**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Student v. Dracut Public Schools BSEA # 2312210**

**RULING ON PARENT’S MOTION FOR RECONSIDERATION**

This matter comes before the Hearing Officer on *Parent’s Motion for Reconsideration* filed via email on July 3 and 4[[1]](#footnote-1), 2023 (the *Motion*). In it, Parent seeks reconsideration of the Hearing Officer’s prior dismissal of claims relating to the District’s failure to respond to Student’s bullying, sexual assault, and cyberbullying and Parent’s request for ADA accommodations.[[2]](#footnote-2)

Parent is *pro se* in this matter.[[3]](#footnote-3) 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, Parent’s *Motion* is **DENIED, in substantial part, and ALLOWED, in part.**

**PROCEDURAL HISTORY:**

On June 30, 2023, the undersigned Hearing Officer issued *Ruling on Motion to Dismiss the Parent’s Request for Hearing (June 30, 2023 Ruling).[[4]](#footnote-4)* The *Ruling* dismissed with prejudice the following claims for lack of subject matter jurisdiction:

* 1. Beginning in September 2018 and until the filing of the complaint, Dracut “failed to provide [Student] with a safe education.”
	2. During the 2021-2022 and 2022-2023 school years Dracut provided Student “with an unprotected email address,” and, as a result, Student was “solicited by child predators.” Dracut also used Student’s first and last name “for all internet programs as a sign in ID” in violation of 201 CMR 17.00; forced Student had to “share” a Chromebook which allowed “others” access to her “private information.” In addition, Dracut “put [Student] online in school” against Parent’s wishes, as a result of which Student was “hacked and compromised” on January 27, 2023. Dracut failed to investigate the matter properly nor to “rectify their email system.”
	3. During the 2021-2022 and 2022-2023 school years, Dracut failed to respond properly to allegations that Student was being bullied by a number of students and staff. Dracut also retaliated against Student, in part, by “ostracizing” her and ignoring her “accommodations” and against Parent, in part, by “placing a No Trespass Order on [her]” and refusing to hire an independent investigator to investigate Parent’s claims.
	4. During the 2021-2022 and 2022-2023 school years Dracut administrative staff “refused to honor ADA accommodation requests” made by Parent both on behalf of Student and herself, and, specifically, that Dracut “refused to accommodate [Student’s] communication preferences which is to not have meetings or questioning in person but rather for it be done via email, recorded zoom meet, or recorded telephone. [Student] asked to please have notice of what the topic is. She also asked for [Parent] to be present as an ADA accommodation. These were ignored and at times violated.”
	5. In November 2022, Dracut violated Parent’s “Constitutional rights” when she “didn't get to vote” due to the No-Trespass Order.
	6. In November 2022, Parent “was not able to have [Student’s parent-teacher] conference in person like other parents” due to the No-Trespass Order and that”[d]uring this conference the Zoom meet froze as is known with the schools [sic] reception to do and [Parent] was cut off halfway through and did not get [her] alotted [sic] time as other parents did.”
	7. In September 2018 and again in March 2023, Dracut failed to respond properly and investigate two “sexual assault” claims made by Student (the first incident of which took place in September 2018 and the second on March 27, 2023). Dracut also retaliated against Student and Parent for filing these reports with the District.
	8. In the spring of 2022 and again in the spring of 2023, Dracut, and specifically the Superintendent and School Committee, refused to change Student’s schools as requested by Parent.
	9. During the 2021-2022 and 2022-2023 school years Dracut, and specifically the Superintendent, denied [Parent access to] Student’s “records.”

In relevant part, the June 30, 2023 Ruling states that

“… Parent’s claims relative to “safety” (Claim (a)), the District’s faulty “email system” and Chromebook/online use policies (Claim (b)), the failure of the Superintendent to respond to Parent’s emails and Parent’s inability to participate in-person in a parent-teacher conference (Claim (f)), and the Superintendent’s refusal to change Student’s school (Claim (h)) must be dismissed with prejudice for lack of subject matter jurisdiction as the BSEA has no jurisdiction over ‘regular education’ matters….

… Nor does the BSEA have any jurisdiction over claims relating to Dracut’s improper response to Student’s allegations of bullying and Title IX (Claims (c) and (g), respectively), specifically because, other than indicating that a Section 504 Plan was proposed by the District, the Hearing Request makes no claim of any connection between Student’s disability and either the bullying or Title IX incidents or the District’s handling of the incidents. Parent does not assert that the bullying or Title IX incidents impacted Student's receipt of Section 504 FAPE services or that she required additional or different services….

Dismissal of the above claims is also appropriate in this matter as, for relief, Parent wants ‘abuse stopped’; ‘no further retaliation’; a new email address, password, and Student ID number as well as ‘firewalls and protection’ and a ‘new online sign in system’; a Chromebook; ‘bullying reports and violations reports … investigated properly’; and ‘accountability and justice.’ None of these remedies is available as relief at the BSEA, which ‘generally encompasses orders for changed or additional services, specific placements, additional evaluations, reimbursement for services obtained privately by parents or compensatory services.’

Nor are any of the claims addressed in this section (to wit: Claims (a), (b), (c), (d), (e), (f), (g), (h), and (i)) IDEA-based. In the instant matter, Student has been found eligible pursuant to Section 504 only, not the IDEA. Nor are these claims relevant to a denial of a FAPE pursuant to Section 504. As such, the BSEA lacks jurisdiction over these claims, and, as discussed *supra*, they are dismissed with prejudice.”[[5]](#footnote-5)

Surviving dismissal were Parent’s Claims (j)[[6]](#footnote-6) and (k)[[7]](#footnote-7). As such, the Hearing Officer ordered that the

“only issues remaining for Hearing are (1) whether Dracut’s proposed 504 Plan is appropriate, (2) whether the District failed to meet with Parent to amend Student’s 504 Plan in violation of the procedural requirements of Section 504, and (3) whether the District retaliated against Parent by ‘taking back’ the 504 Plan and insisting that Parent provide additional documentation of Student’s diagnosis, and (4) whether the District failed to implemented accepted portions of Student’s 504 Plan.”

On July 3, 2023, Parent filed the instant *Motion* via email, asserting that the March 27, 2023

“bullying report [was] directly related to the disability as [Student’s] disability is anxiety due to bullying. It is related to the 504 plan  which was recorded just 13 days earlier and I believe my claim of the district refusing to even answer it belongs in the BSEA forum.

Dracut Public Schools has never responded to this, investigated it, or ruled on it….

… The District [also] violated the 504 plan.

I'm requesting the earlier ruling of Dismissal of this claim for making no connection to the students [sic] disability please be reconsidered and allowed as it is connected.”

Via a separate email on the same day, Parent added,

“[Student’s] Disability and anxiety is [sic] directly related to bullying incidents. They were in fact caused by consistent bullying in the School. The district was aware of this and it is clearly stated in the recorded 504 meeting.

No safe place was ever established for [Student] as [] proposed during that meeting.

During that meeting is also repeatedly heard by [] that [Student] is to have a safe person who we identified as Ms. []. It is also heard and agreed upon that [Student] is to be able to call her mother. This meeting was on 3/14/2023.

13 days after the meeting on 3/27/2023 [Student] was sexually assaulted at recess. There was no safe person at recess. There were no extra people added. The District put no plan in pace [sic] as they stated they would accommodate [Student] at recess for this. Due to their neglect in following the 504 plan they placed [Student] in harm's way.

Also it was discussed for a situation such as this that [Student] be allowed to call her mother. [Student] went to the safe person as was agreed upon by the District. She asked to call her mother. Teacher Ms. [] alerted the office however the school neglected to ever call the parent and left the child at school for over 2 and a half hours. In fact the school never notified the parent at all and was only when the child picked up from school was the parent alerted.

[S]ince anxiety and PTSD is [sic] the child's disability and is directly a result of bullying these incidents are connected to [Student’s] disability. Therefore I am requesting these claims be allowed and the bullying reports as well as the sexual assault claims are connected as well. [Claims relating to these] reports and findings should be allowed in as they directly relate to the diagnosis and basis of the 504 plan and should be allowed.

I am also requesting that the cyberbullying and hacking be allowed as this too was a bullying situation where I filed an official bullying report. I was not alone in filing a bullying report on the student who did this another parent also filed a bullying report about this.

This person has [Student’s] passwords and logins and has never been changed. tests were taken in [Student’s] name which affected her grades. Knowing this person could log into her personal information at any time and could violate her in social avenues (could again send fake emails out to her friends pretending to be her).

… [Student’s] therapist stat[ed] its [sic] an issue of how [Student’s] peers view her. This is causing crippling anxiety and therefore affecting her a FAPE and this should also be allowed [in].

I'm also claiming the Districts [sic] failure to call me after her sexual assault as agreed upon, failure to respond, and neglect of the situation was both discrimination and was retaliation on me for requesting a 504 plan for [Student] just 2 weeks prior.”

On July 4, 2023, Parent wrote to the Hearing Officer again, as follows:

“…The District not only ignored [Student] going to her safe person [] and calling her mother but the refusal to acknowledge investigate the situation left her to be extremely [v]ulnerable and fearful leading to further anxiety and panic attacks not knowing would she be attacked again as she has been repeatedly.  This made her symptoms worse and have made it impossible to recieve [sic] a FAPE.

… I also feel the District not honoring the parents [sic] ADA accomodations [sic] requests is preventing [Student] from a FAPE and violates parental rights.

In not honoring these accomodations [sic] I am not able to effectively participate in [Student’s] education and make sure she is receiving all the benefits and accomodations [sic] she is supposed to. Parent participation is crucial in a child's education especially one with special needs….”

In her July 4, 2023 email, Parent reiterated her claim that the District’s “failure to investigate the sexual assault were all means [of] retaliation for the request of the 504 plan.”[[8]](#footnote-8)

On July 11, 2023, Dracut indicated via email correspondence that Dracut “opposes the motion and relies on its initial filing, but will not be filing a separate response.”

**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.”[[9]](#footnote-9) 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.”[[10]](#footnote-10) These “[f]actual allegations must be enough to raise a right to relief above the speculative level.”[[11]](#footnote-11)

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."[[12]](#footnote-12) In Massachusetts, a parent or a school district, "may request mediation and/or a hearing at any time on any matter[[13]](#footnote-13) 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.”[[14]](#footnote-14) 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….”[[15]](#footnote-15) 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."[[16]](#footnote-16)

BSEA jurisdiction extends to IDEA-based claims.[[17]](#footnote-17) 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.[[18]](#footnote-18) 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.”[[19]](#footnote-19) 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].”[[20]](#footnote-20)

1. *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 Parent’s instant *Motion*.[[21]](#footnote-21)

**APPLICATION OF LEGAL STANDARDS**:

As stated in my *June 30, 2023 Ruling*, in evaluating Dracut’s *Motion to Dismiss* under the **LEGAL STANDARDS** set forth *supra*, I took Parent’s allegations as true as well as any inferences that might be drawn from them in the Parent’s favor, and denied dismissal if these allegations plausibly suggested an entitlement to relief[[22]](#footnote-22) Here, Parent seeks reconsideration of Claims (b), (c), (d), and (g). Upon reconsideration of the matter, considering as true all facts alleged by the party opposing dismissal (in this case, Parent), I find, again, that Parent’s claims relating to the District’s failure to respond to Student’s allegations of cyberbullying (Claim (b)) and bullying (Claim (c)) and to Parent’s request for ADA accommodations (Claim (d)) cannot survive dismissal. However, upon reconsideration, Parent’s claim relative to the District’s failure to respond to Student’s sexual assault (Claim (g)) survives dismissal, in part. My reasoning follows.

1. Claims (b), (c), and (d) Are Dismissed With Prejudice.

In her *Motion*, Parent asserts that the Hearing Officer should reconsider dismissal of Claim (b) [[23]](#footnote-23) because “the cyberbullying and hacking … was a bullying situation where [Parent] filed an official bullying report. This person has [Student’s] passwords and logins and has never been changed [and] tests were taken in [Student’s] name which affected her grades … [Student’s] therapist stating its [sic] an issue of how [Student’s] peers view her. This is causing crippling anxiety and therefore affecting her a FAPE and this should also be allowed.”

Here, the “gravamen” of Parent’s claimis not one of violation of the IDEA.[[24]](#footnote-24) Parent states that “tests were taken in [Student’s] name which affected her grades” and that the cyberbullying impacted peers’ perception of Student, thereby increasing her anxiety and “affecting her FAPE”, but she also indicates that Student was one of many students hacked, and hence, she was not singled out for “cyberbullying and hacking” due to her disability. As such, Parent raises “no factual allegations to indicate that a dispute exists concerning [Student’s] eligibility under the IDEA or Section 504 or the discharge of [Dracut’s] procedural and substantive responsibilities under the IDEA or [Section 504 of the Rehabilitation Act of 1973].”[[25]](#footnote-25) In fact, any general education student impacted by the hacking could raise the same claims. As such, Claim (b) remains dismissed with prejudice.

In addition, Parent seeks reconsideration of the dismissal with prejudice of Claim (c) [[26]](#footnote-26), stating that (1) “[Student’s] Disability and anxiety is [sic] directly related to bullying incidents [which] were in fact caused by consistent bullying in the School”; (2) and, that “since anxiety and PTSD is the child's disability and is directly a result of bullying these incidents are connected to [Student’s] disability…. All [claims relating to these] reports and findings should be allowed in as they directly relate to the diagnosis and basis of the 504 plan and should be allowed”.

However, Parent’s “request[] [that] the earlier ruling of Dismissal of this claim for making no connection to the students [sic] disability please be reconsidered and allowed as it is connected” is a mischaracterization of the Hearing Officer’s *June 30, 2023 Ruling*; said *Ruling* did not dismiss with prejudice Parent’s claims for not being “connected” to Student’s disability but rather for lack of subject matter jurisdiction. Not every matter relating to disability is within the purview of the BSEA.[[27]](#footnote-27)

In addition, Parent’s argument relative to Claim (c) is unpersuasive. Even if Student’s disability is “directly a result of bullying”, Parent’s claim still does not relate to “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”[[28]](#footnote-28), nor does it involve the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973….”[[29]](#footnote-29) Furthermore, as relief, Parent asks the BSEA to investigate and issue new findings regarding the bullying incidents. The BSEA cannot grant such relief. [[30]](#footnote-30) As such, Claim (c) remains dismissed with prejudice.

Parent similarly seeks reconsideration of the dismissal with prejudice of Claim (d)[[31]](#footnote-31), stating that “the District’s failure to honor[] the parents [sic] ADA accomodations [sic] requests is preventing [Student] from a FAPE and violates parental rights. In not honoring these accomodations [sic] I am not able to effectively participate in [Student’s] education and make sure she is receiving all the benefits and accomodations [sic]she is supposed to. Parent participation is crucial in a child's education especially one with special needs….” This claim is not within the grant of the BSEA’s jurisdiction; I reiterate my reasoning as articulated in the *June 30, 2023 Ruling*: “Parent’s claim relative to the District’s violation of her own and Student’s rights under the ADA (Claim (d)) must be dismissed with prejudice as, ‘in contrast to Section 504, there is no express grant of jurisdiction to a BSEA Hearing Officer to address ADA claims,’ and especially not those that relate to Parent rather than to Student.”[[32]](#footnote-32) In addition, the “gravamen” of this claimis not one of violation of the IDEA, and any parent of a general education student could raise a similar claim.[[33]](#footnote-33) As such, Claim (d) remains dismissed with prejudice.

1. Claim (g) Is Dismissed With Prejudice, In Part, And Survives Dismissal, In Part.

Parent also seeks reconsideration of Claim (g)[[34]](#footnote-34), asserting that the “bullying report [was] directly related to the disability as [Student’s] disability is anxiety due to bullying. It is related to the 504 plan which was recorded just 13 days earlier and [the] claim of the district refusing to even answer it belongs in the BSEA forum.”[[35]](#footnote-35) Parent clarified that Claim (g) should survive dismissal because Dracut’s “refusal to acknowledge [and] investigate the [sexual assault] left [Student] to be extremely [v]ulnerable and fearful leading to further anxiety and panic attacks not knowing would she be attacked again as she has been repeatedly. This made her symptoms worse and have made it impossible to recieve [sic] a FAPE.” She also reiterated her claim that the District’s “failure to investigate the sexual assault were all means [of] retaliation for the request of the 504 plan.”

Before addressing the substance of Parent’s argument, I note that, because Parent is a *pro se* litigant, I am obligated to “zealously guard[] [her] attempts [to advocate] on [her] own behalf. We are required to construe liberally a *pro se* complaint and may affirm its dismissal only if a plaintiff cannot prove any set of facts entitling him or her to relief…the policy behind affording pro se plaintiffs liberal interpretation is that if they present sufficient facts, the court may intuit the correct cause of action, even if it was imperfectly pled.”[[36]](#footnote-36)

Here, Parent has filed multiple email pleadings in a good-faith effort to respond to the District’s *Motion to Dismiss* and the Hearing Officer’s subsequent *June 30, 2023 Ruling*. In each such pleading, Parent has elaborated on her claims against Dracut, attempted to link her factual allegations with Student’s entitlement to FAPE. In so doing, Parent has alleged sufficient facts to notify the District and the BSEA that she believes Student has been deprived of a FAPE as a result of the District’s alleged failure to investigate and respond to Student’s sexual assault, especially, as she alleges, since the District failed to provide Student with her 504 accommodations following the incident. She has also alleged that the District’s improper response to the sexual assault was a form of retaliation for her participation in protected activity as advocate on behalf of her daughter. As now pled, especially in light of Parent’s *pro se* status, I am unable to dismiss this claim in whole against Dracut.[[37]](#footnote-37)

 Claim (g), as pled in Parent’s July 2023 email communications is IDEA-based, in part, as it directly relates to “the discharge of the School’s procedural and substantive responsibilities under the IDEA or [Section 504 of the Rehabilitation Act of 1973].”[[38]](#footnote-38) Specifically, Parent’s claim that Dracut’s “refusal to acknowledge [and] investigate the [March 2023 sexual assault]” resulted in a denial of a FAPE to Student survives dismissal.[[39]](#footnote-39)

However, Parent’s claim that Dracut retaliated against Student and Parent for filing a “report” with the District in March 2023 remains dismissed with prejudice for the reasons articulated in the *June 30, 2023 Ruling*.[[40]](#footnote-40)

**ORDER**:

Parent’s *Motion* is hereby DENIED, in part, and ALLOWED, in part. Specifically, the following claims are dismissed with prejudice:

1. Beginning in September 2018 and until the filing of the complaint, Dracut “failed to provide [Student] with a safe education.”
2. During the 2021-2022 and 2022-2023 school years Dracut provided Student “with an unprotected email address,” and, as a result, Student was “solicited by child predators.” Dracut also used Student’s first and last name “for all internet programs as a sign in ID” in violation of 201 CMR 17.00; forced Student had to “share” a Chromebook which allowed “others” access to her “private information.” In addition, Dracut “put [Student] online in school” against Parent’s wishes, as a result of which Student was “hacked and compromised” on January 27, 2023. Dracut failed to investigate the matter properly nor to “rectify their email system.”
3. During the 2021-2022 and 2022-2023 school years, Dracut failed to respond properly to allegations that Student was being bullied by a number of students and staff. Dracut also retaliated against Student, in part, by “ostracizing” her and ignoring her “accommodations” and against Parent, in part, by “placing a No Trespass Order on [her]” and refusing to hire an independent investigator to investigate Parent’s claims.
4. During the 2021-2022 and 2022-2023 school years Dracut administrative staff “refused to honor ADA accommodation requests” made by Parent both on behalf of Student and herself, and, specifically, that Dracut “refused to accommodate [Student’s] communication preferences which is to not have meetings or questioning in person but rather for it be done via email, recorded zoom meet, or recorded telephone. [Student] asked to please have notice of what the topic is. She also asked for [Parent] to be present as an ADA accommodation. These were ignored and at times violated.”
5. In November 2022, Dracut violated Parent’s “Constitutional rights” when she “didn't get to vote” due to the No-Trespass Order.
6. In November 2022, Parent “was not able to have [Student’s parent-teacher] conference in person like other parents” due to the No-Trespass Order and that”[d]uring this conference the Zoom meet froze as is known with the schools [sic] reception to do and [Parent] was cut off halfway through and did not get [her] alotted [sic] time as other parents did.”
7. In September 2018, Dracut failed to respond properly and investigate a “sexual assault” claim made by Student and that Dracut retaliated against Student and Parent for filing this report with the District. Dracut also retaliated against Student and Parent for filing a report with the District following the March 2023 sexual assault on Student.
8. In the spring of 2022 and again in the spring of 2023, Dracut, and specifically the Superintendent and School Committee, refused to change Student’s schools as requested by Parent.
9. During the 2021-2022 and 2022-2023 school years Dracut, and specifically the Superintendent, denied [Parent access to] Student’s “records.”

As such, the only issues remaining for Hearing are as follows:

(1) Whether Dracut’s proposed 504 Plan is appropriate;

(2) Whether the District failed to meet with Parent to amend Student’s 504 Plan in violation of the procedural requirements of Section 504;

(3) Whether the District retaliated against Parent by ‘taking back’ the 504 Plan and insisting that Parent provide additional documentation of Student’s diagnosis;

(4) Whether the District failed to implement accepted portions of Student’s 504 Plan; and

(5) Whether Dracut failed to investigate the March 2023 sexual assault incident, and, if so, whether such failure denied Student a FAPE.

The Hearing is currently scheduled to begin on August 3, 2023. Based on the number of issues identified for Hearing, the parties are instructed to provide the Hearing Officer with their availability in August and September 2023 so that additional hearing dates may be scheduled.

So Ordered by the Hearing Officer ,

 s/ *Alina Kantor Nir*
Alina Kantor Nir

Date: July 11, 2023

COMMONWEALTH OF MASSACHUSETTS

BUREAU OF SPECIAL EDUCATION APPEALS

EFFECT OF BUREAU DECISION AND RIGHTS OF APPEAL

# Effect of the Decision

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. Accordingly, the Bureau cannot permit motions to reconsider or to re-open a Bureau decision once it is issued. Bureau decisions are final decisions subject only to judicial 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. Rather, a party seeking to stay the decision of the Bureau must 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,” during the pendency of any judicial appeal of the Bureau decision, 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 during the pendency of judicial proceedings must seek a preliminary injunction ordering such a change in placement from the court having jurisdiction over the appeal. *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 decision of 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 of the Bureau decision. 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. Parent emailed the Hearing Officer on July 3, 2023 at 8:07 and 8:13PM. She also emailed the Hearing Officer on the morning of July 4, 2023, on which date the BSEA was closed for the national holiday. [↑](#footnote-ref-1)
2. See *Student v. Dracut Public Schools (Ruling on Dracut Public Schools’ Motion Dismiss the Parent’s Request for Hearing)*, BSEA #2312210 (Kantor Nir, June 30, 2023). [↑](#footnote-ref-2)
3. Because Parent is *pro se*, the Hearing Officer allowed the email submission of her motion. [↑](#footnote-ref-3)
4. The June 30, 2023 Ruling also addressed, and denied, *Parent’s Motion for Counsel’s Recusal*. [↑](#footnote-ref-4)
5. Internal citations are omitted. [↑](#footnote-ref-5)
6. Claim (j) stated that Dracut “violated the 504 plan proposed on 3/20/2023 section number 3 [which stated that Student] is able to contact parent when anxious or on request via (phone or zoom)” when, on March 27, 2023, Student was not allowed to contact Parent,” and “section 6 [of the 504 Plan which stated that Student] will have access to an identified point person at recess when she is feeling anxious. No such person was at recess after this attack and [Student] had to wait until she was in class and immediately reported it to her teacher who alerted the office.” [↑](#footnote-ref-6)
7. Claim (k) stated that “Dracut’s proposed 504 Plan in March 2023 failed to include “Parent’s concerns.” When Parent refused to sign the 504 Plan, the District retaliated against Parent by “taking back” the 504 Plan and insisting that Parent provide additional documentation of Student’s diagnosis, and, as such, Parent “was made to provide more than other parents do.” [↑](#footnote-ref-7)
8. On July 3, 2023, Parent amended the Hearing Request to include a claim that the District retaliated against her for filing the instant due process hearing. This claim is not addressed in this Ruling as Dracut has not had an opportunity to respond to Parent’s Amendment. [↑](#footnote-ref-8)
9. *Iannocchino v. Ford Motor Co.,* 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). [↑](#footnote-ref-9)
10. *Blank*, 420 Mass. at 407. [↑](#footnote-ref-10)
11. *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted). [↑](#footnote-ref-11)
12. See 34 C.F.R. §300.507(a)(1). [↑](#footnote-ref-12)
13. Limited exceptions exist that are not here applicable. [↑](#footnote-ref-13)
14. 603 CMR 28.08(3)(a).  [↑](#footnote-ref-14)
15. See 29 U.S.C. 794 (Section 504 of Rehabilitation Act); 34 CFR 104. [↑](#footnote-ref-15)
16. *In Re: Georgetown Pub. Sch.*, BSEA # 1405352 (Berman 2014). [↑](#footnote-ref-16)
17. See Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 59, 64 (1st Cir. 2002). [↑](#footnote-ref-17)
18. Id. at 60. [↑](#footnote-ref-18)
19. *Rose v.* *Yeaw*, 214 F.3d 206, 210 (1st Cir. 2000). [↑](#footnote-ref-19)
20. *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-20)
21. I note, however, in this regard, that the *June 30, 2023 Ruling* was dispositive, and nevertheless considered a final agency action, with respect to those claims dismissed. [↑](#footnote-ref-21)
22. *Blank*, 420 Mass. at 407. [↑](#footnote-ref-22)
23. Claim (b) states,

“During the 2021-2022 and 2022-2023 school years Dracut provided Student ‘with an unprotected email address,’ and, as a result, Student was “solicited by child predators.” Dracut also used Student’s first and last name ‘for all internet programs as a sign in ID’ in violation of 201 CMR 17.00; forced Student had to “share” a Chromebook which allowed ‘others’ access to her “private information.” In addition, Dracut ‘put [Student] online in school’ against Parent’s wishes, as a result of which Student was ‘hacked and compromised’ on January 27, 2023. Dracut failed to investigate the matter properly nor to ‘rectify their email system.’” [↑](#footnote-ref-23)
24. See *Fry v. Napolean Community Schools*, 137 S.Ct. 743, 752 (2017). [↑](#footnote-ref-24)
25. *Id*. [↑](#footnote-ref-25)
26. Claim (c) states that “[d]uring the 2021-2022 and 2022-2023 school years, Dracut failed to respond properly to allegations that Student was being bullied by a number of students and staff. Dracut also retaliated against Student, in part, by ‘ostracizing’ her and ignoring her ‘accommodations’ and against Parent, in part, by ‘placing a No Trespass Order on [her]’ and refusing to hire an independent investigator to investigate Parent’s claims.” [↑](#footnote-ref-26)
27. See *In re: Monomoy Regional School District (Ruling on Motion to Dismiss),* BSEA # 2009834 (Berman, 2020) (dismissing bullying claims where “the hearing request alleges no nexus between Student’s disability and the bullying or the District’s response to it that would potentially bring the dispute within the domain of BSEA jurisdiction”). [↑](#footnote-ref-27)
28. 603 CMR 28.08(3)(a).  [↑](#footnote-ref-28)
29. See 29 U.S.C. 794 (Section 504 of Rehabilitation Act); 34 CFR 104. [↑](#footnote-ref-29)
30. *In Re: Georgetown Pub. Sch.*, BSEA # 1405352 (Berman 2014). [↑](#footnote-ref-30)
31. Claim (d) states that “during the 2021-2022 and 2022-2023 school years Dracut administrative staff ‘refused to honor ADA accommodation requests’ made by Parent both on behalf of Student and herself, and, specifically, that Dracut ‘refused to accommodate [Student’s] communication preferences which is to not have meetings or questioning in person but rather for it be done via email, recorded zoom meet, or recorded telephone. [Student] asked to please have notice of what the topic is. She also asked for [Parent] to be present as an ADA accommodation. These were ignored and at times violated.’” [↑](#footnote-ref-31)
32. Citations omitted. [↑](#footnote-ref-32)
33. See *Fry v. Napolean Community Schools*, 137 S.Ct. 743, 752 (2017). [↑](#footnote-ref-33)
34. Claim (g) states that “[i]n September 2018 and again in March 2023, Dracut failed to respond properly and investigate two “sexual assault” claims made by Student (the first incident of which took place in September 2018 and the second on March 27, 2023). Dracut also retaliated against Student and Parent for filing these reports with the District.” [↑](#footnote-ref-34)
35. Parent refers to the March 27, 2023 “bullying report” when stating, in her July 3, 2023 email, that “bullying report [was] directly related to the disability as [Student’s] disability is anxiety due to bullying.” However, based on her subsequent statements in said email communication, and the Hearing Officer’s understanding of the issues from Parent’s Hearing Request, it appears that this claim relates to the sexual assault incident, rather than to any bullying incidents, that is, Claim (g) rather than Claim (c). [↑](#footnote-ref-35)
36. *Ahmed v. Rosenblatt*, 118 F.3d 886, 890 (1st Cir. 1997); see also *In Re: Student & Natick Public Schools (Ruling on Motion to Dismiss)*, BSEA # 16-11011 (Berman, 2016) (“Some of Parent’s claims may prove to fall within the purview of the BSEA’s authority; of those claims, Parent may or may not be able to meet her burden of proof at a hearing. Other claims may turn out to be outside the scope of the BSEA’s jurisdiction, or otherwise not be appropriate for consideration by the BSEA. At this juncture, especially in light of Parent’s pro se status, it would be both premature and contrary to the mandate for notice pleading and liberal construction of pleadings to dismiss Parent’s claims against Natick fully or in part without having taking steps to fully ascertain just what those claims consist of and without having considered any evidence”). [↑](#footnote-ref-36)
37. That part of Parent’s Claim (g), to wit: that in September 2018 Dracut failed to respond properly and investigate a “sexual assault” claim made by Student and that Dracut retaliated against Student and Parent for filing a report with the District, remains dismissed with prejudice for the reasons articulated in the *June 30, 2023 Ruling*. Further, in her July 2023 email pleadings, Parent did not request that the Hearing Officer reconsider dismissal of this part of Claim (g). [↑](#footnote-ref-37)
38. *In Re Xylia*, BSEA # 12-0781 (Byrne 2012). [↑](#footnote-ref-38)
39. See *In re: Student v. Springfield Public Schools (Ruling on Springfield Public Schools’ Motion to Dismiss)*, BSEA # 2208440 (Kantor Nir, 2022) (“taking Parent’s allegations as true, Parent’s assertion that the District’s actions (or inactions) relative to Student’s Title IX complaint resulted in the District’s failure to deliver FAPE and in the deprivation of ‘educational opportunity [to Student] that directly correlated to significant regression, lack of progress, and anxiety, and depression … [as well as] a fear of school’ forms the basis of Student’s complaint. Because the gravamen of the claim is IDEA-based, it requires exhaustion of administrative remedies under the IDEA and survives dismissal”) (internal citations omitted); see also *Dear Colleague Letter: Responding to Bullying of Students With Disabilities*, 64 IDELR 115 (OCR 2014). [↑](#footnote-ref-39)
40. See also *In Re: Ollie v. Springfield Public Schools (Ruling on Springfield Public Schools’ Partial Motion to Dismiss)*, BSEA # 20-4776 (Reichbach, 2020) (unless a claim of retaliation is tied to a FAPE claim, it is outside the jurisdiction of the BSEA). [↑](#footnote-ref-40)