**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Student v. Quaboag Regional School District BSEA # 2403026**

**RULING ON SCHOOL DISTRICT’S MOTION TO DISMISS**

This matter comes before the Hearing Officer on the September 28, 2023 Quaboag Regional School District’s (Quaboag or the District) *School District* *Motion to Dismiss* (*Motion*) seeking dismissal of the Hearing Request on the grounds that “the crucial determination at issue of eligibility has not yet been seen through to fruition and is therefore not ripe for adjudication.”

On October 5, 2023, Parents filed *[Student’s] [[1]](#footnote-1) Response To Quaboag’s Motion To Dismiss* (*Response*), asserting that

“Quaboag’s Motion would have the Bureau believe this matter is not ripe because [Student] is new to Quaboag and Quaboag needs time to conduct evaluations and hold a Team meeting. The reality is very different. Quaboag’s Director of Student Support Services, Dr. Kirsten Esposito, became intimately familiar with [Student] while serving the same role at [Student’s] former school district (‘North Brookfield).”

Parents further assert that

“there is no reason to subject anxiety-riddled [Student] to new evaluations when [the independent report] issued less than five (5) months earlier and presented clear diagnoses warranting an IEP and setting forth clear recommendations for services…. Parent has little hope that Dr. Esposito would proceed differently based on the new evaluations she is now offering. The anxiety gripping [Student] calls for immediate action rather than waiting for Quaboag to conduct additional, unnecessary evaluations that might also be disregarded. Parent’s only available recourse to timely address [Student’s] needs [was] to request a hearing.”

Moreover, although Quaboag offered to complete the new evaluations by October 24, 2023, and hold a Team meeting on October 26, 2023, “Parent is understandably skeptical of Quaboag sticking to this schedule. Moreover, if Quaboag does stick to this schedule, then the parties should know prior to the hearing whether or not Quaboag’s new evaluations obviate the need for the hearing scheduled on October 30, 2023.”

Neither party has requested a hearing on the *Motion*. Because neither testimony nor oral argument would advance the Hearing Officer’s understanding of the issues involved, this Ruling is issued without a hearing, pursuant to *Bureau of Special Education Appeals Hearing Rule* VII(D).

For the reasons set forth below, the *Motion* is ALLOWED.

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

1. Student is a 9-year-old, 4th grade student who resides in North Brookfield, Massachusetts. He is currently attending the Quaboag Regional School District where he was accepted via School Choice in June 2023. Student formerly attended school at North Brookfield Public Schools (North Brookfield). While at North Brookfield, Student displayed slow academic progress. He received reading instruction through the Title 1 program from kindergarten through third grade.
2. At Parents’ request, North Brookfield evaluated Student for special education eligibility in May-July of 2022.
3. In the fall of 2022, Parent obtained a private evaluation which identified Student as having some challenges with phonological awareness skills. During this time, Student began to suffer from panic attacks and anxiety.
4. In November 2022, North Brookfield found Student ineligible for special education and related services.
5. In January 2023, a privately obtained Vision Assessment diagnosed Student with Deficient Saccadic Eye Movement and Hyperopia and recommended outpatient vision therapy and specific school-based accommodations.
6. In March 2023, North Brookfield held a meeting and issued a 504 Accommodation Plan. Parent signed the 504 Plan on May 2, 2023.
7. In March 2023, Student participated in a private Integrated Neuropsychological and Educational Evaluation which identified challenges in processing speed, executive functioning, visual-motor skills and phonological awareness. The evaluator diagnosed Student with a Specific Learning Disorder (Dyslexia, Dysgraphia. and Dyscalculia) and recommended specialized instruction in reading, writing and math as well as occupational therapy.
8. On May 11, 2023, Student was assessed for his panic attacks. The evaluator found that Student was “most likely [] experiencing '’heightened school related anxiety which is impacting his mental health and [] the anxiety was not tied to a medical illness.’”
9. On May 24, 2023, North Brookfield convened to review the Integrated Neuropsychological and Educational Evaluation. The Team did not find Student eligible for special education and related services, contending that Student “present[ed] with neurological impairment, did not present with an educational disability, and therefore did not warrant related service or specially designed services through special education.''
10. On June 1, 2023, Parent informed Quaboag Regional School District Principal, Melissa Provost, and Quaboag Team Chair, Martha Girouard, of [Student’s] evaluations, diagnoses, and needs, and emailed them the independent report, along with other materials. Principal Provost responded that she would review the evaluations.[[3]](#footnote-3)
11. On June 13, 2023, the 504 Team convened to review the Integrated Neuropsychological and Educational Evaluation. The Team added some accommodations to Student’s 504 Plan. Parent signed the updated 504 Plan on June 19, 2023 but “rejected the sufficiency thereof and asserted that [Student] should instead be eligible for an IEP.”
12. On June 29, 2023, Student was diagnosed with generalized anxiety disorder, and in August 2023, he began seeing a Licensed Mental Health Counselor.
13. On August 22, 2023, Parent provided the independent report to Student current general education teacher in the Quaboag Regional School District.
14. In September 2023, Student transferred to the Quaboag Regional School District as a School Choice student.
15. On or about September 1, 2023, Parents requested a meeting to discuss eligibility but the meeting was denied. Quaboag’s Director of Student Services stated that Quaboag would "not overrule or reconsider" the determinations made by North Brookfield.[[4]](#footnote-4) However, “Quaboag did—simultaneously with that rejection—ask whether Parent wanted new evaluations that would necessitate a Team meeting.”
16. On September 20, 2023, Parents filed a Hearing Request with the Bureau of Special Education Appeals (BSEA) asserting, in part, that Student “is entitled to an IEP that includes at least the diagnoses and recommendations listed in [the privately obtained] Neuropsychological and Educational Report.”
17. On September 22, 2023, the Hearing Request was granted accelerated status pursuant to the Hearing Rules for Special Education Appeals.
18. On September 28, 2023, Quaboag filed the instant *Motion*, asserting, in part, that

“[a]t an open house on September 14, 2023, the parent told [Student’s] classroom teacher that [Student’s] homework was giving him panic attacks, and that she believes that [Student] has dyslexia. The parent then stated that [Student] needed to be on an IEP. This was reported to the Director of Support Services who referred the student for formal evaluation. Quaboag issued consents for evaluation on September 21, 2023, within five (5) school days of notice at the open house. Consents to evaluate were signed and returned to Quaboag on September 26, 2023.”

1. On October 4, 2023, Quaboag offered dates for the new evaluations and a Team meeting to discuss them. Quaboag offered to complete the new evaluations by October 24, 2023, and hold a Team meeting on October 26, 2023.
2. The Hearing is scheduled on October 30, 2023.

**LEGAL STANDARDS:**

1. Legal Standard for Motion to Dismiss.

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.[[5]](#footnote-5)

To survive a motion to dismiss, there must exist “factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”[[6]](#footnote-6) The hearing officer must take as true “the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff’s favor.”[[7]](#footnote-7) These “[f]actual allegations must be enough to raise a right to relief above the speculative level.”[[8]](#footnote-8)

**APPLICATION OF LEGAL STANDARDS:**

In the instant matter, Parents seek to dispute the finding of ineligibility that Quaboag has yet to (and might not) make. Specifically, this District (as opposed to North Brookfield) has not yet assessed or convened a Team to make a finding of eligibility (or not) as Student is only now in the process of undergoing an evaluation. Parents’ claims relate solely to “contingent future events that may not occur as anticipated, or indeed may not occur at all.”[[9]](#footnote-9) Although a Team determination may be available by the date of the currently-scheduled Hearing, the Team is as likely to find Student eligible as it is to find him ineligible. Parents’ complaint is premature.

The ripeness doctrine is designed “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.”[[10]](#footnote-10) The ripeness doctrine “asks whether an injury that has not yet happened is sufficiently likely to happen to warrant judicial review.”[[11]](#footnote-11) A claim is ripe “only if ... the issues raised are fit for judicial decision at the time the suit is filed and ... the party bringing suit will suffer hardship if court consideration is withheld.”[[12]](#footnote-12)

The fitness inquiry examines “whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all.”[[13]](#footnote-13) Here, Parents in essence seek relief upon facts that are not sufficiently developed and may never come to pass. The Bureau of Special Education Appeals (BSEA) has jurisdiction over "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…"[[14]](#footnote-14) and may dismiss a Hearing Request for lack of subject matter jurisdiction.[[15]](#footnote-15) "[A]ny matter" refers to a current, live dispute between and/or among the parties, as a "due process complaint must allege a violation…."[[16]](#footnote-16) The BSEA provides “adjudicatory hearings, mediation and other forms of alternative dispute resolution…for resolution of disputes…,"[[17]](#footnote-17) and 603 CMR §28.08(3) states that the BSEA "shall conduct mediations and hearings to resolve … disputes." Therefore, the BSEA has no “jurisdiction over matters in which no dispute or disagreement has arisen, even if a party anticipates a future dispute,”[[18]](#footnote-18) and a hearing may not proceed on upon facts that are not sufficiently developed and may never come to pass.[[19]](#footnote-19)

The hardship inquiry centers upon “the hardship that may be entailed in denying judicial review,”[[20]](#footnote-20) and “whether the sought-after declaration would be of practical assistance in setting the underlying controversy to rest.”[[21]](#footnote-21) Although a “plaintiff must present evidence sufficient to satisfy both prongs of the test[,] ... a very strong showing on one axis may compensate for a relatively weak showing on the other.”[[22]](#footnote-22) Here, although the Hearing Officer is sensitive to Parent’s assertion that Student is in distress, Parents have failed to assert sufficient facts to “compensate” for the absence of an “underlying controversy.” Even if I view the facts in the light most favorable to Parents, as I am required to do when considering a motion to dismiss,[[23]](#footnote-23) I cannot find that the matter is ripe for adjudication against the party named in this dispute at this time.[[24]](#footnote-24) Therefore, Quaboag’s *Motion to Dismiss* is ALLOWED.

**ORDER:**

Quaboag’s *Motion to Dismiss* is ALLOWED. The matter is dismissed WITHOUT PREJUDICE. The Conference Call scheduled for October 10, 2023 is cancelled. The Hearing scheduled for October 30, 2023 is also cancelled.

So ordered,

By the Hearing Officer,

/s/ *Alina Kantor Nir*
Alina Kantor Nir

Date: October 10, 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. As Student is a minor, the Hearing Request and subsequent pleadings were filed by Parent. I therefore attribute all references thereto to Parent rather than to Student. [↑](#footnote-ref-1)
2. The statement of facts is prepared principally in order to rule on the District’s *Motion*. For this purpose, I consider the factual allegations in the Hearing Request to be true, as well as all reasonable inferences in Parents’ favor. See *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995). [↑](#footnote-ref-2)
3. It appears that Parent was entertaining having Student attend Quaboag as a School Choice student. [↑](#footnote-ref-3)
4. Quaboag’s Director of Student Services served in a similar capacity at North Brookfield during the 2022-2023 school year. [↑](#footnote-ref-4)
5. See *Nollet v. Justices of the Trial Court of Mass.,*83 F. Supp. 2d 204, 208 (D.Mass. 2000), *aff'd,*248 F.3d 1127 (1st Cir. 2000); *In Re: Ludlow Public Schools*, BSEA No. 1603808, 115 LRP 58373 (Figueroa, 2015). [↑](#footnote-ref-5)
6. *Iannocchino v. Ford Motor Co.,* 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). [↑](#footnote-ref-6)
7. *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995). [↑](#footnote-ref-7)
8. *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted). [↑](#footnote-ref-8)
9. *Texas*, 523 U.S. at 300 (quoting *Thomas v. Union Carbide Agric. Prods. Co*., 473 U.S. 568, 580–81 (1985)). [↑](#footnote-ref-9)
10. *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–149 (1967)). [↑](#footnote-ref-10)
11. *Gun Owners' Action League, Inc. v. Swift*, 284 F.3d 198, 205 (1st Cir. 2002) (citation and internal quotation marks omitted). [↑](#footnote-ref-11)
12. *Labor Relations Div. of Constr. Indus. of Mass., Inc. v. Healey*, 844 F.3d 318, 326 (1st Cir. 2016) (emphasis added) (citation and internal quotation marks omitted). [↑](#footnote-ref-12)
13. *Texas v. United States*, 523 U.S. 296, 299 (a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all). [↑](#footnote-ref-13)
14. 20 USC §1415(b)(6)(A); 34 CFR §300.507(a)(1); MGL c. 71B, §2A(a)(i); 603 CMR §28.08(3). [↑](#footnote-ref-14)
15. See Hearing Rules for Special Education Appeals, Rule XVIIB(1) and 801 CMR 1.01(7)(g)(3). These provisions are analogous to Rule 12(b)(1) of the Federal and Massachusetts Rules of Civil Procedure. [↑](#footnote-ref-15)
16. 20 USC §1415(b)(6)(B); 34 CFR §507(a)(2). [↑](#footnote-ref-16)
17. MGL c. 71B, §2A(a)(i) [↑](#footnote-ref-17)
18. *In Re: Reading Public Schools (Ruling on Reading Public Schools’ Motion to Dismiss)*, BSEA # 1706923 (Berman, 2017) (parents could not dispute the appropriateness of an IEP that was yet to be drafted). [↑](#footnote-ref-18)
19. See *Johnson v. Gen. Electric*, 840 F. 2d 132, 136 (1st Cir. 1988) (“It is unwise to encourage lawsuits before the injuries resulting from the violations are delineated, or before it is even certain that injuries will occur at all”); see also *In Re: Division of Administrative Law Appeals [Edward McGrath in his capacity as Chief Magistrate] & Bureau of Special Education Appeals [Reece Erlichman in her capacity as Director, Sara Berman in her capacity as Hearing Officer] (Ruling on the Division of Administrative Law Appeals’ & Bureau of Special Education Appeals’ Joint Motion to Dismiss),* BSEA # 2303901(Figueroa, 2022) (“Parent's claims must be ripe before she may raise them at the appropriate time in the appropriate forum”). [↑](#footnote-ref-19)
20. *Ernst & Young v. Depositors Econ. Prot. Corp*., 45 F.3d 530, 536 (1st Cir. 1995). [↑](#footnote-ref-20)
21. *Town of Barnstable v. O'Connor*, 786 F.3d 130, 143 (1st Cir. 2015) [↑](#footnote-ref-21)
22. *NEGB, LLC v. Weinstein Co. Holdings, LLC*, 490 F.Supp.2d 89, 95 (D. Mass. 2007) [↑](#footnote-ref-22)
23. See *Blank,* 420 Mass. at 407. [↑](#footnote-ref-23)
24. *Labor Relations Div. of Constr. Indus. of Mass., Inc.*, 844 F.3d at 326 (emphasis added); see *Reddy v. Foster*, 845 F.3d 493 (1 st Cir. 2017) (finding that the action was not ripe for adjudication where the complaint “claims only that the plaintiffs ‘fear prosecution under the Act’ [and] [n]owhere does the complaint allege that the demarcation of a zone is imminent or that prosecution will occur without that precondition first having been satisfied”). [↑](#footnote-ref-24)