**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Newton Public Schools BSEA # 2208172**

**RULING ON PARENTS’ MOTION TO DISMISS (CONVERTED TO MOTION FOR SUMMARY JUDGMENT)**

This matter comes before the Hearing Officer on Parents’ *Motion to Dismiss (Motion)[[1]](#footnote-1)* filed on April 7, 2022. In it, the Parents argue that the Hearing Officer should “dismiss the request of Newton Public Schools [the District] for a hearing to contest the request of the Parents for an independent educational evaluation (‘IEE’) of [Student], as there is no merit to this request.” Specifically, they assert that the District failed to file its Request for Hearing in a timely manner, and, therefore, as a matter of law, Parents are entitled to an IEE. On April 13, 2022, the District filed *Newton Public Schools’ Opposition to Parents’ Motion for Summary Judgment*[[2]](#footnote-2) (*Opposition)[[3]](#footnote-3).* The District argues that a “genuine issue of disputed material facts” exists, thereby, precluding summary judgment.

Parent requested a hearing on the *Motion*. However, because neither testimony nor oral argument would advance the Hearing Officer’s understanding of the issues involved, this Ruling is issued without a hearing, pursuant to *Bureau of Special Education Appeals Hearing Rule* VII(D).

For the reasons set forth below, the Parents’ *Motion* is hereby ALLOWED.

**PROCEDURAL HISTORY AND RELEVANT FACTS:**

Student is a fourth grade Student attending Burr Elementary School in Newton, Massachusetts. (*Request for Hearing*) The elementary school day hours are from 8:10AM to 2:50PM, Monday through Friday, with the exception of Tuesdays, on which day there is a 12:30PM dismissal. (*Opposition*)

In July and August 2020, the District conducted psychological and academic testing of Student. The psychological evaluation consisted, in part, of the WISC-V, NEPSY-II, ROCF, BRIEF-2, and BASC-3. Academic testing consisted of the WIAT-III, GORT-5, CTOPP-2, and TEWL-3. Student was subsequently found eligible for special education. (*Request for Hearing*)

On March 10, 2022 (Thursday) at 11:35AM, Parents emailed Susan Doyoutas, the Special Education Team Specialist at Burr Elementary School, and requested that the District “fully fund an IEE at full district expense.” Parents declined to share their income with the District. At 2:36PM, Ms. Doyoutas emailed Parents asking them to “specify which evaluations [they were] requesting the IEE in.” At 4:51 PM, Parents responded, “Full neuropsychological testing.” (*Parents’ Exhibit, District’s Exhibit A*)

On March 11, 2022 (Friday), the District’s Assistant Director of Elementary Special Education, Mark Nacht, unsuccessfully attempted to contact Parents via phone. (*District’s Exhibit B*) On March 14, he followed up with an email explaining that Student’s “one and only (initial) evaluation occurred August 2020,” and seeking to “get a better sense of what area(s) [Parents were] most concerned with reassessing and [to] discuss a few options [they could] take.” (*Parents’ Exhibit, District’s Exhibit B*)

On March 15, 2022 (Tuesday), Mr. Nacht and Parents spoke on the telephone. Mr. Nacht explained the IEE process to Parents and offered Parents “the option of an administration by a non-Burr psychologist and special educator from [the District], since they had expressed distrust in the Burr team.” Parents “ended the conversation by stating they would like to take the day to discuss things over before making a final decision regarding their request for an IEE and would get back to [Mr. Nacht] by the end of the day.” (*District’s Exhibit B* )

At 3:56PM on March 15, Parents emailed Mr. Nacht indicating that they “would like to continue with [their] original request for Newton to fully fund an IEE at the [District’s] expense.” They reiterated that they were not sharing their income with the District. Parents also noted that they had hoped the District would agree to the IEE without filing for a BSEA hearing but were “willing to go that route if it [meant] fighting for [Student’s] rights toward appropriate education.” (*Parents’ Exhibit, District’s Exhibit C*)

At 4:16PM on March 15, the Assistant Director of Elementary Special Education responded that he had been “hoping [Parents] would allow [the District] to administer a comprehensive evaluation first as is a district’s right.” He informed Parents that the District would be filing with the BSEA regarding their request that day. (*Parents’ Exhibit, District’s Exhibit C*)

On March 18, 2022 (Friday), the District filed a Request for Hearing asserting that its psychological and academic assessments conducted in 2020 were comprehensive and appropriate. The District also argued that the District has “the opportunity to provide more recent testing prior to being required to fund an IEE.” (*Request for Hearing*)

On April 7, 2022, the Parents filed the instant Motion asserting the District’s filing has no “merit.” (*Motion*) Specifically, they asserted that “Pursuant to the Individuals with Disabilities Act and related federal and state regulations, specifically 34 CFR 300.502(b)(2) and 603 CMR 28.04(5)(d): Newton Public Schools failed to file their request within five school days.” (*Motion*)

On April 10, 2020, the Hearing Officer informed the parties via email that the Motion will converted to a Motion for Summary Judgment. Both parties assented via email, and the Hearing Officer provided the parties with an opportunity to submit additional exhibits.

On April 13, 2022, the District filed its opposition, asserting that a genuine issue of material fact exists as to whether the District filed its Request for Hearing within the requisite statutory time period of Parents’ “unequivocal request for an IEE, and, therefore , summary judgment is precluded.”

**LEGAL STANDARD:**

1. *Legal Standards and Conversion to Motion for Summary Judgment*

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 Rule XVII A and B of the *Hearing Rules* 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.

Unlike a Motion to Dismiss, which requires the fact-finder to make a determination based on a complaint or Hearing Request alone, evaluation of a Motion for Summary Judgment permits the fact-finder to go beyond the pleadings to assess evidence. Rule 12(b) of the Federal Rules of Civil Procedure addresses these circumstances as follows:

"If, on any motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

As noted above, Parents submitted exhibits in support of their *Motion*. Neither party objected to their consideration for purposes of deciding a pre-hearing motion. As such this Hearing Officer informed the parties that the Motion to Dismiss would be treated as a Motion for Summary Judgment, and the parties were given an opportunity to submit further exhibits in light of the change in standard.

1. *Legal Standard for Motion for Summary Judgment*

Pursuant to 801 CMR 1.01(7)(h), summary decision may be granted when there is “no genuine issue of fact relating to all or part of a claim or defense and [the moving party] is entitled to prevail as a matter of law.”[[4]](#footnote-4) As with motions to dismiss, in determining whether to grant summary judgment, BSEA hearing officers are guided by the Federal and Massachusetts Rules of Civil Procedure, herein Rule 56, which provide that summary judgment may be granted only if the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law."[[5]](#footnote-5)

The party seeking summary judgment must first demonstrate, with the support of its documents (pleadings, affidavits, and other evidence), that there is no genuine issue of fact relating to the claim or defense. The moving party bears the burden of proof, and all evidence and inferences must be viewed in the light most favorable to the party opposing summary judgment.[[6]](#footnote-6)

In response to a motion for summary judgment, the opposing party “must set forth specific facts showing that there is a genuine issue for trial.”[[7]](#footnote-7) An issue is genuine if it “may reasonably be resolved in favor of either party.”[[8]](#footnote-8) To survive this motion and proceed to hearing, the adverse party must show that there is “sufficient evidence” in her favor that the fact finder could decide for her.[[9]](#footnote-9) In other words, the evidence presented by the non-moving party “must have substance in the sense that it [demonstrates] differing versions of the truth which a factfinder must resolve at an ensuing trial.”[[10]](#footnote-10) The non-moving party’s evidence will not suffice if it is comprised merely of “conclusory allegations, improbable inferences, and unsupported speculation.”[[11]](#footnote-11)

I next turn to the legal standards regarding IEEs.

1. *Independent Educational Evaluations*

Parents of a child with a disability are entitled to patriciate in the process used to develop the educational plan for the child.[[12]](#footnote-12) To that end, 20 U.S.C. §1415 provides for an “opportunity for parents of a child with a disability to …obtain an independent educational evaluation of the child….” An independent educational evaluation is an evaluation conducted by a qualified examiner not employed by the school district responsible for the student’s education.[[13]](#footnote-13)

In addition, 34 CFR 300.502(b) provides, in pertinent part, that

“(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent education evaluation at public expense, the public agency must, without unnecessary delay, either –

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.”[[14]](#footnote-14)

603 CMR 28.04(5)(d) adds:

“If the parent is requesting an independent education evaluation in an area not assessed by the school district, the student does not meet income eligibility standards, or the family chooses not to provide financial documentation to the district establishing family income level, the school district shall respond in accordance with the requirements of federal law. Within five school days[[15]](#footnote-15), the district shall either agree to pay for the independent education evaluation or proceed to the Bureau of Special Education Appeals to show that its evaluation was comprehensive and appropriate. If the Bureau of Special Education Appeals finds that the school district’s evaluation was comprehensive and appropriate, then the school district shall not be obligated to pay for the independent education evaluation requested by the parent.”[[16]](#footnote-16)

Since the Massachusetts standard provides more protection to parents than the IDEA, the state standard must be applied.[[17]](#footnote-17)

In the absence of guidance in either state or federal regulations regarding computing time for the purpose of BSEA filings, the Hearing Officer looks to Rule 6(a) of the Federal Rules of Civil Procedure to determine how to compute the 5-school day timeline for the purpose of filing BSEA complaints relative to requests for IEEs. Rule 6(a)(1)(A) dictates that when the period is stated in days, the day of the event that “triggers the period” must be excluded. Therefore, for the purpose of determining whether a school district files a request for hearing with the BSEA “within five school days” of a parent’s request for an IEE, the “day that triggers the event” is the day on which the parent makes her request, and such day must be excluded from computing the 5 school-day period.

**APPLICATION OF LEGAL STANDARDS**:

Based on my review of the parties’ submissions and of the relevant statutes and regulations, I conclude that Parents have met their burden to demonstrate that they are entitled to summary judgment. Specifically, Parents demonstrated that there is no dispute that the District failed to file a timely hearing request in response to Parents’ request for an IEE and that, as a matter of law, Parents are entitled to an IEE. My reasoning follows.

The issue before me in this Ruling is whether the District filed its Request for Hearing within 5 school days of the Parents’ request for an IEE.[[18]](#footnote-18) Parents assert that they requested an IEE on March 10, 2022. The District, on the other hand, argues that the request was made, in essence, on March 11, 2022; according to the District, because Parents’ request for an independent neuropsychological evaluation was sent after school hours on March 10, the District received the request on March 11, 2022, and, as a result, “day one of the statutory filing period began on the next school working day, Monday, March 14, 2022. Therefore the fifth …working school day by which [the District] was required to file with the BSEA was Friday, March 18, 2022, the date in which [the District] filed [the] Hearing Request.” (*Opposition*)

Although the District is correct that the day on which an IEE request is made is excluded from computing the 5-school day time period, Parents, in fact, made their IEE request on March 10, 2022 at 11:35AM when they asked Ms. Doyoutas for the District to “fully fund an IEE at full district expense;” not at 4:51PM that day when they clarified that they were seeking a psychological evaluation. (*Parents’ Exhibit, District’s Exhibit A*) Both federal and state law provide that all a parent must do is “disagree[ ] with an evaluation obtained by the public agency.”[[19]](#footnote-19) Once the parent disagrees, the burden automatically shifts to the to either “[f]ile a due process complaint to request a hearing to show that its evaluation is appropriate,” or “[e]nsure that an [IEE] is provided at public expense.”[[20]](#footnote-20)  Parents have no other obligations in the process.

The fact that a district requires additional information or clarification does not affect the timeline which begins “within five school days” of a parent’s initial, written “disagreement” with the school district’s evaluation. Indeed, 34 CFR 300.502(b)(4) states that if “a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.” Therefore, communications between a district and a parent subsequent to a request for an IEE do not “toll” or “restart” the 5-school day filing period.

Because Parents’ request for an IEE was made during school working hours on March 10, 2022, the District’s filing with the BSEA on March 18, 2022 was untimely, as it occurred beyond the 5-school day time period. And, because Parents have demonstrated that there is no dispute that the District failed to file a timely hearing request in response to Parents’ March 10, 2022 request for an IEE, Parents are entitled to an independent neuropsychological evaluation at public expense as a matter of law.

**ORDER**:

Parent’s *Motion* is ALLOWED. Newton Public Schools shall provide Student with an independent neuropsychological evaluation at public expense. The hearing scheduled for May 13, 2022 is hereby cancelled.

So ordered,

By the Hearing Officer,

s/ *Alina Kantor Nir*
Alina Kantor Nir

Date: April 19, 2022

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 in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review. 20 U.S.C. s. 1415(i)(2).

An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

# Confidentiality

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove\_School District v. Pulitzer Publishing*

*Company*, 898 F.2d 1371 (8th. Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

Record of the Hearing

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to federal law, upon receipt of a written request from any party, the Bureau of Special Education Appeals will arrange for and provide a certified written transcription of the entire proceedings by a certified court reporter, free of charge.

1. Parents submitted one exhibit with their *Motion.* [↑](#footnote-ref-1)
2. For the reasons discussed in this Ruling, the *Motion to Dismiss* was converted to a *Motion for Summary Judgment*. [↑](#footnote-ref-2)
3. The District submitted three exhibits with its *Opposition.* [↑](#footnote-ref-3)
4. 801 CMR 1.01(7)(h). [↑](#footnote-ref-4)
5. *Id*. [↑](#footnote-ref-5)
6. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252 (1986); see also In Re: Westwood Pub. Schl., BSEA No. 10-1162 (Figueroa, 2010); In Re: Mike v. Boston Public Schools, BSEA No. 10-2417 (Oliver, 2010); Zelda v. Bridgewater-Raynham Pub. Schl. and Bristol Cty Agricultural Schl., BSEA No. 06-0256 (Byrne, 2006). [↑](#footnote-ref-6)
7. *Anderson v. Liberty Lobby, Inc.* 477 U.S*.* at 250. [↑](#footnote-ref-7)
8. *Maldanado-Denis v. Castillo-Rodriguez,* 23 F.3d 576, 581 (1st Cir. 1994). [↑](#footnote-ref-8)
9. *Anderson*, 477 U.S. at 249. [↑](#footnote-ref-9)
10. *Mack v. Great Atl. & Pac. Tea Co.,* 871 F.2d 179, 181 (1st Cir. 1989). [↑](#footnote-ref-10)
11. *Medina-Munoz v. R.J. Reynolds Tobacco Co.,* 896 F.2d 5, 8 (1st Cir. 1990). [↑](#footnote-ref-11)
12. See 20 USC 1415(b)(1). [↑](#footnote-ref-12)
13. See 34 CFR 300.502(b). [↑](#footnote-ref-13)
14. Similarly, Massachusetts law states that “[u]pon receipt of evaluation results, if a parent disagrees with an initial evaluation or reevaluation completed by the school district, then the parent may request an independent education evaluation.” 603 CMR 28.04(5)(d). (Because Parents refused to share their income with the District, I do not address 603 CMR 28.04(5)(c) in this Ruling.) [↑](#footnote-ref-14)
15. 603 CMR 28.02(5) defines “day”to mean calendar day unless the regulation specifies school day, which shall mean any day, including a partial day, that students are in attendance at school for instructional purposes. Similarly, 34 CFR § 300.11 (a) and (c) include the following relevant definitions:

**(**a) *Day* means calendar day unless otherwise indicated as business day or school day.

(c)

(1) *School day* means any day, including a partial day that children are in attendance at school for instructional purposes. [↑](#footnote-ref-15)
16. 603 CMR 28.04(5)(d) (emphasis added). See also *Letter to Baus*, 65 IDELR 81 (OSEP Feb. 23, 2015) (when an evaluation is conducted in accordance with 34 CFR §§300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs). [↑](#footnote-ref-16)
17. See *Town of Burlington v. Mass. Dept. of Education*, 736 F.2d 773, 792 (1st Cir. 1984). [↑](#footnote-ref-17)
18. See 603 CMR 28.04(5)(d). [↑](#footnote-ref-18)
19. 34 C.F.R. § 300.502(b)(1); see also 603 CMR 28.04(5) (“ Upon receipt of evaluation results, if a parent disagrees with an initial evaluation or reevaluation completed by the school district, then the parent may request an independent education evaluation”) (emphasis added). [↑](#footnote-ref-19)
20. 34 CFR § 300.502(b)(2)(i)–(ii). [↑](#footnote-ref-20)