**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

In re: Bobby[[1]](#footnote-1) BSEA **#**2311739

**RULING ON HINGHAM PUBLIC SCHOOLS’ MOTION TO DISMISS**

This matter comes before the Hearing Officer on the *Motion to Dismiss* (Motion) filed by Hingham Public Schools (Hingham, or the District) in response to the *Hearing Request* filed by Parents on May 23, 2023. Neither party has requested a hearing on the *Motion*, and as neither testimony nor oral argument would advance the Hearing Officer’s understanding of the issues involved, this Ruling is being issued without a hearing pursuant to *BSEA Hearing Rule VII(D)*.

For the reasons set forth below, Hingham’s *Motion to Dismiss* is hereby ALLOWED.

I. BACKGROUND

 A. PROCEDURAL HISTORY

Parents filed a *Hearing Request* on May 23, 2023, alleging that their son Bobby, who is eligible for special education and receives services pursuant to an Individualized Education Program (IEP), was denied the opportunity offered to all other students at Hingham High School to be graded “credit/no credit,” instead of by letter grades, during the 2020-2021 school year. Parents requested, as a remedy for this denial, that Bobby’s transcript be “corrected” to reflect “credit/no credit” grades for this school year.

 The Hearing was scheduled for June 27, 2023.

 The District filed a *Motion to Dismiss* on May 23, 2023, arguing that the Bureau of Special Education Appeals (BSEA) lacks jurisdiction to grant Parents’ requested resolution, namely the “correction” or modification of student transcripts. According to Hingham, the process for resolving disputes over student records is specified in detail in the state student records regulations, over which the BSEA has no authority.[[2]](#footnote-2)

 On May 26, 2023, Parents filed their *Opposition to Respondent’s Motion to Dismiss*. They asserted that because Bobby is a student with a disability entitled to an IEP, their request that the BSEA order the correction of Bobby’s transcript falls within the agency’s jurisdiction to “provide for the resolution for differences of opinions among school districts [and] parents,” pursuant to 603 CMR 28.03. Moreover, 603 CMR 23.08 specifically provides, in relevant part, that parents “shall have the right to add information, comments, data, or any other relevant written material to the student record” of an eligible student, and “the right to request in writing deletion or amendment of any information contained in the student record, except for information which was inserted into that record by an Evaluation Team.” Furthermore, 603 CMR 23.06(1) allows for the elimination of “misleading” information in a student’s transcript. Finally, Parents contend that the statute of limitations would not preclude their claim, as they were not made aware of the District’s credit/no credit offering until June of 2021.

Following a Conference Call, the parties jointly requested that the Hearing be postponed until early August to allow for further briefing on the issue of jurisdiction, and due to scheduling conflicts over the summer. Shortly thereafter, the parties jointly requested further postponement due to additional scheduling conflicts, and the Hearing was postponed for good cause to August 28 and September 6, 2023.

 In the meantime, on June 22, 2023, Parents filed *Petitioner’s Supplemental Memorandum on Jurisdiction of BSEA in this Matter*. Parents reiterated their assertion that because Bobby is a student with special needs, was not given the same opportunity as his “typical peers during his sophomore year in high school to be graded credit/no credit, without grades,” and has been adversely affected by the District’s “failure . . to correct his transcript,” their claim is properly before the BSEA. They cited several sources of law regarding the jurisdiction of the BSEA over matters relating to the identification, evaluation, education program or educational placement of a child with a disability or the provision of a free and appropriate education to the child, and the duties of hearing officers. Parents also referenced law regarding parents’ ability to challenge, through hearing, the content of student records that may be inaccurate, misleading, or inappropriate.

 The same day, Hingham filed its *Response to Petitioner’s Supplemental Response*, arguing that for the BSEA to assert jurisdiction over an issue involving a request for modification of a student transcript, a showing must be made that a procedural protection arising out of state or federal law for students with disabilities has been violated by the District. In this case, no showing has been made that a recognized special education procedural protection has been violated, as there is no such protection for students with disabilities associated with transcripts. As such, the BSEA has no jurisdiction, and the matter must be dismissed.

B. FACTUAL BACKGROUND[[3]](#footnote-3)

The following facts are not in dispute and are taken as true for the purposes of this Ruling.

1. Bobby was enrolled in Hingham High School as a sophomore during the 2020-2021 school year.

2. During this school year, which included periods of remote learning due to the Covid-19 pandemic, Hingham Public Schools initiated a temporary policy offering students the opportunity to receive grades of “credit” or “no credit,” in order to prioritize the social-emotional well-being of students, promote equity, and hold students harmless from the impact of school closure. Parents assert that they were not aware of this option, offered in April of 2020, until June of 2021.

3. Prior to his sophomore year, Bobby had been deemed a special education eligible student receiving special education services to address ADHD “and emotional/anxiety issues.” In the fall of 2020 he was also diagnosed with PAN/PANDAS, which impacted his ability to access the curriculum and attend school, given his highly compromised immune system. Bobby had been experiencing symptoms since November of 2019, but pharmacological protocols were not established for him until January of 2021.

4. Bobby was unable to access the curriculum effectively during his sophomore year and, at some point, discontinued remote learning “because of the stresses associated with his diagnosis.” His doctors sent letters to the District to inform them that he was struggling and in May, 2021, Bobby was placed on “MA Physical Affirmed Need for Temporary Home Education for Medically Necessary Reasons.” At this time, through the efforts of the District and Parents, Hingham arranged for remote tutoring by the retired teacher who had taught Bobby’s strategies class prior to his sophomore year.

5. In September, 2022, Bobby returned to in-person learning full-time at Hingham High School. Since that time, while receiving treatment for PANS, he has succeeded academically and made Honor Roll both junior and senior years.

II. DISCUSSION

 A. *Legal Standards*

 1. 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 *Hearing Rule* XVII (A) and (B)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.”[[4]](#footnote-4) In evaluating a motion to dismiss, 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.”[[5]](#footnote-5) These “[f]actual allegations must be enough to raise a right to relief above the speculative level.”[[6]](#footnote-6) If a hearing officer concludes that she cannot grant relief under either federal or state special education statutes or the relevant portions of Section 504 of the Rehabilitation Act, even taking as true all facts alleged by the party opposing dismissal and drawing all reasonable inferences in that party’s favor, the hearing officer may dismiss a case.[[7]](#footnote-7)

 2. BSEA Jurisdiction

To survive a motion to dismiss, the moving party must allege a claim over which the BSEA has jurisdiction. Under its governing statue, the BSEA has the authority to provide:

adjudicatory hearings, mediation and other forms of alternative dispute resolution . . . for resolution of disputes between and among parents, school districts, private schools and state agencies concerning: (i) any matter relating to the identification, evaluation, education program or educational placement of a child with a disability or the provision of a free and appropriate public education to the child arising under this chapter and regulations promulgated hereunder or under the Individuals with Disabilities Education Act, 20 U.S.C. section 1400, et seq., and its regulations; or (ii) a student’s rights under Section 504 of the Rehabilitation Act of 1983, 29 U.S.C. section 794, and its regulations.[[8]](#footnote-8)

The BSEA may “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."[[9]](#footnote-9)

 3. Student Records

 In their filings, both parties reference Massachusetts regulatory authority governing the maintenance, modification, destruction, etc. of student records and student records issues, which appear in 603 CMR 23.00 *et seq*. The Massachusetts student records regulations apply to all “eligible students,” a term defined within the regulations, in pertinent part, as “any student who is 14 years of age or older or who has entered 9th grade.”[[10]](#footnote-10) Pursuant to these regulations, modifications, deletions, or amendments to student records are to be made in accordance with a specified procedure which permits families to make objections to these records by presenting the information in writing and/or through a conference with the principal or his/her designee.[[11]](#footnote-11) Should eligible students or their parents wish to challenge the decision of the principal or his/her designee, they may appeal that decision to the superintendent of the school district and, ultimately, to the school committee.[[12]](#footnote-12)

These student records regulations specifically apply to high school transcripts. [[13]](#footnote-13) In addition to the procedures above, which allow eligible students or their parents to challenge the content of the transcript, the regulations provide for the maintenance and ultimate destruction of that transcript.[[14]](#footnote-14) Among other things, the regulations instruct a principal or his/her designee to “periodically review and destroy misleading, outdated, or irrelevant information” in the temporary record of a student currently enrolled in the district, so long as eligible students and their parents are notified and given the opportunity to receive the information prior to its destruction.[[15]](#footnote-15)

Finally, the Massachusetts student records regulations specify that nothing within them “shall abridge or limit any right of an eligible student or parent to seek enforcement of 603 CMR 23.00 or the statutes regarding student records, in any court or administrative agency of competent jurisdiction.”[[16]](#footnote-16)

 Parents also cite to 20 USC § 1232(g)(a)(2) for the proposition that parents of a student who is attending, or has attended, a public school may

challenge the content of such student’s education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

This provision is part of the federal Family Educational Rights and Privacy Act (FERPA).[[17]](#footnote-17)

 B. *Analysis*

Parents appear to conflate two unrelated sets of regulations and their accompanying procedures: those governing special education and the jurisdiction of the BSEA, which appear within 603 CMR 28.00 *et seq*; and those governing student records, which appear within 603 CMR 23.00 *et seq*, are generally applicable to all students, and contain their own procedures for resolution of disputes.

Viewing the factual allegations in the light most favorable to Parents, I find that during the relevant time, Bobby was an “eligible student,” as defined within both special education and student records regulations. Because he was a high school student, Bobby could (as could Parents) object to the content of his student record and request, among other things, that it be “corrected.”[[18]](#footnote-18) Bobby and his parents could file written information in support of their position and/or present that information in a conference with the principal or his/her designee.[[19]](#footnote-19) In the event they were unsatisfied with the results of this process, they could appeal to the superintendent, then to the school committee, and, ultimately, to a court or administrative agency of competent jurisdiction.[[20]](#footnote-20) As a public school district receiving federal funds, Hingham must also comply with the provisions of FERPA, outlined above.

As a high school sophomore who has been found eligible for special education and related services, Bobby is also entitled to the procedural and substantive protections of the IDEA and state special education law. His identity as a student with a disability does not, however, confer upon the BSEA jurisdiction over all issues related to his education.[[21]](#footnote-21) As described above, Parents may seek a hearing at the BSEA on any matter relating to Bobby’s eligibility, evaluation, education program or educational placement; the provision of a free and appropriate public education (FAPE) to Bobby; or the procedural protection of state and federal law for students with disabilities.[[22]](#footnote-22)

Here, Parents allege that Bobby was denied the opportunity to choose credit/no credit grades for his sophomore year, an opportunity offered to all other students at Hingham High School that school year. They do not challenge Bobby’s IEP, nor do they contend that he was denied a FAPE. Parents do not identify a procedural protection applicable to students with disabilities that Bobby was denied, much less argue that any such procedural inadequacies constituted a violation of his right to a FAPE.[[23]](#footnote-23) Access to a particular form of grading (i.e. credit/no credit) is not a procedural protection guaranteed by state or federal special education law.

As such, even taking as true Parents’ allegations that Bobby was denied the option to elect a credit/no credit grading system during his sophomore year, and that this impacted him negatively, and drawing all reasonable inferences therefrom, I conclude that I cannot grant the relief Parents seek – an order that Hingham “correct” Bobby’s transcript. Parents’ claims are not within the jurisdiction of the BSEA, though nothing in this Ruling prevents them from seeking “correction” of Bobby’s transcript through the procedures outlined in the student records regulations, discussed above.

CONCLUSION

Upon consideration of Parents’ *Hearing Request*, Hingham’s *Motion to Dismiss*, Parents’ *Opposition* thereto, Parents’ *Supplemental Memorandum* and Hingham’s *Response* thereto, I find that Parents have failed to state a claim for which relief may be granted, and dismissal is warranted.[[24]](#footnote-24)

**ORDER**

 Hingham’s *Motion to Dismiss* is hereby ALLOWED. The Hearing scheduled to begin August 18, 2023 is cancelled.

By the Hearing Officer:

 /s/ Amy Reichbach

Amy M. Reichbach

Dated: July 12, 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 for review in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts. 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. “Bobby” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public. [↑](#footnote-ref-1)
2. Hingham suggested, further, that if Parents’ *Hearing Request* raised issues within the jurisdiction of the BSEA, the statute of limitations might preclude their claim. The District did not, however, flesh out this argument. [↑](#footnote-ref-2)
3. Except where noted, the information in this section is drawn from the parties’ pleadings and is subject to revision in further proceedings. [↑](#footnote-ref-3)
4. *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). [↑](#footnote-ref-4)
5. *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995). [↑](#footnote-ref-5)
6. *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted). [↑](#footnote-ref-6)
7. See *Ruling on Marshfield Public Schools’ Motion to Dismiss*, BSEA # 2305747 (Kantor Nir, 2023). [↑](#footnote-ref-7)
8. M.G.L. c. 71B § 2A(a). See 603 CMR 28.08(3)(a) (“A parent or school district . . . may request mediation and/or a hearing at any time on any matter 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.”) [↑](#footnote-ref-8)
9. *In Re: Georgetown Pub. Sch*., BSEA #1405352 (Berman, 2014). [↑](#footnote-ref-9)
10. 603 CMR 23.03. This definition differs from that of an “eligible student” for the purposes of special education in Massachusetts, which is “a person three through 21 years of age who has not attained a high school diploma or its equivalent, who has been determined by a Team to have a disability(ies), and as a consequence is unable to progress effectively in the general education program without specially designed instruction or is unable to access the general curriculum without a related service.” 603 CMR 28.02. [↑](#footnote-ref-10)
11. See 603 CMR 23.08(2). [↑](#footnote-ref-11)
12. See 603 CMR 23.09. [↑](#footnote-ref-12)
13. See 603 CMR 23.02. [↑](#footnote-ref-13)
14. See 603 CMR 23.06. [↑](#footnote-ref-14)
15. *Id.* [↑](#footnote-ref-15)
16. 603 CMR 23.09(5). [↑](#footnote-ref-16)
17. See 20 USC § 1232(g)(a)(2). [↑](#footnote-ref-17)
18. See 603 CMR 23.03, 23.06, 23.08. [↑](#footnote-ref-18)
19. See 603 CMR 23.08. [↑](#footnote-ref-19)
20. See 603 CMR 23.09. [↑](#footnote-ref-20)
21. See *Ruling on Marshfield Public Schools’ Motion to Dismiss*, BSEA # 2305747 (Kantor Nir, 2023) (The BSEA has jurisdiction to consider only those claims for which it is expressly delegated authority by its enabling statutes and regulations, and not inconsistent with them.) [↑](#footnote-ref-21)
22. See M.G.L. c. 71B § 2A(a); 603 CMR 28.08(3)(a). [↑](#footnote-ref-22)
23. Cf. 20 U.S.C. § 1415(f)(3)(E)(ii); 24 CFR 300.513(a)(2); *Roland M. v Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990). [↑](#footnote-ref-23)
24. See *Ruling on Marshfield Public Schools’ Motion to Dismiss*, BSEA # 2305747 (Kantor Nir, 2023). [↑](#footnote-ref-24)