**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In re: Student v. Newburyport Public Schools BSEA # 2311471, 2401600**

**RULING ON**

**NEWBURYPORT PUBLIC SCHOOLS’ MOTION FOR PARTIAL RECONSIDERATION**

**OF THE DISTRICT’S MOTION TO DISMISS FOR MOOTNESS AND MOTION TO DISMISS FOR LACK OF JURISDICTION**

**AND**

**ON**

**PARENTS’ MOTION TO INCLUDE WITNESSES AND EXHIBITS IN HEARINGS PROCESS**

This matter comes before the Hearing Officer on two motions filed by the parties, respectively. On November 13, 2023,[[1]](#footnote-2) Newburyport Public Schools (District or Newburyport) filed *Newburyport Public Schools’ Motion for Partial Reconsideration of the District’s Motion to Dismiss for Mootness and Motion to Dismiss for Lack of Jurisdiction* (*the District’s* *Motion)* asserting, in part, that adjudicating a Hearing to facilitate one party’s fee claim is an error of law and is contrary to public policy.

Also on November 13, 2023,[[2]](#footnote-3) Parents filed *Parents’ Motion To Include Witnesses And Exhibits In Hearings Process (Parents’ Motion)* requesting that additional “witnesses and exhibits be included at hearing for the issues that remain.”

On November 13, 2023,[[3]](#footnote-4) Parents filed *Parents’ Opposition To Newburyport Public Schools’ Motion For Partial Reconsideration Of The District’s Motion To Dismiss For Mootness And Motion To Dismiss For Lack Of Jurisdiction (Parents’ Opposition)*, asserting, in part, that the instant hearing began on August 7, 2023, and the District’s “offer to resolve issues came long after the hearing actually started.”

On November 13, 2023, the District filed *Newburyport Public Schools’ Objection To Parents’ Motion To Include Witnesses And Exhibits In Hearings Process (District’s Objection)* in which the District “renew[ed] the arguments made in its Motion for Reconsideration of November 11, 2023”, contending, in part, that “there are no witness or documentary evidence Parents could present at Hearing that would be relevant to any actionable claims at the BSEA.”

Neither party has requested a hearing on the *Motions*. 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 *District’s* *Motion* is **DENIED.** *Parents’ Motion* is also **DENIED.**

**RELEVANT FACTS[[4]](#footnote-5) AND PROCEDURAL HISTORY:**

The factual background and procedural history of this matter have been described in detail in my previous published Rulings. I need not repeat them here, except to note that on November 4, 2023 in *Ruling on Newburyport Public Schools’ Motion for Partial Reconsideration of the District’s Motion to Dismiss for Mootness and Motion to Dismiss for Lack of Jurisdiction* , I dismissed the majority of Parents’ claims but concluded that “[a]s the Hearing on Issues #1 through 4 began on August 7, 2023, prior to the District’s offer on October 23, 2023, and, given that Newburyport has not included attorney’s fees as part of [its] settlement offer, the issues which formed the basis of the Hearing which began in August 2023 have not been fully resolved and remain ripe for adjudication.[[5]](#footnote-6)” I also ordered as follows:

“**The Hearing scheduled to continue on November 8, 2023 will proceed on Issues #1-4 ONLY. As such, witnesses not included on the witness list 5 days prior to the start of the Hearing on August 7, 2023 and exhibits not entered into evidence on August 7, 2023 will not be allowed, unless granted permission by the Hearing Officer following a party’s motion thereto.**”

**LEGAL STANDARDS AND DISCUSSION:**

1. **The District’s Motion.**
2. *Legal Standard for Motion for Reconsideration*

BSEA Hearing Rule XII B addresses only the finality of BSEA Decisions, stating that the “Hearing Officer’s decision is the final decision of the BSEA and is not subject to further agency review. Motions to reconsider or to re-open a hearing once a decision has been issued are not permitted.” However, as the Rule is silent as to reconsideration of a Ruling on a Motion to Dismiss, I see no legal impediment to my addressing *the* *District’s Motion*.[[6]](#footnote-7)

1. *Discussion*

The District argues that adjudicating a Hearing to facilitate one party’s fee claim is an error of law, especially as Parents’ FAPE claims that formed the basis for the hearing have been declared moot, unripe, or dismissed for lack of jurisdiction. It argues that federal courts have original and sole jurisdiction over attorney’s fees claims and that the Hearing Officer’s reliance on *In Re: Weston Public Schools (corrected Ruling on Weston Public Schools’ Motion to Dismiss And Decision)*, BSEA #2202541 is misplaced as “BSEA decisions are not precedential or binding” and the current matter is distinguishable as, here,

“the proposal of compensatory services, reimbursement for Parents’ out-of-pocket expenses for privately obtained educational services, and placement in a DESE approved private day school was made through the IEP Team process. These proposals were not made as part of any settlement negotiations nor in consideration for any compromise, such as a waiver of claims or withdrawal of the Hearing Request.

For purposes of argument, even if the District’s proposals could be construed as a ‘settlement offer,’ the proposals were timely because by amending their Hearing Requests on October 26, 2023, the Parents automatically triggered recommencement of the due process timeline under the IDEA.”

The District further contends that adjudicating an IDEA due process claim purportedly to “resolve” an attorney’s fee claim will discourage resolution of disputes prior to litigation and is contrary to public policy.

I note at the outset that although the Hearing Officer cannot award attorney’s fees, a “party to a hearing has the right to obtain written findings of fact and decisions”[[7]](#footnote-8) from the assigned Hearing Officer. In addition, even if the District proposed its offer of compensatory services during an IEP meeting, as opposed to as part of a “settlement offer,” it did so after the start of the Hearing in this matter. As such, both legally and from a public policy standpoint, the Hearing Officer cannot compel Parents to forgo their litigation subsequent to the start of a proceeding.[[8]](#footnote-9)

Moreover, a recalculation of the timelines cannot render the District’s proposal timely; an offer must be “made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an IDEA administrative proceeding, at any time more than 10 days before the *proceeding begins*” (emphasis added).[[9]](#footnote-10) Here, the proceeding began on August 7, 2023.

The District’s argument that “Parents seeking attorney’s fees in future BSEA cases will no doubt be reluctant to resolve cases absent the opportunity to obtain the Bureau’s imprimatur on their claims, regardless of a school district’s proposals at Team meetings, mediations, resolution sessions, or offers of compromise for purposes of settlement” is unpersuasive. Newburyport’s argument fails to acknowledge the distinguishing factor in this case, which is that the instant “proceeding” has “begun.”

1. **Parents’ Motion.**

According to BSEA *Hearing Rule VIII*, also titled the Five Day Rule, “[c]opies of all documents to be introduced (exhibits) and a list of the witnesses to be called at the hearing must be received by the opposing party (ies) and the Hearing Officer at least five (5) business days prior to the hearing unless otherwise allowed by the Hearing Officer.”[[10]](#footnote-11) In addition, the Hearing Officer may “require any party to submit additional evidence on any relevant matter.”[[11]](#footnote-12)

Here, Parents request that 6 witnesses and 19 exhibits be added for the Hearing which is scheduled to continue on Friday, November 17, 2023. They argue that

“All exhibits were either produced by the District or the Parents and are already part of the administrative record. There are no surprises to their existence or use in the hearing under consideration. Likewise, the witnesses are known and their testimony, as noted, is relevant to the issues still under consideration by the BSEA. Both an updated witness list and second exhibit book was provided to the Hearing Officer and District on October 31, 2023.”

The November 4, 2023 Ruling ordered that “**witnesses not included on the witness list 5 days prior to the start of the Hearing on August 7, 2023 and exhibits not entered into evidence on August 7, 2023 will not be allowed**” to be presented when the Hearing continues on November 17. The Hearing in this matter began on August 7, 2023. As Parents are represented by counsel and have been for the duration of this appeal, they have had sufficient time to plan their litigation strategy, including their witnesses and exhibits. That the “existence” of such witnesses and documents is not a “surprise” does not deflect from Parents’ failure to present both witnesses and exhibits 5 days prior to the start of the proceeding on August 7, 2023. I also note that the parties were allowed to provide an “updated witness list and second exhibit book” in anticipation of the additional claims which were to be litigated when the Hearing resumed. Such claims have since been dismissed. Therefore, Parents’ request to amend both their witness list and exhibits is without good cause and is DENIED.

**ORDER:**

The *District’s* *Motion* is hereby **DENIED.** *Parents’ Motion* is also hereby **DENIED.**

By the Hearing Officer:

/s/ Alina Kantor Nir

Alina Kantor Nir
Dated: November 14, 2023

**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. The District’s Motion was filed on Saturday, November 11, 2023, but is deemed to have been filed on the next business day, November 13, 2023. [↑](#footnote-ref-2)
2. Parents’ Motion was filed on Saturday, November 11, 2023, but is deemed to have been filed on the next business day, November 13, 2023. [↑](#footnote-ref-3)
3. Parents’ Opposition was filed on Sunday, November 12, 2023, but is deemed to have been filed on the next business day, November 13, 2023. [↑](#footnote-ref-4)
4. The statement of facts is prepared principally in order to rule on the Motions. [↑](#footnote-ref-5)
5. See *In Re: Weston Public Schools (Corrected Ruling On Weston Public Schools' Motion To Dismiss And Decision),* BSEA # 2202541 (Figueroa, 2021) (“While in retaining counsel Parents must generally have an expectation of paying fees to obtain a desired result, here, Weston must have known that failing to make an offer of settlement at least 10 days before the Hearing per 20 USC 1415 (i)(3)(D)(i), inclusive of attorney's fees would not fully resolve the dispute between the Parties. While well intended, Weston's offer of settlement, which Parents rejected, was too little, too late, and left the door open for Parents to try their case before the BSEA, a forum that has jurisdiction over procedural and substantive violations of the IDEA and the Massachusetts Special Education Law. The dispute between the parties not having been fully resolved, Parents were entitled to proceed to Hearing”). [↑](#footnote-ref-6)
6. I note, nevertheless, in this regard, that the November 4, 2023 Ruling was dispositive, and nevertheless considered a final agency action, with respect to those claims dismissed. [↑](#footnote-ref-7)
7. See *El Paso Indep. Sch. Dist. v. Richard R*., 591 F.3d 417, 423 (5th Cir. 2009) (“despite the fact that the administrative hearing officer does not have the authority to award attorney's fees,” an “administrative hearing officer's order provides the requisite ‘judicial imprimatur’ for a party to be considered a ‘prevailing party’ for attorney's fee purposes”). [↑](#footnote-ref-8)
8. *Rena C. v. Colonial Sch. Dist.,* 890 F.3d 404, 419–20 (3d Cir. 2018) (“We do not read the IDEA to force parents to decide between the resolution of a placement dispute and paying for the attorney who assisted in achieving [resolution]. A school district seeking to settle a dispute in which a lawyer has been involved should acknowledge that the parent has accrued attorney's fees and should clearly state if its offer includes the payment of any fees”; see also *Duane M. v. Orleans Parish Sch. Bd.,* 861 F.2d 115, 120 (5th Cir.1988) (“The legislative history of section 1415[ ] reflects Congress' unequivocal intent to award attorneys' fees to parents for legal representation at due process hearings which the [IDEA] requires”); Gary G. v. El Paso Indep. Sch. Dist., 632 F.3d 201, 210 (5th Cir. 2011) (whether plaintiff is substantially justified in rejecting a settlement offer because it does not include attorney’s fees depends on the specific facts of the case). [↑](#footnote-ref-9)
9. 34 CFR330.517 (c)(2)(1)(C). [↑](#footnote-ref-10)
10. See also BSEA Hearing Rule X(A)(6) (each party has the right to “request that the Hearing Officer prohibit the introduction of any evidence at the hearing that has not been disclosed to the parties at least five (5) business days before the hearing”). [↑](#footnote-ref-11)
11. BSEA Hearing Rule IX(C)(6). [↑](#footnote-ref-12)