**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Student v. Newburyport Public Schools** **BSEA # 2411365**

**RULING ON NEWBURYPORT PUBLIC SCHOOLS' [PARTIAL] MOTION TO DISMISS PARENTS' TORT, RETALIATION, "CREDIBILTY," AND CONSTITUTIONAL CLAIMS;**

**NEWBURPORT PUBLIC**

**SCHOOLS' MOTION FOR SUMMARY JUDGMENT’, AND**

**PARENTS’ [PARTIAL] MOTION FOR SUMMARY JUDGMENT**

This matter comes before the Hearing Officer on *Newburyport Public Schools' [Partial] Motion To Dismiss Parents' Tort, Retaliation, "Credibility," And Constitutional Claims* (*District’s* *[Partial] Motion to Dismiss*), *Newburyport Public Schools’ Motion for Summary Judgment* (*District’s* *Motion for Summary Judgment*) (together, the *District’s* *Motions*) filed on May 20, 2024[[1]](#footnote-2), and on *Parents’ [Partial] Motion for Summary Judgment* filed on May 28, 2024.

The *District’s* *Motion to Dismiss* seeks dismissal of “some of the Parents' claims on the grounds that of the fifteen (15) issues raised in this matter, eight (8) issues are claims in tort, claims of retaliation, a claim of the lack of ‘credibility’ resulting in ‘harm,’ and a Constitutional claim,” all of the type “previously dismissed… (albeit for a different time period)… by this Hearing Officer for lack of jurisdiction in a November 4, 2023, Ruling in the matter of BSEA # 2311471 [and] 2401600.”

In the *District’s* *Motion for Summary Judgment*, Newburyport contends that there is no genuine issue of material fact and Newburyport is entitled to prevail as a matter of law. Specifically, the District asserts that the BSEA may not order the District “to do something it is not legally obligated to do,” such as create an in-District program or fund Parents’ home program. Newburyport further asserts that a homebound setting is the most restrictive environment for a student, not, as Parents assert, the least restrictive environment (LRE) given the lack of private day programs for Student. Moreover, according to the District, Parents have obstructed its efforts to provide the student a free appropriate public education (FAPE), making Parents ineligible for relief, including equitable remedies. Last, the District argues that Parents incorrectly claim that Student's graduation date should be changed based on the parties' November 2023 Agreement, as not only does the Hearing Officer lack jurisdiction to interpret or enforce settlement agreements, but a Hearing Officer cannot extend a student's eligibility beyond her legitimate graduation from high school or "aging out" at age 22, as will likely be the case for this Student.

On May 28, 2024, Parents filed *Parents’ Response To District’s [Partial] Motion To Dismiss Parents’ Tort, Retaliation, Credibility, And Constitutional Claims (Response to [Partial] Motion to Dismiss)* asserting that their claims are within the BSEA’s subject matter jurisdiction. Parents also filed *Parents’ Opposition to Newburyport Public Schools’ Motion For Summary Judgment (Parents’ Opposition*)asserting that the BSEA has authority to order the District to create a program for Student and that the creation of an in-District program provides Student a FAPE in the LRE and is appropriate under the circumstances.

In addition, on May 28, 2024, Parents filed *Parents’ [Partial] Motion for Summary Judgment*, moving “for summary judgement on the Issue #1 as stated within the instant matter” and “if summary judgment is granted, proceedings will be held on the remaining issues (modeled after both the Massachusetts and Federal Rules of Civil Procedure, Rule 56, Summary Judgment). Parents[] move for the District to create an in-District program for Student as District’s inaction to provide Student a FAPE continues to cause irreparable harm and Student and Parents[] are entitled to judgment as a matter of law.” On May 31, 2024, Newburyport filed its *Opposition to Parents’ [Partial] Motion for Summary Judgment* (*District’s Opposition*) asserting that “[b]ut for the Parents’ statement that the Student resides in Newburyport and, as a student eligible for special education, she is entitled to an educational placement, the Parents’ arguments … are disputed issues relating to the District’s defense of the Parents’ claims. The Parents set forth no cogent undisputed legal arguments permitting Summary Judgment in their favor. Therefore, as a matter of law, the BSEA must deny the Parents’ Motion for Summary Judgment.”

Neither party has requested a hearing on any of the motions addressed in this Ruling. 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 [Partial] *Motion to Dismiss* is ALLOWED. The *District’s Motion for Summary Judgment* is also ALLOWED. *Parents’ [Partial] Motion for Summary Judgment* is DENIED.

**RELEVANT FACTS:**

The following facts are not in dispute and are derived from the Hearing Request[[2]](#footnote-3), the District’s response thereto, the *District’s* *Motions*, Parents’ *Response to [Partial] Motion to Dismiss*, *Parents’* *Opposition,* *Parents’ [Partial] Motion for Summary Judgment*,the *District’s Opposition,* and all exhibit attached to said pleadings*.*

1. Student is a sixteen-year-old resident of Newburyport. She is diagnosed with Autism Spectrum Disorder (Level 3), Intellectual Disability (Severe), Epilepsy[[3]](#footnote-4), and Attention Deficit Hyperactivity Disorder (ADHD). (S-A, P-HR-159a) Student also has difficulties with body awareness, modulation of movement, and safety . (P-HR-111a) She has a “strength in social motivation” and is “reinforced by social attention.” (S-A, P-HR-159a)
2. Student has not attended a school program since May 2021, when Parents unilaterally removed her from a private day program funded by Newburyport. (S-D) Parents have been providing Student with a home program at their own expense. (P-SJ-6, P-SJ-8, P-SJ-9, P-SJ-10, P-SJ-11, P-SJ-12, P-SJ-12a)
3. In January 2023, the District sent Parents a consent form to make referrals to 11 programs. In March 2023, Parents consented to have the District send referral packets to "day placements only with a transition to residential in the future; placement packets are to be sent to placements within commuting distance only." Parents also limited the information in the referral packets to only the most recent Individualized Education Program (IEP), most recent neuropsychological evaluation report, progress reports, and most recent communication between Parents and the District.[[4]](#footnote-5) (S-DP-HR-147a) Student was referred to 3 programs, all of which declined her admission. (S-DP-HR-147a)
4. The Team met on September 28, 2023 and on October 11, 2023 to develop an IEP for Student. On October 23, 2023, the District proposed an IEP dated 10/11/2023 to 10/10/2024 (2023-2024 IEP) with goals and services in the areas of Functional Communication, Expressive Language, Receptive Language, Functional Motor Skills, Functional Mobility, Daily Living Skills, Functional Academics, Social and Behavioral. The Team proposed placement in any DESE-approved public day, private day, or residential setting. The Placement Consent Form indicates that a Separate Private Day School is proposed. The school-based Team observed that given Student’s specific needs “and the limited schools available within the proximity of her home, … a residential placement may be required.” At the meeting, the District agreed to send referral packets to day programs within proximity to Student’s home. The District requested releases to send referral packets to 9 programs. (S-B, P-HR-121, P-HR-121a, P-HR-121c) This request was reiterated via email on October 25, 2023. Parents did not sign any releases. (S-C, P-HR-121)
5. In October 2023, Parents informed the District that they were “looking for a DESE Day placement [and] not a residential placement. A residential placement would be detrimental to [Student’s] quality of life at this point in time.” This opinion was echoed by Student’s pediatrician and behavioral pediatrician on the grounds that “parents are providing [Student] with excellent care” and that a residential program would “compete with the quality of life she currently has and will continue to have.” The developmental pediatrician recommended a DESE-approved day program, an in-District program, or a home-based program for Student. Student’s psychotherapist similarly opposed a residential program as “the separation” from Parents would be “stressful” for Student. (P-HR-114, P-HR-117a, P-HR-117b, P-HR-118a)
6. On November 15, 2023, the Parties executed a Settlement Agreement whereby the District agreed, in part, to provide Student with compensatory services “equaling 2 additional years of a free and appropriate public education to Student after Student’s 22nd birthday.” (P-HR-124, P-O4 and 5)
7. On November 20, 2023, Parents rejected portions of the 2023-2024 IEP but consented to the placement at a separate day school. (S-B, P-HR-126a, P-HR-126b) Parents did not feel that the IEP “capture[ed] [Student’s profile] correctly, among other details.” (S-F) Parents requested changes to PLEP B, Current Performance Levels, goals, and benchmarks. They requested that some goals, such as the Functional Academics Goal, be broken up into Reading and Math, respectively, and that a Recreational Therapy Goal be added. (S-B, P-HR-126a, P-HR-126b) Parents also requested Augmentative and Alternative Communication (AAC) and Assistive Technology (AT) Evaluations and contacted private evaluators to conduct them it. They indicated that they were seeking public reimbursement for same. (P-HR-126b, P-HR-129)
8. Also on November 20, 2023, Parents consented to referrals to 7 of the 8 programs[[5]](#footnote-6) proposed by the District but requested that the information be limited to “the final 2023-2024 IEP.” (P-HR-126c) According to the District, such limitation “is inadequate for any Student’s referral, but would be highly concerning to any program given [Student’s] significant educational needs.” (S-D, S-F, S-H, S-I, P-HR-126c)
9. On December 5, 2023, via email, the District again requested that Parents allow the District to make referrals to the 8 day-programs initially proposed. The District reiterated that restricting its “ability to make formal referrals until the 2023-2024 IEP is accepted prohibits the [District’s] ability to make formal referrals at this time” and requested that Parents “confirm that the District can move forward with formal referrals to the programs now.” (P-HR-128)
10. On December 15, 2023, via email, Parents requested interim programming for Student “while [they were] waiting for the packets to be sent, received and reviewed.” (P-HR-130)
11. Also on December 15, 2023, the Team reconvened to review rejected portions of the 2023-2024 IEP.[[6]](#footnote-7) Parents again insisted that referrals be made only after the IEP was finalized.[[7]](#footnote-8) They also requested that Newburyport create an in-District program for Student. (S-C, S-D, S-E, S-F) Given Student’s need for age and developmentally appropriate peers, the District continued to propose a private day placement, and, in the absence of one in close proximity to Student’s home, a residential placement. The District maintained that it was in Student’s “best interest” to make formal referrals as soon as possible given the limited number of programs/opening, and a fully accepted IEP was not required to make formal referrals, as the District could supplement the referral with an updated IEP once it was available. (S-F)
12. According to Newburyport, there is no in-district program that can meet Student’s needs and no cohort of peers exists to create an in-District program. (S-C, S-D, S-E)
13. According to Parents, based on the District’s website, “there is an 18-22 program in-District that … is set to be dismantled; there was a student in-District … [who] was recently placed out of district; and, there is a class of rising 9th grade students that the District says is not an appropriate cohort [] and the District [would] not allow [them] to observe the program or the 18-22 program.” (P-HR-165a) Parents suggested that the District “bring [other] students back in-district.” (S-F)
14. On January 2, 2024, the District reissued the 2023-2024 IEP, incorporating many of Parents’ requested changes. (S-D, S-F, P-HR-130b) The District again requested that Parents sign releases for day placement referrals, but Parents declined. (S-C, S-D)
15. Via email dated January 4, 2024, the District requested consent to make referrals not only to the previously proposed programs but to 3 additional ones, including the LABBB Lexington. (P-HR-131c) (P-HR-131, P-HR-131c)[[8]](#footnote-9)
16. On January 17, 2024, the District contacted Parents via email, stating that “given the limited options for potential placements we must make formal referrals without a further delay” and offering to “supplement the referral with an updated accepted IEP” as well as proposing “to make formal referrals to residential placements to avoid further delays….” Releases were included in the email. (P-HR-136, P-HR-136a, P-SJ2)
17. Also on January 17, 2024, and again on January 22, 2024, the District reissued the 2023-2024 IEP incorporating more of the changes requested by Parents. In the N1, the District continued to request releases to send referral packets to day and residential programs even in the absence of a “final” IEP. (P-HR-136c, P-HR-137) According to Parents, the IEP re-issued on January 17, 2024 “was the first IEP to include Student’s current performance data in part and therefore appropriate to send” to programs. (Parents’ *Opposition*)
18. On January 18, 2024, Parents requested that the District change Student’s graduation date per the Settlement Agreement. The District disagreed that the 2 years of compensatory services as part of the Settlement Agreement “change[d] [Student’s] graduation date.” Parents requested a Team meeting to discuss this. The District declined to meet again but requested that Parents sign the releases “without further delay.” (P-HR-137, P-O4 and 5)
19. On January 25, 2024 the same day, Parents partially rejected the 2023-2024 IEP “because there [was] no recreational therapy goal” and the benchmarks did “not represent” Student. Parents clarified that they could not sign releases of information “for any IEP that was so far apart from representing our daughter’s unique special needs.” However, “[in] an effort to move forward, [Parents indicated they could] address those questions to any proposed placement.” Parents accepted placement at a separate day school (private). Parents declined residential referrals and requested a Team meeting to discuss interim services. They requested that the IEP be “implemented immediately and with fidelity.” (S-F, P-O7 and 7a, P-SJ2 and 2a, P-HR-138a, P-HR-138b, P-SJ6)
20. Also on January 25, 2024, Parents consented to 6 of the 12[[9]](#footnote-10) referrals proposed by the District. However, Parents again limited the information that could be included in the referral packets to “the IEP signed on 1.25.2024” and the data provided by Parents’ private providers to the District. (S-D, P-HR-138c, P-HR-138d) Parents indicated that they were unclear “whatever additional documents the District was looking to send.” (P-HR-165a)
21. Also in January 2024, a Neuropsychological and Academic Evaluation was completed at public expense by Dr. Janusis (at Parents’ choosing). Findings demonstrated intellectual and adaptive abilities in the very low range “consistent with [Student’s] previous evaluation results.” Dr. Janusis recommended, in part, that Student participate in a day school program with year-round services of at least 30 hours per week. She further recommended that Student

“work on her activities of daily living skills and increasing her overall independence. **The least restrictive and the most developmentally appropriate setting for her to work on these skills is at home.[[10]](#footnote-11)** [Student] is 16 years old and wants to be home with her parents like her peers. In addition, [Student] feels most comfortable and safe at home and as such this is where she will be the most successful. She needs continued specialized in home ABA….” (S-A, P-HR-120, P-159a, P-165a)

1. Parents declined to allow the District to contact Dr. Janusis. (S-D, S-F)
2. The Team reconvened on February 12, 2024. At this time, Parents requested a home-based program, referring to Student’s home as her place of safety and stability. (S-C, S-D, S-E, S-G, P-HR-147a, P-HR-150, P-HR-151a, P-HR-152, P-HR-165a)
3. The District declined Parents’ request on the grounds that it was overly restrictive; Student was not home-bound; and home placement would not expose Student to a cohort of peers. The Team proposed sending a referral packet to SEEM Collaborative, but Parents rejected this option and continued to refuse to consent to referrals to 7 of the proposed placements. (S-C, S-D, S-E, S-G, P-HR-147a, P-HR-150, P-HR-151a, P-HR-152, P-HR-165a)
4. Also at the February 12, 2024 Team meeting, although the District disputed its obligation to provide interim services as Newburyport had proposed placement in any DESE approved day or residential program but “Parents had obstructed the process by refusing to cooperate”, the District offered interim services to Student “until [Student was] accepted to a program or through April 12, 2024, whichever [came] first.” The District agreed to contact possible providers. (S-D, P-HR-165a)
5. At the February 2024 meeting, Parents learned that the District was dismantling an in-District special education program that they believed could have been appropriate for Student. Parents requested to observe a program for rising 9th grade students but were refused. (P-SJ6)
6. Following the meeting, the District contacted 21 public school districts nearby to see if they accept students from other districts, and if so, whether they have an appropriate In-district cohort for Student. (S-D, P-HR-147a) Only 3 indicated that they accept referrals for non-resident students. Parents were provided with, and executed, consents to send referrals to these schools. The District sent the referrals to all 3 districts, but Student was not accepted at any of them. (S-C, P-HR-151, P-HR-151a)
7. The Team reconvened on March 22, 2024 for a re-evaluation meeting which included a review of the District’s Academic Achievement, Occupational Therapy, Physical Therapy, Speech Language Therapy, AAC, and AT[[11]](#footnote-12) assessments as well as Dr. Janusis’s report. (S-J, P-O12, )
8. On March 23, 2024, Parents limited their consent again to 5 of the programs, some of which they had already consented to previously. Student was denied admission to all these programs.[[12]](#footnote-13) (S-C, P-HR-164)
9. On April 5, 2024, the District proposed an IEP dated 3/22/2024 to 3/21/2025 (2024-2025 IEP). This IEP was substantially the same as the previously proposed IEP. Placement again was proposed at a Private Separate Day School, and the District requested releases to share Student’s updated testing results and new IEP with the 12 programs for which it had previously requested Parents’ consent. (S-J, P-HR-161a, P-HR-162a, P-HR-164)
10. According to Parents, “[a]s of … April 12, 2024, [Student was] still not receiving any educational services from the District, interim or otherwise.” (P-HR-165a, P-O8a, P-SJ-6)
11. On or about April 2024, the District made “blind referrals” to 3 residential programs, all of which indicated that the student in question would be an appropriate candidate for consideration. (S-C, S-E)
12. On April 16, 2024, Parents filed an Expedited Request for Hearing.[[13]](#footnote-14) The following issues were raised[[14]](#footnote-15):
	1. Issue 1: Whether the District has failed to locate an appropriate program and/or the District should create an in-District program appropriate to [Student’s] needs as detailed in her 2024 Neuropsychological and Academic Evaluation?
	2. Issue 2: Whether the District failed to offer Student a FAPE in the LRE during the 2023-2024 school year?
	3. Issue 3: Whether the District failed to provide interim services to Student, including but not limited to, during the extraordinary lengthy IEP process, back-to-back IEPs (January 25, 2024 signed IEP, three-year evaluations to propose a new IEP again in April 2024), and/or the exhaustion of sending out packets to proposed placements repeatedly?
	4. Issue 4: Whether the District neglected Student, her trauma, and/or educational needs?
	5. Issue 5: Whether or not the graduation date should be changed to reflect the November 2023 agreement and any further compensatory education/time?
	6. Issue 6: Whether there is a limit in time on the IEP process to tend to a Student’s education as to not cause further injury, akin to 34 CFR § 300.530, so a Student removed with cause for health, safety and/or lack of a free and appropriate public education can still make effective progress and not lose valuable time to their education?
	7. Issue 7: Whether the District acted with deliberate indifference and/or retaliation in violation of Section 504 of the Rehabilitation Act and other laws under the BSEA authority?
	8. Issue 8: Whether the February 16, 2024 letter authored by the District’s representative, Deb O’Connor, supports retaliation inclusive of the misrepresentation of facts therein?
	9. Issue 9: Whether the District's offer of a prospective residential placement offers Student FAPE, including but not limited to, in contrast to recommendations in Student’s 2024 Neuropsychological and Academic Report, Student’s previous trauma in her day placement, Student’s emotional needs, District’s lack of supervision of Student’s needs in Student’s previous day placement and/or Parent’s rights?
	10. Issue 10: Whether Newburyport’s IEP for the 2023-2024 and 2024-2025 school years, inclusive of all the facts, are reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment?
	11. Issue 11: Including but not limited to, the District’s failure to implement any IEPs, whether District acted with more than just negligence and/or inclusive of deliberate indifference in violation of Section 504 of the Rehabilitation Act?
	12. Issue 12: Whether District was more than negligent and/or deliberately indifferent, the conscious or reckless disregard of the consequences of one’s acts or omissions, to the Student and Parent’s inclusive of the facts herein?
	13. Issue 13: Whether the District’s lack of actions, inclusive of these facts, determined to be more than negligent and/or deliberate indifference or not, amount to retaliatory action as it is connected to the provision of FAPE to Student?
	14. Issue 14: Whether the District’s repeated offer of a prospective residential placement in light of the U.S. Department of Education’s investigation into the Commonwealth’s [Department of Elementary and Secondary Education] DESE, recent Boston Globe Spotlight articles addressing abuse at residential placements and this hearing record, including but not limited to, the objections of Student’s medical providers and parents to a residential placement at this time, is appropriate to Student’s provision of a FAPE, safety, mental well-being and overall quality of life and/or does not violate the Parents’ Constitutional Rights?
	15. Issue 15: Whether the District can be found credible inclusive of the facts, testimony and documentary evidence with regard to issues within the jurisdiction of the BSEA and, if found to be less than credible, harm was caused to Student and Family?
13. For relief, Parents requested[[15]](#footnote-16):
	1. The immediate creation of an education program in-District to meet [Student’s] needs per the recommendations in her 2024 three-year evaluations inclusive of the Neuropsychological and Academic Evaluation and evaluations by District staff, per [Student’s] emotional needs, and per [Student’s] most recent signed IEP;
	2. Compensatory services from November 2023, the date of the previous settlement agreement, and forward for the time that [Student] has not been provided with any services from [Newburyport], including but not limited to, the cost of private self-pay therapies as provided by health insurance plans and related deductibles, copays, travel, and the monthly cost of a second primary insurance plan solely enrolled for [Student] to keep the cost of these medical therapies lower, absent no educational support from [Newburyport];
	3. Compensatory damages as within the authority of the BSEA;
	4. A decision, as the result of the conclusion of a hearing on the matters herein, by the hearing officer as these matters are continued in precedence and capable of continuing, ongoing and repetitive as the facts herein bear evidence;
	5. A declaration of procedural and substantive violations in this matter and inclusive of all the facts within this hearing request;
	6. Counsel and professional fees based on the gross disregard for law, regulations and procedures outlined in both state and federal law; and
	7. All other remedies available pursuant to the Code of Massachusetts Regulations Chapter 603, Section 28.00, the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq., Chapter 766 of the Acts of 1972, M.G.L. c. 71B, Section 504 of the Rehabilitation Act of 1972, 29 U.S.C. 794, 34 C.F.R. Part 104; and Title II of Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. and Civil Action for Depravation of Rights, 42 U.S.C. §1983, The Fourteenth Amendment, and applicable contract law.
14. On May 16, 2024, Parents partially rejected the 2024-2025 IEP due to the “omission of a recreational therapy goal.” Parents requested an in-District placement for Student. (S-J)
15. To date, no public or private day school program has accepted Student for admission. (S-C, P-HR-164)

**LEGAL STANDARDS AND DISCUSSION:**

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

20 U.S.C. § 1415(b)(6) grants the Bureau of Special Education Appeals (BSEA)  jurisdiction over timely complaints filed 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.”[[16]](#footnote-17) In Massachusetts, a parent or a school district, “may request mediation and/or a hearing at any time on any matter[[17]](#footnote-18) 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.”[[18]](#footnote-19) Nevertheless, it is well established that matters that come before the BSEA must involve a live or current dispute between the parties.[[19]](#footnote-20) In addition, 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.”[[20]](#footnote-21)

**I . Newburyport’s [Partial]Motion to Dismiss**

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 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. To survive a motion to dismiss, there must exist “factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”[[21]](#footnote-22) 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.”[[22]](#footnote-23) These “[f]actual allegations must be enough to raise a right to relief above the speculative level.”[[23]](#footnote-24)

1. Application of Legal Standard

In evaluating the *District's* *[Partial] Motion to Dismiss* under the Legal Standards set forth above, and taking the allegations in Parents' Hearing Request as true as well as drawing any inferences that may be drawn from them in their favor, I hereby ALLOW dismissal with prejudice for Issues 4, 7, 8, 11, 12, 13, 14, and 15[[24]](#footnote-25) for lack of subject matter jurisdiction.[[25]](#footnote-26)

Parents assert that their negligence claims should not be dismissed as the “District has a duty to educate Student and District failed or breached that duty.” However, to the extent that Parents bring their claims pursuant to a negligence or a tort statute, Issues 4, 11, 12, and 13 must be dismissed as the BSEA has no subject matter jurisdiction over issues relative to neglect or negligence. [[26]](#footnote-27) Nor does the BSEA have any jurisdiction over the Constitutional violations asserted in Issue 14.[[27]](#footnote-28)

In addition, Issues 7, 8, and 13 (to the extent that the latter asserts a claim of retaliation in addition to negligence) must be dismissed as the BSEA lacks jurisdiction over retaliation claims that are not connected to the provision of a FAPE to Student.[[28]](#footnote-29) Parents argue that

“the apparent District’s retaliation is connected to the provision of FAPE. Though the BSEA is limited in the relief that it can offer, the District has not provided Student educational services for nearly two years; neither has District made a genuine offer of to provide Student with any interim services. The facts of the case show retaliation and specifically the District’s February 16, 2024 letter is evidence for retaliation. While the current Interim Director signed the letter, she was not present for the entire time period provided in detail in the letter, including details of mediation, a mediation where this Interim Director was not present.”

Although the “issue of retaliatory motive ... presents a pure question of fact,”[[29]](#footnote-30) Parents have presented no facts to support their assertion of retaliatory motive in their Hearing Request. Even if I take as true “the allegations of the complaint, as well as such inferences as may be drawn therefrom in [Parents’] favor,”[[30]](#footnote-31) Parents’ allegations do not raise “raise a right to relief above the speculative level.”[[31]](#footnote-32) Here, at all times the District proposed a program for Student, just not the one with which Parents agree. Moreover, the District proposed interim services for Student in February 2024, despite Newburyport’s express opinion that it was not legally responsible to provide Student with such service. Other than to state that Student continued to be without a placement and that the February 16, 2024 letter was “inclusive of [ ] misrepresentation of fact”, Parents offer no allegations that the District took any steps in retaliation for Parents’ exercising their rights under the IDEA and Section 504. A difference in opinion does not raise a claim of retaliation, and Parents, in the instant matter, allege no facts suggesting a “logical path” between their “claims of retaliation to the District's failure to provide, and [Parents’] effort to obtain for, [Student]” a FAPE pursuant to the IDEA. [[32]](#footnote-33) While the Parents may be frustrated by the District's denial of their specific wishes for Student’s education the mere fact that Newburyport’s recommendations deviated from Parents’ express requests does not render the District’s actions retaliatory.[[33]](#footnote-34) As such, dismissal of Issues 7, 8, and 13 is appropriate.

I find Parents’ claim relative to the District’s “credibility” (Issue 15) to be confusing and premature. At hearing, inconsistencies in testimony and/or documentary evidence may provide sufficient support for adverse credibility determinations. However, such credibility determinations are made with respect to the substantive claims made; in other words, credibility is not a claim in-and-of-itself. Moreover, Issue 15 relative to the District’s “credibility” must be dismissed since the only “harm” the Hearing Officer has jurisdiction to assess is educational harm to Student. The Hearing Officer has no jurisdiction to make findings relative to the “harm [] caused to Student and Family” if “the District [is] …found to be less than credible.” [[34]](#footnote-35)

**II. Cross-Motions for Summary Judgment.**

1. Legal Standard for Summary Judgment:

Pursuant to 801 CMR 1.01(7)(h), summary decision may be granted when there is “no genuine issue of fact relating to all or part of a claim or defense and [the moving party] is entitled to prevail as a matter of law.”[[35]](#footnote-36) In determining whether to grant summary judgment, BSEA hearing officers are guided by Rule 56 of the Federal and Massachusetts Rules of Civil Procedure, which provides that summary judgment may be granted only if the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law."[[36]](#footnote-37) A genuine dispute as to a material fact exists if a fact that “carries with it the potential to affect the outcome of the suit” is disputed such that “a reasonable [fact-finder] could resolve the point in the favor of the non-moving party.”[[37]](#footnote-38) “As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.”[[38]](#footnote-39)

The moving party bears the burden of proof, and all evidence and inferences must be viewed in the light most favorable to the party opposing summary judgment.[[39]](#footnote-40)

In response to a motion for summary judgment, the opposing party “must set forth specific facts showing that there is a genuine issue for trial.”[[40]](#footnote-41) To survive this motion and proceed to hearing, the adverse party must show that there is “sufficient evidence” in its favor that the fact finder could decide for it.[[41]](#footnote-42) In other words, the evidence presented by the non-moving party “must have substance in the sense that it [demonstrates] differing versions of the truth which a factfinder must resolve at an ensuing trial.”[[42]](#footnote-43) The non-moving party’s evidence will not suffice if it is comprised merely of “conclusory allegations, improbable inferences, and unsupported speculation.”[[43]](#footnote-44)

1. Legal Standards Relative to Proposing A Residential Program Where No Day Program Is Available:

Although “locate or create” can be found neither in the federal or state statutes nor in their implementing regulations, as Hearing Officer William Crane stated in *Chelsea Public Schools, BSEA #* 01-2623, “It is generally accepted that when a school district is not able to *locate* appropriate services, the school district has a responsibility to *create* such services.”[[44]](#footnote-45) Nevertheless, the conjunction in the “locate or create” directive clearly offers school districts discretion in how to proceed in consideration of a variety of factors. Although school districts may opt to create a program, this is not a mandate where the district choses instead to locate an approved program.[[45]](#footnote-46) Specifically, in cases whether a student is incapable of enduring longer transportation time[[46]](#footnote-47), Hearing Officers have ordered school districts to fund placement in an approved residential school in lieu of transportation; in fact, in numerous BSEA decisions Hearing Officers have ordered school districts to pursue a more restrictive setting where an appropriate day program could not be located.[[47]](#footnote-48)

A home placement is even more restrictive than a residential placement.[[48]](#footnote-49) IDEA’s requirement that a child be educated in the least restrictive environment possible[[49]](#footnote-50) means that a school's goal must be to educate a student “in an environment that is as close to a typical school education as possible but that will still give him an appropriate education."[[50]](#footnote-51)

1. Application of Legal Standards.
2. Summary Judgment for the District is Allowed on Issues 1, 2, 9 and 10.

Here, the parties filed cross motions for summary judgment on Issue 1, each arguing that the opposite outcome is warranted. As to this issue I must determine whether a genuine issue exists that would preclude entry of summary judgment and if not, whether either party prevails as a matter of law. For either party to prevail on its respective *Motion for Summary Judgment* as to Issue 1, that party must demonstrate, through the documents submitted in support of its *Motion*, that “there is no genuine issue of fact relating to all or part of a claim or defense and [the party] is entitled to prevail as a matter of law….”[[51]](#footnote-52) Faced with cross-motions for summary judgment, I must review each motion separately on its own merits ‘to determine whether either of the parties deserves judgment as a matter of law.[[52]](#footnote-53)  If I determine that one party is not entitled to summary judgment, I must turn to the “the cross motion and give the unsuccessful movant ‘all of the favorable factual inferences that it has just given to the movant's opponent.’”[[53]](#footnote-54)  If the non-movant's evidence is “merely colorable” or “not significantly probative,” summary judgment may be granted.[[54]](#footnote-55)

I note at the outset that Issues 1, 2, 9, and 10, as articulated in Parents’ Hearing Request, are essentially the same, asserting that the District’s proposals for a residential program for the 2023-2024 and 2024-2025 school years, in the absence of a private or public day program within a one-hour proximity to Student’s home, is not appropriate and, instead, that the District should either create an in-District program or fund a home-based program for Student. As such, I address these issues together.

The District asserts that there is no genuine dispute as to the following material facts: Parents and their evaluator agree that a day program placement is appropriate for Student. Parents have insisted on a day program of a certain proximity to Student’s home. The District has proposed to refer Student to thirteen-day school programs.[[55]](#footnote-56) Parents have not consented to half of the referrals proposed by the District.[[56]](#footnote-57) Until January 25, 2024, no referrals were sent out because Parents insisted that the IEP be finalized before any referral packets were sent out despite the District’s offer to supplement any packets. Parents limited the information to be shared in the referral packets. In December 2023, Parents requested an in-District program for Student. No in-District program is available for Student due to the absence of a peer cohort. In February 2024, Parents requested funding of their home program in lieu of a day program. Parents’ home program is not a DESE-approved program. At this time, no day placements are available. Parents have refused to consent to referrals to DESE-approved residential programs. As such, Newburyport argues that Newburyport is entitled to prevail as a matter of law because the BSEA may not order the District to create an in-District program or to fund Parents’ home program.[[57]](#footnote-58)

In response, Parents assert that the District did not engage in sufficient “advocacy” to have Student secure a day placement and that “there is no clarification of why LABBB did not accept Student and whether there was an exchange about the possibility of acceptance with [Registered Behavior Therapy] support from the District.” However, such assertions are “conclusory allegations, improbable inferences, and unsupported speculation.”[[58]](#footnote-59) They do not change the indisputable and material fact that no day program is available to Student.

Meanwhile, in their *[Partial] Motion for Summary Judgment*, Parents assert that there is no genuine issue of material fact in dispute as to the first issue:

 “1. Student is a resident student in the District;

2. The District is legally responsible to provide Student a free appropriate public education (FAPE);

3. Student’s 2024 Neuropsychological and Academic Report recommends a day placement and that Student should live at home;

4. Student has a right to a FAPE in the least restrictive environment (LRE);

5. The District has failed to locate an appropriate day program for Student and Student’s unique needs within commuting distance to Student’s home;

6. As Student has experienced trauma in her last two private day placements, Student is in a safe stable environment in Student’s home with her family, all supported by the Neuropsychological and Academic Report and recommendations paid for by the District; and,

7. The District has no professionally provided evidence to support a residential placement for Student and Student’s unique needs to force residential placement against the will of Student and Family.”

Although the parties dispute that “Student has experienced trauma in her last two private day placements,” this is not a material fact[[59]](#footnote-60); Student’s past trauma is irrelevant to the issue of whether the absence of a day program necessitates a proposal for a residential program or the creation of an in-District program.[[60]](#footnote-61)

Therefore, I find that there is no genuine dispute as to these material facts:

1. Student is a resident student in the District. The District is legally responsible to provide Student a FAPE. Student has a right to a FAPE in the LRE.

2. Parents and their evaluator agree that a day program placement is appropriate for Student. No evaluator has recommended a residential placement for Student.

3. The District has proposed to refer Student to 13 day school programs.

4. Parents have insisted on a day program within a certain proximity to Student’s home.

5. Parents have not consented to any of the referrals proposed by the District.

6. Until the end of 2023, no referrals were sent out because Parents insisted that the IEP be finalized before any referral packets were sent despite the District’s offer to supplement any packets at a later time.

7. At the present time, no day placements are available, and, Parents have refused to consent to referrals to DESE-approved residential programs.

8. Student is in a safe stable environment in Student’s home with her family.

9. In December 2023, Parents requested an in-District program for Student; no in-District program was, or is available for Student at the time (and presently) due to the absence of an appropriate peer cohort.[[61]](#footnote-62)

10. In February 2024, Parents requested funding of their home program in lieu of a day program. Parents’ home program is not a DESE-approved program.

Based on these undisputed facts, the District is entitled to summary judgment as to Issues 1, 2, 9, and 10. Finding this, I need not analyze Parents’ cross-motion. My analysis follows.

Parents insist that the District create an in-District program. However, while it may be reasonable and actionable to seek an order that a district “… add [] requisite educational services to [] … services already being provided” at an existing program in order to make it more robust*,*[[62]](#footnote-63) ordering a district to create, as Parents request in the instant matter, an appropriate cohort for Student, is not. Although Parents assert that “between the parents and the District, there are sufficient resources between the school and home that can together craft the program recommended by Dr. Janusis [as the] District has a buddy program, a [Board Certified Behavior Analyst (BCBA)] who works well with the Student, and therapeutic expertise on staff and/or in other therapeutic programs where the Student has derived progress,” they offer no plausible evidence that an appropriate cohort exists for Student within Newburyport Public Schools. In fact they concede that the one peer who may have been appropriate for Student, has now been outplaced.[[63]](#footnote-64) Parents would like the District to bring students currently attending out-of-district placements back to the District to create an appropriate cohort for Student. However, such action would be fraught with multiple challenges, not the least of which are legal.[[64]](#footnote-65)

Parents argue that, in the alternative, the District should fund their home program. According to Parents, this would be a less restrictive option than a residential placement. Although I empathize with Parents’ desire to keep their child with them, the IDEA’s definition of restrictiveness does not rely on proximity to the home.[[65]](#footnote-66) Moreover, although the IDEA recognizes the need to educate some children in more restrictive settings, such as “in the home,”[[66]](#footnote-67) like all placement decisions, this decision must be made by the IEP Team.[[67]](#footnote-68) Here, the Team has not identified the home as an appropriate placement. In fact, not even Parents’ own experts have identified the home as an appropriate school placement for Student; Dr. Janusis recommended, in part, that Student participate in a day school program with year round services of at least 30 hours per week. Only in the context of “work[ing] on [] activities of daily living skills,” did she add that the “**least restrictive and the most developmentally appropriate setting for her to work on these skills is at home.**[[68]](#footnote-69)

Moreover, Parents’ self-created home-based program is not a DESE-approved program. IDEA conditions its funding to the states on state oversight and approval of school placements, and the guarantee that students placed by the states receive a FAPE.[[69]](#footnote-70) Under 20 U.S.C. § 1401(a)(18)(D), the ‘free and appropriate public education’ required under IDEA must meet the standards of the State educational agency; this means that “the universe of private programs that a state may consider is at least partly defined by state law.”[[70]](#footnote-71) 603 CMR 28.06 (3)(d) states that the “school district shall, in all circumstances, first seek to place a student in a program approved by the Department pursuant to the requirements of 603 CMR 28.09….When an approved program is available to provide the services on the IEP, the district shall make such placement in the approved program in preference to any program not approved by the Department.” As such, the Hearing Officer cannot order a school district to fund an unapproved program where an appropriate approved one is available.[[71]](#footnote-72)

Here, an approved residential program could be available to Student and must be given preference. The instant matter is analogous to *Manchester*-*Essex Reg'l Sch. Dist. Sch. Comm. v. Bureau of Special Educ. Appeals of The Massachusetts Dep't of Educ*., 490 F. Supp. 2d 49, 54–55 (D. Mass. 2007). There, parents sought placement of their child in a non-approved program. The Court held that “[a]s a matter of law, the School District was entitled to refuse the unapproved and unaccredited program for D.T.'s IEP.”[[72]](#footnote-73)

A similar conclusion was reached in *Tewksbury School Committee v. Bureau of Special Education Appeals, et al.,* Civil Action No. 08-11172-GAO (Mass. 2009). There, the Court found that the district was not required to amend the student's IEP to reflect the Kumon Center as the service provider nor to pay the Kumon Center directly.

Likewise, in *Tewksbury Public Schools*, BSEA # 1402344 (Putney-Yaceshyn, 2015 ), parents sought an order that Tewksbury fund a residential placement for Student in an adult group home. Hearing Officer Putney-Yaceshyn concluded that legal authority would not permit the BSEA to order a school district to fund a residential placement for a student in an adult group home, as adult group homes are not educational placements. Moreover, given Student's acceptance at an approved residential school, Tewksbury could not be permitted to use public funds to place the student residentially in a non-educational residential placement.

While it is undisputed that the Team in the present matter has recommended a day program for Student and that no evaluator has recommended placement in a residential program, as the U.S. Court of Appeals for the Third Circuit Court has stated, “Only when alternatives exist must the court reach the issue of which is the least restrictive.”[[73]](#footnote-74) Here, there are no day alternatives for Student. None of the 6 day-programs to which Parents had consented has accepted Student. The District must locate an approved, albeit more restrictive, setting.[[74]](#footnote-75) Therefore, as a matter of law, the District is entitled to summary judgment onIssues 1, 2, 9 and 10.

To the extent that Issue 11 asserts a claim of discrimination pursuant to Section 504 of the Rehabilitation Act of 1973, I find that, as a matter of law, the District has not discriminated against Student in violation of Section 504. Section 504’s requirements as to FAPE in the LRE are similar to those of the IDEA.[[75]](#footnote-76) One primary difference between the requirements of Section 504 and those of the IDEA is that in addition to the findings necessary to prevail under the IDEA, a petitioner must prove discrimination in order to prevail under Section 504.[[76]](#footnote-77) Where parents seek to rectify alleged past discrimination, a showing of “deliberate indifference” may be required.[[77]](#footnote-78) Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood.[[78]](#footnote-79) Nevertheless, if a district’s actions are proper under the IDEA, then said actions cannot have been discriminatory under Section 504.[[79]](#footnote-80) This means that if an educational agency is in compliance with IDEA, it is necessarily in compliance with Section 504.Because I conclude that the District is entitled to summary judgment on all claims relating to violations of a FAPE under IDEA, Parents’ claim under § 504 fares similarly. Consequently, to the extent that Issue 11 asserts a claim of discrimination pursuant to Section 504 of the Rehabilitation Act of 1973, the District is entitled to summary judgment on Issue 11.

As I have reached the above findings relative to Issues 1, 2, 9 and 10, I need not analyze *Parents’ [Partial] Motion for Summary Judgment* as to the claims asserted in Issue 1.

1. *Legal Standards Relative to Interim and Compensatory Services*

Pursuant to the IDEA and Massachusetts Special Education law and regulations, school districts are responsible to implement all accepted portions of a student's IEP, and deliver the services consistent with said IEP.[[80]](#footnote-81) “Compensatory services come into play when the school district fails to deliver the accepted services pursuant to the student's IEP.”[[81]](#footnote-82) Interim services, although undefined by IDEA or its implementing regulations, are generally considered to be services provided to a student where a referral has been made but a placement remains unavailable.

1. *Application of Legal Standards.*

Summary Judgment for the District is Allowed on Issues 3 and 6.

Issues 3 and 6 are substantially similar in that Parents claim that the District extended unnecessarily the IEP process to the detriment of Student’s FAPE and, in the meantime, failed to provide Student with interim services such that Student is now entitled to compensatory services. As such, I address them together.

The District asserts that there is no genuine dispute as to these material facts: after Parents unilaterally removed Student from her prior day program, the District offered to send out referral packets to day programs, and, during the relevant rime period, as early as September 28, 2023[[82]](#footnote-83), the District offered to send additional referrals for day (and/or residential) programs for Student. Parents did not consent to any referrals until January 26, 2024, and then only to some of the referrals with additional limitations on the information that could be sent. Newburyport continued to propose additional referrals, but Parents continued to limit their consent. In December 2023, Parents requested an in-District program, but no appropriate in-District program was, or is, available in Newburyport. Parents then requested placement in a home program in lieu of a day program. However, Parents’ home program is not approved by DESE. To date, no day program has accepted Student, and Parents have refused to consent to referrals to DESE-approved residential programs. On February 12, 2024, the District agreed to contact possible providers to provide interim services to Student during the referral period.

Parents assert that they were forced to withdraw Student due to trauma in a prior placement; that the District refused to update Student’s current performance levels with information provided by Student’s in home providers and without such information, the IEP could not be finalized and sent to potential placements; and that Parents had asked the District to evaluate and observe Student, but the District delayed the IEP process by delaying the evaluation process.

However, even if Parents’ assertions were correct, there is not “sufficient evidence” in their favor that the fact finder could decide for them[[83]](#footnote-84) on Issues 3 and 6. I note, first, that whether Parents’ unilateral withdrawal of Student from her prior day program was justified is not an issue before me.[[84]](#footnote-85) Whether the District was required to provide interim services during the 2023-2024 school year (or whether Parents are now eligible for compensatory services) depends solely on whether the District made available to Student a FAPE during the relevant time period. As determined *supra*, as a matter of law, the District was required to propose a residential placement when no day program could be located. It did just so, and, as such met its obligation. Although Parents requested immediate implementation of the signed 2023-2024 IEP in January 2024, such request was an impossibility as the services proposed by the 2023-2024 IEP, and subsequently by the 2024-2025 IEP, were to be implemented in the context of a day program, and neither party has proposed that the accepted portions of the 2023-2024 IEP could be implemented anywhere but in such program.[[85]](#footnote-86)

Nor did Parents present “sufficient evidence” in their favor that a fact finder could decide for them[[86]](#footnote-87) that Newburyport “extended” the IEP process. Newburyport convened the Team five times during the 2023-2024 school year, making changes to the IEP at Parents’ request and proposing to make referrals at each meeting and via intermittent email communications with Parents throughout the year. To date, Parents have yet to accept in full either the 2023-2024 or 2024-2025 IEPs.[[87]](#footnote-88) The only evidence of delay is by Parents, as they refused to have referrals sent to any potential placements until the end of January 2024.

As such, Parents are not entitled to any compensatory services. [[88]](#footnote-89) As a matter of law, the District did not fail to provide Student with interim services, and, hence, the District is entitled to summary judgment on Issu 3. Moreover, the District did not unnecessarily extend the IEP process, and, therefore, as a matter of law, the District is entitled to summary judgment on Issue 6.

1. Legal Standards Relative to Extending Eligibility:

Under the statutory framework of the IDEA, a student who reaches age 22 no longer has a right to a FAPE because she has aged out of eligibility.[[89]](#footnote-90) A student’s special education eligibility cannot be extended beyond the legitimate graduation from high school or "aging out" at age 22.[[90]](#footnote-91)

1. Application of Legal Standards to Issue 5:

Summary Judgment for the District is Allowed on Issue 5.

Hearing Officers often "consider" settlement agreements and "their legal implications" in disputes before the BSEA[[91]](#footnote-92), although the BSEA generally does not exercise jurisdiction over disputes arising from contract law.[[92]](#footnote-93) In “considering” the Settlement Agreement, here, I find that the plain language of the Agreement addresses compensatory services only. That the Agreement references FAPE, does not mean that it extends eligibility for Student after her 22nd birthday. Therefore, as a matter of law, the District is entitled to summary judgment on Issue 5.

**ORDER:**

The District’s *[Partial] Motion to Dismiss* is ALLOWED. Issues 4, 7, 8, 11, 12, 13, 14, and 15 are hereby dismissed with prejudice.

The District’s *Motion for Summary Judgment* is also ALLOWED, and summary judgment is entered for Newburyport for Issues 1, 2, 3, 5, 6, 9, and 10.

*Parents’ [Partial] Motion for Summary Judgment* is DENIED.

The Hearing in this matter is hereby cancelled.

So ordered,

By the Hearing Officer,

/s/ *Alina Kantor Nir*
Alina Kantor Nir

Date: June 10, 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. As the *District’s Motions* were filed after 5PM on May 20, 2024, they are deemed to have been filed on the next business day, May 21, 2024. [↑](#footnote-ref-2)
2. Many of the exhibits included by Parents in their Hearing Request are also included in *Parents’* *Opposition* and in *Parents’ [Partial] Motion for Summary Judgment*. To the extent that I reference an exhibit included in the Hearing Request, I include the exhibit number used in the Hearing Request and so do not necessarily indicate the exhibit number also used for the same exhibit in *Parents’* *Opposition* and/or in *Parents’ [Partial] Motion for Summary Judgment.* [↑](#footnote-ref-3)
3. Student has been seizure free for several years. (S-A) [↑](#footnote-ref-4)
4. Prior to 2021, when sending referral packets for Student, the District had included a previous IEP. (P-O2). [↑](#footnote-ref-5)
5. Parents consented to have referrals sent to Melmark New England, Evergreen Center, Amego School, May Center (Wilmington), May Center (Randolph), Northshore Educational Consortium's Kevin O'Grady School, and League School. [↑](#footnote-ref-6)
6. At this time, the District also proposed a reevaluation which included testing in the areas of Academic Achievement, Occupational Therapy, Physical Therapy, Speech Language Therapy, Augmentative and Alternative Communication (AAC), and Assistive Technology (AT). (S-F, S-J) [↑](#footnote-ref-7)
7. Student’s Educational Advocate supported “delaying signatures in several instances because [IEPs] were incomplete, missing current performance data, and a private day school receiving an incomplete IEP cannot base a decision on admittance.” (P-O16) [↑](#footnote-ref-8)
8. The IEP sent to Parents via email was the incorrect IEP. The corrected IEP was resent to Parents for signature. (P-O7) [↑](#footnote-ref-9)
9. On January 25, 2024, the District also proposed a referral to Crest Collaborative. (P-HR-138c, P-O5) [↑](#footnote-ref-10)
10. Emphasis in original. [↑](#footnote-ref-11)
11. A Transition Assessment was scheduled for spring 2024. (S-J) [↑](#footnote-ref-12)
12. The LABBB Collaborative refused admission to Student. (P-HR-164, P-O3 and O10) In a subsequent email to the District from LABBB, the admission staff noted that if a student required a Registered Behavior Therapist (RBT), LABBB would hire the staff and bill the school district. Had Student required additional services at LABBB beyond the standard tuition rate, the District would have agreed to fund said services. (S-C, S-E) Student’s Education Advocate recollects that “the District [had] little to no communication with LABBB in regard to [Student’s] acceptance or denial.” (P-O16) [↑](#footnote-ref-13)
13. On April 16, 2024, the matter was determined not to meet the expedited standard. [↑](#footnote-ref-14)
14. These are copied verbatim from Parents’ Request for Hearing. [↑](#footnote-ref-15)
15. These are copied verbatim from Parents’ Hearing Request. [↑](#footnote-ref-16)
16. See 34 C.F.R. §300.507(a)(1). [↑](#footnote-ref-17)
17. Limited exceptions exist that do not apply here. [↑](#footnote-ref-18)
18. 603 CMR 28.08(3)(a). [↑](#footnote-ref-19)
19. See *In Re : Student v. Bay Path Reg’l Vocational Tech. High Sch.*, BSEA # 18-05746 (Figueroa, 2018). [↑](#footnote-ref-20)
20. *In Re: Georgetown Pub. Sch*., BSEA #1405352 (Berman, 2014). [↑](#footnote-ref-21)
21. *Iannocchino v. Ford Motor Co.,* 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). [↑](#footnote-ref-22)
22. *Blank v. Chelmsford Ob/Gyn, P.C*., 420 Mass. 404, 407 (1995). [↑](#footnote-ref-23)
23. *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted). [↑](#footnote-ref-24)
24. Parents’ *Response to Motion to Dismiss* defends against dismissal of each issue identified in the Hearing Request. However, as Newburyport seeks dismissal of Issues 4, 7, 8, 11, 12, 13, 14, and 15 only in its Motion to Dismiss, I address only said Issues in this portion of the Ruling. [↑](#footnote-ref-25)
25. *Blank*, 420 Mass. at 407. [↑](#footnote-ref-26)
26. See *In Re: Newburyport Public Schools (Ruling On Newburyport Public Schools' Partial Motion To Dismiss Claims And On Newburyport Public Schools' Motion To Dismiss For Mootness)*, BSEA # 2311471, 2401600 (Kantor Nir, 2023) (“Hearing Officer has neither the statutory authority nor expertise to do what a court does in a negligence case”); see also *In Re: Old Rochester Regional School District and Alice (Ruling on Motion to Dismiss)*, BSEA #1806205 (Byrne, 2018) (that “claims that school actions violated principles of constitutional law or common law tort do not fall within the limited jurisdiction of the BSEA”). [↑](#footnote-ref-27)
27. See *In Re: Old Rochester Regional School District and Alice (Ruling on Motion to Dismiss)*, BSEA #1806205 (Byrne, 2018). In *Parents’* *Opposition*, Parents cite to *Troxel v. Granville*, 120 S.Ct. 2054 (2000) for the proposition that there is a fundamental right under the Fourteenth Amendment for a parent to oversee the care, custody, and control of a child. Moreover, *Parents’ Motion for Summary Judgment* argues that public policy demands that Student not be removed from her stable home environment. Without commenting on or addressing the Court’s ruling in *Troxel,* I note Parents have not cited any authority to suggest that—or made any argument explaining why— *Troxel* applies in the context of a due process hearing to determine special education rights under federal or state law. The limited jurisdiction of the BSEA does not extend to ordering removal from home; in fact, the BSEA lacks all authority to compel Parents to avail themselves of any program deemed appropriate by a Hearing Officer. If Parents choose not to avail themselves of a residential placement, Student cannot be forcibly “removed” from her home and outplaced by order of the BSEA. See, e.g., *In re: Westfield Public Schools (Ruling On Westfield Public Schools' Motion For Compliance With Decision)*, BSEA # 2212235c (Kantor Nir, 2023) (Hearing Officer cannot force Student's participation in extended evaluation); *In re: Susana and Newburyport Public Schools*, BSEA # 16-06551 (Reichbach, 2016) (Hearing Officer cannot force parent to bring student for evaluation); *In re: Christian C*., BSEA # 96-2712 (Oliver, 1996) (acknowledging that the “BSEA does not have the authority to order a Parent to send a [] student to this [] program”). [↑](#footnote-ref-28)
28. See, e.g., 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 [] 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); In Re: Ollie v.Springfield Public Schools (Ruling on Springfield Public Schools' Partial Motion to Dismiss), BSEA # 20-04776 (Reichbach, 2020) (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-29)
29. *Richard v. Reg'l Sch. Unit 57,* 901 F.3d 52, 59 (1st Cir. 2018). [↑](#footnote-ref-30)
30. *Blank v. Chelmsford Ob/Gyn, P.C*., 420 Mass. 404, 407 (1995). [↑](#footnote-ref-31)
31. *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted). [↑](#footnote-ref-32)
32. See *Richard*, 901 F.3d at 60. [↑](#footnote-ref-33)
33. *Cf*. *Walczak v. Fla. Union Free Sch. Dist.,* 142 F.3d 119, 132 (2d Cir. 1998) (IDEA does not guarantee an education “that provides everything that might be thought desirable by loving parents”). [↑](#footnote-ref-34)
34. See *In Re: Newburyport Public Schools (Ruling On Newburyport Public Schools' Partial Motion To Dismiss Claims And On Newburyport Public Schools' Motion To Dismiss For Mootness),* BSEA # 2311471, 2401600 (Kantor Nir, 2023) (BSEA has no jurisdiction over any claims for injuries to the family). [↑](#footnote-ref-35)
35. 801 CMR 1.01(7)(h). [↑](#footnote-ref-36)
36. *Id*. [↑](#footnote-ref-37)
37. *French v. Merrill*, 15 F.4th 116, 123 (1st Cir. 2021); see *Maldanado-Denis v. Castillo-Rodriguez,* 23 F.3d 576, 581 (1st Cir. 1994). [↑](#footnote-ref-38)
38. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). [↑](#footnote-ref-39)
39. *Id*. 477 U.S. at 252; see *In* Re: Westwood Pub. Sch., BSEA No. 10-1162 (Figueroa, 2010); In Re: Mike v. Boston Pub. Sch., BSEA No. 10-2417 (Oliver, 2010); Zelda v. Bridgewater-Raynham Pub. Sch. and Bristol County Agricultural Sch., BSEA No. 06-0256 (Byrne, 2006). [↑](#footnote-ref-40)
40. *Anderson,* 477 U.S*.* at 250. [↑](#footnote-ref-41)
41. *Id*. at 249. [↑](#footnote-ref-42)
42. *Mack v. Great Atl. & Pac. Tea Co.,* 871 F.2d 179, 181 (1st Cir. 1989). [↑](#footnote-ref-43)
43. *Medina-Munoz v. R.J. Reynolds Tobacco Co.,* 896 F.2d 5, 8 (1st Cir. 1990). [↑](#footnote-ref-44)
44. *Chelsea Public Schools, BSEA #* 01-2623, 101 LRP 103 (Crane, 2001). [↑](#footnote-ref-45)
45. See *T.R. v. Kingwood Twp. Bd. of Educ.,* 205 F.3d 572, 579–80 (3d Cir. 2000) (“a district that does not operate a regular preschool program is not required to initiate one simply in order to create an LRE opportunity for a disabled child”); see also *T.M. v. Cornwall Cent. Sch. Dist*., 752 F.3d 145, 166 (2d Cir. 2014) (“school district may choose to place the child in a private mainstream summer program, or a mainstream summer program operated by another public entity. Each school district thus has broad discretion over how it structures its [] placements”). [↑](#footnote-ref-46)
46. See, in general, 603 CMR 28.06(8)(a) (transportation limited to no more than one hour each way except with the approval of the IEP Team). But see *J.T. v. D.C.*, 496 F. Supp. 3d 190, 207 (D.D.C. 2020), *aff'd*, No. 20-7105, 2022 WL 126707 (D.C. Cir. Jan. 11, 2022) (“Since the IEP does not require that V.T.’s placement be within a certain distance of his home, DCPS has not denied him a FAPE by failing to place him at a close-in school”); *In Re: Tewksbury Public Schools*, BSEA # 1402344 (Putney-Yaceshyn, 2015) (finding “no credible evidence that Student would not receive a free appropriate public education in the least restrictive environment due to the distance”); *In Re: Brookline Public Schools*, BSEA # 12-4227 (Figueroa, 2012) (where Student has demonstrated no discomfort when travelling great distances, KCC was an appropriate placement, capable of providing Student FAPE consistent with the proposed IEP”); *Los Angeles Unified School District*, 2009060473, 53 IDELR 138 (SEA CA, 2009) (where no medical evidence that a longer bus ride would trigger Student's seizure, district offered FAPE and need not place student in a program preferred by parent). [↑](#footnote-ref-47)
47. See e.g., *In Re: Swansea Public Schools (Ruling on Motion to Order Compliance with Decision)*, BSEA No. 2207178-C (Berman, 2022) (where district could not ‘locate or create’ a program for Student, district ordered to fund Student's residential placement); *In Re: Westport Community Schools and Jed*, BSEA # 1302922 (Oliver, 2013) (“a residential component may be ordered, albeit for non-educational reasons, if the distance between the student's home and day placement would require that the student remain in the vehicle for more than an hour each way”); *In Re: Grafton Public Schools*, BSEA # 11-7489 (Scannell, 2011) (although student did not a require a residential placement for educational reasons, district ordered to fund placement “at Landmark (and attendant residential costs as without residential placement [student] [could not] access the program)”); *In Re: Plymouth Public Schools and Ilse*, BSEA # 03-4823 (Byrne, 2003) (ordering the Team “to consider…[an] appropriate day placement within a more reasonable commuting distance; and even residential placement”); *In Re: Harwich Public Schools*, BSEA # 00-2222 (Figueroa, 2001) (although student’s needs could be be met in a private day program “if such program cannot be found within a reasonable distance from the Student's home”, a residential placement should be considered”); *Boston Public Schools*, BSEA # 01-3847 (Beron, 2001) (ordering that both “day and residential programs [] be explored”); *In* *Re: Jason V*., BSEA # 95-0217 (Erlichman, 1994) (ordering “placement [] on a residential basis (in light of the distance between [] home and Landmark)”); *Shawn E. v. Plymouth-Carver Public Schools*, BSEA # 85-0445, 508 LRP 8668 (Erlichman, 1986) (ordering district to locate or create a program in keeping with the dictates of the decision” but “in the event that no appropriate public school placement can be secured/created within a reasonable period of time,” then the district should “investigat[e] and secur[e] a more restrictive placement”). [↑](#footnote-ref-48)
48. See, e.g., *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist*., 592 F.3d 267, 271 (1st Cir. 2010) (agreeing that full-time or part-time placement at a special day school was less restrictive than home instruction); *Matter of J.J.E. v. Indep. Sch. Dist. 279 (Osseo Area Pub. Sch.),* No. A16-0828, 2017 WL 164432, at \*5 (Minn. Ct. App. Jan. 17, 2017)(agreeing with school that “in-school placement, which is a less-restrictive environment than at-home education, generally is preferable to at-home education”); *Alvarez v. Swanton Loc. Sch. Dist*., 458 F. Supp. 3d 726, 735 (N.D. Ohio 2020) (“the parents’ unrelenting demand that K.A. receive home instruction clashed with the requirement that placement be in the least restrictive environment”); *J.B. and M.B., v. Bd. of Ed. for Horry Cnty*., 36 IDELR 65 (D.S.C. December 13, 2001) (finding Parents’ home-based program more restrictive than the school-based program offered by the district). Nor has any physician endorsed home instruction for medical reasons for Student pursuant to 603 CMR 28.03 (c). [↑](#footnote-ref-49)
49. See 20 U.S.C. § 1412(a)(5). [↑](#footnote-ref-50)
50. *L.G. v. Sch. Bd. of Palm Beach Co., Fla.,* 512 F. Supp. 2d 1240, 1244 (S.D. Fla. 2007) *aff'd sub nom. L.G.. v. Sch. Bd. of Palm Beach County,*255 F. App'x. 360 (11th Cir. 2007). [↑](#footnote-ref-51)
51. 801 CMR 1.01(7)(h). [↑](#footnote-ref-52)
52. See *Drew Co., Inc. v. Wolf,* 511 F. Supp. 3d 15, 17–18 (D. Mass. 2021) (“Cross-motions for summary judgment do not alter the basic Rule 56 standard, but rather simply require [the court] to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed” (quoting*Ferguson v. Gen. Star Indem. Co.,* 582 F.Supp.2d 91, 98 (D. Mass. 2008) (quoting *Adria Int'l Grp., Inc. v. Ferré Dev., Inc.*, 241 F.3d 103, 107 (1st Cir. 2001). [↑](#footnote-ref-53)
53. *Nucap Indus., Inc. v. Robert Bosch LLC*, No. 15-2207, 273 F.Supp.3d 986, 997–98, 2017 WL 1197104, at \*6 (N.D. Ill. Mar. 31, 2017) (quoting *R.J. Corman Derailment Servs., LLC v. Int'l Union of Operating Engrs., Local Union 150,* 335 F.3d 643, 647–48 (7th Cir. 2003)). [↑](#footnote-ref-54)
54. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249–50 (1986) [↑](#footnote-ref-55)
55. Although the District references proposing 69 referrals, the District offered Parents approximately 11-13 programs as options, though these options were proposed repeatedly throughout the 2023-2024 school year. [↑](#footnote-ref-56)
56. Parents do not dispute that they did not consent to each and every referral offered. [↑](#footnote-ref-57)
57. Newburyport further asserts that a homebound setting is the most restrictive environment for Student, and is not, as Parents assert, the least restrictive environment given the lack of a proximate private day program. [↑](#footnote-ref-58)
58. *Medina-Munoz v. R.J. Reynolds Tobacco Co.,* 896 F.2d 5, 8 (1st Cir. 1990). [↑](#footnote-ref-59)
59. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). [↑](#footnote-ref-60)
60. I note that neither of Student’s prior placements has been in a residential program. [↑](#footnote-ref-61)
61. Whether the District has the resources to create an in-District program (as Parents assert that it does) would only be material if, as a matter of law, the District was required to create an in-District program in this matter. However, as I explain, as a matter of law, the District is not required to create a program where it chooses to locate one. See *T.R. v. Kingwood Twp. Bd. of Educ*., 205 F.3d at 579–80. [↑](#footnote-ref-62)
62. *Chelsea Public Schools, BSEA #* 01-2623, 101 LRP 103 (Crane, 2001). [↑](#footnote-ref-63)
63. In their *[Partial]* *Motion for Summary Judgment*, Parents stress that “[p]lacing Student with peers [who] cannot communicate in the same way to which Student is currently familiar and accessing deprives Student of meaningful interactions and the ability to develop this skill.” They cite to Student’s limited communication skills as grounds for maintaining her in her home environment. It is unclear how Student would develop her communication skills as a sole attendee in an in-District program or how she would communicate effectively in a peer environment within the District’s “buddy program,” as Parents envision. [↑](#footnote-ref-64)
64. Although a school district must be able to offer education to students with disabilities a continuum of placement options, a school district seeking to change a student’s placement along the continuum must follow specific procedures under IDEA to do so, and such procedures, in turn, provide parents with multiple procedural safeguards. See 34 CFR 300.115 (b); see also 34 CFR 300.503(a)(1); *Letter to Fisher*, 21 IDELR 992 (OSEP 1994) (if the proposed change substantially or materially affects the composition of the educational program and services provided to the child, then a change in placement occurs, triggering the notice requirement).

Parents argue that the creation of an in-District program would provide Student a FAPE in the LRE and is appropriate under the circumstance as “Parents have been agreeable throughout the IEP process, and with Student’s Education Advocate, advocated for a program that will provide Student a FAPE in the LRE while keeping Student in her stable home environment where Student is well-supported.” I note, first, that even Dr. Janusis did not endorse placement in an in-District program. In fact, her report makes it clear that Student cannot benefit from the general education environment, and that Student requires the significant support and structure of a day program. Moreover, even if I accept Parents’ statements as true, as a matter of law, the District must create **or** locate an appropriate program. The District has cited impediments to creation of a program for Student (i.e., no cohort). Newburyport must, therefore, locate a program, as discussed in this Ruling. [↑](#footnote-ref-65)
65. See 34 CFR 300.114 and 603 CMR 28.06(2)(c) (LRE means to “the maximum extent appropriate, students with disabilities are educated with students who do not have disabilities”); see also, e.g., *Chris D. v. Montgomery Co. Bd. of Educ.,* 743 F.Supp. 1524 (M.D. Ala. 1990) (full-time residential placement was less restrictive than individual instruction either in the home or in a school administration building as student will have the opportunity to interact with other students); *Metropolitan Sch. Dist of Lawrence Township,*36 IDELR 282 (SEA Ind. 2002) (homebound placement for autistic student inappropriate because student had no contact with other students); *Lafayette Sch. Corp.,*30 IDELR 736 (SEA Ind. 1999) (parents' preferred homebound placement was unduly restrictive when full-day program available). [↑](#footnote-ref-66)
66. 20 U.S.C. § § 1401(29)(A). [↑](#footnote-ref-67)
67. *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, 76 IDELR 77 (EDU 2020); and *Questions and Answers on Providing Servs. to Children with Disabilities During an H1N1 Outbreak*, 53 IDELR 269 (OSERS 2009). [↑](#footnote-ref-68)
68. Evaluator’s emphasis. Like Student’s pediatrician, behavioral pediatrician and psychotherapist, who advocated against residential placement, Dr. Janusis based her opinion on Student’s “comfort” at home. [↑](#footnote-ref-69)
69. See 20 U.S.C. § 1412(a). [↑](#footnote-ref-70)
70. *T.R. v. Kingwood Twp. Bd. of Educ.,* 205 F.3d at 580; see *Antkowiak v. Ambach,* 838 F.2d 635, 638 (2d Cir.1988) (rejecting placement in an unapproved school); see also *Z.H. v. New York City Dep't of Educ.,* 107 F. Supp. 3d 369, 376 (S.D.N.Y. 2015)(“fact that a school district may consider placement in a private school does not mean that it may place the student at any private school, including one that does not meet the Commissioner's approval standards”). [↑](#footnote-ref-71)
71. This holds true except “in cases where a parent unilaterally places a child in a program because the school has not offered an appropriate IEP.” See *Manchester-Essex Reg'l Sch. Dist. Sch. Comm. v. Bureau of Special Educ. Appeals of The Massachusetts Dep't of Educ*., 490 F. Supp. 2d 49, 54 (D. Mass. 2007). Here, however, Parents request prospective placement in a home program. As such, the issue differs from cases involving unilateral placement.

Parents point to *In re: Student v. Shrewsbury Public Schools*, BSEA# 20-00185 & 20-01827 (Figueroa, 20202) where ““when the District’s efforts to secure another residential placement yielded no result, it did what it was mandated to do: create a program.” However, in *Shrewsbury*, Student was not withdrawn unilaterally from his residential program, but rather “Student’s enrollment in his then residential placement came to an end.” Hence, Shrewsbury was required, in the interim, to create a comparable program. The school district in that case could do so because it had an established in-district program with a cohort of peers it could supplement with additional services to meet the Student’s needs. These additional services were already proposed, and accepted by, Parent. Here, there is no home/community component in Student’s IEP for the District to implement nor is there an established in-District program with an appropriate cohort. [↑](#footnote-ref-72)
72. *Manchester*-*Essex Reg'l Sch. Dist. Sch. Comm.,* 490 F. Supp. 2d 54–55. See *T.R. v. Kingwood Twp. Bd. of Educ.,* 205 F.3d at 580 (“the Board was not required to consider placement in Rainbow Rascals because that program was not properly accredited under New Jersey law”).

Parents argue that the holding cited by the District from *Manchester-Essex*, which states that “state law provides that public schools can only place special education students in State-approved educational settings,” neglects the regulation’s intent “to protect and serve the best interest of the child and parent as well as to safeguard the School District's resources and prevent the funding of an inappropriate educational program.” They assert that “[h]ere, he best interest of the Student is to receive a FAPE in the LRE, for the Student to not be separated from a stable supportive home environment, for the Student to not be separated from her family, for the School District resources to be safeguarded (an in-District program is a fraction of the cost of an out-of-district program) and to prevent the District from funding an inappropriate educational program – a more restrictive placement separate from her family that is in direct contradiction to Student’s Neuropsychological and Academic Evaluation Report.” However, Parents misread *Manchester-Essex,* which stands for the proposition that a school may not be ordered to fund a non-approved program (save for situations of reimbursement for a denial of a FAPE); it does not stand for the proposition that that “the best interest of a child” is a criterion to be considered when ordering prospective funding of a placement. [↑](#footnote-ref-73)
73. *Kruelle v. New Castle Cnty. Sch. Dist.,* 642 F.2d 687, 695 (3d Cir. 1981). [↑](#footnote-ref-74)
74. See *Smith v. James C. Hormel Sch. of Virginia Inst. of Autism*, No. 3:08CV00030, 2009 WL 4799738, at \*26 (W.D. Va. Dec. 8, 2009), *report and recommendation adopted in part, rejected in part,* No. CIV.A. 3:08-CV-00030, 2010 WL 1257656 (W.D. Va. Mar. 26, 2010) (“As there were no appropriate day placement programs in the area, residential placements were the option available”). Parents’ argument that “residential placements have been ordered only when requested by the Parents and supported by those knowing the needs of those students” is unpersuasive and inaccurate. See *Jason V.,* BSEA # 95-0217, *In Re: Harwich Public Schools,*

BSEA # 00-2222, and *Boston Public Schools*, BSEA # 01-3847. [↑](#footnote-ref-75)
75. See *Babicz v. Sch. Bd of Broward Co.,*135 F.3d 1420 (11th Cir. 1998); see also *Mark H. v. Lemahieu,* 513 F.3d 922, 925 (9th Cir. 2008) (“FAPE requirements in the IDEA and in the § 504 regulations are [] overlapping but different”).  [↑](#footnote-ref-76)
76. See *Alexander* *v. Choate*, 469 US 287, 296 (1985). [↑](#footnote-ref-77)
77. See *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 125 n.17 (1st Cir. 2003) (“§ 504 claims require some showing of deliberate indifference not required by IDEA”). [↑](#footnote-ref-78)
78. See *Lovell v. Chandler*, 303 F.3d 1039, 1056 (9th Cir. 2002). [↑](#footnote-ref-79)
79. See 34 CFR 104.33 (b)(2). [↑](#footnote-ref-80)
80. 603 CMR 28.05(7)(b). [↑](#footnote-ref-81)
81. *Medford Public Schools*, BSEA # 2002451 (Figueroa, 2020). [↑](#footnote-ref-82)
82. In fact, the District proposed to send releases for Student as early as in January 2023. [↑](#footnote-ref-83)
83. *Anderson,* 477 U.S*.* at 249. [↑](#footnote-ref-84)
84. *Parents’ [Partial] Motion for Summary Judgment* stresses that Student’s removal from her prior placement was “with cause” and that the District failed to offer Student sufficient behavioral support in her prior placement. These arguments were before me in the Parents’ prior BSEA matters, are not before me at this time, and are irrelevant to the issues before me. In addition, even if it is true that parents had requested that the District evaluate Student, and the District did not do so until spring 2024, Parents did not present any evidence to the effect that had the District evaluated Student sooner, a different proposal would have been made that would have allowed Parents to consent to the referral process in a more timely manner; nor would such evidence have swayed a fact finder in Parents’ favor. Specifically, even if the 2023-2024 IEP’s benchmarks were imperfect due to lack of assessment, the District at all times continued to work with Parents to revise the IEP and offered to supplement any documentation to proposed programs. Moreover, Dr. Janusis’s independent evaluation was completed in January 2024, and the information included therein was substantially similar to the results of District assessments. All reports were forwarded to proposed programs, but Student was denied admittance at all day programs. As such, it is immaterial that the District did not agree to evaluate Student sooner. [↑](#footnote-ref-85)
85. See *O.O. v. District of Columbia,* 573 F.Supp.2d 41, 53 (D.D.C.2008) (“[The school] must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP”); see also *Marc V. v. N. E. Indep. Sch. Dist.,* 455 F. Supp. 2d 577, 595 (W.D. Tex. 2006), *aff'd sub nom. Marc V. v. N. E. Indep. Sch. Dist.*, 242 F. App'x 271 (5th Cir. 2007)(where a student’s program and placement were developed based on the assessments that recommended more class structure than is possible with only general education support, the court concluded that many of the “IEP goals would be practically impossible to implement in a homebound setting”); *San Lorenzo Valley Unified School District*, SN01-02735, 37 IDELR 107 (SEA CA, 2002) (“The District could not implement [ ] agreed upon goals and objectives … until after it offered [ ] a school-based placement”). In the instant matter, on February 12, 2024, the District offered interim services to Student, although it is unclear from the record whether a provider was ever identified. [↑](#footnote-ref-86)
86. *Anderson,* 477 U.S*.* at 249. [↑](#footnote-ref-87)
87. See *Lessard,* 518 F.3d at 26 (“it cannot be that a school system transgresses the IDEA whenever a parent—for whatever reason—refuses to sign a completed IEP”) (citing to additional court cases reaching a similar result). [↑](#footnote-ref-88)
88. See *id.* at 27 (the “interactive process constructed by Congress was not intended to deal a trump card to parents bent on prolonging IEP negotiations indefinitely”); see also *E.T. v. Bureau of Special Educ. Appeals of the Div. of Admin. L. Appeals*, 169 F. Supp. 3d 221, 239-40 (D. Mass. 2016) (in a case where district offered 14 potential programs but parents only consented to one, Court found that parents delayed the process by declaring that all thirteen options would “not fit” student); *Student with a Disability*, 111 LRP 67327 (SEA NY 2011) (no denial of FAPE where parents were uncooperative and failed to timely complete the intake procedure at the nonpublic school because of distance from home). [↑](#footnote-ref-89)
89. See 20 U.S.C. § 1412(a)(1)(A). [↑](#footnote-ref-90)
90. See *Dracut Sch. Comm. v. Bureau of Special Educ. Appeals of the Mass. Dep't of Elementary & Secondary Educ.*, 737 F. Supp. 35, 54 (D. Mass. 2010) (hearing officer could not extend eligibility for services under the IDEA as an equitable remedy); see also *LaRoe v. Div. of L. Appeals BSEA,* No. CV 3:21-30020-MGM, 2022 WL 1542087, at \*1 (D. Mass. Apr. 20, 2022), report and recommendation adopted, No. CV 21-30020-MGM, 2022 WL 1538928 (D. Mass. May 16, 2022) (inferring that “the First Circuit would reject a claim for a stay put order that required [school to] continue providing special education services to a student who was past the age of twenty-two”). [↑](#footnote-ref-91)
91. See *Peabody Public Schools*, BSEA # 09-6506 (Crane, 2009) (a Hearing Officer "may (or must) consider the agreement and determine whether and to what extent the agreement alters the rights and responsibilities of the parties with respect to a student's special education services and related procedural protections") (citing relevant caselaw). [↑](#footnote-ref-92)
92. See *In Re: Student v. Worcester Public Schools*, BSEA # 1302473 (Putney-Yaceshyn, 2013) (“the BSEA does not have authority to interpret or enforce the terms of private settlement agreements" but, at the same time, may rely on the existence of a settlement agreement and its terms). [↑](#footnote-ref-93)