

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

**In RE:** Student v.  
Ludlow Public Schools

**BSEA #1603808**

**Ruling on Ludlow Public Schools' Partial Motion to Dismiss**

Parent filed a Hearing Request on May 21, 2015, BSEA #1509319 (case #1) which case she withdrew on November 2, 2015, two days before the Hearing was to occur. In response to Parent's action, Ludlow Public Schools (Ludlow) filed an Expedited Hearing Request on November 2, 2015, BSEA #1603589. On November 9, 2015, Parent requested the instant Hearing, raising many of the same issues she had raised in BSEA # 1509319. A Hearing on Ludlow's Hearing Request was held on November 16, 2015 and a Decision was issued on November 25, 2015. This Decision addressed some of the same issues previously raised by Parent both in BSEA #1509319 (case #1) and in the instant case, BSEA #1603808

On November 19, 2015, Ludlow Public Schools ("Ludlow") filed a *Motion to Dismiss and Motion in Limine To Narrow the Parent's Hearing Request* in the above-referenced matter. Ludlow sought dismissal or limitation of certain claims raised by Parent alleging that many of the issues raised by Parent had been disposed of via Rulings (and later a Decision) issued in the context of BSEA #150319 and BSEA #1603589. More specifically, Ludlow argued that the principles of *Res Judicata* and *Collateral Estoppel* prevented Parent from raising the same issues that had been previously adjudicated; that some of her claims fell outside the applicable two-year statute of limitations consistent with the Individuals with Disabilities Education Act ("IDEA"); and that the BSEA lacked jurisdiction to award the remedy sought by Parent.

On November 24, 2015, the BSEA received Parent's response to Ludlow's Motions. Her response provided additional explanations in support of her position that none of her disputed claims should be dismissed.

I note that Ludlow agreed to the Facts delineated by Parent in her Hearing Request for purposes of this Ruling only, but reserved its right to dispute them if its Motions were denied. Ludlow's right to dispute the facts at a Hearing on the merits is hereby **RESERVED**.

Upon consideration of the Parties' submissions, the Hearing Request, Amendment and Ludlow's Response to Parent's Hearing Request, Ludlow's Partial Motion to Dismiss is **GRANTED IN PART**, as explained below.

**Facts:**

The facts delineated below are presumed to be true for the purposes of this Ruling only:

1. Student is a nine year-old whose primary diagnosis is Autism Spectrum Disorder. According to Parent, Student attended school in Ludlow from January 2009 through January 2013 (first grade).
2. On or about January 2013, Ludlow arranged Student's enrollment in Agawam Public Schools' Verbal Behavior Classroom at the Robinson Park School in response to Parent's dissatisfaction with Ludlow<sup>1</sup>.
3. Student remained in Agawam through January 2014, the middle of his second grade. At that point, due to Parent's dissatisfaction with the program, Ludlow placed Student at the May Center (May) where he remained through mid-May of 2015.
4. On May 14, 2015, Parent rejected the proposed placement and IEP issued in April 2015. Said IEP called for Student to attend school in Ludlow starting on May 18, 2015.
5. Parent then requested a Hearing with the BSEA on May 21, 2015 (BSEA #1509319), and amended her Hearing Request on June 12, 2015. Parent's Amended Hearing Request alleged: 1) that Ludlow provided improper oversight of Student's out-of-district placements causing Student to leave the programs in Agawam and May; 2) that Student was owed compensatory speech services from when he was placed in Agawam in 2013; 3) that in 2013 when Student was in Agawam Ludlow attempted to violate "stay-put"; 4) that Ludlow allowed non-compliance by May with regard to medication administration, storage, documentation and staff training; 5) that Ludlow violated Student's stay-put rights when Student was discharged from May; and 6) that Student should have been provided compensatory tutoring services (Parent's Hearing Request).
6. On June 12, 2015, Parent<sup>2</sup> and Ludlow submitted their positions regarding Student's Stay-put rights to Hearing Officer Ann Scannell, who issued a Ruling on June 23, 2015, finding that Ludlow's IEP fulfilled its obligations under Stay-put (Administrative Notice of BSEA #1509319).
7. On June 23, 2015, Ludlow filed a Partial Motion to Dismiss in BSEA #1509319, alleging that Parent's 2013 compensatory speech services claim was time-barred by the statute of limitations. Parent responded to this Motion on August 14, 2015.
8. BSEA #1509319 was administratively reassigned to Hearing Officer Rosa I. Figueroa on July 2, 2015.
9. On August 18, 2015, an Order was entered in BSEA #1509319 setting Hearing dates for November 5 and 6, 2015 and a Pre-hearing Conference for October 5, 2015.
10. On September 8, 2015 a Ruling Denying Ludlow's Partial Motion to Dismiss was issued on BSEA #1509319. This Ruling further clarified that the IDEA two-year statute of

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<sup>1</sup> Administrative notice is taken of of the BSEA #1509319 and #1603589, reflecting that Student started attending Agawam on or about March 2013.

<sup>2</sup> Parent supplemented her Stay-put submission on June 17, 2015.

limitations was controlling but because Parent had not specified the time in 2013 during which Agawam (where Ludlow had placed Student) had allegedly failed to offer the speech and language services, that claim could not be dismissed in the context of a Motion to Dismiss. The Ruling further clarified that

If Agawam failed to provide Student the agreed upon speech and language services at any time *after* June 26, 2013, those claims would be viable and not barred by the statute of limitations applicable to IDEA matters as the controlling date for the statute of limitation purposes is June 12, 2013.<sup>3</sup>

11. Parent wrote to the BSEA seeking to set aside Hearing Officer Scannell's Ruling on Stay Put and instead requesting tutoring services for Student during the pendency of her appeal in BSEA #1509319. Following a discussion with the Parties regarding their positions on this issue during a Pre-Hearing Conference held on October 5, 2015, a Ruling on Parent's Request for Tutoring was issued on October 7, 2015, Denying Parent's request. Said Ruling also affirmed the previous Orders issued by Hearing Officer Scannell (Ruling on Stay-put and Recusal Motion) which Rulings would not be subject to further administrative review.
12. On October 20, 2015, Student's pediatrician completed a Physician's Statement for Temporary Home or Hospital Education, citing autism and ADL issues as the medical reason for home tutoring in BSEA #1509319.
13. On October 16, 2015, Parent made a Request for Production of Documents in BSEA #1509319.
14. On October 26, 2015, Ludlow filed Objections and Request for a Protective Order in BSEA #1509319. The same date Parent requested a postponement of the Hearing which was Denied, and on October 27, 2015 she filed a Response to Ludlow's Objections and Request for Protective Order.
15. A Ruling addressing the Parties filings in BSEA #1509319 was issued on October 27, 2015, entering the following Orders:
  - 1) Ludlow's Objections and Requests for Protective Orders are **GRANTED in PART** and **ALLOWED in PART** consistent with this Ruling.
  - 2) Parent's Response to Ruling On her Request for Postponement of the Hearing seeking home services pursuant to a Physician's Statement for Temporary Home or Hospital Education is **DENIED**.

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<sup>3</sup> I note that Parent withdrew BSEA #1509319 and therefore, the controlling date for statute of limitation purposes in the instant case is November 9, 2015, the date of her re-filing. Any claims prior to that date are now time-barred unless Parent can demonstrate that one of the exceptions applies to her as discussed later in this Ruling.

- 3) No further Amendments of the Hearing Request will be allowed at this juncture. The Hearing will proceed under the issues specifically stated in Parent's Hearing Request and Amended Hearing Request received on or about June 12, 2015.
- 4) There will be no further reviews of determinations entered by the BSEA prior to Hearing.
- 5) The deadline for Ludlow to produce the information requested by Parent is the close of business on Friday October 30, 2015.
- 6) The deadline for submission of exhibits and witness lists is extended to Monday November 2, 2015.

16. The October 27, 2015 Ruling in BSEA #1509319 further stated that,

In her submission, Parent now seeks home tutoring services for Student pursuant to a Physician's Statement for Temporary Home or Hospital Education (Physician's Statement) which she attached to her request. She further states that Ludlow has denied her request. The Physician's Statement submitted by Parent does not specify any medical condition preventing Student from attending school. Without this information, Parent will have to present evidence at Hearing, inclusive of testimony by the physician, supportive of her request. Without this additional evidence it is not possible for the Hearing Officer to properly address Parent's request, therefore, Parent should be prepared to present such evidence. I note however, that any determination regarding home tutoring pursuant to a Physician's Statement would only offer temporary relief and cannot be considered Student's long-term placement for purposes of the IDEA, which is the issue at hand. See 603 CMR 28.03(3)(c).

17. On November 2, 2015, Parent withdrew BSEA #1509319 without prejudice. The same date Ludlow requested that Parent's withdrawal be entered with prejudice, but its request was Denied via Ruling issued on November 2, 2015,<sup>4</sup> and BSEA #1509319 was closed without prejudice.

18. Ludlow then filed an Expedited Hearing Request on November 2, 2015 (BSEA #1603589), seeking a determination that its proposed IEP was appropriate. The matter was heard on November 16, 2015 but Parent was *in absentia*.<sup>5</sup> The Decision on BSEA #1603589, issued on November 25, 2015, found Ludlow's proposed program appropriate and ordered its immediate implementation, and ordered updating of Student's Health Care Plan requiring Ludlow to have it ready for implementation on Student's first day in

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<sup>4</sup> A Corrected Ruling was issued at Parent's request on November 3, 2015.

<sup>5</sup> Parent did not attend but via letter dated November 13, 2015 (largely quoted in the Decision), noted her position and concerns, which were addressed in the Decision on BSEA #1603589.

attendance. It also addressed Parent's Physician's Statement noting that it was insufficient to support home education (home tutoring) as it did not meet the requirements of 603 CMR 28.03(3)(c).

19. Parent filed the Hearing Request in the instant case (BSEA #1603808) on November 9, 2015, noting many of the same issues<sup>6</sup> raised in her May 2015 Hearing Request but making more specific requests for relief, namely,

- 1) that Student be placed at River Street School in East Windsor, Connecticut;
- 2) home services in the amount of ten hours per week, including school vacations;
- 3) compensatory tutoring that should have been provided by the [D]istrict for [Student's] time out of school (beginning May 18, 2015);
- 4) district be ordered to create a written protocol on:
  - a) how they plan on properly overseeing Student's programming; and,
  - b) a detailed problem resolution system to use when issues arise;
- 5) contingent on the Bureau's approval of #4, that the BSEA detail in writing the Parent's options should the District not comply;
- 6) other relief as the BSEA sees fit, given the circumstances.

20. In her Hearing Request in the instant case parent further noted that

Referral packets were sent out in April 2015, but all came back as not able to take child into their programs. Ludlow's Special [Education] Director had told Parent before [the] annual April 2015 IEP meeting that the IEP would be "written for Ludlow" and Parent was given a draft IEP at the beginning of the meeting. Parent was ill and had almost no voice, and was not able to give meaningful input to the IEP. Parent firmly believes that Ludlow predetermined Student's placement and services, and therefore, the IEP should be rendered invalid.

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<sup>6</sup> Parent's issues in BSEA #1603808 were:

- 1) Student was denied a FAPE by improper oversight of both Agawam and May out-of-district placements in general by Ludlow;
- 2) Student is owed compensatory speech services from the Agawam placement in 2013;
- 3) Ludlow attempted to violate "stay-put" in 2013 while the Student was in Agawam;
- 4) Ludlow allowed noncompliance by the May School in regards to medication administration, storage, documentation, and staff training;
- 5) Stay-put was violated in May of 2015;
- 6) Ludlow pre-determined the student's placement and services, and therefore the IEP should be rendered invalid.

21. On November 19, 2015, Ludlow filed a Motion for Partial Dismissal and a Motion *in Limine* to narrow the scope of the issues in the instant appeal.
22. Parent filed a Response to Ludlow's Motion on November 24, 2015.
23. To date, Parent has not availed herself of the program offered by Ludlow and Student remains out of school since May 15, 2015.

## **Legal Framework:**

### **I. Standard for Ruling on Motion to Dismiss**

The standard for rulings on Motions to Dismiss has been previously discussed in the *Ruling on Ludlow Public Schools' Partial Motion to Dismiss*, BSEA #1509319 (September 8, 2015), as follows

In the case at bar the parties do not dispute the jurisdiction of the BSEA over motions to dismiss involving failure to state a claim upon which relief may be granted, 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*. These provisions are analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

For a claim to survive a motion to dismiss, the factual allegations must plausibly suggest an entitlement to relief. *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 557 (2007)). 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." *Blank v. Chelmsford Ob/GYN, P.C.*, 420 Mass. 404, 407 (1995). 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)..." *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted). The Hearing Officer will consider the facts alleged in the pleadings and documents attached or incorporated by reference. *Nollet v. Justices of the Trial Court of Mass.*, 83 F. Supp. 2d 204, 208 (D.Mass. 2000), *aff'd*, 248 F.3d 1127 (1<sup>st</sup> Cir. 2000).

Only if the Hearing Officer cannot grant relief under federal or state special education law (20 U.S.C. § 1400 et. Seq. or M.G.L. 71B), or Section 504 (29 U.S.C. § 479), may the case be dismissed. See *Calderon-Ortiz v. LaBoy Alverado*, 300 F.3d 60 (1<sup>st</sup> Cir. 2002);

*Witinsville Plaza Inc. v. Kotseas*, 378 Mass. 85, 89 (1979); *Nader v. Cintron*, 372 Mass. 96, 98 (1977); *Norfolk County Agricultural School*, 45 IDELR, 26 (December 28, 2005). Conversely, if the opposing party's allegations raise the plausibility of a viable claim that may give rise to some form of relief under special education law (20 U.S.C. § 1400 et. Seq. or M.G.L. 71B), or Section 504 (29 U.S.C. § 479), the matter may not be dismissed. See *Ashcorft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).

With this guidance I turn to the case at bar and the claims raised by Ludlow.

## **Discussion:**

### **I. Claims outside the jurisdiction of the BSEA:**

Ludlow argues that some of the claims raised by Parent fall outside the jurisdiction of the BSEA, which jurisdiction is defined in 603 CMR 28.08(3) providing that,

Jurisdiction. In order to provide for the resolution of differences of opinion among school districts, private schools, parents, and state agencies, the Bureau of Special Education Appeals, pursuant to G.L. c.71B §2A, shall conduct mediations and hearings to resolve such disputes....

- (a) A parent or a school district, except as provided in 603 CMR 28.08(3)(c) and (d), may request mediation and/or a hearing at any time 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. A parent of a student with a disability may also request a hearing on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973, as set forth in 34 CFR §§104.31-104.39.

Ludlow asserts that in her Hearing Request Parent argues that “student was denied FAPE by improper oversight of both Agawam and [the] May [School] out-of-district placements”, and requests that Ludlow be ordered to “create a written protocol” on how Ludlow plans to properly oversee student program, and provide a “detailed problem resolution system” to be implemented when problems arise. Parent also requested that “contingent on the Bureau’s approval [the written protocol and detailed problem resolution system]...” the BSEA should also detail in writing the Parent’s options in instances where the District fails to comply with said problem resolution system.

Parent is correct in her argument that the BSEA has jurisdiction to decide whether Student was denied FAPE while in an out-of-district placement proposed by Ludlow. Where an out-of-district placement is made by the public school, consistent with 603 CMR 28.06(3), the administrator of Special Education must make good faith efforts to ensure that the student's IEP is being implemented appropriately and that the services are consistent with the student's IEP. Specifically, 603 CMR 28.06(3) (b) mandates that

The school district is required to monitor the provision of services to and the programs of individual students placed out-of-district. Documentation of monitoring plans and all actual monitoring shall be placed in the files of every eligible student who has been placed out of district. To the extent that this monitoring requires site visits, such site visits shall be documented and placed in the students' files for review. The duty to monitor out-of-district placements cannot be delegated to parents or their agents, to the Department, or to the out-of-district placement. The school district may however, contract directly with a person to conduct such monitoring.

Clearly, a public school district cannot divorce itself from its oversight responsibilities for children in out-of-district placements. Public school districts must ensure proper implementation of the accepted IEPs, must conduct site visits and must maintain documentation of actual monitoring for the particular student in that student's file. This oversight however, is not intended to require school districts to micromanage the operations of out-of-district placements.

First, any additional, generally applicable provisions for oversight of publicly funded private school students, is within the purview of DESE or potentially the legislature, but not the BSEA. The BSEA lacks jurisdiction to direct Ludlow to create a general written protocol for oversight of private programs.

The BSEA's jurisdiction is limited to the particular child who is the subject of a BSEA Hearing. In this context, the BSEA may only look at whether Ludlow violated any existing regulation regarding oversight, but it cannot order that a particular protocol be put in place. Since the BSEA can only order Ludlow to conduct appropriate oversight as to Student, if Parent still wishes this to be an issue for Hearing she may amend her Hearing Request to so reflect.

Second, to the extent that Parent alleges that Student was denied a FAPE while he was in Agawam and at the May School by Ludlow's failure to meet its responsibilities as the sending District (and mindful of the applicable statute of limitations), Parent's claims in this regard may proceed. Here again, Parent may not however, have the remedy she requested because of the BSEA's lack of subject matter jurisdiction over the portions of her claim that fall within the discretion of DESE.

Third, the BSEA cannot require Ludlow to create detailed problem resolution systems in addition to those already established under federal and special education laws, namely, mediations and



hearings.<sup>7</sup> Therefore, Parent's recourse regarding dispute resolution avenues is limited to those already in existence.

I note that all available dispute resolution options at the BSEA are detailed in the Notice of Parent's Procedural Safeguards already provided to Parent by the BSEA.<sup>8</sup>

Parent's request that the District be ordered to create a written protocol addressing the specific plan for overseeing Student's programming and a detailed problem resolution system separate from those already available under the IDEA is DISMISSED with PREJUDICE. Parent may amend her complaint consistent with the guidance offered *supra* if she so desires,

Since Issue number 5, that the BSEA detail Parent's options should the District fail to comply, is contingent upon a favorable ruling on Issue number 4 (which is being Dismissed), Issue number 5 is similarly DISMISSED with PREJUDICE.

## **II. Dismissal of 2013 Claim as Time-Barred by the Statute of Limitations:**

As previously discussed in the *Ruling on Ludlow Public Schools' Partial Motion to Dismiss* issued on September 8, 2015 in BSEA #1509319,

The Individuals with Disabilities Education Act (IDEA), requires that parties filing appeals under the IDEA do so

...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.  
20 U.S.C. § 1415(f)(3)(C) .

The IDEA contemplates two exceptions<sup>9</sup> to the statute of limitations but generally, unless one of the exceptions is met, a party must raise his/ her claims within the two year statute of limitations or those claims falling outside the two year standard may be dismissed. (See also, Rule I(C) of the *Hearing Rules for Special Education Appeals*.<sup>10</sup> ) Massachusetts has adopted the federal two year standard. 603 CMR 28. 01(2).<sup>11</sup>

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<sup>7</sup> See *In Re: Boston Public Schools*, BSEA #01-2461, 7 MSER 16 (February 7, 2001) (The Hearing Officer was "unable to find support, within the regulatory/statutory structure, for a BSEA Hearing Officer to go beyond the resolution of disputes pertaining to individual students").

<sup>8</sup> An additional copy of Parent's Procedural Safeguards is attached to this Ruling.

<sup>9</sup> There are two exceptions to the statute of limitations: 1) the local education agency misrepresented "that it had resolved a problem forming the basis of the complaint"; or, 2) the local educational agency withheld information required to be provided to the parent. 20 U.S.C. § 1415(f)(3)(D).

<sup>10</sup> "A parent or agency shall request an impartial due process hearing within two (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. This timeline does not apply if a parent was prevented from requesting a hearing due to either specific misrepresentations by the school district that it had resolved the problem forming the basis of the hearing request or the school district's withholding of information from the parent that was required to be provided under Federal law." Rule I(C) of the *Hearing Rules for Special Education Appeals*.

<sup>11</sup> "... The requirements set forth in 603 CMR 28.00 R in addition to, or in some instances clarify or for their elaborate, the special education rights and responsibilities set forth in state statute (M.G.L. c.71B), federal statute

Here, Parent withdrew her previous case (BSEA # 1509319) and then filed a new Hearing Request on November 9, 2015.<sup>12</sup> As such, consistent with federal and Massachusetts law, the controlling date for statute of limitations purposes is November 9, 2015, and unless Parent can prove one of the exceptions to the statute of limitations she may only go back two years from that date, that is, from November 9, 2013. 20 U.S.C. § 1415(f)(3)(C). If Parent cannot demonstrate the existence of one of the exceptions to the statute of limitations she may not proceed on claims accruing prior to November 9, 2013, as any claim occurring prior thereto would be time-barred. If she can prove one of the exceptions, then, the statute of limitations may be tolled to the date on which Parent knew of the violation.

In her Hearing Request Parent does not state the specific date in 2013 when the alleged violation involving failure to provide speech and language services occurred, or when she first learned of the alleged violation. In her response to Ludlow's Motions, Parent asserts that she was prevented from raising this issue earlier because Ludlow concealed information crucial to her ability to show that Student had not been provided speech and language services as per the IEP. As such, these issues must be preserved for Hearing.

Parent shall however, provide a more definitive statement as to: a) the specific date on which she alleges that Ludlow failed to provide Student speech services while enrolled in Agawam; b) must submit evidence of when she learned of it; and c) of her attempts to obtain the information and Ludlow's refusal and/or failure to provide the information. If unable to do so, and if the alleged transgression occurred prior to November 9, 2013, Parent's claims in this regard are time-barred and will be Dismissed. If the alleged transgression involving compensatory speech and language services occurred on or after November 9, 2013, Parent's claim may proceed to Hearing.

Taking into account the discussion herein and drawing all inferences in Parent's favor, regardless of Parent's ability to ultimately prove her allegations regarding speech and language services and the date on which she became aware of said violation, I find that Parent has raised the plausibility of a viable claim, pursuant to *Ashcroft v. Iqbal*, 129 S. Ct. at 1949, for which relief can be granted under special education law (20 U.S.C. § 1400 et. seq. or M.G.L. 71B), or Section 504 (29 U.S.C. § 479). As such, pending further clarification of the time frame alleged, the date on which she learned of the alleged transgression, and information to support her efforts to obtain the information from Ludlow, Parent may proceed to Hearing on these claims.

### **III. Allegation of Ludlow's lack of supervision regarding the May School's medication administration, storage, documentation and staff training:**

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(20 U.S.C. §1400 et seq. as amended), and Federal regulations (34 CFR §300 et seq. as amended).” 603 CMR 28.01(2).

<sup>12</sup> Although Ludlow mentions November 12, 2015 as the date for receipt of Parent's Hearing Request, the BSEA's Administrative record shows that Parent's Hearing Request was received at the BSEA on November 9, 2015. For purposes of this Motion, I assume that Parent also served her Hearing Request to Ludlow on November 9, 2015. However, if Parent cannot prove that she served Ludlow prior to November 12, 2015, then, the controlling date for purposes of the statute of limitations will be November 12 (not November 9), 2015 the date in which Ludlow received her Hearing Request. It is well established that timelines under the IDEA begin to accrue on the date that the opposing party (Ludlow) receives the Hearing Request. See Rule I.B of the *Hearing Rules for Special Education Appeals*.

Ludlow argues that it does not have the authority or the responsibility to oversee the May School's compliance regarding administration, storage, and documentation of medication administration or staff training in this regard.

Ludlow correctly argues that the May School is a private, Massachusetts approved school and that the Department of Elementary and Secondary Education (DESE) is the agency charged with the responsibility of monitoring and enforcing compliance with the regulations governing private schools in Massachusetts.

Moreover, Ludlow argues that consistent with 603 CMR 28.08(3)(a), the BSEA lacks jurisdiction to monitor and enforce compliance regarding "medication, administration, storage, documentation and staff training" and as such Parent has raised a claim upon which relief cannot be granted. Therefore, Parent's claim that Ludlow "allowed noncompliance by the May School in regards to medication administration, storage, documentation and staff training" is DISMISSED with PREJUDICE as against Ludlow.

#### **IV. Claims barred by Collateral Estoppel and/or Res Judicata:**

Ludlow's next challenge to Parent's Hearing Request involves *collateral estoppel* and *res judicata*. Relying on *Fidler v. E.M. Parker Co.*, 394 Mass. 534, 539 (1985), quoting *Montana v. United States*, 440 U.S. 147, 153 (1979), Ludlow argues that

"common law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that 'a right, question or fact distinctly working in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties...'

Ludlow argued that the doctrine of res judicata would bar Parent from raising claims at a subsequent hearing that have been litigated or that could have been litigated in a previous case. Similarly once an issue has been determined in a proceeding between two parties, those same two parties may not litigate the same issue in a proceeding on a different cause of action.

In this regard, Ludlow argued that since some of the issues Parent raises in BSEA #1604188 have already been decided in BSEA #1603589, those issues should be dismissed.

A) Ludlow specifically points to Parent's allegation regarding violation of stay-put rights in May 2015, an issue already disposed of via Ruling issued by Hearing Officer Ann Scannell in BSEA #1509319.

Administrative notice of BSEA #1509319 shows that Hearing Officer Scannell issued a ruling on Stay-Put on June 23, 2015 in which she found that

[Ludlow's] April 13, 2015 to April 12, 2016 proposed IEP fulfills the school district's obligation to provide a comparable educational program, and is the stay put placement for purposes of this dispute.

Hearing Officer Scannell made no determination regarding the appropriateness of Ludlow's proposed IEP, but that issue was resolved by this Hearing Officer in the Decision issued in BSEA #1603589, on November 25, 2015, finding Ludlow's April 2015 to April 2016 appropriate to meet Student's needs.

Ludlow is correct that the doctrines of *collateral estoppel* and *res judicata* prevent Parent from re-litigating this issue/claim. As such, Parent's claim regarding any alleged violation by Ludlow of Student's stay-put rights in May 2015 is DISMISSED with PREJUDICE.

B) Consistent with the aforementioned doctrines, Ludlow is further correct that Parent's Claim that Student be provided compensatory tutoring for his time out of school since May 18, 2015, may not proceed. This issue was first addressed by Hearing Officer Scannell, in a Ruling on Stay-put which denied Parent's request for home tutoring. This issue was then addressed by this Hearing Officer in an Order issued on October 7, 2015, in BSEA #1509319 denying Parent's request that the previous Ruling issued by Hearing Officer Scannell be overturned. Later, after a Physician's Statement for Temporary Home or Hospital Education was submitted to Ludlow by Parent, an October 28, 2015 Ruling was issued by this Hearing Officer denying tutoring services pursuant to the Physician's Statement.<sup>13</sup> See *Ruling on Ludlow Public Schools' Objections and Request for Protective Order and Parent's Response to Ruling on Request for Postponement of the Hearing*, BSEA #1509319 (October 27, 2015).

Parent's issue/claim regarding tutoring since May 18, 2015 is DISMISSED with PREJUDICE.

C) In the instant case Parent seeks an out-of district placement for Student at the River Street School in Connecticut and also requests 10 hours per week of home services. Ludlow seeks to prevent Parent from proceeding with these claims.

As previously stated in this Ruling, the doctrine of *Res Judicata* prevents Parent from re-litigating a matter which has been previously adjudicated. For this purpose, I take administrative notice of the Decision in BSEA #1603589. Following a Hearing<sup>14</sup> on November 16, 2015, this Hearing Officer found Ludlow's proposed IEP and placement for the period from April 2015 to April 2016 appropriate to meet Student's needs, as it offered him a FAPE in the least restrictive environment. Said Decision also addressed Parent's request for home tutoring, on the basis that the Physician's Statement on which she relied failed to state a valid medical reason. See *Decision in In Re: Ludlow Public Schools*, BSEA #1603589 (November 25, 2015).

Barring a material change of circumstances since that Decision, which Parent has not advanced in the context of the instant case, Parent may not proceed to Hearing to challenge the appropriateness of the April 2015 to April 2016 IEP.

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<sup>13</sup> The issue regarding the Physician's Statement was once again addressed in the Decision on BSEA #1603589.

<sup>14</sup> The date of this Hearing was changed when Parent informed the BSEA that she was not available previously assigned date. This matter was also heard in Springfield, Massachusetts in deference to Parent's preference. Parent however, was absent and did not submit any exhibits.

Parent however, may proceed on her procedural challenge that Ludlow predetermined Student's placement and services in April 2015. In this regard, Ludlow's request to dismiss all claims arising out of the April 2015 to April 2016 IEP is only GRANTED in PART.

To the extent that Parent's Hearing Request seeks to re-litigate the claims adjudicated in the Decision in BSEA #1603589, those claims are DISMISSED with PREJUDICE.

Ludlow's Motion for Partial Dismissal and Motion *In Limine* to Narrow the Scope of Issues in the Parent's Hearing Request is **GRANTED in PART** consistent with this Ruling.

Assuming that Parent knew or should have known of events giving rise to claims that fall within the two year statute of limitations, Parent may proceed to Hearing on:

- a) whether Ludlow withheld information from Parent that prevented Parent from learning of the alleged failure to provide speech and language services while Student was in Agawam; if so,
- b) whether the statute of limitations should be tolled to allow Parent to proceed with her allegation that Student was denied speech and language services while in Agawam;
- c) whether Ludlow owes Student compensatory speech services from his Agawam placement in 2013;
- d) whether Ludlow attempted to violate "stay-put" in 2013 while Student was in Agawam;
- e) whether Student was denied a FAPE while in Agawam and at the May School as a result of Ludlow's failure to meet its responsibilities as the sending District;
- f) whether Ludlow pre-determined Student's placement and services in April 2015.

Lastly, while neither Party requested a postponement of the Hearing scheduled for December 14, 2015, I note that Parent's Response to Ludlow's Motion to Dismiss notes on the last page:

Also, Ludlow never contacted the Parent within 15 days to discuss resolution. Resolution has not been completed, nor has it been waived, as of this writing [November 24, 2015].

Since there is no requirement that resolution sessions be convened in school initiated Hearing Requests (case #2), Parent's statement is only relevant to her own Hearing Request in the instant case. Under Rule I F of the *Hearing Rules for Special Education Appeals*, the Hearing may only occur if Ludlow has not resolved the complaint to Parent's satisfaction within 30 days, or conducted the resolution session, or participated in mediation, or waived it. Parent's statement appears to indicate that she is interested in participating in a resolution session. Therefore, the Parties shall clarify their position regarding their desire to participate in a resolution session.

Consistent with this Ruling, in order to preserve some of Parent's claims, Parent must amend her Hearing Request and must provide the additional information required to clarify her position. If

Parent Amends the Hearing Request, pursuant to Rule I.G of the *Hearing Rules for Special Education Appeals* the entire process starts over for purposes of the timelines, including the Resolution session.

Given the Parties' failure to submit exhibits and witness lists, the need for Parent's clarification of issues and possible amendment of the Hearing Request, and the need for issuance of this substantive ruling prior to Hearing, it is unrealistic for the Parties to proceed to Hearing on the initial date. A telephone conference call however, is in the process of being schedule so that a new Hearing date can be established as soon as possible.

**ORDER:**

1. Ludlow's Partial Motion to Dismiss is **GRANTED in PART**.
2. By the close of business on December 30, 2015, Parent shall:
  - a) Provide a more definitive statement of the specific date(s) on which she alleges that Ludlow failed to provide Student speech services while he was enrolled in Agawam. If this alleged transgression occurred prior to November 9, 2013, Parent's claim is time barred and hence Dismissed. If the alleged transgression occurred on or after November 9, 2013, Parent's claim may proceed to Hearing.
  - b) The Parties shall state their position regarding the status of the Resolution Session, whether it has been waived or whether one will be conducted and when.
  - c) Parent shall file an Amended Hearing Request if so desired.
3. Ludlow's right to dispute the facts at a Hearing on the merits is hereby **RESERVED**.

By the Hearing Officer,

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Rosa I. Figueroa

Dated: December 14, 2015