 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 *Hearing Rule XVII (A) and (B)* 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

¹⁵ 20 USC § 1414(a)(1)(D)(ii)(I); 34 CFR § 300.300(a)(3)(i). See *C.M.E. v. Shoreline Sch. Dist.*, 2020 WL 10141433 at *6-*8 (W.D. Wa. 2020) (consent override provisions affirmatively apply to students enrolled in public school; where parents seek special education services from a school district for their child, they cannot refuse consent for a portion of an initial evaluation that is necessary for the district to determine contents of student’s IEP). Even where a state law does not explicitly prohibit substitute consent in the context of initial evaluations, school districts’ discretion to pursue such consent is not unfettered. See *Fitzgerald v. Camdenton R-III Sch. Dist.*, 439 F.3d 773 (776-77) (8th Cir. 2008) (the word “may” in a special education statute “does not give an agency absolute discretion if it is inconsistent with the overall purpose of the statute”; where parents refuse consent to initial evaluation, privately educate the child, and expressly waive all benefits under the IDEA, “Congress intends that a district may not force an evaluation”). See also *Burkes v. Lavonia Sch. Dist.*, 487 F. Supp.2d 313, 317 (W.D. N.Y. 2007) (“IDEA does not permit a school district to compel the evaluation of a student for determination of that student’s eligibility for publicly-funded special education services where the student’s parent has objected to such an evaluation and has refused to accept publicly-funded special-education [*sic*] services”).

¹⁶ See 603 CMR § 28.08(3)(c).

¹⁷ 20 USC 1414(a)(1)(D)(i); 34 CFR § 300.300(a)(2). See 34 CFR § 300.300(a)(1)(D)(II) (“If the parent of such child refuses to consent to services . . . the local educational agency shall not provide special education and related services to the child by utilizing” due process procedures); 34 CFR § 300.300(b)(3)(i).

¹⁸ 20 USC § 1414(A)(1)(D)(i)(III); 34 CFR § 300.300(a)(3).

¹⁹ 24 CFR § 300.300(b)(3)(i); 603 CMR § 28.08(3)(c) (“A school district may not request a hearing on a parent’s failure or refusal to consent to . . . initial placement of a student in a special education program”).

dismiss, there must exist “factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”²⁰ In evaluating a motion to dismiss, 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.”²¹ These “[f]actual allegations must be enough to raise a right to relief above the speculative level.”²²

2. *Application*

In the instant matter, Phoenix Academy is essentially requesting three things: (1) substitute consent to complete its initial evaluation of Alex; (2) a finding that its proposed initial IEP for Alex is reasonably calculated to offer Alex a FAPE; and (3) approval of its decision to refuse home/hospital services for Alex.

Phoenix Academy acknowledges that it has not completed an initial evaluation of Alex, and, as such, seeks an order from the BSEA granting consent for the School to conduct additional assessments over Parents’ objection. As discussed above, however, under Massachusetts law, the BSEA may not grant such consent, and further, Phoenix Academy is precluded from seeking a hearing to request that the BSEA grant substitute consent to proceed.²³ For this reason, even taking as true that additional evaluations are necessary for the School to develop a full picture of Alex’s needs, in order to address them appropriately, there is no relief that may be granted in this respect in Phoenix Academy’s favor.

The same is true of the School’s request that the BSEA review and approve its proposed IEP as appropriate for Alex. Parents have rejected that initial IEP in full and, consequently, Alex is not currently receiving special education and related services, nor has he ever received either while a student at the School. As Parents have refused consent for the initial provision of special education and related services, both federal and state law prohibit Phoenix Academy from seeking a decision from the BSEA that the proposed services may be provided to Alex.²⁴ Again, taking all allegations in the complaint as true, and even assuming that Alex requires such services in order to receive a FAPE, there is still no relief that may be granted in the School’s favor. I note, however, that due to Parents’ refusal to consent to the provision of special education and related services, Phoenix Academy shall not be considered in violation of its obligation to provide Alex with a FAPE.²⁵

Finally, Phoenix Academy requests that I approve its denial of Parents’ request for home/hospital services for Alex. As Parents have not consented to special education or related services for Alex, he is currently a general education student. The School’s request, therefore, does not involve the identification, evaluation, educational placement, or provision of a FAPE to a child pursuant to state or federal special education laws.²⁶ Therefore, even taking as true the

²⁰ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

²¹ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

²² *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

²³ See 603 CMR § 28.08(3)(c).

²⁴ See 24 CFR § 300.300(b)(3)(i); 603 CMR § 28.08(3)(c).

²⁵ See 20 USC § 1414(A)(1)(D)(i)(III); 34 CFR § 300.300(a)(3).

²⁶ See 34 CFR § 300.507(a)(1); 603 CMR § 28.08(3)(a).

School's allegations that Alex does not qualify for home/hospital services, as an entity of limited jurisdiction, the BSEA does not have the authority to grant the relief Phoenix Academy seeks.

Because the BSEA cannot exercise jurisdiction over Phoenix Academy's claims, the School's factual allegations and the inferences therefrom, taken as true, do not plausibly suggest an entitlement to relief.²⁷ As such, Parents' request for dismissal of Phoenix Academy's claims in ALLOWED.

3. *Summary Judgment*

As none of Phoenix Academy's claims survive so much of Parents' *Motion* as seeks dismissal, I need not address the summary judgment standard.

4. *Permanent Injunction*

Although Parents have requested that I permanently enjoin Phoenix Academy from acting in a manner they describe as retaliatory, I do not have the authority to hear such a claim, even if they had filed their own *Hearing Request*, as they were invited to do. The only relief available under the IDEA is relief for the denial of a FAPE.²⁸ I do not have jurisdiction to grant the permanent injunction Parents seek. Thus, this request is DENIED.

III. CONCLUSION

Upon consideration of Phoenix Academy's *Hearing Request*, Parents' *Motion for Summary Judgment, Dismissal and Permanent Injunction*, and the School's *Opposition* thereto, as well as the arguments of all parties, I find that I lack jurisdiction over all pending claims.

ORDER

²⁷ See *Golchin*, 460 Mass. at 223; *Iannocchino*, 451 Mass. at 636; *Blank*, 420 Mass. at 407.

²⁸ See *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 753 (2017); see also *Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 25 (1st Cir. 2019) ("What matters is not whether a 'a complaint includes (or, alternatively, omits) the precise words [] 'FAPE' or 'IEP,'" but rather whether a claim in fact 'seeks relief for the denial of an appropriate education.'" (citing *Fry*)); *Diaz-Fonseca v. Commonwealth of Puerto Rico*, 451 F.3d 13, 19 (1st Cir. 2006) (holding that where the essence of a claim is a denial of FAPE, no greater remedies than those authorized by the IDEA may be awarded, regardless of how the claims are characterized); *S.S. v. Springfield*, 332 F. Supp. 3d 367, 377 (D. Mass. 2018) ("relief for the denial of a FAPE . . . is the only 'relief' the IDEA makes 'available'") (internal citation omitted); *Ruling on Acton Boxborough Regional School District's Partial Motion to Dismiss and Parent's Motion to Join the Town of Acton*, BSEA #2101061 (Reichbach, 2021) ("Because the only relief the BSEA can grant is relief for the denial of a FAPE, I must dismiss any claims that do not concern the denial of a FAPE, regardless of where they transpired and whom they involved").

Insofar as Parents seek Summary Judgment and a Permanent Injunction, their *Motion* is DENIED; insofar as they seek Dismissal of Phoenix Academy's *Hearing Request*, their *Motion* is GRANTED.

The matter is hereby DISMISSED.

By the Hearing Officer,

/s/ Amy Reichbach

Date: March 3, 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 (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.