**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

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

**RULING ON NEWBURYPORT PUBLIC SCHOOLS’ PARTIAL MOTION TO DISMISS CLAIMS**

This matter comes before the Hearing Officer on Newburyport Public Schools’ (District or Newburyport) August 1, 2023 *Newburyport Public Schools’ Partial Motion to Dismiss Claims* (*Motion*), in which the District asserts that the BSEA lacks jurisdiction over several of Parents’ claims. On August 3, 2023, Parents responded with their objections to dismissal of their claims.

Neither party has requested a hearing on the *Motion*. 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 hereby **ALLOWED, in part, and DENIED, in part.**

**RELEVANT FACTS[[1]](#footnote-2) AND PROCEDURAL HISTORY:**

1. Student is a 15-year-old resident of Newburyport, Massachusetts, who is currently receiving home-based non-educational services through insurance after she was unilaterally removed by Parents from her placement at Legacy by Gersh/Crotched Mountain (hereinafter, Legacy) in July 2022 where she had been placed by the District on November 29, 2021, pursuant to a fully accepted IEP. She is diagnosed with Autism Spectrum Disorder, Epilepsy, and Attention Deficit Hyperactivity Disorder (ADHD).
2. Prior to said placement, on September 2, 2021, the parties participated in a mediation relative to past payment for a home-based program and prospective placement. The parties executed an agreement relative to September 2021 only, and referral packets were sent to proposed day placements.
3. On September 14, 2021, Parents submitted a public records request to the District to obtain funding records for Student’s education.
4. On September 27, 2021, the District provided public records to Parents including spreadsheets for Student’s educational spending. According to Parents, only general information was provided, and none was specific to Student.
5. On September 30, 2021, the parties participated in another mediation, but no agreement was reached.
6. On October 12, 2021, the District notified Parents that the District would not reimburse certain payments for home programming as the agreement relative to such reimbursements expired on September 30, 2021.
7. The parties agree that Legacy is Student’s “stay-put” placement.
8. While at Legacy, Student’s behaviors increased, as did instances when Student sustained injuries from other students.
9. On February 1, 2022, the Team met over Zoom to discuss behavior support for Student. At the Team meeting, the BCBA left the meeting early without explanation. Parents also expressed concern that the BCBA support offered to Student would be fully remote.
10. On February 7, 2022, the District sent Parent a draft amendment to the IEP, to which Parent consented on February 14, 2022.
11. On May 13, 2022, the Team convened for an annual review, and the District proposed an IEP designating Legacy as the placement. The District endorsed a residential placement for Student based on the Team’s recommendations. Parents requested a day program. The Team agreed to reconvene in July 2022 to discuss the Student’s transition to a residential program in the fall of 2022.
12. Following the Team meeting, the District proposed an IEP dated May 13, 2022, to May 12, 2023, and a private day placement at Legacy. Parents partially rejected the IEP on or about June 23, 2022, and did not indicate a response to the proposed placement.
13. On or about May 23, 2022, the parties entered into a Settlement Agreement which included a release of any and all claims the Parents had or may have against the District through the date of execution of the Agreement.[[2]](#footnote-3)
14. During Student’s tenure at Legacy, Parents became increasingly concerned over Student’s increased behaviors as well as by reports of Student being injured by other students.
15. On May 31, 2022, Parents proposed an independent BCBA observation, to which the District agreed.
16. On June 23, 2022, Parents sent the District the independent BCBA report.
17. On June 30, 2022, Parents rejected the placement at Legacy, and, on or about July 5, 2022, Parents unilaterally removed Student from her agreed upon program and placement at Legacy.
18. On July 8, 2022, a mediation was scheduled for July 26, 2022.
19. On July 11, 2022, Parents submitted a public records request to the District for a copy of all expenditures including, but not limited to, tuition, any IEP services, room and board and reimbursements, for Student expended during Fiscal Year 2022 during her placement at Legacy and proposed and budgeted as of school committee and city council votes for Fiscal Year 2023.
20. On August 15, 2022, the District responded to the public records request which was dated July 26, 2022.[[3]](#footnote-4)
21. On August 16, 2022, after reviewing the District's response to the July 11 public records request, Parents learned that all individuals and/or providers were paid on June 6, 2022 in accordance with the May 23, 2022 settlement agreement, save for Parents, who had also expected to be paid.
22. In the fall of 2022, the District reaffirmed that it would provide Student with her "stay put" placement. The District also offered to send formal referral packets to May Center, Melmark, and New England Center for Children (NECC). Parents consented to referral packets for Melmark and NECC.
23. Following a failed mediation, on October 5, 2022, Parents submitted another public records request for all receipts for expenditures including, but not limited to, tuition, any IEP services, room and board and reimbursements, for Student's placement at Legacy by Gersh (from November 29, 2021 to June 17, 2022) as they found the District's response to their previous request for such records incomplete. Parents also requested any and all Fiscal Year 2023 receipts for expenditures for Student as a resident student in the Newburyport Public Schools.
24. On October 20, 2022, Parents received a response to the October 5, 2022 public records request, but the District's response included bills received, not bills expended upon.
25. On November 14, 2022, Parents submitted a third public records request to the District for: 1. All expenditures including, but not limited to, tuition, any IEP services, room and board and reimbursements, for Student expended during Fiscal Year 2022 during her placement at Legacy; 2. Any proposed or voted final budget reports before Newburyport School Committee and Newburyport City Council on the budget for an educational placement at Legacy for Fiscal Year 2023 and the number of Newburyport resident students placed at Legacy; 3. And, a specific dollar amount of funds expended during FY23 for the education of Student with receipts to coincide with those expenditures.
26. On November 14, 2022, Parents submitted a complaint to Problem Resolution Systems, Department of Elementary and Secondary Education (DESE).
27. On November 29, 2022, the District responded to Parents' November 2022 public records request, stating that the “District previously provided you with all documents responsive to your request that are currently in the district's possession, custody, and/or control, on or about October 20, 2022."
28. On November 29, 2022, Parents filed an appeal with the Secretary of State for the Commonwealth of Massachusetts, requesting that the District fulfill the public records requests for receipts of actual expenditures for Student’s education (i.e., not just proof that the bills were received).
29. On December 14, 2022, the Secretary of State determined that the District must submit additional records in response to Parents' public records requests within ten business days.
30. From July 2022 to December 2022, Student was provided with BCBA support and a 1:1 aide to provide some educational services not covered by insurance for a maximum of 12 hours/week when staff was available, this at cost to Parents. Parents also taught Student until October 2022, limited to fill-in services while ABA services increased due to provider availability.
31. In January 2023, Student’s insurance began to cover Student’s ABA services so that Parents were no longer incurring the expense of BCBA/ABA support. All ABA services were provided at home with a parent present at all times, as required by insurance.
32. On January 5, 2023, the District provided Parents with additional student records, but these records again included bills that were marked received as opposed to proof of expenditure for Student’s stay-put placement.
33. On January 23, 2023, the Secretary of State determined that the District had fulfilled the Parents' Public Records Request. Parents responded that they were

“looking for proof of payment/expenditure that is a document in the normal course of business that shows a stamp of ‘approved by school committee,’ a hand-written purchase order (PO) number, as well as a sticker produced by the school on the same document that shows the PO#, date, check number, etc. as shown on the provided example. This document is produced within 2-3 weeks of receipt of a bill in this district. As a normal course of business, this document should be readily available."

1. On January 24, 2023, a Team meeting was held to review the June 2022 BCBA Observation Report. Staff from Student’s stay-put placement (now, as a result of a change of management and ownership, Seven Hills) were not present. According to Parents, the District did not allow the author of the BCBA observation report to complete her narrative and recommendations at the meeting.
2. On February 13, 2023, the Secretary of State determined that the District had “no proof of payment and expenditure records in its possession."
3. On March 3, 2023, Parents sent an Authorization for Release of Information to day placements that could transition Student to residential setting in the future. As such, Parents were seeking and agreeable to day placement options within commuting distance of Student's home. Parents also requested to review the referral packets.
4. Parents considered Seven Hills (previously, Legacy) as a placement for Student but believe that it remains inappropriate. Additionally, according to Parents, Newburyport has not reserved Student’s stay-put placement at Seven Hills by paying for said placement.
5. On March 23, 2023, Parents received an email from the District including the referral packet which had already been sent to proposed placements without Parents' review. To date, Parents have not received an update from Newburyport on responses to these packets.
6. On May 18, 2023, Parents filed a Hearing Request in the instant matter[[4]](#footnote-5) asserting the following issues for Hearing:[[5]](#footnote-6)
	* 1. Whether District failed in oversight to provide a FAPE to Student while Student attended Legacy?
		2. Whether District failed in its duty to act to provide a FAPE to Student when presented with an independent BCBA observation report in June 2022 to still not providing education services to Student at present?
		3. Whether the District wrongly, repeatedly and fraudulently, stated it was paying Student's stay-put placement, when in fact District was not paying for the placement but repeatedly requested Student go back to placement?
		4. Whether the District was deliberately indifferent, the conscious or reckless disregard of the consequences of one's acts or omissions, to the Student and Parent's due process rights and the Student's right to FAPE amounting to harm to Student and Family by: blatantly ignoring the BCBA observation report received by the District in June 2022 observing Student not receiving FAPE in stay-put placement at then-Legacy by Gersh; the lack of oversight in support to protect Student with notification of numerous incident reports; the District not inquiring about Student whom to the District's knowledge was without a placement for more than 90 days to first meeting with new District personnel; the District's two-month delay to a scheduled mediation; the District's lack of good faith at mediation to resolve both issues; the District's unilateral postponement of the IEP meeting to six months later; the District's denial of meaningful participation to Parents by the District not inviting stay-put placement (formerly Legacy and at the time, Seven Hills) to an IEP meeting while the District continued to propose the placement at the same meeting; the District's egregious misrepresentations and omissions in the N1 of January 24, 2023 IEP meeting; the District's two misleading public records request responses asking only for expenditures requiring Parents' appeal to the Secretary of State, then again the District's additional misleading response to the appeal for records to the Secretary of State requesting; District's lack of good faith to continue a previous settlement agreement when a change of director/district representative occurred at the District and the school district's attorney remained the same throughout?
		5. Whether the District's lack of action in these claims and inclusive of the facts contained herein, determined to be deliberate indifference or not, amount to retaliatory action given the number of procedures before the BSEA in most recent years and the harm to Student and Family?
		6. Whether District failed in its duty to reserve Student's stay-put placement while continually requesting that Student return to placement, with deliberate indifference or not, to Student's needs?
		7. Whether the District denied Parents/Student meaningful participation during the January 24, 2023, IEP meeting; and whether this IEP meeting's subsequent N1 written by the District contains egregious misrepresentations and/or omissions and those misrepresentations and/or omissions impede Student's and Parents' rights?
		8. Whether District disregarded and/or violated public records law in responses to both the Parents and Secretary of State when District did not submit proof of expenditures in District's responses as specifically asked in the Parents' public records request and Secretary's determinations; and whether the District's disregard and/or violation amounted to deception that resulted in financial gain of the District instead of expenses of the Student's education causing harm to Student and Family?
7. Parents sought the following relief:
	1. Non-retaliatory and non-discriminatory partnership with District to provide services to Student that District is legally required to provide Student until age 22;
	2. An interim home-based program supported by District inclusive of staff and adequate funding for Student until a permanent day placement can be found;
	3. A brick-and-mortar day placement, a least restrictive environment with appropriately trained staff including behavior support/ABA for Student’s unique needs;
	4. Compensatory services for the time that Student was not provided with a FAPE inclusive of Student’s placement at Legacy and the June 2022 observation report; Compensatory damages; Attorney's fees;
	5. A declaration of procedural and substantive violations in this matter; and
	6. All other remedies available pursuant to the Code of Massachusetts Regulations Chapter 603, Section 28.00, the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq., Chapter 766 of the Acts of 1972, M.G.L. c. 71B, Section 504 of the Rehabilitation Act of 1972, 29 U.S.C. 794, 34 C.F.R. Part 104; and Title II of Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. and Civil Action for Depravation of Rights, 42 U.S.C. §1983, The Fourteenth Amendment, and applicable contract law.
8. On August 1, 2023, the District filed the instant Motion asserting that

“The Bureau's jurisdiction is limited to findings of fact and equitable remedies under the Individuals with Disabilities Act (IDEA)1 and M.G.L. c. 71B. There is no statutory authority or regulatory scheme whereby a BSEA Hearing Officer can make findings of fact and award relief for claims of ‘deliberate indifference,’ ‘fraud,’ '’retaliation,’ ‘discrimination,’ and the like. As the United States Supreme Court recently made clear in *Perez v. Sturgis Public Schools*, … if there is a claim of a denial of a free appropriate public education (FAPE), the FAPE claim and any potential equitable remedies must be addressed administratively first. However, the exhaustion of administrative remedies requirement does not mean Parents can ‘back-door’ findings of fact on damages claims under the auspices of a FAPE claim before an agency that has no authority to award relief for such claims. To do so would amend the Bureau's statutory authority, contravening the limits of the Bureau's jurisdiction under the IDEA and state law. As the Court in Perez further notes, there is no bar to the Parents pursuing their non-FAPE claims in a court of competent jurisdiction after their FAPE claims are administratively addressed.

Additionally, as stated in the District's Response to the Parents' Hearing Request, the District does not waive its right to due process, including but not limited to its right to a jury trial on the parents' claims that are outside the scope of allowable (i.e., FAPE) claims set forth in the IDEA.

Similarly, there is no allowable remedy the Bureau can order under the Massachusetts Public Records Law….

… [T]he Parents and the District entered into an agreement on May 23, 2022, whereby the Parents and Student released all claims to date. Accordingly, the Parents/Student are precluded from asserting any claims prior to May 23, 2022.

The issues for Hearing that the BSEA has jurisdiction to decide are:

1. Whether the May 2022-May 2023 IEP proposed by the District offered the Student FAPE;

2. Whether the District offered the Student the opportunity to ‘stay-put’ in her last agreed upon placement from on or about July 1, 2022, when the Parents removed her from school; and

3. Whether the District's offer of a prospective residential placement offers the Student FAPE, whether required for substantive reasons or due to proximity between home and school.”

**LEGAL STANDARDS:**

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, which require the fact-finder to make a determination based on a complaint or hearing request alone.

To survive a motion to dismiss, there must exist “factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”[[6]](#footnote-7) 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.”[[7]](#footnote-8) These “[f]actual allegations must be enough to raise a right to relief above the speculative level.”[[8]](#footnote-9)

1. *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."[[9]](#footnote-10) In Massachusetts, a parent or a school district, "may request mediation and/or a hearing at any time on any matter[[10]](#footnote-11) 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.”[[11]](#footnote-12) 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….”[[12]](#footnote-13) 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."[[13]](#footnote-14)

BSEA jurisdiction extends to IDEA-based claims as well.[[14]](#footnote-15) The First Circuit held, in a case addressing exhaustion of claims filed under 42 U.S.C. § 1983, that the BSEA is not deprived of jurisdiction by the fact that certain claims are not based directly upon violations of the Individuals with Disabilities Education Act (IDEA), nor by the fact that the relief a complainant seeks cannot be awarded by the agency. The IDEA’s exhaustion requirement ensures that the BSEA is able to develop a factual record and apply its “specialized knowledge” in an IDEA-based claim.[[15]](#footnote-16) The IDEA’s exhaustion requirement “applies even when the suit is brought pursuant to a different statute so long as the party is seeking relief that is available under subchapter II of IDEA.”[[16]](#footnote-17) However, in *Fry v. Napolean Community Schools*, 137 S.Ct. 743, 752 (2017), the U.S. Supreme Court held that “exhaustion is not necessary when the gravamen of the plaintiff’s suit is something other than the denial of the IDEA’s core guarantee – what the Act calls a ‘free appropriate public education.’” Whether a claim is IDEA-based turns on whether the underlying claim is one of violation of the IDEA, or “where there are no factual allegations to indicate that a dispute exists concerning the individual student’s eligibility under the IDEA or Section 504 or the discharge of the School’s procedural and substantive responsibilities under the IDEA or [Section 504 of the Rehabilitation Act of 1973].”[[17]](#footnote-18) In a recent decision, t *Perez v. Sturgis Public Schools*, 123 LRP 10045 (03/21/23), the Supreme Court ruled that Section 504 and ADA Title II claims for money damages are exempt from IDEA's exhaustion requirement.

**APPLICATION OF LEGAL STANDARDS:**

In evaluating the District’s Motion to Dismiss under the **LEGAL STANDARDS** set forth supra, I must take the allegations in Parents’ Hearing Request as true as well as any inferences that may be drawn from them in their favor, and must deny dismissal if these allegations plausibly suggest an entitlement to relief. [[18]](#footnote-19)

*1. Claims ii, iv (in part), vi, and vii survive dismissal.*

As explained in the **LEGAL STANDARDS** section *supra,* the BSEA has jurisdiction over IDEA and IDEA-based claims. As such, the issue of whether the District failed to consider and implement the recommendations of the independent BCBA observation report in June 2022 for the 2022-2023 school year (Claim ii[[19]](#footnote-20)) is within the BSEA’s jurisdiction and **SURVIVES** dismissal.[[20]](#footnote-21)

Similarly, Parents’ claim that the District failed to offer the Student the opportunity to ‘stay-put’ in her last agreed upon placement from on or about July 1, 2022 (Claim vi) **SURVIVES** dismissal[[21]](#footnote-22) as does Parents’ claim that the District denied Parents/Student meaningful participation during the January 24, 2023, IEP meeting and that this IEP meeting's subsequent N1 written by the District contained egregious misrepresentations and/or omissions and those misrepresentations and/or omissions impeded Student's and Parents' rights (Claim vii[[22]](#footnote-23)).

Moreover, to the extent that Parents assert in claim iv that the District failed to offer Student a FAPE in the LRE during the 2022-2023 school year by “blatantly ignoring the BCBA observation report received by the District in June 2022”; failing to inquire “about Student whom to the District's knowledge was without a placement for more than 90 days to first meeting with new District personnel”; delaying “a scheduled mediation” by “two months”; unilaterally postponing the IEP meeting by six months; denying Parents of meaningful participation to Parents by “not inviting stay-put placement (formerly Legacy and at the time, Seven Hills) to an IEP meeting while the District continued to propose the placement at the same meeting”, such claim **SURVIVES** dismissal.[[23]](#footnote-24)

In addition, Parents’ claims that (1) the District acted with “deliberate indifference, [or] the conscious or reckless disregard of the consequences of one's acts or omissions, to the Student and Parent's due process rights and the Student's right to FAPE amounting to harm to Student and Family” through the actions or lack-thereof described above (Claim iv, in part) and (2) that “with deliberate indifference or not, to Student's needs” the “District failed in its duty to reserve Student's stay-put placement while continually requesting that Student return to placement” (Claim vi) are IDEA-based. Specifically, the “gravamen” of Parents’ claims is “the denial of the IDEA’s core guarantee – what the Act calls a ‘free appropriate public education.’”[[24]](#footnote-25) Here, Parents assert “factual allegations to indicate that a dispute exists concerning the [Student’s rights] under the IDEA [and] the discharge of the School’s procedural and substantive responsibilities under the IDEA”[[25]](#footnote-26) (i.e., consideration by the Team of a private report, overseeing private placement funded at public expense, provision of a FAPE, timely invitation to timely Team meetings, meaningful parental participation, right to stay-put, and provision of prior written notice). Although Parents seek “compensatory damages” which the Hearing Officer has no authority to award, they also ask that the BSEA order “an interim home-based program supported by District inclusive of staff and adequate funding for Student until a permanent day placement can be found,” a “brick-and-mortar day placement, a least restrictive environment with appropriately trained staff including behavior support/ABA for Student’s unique needs,” compensatory services, and a declaration of procedural and substantive violations in this matter, all of which are available as relief at the BSEA.[[26]](#footnote-27) As such, these claims **SURVIVE** dismissal.

By way of summary, to the extent that Parents assert that the District failed to offer Student a FAPE in the LRE by “blatantly ignoring the BCBA observation report received by the District in June 2022”; failing to provide “oversight in support to protect Student with notification of numerous incident reports”; failing to inquire “about Student whom to the District's knowledge was without a placement for more than 90 days to first meeting with new District personnel”; unilaterally postponing the IEP meeting by six months; denying Parents of meaningful participation by “not inviting stay-put placement (formerly Legacy and at the time, Seven Hills) to an IEP meeting while the District continued to propose the placement at the same meeting”; and/or misrepresenting and omitting information in the N1 for January 24, 2023 IEP meeting [[27]](#footnote-28) (claim iv, in part), such claim is within the BSEA’s subject matter jurisdiction[[28]](#footnote-29) and **SURVIVES** dismissal[[29]](#footnote-30).

*2. Claims i, iii, iv (in part only), v, and viii are hereby dismissed.*

Parents’ claims that the District failed to offer Student a FAPE during the 2021-2022 school year by failing to provide appropriate “supervision” over Legacy during that period (Claim I and Claim iv, in part) were subject to Parents’ release of any and all claims prior to May 23, 2022, which was the date that the parties executed their Settlement Agreement. Hence, even if I take Parents’ allegations as true and draw all inferences in their favor as I am required to do, I could not offer them any relief for this claim. Therefore, Claim i must be **DISMISSED** with prejudice.[[30]](#footnote-31)

Parents argue that their claim relative to the District’s “fraudulent” actions (Claim iii) is within the Hearing Officer’s jurisdiction as it “goes to the credibility of the District in all respects within the scope of the hearing.” However, there is a distinction between asking the Hearing Officer to make credibility findings as to testimony and documentary evidence with regard to issues within the jurisdiction of the BSEA and asking her to make findings, such as here, relative to fraud. Here, Parents’ claim relative to the District’s “fraudulent” actions is not within the jurisdiction of the BSEA,as nothing in the pertinent federal or Massachusetts laws and regulations grants the BSEA authority to hear matters concerning allegations of fraud.[[31]](#footnote-32) Therefore, this claim must be **DISMISSED** with prejudice.[[32]](#footnote-33)

Parents’ claims that the District did not mediate in good faith (Claim iv, in part) and Newburyport failed “to continue” a previous settlement agreement (Claim iv, in part) are also **DISMISSED** with prejudice for lack of subject matter jurisdiction.[[33]](#footnote-34)

Relative to Claim v, Parents assert that it “is likely a matter for a different venue, but under *Perez*, we protected our rights relating to exhaustion of administrative remedies; if it is your decision to not address this issue, then we would argue that your decision should reflect that exhaustion of administrative remedies on this issue is not required to address this question in a different legal venue that is not administrative.” The BSEA lacks jurisdiction over Parents’ claim of retaliation (Claim v). Not only is the BSEA limited in the relief it can offer and has no authority to order a “[n]on-retaliatory and non-discriminatory partnership with District to provide services to Student that District is legally required to provide Student until age 22”[[34]](#footnote-35), but also Parents do not assert that their retaliation claim is connected to the provision of a FAPE to Student, and, as such, the BSEA has no jurisdiction over said claim[[35]](#footnote-36). Therefore, this claim must be **DISMISSED** with prejudice.

Nor does the BSEA have any jurisdiction over Parents’ claims relative to “the District's two misleading public records request responses asking only for expenditures requiring Parents' appeal to the Secretary of State, then again the District's additional misleading response to the appeal for records to the Secretary of State requesting expenditures to later provide an answer of no expenditures for said Student five months later”[[36]](#footnote-37) (Claim viii) or the “District's lack of good faith to continue a previous settlement agreement when a change of director/district representative occurred at the District and the school district's attorney remained the same throughout”[[37]](#footnote-38) (claim iv, in part), and such claims must be **DISMISSED** with prejudice.

**ORDER:**

The District’s Motion is hereby **ALLOWED, in part, and DENIED, in part.**

Specifically, the following claims are **DISMISSED WITH PREJUDICE:**

* + 1. Whether District failed in oversight to provide a FAPE to Student while Student attended Legacy?
		2. Whether the District failed to offer Student a FAPE during the 2021-2022 school year?
		3. Whether the District failed to mediate in good faith?
		4. Whether the District failed “to continue” a previous settlement agreement?
		5. Whether the District wrongly, repeatedly and fraudulently, stated it was paying for Student's stay-put placement, when in fact District was not paying for the placement but repeatedly requested Student go back to placement?
		6. Whether the District's lack of action in Parent’s claims determined to be deliberate indifference or not, amount to retaliatory action given the number of procedures before the BSEA in most recent years and the harm to Student and Family?
		7. Whether District disregarded and/or violated public records law in responses to both the Parents and Secretary of State when District did not submit proof of expenditures in District's responses as specifically asked in the Parents' public records request and Secretary's determinations; and whether the District's disregard and/or violation amounted to deception that resulted in financial gain of the District instead of expenses of the Student's education causing harm to Student and Family?

The following claims **SURVIVE** dismissal and will be address at the Hearing scheduled to begin on August 7, 2023:

1) Whether the District failed to offer Student a FAPE in the LRE during the 2022-2023 school year by “blatantly ignoring the BCBA observation report received by the District in June 2022”; failing to inquire “about Student whom to the District's knowledge was without a placement for more than 90 days to first meeting with new District personnel”; unilaterally postponing the IEP meeting by six months; denying Parents of meaningful participation by “not inviting stay-put placement (formerly Legacy and at the time, Seven Hills) to an IEP meeting while the District continued to propose the placement at the same meeting”; and/or misrepresenting and omitting information in the N1 for January 24, 2023 IEP meeting; and, if so, whether the District acted with deliberate indifference in violation of Section 504 of the Rehabilitation Act?

2) Whether the District failed to offer Student the opportunity to ‘stay-put’ in her last agreed upon placement from on or about July 1, 2022, when the Parents removed her from Legacy?

3) Whether the District denied Parents/Student meaningful participation during the January 24, 2023, IEP meeting; and whether this IEP meeting's subsequent N1 written by the District contains egregious misrepresentations and/or omissions and those misrepresentations and/or omissions impede Student's and Parents' rights?

4) If the answer to either/and/or (1), (2) and (3) is in the affirmative, what is the appropriate remedy? and,

5) Whether the District's offer of a prospective residential placement offers Student FAPE, whether required for substantive reasons or due to proximity between home and school?

By the Hearing Officer:

/s/ Alina Kantor Nir

Alina Kantor Nir
Dated: August 4, 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 statement of facts is prepared principally in order to rule on the District’s *Motion to Dismiss*. For this purpose, I consider the factual allegations in the Hearing Request to be true, as well as all reasonable inferences in Parents’ favor. [↑](#footnote-ref-2)
2. This agreement was in resolution of BSEA # 2205014. [↑](#footnote-ref-3)
3. On August 1, 2022, a new Director of Student Services began his tenure in the District. [↑](#footnote-ref-4)
4. On May 18, 2023, the Director of the Bureau of Special Education Appeals determined that matter did not meet the standard for an accelerated hearing. [↑](#footnote-ref-5)
5. These are the issues as identified by Parents in the Hearing Request. [↑](#footnote-ref-6)
6. *Iannocchino v. Ford Motor Co.,* 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). [↑](#footnote-ref-7)
7. *Blank v. Chelmsford Ob/Gyn, P.C*., 420 Mass. 404, 407 (1995). [↑](#footnote-ref-8)
8. *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted). [↑](#footnote-ref-9)
9. See 34 C.F.R. §300.507(a)(1). [↑](#footnote-ref-10)
10. Limited exceptions exist that are not here applicable. [↑](#footnote-ref-11)
11. 603 CMR 28.08(3)(a).  [↑](#footnote-ref-12)
12. See 29 U.S.C. 794 (Section 504 of Rehabilitation Act); 34 CFR 104. [↑](#footnote-ref-13)
13. *In Re: Georgetown Pub. Sch.*, BSEA # 1405352 (Berman 2014). [↑](#footnote-ref-14)
14. See Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 59, 64 (1st Cir. 2002). [↑](#footnote-ref-15)
15. Id. at 60. [↑](#footnote-ref-16)
16. *Rose v.* *Yeaw*, 214 F.3d 206, 210 (1st Cir. 2000). [↑](#footnote-ref-17)
17. *In Re Xylia*, BSEA # 12-0781 (Byrne 2012); see *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 29 (2006); *Frazier*, 276 F.3d at 64. [↑](#footnote-ref-18)
18. *Blank*, 420 Mass. at 407. [↑](#footnote-ref-19)
19. Parents’ claim iv also addresses, in part, the District’s failure to consider the BCBA report, and, said portion of claim iv also **SURVIVES** dismissal. [↑](#footnote-ref-20)
20. See 34 C.F.R. §300.507(a)(1); see also 603 CMR 28.08(3)(a).  [↑](#footnote-ref-21)
21. See *id*. [↑](#footnote-ref-22)
22. Claim iv incorporates this allegation as well. [↑](#footnote-ref-23)
23. However, as discussed *infra*, Parents’ claim relative to the District's two-month delay to a scheduled mediation; the District's lack of good faith at mediation to resolve both issues; and the District's unilateral postponement of the IEP meeting to six months later is hereby **DISMISSED** with prejudice, as mediation is a voluntary process, and there is no recourse available at the BSEA for delays in scheduling mediation or in lack of good faith during mediation. See 34 CFR 300.506 (b)(1). [↑](#footnote-ref-24)
24. *Fry v. Napolean Community Schools*, 137 S.Ct. 743, 752 (2017); see also *In Re: Student v. Braintree Public Schools (Ruling)*, BSEA # 1400815 (“it is not the precise relief requested by the moving party that is critical in determining whether the exhaustion is required, but rather whether the claim presented is “IDEA-related” so as to implicate both the statutory obligation of the school to provide FAPE and the expertise of the administrative fact-finding agency…. so long as the petitioner articulates claims that assert violations of a student’s right to FAPE, that is, claims that are IDEA and/ or Section 504 related, implicating the school district’s responsibilities under the statute, the BSEA Hearing Officer must hear those claims. Moreover, when the petitioner articulates the plausibility of the existence of IDEA and/ or Section 504 related claims, the matter cannot be dismissed even if the ultimate recourse is only available in a different forum”). [↑](#footnote-ref-25)
25. *In Re Xylia*, BSEA # 12-0781 (Byrne 2012); see *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 29 (2006); *Frazier*, 276 F.3d at 64. [↑](#footnote-ref-26)
26. See *In Re: Student v. Braintree Public Schools (Ruling)*, BSEA # 1400815 (“when the petitioner articulates the plausibility of the existence of IDEA and/ or Section 504 related claims, the matter cannot be dismissed even if the ultimate recourse is only available in a different forum”). [↑](#footnote-ref-27)
27. These allegations are part of Parents’ claim iv. Note that the portion of this claim relating to Parents’ public records request is not IDEA based and is therefore dismissed with prejudice as indicated *infra.* [↑](#footnote-ref-28)
28. See 603 CMR 28.08(3)(a).  [↑](#footnote-ref-29)
29. The portion of this claim asserting that the District failed to provide “oversight in support to protect Student with notification of numerous incident reports” at Legacy is **DISMISSED** with prejudice as it was subject to the May 2023 Settlement Agreement’s release of claims. See my explanation *infra* for Parents’ Claim i. [↑](#footnote-ref-30)
30. See *In Re: Peabody Public Schools*, BSEA # 09-6506 (Crane, 2009) (“where the agreement relates to rights and responsibilities that fall within the purview of the Hearing Officer (and which are defined within the IDEA as the ‘the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child’), the federal courts have consistently concluded that the Hearing Officer may (or must) consider the agreement and determine whether and to what extent the agreement alters the rights and responsibilities of the parties with respect to a student’s special education services and related procedural protections”)(providing legal citations to federal court cases) (internal citations omitted). [↑](#footnote-ref-31)
31. See 603 CMR 28.08(3)(a).  [↑](#footnote-ref-32)
32. See In Re Xylia, BSEA #12-0781 (Byrne 2012); see also *In re: Student v. Dracut Public Schools (Ruling on Dracut Public Schools’ Motion to Dismiss The Parent’s Request for Hearing and on Parent’s Motion for Counsel’s Recusal),* BSEA # 2312210 (Kantor Nir, 2023). [↑](#footnote-ref-33)
33. See 34 CFR 300.506 (b)(1); *In re: Student v. Newburyport Public Schools (Ruling on Motion to Dismiss)*, BSEA # 2205014 (Putney-Yaceshyn, 2022) (“there has been consensus among BSEA hearing officers that the aforementioned statutes and regulations do not confer upon hearing officers the authority to interpret or enforce the terms of a private settlement agreement reached outside of the hearing process between parties involved in a BSEA hearing”). [↑](#footnote-ref-34)
34. See *In Re: Georgetown Pub. Sch.*, BSEA # 1405352 (Berman 2014). [↑](#footnote-ref-35)
35. See *In re: Student v. Springfield Public Schools (Ruling on Springfield Public Schools’ Motion to Dismiss)*, BSEA # 2208440 (Kantor Nir, 2022) (“where Parent’s retaliation claim does not relate to Student’s evaluation or provision of special education services [, …] Parent’s claim of retaliation is not subject to the exhaustion requirement and must be dismissed for lack of jurisdiction”) (internal citations omitted); see also In Re: Ollie v. *Springfield* Public Schools (Ruling on*Springfield* Public Schools’ Partial Motion to Dismiss), BSEA # 20-4776 (Reichbach, 2020) (concluding that that unless a claim of retaliation is tied to a FAPE claim, it is outside the jurisdiction of the BSEA); *In re: Scituate Public Schools,* BSEA # 2212423 (Putney-Yaceshyn, 2022) (dismissing with prejudice parent's claims related to civil rights violations). [↑](#footnote-ref-36)
36. See *In Re: Student v. Taunton Pub. Sch. Dist*., BSEA # 1304738 (Figueroa 2013) ("The BSEA lacks jurisdiction to order access to a student's record under the Family Educational Rights and Privacy Act (20 U.S.C. s.1232g(f)) or the Public Records law (M.G.L. c.66s.10) or the Student Records Regulations (603 CMR 23.09(1), (2) and (3)"); *Cf*. *In re: Student v. Marshfield Public Schools (Ruling on Marshfield Public Schools’ Motion to Dismiss/Motion for Summary Judgment),* BSEA # 2209242 (Kantor Nir, 2022) (“the BSEA does not have any authority to enforce allegations of educational record violations under either state or federal laws, unless such claims are also FAPE-based”). In contrast see, *In re: Student v. Marshfield Pub. Sch*., BSEA # 2209242 (Kantor Nir, 2022) (finding that the BSEA has jurisdiction over Parent's claim that without access to her child's records, she was unable to make meaningful decisions about the adequacy of her child's programming and that, as a result, the school district had deprived her child of FAPE and prevented meaningful parental participation). Parents conceded that claim viii “may be the province of the regulation on point.” [↑](#footnote-ref-37)
37. *Cf. Israel and Monson Public Schools*, BSEA # 10-5064 (Byrne, 2010) (“the BSEA should not assert jurisdiction over a settlement agreement… the dispute about the terms of the settlement agreement could be considered in a court of competent jurisdiction, where the judge’s experience and expertise in interpretation of contract language, along with the court’s enforcement powers”). [↑](#footnote-ref-38)