**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Student v. Mendon-Upton Regional School District BSEA # 2504547**

**RULING ON MENDON-UPTON REGIONAL SCHOOL DISTRICT’S MOTION TO DISMISS**

This matter comes before the Hearing Officer on the November 8, 2024 *Mendon-Upton Regional School District’s Motion to Dismiss* (*Motion*) in which Mendon-Upton Regional School District (Mendon-Upton or the District) seeks dismissal of all claims relative to confidentiality violations and safe transportation for lack of subject matter jurisdiction.

On the same day, Parent responded, stating, in part, that “there is merit to [her]

request, as both the district and its counsel should be held to standards ensuring the safety and privacy of students; MURSD and their counsel have failed to do this. I believe it is a violation of my right to due process hearing and my child’s right to privacy to continue with [District’s Counsel] representing the district.”

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

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

**PROCEDURAL HISTORY AND RELEVANT FACTS:**

For the purposes of this *Motion*, I must take as true the assertions set out in the Parent’s pleadings. [[1]](#footnote-1)

Student is a 7-year-old, 2nd grade student who is supported through a 504-plan due to her diagnosis of ADHD. On October 28, 2024, Parent filed a due process complaint with the Bureau of Special Education Appeals (BSEA)alleging that the District had “failed to maintain the privacy and safety of my child on numerous occasions, and also has failed to uphold her 504 plans as written on multiple occasions.” According to the Hearing Request, Student “is not safe in this school district, and the only solution is for the BSEA to find in her favor and require the district to pay for transportation and tuition to a private school of our choice that will uphold her 504 plan.” According to Parent, Mendon-Upton failed to “[m]aintain confidentiality of our children, as evidenced by two privacy violations for [Student] by improper e-mail disclosure”; “[m]aintain privacy and safety of [Student], as evidenced by two violations of the district's photo release policy where pictures of children were distributed to third parties and on public social media sites”; “[p]rovide accommodations as set forth on their 504-plans”; “[p]rovide safe transportation to and from school, as evidenced by them being dropped off at a neighbor's house on 10/22/24”; and the “attorney for the district has failed to maintain confidentiality for [Student], as evidenced by a privacy violation by improper email disclosure.”

**LEGAL STANDARD FOR MOTION TO DISMISS:**

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

To survive a motion to dismiss, there must exist “factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”[[2]](#footnote-2) 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.”[[3]](#footnote-3) These “[f]actual allegations must be enough to raise a right to relief above the speculative level.”[[4]](#footnote-4)

**APPLICATION OF LEGAL STANDARD**:

In evaluating the *Motion to Dismiss*under the **LEGAL STANDARD** set forth *supra*, I take allegations as true as well as any inferences that may be drawn from them in the Parent’s favor, and deny dismissal if these allegations plausibly suggest an entitlement to relief.[[5]](#footnote-5) Here, considering as true all facts alleged by the party opposing dismissal (in this case, Parent), I find dismissal of claims relating to confidentiality and safe transportation appropriate for lack of subject matter jurisdiction. My reasoning follows.

The BSEA has limited subject matter jurisdiction. 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."[[6]](#footnote-6) In Massachusetts, a parent or a school district, "may request mediation and/or a hearing at any time on any matter[[7]](#footnote-7) 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."[[8]](#footnote-8) 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."[[9]](#footnote-9)

The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) protects the privacy of student education records. Barring specific exceptions, school districts may not disclose "personally identifiable information," which includes, but is not limited to the student's name; the name of the student's parent or other family members; the address of the student or student's family; personal identifier, such as the student's Social Security number, student number, or biometric record; other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community who does not have personal knowledge of the relevant circumstances to identify the student with reasonable certainty; and, information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.[[10]](#footnote-10) Similarly, under the IDEA, parental consent must be obtained before personally identifiable information is disclosed to parties, other than participating agencies, unless the information is contained in education records and the disclosure is authorized without parental consent under FERPA.[[11]](#footnote-11)

There is no enforceable private legal right of action under FERPA for violations thereunder.[[12]](#footnote-12) Rather, families who contend that federal education record provisions have been violated can file with the "Student Privacy Policy Office" (SPPO),[[13]](#footnote-13) which is the federal agency under FERPA that is charged with investigating, reviewing, and adjudicating violations of the Act.[[14]](#footnote-14) In Massachusetts, the student record regulations are promulgated to ensure parents' and students' rights of confidentiality, inspection, amendment, and destruction of student records and to assist local school systems in adhering to the law.[[15]](#footnote-15) Contrary to the federal educational record laws, however, Massachusetts law provides private appeal procedures for parents and students who believe the state educational record laws have been violated, this through appeal to the superintendent of schools and thereafter the school committee.[[16]](#footnote-16)

The BSEA is not the appropriate forum in which to assert claims regarding FERPA and the Massachusetts student records law.[[17]](#footnote-17) The BSEA has authority only over matters involving "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-18) Therefore, under both federal and state law, "the only avenue for a hearing officer to consider evidence regarding a breach of confidentiality by a school district employee would be if the parent alleged that such disclosure deprived the student of a FAPE."[[19]](#footnote-19)

Here, Parent has made no allegation that the District’s failure to “[m]aintain confidentiality of our children, as evidenced by two privacy violations for [Student] by improper e-mail disclosure”, its failure to“[m]aintain privacy and safety of [Student], as evidenced by two violations of the district's photo release policy where pictures of children were distributed to third parties and on public social media sites”; and/or the attorney’s failure “to maintain confidentiality for [Student], as evidenced by a privacy violation by improper email disclosure” have deprived (or would deprive) subject Student of a FAPE.[[20]](#footnote-20) Therefore, in the present matter, there is no relief that I am authorized to grant in response to said alleged disclosures, and the claims must be **dismissed with prejudice** for lack of subject matter jurisdiction.

I next address Student’s transportation claim. Here, Student is not IDEA-eligible but is eligible pursuant to Section 504. Section 504 requires schools to provide a free appropriate public education to each qualified individual with a disability.[[21]](#footnote-21) An "appropriate education" is the provision of regular or special education and related aids and services that are designed to meet the educational needs of an individual with a disability as adequately as the needs of individuals without disabilities are met.[[22]](#footnote-22) Although Section 504 does not delineate specific types of related services, OCR has interpreted Section 504 to encompass transportation as one of the many related services available under the law.[[23]](#footnote-23) Transportation is also among the list of nonacademic and extracurricular services expressly enumerated as covered by Section 504's antidiscrimination provision.[[24]](#footnote-24)

Nevertheless, in the instant matter, Parent does not allege disability-based discrimination in the District’s provision of transportation, nor does she allege that the District failed to implement any safety measures required by Student’s Section 504 Plan. Rather, Parent alleges that in the context of general education transportation, the District delivered Student to the wrong house. Because such claim is unrelated to the provision of a FAPE under IDEA or Section 504 of the Rehabilitation Act, the BSEA has no jurisdiction over this transportation issue. Therefore, the claim must be **dismissed with prejudice**.

**ORDER**:

The District’s *Motion to Dismiss* is ALLOWED. Specifically, Parent’s claims that Mendon-Upton failed to “[m]aintain confidentiality of our children, as evidenced by two privacy violations for [Student] by improper e-mail disclosure”; “[m]aintain privacy and safety of [Student], as evidenced by two violations of the district's photo release policy where pictures of children were distributed to third parties and on public social media sites”; “[p]rovide safe transportation to and from school, as evidenced by them being dropped off at a neighbor's house on 10/22/24”; and the “attorney for the district has failed to maintain confidentiality for [Student], as evidenced by a privacy violation by improper email disclosure” are hereby **dismissed with prejudice**. Parent’s claim that the District failed to “[p]rovide accommodations as set forth on [Student’s] 504-plans” survives dismissal.

So ordered,

By the Hearing Officer,

/s/ *Alina Kantor Nir*
Alina Kantor Nir

Date: November 12, 2024

COMMONWEALTH OF MASSACHUSETTS

BUREAU OF SPECIAL EDUCATION APPEALS

EFFECT OF BUREAU DECISION AND RIGHTS OF APPEAL

# Effect of the Decision

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Accordingly, the Bureau cannot permit motions to reconsider or to re-open a Bureau decision once it is issued. Bureau decisions are final decisions subject only to judicial review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. Rather, a party seeking to stay the decision of the Bureau must obtain such stay from the court having jurisdiction over the party’s appeal.

Under the provisions of 20 U.S.C. s. 1415(j), “unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement,” during the pendency of any judicial appeal of the Bureau decision, unless the child is seeking initial admission to a public school, in which case “with the consent of the parents, the child shall be placed in the public school program.” Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child’s placement during the pendency of judicial proceedings must seek a preliminary injunction ordering such a change in placement from the court having jurisdiction over the appeal. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1st Cir. 1983).

# Compliance

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau of Special Education Appeals contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the facts on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Elementary and Secondary Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

# Rights of Appeal

Any party aggrieved by a decision of the Bureau of Special Education Appeals may file a complaint in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review of the Bureau decision. 20 U.S.C. s. 1415(i)(2).

An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

# Confidentiality

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove School District v. Pulitzer Publishing Company*, 898 F.2d 1371 (8th. Cir. 1990).

If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

Record of the Hearing

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to federal law, upon receipt of a written request from any party, the Bureau of Special Education Appeals will arrange for and provide a certified written transcription of the entire proceedings by a certified court reporter, free of charge.

1. See *Blank v. Chelmsford Ob/Gyn, P.C*., 420 Mass. 404, 407 (1995). [↑](#footnote-ref-1)
2. *Iannocchino v. Ford Motor Co.,* 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). [↑](#footnote-ref-2)
3. *Blank v. Chelmsford Ob/Gyn, P.C*., 420 Mass. 404, 407 (1995). [↑](#footnote-ref-3)
4. *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted). [↑](#footnote-ref-4)
5. *Blank*, 420 Mass. at 407. [↑](#footnote-ref-5)
6. See 34 C.F.R. §300.507(a)(1). [↑](#footnote-ref-6)
7. Limited exceptions exist that are not here applicable. [↑](#footnote-ref-7)
8. 603 CMR 28.08(3)(a). [↑](#footnote-ref-8)
9. *In Re: Georgetown Pub. Sch*., BSEA #1405352 (Berman, 2014). [↑](#footnote-ref-9)
10. See 34 CFR 99.3 and 34 CFR 300.622(a). [↑](#footnote-ref-10)
11. See 34 CFR 300.622 (a). [↑](#footnote-ref-11)
12. Gonzaga Univ. v. Doe, 536 U.S. 273, 287, 122 S. Ct. 2268, 2277, 153 L. Ed. 2d 309 (2002) (internal citations omitted) ("To begin with, the provisions entirely lack the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights. …FERPA's provisions speak only to the Secretary of Education, directing that '[n]o funds shall be made available' to any 'educational agency or institution' which has a prohibited 'policy or practice.' This focus is two steps removed from the interests of individual students and parents and clearly does not confer the sort of 'individual entitlement' that is enforceable under § 1983"); see 34 CFR 99.60(b)(1). [↑](#footnote-ref-12)
13. The SPPO replaced the Family Policy Compliance Office (FPCO) on January 6, 2019. Although FPCO no longer exists, Letters of Findings and guidance previously issued by FPCO are still valid under current federal laws and provide useful insight into student privacy rules and requirements. [↑](#footnote-ref-13)
14. See 34 CFR 99.60(b)(1). [↑](#footnote-ref-14)
15. See 603 CMR 23.01. [↑](#footnote-ref-15)
16. Pursuant to 603 CMR 23.05, the school principal is responsible for maintaining the privacy of student records maintained in her building. In addition, 603 CMR 23.09, in part, provides parents with specific appeal rights as follows:

"(1) In the event that any decision of a principal or his/her designee regarding any of the provisions contained in [the Massachusetts student record regulations] is not satisfactory in whole or in part to the eligible student or parent, they shall have the right of appeal to the superintendent of schools. Request for such appeal shall be in writing to the superintendent of schools.

… (3) In the event that the decision of the superintendent of schools or his/her designee is not satisfactory to the appellant in whole or in part, the appellant shall have the right of appeal to the school committee. Request for such appeal shall be in writing to the chairperson of the school committee." [↑](#footnote-ref-16)
17. See *In Re: Student v. Taunton Pub. Sch. Dist.,* BSEA # 1304738 (Figueroa 2013) ("The BSEA lacks jurisdiction to order access to a student's record under the Family Educational Rights and Privacy Act (20 U.S.C. s.1232g(f)) or the Public Records law (M.G.L. c.66s.10) or the Student Records Regulations (603 CMR 23.09(1), (2) and (3).. [↑](#footnote-ref-17)
18. 603 CMR 28.08(3)(a).  [↑](#footnote-ref-18)
19. *In Re: Student and Springfield Pub. Sch. (Ruling on Springfield Public Schools' Motion to Dismiss/Motion for Summary Judgment Relative to Parent's Amended Hearing Request)*, BSEA # 2203555 (Berman, 2022); see also *In Re: Boston Pub. Sch.,* BSEA # 1900241 (Berman, 2018) ("where procedural safeguards, including parental access to student records, are deemed an essential component of FAPE, such safeguards should be treated as encompassed in 'the identification, evaluation, education program or educational placement of a child with a disability or the provision of a free and appropriate public education to the child…'. As such, the alleged failure of a school district to implement these safeguards may be the proper subject for a due process hearing, particularly when a parent alleges that such failure has deprived a child of FAPE or prevented meaningful parental participation in the Team process"); see also *In re: Student v. Marshfield Pub. Sch.*, BSEA # 2209242 (Kantor Nir, 2022) (finding that the BSEA has jurisdiction over Parent's claim that without access to her child's records, she was unable to make meaningful decisions about the adequacy of her child's programming and that, as a result, the school district had deprived her child of FAPE and prevented meaningful parental participation). [↑](#footnote-ref-19)
20. See, e.g., *In Re: Student and Springfield Pub. Sch.,* BSEA #2203555 (Berman, 2022); *In re: Student v. Marshfield Pub. Sch*., BSEA # 2209242 (Kantor Nir, 2022). [↑](#footnote-ref-20)
21. See 34 CFR 104.33(a). [↑](#footnote-ref-21)
22. See 34 CFR 104.33 b)(1). [↑](#footnote-ref-22)
23. See *Shasta County (CA) Office of Educ*., 16 IDELR 1206 (OCR 1990). [↑](#footnote-ref-23)
24. See 34 CFR 104.37(a)(2). [↑](#footnote-ref-24)