**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**Student v. the Massachusetts Department of BSEA # 2309949**

**Elementary and Secondary Education**

**RULING ON THE DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION’S MOTION TO DISMISS**

*PROCEDURAL HISTORY*

Parent’s advocate, Tami Joia, filed a Request for Hearing on April 12, 2023. She listed the opposing party as “DESE/PRS SEA Division Of [sic] Administrative Law Appeals Bureau Of [sic] Special Education Appeals.” On the attached fax cover sheet she wrote, “For the record, please do not add additional parties to the Parent’s complaint without the Parent’s knowledge or consent in an effort to change or modify the complaint, which would be a violation of the BSEA.” She further wrote, “In the event Reece Erlichman, BSEA Dir. adds additional parties it will be seen as an effort to derail, modify and protect the SEA, and the parent [sic] exercise of her rights under the law.” Ms. Joia checked the box indicating that she is the attorney for parent/student, but wrote advocate beside her name.

Parent’s Hearing Request essentially seeks to appeal a PRS Letter of Finding issued on April 3, 2023. Parent’s Hearing Request alleges that the Massachusetts Department of Elementary and Secondary Education (DESE) failed to properly investigate and made erroneous findings with respect to Parent’s claims before DESE’s Problem Resolution System (PRS). Parent’s Hearing Request sought the following relief: 1. A “corrective [sic] Letter of Finding Order to nullify the SEA’s PRS #8566 Letter of Findings dated April 3, 2023; 2. An order that the SEA provide a “re-determination that includes the facts, the laws, and the evidence to determine whether the district violated the laws for which the Parent alleged in her complaint and correct the issues in the complaint immediately.”; 3. The Parent is seeking the termination of an employee of PRS; 4. Parent is seeking “that all Paraprofessionals that work in the District that is [sic] receiving school and district wide Title I funds all obtain the necessary state Paraprofessional certification or provide to the state the necessary documents to prove they meet the state’s qualifications pursuant to Title and the State Title I Hiring Requirements as the district is obligated to take the measurable steps to recruit, hire, train, and retain personnel who meet the applicable requirements described.”; 5. Parent is seeking an order that a Westfield Public Schools employee receive “training pursuant to the district receiving Title I funds district wide and targeted assistance.”; 6. Parent seeks an Order that the same Westfield Public Schools employee receive training in the IDEA, Title I, Section 504, and the ADA and that Parent be provided information regarding the training.

*DESE’S POSITION*

DESE argues that Parent’s Hearing Request must be dismissed because the clear and unambiguous language of the Department’s regulations prevent the BSEA from reviewing the investigatory procedures or substance of a compliance determination made by PRS. It argues that the BSEA lacks jurisdiction to review determinations made by DESE’s PRS. It states that neither state nor federal law subjects PRS compliance determinations to review by the BSEA and state regulations prohibit such a review. It points to recent BSEA precedent as support for its position.

*PARENT’S POSITION*

Parent’s argument seems to be that 603 DESE 28.08(2) is inconsistent with the IDEA Part B and denies the Parent the right to dispute the findings of a PRS Letter of finding in “a separate action.” She argues that DESE is a public agency and thus, Parent’s due process complaint disputing the PRS Letter of Finding is “within the Hearing Officer’s jurisdiction and must move forward to ensure that the Parent’s rights to a fair and impartial hearing have been met.” She further argues, based upon the definitions she cites regarding DESE being a public agency, that the BSEA has jurisdiction to hear an appeal of a Letter of Finding. Parent argues that she is filing a due process complaint to “dispute’ not ‘review’” the PRS Letter of Finding. She states that it is the Hearing Officer’s duty to decide whether the SEA impeded the child’s right to a free appropriate public education. Parent notes that this is her third due process complaint against DESE/PRS and all were dismissed under 603 CMR 28.08(2).[[1]](#footnote-1)

*FACTS[[2]](#footnote-2)*

On February 3, 2023, DESE’s PRS received a written statement of concern from Parent and Ms. Joia. On April 3, 2023 PRS issued a Letter of Finding. The Letter of Finding summarized the steps taken by PRS in issuing its findings. The Letter of Finding summarized the concerns raised by Parent, provided conclusions with respect to its findings and contained “Required Corrective Action.” The Letter of Finding informed Parent that the Department does not consider appeals of its decisions. It further informed Parent that for matters involving special education or Section 504, the parties could seek mediation and/or a hearing through the Bureau of Special Education Appeals. It clarified that any hearing would be a new proceeding and would not be for the purposes of reviewing DESE’s decision in that matter. Parent, via her advocate, Ms. Joia, filed a Request for Hearing on April 12, 2023. (See above summary of Parent’s Hearing Request.)

*LEGAL STANDARD*

1. Legal Standard for Motion to Dismiss

 Hearing Officers are bound by the BSEA Hearing Rules for Special Education Appeals (Hearing Rules) and the Standard Rules of Adjudicatory Practice and Procedure, 801 Code Mass Regs 1.01. Pursuant to 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.

To survive a motion to dismiss, there must exist “factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”[[3]](#footnote-3) 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.”[[4]](#footnote-4) These “[f]actual allegations must be enough to raise a right to relief above the speculative level.”[[5]](#footnote-5)

2. Jurisdiction of the Bureau of Special Education

20 U.S.C. § 1415(b)(6) grants the Bureau of Special Education Appeals (BSEA)  jurisdiction over timely filed complaints by a parent/guardian or a school district “with respect to 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.”[[6]](#footnote-6) In Massachusetts, a parent or a school district, “may request mediation and/or a hearing at any time on any matter[[7]](#footnote-7) concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities.”[[8]](#footnote-8) 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….”[[9]](#footnote-9) However, the BSEA “can only grant relief that is authorized by these statutes and regulations, which generally encompasses orders for changed or additional services, specific placements, additional evaluations, reimbursement for services obtained privately by parents or compensatory services.”[[10]](#footnote-10)

*ANALYSIS/CONCLUSIONS*

603 CMR 28.08(2) provides that

…the Department [’s PRS] can make findings on procedural issues and issues related to implementation of requirements.  Any party wishing to file a complaint may do so through the Department. Use of the Department Problem Resolution procedures shall not prevent a party from requesting alternative administrative remedies of mediation or hearing on any matter, at any time.  Copies of the Problem Resolution System Guidelines and Procedures are available from the Department upon request. **Findings and orders** issued by the Department on complaints and the Department’s processing of a complaint **are not reviewable by the Bureau of Special Education Appeals**.  Additionally, the pendency of a complaint before the Department does not make the Department a necessary party to actions on related issues pending before the Bureau of Special Education Appeals. (emphasis added)

Under the above regulation, it is very clear that the BSEA does not have the authority to entertain Parent’s appeal of the PRS Letter of Finding. Parent unpersuasively argues that she is not seeking a review of the PRS Letter of Finding, but is seeking to “dispute” the Letter of Finding. This is a distinction without a difference. She is in fact seeking to appeal the Letter of Finding through the BSEA hearing process, which is not permitted.

This precise issue was recently considered by Hearing Officer Rosa Figueroa in a Ruling on a Motion to Dismiss in *In Re: Brookline Public Schools,* BSEA #2303670 (April 3, 2023).

[T]he language in Massachusetts Special Education Regulation 603 CMR 28.08(2)[[11]](#footnote-11) is clear and unambiguous that findings and orders by DESE’s PRS are not reviewable by the BSEA and that DESE is not a necessary party on related issues pending before the BSEA.[[12]](#footnote-12) DESE’s Department’s Complaint Procedures Guide, parallels the regulation, noting that “PRS findings are final and may not be appealed”. The language in the regulation in effect limits the BSEA’s jurisdiction, prohibiting the BSEA from entertaining claims against DESE on matters that PRS has already issued a finding an order on as well as claims that seek review of a PRS determination or challenge the process PRS follows in issuing a finding and order.[[13]](#footnote-13) Neither regulation 603 CMR 28.08(2) or DESE’s internal procedures document regarding PRS complaints is inconsistent with federal law. See also, *In re: Student v. Medford Public Schools*, BSEA #20-02451 (2020) finding that the PRS complaint process and BSEA hearings are separate and distinct processes and that the determinations of one are not reviewable by the other.

Throughout her Opposition to DESE’s Motion to Dismiss, Parent argues that 603 CMR 28.08(2) violates Part B of the IDEA and federal law in general. She does not provide any authority for this assertion, nor does she cite to a specific law or regulation that she alleges 603 CMR 28.08(2) violates, and I am not aware of any.

It is notable that throughout her fifteen-page hearing request and ten-page opposition to DESE’s Motion to Dismiss, Parent does not mention Student’s needs, strengths and weaknesses or the services she requires. She makes a vague allusion to DESE’s denying FAPE to Student by not providing a mechanism by which Parent can appeal the PRS Letter of Finding, but never mentions what educational services she believes Student requires or has been denied.

Since Parent seeks to appeal a PRS Letter of Finding to the BSEA, an action specifically precluded by 603 28.08(2), she has failed to state a claim on which relief may be granted. As such, DESE’s Motion to Dismiss is ALLOWED.

**ORDER**

DESE’s Motion to Dismiss is ALLOWED. This matter is dismissed *with prejudice*.



Dated: May 11, 2023

COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

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. It is unclear whether it was Parent or her advocate, Tami Joia, who has filed three prior due process complaints regarding this issue. [↑](#footnote-ref-1)
2. The facts are established for purposes of this Ruling only. [↑](#footnote-ref-2)
3. Iannocchino v. Ford Motor Co.,*451 Mass. 623, 636 (2008) (quoting*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).* [↑](#footnote-ref-3)
4. Blank v. Chelmsford Ob/Gyn, P.C*., 420 Mass. 404, 407 (1995).* [↑](#footnote-ref-4)
5. Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted)* [↑](#footnote-ref-5)
6. See 34 C.F.R. §300.507(a)(1). [↑](#footnote-ref-6)
7. Limited exceptions exist that are not here applicable. [↑](#footnote-ref-7)
8. 603 CMR 28.08(3)(a). [↑](#footnote-ref-8)
9. See 29 U.S.C. 794 (Section 504 of Rehabilitation Act); 34 CFR 104, et seq. [↑](#footnote-ref-9)
10. In Re: Georgetown Pub. Sch.*, BSEA #1405352 (Berman, 2014).* [↑](#footnote-ref-10)
11. “Findings and orders issued by the Department on complaints and the Department’s processing of a complaint are not reviewable by the Bureau of Special Education Appeals.” 603 CMR 28.08(2). [↑](#footnote-ref-11)
12. “**Department Procedures.** The Department maintains a Problem Resolution System that provides for the investigation of complaints and the enforcement of compliance with 603 CMR 28.00, as well as with other statutes and regulations relating to the provision of publicly funded education. The Department can make findings on procedural issues and issues related to implementation of requirements. Any party wishing to file a complaint may do so through the Department. Use of the Department Problem Resolution procedures shall not prevent a party from requesting alternative administrative remedies of mediation or hearing on any matter, at any time. Copies of the Problem Resolution System Guidelines and Procedures are available from the Department upon request. Findings and orders issued by the Department on complaints and the Department's processing of a complaint are not reviewable by the Bureau of Special Education Appeals. Additionally, the pendency of a complaint before the Department does not make the Department a necessary party to actions on related issues pending before the Bureau of Special Education Appeals.” 603 CMR 28.08(2). [↑](#footnote-ref-12)
13. See PRS letters of finding and closeout letters including PRS letter to Parent dated August 22, 2022, stating that,

For matters related to special education or Section 504, the parties may seek mediation and/or a hearing through the Bureau of Special Education Appeals (BSEA) on the same issues addressed in this letter. Such a hearing, however, is a new proceeding and is not for the purposes of reviewing the Department’s decision in this matter. Any order or decision issued by the BSA on the issues raised in this complaint would be binding. [↑](#footnote-ref-13)