**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In re: Student v. Wachusett Regional School District BSEA#: 2409133**

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

This matter comes before the Hearing Officer on the Wachusett Regional School District’s (Wachusett or the District) March 18, 2024 *Motion to Dismiss*[[1]](#footnote-2) (*Motion*) in which Wachusett asserts that Parent’s[[2]](#footnote-3)

“claim for reimbursement should be denied for several reasons. First, it is an improper request for the Bureau of Special Education Appeals ("BSEA") to review a finding and order from the Problem Resolution System ("PRS") run by the Department of Elementary and Secondary Education ("DESE") on PRS Complaint 8719 ("Complaint")…. Second, this claim for reimbursement should be denied because the IEP and amendment in effect during the 2022-2023 school year were accepted insofar as the services are concerned. … Third, this claim for reimbursement should be denied because Wachusett is not the appropriate party. [Bancroft][[3]](#footnote-4) School is located in [Worcester], MA while Parent and Student's district of residence is the Wachusett Regional School District.”

On March 20, 2024, Parent filed an *Opposition to Motion to Dismiss* *(Opposition)*, asserting that DESE did not issue any findings or orders relative to reading services; that the District’s “procedural impropriety” is “within the very type of exception BSEA can make to revisit an accepted expired IEP”; and that Wachusett is “the proper name party in this action” as “Wachusett either intentionally or through deliberate indifference failed to respond leaving the student without the services he was legally entitled to as outlined in his IEP.”

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

For the reasons set forth below, the District’s *Motion* is DENIED.

**RELEVANT FACTS[[4]](#footnote-5) AND PROCEDURAL HISTORY:**

1. Student is a 10 year old resident of Jefferson, Massachusetts. Since the start of the 2022-2023 school year, Student has been attending the Bancroft School in Worcester, Massachusetts pursuant to a unilateral placement by Parents. Prior to attending Bancroft, Student attended Thomas Prince School in Princeton, Massachusetts, within the Wachusett Regional School District pursuant to an Individualized Education Program (IEP) with a full inclusion placement.
2. Student is eligible for special education and relation services pursuant to the Specific Learning Disability (Dyslexia) and Health (ADHD) disability categories.
3. During the 2021-2022 school year, Wachusett proposed, and Parents accepted on January 20, 2022, an IEP dated 12/16/21 - 12/15/22 (as amended on March 7, 2022 and accepted by Parent on April 12, 2022), which offered goals and services in Specialized Reading Instruction and Visual/Motor Coordination.
4. According to Parent, at some time during the 2021-2022 school year, Parents

“twice reached out to Amanda Martinez, the IEP Chair at the Thomas Prince School, inquiring about services for the 2022-2023 school year if [Student] was unilaterally placed in a private school. Despite these inquiries, the District remained unresponsive even failing to acknowledge a unilateral placement letter [sent to the District on June 19, 2022] that expressed the intent to seek reimbursement for private school tuition during the 2022-2023 term.”

1. Parents subsequently enrolled Student at Bancroft School for 2022-2023 school year.
2. According to Parent, during the 2022-2023 school year, the District failed “to provide any services outlined in [Student’s] IEP.” In addition, “the District failed to convene the annual IEP Meeting or Inform [sic] the family of the closure of the student's IEP [in December 2022].”
3. On March 7, 2023, Parent filed a complaint with PRS (PRS 8719) which, according to Parent, concluded that

“the District denied [Student] of a Free Appropriate Public Education (FAPE) by not providing any of the services specified in his IEP. [Student’s] parents had asked DESE for a compensatory services plan for occupational therapy only, as [Student] had been receiving the daily multi-sensory reading instruction through daily Orton Gillingham tutoring services that his parents privately funded through the $44,500 tuition to Bancroft School's language based language program, Hope Graham Program. [Student’s] parents did not seek compensatory services for the reading instruction, as they had assumed they could collaborate with the District for reimbursement of the privately funded reading instruction that took place during the time period of the District's non­compliance.”

1. According to Parent, PRS’s “letter of finding did not reference any [] services [other than Occupational Therapy services] that Wachusett failed to implement, as the parent's own complaint did not raise a complaint for other services already being privately funded.”
2. On May 30, 2023, Parents met with Wachusett and “discussed the compensatory services plan for occupational therapy.” Parents made their “reimbursement request for reading services” and were “advised to contact central office.” According to Parents, despite numerous requests for reimbursement, the District “appears to take the position that their sole obligation is to provide occupational therapy services, paying no attention to the finding of denial of FAPE and the statutory reimbursement provisions established under IDEA.”
3. Also on May 30, 2023, the Team met to develop a new IEP for Student. The District proposed (and on July 9, 2023 Parent accepted) a full inclusion placement at the Thomas Elementary School with goals and services in Specialized Reading Instruction and Visual/Motor Coordination.
4. On February 4, 2024, Parent sent an email to Wachusett Special Education Director, Joan DeAngelis, regarding the “reimbursement request” and “received a response stating IEP services should be obtained through the Worcester School District [with] notably no acknowledgment of the reimbursement request.”
5. Also on February 4, 2024, Parent filed a complaint with DESE (PRS #10709) due to Wachusett’s failure to respond to Parent’s request for reimbursement. On March 7, 2024, DESE advised that it would not “investigate the reimbursement complaint due to the [expiration of the] one­year lookback period tolling [and] recommended Due Process Hearing or Mediation.”
6. On March 7, 2024 Parent filed a Hearing Request with the BSEA seeking reimbursement for the specialized reading services which were provided to Student at Parent’s expense during the 2022-2023 school year. Parent’s “hearing request [aims] to specifically address reimbursement for privately funded services during the period when [Student] was deprived of reading services under the IEP. This request does not pertain to the existing compensatory service plan in place to make up his occupational therapy services.”[[5]](#footnote-6)
7. On March 18, 2024, the District filed its *Response* and the instant *Motion*, and, on March 20, 2024, Parent filed an *Opposition* to the Motion.

**LEGAL STANDARDS:**

1. *Legal Standard for Motion to Dismiss*

Hearing Officers are bound by the BSEA *Hearing Rules for Special Education Appeals* (Hearing Rules) and the Standard Rules of Adjudicatory Practice and Procedure, 801 Code Mass Regs 1.01. Pursuant to Rule XVII A and B of the Hearing Rules and 801 CMR 1.01(7)(g)(3), a hearing officer may allow a motion to dismiss if the party requesting the hearing fails to state a claim upon which relief can be granted. These rules are analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure. As such, hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim, which require the fact-finder to make a determination based on a complaint or hearing request alone.

To survive a motion to dismiss, there must exist “factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”[[6]](#footnote-7) The hearing officer must take as true “the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff’s favor.”[[7]](#footnote-8) These “[f]actual allegations must be enough to raise a right to relief above the speculative level.”[[8]](#footnote-9)

1. *Jurisdiction of the Bureau of Special Education Appeals (BSEA)*

20 U.S.C. § 1415(b)(6) grants the BSEA jurisdiction over timely filed complaints by a parent/guardian or a school district "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child."[[9]](#footnote-10) In Massachusetts, a parent or a school district, "may request mediation and/or a hearing at any time on any matter[[10]](#footnote-11) concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities.”[[11]](#footnote-12) A parent of a student with a disability may also request a hearing on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973….”[[12]](#footnote-13) However, the BSEA "can only grant relief that is authorized by these statutes and regulations, which generally encompasses orders for changed or additional services, specific placements, additional evaluations, reimbursement for services obtained privately by parents or compensatory services."[[13]](#footnote-14)

**APPLICATION OF LEGAL STANDARDS:**

After evaluating the District’s *Motion* under the LEGAL STANDARDS set forth *supra*, and taking the allegations in Parent’s Hearing Request as true, as well as any inferences that may be drawn from them in her favor,[[14]](#footnote-15) I find that the District’s *Motion* must be DENIED.

I address each of the District’s arguments below.

The District asserts that Parent’s Hearing Request must be dismissed as the BSEA may not review a finding and order from PRS. According to Wachusett,

“In PRS Complaint 8719, DESE issued a finding on whether there was a denial of FAPE and the matter was resolved and closed including an agreed-upon compensatory service plan. The compensatory service plan included OT services and the clause stating, ‘The Wachusett Regional School District and the Parents/Guardians that the above identified Compensatory Services are appropriate and will compensate the Student ... [.’] … Now, Parent is saying that plan did not cover all of the services that they want despite agreeing that the prior plan was the compensation for any services owed. Parent claims in her request for a Hearing that she does not want to address the OT services but it is impossible to extricate the compensatory OT services from the now requested reimbursement for reading services since they are both services that the child would receive in the C Grid of his IEP and therefore would have been contemplated in the same service plan and would have been part of DESE's orders.”

Parent's request “for a hearing for additional services beyond what was approved of and ordered by DESE as a part of the resolution of the Complaint amounts to a review of DESE's findings and orders,” which is precluded under 603 CMR 28.08(2).

### 603 CMR 28.08(2) states, in relevant part, that

### “[t]he Department can make findings on procedural issues and issues related to implementation of requirements. Any party wishing to file a complaint may do so through the Department. Use of the Department Problem Resolution procedures shall not prevent a party from requesting alternative administrative remedies of mediation or hearing on any matter, at any time .… Findings and orders issued by the Department on complaints and the Department's processing of a complaint are not reviewable by the Bureau of Special Education Appeals.”

As one BSEA Hearing Officer explained,

“[p]er the applicable Massachusetts Special Education Regulations, if a BSEA Hearing is requested prior to issuance of a PRS determination relating to the same issues, PRS must stay their findings pending issuance of the BSEA decision. Similarly, if PRS receives a complaint and issues a finding prior to filing, or in the absence of, a BSEA Hearing Request, PRS’ findings may not be reviewable by the BSEA. If a party disagrees with PRS’s findings it must seek review directly through the DESE.”[[15]](#footnote-16)

### Taking the allegations in Parent’s Hearing Request as true as well as any inferences that may be drawn from it in her favor, I find that Parent is not seeking a “review” of PRS’s findings or conclusions. Rather, she seeks an order from the BSEA relative to a matter not resolved by PRS, that is, reimbursement for Student’s privately funded reading instruction. The District’s argument that the reading service “would have been contemplated in the same service plan [as for OT services] and would have been part of DESE's orders” is unconvincing as it raises a question of fact, the resolution of which would require a hearing.

In addition, the District asserts that “this claim for reimbursement should be denied because the IEP and amendment in effect during the 2022-2023 school year were accepted insofar as the services are concerned.” Specifically, the District argues that

“The 2021-2022 IEP was developed on December 16, 2021 and Parent accepted the proposed IEP …. Then the team met on March 7, 2022 to review an outside evaluation. Parent accepted that March 2022 Amendment via email on April 12, 2022. The team then met in May 2023 to develop a new IEP to last until December 2023. Parent fully accepted that IEP in July 2023. During the 2022-2023 school year, Student's IEPs and Amendment were either fully accepted or partially accepted with the only rejections in regards to the bullying statement which did not weigh on provision of services, especially the reading services at issue …. [C]laims regarding fully accepted, implemented and expired IEPs are not cognizable and should be dismissed as a matter of law.”

Although the District correctly asserts that fully accepted, implemented, and expired IEPs may not be revisited by the BSEA[[16]](#footnote-17), here, Parent’s claim for reimbursement is based on the District’s alleged failure to implement the fully accepted 2021-2022 IEP. Moreover, Parents rejected the 2021-2022 IEP (as amended) on June 19, 2022 during the term of the IEP by submitting a unilateral placement letter. Parents allege that the District failed to provide Parents with Notice of Procedural Safeguards and that Wachusett failed to propose a new IEP for Student in December 2022.[[17]](#footnote-18) Therefore, while it is true that Parent challenges the 2021-2022 IEP after its expiration, where Parent raises questions of fact as to her rejection of said IEP during the time period in which it was in effect, and as to the District’s failure to provide notice of her options for rejection of an IEP and proceeding to a due process hearing[[18]](#footnote-19), I conclude that the BSEA is not precluded from revisiting this IEP even where it was challenged after its expiration. The fact that Parent accepted the IEP proposed by the District in May 2023 has no relevance to the instant matter, as Parent appears to be seeking reimbursement for the 2022-2023 school year only.

The District also asserts that “this claim for reimbursement should be denied because Wachusett is not the appropriate party. [Bancroft] School is located in [Worcester], MA while Parent and Student's district of residence is the Wachusett Regional School District.” Specifically, the District observes that

“Under 34 CFR § 300.131, [Worcester] as district of the [private] school is responsible for a service plan and for proportionate share expenditures while Wachusett would be responsible for offering services in the child's IEP at a location in the district of residence. Since Parent did not pursue services with their district of residence, Wachusett Regional, [Worcester] is the proper party to pursue for reading tutor reimbursement since it is an expenditure not a service provided by either [Worcester] or Wachusett. Thus, Wachusett is not the correct party and this claim should be denied.”

The District’s argument is unpersuasive. Students with disabilities placed by parents in private schools due to personal preferences do not have an individual entitlement to the special education and related services they would receive if they were enrolled in a public school or placed in a private school by the LEA in order to provide a FAPE; in contrast where parents place their child in a private school where FAPE is at issue, they have a right to due process regarding educational placement and IEP implementation issues. .[[19]](#footnote-20)  In the instant matter, taking as true the allegation[[20]](#footnote-21) in Parent’s Hearing Request that Parents’ unilateral placement of Student at Bancroft School was related to Wachusett’s alleged denial of a FAPE, Wachusett, as Student’s school district of residence, is an appropriate party to this dispute.

**ORDER:**

The District’s *Motion* is hereby DENIED. The Hearing is scheduled to begin on April 10, 2024.

By the Hearing Officer:

/s/ Alina Kantor Nir

Alina Kantor Nir
Dated: March 21, 2024

**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. On March 18, 2024, Wachusett Regional School District filed its Response to the Hearing Request, embedded in which was the *Motion to Dismiss*. [↑](#footnote-ref-2)
2. The Hearing Request was filed by Student’s mother only. I refer to her as “Parent” in this Ruling. [↑](#footnote-ref-3)
3. The District erroneously refers to Bancroft School as Baxter School in its pleading. [↑](#footnote-ref-4)
4. The statement of facts is prepared principally in order to rule on the District’s *Motion to Dismiss*. [↑](#footnote-ref-5)
5. In the Hearing Request, Parent also noted that she “had filed separate complaints with the DESE concerning [the District’s] handling of multiple bullying incidents”, and the District retaliated against Student due to Parents “exercising their rights to protected petitioning activity.” [↑](#footnote-ref-6)
6. *Iannocchino v. Ford Motor Co.,* 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). [↑](#footnote-ref-7)
7. *Blank v. Chelmsford Ob/Gyn, P.C*., 420 Mass. 404, 407 (1995). [↑](#footnote-ref-8)
8. *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted). [↑](#footnote-ref-9)
9. See 34 C.F.R. §300.507(a)(1). [↑](#footnote-ref-10)
10. Limited exceptions exist that are not here applicable. [↑](#footnote-ref-11)
11. 603 CMR 28.08(3)(a).  [↑](#footnote-ref-12)
12. See 29 U.S.C. 794 (Section 504 of Rehabilitation Act); 34 CFR 104. [↑](#footnote-ref-13)
13. *In Re: Georgetown Pub. Sch.*, BSEA # 1405352 (Berman 2014). [↑](#footnote-ref-14)
14. *Blank*, 420 Mass. at 407. [↑](#footnote-ref-15)
15. *In re: Student v. Medford Public Schools*, BSEA # 20-02451 (Figueroa, 2020); see *Student v. the Massachusetts Department of Elementary and Secondary Education (Ruling on Massachusetts Department of Elementary and Secondary Education Motion to Dismiss)*, BSEA # 2309949 (Putney-Yaceshyn, 2023) (“[u]nder the above regulation, it is very clear that the BSEA does not have the authority to entertain [an] appeal of the PRS Letter of Finding [through the BSEA hearing process])”. [↑](#footnote-ref-16)
16. See, for example, *Natick Public Schools*, BSEA # 11-3131 (Crane, 2011) (“The general and well-settled rule is that acceptance of an IEP precludes a Hearing Officer from considering its appropriateness. Thus, Parents cannot, on the one hand, accept the IEPs, thereby indicating that they agree with the goals and objectives and the types and amounts of services reflected within that IEP, and then, at a later time after the IEP has been implemented, complain that the goals and objectives and the types and amounts of services reflected within the IEP were not reasonably calculated to provide Student with FAPE in the least restrictive environment”) (internal citations omitted). [↑](#footnote-ref-17)
17. See 34 CFR 300.504(a) and 20 USC 1414 (d)(4)(A). I infer this from Parent’s claim that “the District failed to convene the annual IEP Meeting or Inform the family of the closure of the student's IEP [in December 2022].” [↑](#footnote-ref-18)
18. See *Springfield Public Schools (Ruling on Springfield Public Schools' Motion To Dismiss and Educational Surrogate Parent's Motion for Summary Judgment)*, BSEA # 08-3378 (Figueroa, 2008)(“Both the courts and the BSEA have repeatedly held that Hearing Officers are precluded from revisiting/re-opening accepted IEPs that have expired where parents have participated in the development of the IEP; parents have received notice of their options for rejection of an IEP and proceeding to a due process hearing; parents have chosen to accept the IEP; and parents have never rejected the IEP during its term”) (citations omitted). [↑](#footnote-ref-19)
19. See 34 CFR 300.137(a); see also 34 CFR 300.130 through 34 CFR 300.148 (requiring each state to have in effect policies and procedures that ensure that local educational agencies and, if applicable, the state educational agency meet the private school requirements in the regulations); *Letter to Champagne*,22 IDELR 1136 (OSEP 1995); see also See *Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schs*., 80 IDELR 197 (OSERS 2022). IDEA's due process procedures do not apply to issues regarding the provision of services to any particular parentally-placed private school child with a disability. While IDEA provides no individual entitlement to children with disabilities whose parents have placed them in a private school when FAPE is not at issue, the law does require that an LEA spend a proportionate amount of its IDEA Part B funds to provide equitable services to this group of children. See *Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schs*., 80 IDELR 197 (OSERS 2022). Therefore, in this matter, Worcester is not an appropriate party in the dispute nor could Parent file a due process complaint against Worcester “for reading tutor reimbursement.” [↑](#footnote-ref-20)
20. *Blank*, 420 Mass. at 407. [↑](#footnote-ref-21)