**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In re: Student[[1]](#footnote-2) v. Dracut Public Schools BSEA # 2312210**

**RULING ON DRACUT PUBLIC SCHOOLS’ MOTION TO DISMISS THE PARENT’S REQUEST FOR HEARING**

**AND ON**

**PARENT’S MOTION FOR COUNSEL’S RECUSAL**

This matter comes before the Hearing Officer on Dracut Public Schools’ (District or Dracut) June 12, 2023 *Motion to Dismiss the Parent’s Request for Hearing and Memorandum of Law in Support Thereof and Response to the Parent’s Request for Hearing (Motion to Dismiss)*, in which the District asserts that “(1) the Parent has failed to state a claim upon which relief may be granted; and (2) the BSEA lacks jurisdiction over the Parent's claims.” On June 21, 2023, Parent filed her objections to the Motion (hereinafter, Parent’s Response).[[2]](#footnote-3) On same date, Parent also submitted Parent’s Motion for Counsel’s Recusal requesting that Dracut’s Counsel be disqualified or recused from the instant due process hearing (*Motion for Recusal*). On June 28, 2023, Dracut filed Dracut Public’s School’s Opposition to Parent’s Motion for Counsel’s Recusal, to which Parent responded on the same day.

Neither party has requested a hearing on either 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 to Dismiss*is hereby **ALLOWED, in substantial part, and DENIED, in part.** Parent’s *Motion for Recusal* is hereby **DENIED.**

**RELEVANT FACTS AND PROCEDURAL HISTORY:**

For the purpose of this Ruling, I consider the factual allegations in the Hearing Request to be true, as well as all reasonable inferences in Parent’s favor[[3]](#footnote-4):

1. Student attends the 4th grade at George Englesby Elementary School in Dracut, Massachusetts. Student is diagnosed with an undisclosed disability or disabilities which appear to be social-emotional in nature.[[4]](#footnote-5)
2. On or about March 20, 2023, Dracut proposed a 504 Plan for Student.[[5]](#footnote-6)
3. Parent did not sign the 504 Plan, because “there is still incorrect information on it and [, Parent] refuse[s] to sign a fraudulent document.” Specifically, the “proposal had a name listed as the father that is not [Student’s] father and also had the incorrect concerns listed in the parent/student concerns section. There were also accommodations [that had been] discussed that were not listed. Due to the incorrect facts[, Parent] could not legally sign this 504 Plan.”
4. Although Parent attempted to set up a meeting with the District to “correct the errors” on the 504 Plan, the District “never got back to [Parent], [and] the 504 plan was never corrected.
5. The District sent the 504 Plan “with all this private information in an unsealed envelope home with [Student], [where Parent] had requested ADA accommodations to mail and email [her all documents].”
6. After Parent refused to sign the 504 Plan, “[the District] took the proposed 504 plan back and said [that Parent needed to] to have another meeting.” The District also requested that Parent “get a letter from the therapist's supervisor [in addition to] the diagnosis [already provided to the District].”
7. Parent subsequently submitted a letter from Student’s pediatrician “specifically stating [Student’s] diagnosis and [] recommend[ing] that a 504 plan would be beneficial.”
8. On March 27, 2023, Student “was sexually assaulted at recess by a 5th grader.” The Principal “neglected to allow [Student] to call [Parent]…. Calling [Parent] after any traumatic event [] was discussed at the original recorded [504 meeting] and was agreed upon by all.”
9. On June 1, 2023, Parent filed a Hearing Request with the BSEA seeking “a hearing and an investigation on all [her] claims.” According to the request, Parent is a person with disabilities[[6]](#footnote-7) who requires “[Americans with Disabilities or] ADA accommodations.”[[7]](#footnote-8)
10. According to Parent, Student and she are or have been “targeted due to financial status, disabilities, race, single mother household, and religious and spiritual beliefs.” Specifically, Parent asserted the following claims[[8]](#footnote-9):
	1. Beginning in September 2018 and until the filing of the complaint, Dracut “failed to provide [Student] with a safe education.”[[9]](#footnote-10)
	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 and forced Student 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[[10]](#footnote-11). Dracut failed to investigate the matter properly and to “rectify their email system.”
	3. During the 2021-2022 and 2022-2023[[11]](#footnote-12) 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[ing], 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[[12]](#footnote-13) 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 school 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.”
	10. 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.”
	11. Dracut’s proposed 504 Plan in March 2023 failed to include “Parent’s concerns.”[[13]](#footnote-14) 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.”
11. Parent seeks the following relief[[14]](#footnote-15):
	1. Parent “want[s] this abuse stopped.” She “want[s] no further retaliation from any Dracut Town Department.”
	2. Parent “would like ALL my bullying reports and violations reports to be investigated properly.”
	3. Parent “want[s] [Student’s] email addresses changed and the old ones deleted. [She] want[s] [the] new email addresses to not contain [Student’s] names or identifying numbers.” She also requests “new passwords” of Parent’s choosing and “new Student ID numbers.” She also asks that “Dracut [] add firewalls and protection for its [sic] children to be added to their system and for it to be inspected afterward to make sure it is up to standards and code,” “create a new online system sign in system using non identifying credentials and for there to be different passwords for each site,” and provide Student with her own Chromebook.
	4. Parent “would like to see accountability and justice.”
	5. Parent “seek[s] that education for [Student] be provided elsewhere and for transportation reimbursement to be paid for by Dracut Public Schools as they have consistently failed to provide a safe education and have shown over and over that they are incapable of doing so.”
	6. Parent “seek[s] the right to file a lawsuit in court.”
	7. Parent “seek[s] monetary compensation.”
12. On June 12, 2023, Dracut filed the instant Motion to Dismiss, asserting,

“the BSEA should dismiss, with prejudice, the Parent's request for hearing because none of the claims raised, or relief requested, is related to the identification, evaluation, or educational placement of the Student nor the provision of F APE to the Student. Although the Parent, among numerous other claims, alleges that the District violated Section 504, such claim should still be dismissed with prejudice because the Parent has yet to consent to the implementation of the proposed Section 504 plan. Even if the allegations raised by the Parent are true, there is no relief which the BSEA can grant where the Parent has not consented to the proposed Section 504 Plan and the accommodations included cannot be implemented by the District. In addition, even though the Parent requests an out-of-district placement for the Student, this relief should also be dismissed because the Parent has refused to allow the District to implement any services under Section 504. In the absence of consent to the initial Section 504 Plan, the District cannot implement any Section 504 services and certainly not an out-of-district placement. Lastly, the BSEA should dismiss with prejudice any and all claims raised by the Parent arising prior to June 1, 2021, as such claims are untimely and barred by the applicable statute of limitations.”

1. On June 21, 2023, Parent responded to the District’s Motion to Dismiss, asserting that “the facts show good reason to not sign a document that is incorrect and illegal. The facts also show [Parent] went above and beyond to set [up] meetings and correct the 504 plan errors. The District violated Massachusetts Education laws and have clearly shown retaliation and unethical practices. They [sic] have gone through great measures to prevent [Student] [] from receiving the special needs services [she is] entitled to.”
2. Also on June 21, 2023, Parent filed Parent’s Motion to Disqualify Counsel asserting that Dracut’s Counsel should “recuse himself from the case on the following [grounds]”:

“I filed a bullying report on a former principal with Superintendent [].

On 4/11/2022 Superintendent [] said he would conduct an independent review of the allegations of abuse that I made. [Dracut’s Counsel] conducted that investigation. This was to be an ‘independent review’ according to Superintendent [].

The investigation attacks my reputation, states numerous mistruths, slanders me and is libel. [Dracut’s Counsel] represented the District against my 2 PRS claims against the district which I won both of. [Dracut’s Counsel] is also representing the District here in the BSEA request for hearing. I feel this is a conflict of interest as how can his investigation be an independent review if you are representing the District and being paid to do so.

Since [Dracut’s Counsel] has already claimed to be an independent reviewer with the District and our family, I feel it is unethical that he represent[s] the District in the PRS cases and for him to do so again at these proceedings. I also feel his ‘independent review’ should be discredited for it was anything but independent.”

1. On June 28, 2023, Dracut filed Dracut Public’s School’s Opposition to Parent’s Motion for Counsel’s Recusal (*Opposition to Motion for Recusal*)[[15]](#footnote-16) asserting, in part, that the “investigation [in which Counsel acted as ‘independent reviewer for the District was] conducted was in the course of my duties as legal counsel for the Dracut Public Schools” as was his representation of the District “in the context of two (2) complaints the Parent filed with the Department of Secondary and Elementary Education's Problem Resolution System ("PRS").” Dracut asserts that “[b]ased upon the circumstances specific to this matter, there is no conflict of interest with any of [Counsel’s] other clients caused by [his] representation of Dracut” nor does Counsel have a “specific personal conflict of interest” relative to this matter.
2. Also on June 28, 2023, Parent submitted a response to *Opposition to Motion for Recusal* seeking to “supply evidence and facts to prove” that the District’s *Opposition to Motion for Recusal* is “incorrect.” Parent supplemented her June 28, 2023 email response to the District’s *Opposition to Parent’s Motion for Recusal* with email communications from January 2020, December 2021, and April 2022, as well as pictures of her chaperoning a field trip. These were “submit[ed] [] as evidence to challenge what the district submitted in their 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.”[[16]](#footnote-17) 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.”[[17]](#footnote-18) These “[f]actual allegations must be enough to raise a right to relief above the speculative level.”[[18]](#footnote-19)

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."[[19]](#footnote-20) In Massachusetts, a parent or a school district, "may request mediation and/or a hearing at any time on any matter[[20]](#footnote-21) 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.”[[21]](#footnote-22) 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….”[[22]](#footnote-23) 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."[[23]](#footnote-24)

BSEA jurisdiction extends to IDEA-based claims as well.[[24]](#footnote-25) 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.[[25]](#footnote-26) 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.”[[26]](#footnote-27) 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].”[[27]](#footnote-28)

In a recent decision, the Supreme Court ruled Section 504 and ADA Title II claims for money damages are exempt from IDEA's exhaustion requirement.[[28]](#footnote-29) Unlike the IDEA, Section 504 includes no exhaustion requirement. Although a student covered by IDEA as well as Section 504 may need to exhaust IDEA’s remedies when seeking relief for a violation of Section 504 relating to the denial of FAPE[[29]](#footnote-30), where a student is not eligible under the IDEA or a complaint seeks relief for disability-based discrimination at school but not for the denial of a FAPE, exhaustion of remedies is unnecessary.[[30]](#footnote-31)

1. Legal Standard for Ruling on Motion for Counsel’s Recusal

Motions to recuse counsel by their nature are intensely fact specific.[[31]](#footnote-32) In deciding whether recusal of counsel is warranted, a judge must “reconcil[e] the right of a person to counsel of his choice on the one hand, and the obligation of ‘maintaining the highest standards of professional conduct and the scrupulous administration of justice,’ on the other.”[[32]](#footnote-33) While “the right of a litigant to counsel of his choosing is not absolute and cannot always predominate,” motions to disqualify “must be considered in light of the principle that courts ‘should not lightly interrupt the relationship between a lawyer and [a] client.’”[[33]](#footnote-34) Because granting a motion for counsel’s recusal has “immediate, severe, and often irreparable … consequences” for the party and disqualified attorney, courts have exercised extreme caution in allowing counsel recusal or disqualification.[[34]](#footnote-35) As stated in Borman v. Borman, 378 Mass. 775, 787–88, 393 N.E.2d 847, 855–56 (1979):

“When disqualification occurs after employment has begun, it temporarily (and possibly permanently) disables the litigant in his effort to prosecute a claim or mount a defense. It is not surprising therefore that the code has been used increasingly as a catalog of pretrial tactics. When needless disqualification occurs as a result of these tactics, the very rules intended to prevent public disrespect for the legal profession foster a more dangerous disrespect for the legal process…. When a lawyer, exercising his best judgment, determines that his employment will not bring him into conflict with the code, disqualification may occur only if the trial court determines that his continued participation as counsel taints the legal system or the trial of the cause before it.”[[35]](#footnote-36)

Hence, disqualification should not be ordered “except when absolutely necessary.”[[36]](#footnote-37) Because there are “severe consequences of stripping a party of chosen counsel[,]” judges are counseled to proceed with “deliberate caution” when considering requests for disqualification.[[37]](#footnote-38) They are also advised to “be alert that the Canons of Ethics are not brandished for tactical advantage,” especially when claims of unethical behavior are offered as grounds for disqualification.[[38]](#footnote-39)

Nevertheless, there are circumstances that require disqualification of counsel.[[39]](#footnote-40) Rule 3.7 of the Massachusetts Rules of Professional Conduct provides that disqualification is appropriate when a lawyer “is likely to be a necessary witness” in a case. Rule 3.7 further provides that a lawyer may act as a witness and an advocate where “(1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.”[[40]](#footnote-41) In such cases, the court must “reconcile ‘the right of a person to counsel of his choice on the one hand, and the obligation of maintaining the highest standards of professional conduct and the scrupulous administration of justice, on the other.’”[[41]](#footnote-42) The movant bears the burden to show that she “cannot support [her] claim without [the] attorney’s testimony.”[[42]](#footnote-43) In addition, disqualification is “not required in every case in which counsel could give testimony on behalf of his client on other than formal or uncontested matters. We must look to whether the attorney is likely to ‘withhold crucial testimony from his client because he prefers to continue as counsel,’ to determine if the ‘continued participation as counsel taints the legal system or the trial of the cause before it.’”[[43]](#footnote-44)

Similarly, Rule 1.7 prohibits an attorney from representing a client, (a) “if the representation of that client will be directly adverse to another client,” or (b) “if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests[.]” The Rule further provides that continued representation nevertheless is appropriate if “(1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.” In such cases, the movant must establish that an “actual” or “genuine” conflict of interest exists such that “the independent professional judgment of trial counsel is impaired, either by his own interests, or by the interests of another client.”[[44]](#footnote-45) Nevertheless, the burden is on the party moving for disqualification “to establish the need to interfere with” the attorney-client relationship.[[45]](#footnote-46)

**APPLICATION OF LEGAL STANDARDS:**

1. **Motion to Dismiss**
	1. Statute of Limitations,

In evaluating the District’s *Motion to Dismiss*under the **LEGAL STANDARDS** set forth *supra*, I take Parent’s allegations in her Hearing Request as true as well as any inferences that may be drawn from them in her favor, and deny dismissal if these allegations plausibly suggest an entitlement to relief. [[46]](#footnote-47) Here, Parent is a *pro se* litigant, and, therefore, I interpret her claims and draw inferences therefrom more liberally than would be accorded to a litigant represented by counsel.[[47]](#footnote-48) I address the claims *infra*.

The District argues that “the BSEA should dismiss with prejudice any and all claims raised by the Parent arising prior to June 1, 2021, as such claims are untimely and barred by the applicable statute of limitations.” In response, Parent argues that “the 2 year [statute] of limitations should be extended” on the following grounds:

“1. The District continued these actions retaliatory cruel and abuse actions repeatedly and have not stopped with the most critical events happening within the 2 year statute.

2. Covid[.]

3. The District ignored the parents [sic] emails, requests for documents, and left open complaints which prevented the parent from properly seeking justice through due process. They withheld documents causing the parent to have to file in PRS then [Dracut’s Counsel] filed the maximum extensions each time for every document due causing the lengthiest amount [of] time. This pattern is clearly displayed through the facts and timeline. The District has never investigated and/or closed several of the complaints and reports, including bullying reports tha[t] they were legally obligated by law to investigate and close. The [purposely] parent was blocked with their extensions and slow responses. The district failed to provide numerous requests, reports, files, answers and such many which have statutes of limitations that they were to complete by and to this day hasn't answered a large majority of the parents [sic] emails. Under the IDEA, a due process complaint is timely if filed within two years of the date that the parent or district knew or should have known about the action forming the basis for the complaint.[[48]](#footnote-49) Section 504, on the other hand, does not include a statute of limitations. However, courts have generally applied the IDEA’s two-year statute of limitations to FAPE claims brought pursuant to § 504 where the two are intertwined,[[49]](#footnote-50) and “[w]hen there is no separate claim of disability discrimination under § 504.”[[50]](#footnote-51) In other words, the IDEA statute of limitations applies to § 504 claims “premised on IDEA obligations, such as those invoking Child Find and FAPE duties.”[[51]](#footnote-52)

Parent’s claim asserting discrimination in violation of § 504 (Claim (k)) is inarguably within the statute of limitations, as is Parent’s claim that the District violated Student’s substantive and procedural rights pursuant to § 504 (Claim (j)). (Although it does not appear that Parent asserts any violations relating to Student’s right to a FAPE accruing prior to June 1, 2021, to the extent that any exist and have been asserted in the Complaint, they are dismissed with prejudice.)[[52]](#footnote-53)

Parent asserts that “all of what I am claiming pertains to this forum as the actions and [in] some cases refusal to act by the district directly affects the students [sic] ability to [receive] a free and proper education as it targets there [sic] disability and their actions violate the 504 plan.” In addition, the District’s “cruel and abusive behavior causes anxiety and is exactly the behaviors that caused [Student’s] PTSD to begin with which was also done at the school. Which I believe absolutely places this in the BSEA's forum.” However, Parent’s arguments are unpersuasive as to most of her claims.

* 1. Subject Matter Jurisdiction.

Claims (a), (b), (c), (d), (e), (f), (g), (h), and (i)[[53]](#footnote-54) must be dismissed with prejudice for lack of subject matter jurisdiction. for lack of The Section 504 regulations establishing procedural safeguards require districts to afford parents an impartial hearing in connection with actions relating to the identification, evaluation, or educational placement of students with disabilities.[[54]](#footnote-55) Section 504 also requires a district to provide a "free appropriate public education" to each qualified individual with a disability within its jurisdiction, regardless of the nature or severity of the individual's disability.[[55]](#footnote-56) Hence, in the context of a student found eligible for a 504 Plan, the BSEA’s jurisdiction is limited to disputes that are related to the “denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973….”[[56]](#footnote-57)

As such, 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.[[57]](#footnote-58)

In addition, 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. [[58]](#footnote-59) Similarly, the BSEA has no jurisdiction over Parent’s claims of retaliation[[59]](#footnote-60) (Claims (c) and (g))[[60]](#footnote-61), and these claims must be dismissed with prejudice.

Furthermore, Parent’s claim relative to violation of her constitutional rights (Claim (e)) must be dismissed with prejudice as the BSEA lacks specific statutory authority over, or expertise and experience in, adjudicating constitutional claims.[[61]](#footnote-62) Nor does the BSEA have any jurisdiction over claims relating to Dracut’s improper response to Student’s allegations of bullying[[62]](#footnote-63) and Title IX[[63]](#footnote-64) (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.[[64]](#footnote-65) 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.[[65]](#footnote-66) Similarly, although the right to examine "relevant records" is included among the procedural safeguards granted to parents under Section 504[[66]](#footnote-67), and Parent asserts that the Superintendent denied her access to Student’s records (Claim (i)), she makes no connection between such denial and Student’s access to a FAPE[[67]](#footnote-68). Therefore, these claims too must be dismissed with prejudice.

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,[[68]](#footnote-69) which “generally encompasses orders for changed or additional services, specific placements, additional evaluations, reimbursement for services obtained privately by parents or compensatory services."[[69]](#footnote-70) As stated by Hearing Officer Rosa Figueroa in *In Re: Student v. Weymouth Public Schools (Ruling on Weymouth Public Schools’ Motion to Dismiss),* BSEA # 14-09137 (2014), the BSEA cannot “monitor” a school district” to ensure it provides Student with the safe [] environment” or “micromanage the day—to—day operations of the school district” as “the BSEA is not a policing agency and it lacks the type of enforcement authority.” In addition, the Hearing Officer cannot order “monetary compensation.”[[70]](#footnote-71) Also, Parent “seek[s] the right to file a lawsuit in court,” but the Hearing Officer lacks the authority to devise such an order.[[71]](#footnote-72)

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. [[72]](#footnote-73) 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.[[73]](#footnote-74) As such, the BSEA lacks jurisdiction over these claims, and, as discussed *supra*, they are dismissed with prejudice.

* 1. Claims Surviving Dismissal.

In Claim (j), Parent asserts that Dracut “violated the 504 plan … section number 3 [which stated that Student] is able to contact parent when anxious or on request via (phone or zoom)” and “section 6 [which stated that Student] will have access to an identified point person at recess when she is feeling anxious.” The District argues that “any claim by the Parent that the District failed to comply with Section 504 by failing to properly implement the Student's Section 504 Plan must be dismissed with prejudice because the Parent has failed to provide parental consent for the Student's accommodations to be implemented.” However, the District’s argument is unpersuasive because Parent also asserts that sections 3 and 6 of the 504 Plan were “agreed upon by all.” Interpreting Parent’s claim liberally, taking her allegations as true, and drawing inferences in her favor, as I am required to do, I find that Claim (j) “raises allegations [that] plausibly suggest an entitlement to relief.[[74]](#footnote-75) Specifically, from Parent’s allegation I infer that she “agreed” to implementation of sections 3 and 6 of the 504 Plan, but the District failed to implement said sections. Therefore, Claim (j) survives dismissal.

In addition to asserting that that the District failed to comply with the 504 Plan, Parent asserts in Claim (k) that Dracut’s March 2023 504 Plan, in part, “failed to specify Parent’s concerns.” According to Parent, the District failed to meet with Parent to amend the 504 Plan, and that, 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. As such, Parent “was made to provide more than other parents do.”

Interpreting Parent’s claim liberally, taking her allegations as true, and drawing inferences in her favor, as I am required to do, I find that Claim (k) “raises allegations [that] plausibly suggest an entitlement to relief. [[75]](#footnote-76) Specifically, Parent asserts that the 504 Plan does not capture Parent’s “concerns”, from which assertion, I infer that she is alleging that the 504 Plan as developed is not appropriate. From Parent’s assertion that the District refused to set up a meeting to amend Student’s 504 Plan, I also infer that Parent alleges procedural violations relating thereto.

Moreover, in contrast to the retaliation allegations in Claims (c) and (g), discussed *supra*, in Claim (k), Parent suggests that the District’s retaliation is “tied to a FAPE claim”[[76]](#footnote-77) since Parent’s “claim of retaliation is literally ‘related’ to … her efforts to gain for [Student] ‘the provision of a free appropriate public education.’”[[77]](#footnote-78) Moreover, Parent’s request for relief in the form of “education for [Student] be provided elsewhere and for transportation reimbursement to be paid for by Dracut Public Schools” is available at the BSEA. [[78]](#footnote-79)

Therefore, Claim (k) survives dismissal as well.

1. **Motion for Recusal**

Because the attorney-client relationship “should not lightly”[[79]](#footnote-80) be disrupted, I exercise “extreme caution”[[80]](#footnote-81) in assessing the merits of Parent’s Motion for Recusal. The District enjoys the right to the counsel of its choice, and, as such, the burden rests with Parent to establish the need to interfere with this relationship.[[81]](#footnote-82) After analyzing the particular facts of the case at hand,[[82]](#footnote-83) I find that Parent has not met her burden. My reasoning follows.

The Parent moves to have District’s legal counsel recused based on allegations that Dracut’s Counsel has previously conducted an “independent review” of Parent’s bullying allegations and represented the District in Parent’s PRS complaints. According to Parent, “this is a conflict of interest” and “is unethical.”[[83]](#footnote-84)

Parent’s argument is unpersuasive.[[84]](#footnote-85) Dracut’s Counsel’s prior work on behalf of his client relative to Student does not in any way preclude his ongoing involvement. Nor can I find any Rule in the Massachusetts Rules of Professional Conduct that would support Parent’s assertion that such representation by Dracut’s Counsel would be a conflict of interest or unethical under the circumstances.[[85]](#footnote-86) Because I cannot find that the “continued participation [of Dracut’s Counsel] as counsel taints the legal system or the trial of the cause before it,”[[86]](#footnote-87) Parent’s Motion for Recusal must be denied.

**ORDER:**

The District’s *Motion to Dismiss*is hereby **ALLOWED, in substantial part, and DENIED, 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 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.”

Claims (j) and (k) **SURVIVE** dismissal. As such, 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.

Furthermore, Parent’s *Motion for Counsel Recusal* is hereby **DENIED**.

By the Hearing Officer:

/s/ Alina Kantor Nir

Alina Kantor Nir
Dated: June 30, 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. Parent’s Hearing Request and subsequent pleadings include numerous references to her other children. I do not consider any allegations set forth in the complaint that do not refer to Student. [↑](#footnote-ref-2)
2. Although Parent’s Response, Motion for Recusal, and response to Dracut’s Opposition to Parent’s Motion for Recusal were submitted via email and not in accordance with BSEA Hearing Rules, in light of Parent’s *pro se* status, the Hearing Officer allowed Parent’s June 21, 2023 and June 28, 2023 email submissions of pleadings. [↑](#footnote-ref-3)
3. See *Blank v. Chelmsford Ob/Gyn, P.C*., 420 Mass. 404, 407 (1995). [↑](#footnote-ref-4)
4. Parent does not specify Student’s disability in her complaint, but she refers to Student’s anxiety which “developed … as a result of …consistent retaliation from staff and administration, and long term bullying in the Dracut Public Schools.” According to Parent, Dracut “exacerbates and purposely sets out to target [Student’s] disability as well as [that of Parent.]” [↑](#footnote-ref-5)
5. According to the District’s Motion, on March 19, 2023, the District proposed a Section 504 Plan for the Student to address the Student's generalized anxiety and post-traumatic stress disorder (PTSD). [↑](#footnote-ref-6)
6. Parent’s hearing request states that she is a “person [with] disabilities and a [s]urvivor of [d]omestic [a]buse, and a [s]urvivor of [n]arcissistic abuse. [She is] also a minority, a single mother, and a Christian.” [↑](#footnote-ref-7)
7. In her complaint, Parent requested multiple accommodations from the BSEA, including but not limited to “an expedited hearing,” which was denied by BSEA Director Reece Erlichman on June 2, 2023 for failure to meet the standard for an expedited hearing pursuant to 20 USC 1415 or the applicable *Hearing Rules for Special Education Appeals*. I do not address the accommodations sought by Parent on her own behalf in this Ruling. [↑](#footnote-ref-8)
8. Parent’s complaint included more than 50 unnumbered pages. Whereas Parent “numbered” some of the claims, others were incorporated in Parent’s “timeline,” which she asked that the Hearing Officer “use … as both a reference and as claims and violations all of which have either directly involved, negatively impacted, or affected [Student, and] use this as a reference for [Parent] as ADA accommodations.” The undersigned Hearing Officer has attempted to order Parent’s claims and to organize them in such a way as to ensure that the Ruling addresses any and all claims. Where I am able to match an event in the “timeline” with a claim asserted, I do so. Parent’s complaint frequently references incidents and claims relating to Parent’s other children, and these have been disregarded. [↑](#footnote-ref-9)
9. Parent did not specify a time frame for this claim, and the timeframe I provide is based on the fact that Parent’s “timeline” begins in September 2018 and continues until the filing of the Complaint in June 2023. [↑](#footnote-ref-10)
10. Parent’s “timeline” initially indicated that the hacking occurred on January 27, 2022, but she later noted that “the hacking and cyberbulling [sic] went on during 1/26 & 1/27/2023.” [↑](#footnote-ref-11)
11. Based on Parent’s “timeline,” it appears that some of these bullying incidents occurred between October 2021 and the spring of 2022. The “timeline” also includes numerous references to Parent filing bullying reports with the District during the 2022-2023 school year. [↑](#footnote-ref-12)
12. This incident appears to have been investigated by the Dracut Police. [↑](#footnote-ref-13)
13. Parent indicates that the 504 Plan “had the wrong person listed as [Student’s] father,” but the “father’s name” was later corrected by Dracut. “[Dracut] also sent the 504 plan with all this private information in an unsealed envelope home with the child when [she] requested ADA accommodations to mail and email not send [sic] home with the child.” [↑](#footnote-ref-14)
14. For ease of reference, in this Ruling, Parent’s claims will be addressed as delineated in this section (i.e., “Claim (a), Claim (b), Claim (c), etc.). [↑](#footnote-ref-15)
15. The *Opposition to Motion for Recusal* was accompanied by *Exhibit A*, Counsel’s May 20, 2022 Investigation of Complaint of Bullying - Notice of Findings. [↑](#footnote-ref-16)
16. *Iannocchino v. Ford Motor Co.,* 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). [↑](#footnote-ref-17)
17. *Blank*, 420 Mass. at 407. [↑](#footnote-ref-18)
18. *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted). [↑](#footnote-ref-19)
19. See 34 C.F.R. §300.507(a)(1). [↑](#footnote-ref-20)
20. Limited exceptions exist that are not here applicable. [↑](#footnote-ref-21)
21. 603 CMR 28.08(3)(a).  [↑](#footnote-ref-22)
22. See 29 U.S.C. 794 (Section 504 of Rehabilitation Act); 34 CFR 104. [↑](#footnote-ref-23)
23. *In Re: Georgetown Pub. Sch.*, BSEA # 1405352 (Berman 2014). [↑](#footnote-ref-24)
24. See Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 59, 64 (1st Cir. 2002). [↑](#footnote-ref-25)
25. Id. at 60. [↑](#footnote-ref-26)
26. *Rose v.* *Yeaw*, 214 F.3d 206, 210 (1st Cir. 2000). [↑](#footnote-ref-27)
27. *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-28)
28. See *Perez v. Sturgis Public Schools*, 123 LRP 10045 (03/21/23). [↑](#footnote-ref-29)
29. See, e.g., *Weber v. Cranston Pub. Sch. Comm*., 245 F. Supp. 2d 401, 410 (D.R.I. 2003) (“relief for a violation of Section 504 relating to the denial of FAPE is only available in this Court upon utilization of all available state administrative procedures”) [↑](#footnote-ref-30)
30. See *McIntyre v. Eugene Sch. Dist. 4J*, 976 F.3d 902, 914 (9th Cir. 2020) (where student did not have an IEP, and the complaint sought relief for disability-based discrimination and harassment rather than for denial of a FAPE, the Court concluded that exhaustion of administrative remedies was not required). [↑](#footnote-ref-31)
31. See *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981); *Coke v. Equity Residential Properties Trust*, 440 Mass. 511, 516, 800 N.E.2d 280 (2003); *Slade v. Ormsby,* 69 Mass. App. Ct. 542, 546, 872 N.E.2d 223, 226 (2007). [↑](#footnote-ref-32)
32. *Slade*, 69 Mass. App. Ct. at 545–46 (internal citations omitted). [↑](#footnote-ref-33)
33. *G.D. Mathews & Sons Corp. v. MSN Corp*., 54 Mass.App.Ct. 18, 20, 763 N.E.2d 93 (2002), quoting from *Adoption of Erica*, 426 Mass. 55, 58, 686 N.E.2d 967 (1997); see also *Slade*, 69 Mass. App. Ct. at 546. [↑](#footnote-ref-34)
34. See, e.g., *Freeman v. Chicago Musical Instrument Co.,* 689 F.2d 715, 719 (1982); *Borman v. Borman*, 378 Mass. 775, 787–88, 393 N.E.2d 847, 855–56 (1979). [↑](#footnote-ref-35)
35. *Borman*, 378 Mass. at 787–88 (internal citations omitted). [↑](#footnote-ref-36)
36. *Slade*, 69 Mass. App. Ct. at 546; *Masiello v. Perini Corp*., 394 Mass. 842, 850 (1985). [↑](#footnote-ref-37)
37. *Smaland Beach Ass’n, Inc. v. Genova*, 461 Mass. 214, 220, 959 N.E.2d 955, 962-63 (2012). [↑](#footnote-ref-38)
38. See *Serody v. Serody,* 19 Mass. App. Ct. 411, 414 (1985). [↑](#footnote-ref-39)
39. Rule 1.8 delineates specific personal conflicts of interest which limit the ability of an attorney to represent a client, none of which is applicable in the instant matter. These include, in part, that: a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client; a lawyer shall not use confidential information relating to representation of a client to the disadvantage of the client or for the lawyer’s advantage or the advantage of a third person, unless the client gives informed consent, except as permitted or required by these Rules; a lawyer shall not, for his own personal benefit or the benefit of any person closely related to the lawyer, solicit any substantial gift from a client, including a testamentary gift, or prepare for a client an instrument giving the lawyer or a person closely related to the lawyer any substantial gift, including a testamentary gift, unless the lawyer or other recipient of the gift is closely related to the client; prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation; a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation; a lawyer shall not accept compensation for representing a client from one other than the client; a lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client; a lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement; or settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith; a lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client; and, a lawyer shall not during the course of any representation by the lawyer or the lawyer's firm, employ coercion, intimidation, or undue influence to enter into or continue sexual relations with a client, or as a condition of entering into or continuing any representation by the lawyer or the lawyer's firm, require or demand sexual relations with a client or prospective client.  [↑](#footnote-ref-40)
40. Rule 3.7(a). [↑](#footnote-ref-41)
41. *Smaland Beach Ass’n, Inc*., 461 Mass. at 220. [↑](#footnote-ref-42)
42. *Byrnes v. Jamitkowski*, 29 Mass. App. Ct. 107, 110, 557 N.E.2d 79, 81 (1990). [↑](#footnote-ref-43)
43. *Id*. at 109–10 (internal citations omitted). [↑](#footnote-ref-44)
44. *Commonwealth v. Perkins*, 450 Mass. 834, 852, 883 N.E.2d 230, 246 (2008) (quotations omitted). [↑](#footnote-ref-45)
45. *Byrnes*, 29 Mass. App. Ct. at 110. [↑](#footnote-ref-46)
46. *Blank*, 420 Mass. at 407. [↑](#footnote-ref-47)
47. See *Wanham v. Everett Pub. Sch*., 515 F. Supp. 2d 175, 178 (D. Mass. 2007), *amended*, 550 F. Supp. 2d 152 (D. Mass. 2008) (“litigants appearing pro se are afforded wide attitude, especially with respect to technical and procedural requirements”). [↑](#footnote-ref-48)
48. 34 CFR 300.507(a)(2). [↑](#footnote-ref-49)
49. See In Re: Adam and Taunton Pub. Sch., BSEA # 17-08888 (Reichbach, 2017) (citing to P.P. ex rel. Michael P. v. West Chester Area Sch. Dist., 585 F.2d 727, 736 (3rd Cir. 2009) and Blunt, 767 F.3d at 274-75). [↑](#footnote-ref-50)
50. *Id.* (citing Baker v. S. York Area Sch. Dist., 2009 WL 4793954, at \*3 (M.D. Pa. Dec. 8, 2009) and Bell v. Bd. of Educ. of Albuquerque Pub. Sch., 2008 WL 4104070, at \*13 (D.N.M. Mar. 26, 2008)). [↑](#footnote-ref-51)
51. *D.K. v. Abington Sch. Dist*., 696 F.3d 233, 244 (3d Cir. 2012). [↑](#footnote-ref-52)
52. In order for violations relating to Student’s right to a FAPE accruing prior to June 1, 2021 to survive dismissal, they would need to satisfy either of the two exceptions to the statute of limitation of IDEA. See 20 USC § 1415(f)(3)(D); 34 CFR 300.511(f). [↑](#footnote-ref-53)
53. For ease of reference, I refer to Parent’s claims as listed in this Ruling in the **RELEVANT FACTS AND PROCEDURAL HISTORY** section*, supra.* [↑](#footnote-ref-54)
54. See 34 CFR 104.36. [↑](#footnote-ref-55)
55. See 34 CFR 104.33(a). [↑](#footnote-ref-56)
56. See 29 U.S.C. 794 (Section 504 of Rehabilitation Act); 34 CFR 104. [↑](#footnote-ref-57)
57. See *In Re: Hampden-Wilbraham School District*, BSEA # 1403110 (Figueroa, 2013); see also *In Re: Acton Boxborough Regional School District*, BSEA # 2103253 (Figueroa, 2021) (“the BSEA has long held that it has no jurisdiction over regular education matters… [… or] to order remedies over violations of internal school policies, procedures or student handbooks”); *In Re: Rochester Regional School District*, BSEA #1806205 (Byrne, 2018) ("The BSEA is not the proper forum to complain that a school failed to follow the policies and procedures set out in a student handbook") (citations omitted). [↑](#footnote-ref-58)
58. *In Re: CBDE Public Schools (Ruling on CBDE Public School’s Motion to Dismiss),* BSEA # 10-6854 (Crane, 2011). Although failure to provide a student with a disability found eligible pursuant to Section 504 with reasonable accommodations may result in a denial of a FAPE, Parent makes no such claim in her Hearing Request. Furthermore, although Parent has a right to reasonable accommodations on the basis of her disability from public agencies such as school district, such claims are not properly asserted before the BSEA. [↑](#footnote-ref-59)
59. 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-60)
60. Parent’s claim of retaliation in Claim (k) is distinguishable from Claims (c) and (g) and will be discussed *supra*. [↑](#footnote-ref-61)
61. See *In Re: Chicopee Public Schools and Massachusetts Department of Elementary and Secondary Education (Ruling on Motion to Dismiss),* BSEA # 1608986 (Berman, 2016) (dismissing 14th Amendment claim for lack of subject matter jurisdiction). [↑](#footnote-ref-62)
62. *Cf.* *In Re: Student v. Weymouth Public Schools (Ruling on Weymouth Public Schools’ Motion to Dismiss),* BSEA # 14-09137 (Figueroa, 2014) (claim of bullying survived dismissal because Parent expressed concerns that possible bullying may result in a denial of FAPE to Student and, as such, the BSEA had jurisdiction over this issue). [↑](#footnote-ref-63)
63. See *In Re: Rafael and the Norton Public Schools (Ruling on School’s Motion to Dismiss),* BSEA # 160348 (Byrne, 2016) (the BSEA has no jurisdiction over Title IX claims). Here, Parent does not assert that the District’s failure to investigate properly the sexual assault allegations resulted in a denial of a FAPE. In contrast, 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 and quotations omitted) [↑](#footnote-ref-64)
64. 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”); see also *In re: Old Rochester Regional School District*, BSEA # 1806205 (Byrne, 2018) (“As a forum with limited subject matter jurisdiction, any factual/legal assertions that could be construed as viable claims solely under Title IX, MGL c. 151B, MGL c. 119 and MGL c.71 § 370 are not properly lodged here”). [↑](#footnote-ref-65)
65. See *Dear Colleague Letter: Responding to Bullying of Students With Disabilities*, 64 IDELR 115 (OCR 2014). [↑](#footnote-ref-66)
66. See 34 CFR 104.36. [↑](#footnote-ref-67)
67. See *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”). [↑](#footnote-ref-68)
68. See *In re: Acton-Boxborough Regional School District*, BSEA # 2103253 (Figueroa, 2021) (the BSEA “may award only the limited remedies available under the IDEA, MGL. C. 71 B and Section 504 after a finding of past or current failures by school districts to offer FAPE; funding or reimbursement to parents for evaluations, private placements and or related services; modification of special education programs; school placements; and compensatory education and related equitable relief”); *In re: Georgetown Pub. Sch*., BSEA # 1405352 (Berman, 2014) ("The BSEA can only grant relief that is authorized by these statutes and regulations [M.G.L. c. 71B and its regulations; IDEA, 20 USC§ 1400 et seg. and its regulations; Section 504 of the Rehabilitation Act of 1973, 29 USC§ 794 and its regulations]"). [↑](#footnote-ref-69)
69. *In Re: Georgetown Pub. Sch.*, BSEA # 1405352 (Berman, 2014). [↑](#footnote-ref-70)
70. See *In Re: Albert and Boston Public Schools (Ruling on Motion to Dismiss),* BSEA # 06-6508 (Crane, 2007) (“I am not aware of a single judicial or administrative decision that has concluded, either explicitly or implicitly, that Section 504 monetary damages may be allowed in an administrative due process proceeding”). [↑](#footnote-ref-71)
71. *Cf.* *Perez v. Sturgis Public Schools*, 123 LRP 10045 (03/21/23) (ruling that parents of students with disabilities who sue for disability discrimination under Title II of the ADA and seek monetary damages, a type of relief not available under the IDEA, need not first satisfy the IDEA's exhaustion of remedies requirement). [↑](#footnote-ref-72)
72. See Frazier, 276 F.3d at 59 and 64. [↑](#footnote-ref-73)
73. See *Fry*, 137 S. Ct. at 754-55 (“A school’s conduct toward such a child—say, some refusal to make an accommodation—might injure her in ways unrelated to a FAPE, which are addressed in statutes other than the IDEA. A complaint seeking redress for those other harms, independent of any FAPE denial, is not subject to” exhaustion because “the only ‘relief’ the IDEA makes ‘available’ is relief for the denial of a FAPE”). In fact, the Claims discussed in this section could have been raised by any general education student (or parent). See *Id.* at 752. [↑](#footnote-ref-74)
74. *Blank*, 420 Mass. at 407. [↑](#footnote-ref-75)
75. *Id*. [↑](#footnote-ref-76)
76. In Re: Ollie v. *Springfield* Public Schools Ruling on*Springfield* Public Schools Partial Motion to Dismiss), BSEA # 20-4776 (Reichbach, 2020). [↑](#footnote-ref-77)
77. See Weber v. Cranston Sch. Comm., 212 F.3d 41, 51-52 (1st Cir. 2000) (“Weber’s claim of retaliation is literally ‘related’ to the ‘identification, evaluation, or educational placement of [her] child,’ and to her efforts to gain for him ‘the provision of a free appropriate public education.’ As Weber ha[d] completely failed to explain to us why she does not therefore have relief that is available through an IDEA due process hearing that must be exhausted, we conclude that Weber had to invoke the due process hearing procedures of IDEA before filing her retaliation claim in federal court pursuant to Section 504 of the Rehabilitation Act and 42 U.S.C. § 1983”); see also *In Re: Oxford Public Schools*, BSEA # 15-06886 (Berman, 2015) (the BSEA lacks jurisdiction over retaliation claims under the ADA but is the appropriate agency for retaliation claims pursuant to Section 504); *In re: Ollie v. Springfield Public Schools (Ruling on Springfield Public Schools’ Partial Motion to Dismiss)*, BSEA # 2004776 (Reichbach, 2020) (where Parent asserted that a Springfield employee taunted and humiliated Ollie; and that in retaliation for her actions on behalf of her son, IEP meetings have been cancelled and/or attended by a Springfield attorney without notice, and the District has prevented her from meeting with the mayor, threatened her with a defamation lawsuit, and negatively impacted her ongoing work with other families as an advocate, “taking as true Parent’s allegations and inferences that may be drawn therefrom, to the extent she asserts that Springfield’s actions impeded her ability, and/or that of Ollie, to participate in IEP meetings, these claims appeared to be IDEA-based, and, as such, they could not be dismissed at that stage in the case”). [↑](#footnote-ref-78)
78. See *In Re: Georgetown Pub. Sch.*, BSEA # 1405352 (Berman, 2014). [↑](#footnote-ref-79)
79. *G.D. Mathews & Sons Corp*., 54 Mass.App.Ct. at 20. [↑](#footnote-ref-80)
80. See, e.g., *Freeman v. Chicago Musical Instrument Co.,* 689 F.2d 715, 719 (1982); *Borman*, 378 Mass. at 787–88. [↑](#footnote-ref-81)
81. *Byrnes*, 29 Mass. App. Ct. at 110. [↑](#footnote-ref-82)
82. See *Firestone Tire*, 449 U.S. at 377. [↑](#footnote-ref-83)
83. In her *Motion for Recusal*, Parent asserted that Dracut’s “‘independent review’ should be discredited for it was anything but independent.” However, such claim is not within the BSEA’s jurisdiction and is dismissed with prejudice. See, for example, *In Re: Rochester Regional School District*, BSEA # 1806205 (Byrne, 2018) ("The BSEA is not the proper forum to complain that a school failed to follow the policies and procedures set out in a student handbook") (citations omitted). [↑](#footnote-ref-84)
84. Nor did I find Parent’s June 28, 2023 response to the District’s Opposition to Motion for Recusal persuasive as Parent focused her response and the supporting “evidence and facts” on the accuracy of Counsel’s May 20, 2022 Investigation of Complaint of Bullying - Notice of Findings. However, as discussed *supra*, the Hearing Officer has no authority to review the Notice of Findings or to assess the accuracy of its findings. [↑](#footnote-ref-85)
85. See *Massachusetts Rules of Professional Conduct*, Rules 1.7 and 1.8. [↑](#footnote-ref-86)
86. *Borman*, 378 Mass. at 787–88 (internal citations omitted). [↑](#footnote-ref-87)