

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

In re: Student v.
Newton Public Schools

BSEA #1408637

RULING ON NEWTON PUBLIC SCHOOLS' MOTION FOR PARTIAL DISMISSAL

The Hearing Request in this matter was filed with the Bureau of Special Education Appeals (BSEA) on May 15, 2014. On June 16, 2014, Newton Public Schools (NPS) filed a Motion for Partial Dismissal. Generally, “[a]ny party may file written objections to the allowance of the motion and may request a hearing on the motion within seven (7) calendar days after a written motion is filed . . . unless the Hearing Officer determines that a shorter or longer time is warranted.”¹ In this case, the Hearing Officer granted three extensions, and ultimately Student, through her Parent, filed an Opposition on July 24, 2014.² For the reasons below, NPS’s Motion is ALLOWED IN PART, and DENIED IN PART.

Facts:

The following facts are assumed to be true for purposes of this Ruling only.

1. Student recently completed fifth grade at the Memorial Spaulding School, a public school in Newton, Massachusetts. She was initially found ineligible for special education services in May 2012.
2. On July 6, 2012, Parent filed a hearing request with the BSEA in which she disputed NPS’s determination that Student was ineligible for special education services.³ She also alleged numerous procedural violations, including that NPS had failed to timely

¹ Hearing Rules for Special Education Appeals, Rule 7(C).

² Via Order issued on June 9, 2014, deadlines were established for NPS to submit its Partial Motion to Dismiss (June 16, 2014) and for Parent to respond (June 23, 2014). On June 20, 2014, Parent requested and received an extension of the due date for her response from June 23, 2014 to June 30, 2014. At Parent’s request, a second extension for Parent to file a response was granted via order issued on July 9, 2014 (correcting an Order issued on July 8th) through July 16, 2014. A final extension through July 24th was allowed via Order issued on July 14, 2014. In her requests for extensions to file a response, Parent had explained that she was in the process of retaining counsel. Parent reiterated her position during a telephone conference call on July 17, 2014, during which the Hearing Officer agreed that a new response date would be determined if Parent retained counsel, and her attorney required additional time to file a response. As such, the Order of July 14th established the final date by which Parent’s response was due unless counsel was retained. Ultimately, Parent did not secure counsel and the July 24, 2014 deadline became final.

³ The facts in this paragraph are taken from the decision in *In Re: Newton Public Schools* (BSEA #1300077), Hearing Officer Sara Berman, of which this Hearing Officer takes judicial notice.

respond to her request for an independent educational evaluation (IEE). The hearing on the matter was postponed for good cause at the request of the parties.

3. In September 2012, Student was placed on a Section 504 Accommodation Plan.
4. On November 5, 2012, Parent filed a status report in the case then pending before the BSEA in which she limited her request for relief to an order for public funding of the IEE that she had obtained previously, at a cost above the state-approved rate. After a hearing, the Hearing Officer issued the decision in BSEA #1300077 on February 6, 2013. It included the following findings of fact:

“At the conclusion of the [TEAM] meeting [on May 15, 2012], Parent stated that she wanted an independent evaluation of Student. On the Special Education Eligibility/Initial and Reevaluation Determination form, also completed at the conclusion of the Team meeting, Parent indicated that she disagreed with the Schools evaluations.”⁴

“In a letter to the Team Chair dated May 22, 2012, Parent requested an independent evaluation.”⁵

On May 29, 2012, in response to Parent’s letter, the school sent Parent an N-1 form proposing an extended evaluation, but “[t]he N-1 form did not mention the Parent’s request for an IEE.”⁶

After the May, 2012 TEAM meeting, on her own initiative Parent contacted potential evaluators from a list provided by the Student’s pediatrician. “The only individual on the list who was available within the time period sought by the Parent was Brigitte Mercedes, Ph.D., who is a licenced neuropsychologist located in Cambridge, MA. Dr. Mercedes conducted a neuropsychological evaluation of Student on June 8 and 14, 2012. Parent and Dr. Mercedes did not discuss the issue of [Health Care and Finance Policy] rates . . . because Parent was not aware that they existed or were an issue.”⁷

In her decision, the Hearing Officer determined that NPS had in fact committed significant procedural violations in connection with Parent’s request for an IEE.⁸ She

⁴ In Re: Newton Public Schools (BSEA No. 13-00077) at 3.

⁵ *Id.*

⁶ *Id.* at 4.

⁷ *Id.* at 6.

⁸ “Between May 22 and 30, 2012, the School did nothing in response to Parent’s request [for an independent neuropsychological evaluation]. Specifically, during that five school-day interval, the School neither provided the

ordered that NPS take full responsibility for payment of the neuropsychological evaluation Parent had secured.⁹

5. On or about April 29, 2013, Student was found eligible for special education due to a specific learning disability. She was subsequently placed on an Individualized Education Program (IEP). Parent accepted this IEP, as well as a subsequent IEP issued by the TEAM in September 2013.
6. In February and/or March 2014, NPS convened TEAM meetings to discuss, among other things, Student's placement for sixth grade. NPS proposed that Student be placed at Oak Hill Middle School.
7. Parent takes the position that this placement is inappropriate and denies student a Free and Appropriate Public Education (FAPE). In her Request for Hearing, she asks that Student be placed out of District, at NPS's expense; that she receive compensatory damages for denial of special education services from March 2012 to the present time; and that she be reimbursed for an October 2013 neuropsychological examination by Dr. Talamo and the services of Mrs. Bradshaw, who appears to be an educational advocate.
8. NPS takes the position that the IEP(s) it proposed in February and/or March 2014 provide the student with a FAPE. NPS also argues, in both its Response to the Hearing Request and its instant Motion to Dismiss, that many of Parent's allegations are barred by the two-year statute of limitations applicable to IDEA claims and/or by principles of preclusion, and that the BSEA is unable to award part of the relief Parent is seeking.

Discussion:

In its Motion to Dismiss, NPS argues that the two-year statute of limitations bars claims arising prior to May 12, 2012 (two years before the present Request for Hearing was filed on May 12, 2014). It also argues that *res judicata* bars any claim related to the issues litigated in

requisite information, agreed to pay for the IEE nor requested a BSEA hearing...the record unequivocally shows that upon receipt of Parent's IEE request of May 22, 2012, the School never informed Parent of where or how she could obtain an IEE, never informed Parent of the allowable payment rate, never informed Parent of the sliding fee scale option, and never requested a hearing to defend its own evaluation. These procedural missteps were substantial, and effectively precluded parent from even knowing the requirements and limitations of public funding for an IEE." *Id.* at 9, 10.

⁹ "I conclude that in the instant case, it would be inequitable to confine payment to the state-approved rates; here, there clearly are 'unique circumstances' that justify payment of Dr. Mercedes at higher than state-approved rates." *Id.* at 10.

BSEA #1300077 [hereinafter, the “prior case”], and that part of the Parent’s request for relief is beyond the jurisdiction of the BSEA. I address these arguments in turn.

I. Standard for Ruling on Motion to Dismiss

Pursuant to 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 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. This rule is analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure and as such hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim. Specifically, what is required to survive a motion to dismiss “are factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”¹⁰ In evaluating the complaint, 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.”¹¹ These “[f]actual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . .”¹²

II. Statute of Limitations

The Individuals with Disabilities Education Act (IDEA) establishes a two-year statute of limitations with respect to the filing of administrative due process complaints such as a *Hearing Request*.¹³ Generally, a party “shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint.”¹⁴ The relevant one of two exceptions to the timeline occurs where a parent was prevented from requesting a hearing due to, in pertinent part, “the local agency’s withholding of information from the parent that was required under this subchapter to be provided to the parent.”¹⁵ Required information includes the notice of procedural safeguards that the school district must provide to parents at least once a year pursuant to 20 USC § 1415(d).¹⁶

Parent bases her claim for relief, in part, on procedural errors she describes in connection with her request for a CORE (*sic*) evaluation of her daughter in March 2012. Introduction Part A of her Complaint (Compl. pp. 2-5) details events that began on March 15, 2012, up to

¹⁰ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

¹¹ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

¹² *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

¹³ See 20 USC § 1415(f)(3).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, n.35 (W.D. Tex. 2008).

and including her receipt of an incomplete package of information on May 14, 2012; the eligibility meeting that occurred on May 15, 2012; and her receipt of a notice of procedural safeguards for the first time at the May 15, 2012 meeting. It is these events that form the basis of Count I of her Complaint. To the extent that Count I relies on events that occurred prior to the May 15, 2012 meeting, I must consider: (1) whether the Parent knew or should have known about these actions on or before May 14, 2012; and (2) if so, whether NPS withheld information from the parent that it was required to provide under Part B of the federal special education statute.¹⁷

Parent states in her Complaint that on May 14, 2012 she was informed by an NPS employee, Ms. Backer, that Student's education evaluation was incomplete and communicated her concerns regarding missing information on that same day. (Compl. p. 4). To the extent Count I is based on procedural defects in connection with the evaluation of Student that occurred prior to May 15, 2012 (including Count I.A., failure to conduct testing with the statutory deadline; Count I.B, failure to provide complete reports at least 48 hours prior to the TEAM meeting; and Count I.C., failure to complete essential assessments and observations and other documentation), it is evident that Parent knew or should have known of these defects prior to May 15, 2012, and therefore the statute is not tolled on this basis.¹⁸ I must next consider whether the statute of limitations is tolled due to NPS's failure to provide required information.

Pursuant to 20 USC § 1415(d)(1)(A)(i), a notice of procedural safeguards must be provided "upon initial referral or request for evaluation." According to the allegations of the Complaint, which I must at this stage take as true,¹⁹ this notice was not provided until the initial eligibility meeting on May 15, 2012, despite the fact that Parent had requested the evaluation on March 12, 2012. (Compl. p. 5) Given that the failure of a district to provide the requisite notice of procedural safeguards is, in itself, sufficient to satisfy the exception to the two-year rule, events that occurred between March 15, 2012 and May 15, 2012 only, are not time-barred.²⁰ To the extent NPS's Motion seeks dismissal of these allegations on the ground that they are time-barred, it is **DENIED**.

¹⁷ See *id.* ("subchapter referred to here begins at 20 U.S.C. § 1411 and ends at 20 U.S.C. § 1419").

¹⁸ See *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 119-20 (1st. Cir. 2003) ("the time of accrual of a civil rights action is when the aggrieved party knows or has reason to know of the injury which is the basis for his action or when facts supportive of a civil rights action are or should be apparent to a reasonably prudent person similarly situated").

¹⁹ See *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. at 407.

²⁰ See *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d at 945 (finding that school district's failure to provide requisite notice of procedural safeguards tolled statute of limitations). To the extent Parent raises allegations in connection with an "informal" occupational therapy evaluation that occurred during the 2010-2011 school year, these allegations are time-barred, as are any allegations concerning events that occurred prior to March 15, 2012, the date of the school district's failure to provide the procedural safeguards notice.

III. Preclusion²¹

NPS also argues that res judicata bars any claim related to the issues litigated in the prior case, and that, as such, to the extent Parent's claim relates to procedural errors that occurred in connection with her request for an IEE it must be dismissed. Parent responds first, that the doctrine of res judicata may not apply in BSEA decisions; and second, that although her July 2012 hearing request raises some of the same due process issues as the instant hearing request, by verbal agreement between the parties the Hearing Officer addressed only the narrow issue of public funding of the IEE and not the question whether the Student's due process rights had been violated.

Principles of preclusion apply to both litigation in court and a BSEA Hearing Officer's decision regarding the merits of a special education dispute.²² The doctrine aims to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication."²³ Whereas issue preclusion applies only to prevent the relitigation of issues that were litigated, decided, essential to the judgment, and embodied in a final judgment on the merits,²⁴ claim preclusion prevents parties from relitigating issues that were *or could have been* raised in an action (emphasis added).²⁵ Claim preclusion is "based on the idea that the precluded litigant had the opportunity and incentive to fully litigate the claim in an earlier action, so that all matters that were or could have been adjudicated in the earlier action on the claim are considered to have been fully settled by the first judgment."²⁶ Three elements must be satisfied before a claim will be precluded: (1) the claim must be the same; (2) the parties must be the same; and (3) the first case must have ended in a valid final judgment on the merits.²⁷ There is no question that the parties in the instant matter are the same as in the prior case. Similarly, there is no question that the case ended in a valid final judgment on the merits; BSEA No.

²¹ The term "preclusion" is used throughout this ruling to encompass both collateral estoppel, also known as issue preclusion, and res judicata, also known as claim preclusion.

²² See *Kobrin v. Bd. of Registration in Med.* 444 Mass. 837, 844 (2005) ("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").

²³ *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

²⁴ See *Allen v. McCurry*, 449 U.S. at 94; *Tuper. v North Adams Ambulance Serv., Inc.*, 428 Mass. 132, 134-35 (1998).

²⁵ See *Allen v. McCurry*, 449 U.S. at 94; *Cromwell v. Sac County*, 94 U.S. 351, 352 (1876); *In Re Sonus Networks, Inc., Shareholder Derivative Litig.*, 499 F.3d 47, 56-57 (1st Cir. 2007). The BSEA has applied these doctrines in *In Re: Harwich Public Schools*, BSEA # 08-1670 (2/1/08) and *In Re: Neville & Sutton Public Schools*, BSEA # 07-7534 (11/2/07).

²⁶ *In Re Sonus Networks, Inc., Shareholder Derivative Litig.*, 499 F.3d at 56; see *Gonzalez-Pina v. Rodriguez*, 407 F.3d 425, 429 (1st Cir. 2005) ("For a claim to be precluded, the following elements must be present: 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").

²⁷ See *In Re Sonus Networks, Inc., Shareholder Derivative Litig.*, 499 F.3d at 56; *Gonzalez-Pina v. Rodriguez*, 407 F.3d at 42.

13-00077 was issued on February 6, 2013, and neither party appealed that decision to the courts.

The key issue is whether claims are the same in the prior case and the instant case. Two causes of action are considered the same claim if they are identical or if they derive from a “common nucleus of operative facts.”²⁸ The First Circuit applies a transactional approach to defining this term, such 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.”²⁹ To make this determination, a hearing officer or judge should consider (1) whether the facts are related in time, space, origin or motivation; (2) whether the facts form a convenient trial unit; and (3) whether treating the facts as a unit conforms to the parties’ expectations.³⁰ The purpose of this requirement 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.”³¹

In the prior case, Parent alleged that multiple procedural violations had occurred in connection with Student’s initial eligibility determination in the spring of 2012. Any allegations in the instant case regarding the events that transpired in connection with that initial determination comprise a series of related transactions.³² These claims would appear to be precluded. There exists, however, an exception to claim preclusion that controls this case. Where “the parties have agreed in terms or in effect that the plaintiff may split his[/her] claim, or the defendant has acquiesced therein,” the remaining part of the claim “subsists as a possible basis for a second action by the plaintiff against the defendant.”³³ Both parties have represented to this Hearing Officer in the instant case that although Parent’s Hearing Request in the prior case was broader, by agreement the hearing and decision focused only on the issue of Parent’s request for a publicly funded IEE. Because only this part of the claim reached judgment in the previous case, and that limitation was by agreement, only this part of the claim is precluded. To the extent that Parent’s instant claim raises the procedural errors committed in connection with her May 2012 request for an IEE, it is hereby **DISMISSED**.

²⁸ *Breneman v. U.S. ex. Rel. F.A.A.*, 381 F.3d 33, 38 (1st Cir. 2004) (internal citations omitted).

²⁹ *Apparel Art Int’l, Inc. v. Amertex Enters., Ltd.*, 48 F.3d 576, 583-84 (1st Cir. 1995).

³⁰ *Id.* at 583.

³¹ *Id.*

³² *See id.* at 583-84.

³³ RESTATEMENT (SECOND) OF JUDGMENTS § 26(1) (1982).

IV. Reimbursement

In her Complaint, Parent requests that NPS be ordered to reimburse her for the cost of a neuropsychological evaluation performed by one individual, Dr. Talamo, and a classroom observation and related services of a second individual, Ms. Bradshaw. NPS argues that these services constitute costs related to expert witnesses, privately arranged evaluations, and/or educational advocates, and as such reimbursement is not available under (or beyond the jurisdiction of) the IDEA.

Although a plaintiff's reasonable attorney's fees may be recoverable pursuant to a successful appeal under the IDEA, the costs of non-attorney experts are not.³⁴

As to Dr. Talamo, it appears that she was retained by Parent to re-evaluate Student in October 2013. (Compl. p. 15) At this time Parent had already obtained a private neuropsychological evaluation by Dr. Mercedes, which evaluation the BSEA later determined had to be funded by NPS because of its failure to provide Parent with the IEE to which she was entitled.³⁵ As such, Dr. Talamo appears to have been retained by Parent as a private expert and there is no authority for the BSEA to order reimbursement of his fees.³⁶ As to Ms. Bradshaw, Parent describes her as an educational advocate. (Compl. p. 1). The BSEA is similarly unable to order reimbursement of her fees.³⁷ So much of the Parent's complaint that seeks reimbursement for the services of these two individuals is hereby **DISMISSED**.

Conclusion:

For the reasons described above, NPS's Partial Motion to Dismiss Parent's Request for Hearing is **ALLOWED IN PART** and **DENIED IN PART**. Going forward, Parent may present her claims regarding events that occurred from the date of her initial request for evaluation on March 12, 2012 to the date of her Hearing Request, with the exception of claims alleging NPS's procedural errors in connection with her request for an IEE.

³⁴ *Arlington Central Sch. Dist. Bd. Of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (provision allowing for a court, in its discretion, to award reasonable attorney's fees as part of costs to a parent of a child with a disability who is the prevailing party, "this provision does not even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts").

³⁵ See Re: Newton Public Schools (BSEA No. 13-00077).

³⁶ *Arlington Central Sch. Dist. Bd. Of Educ. v. Murphy*, 548 U.S. at 296.

³⁷ See *id.*

ORDERS:

1. NPS's Partial Motion to Dismiss is **GRANTED** to the extent the Request for Hearing raises claims related to the IEE, relitigation of which is precluded, and to the extent the Request for Hearing seeks reimbursement for the services of Dr. Talamo and Ms. Branshaw.
2. NPS's Partial Motion to Dismiss is **DENIED** to the extent it seeks dismissal of allegations pertaining to events that occurred between March 12, 2012 and May 12, 2012 as the statute of limitations is tolled owing to NSP's failure to provide required information.
3. This matter will proceed as a Pre-hearing Conference on August 25, 2014, at 2:00 p.m. at the Bureau of Special Education Appeals, One Congress Street, Boston Massachusetts 02114.

By the Hearing Officer,

Rosa I. Figueroa
Dated: August 19, 2014