

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

**In RE: Student & Reading Public Schools**

**BSEA # 1706923**

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

Parents filed a Hearing Request with the Bureau of Special Education Appeals ("BSEA") on February 21, 2017. On March 6, 2017 Reading Public Schools ("Reading" or "District") filed its *Response to the Parents' Request for Hearing and Motion to Dismiss*. ("Motion"). On March 13, 2017, Parents filed their *Opposition to Reading Public Schools' Motion to Dismiss*. On March 16, 2017, Reading filed *Reading Public Schools' Response to the Parents' Opposition to the District's Motion to Dismiss*. The hearing officer conducted a telephonic motion session on March 31, 2017 at which counsel for both parties argued their respective positions. For the reasons discussed in this *Ruling*, Reading's *Motion to Dismiss* is **GRANTED**.

**PERTINENT FACTUAL BACKGROUND**

For purposes of this *Ruling* the following assertions are considered to be true and construed in favor of the party opposing dismissal, namely, the Parents.

Student is a 17-year-old student with disabilities including specific learning disabilities in the areas of basic reading, reading fluency, and writing. Student also has an attentional disorder, anxiety and depression. The current hearing request is the second that Parents have filed with the BSEA. Parents filed the prior case, BSEA No. 1609401, in 2016. In that case, Parents contested the appropriateness of Reading's IEP covering the period 1/14/15 to 1/14/16 and sought funding for Student's placement as a day student at the Landmark School in Pride's Crossing, MA. On January 3, 2017, after a settlement conference with the BSEA Director, the parties executed a settlement agreement ("Agreement") which resolved BSEA No. 1609401. Both Parties were represented by counsel at all stages of the proceeding, including negotiation and execution of the Agreement. In pertinent part, the Agreement states the following:

1. Subject to the Student's continued enrollment at Landmark, the District agrees to provide an administratively drafted IEP for the 2016-2017 school year, to reflect a change in the Student's placement to placement as a day student at Landmark. The Parents agree to accept this administratively drafted IEP and the Team Determination of Placement within

ten (10) school days of receipt from the District, provided that said IEP is not inconsistent with Student's placement at Landmark's day program for the 2016-2017 school year.

2. ...[T]he district agrees to fund one hundred percent (100%) of the standard applicable public tuition rate for the Student's placement as a day student during the 2016-2017 school year..."
3. The district shall convene a Team Meeting on a mutually convenient date and time on or before May 31, 2017 to develop a proposed IEP for the 2017-2018 school year (the "2017 Team Meeting"), and shall send the Parents...a complete IEP and Placement Consent Form for the 2017-2018 school year. In the event there is a dispute between the parties, Student's stay put shall be the placement determined by the IEP Team at the 2017 Team Meeting...

In addition to the foregoing provisions, the parties also agreed that Parents "remit, release and forever discharge the District" from any legal or equitable claims "relating to Student's educational placement or...services from the beginning of the world to the date of execution of this Agreement." (Agreement, Paragraph 15).

Parents withdrew BSEA No. 1609401 on January 3, 2017. On or about January 30, 2017 Reading issued the administrative IEP referred to in Paragraph 1 of the Agreement. Parents accepted the proposed IEP and placement in full on February 1, 2017.

I note that in December 2016, before the settlement conference took place and before the parties executed the Agreement, Reading had proposed an IEP dated 12/23/16 to 12/22/17 placing Student in the "Bridge Program" within the Reading Public Schools. The record contains no information regarding Parents' response to that IEP, if any. In the current case, Parents allege that this December 2016 – December 2017 proposed IEP, which they believe is inappropriate, is still "on the table."

### **ISSUE PRESENTED**

At issue is whether Parents have failed to state a claim for which relief may be granted because there is not currently a dispute ripe for adjudication by the BSEA.

### **Position of Reading Public Schools**

Reading asserts that this matter is not yet ripe for adjudication. Parents' hearing request disputes the appropriateness of the IEP running from 12/23/16 through

12/22/17. Pursuant to the Agreement of January 2017, this IEP was superseded by the current, accepted IEP for the 2016-17 school year. The Agreement further requires the Team to meet by May 31, 2017 and propose an IEP and placement for 2017-2018. Parents may dispute the proposed 2017-2018 IEP after it is issued; however, unless and until this occurs there is no live controversy before the BSEA.

### **Position of Parents**

Parents contend that the 2016-2017 IEP drafted pursuant to the Agreement expires in June 2017, leaving the 12/23/16-12/22/17 IEP open and in dispute for the period from June 23, 2017 to June 22, 2018.

### **FINDINGS AND CONCLUSIONS**

After reviewing the parties' submissions and hearing oral argument, I conclude that the District's Motion to Dismiss must be GRANTED because there currently exists no dispute between the parties; therefore the BSEA lacks subject matter jurisdiction in this case. My reasoning follows.

The BSEA may dismiss a hearing request because it lacks jurisdiction over the subject matter of the hearing. *Hearing Rules for Special Education Appeals*, Rule XVII.B.1, *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3),<sup>1</sup> Such jurisdiction is defined by both federal and state statutes and regulations. Under the applicable federal provisions, the BSEA has jurisdiction over "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free, appropriate public education to such child..."<sup>2</sup> The Massachusetts special education statute and regulations track the federal language.<sup>3</sup>

In addition to defining the substantive jurisdiction of the BSEA, these statutes and regulations make clear that "any matter" refers to a current, live dispute between and/or among the parties. Thus, the IDEA and corresponding regulations state that a "due process complaint must allege a *violation*..."<sup>4</sup> The Massachusetts statute states "[t]here shall be a [BSEA] which shall provide adjudicatory hearings, mediation and other forms of alternative *dispute resolution...for resolution of disputes*..."<sup>5</sup> Massachusetts regulations state that the BSEA "shall conduct mediations and hearing to resolve...*disputes*."<sup>6</sup> (Emphasis supplied) None of these provisions authorize the BSEA to take jurisdiction over matters in which no dispute or disagreement has arisen, even if a party anticipates a future dispute.

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<sup>1</sup> These provisions are analogous to Rule 12(b)(1) of the Federal and Massachusetts Rules of Civil Procedure.

<sup>2</sup> 20 USC §1415(b)(6)(A); 34 CFR §300.507(a)(1)

<sup>3</sup> MGL c. 71B, §2A(a)(i); 603 CMR §28.08(3).

<sup>4</sup> 20 USC §1415(b)(6)(B); 34 CFR §507(a)(2);

<sup>5</sup> MGL c. 71B, §2A(a)(i)

<sup>6</sup> 603 CMR §28.08(3)

In the instant case, Parents have filed a hearing request seeking an order for a Landmark School placement for Student for 2017-2018. The parties' Agreement explicitly states that Reading is not required to issue a proposed IEP for 2017-2018 until May 31, 2017, at the earliest. At the time Parents filed their hearing request, Reading had not convened a Team meeting or issued an IEP for 2017-2018, and was not required to do so. The only IEP in effect was the 2016-2017 IEP issued by Reading pursuant to the Agreement, and fully accepted by Parents.

This accepted 2016-2017 IEP supersedes all prior IEPs, including—contrary to Parents' assertions to the contrary-- the IEP issued in December 2016. Under the terms of the Agreement, Reading must convene a Team meeting by May 31, 2017 to develop an IEP and placement for 2017-2018. If Parents reject the 2017-2018 IEP after it is issued, they may request a hearing at the BSEA, but they may not seek pre-emptive adjudication of a dispute that they anticipate, but which has not yet occurred.

### **ORDER**

Reading's *Motion to Dismiss* Parent's request for hearing is **GRANTED** without prejudice to the right of Parents to file a hearing request relating to an IEP issued subsequent to expiration of the current, fully-accepted 2016-2017 IEP.

By the Hearing Officer

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Sara Berman

Dated: May 19, 2017

### **EFFECTS OF BUREAU DECISION AND RIGHT OF APPEAL**

Dismissal by the Bureau of Special Education Appeals (BSEA or Bureau) is a final agency action and is not subject to further review by the BSEA. Because 20 U.S.C. Sec. 1415(i)(1)(A) requires the BSEA decision to be final and subject to no further agency review, the BSEA cannot permit motions to reconsider or to re-open a BSEA decision once it is issued. Any party aggrieved by a decision of the BSEA may file a complaint in the Massachusetts Superior Court or in the U.S. District Court for the District of Massachusetts for review of the Bureau's decision. 20 U.S.C. Sec. 1415(i)(2). Any such appeal must be filed within ninety (90) days from the date of the decision. 20 U.S.C. Sec. 1415(i)(2)(B).

