

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS**

In Re: Student v. Westfield Public Schools

BSEA # 2212235

**RULING ON WESTFIELD PUBLIC SCHOOLS' PARTIAL MOTION TO DISMISS
PARENTS' AMENDED HEARING REQUEST AND COUNTERCLAIM**

This matter comes before the Hearing Officer on *Westfield Public Schools' Partial Motion to Dismiss Parents' Amended Hearing Request and Counterclaim (Motion)* filed on July 1, 2022. Westfield Public Schools (Westfield or the District) asserts that many of Parents' claims in the instant matter fall beyond the IDEA's 2-year statute of limitations, are moot, or are overly broad.

On July 7, 2017, Parents filed *Parents' Response to Westfield Public Schools' Partial Motion to Dismiss Parents' Amended Hearing Request and Counterclaim (Response)* opposing the District's *Motion*.

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 hereby ALLOWED, in part, and DENIED, in part.

PROCEDURAL HISTORY AND RELEVANT FACTS:

For the purposes of this *Motion*, I must take as true the assertions set out in Parents' Complaint.

1. Student is a rising ninth grade student attending the Westfield Public Schools. He has been diagnosed with ADHD, specific learning disability (dyslexia), anxiety, and disruptive mood dysregulation disorder (DMDD), and is receiving special education and related services pursuant to an Individualized Education Program (IEP).
2. Due to his struggles with impulsive verbalizations, Student has been participating in the RISE program at Westfield Middle School.
3. An extended evaluation in a public or private day program has been proposed by the District in order to observe Student in a therapeutic milieu, but Parents have yet to consent thereto, and no location has been identified. Parents do "not wish to be 'tricked' into an out-of-district placement that they [do] not believe would meet the needs or be beneficial to [Student]." While Parents "have not ruled out the possibility of another Extended Evaluation," they are concerned that "removing [Student] from his peers will be more detrimental than beneficial to his mental health." They are also "extremely concerned that [Student's] learning disabilities are not being serviced and will continue to

not be addressed if he is denied access to staff who are appropriately certified to meet these challenges.”

4. Student was suspended from school for approximately 88 school days during his 6th grade year¹, 8 school days during his 7th grade year, and 40 school days during his 8th grade year.
5. Due to a behavioral incident which took place on April 29, 2022, Student was suspended for 34 days beginning on May 2, 2022.
6. On May 11, 2022, the District convened a manifestation determination review (MDR). The school-based team found that Student’s behavior during the April 29, 2022 incident was not a manifestation of his disabilities. Parents disagreed and appealed the suspension to the Superintendent of the Westfield Public Schools. On May 13, 2022, the Superintendent upheld the 34-day suspension.
7. On June 17, 2022 Parents filed a due process complaint with the BSEA, asserting claims under both the Individuals with Disabilities in Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 (Section 504).²
8. Specifically, Parents alleged that in violation of the IDEA, the District “committed significant procedural violations that resulted in a denial of [] FAPE” to Student “by changing [Student’s] placement through procedural inadequacies in connection with school discipline” and by denying Parents meaningful participation during the manifestation determination review meeting. In addition, Parents asserted that the District discriminated against Student in violation of Section 504 of the Rehabilitation Act of 1973 “through a pattern of suspensions and manifestation determination review decisions [in 6th, 7th and 8th grade] made in bad faith and with gross misjudgment”; and that Student’s “[p]unishments [were] disproportionately severe for [the] offenses [committed] and [amounted to] differential treatment.”
9. Parents sought to have the BSEA “[o]verturn MDRs from 2019 and 2022”; “[e]xpunge discipline records” from 2019 to 2022; “return [Student] to school, provide an appropriate continuum of services and supports that will allow him to attend his neighborhood school in order to be in the LRE with his peers”; “[p]rovide all compensatory services in a manner that allows [Student] to access and benefit from said educational services by a fully qualified and licensed professional in-person”; “[a]llow [Student] to register for his classes at Westfield High School”; reimburse Parents for “all legal fees incurred by parents since 2019”³; and award any “other such remedies BSEA deems necessary to make corrective measures.”
10. On June 17, 2022 the BSEA granted the matter expedited status pursuant to the Individuals with Disabilities Education Act (IDEA) and the applicable *BSEA Hearing Rules*.
11. On June 27, 2022, the District proposed to expunge from Student’s record the 34-day suspension and the manifestation determination meeting related to said incident, for purposes of settling the pending expedited claims.

¹ Parents’ Hearing Request states both that Student was suspended for 88 school days in his 6th grade year and that, during that year, he received “85 day suspension for minor behaviors.”

² With no objection from the District, Parents submitted an Amended Request for Hearing on June 23, 2022, eliminating some claims for relief.

³ During a conference call on June 27, 2022, Parents indicated that they are not currently represented by legal counsel.

12. On June 28, 2022, the District filed the *Westfield Public Schools' Motion to Dismiss Expedited Claims* arguing that in light of the District's proposal on June 27 to expunge Student's 34-day suspension and the manifestation determination meeting related to said incident, the pending claims should proceed on a regular track along with any counter claims. On June 29, 2022, in my *Ruling on Westfield Public Schools' Motion to Dismiss Expedited Claims*, I allowed the motion, finding that because the District has offered to expunge from Student's record the 34-day suspension and the manifestation determination meeting related to said incident, and since the 2019 suspension and manifestation determination relative thereto are beyond the two-year statute of limitations of the IDEA⁴, there were no claims remaining that satisfied *BSEA Hearing Rule II(C)*, the standard for expedited hearings.

PARTIES' POSITIONS:

Westfield:

In addition, the District argues that due to the statute of limitations, all claims arising prior to June 17, 2020 should be dismissed.⁵ Westfield also asserts that Parents' claim relative to Student's return to Westfield High School should be dismissed as it is not contested, and Student's stay-put placement is Westfield High School. Similarly, the claim relative to Student's registration for classes should be dismissed, as Student's registration will be completed imminently.

Regarding Parents' claim for compensatory services, the District asserts that it requires "specific information as to what the Parents' basis is for making these claims and also cautions that the statute of limitations may curb the time period considered for compensatory services." Relative to Parents' claim for attorney's fees, Westfield argues that Parents are not currently represented by counsel; no attorney has represented Parents during a due process hearing; and, the BSEA does not have the authority to award attorney's fees. Last, the District seeks dismissal of Parents' claim for "[a]ny other such remedies BSEA deems necessary to make corrective measures" on the grounds that it is overly "broad."

Parents:

Parents assert that "a 3 year statute of limitations [should apply to] non-FAPE Section 504 [c]laims in that Westfield discriminated against [Student] in violation of Sec. 504 of the Rehabilitation Act of 1973, through punishments disproportionately severe for offenses between September 2019 and June 17, 2022, inclusive of beginning and end dates." They concede that all other FAPE-based Section 504 claims fall within the 2-year statute of limitations. Parents also contend that although the "issue relative to the 34-day suspension imposed in May 2022 was

⁴ A due process complaint is timely if filed within two years of the date that the parent or district knew or should have known about the action forming the basis for the complaint. See 34 CFR 300.507(a)(2). Although some exceptions apply, none has been asserted in the present matter.

⁵ Because at the time of filing the instant *Motion* Westfield had not yet received the June 29, 2022 *Ruling on Westfield Public Schools' Motion to Dismiss Expedited Claims*, Westfield also argued that the District's agreement to expunge Student's 34-day suspension resolved the expedited claim, and that, as such, it should be dismissed. I do not address this argument in the instant Ruling because the claim was already dismissed.

resolved[, Student] was still denied FAPE during that time period.” As such, they seek compensatory services for denial of a FAPE relative to all suspensions during Student’s 6th, 7th, and 8th grade school years as well as expungement of Student’s suspensions, including those which fall outside of the 2 year statute of limitations “as a form of relief based on the discriminatory nature of extreme disproportionate treatment.” Regarding their claim for legal fees, Parents assert that although the BSEA does not have the authority to award attorney’s fees, Parents “need BSEA fact finding in order to comply with the exhaustion requirements of a potential reviewing court.”

LEGAL STANDARDS:

1. Legal Standard for Motion to Dismiss

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

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

2. Jurisdiction of the Bureau of Special Education

20 U.S.C. § 1415(b)(6) grants the Bureau of Special Education Appeals (BSEA) jurisdiction over timely filed complaints by a parent/guardian or a school district "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child."⁹ In Massachusetts, a parent or a school district, "may request mediation and/or a hearing at any time on any matter¹⁰ concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities."¹¹ A parent of a student with a disability may also request a hearing on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973....¹² However, the BSEA "can only grant relief that is authorized by

⁶ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

⁷ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

⁸ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

⁹ See 34 C.F.R. §300.507(a)(1).

¹⁰ Limited exceptions exist that are not here applicable.

¹¹ 603 CMR 28.08(3)(a).

¹² See 29 U.S.C. 794 (Section 504 of Rehabilitation Act); 34 CFR 104, *et seq.*

these statutes and regulations, which generally encompasses orders for changed or additional services, specific placements, additional evaluations, reimbursement for services obtained privately by parents or compensatory services."¹³

APPLICATION OF LEGAL STANDARDS:

In evaluating the District's *Motion* under the legal standards set forth above, I take Parents' allegations in their Hearing Request as true as well as any inferences that may be drawn from them in their favor, and deny dismissal if these allegations plausibly suggest an entitlement to relief.¹⁴ Here, considering as true all facts alleged by the party opposing dismissal (in this case, Parents), I hereby ALLOW, in part, and DENY, in part, the District's *Motion*. My reasoning as to each claim follows.

1. The District's Motion to Dismiss Parents' Claims Arising Prior to June 17, 2020, Including Claims Seeking Reversal of MDRs from 2019 to 2022, Is Allowed, In Part, And, Denied, In Part.

The District argues that the "IDEA's 2-year statute of limitations precludes any claims arising prior to June 17, 2020"¹⁵ and seeks to dismiss "any and all claims relative to Student's 6th grade year (2019-2020)" on the grounds that "MDRs fall squarely within the purview of the IDEA" and are subject to the IDEA's two year statute of limitations. In contrast, Parents assert that from 2019 to 2022, the District engaged in "a pattern of suspensions and manifestation determination review decisions made in bad faith and with gross misjudgment" in violation of Section 504 and imposed suspensions which were "disproportionate" to the offenses. They argue that "a 3 year statute of limitations [should be applied to all] non-FAPE Section 504 claims."

Under the IDEA, a due process complaint is timely if filed within two years of the date that the parent or district knew or should have known about the action forming the basis for the complaint.¹⁶ Section 504, on the other hand, does not include a statute of limitations.¹⁷

With respect to Section 504, as noted by the federal District Court in Massachusetts in *Dizio v. Manchester Essex Regional School Dist.*, "[t]ypically, when a federal statute does not have its own statute of limitations, courts look to a comparable state statute and apply that limitations

¹³ *In Re: Georgetown Pub. Sch.*, BSEA #1405352 (Berman, 2014).

¹⁴ See BSEA R. XVI (B)(3); see also 801 CMR 1.01 (7)(g)(3).

¹⁵ Parents filed their Hearing Request on June 17, 2022. They amended it on June 23, 2022. Pursuant to Rule I(G) of the BSEA Hearing Rules "to the extent the amendment merely clarifies issues raised in the initial hearing request, the date of the initial hearing request shall be controlling for statute of limitations purposes." Hence, in the instant matter, June 17, 2022 is the controlling date for statute of limitations purposes.

¹⁶ 34 CFR 300.507(a)(2).

¹⁷ Moreover, the analysis for § 504 and IDEA claims is distinct and separate. See, e.g., *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 274-75 (3rd Cir. 2014) (whereas to prevail on her IDEA claims Parents must establish that the District failed to provide Student with a FAPE in the LRE, to prevail on her claims pursuant to § 504, Parents must prove that during the relevant time period Student was disabled; he was "otherwise qualified" to participate in school activities; the District received federal financial assistance; and Student was "excluded from participation in or denied the benefits of the educational program receiving the funds, or was subject to discrimination under the program").

period.”¹⁸ Similarly, in *Student v. Fall River Public Schools*, BSEA # 00-0771, Hearing Officer William Crane determined that the three-year statute of limitations applicable generally to civil rights actions in Massachusetts was appropriate in cases alleging discrimination under § 504.¹⁹

However, courts have generally applied the IDEA’s two-year statute of limitations to FAPE claims brought pursuant to § 504 where the two are intertwined.²⁰ Specifically, “[w]hen there is no separate claim of disability discrimination under § 504, courts have borrowed the IDEA’s statute of limitations for the § 504 claim.”²¹ For instance, in *Dizio*, the Court found that because the parents’ § 504 claims concerned whether the defendants denied the student a FAPE, the § 504 claims were “essentially identical to the IDEA claims and for that reason, [the] Court [applied] the two-year were limitations period to the § 504 ... claims.”²² Therefore, in determining whether to apply the IDEA’s statute of limitations to § 504 claims, a hearing officer must first determine whether the claims pursuant to § 504 are independent of the IDEA claims asserted in the same matter.²³

Applying this framework to the allegations before me, I find that Parents’ claims asserting that the District discriminated against Student on the basis of disability in violation of § 504 by failing to conduct proper manifestation determination review meetings and by failing to provide Parents with opportunities to participate meaningfully therein are intertwined with IDEA claims and are subject to the two-year statute of limitations.²⁴ Specifically, any and all claims accruing prior to June 17, 2020 asserting a denial of a FAPE to Student resulting from the District’s substantive and procedural violations relative to school discipline are hereby DISMISSED.

¹⁸ See *Dizio v. Manchester Essex Reg'l Sch. Dist.*, 2021 WL 3571496, 7-8 (D. Mass. 2021); see also *Wilson v. Garcia*, 471 U.S. 261, 266-267 (1985) (“[w]hen Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so”); *Campbell v. Haverhill*, 155 U.S. 610, 616 (1895) (absent federal limitation, congressional intent is best served if the federal right is “enforced in the manner common to like actions” under state law); *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 198 (1st Cir. 1987) (borrowing N.H. RSA § 508:4 six year limitation on “personal actions” for application to § 1981 action).

¹⁹ See *Dizio* (finding that “Section 504 is best characterized as a ‘civil rights statute,’ and the three-year statute of limitations for civil rights actions (M.G.L. c. 260, s. 5B) therefore presents the most analogous Massachusetts statute”); see also *In re: Adam and Taunton Public Schools (Ruling on Motion to Dismiss)*, BSEA # 17-08888 (Reichbach, 2018) (applying the three year statute of limitations to non-FAPE Section 504 claims).

²⁰ See *In Re: Adam and Taunton Pub. Sch.*, BSEA # 17-08888 (Reichbach, 2017) (citing to *P.P. ex rel. Michael P. v. West Chester Area Sch. Dist.*, 585 F.2d 727, 736 (3rd Cir. 2009) and *Blunt*, 767 F.3d at 274-75).

²¹ *Id.* (citing *Baker v. S. York Area Sch. Dist.*, 2009 WL 4793954, at *3 (M.D. Pa. Dec. 8, 2009) and *Bell v. Bd. of Educ. of Albuquerque Pub. Sch.*, 2008 WL 4104070, at *13 (D.N.M. Mar. 26, 2008)).

²² *Id.*

²³ See *Fry v. Napoleon Cmty. Sch.*, 580 U.S. ____, 137 S.Ct. 743, 758 (2017) (outlining, in exhaustion context, factors to be examined to determine whether a § 504 claim is independent of an IDEA claim); *C.G. ex. re. Keith v. Waller Indep. Sch. Dist.*, 697 Fed. Appx. 816 (5th Cir. 2017) (unpublished) (where parents’ § 504 claim incorporates an identical factual background expressed in the same language as their unsuccessful IDEA claim and fails the test for independence established by the Supreme Court in *Fry*, that claim must also be dismissed, but where the test is met, an independent § 504 claim need not be dismissed merely because the IDEA claim fails).

²⁴ See *Fry*, 137 S.Ct. at 756; see also *In re: Adam and Taunton Public Schools (Ruling on Motion to Dismiss)*, BSEA # 17-08888 (Reichbach, 2018) (“Because Parent could not have brought essentially the same claims if the alleged conduct had occurred in a public facility other than a school, and an adult at the school could not have pressed essentially the same grievance, Parent’s contentions that Taunton discriminated against Adam through a pattern of suspensions without manifestation meetings and changed his classes without parental consent are new IDEA-based claims. They are therefore subject to the IDEA statute of limitations”).

However, any claims asserting discrimination in violation of § 504 on the basis of disability through the administration of disproportionately severe punishments are not FAPE or IDEA based claims as they are not based on a dispute concerning Student’s eligibility under the IDEA or § 504 or the discharge of the School’s procedural and substantive responsibilities under the IDEA or Section 504 of the Rehabilitation Act of 1973.²⁵ Hence, the three-year statute of limitations applicable to allegations of civil rights violations in Massachusetts applies to such claims, and all such claims that accrued prior to June 17, 2019 are hereby also DISMISSED.²⁶

2. The District’s Motion to Dismiss Parents’ Claim Seeking to Expunge Discipline Records, Including 85-Day Suspension from 2019-2020 And Subsequent Suspensions, Is Denied.

The District argues that Parents’ claim seeking to expunge Student’s discipline records from 2019 to 2020, including 85 days of suspension, is barred by the IDEA’s two-year statute of limitations. Parents’ *Response*, however, seeks expungement of the 85 days of suspension “as a form of relief based on the discriminatory nature of extreme disproportionate treatment, which would fall within the 3-year statute of limitations of the non-FAPE based section 504 claims that the punishments were discriminatory in that they were disproportionately severe for the offenses.”

Here, in the context of Parents’ non-FAPE § 504 claims, the central question before the BSEA will be whether Student was subjected to disproportionate treatment (i.e. excessive number/length of out-of-school suspensions) on the basis of his disability. If I find in the affirmative, the District could be ordered to expunge the suspensions from his record.²⁷ Therefore, the District’s *Motion* is DENIED as to Parents’ claim seeking to expunge discipline records, including the 85-day suspension from 2019-2020.

3. The District’s Motion to Dismiss Parents’ Claim Seeking Compensatory Services Is Denied.

The District asserts that it requires “specific information as to the Parents’ basis is for making [their] claims [for compensatory services] and also cautions that the statute of limitations may curb the time period considered for compensatory services. The District also seeks to understand what the Parents suggest in terms of compensatory services, when said services would be delivered, and in what form.” Parents, however, assert that Student was deprived of a FAPE during his suspensions, including during the 34-day suspension that the District has agreed to

²⁵ See *Fry*, 137 S.Ct. at 752 (holding that “exhaustion is not necessary when the gravamen of the plaintiff’s suit is something other than the denial of the IDEA’s core guarantee – what the Act calls a ‘free appropriate public education’” and whether a claim is IDEA-based turns on whether the underlying claim is one of violation of the IDEA, or “where there are no factual allegations to indicate that a dispute exists concerning the individual student’s eligibility under the IDEA or Section 504 or the discharge of the School’s procedural and substantive responsibilities under the IDEA or [Section 504 of the Rehabilitation Act of 1973]”); see also *In re: Adam and Taunton Public Schools (Ruling on Motion to Dismiss)*, BSEA # 17-08888 (Reichbach, 2018) (“Parent’s remaining § 504 claims ... that Taunton discriminated against Adam through its involvement of other systems (DCF, courts, and/or police); through comments made by staff members; and through the administration of disproportionately severe punishments...are not FAPE claims”).

²⁶ The instant matter was filed by Parents on June 17, 2022.

²⁷ See, e.g., *In re: Daniel*, BSEA # 15-04287 (Reichbach, 2014).

overturn. Parents assert that they would not be opposed to a reconvening of the Team to determine appropriate compensatory services.

In general, courts have recognized that “an award of compensatory education is equitable relief that may consider the particular situation at the time that relief is awarded in order to remedy the wrong that has occurred.”²⁸ The equitable authority of a Hearing Officer is “sufficiently broad so that relief can be fashioned that will correct the wrong of the particular case—that is, through an award of compensatory education, to place Student in the situation he would have occupied had [the District] complied with its obligations in the first instance.”²⁹

In light of the Hearing Officer’s “broad” authority to fashion a compensatory remedy within the constraints of the statute of limitations of the relevant statutes discussed *supra*, and the Parents’ assertion of factual allegations that “plausibly” suggest an entitlement to relief,³⁰ the District’s motion to dismiss Parents’ claim for compensatory services is DENIED. Parents’ claim seeking compensatory services survives dismissal.

4. The District’s Motion to Dismiss Parents’ Claim Seeking Any Other Such Remedies the BSEA Deems Necessary to Make Corrective Measures Is Denied, In Part, And, Allowed, In Part.

The District seeks dismissal of Parents’ claim for “[a]ny other such remedies BSEA deems necessary to make corrective measures” as it is too “broad.” However, the District’s argument is unpersuasive.

Massachusetts law affords BSEA Hearing Officers broad authority to “order such educational placement and services as [they] deem[] appropriate and consistent with this chapter to assure the child receives a free and appropriate public education in the least restrictive environment.”³¹ Although the BSEA “can only grant relief that is authorized by [IDEA and Massachusetts special education] statute[] 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,”³² the scope of the administrative due process hearing conducted by the IDEA Hearing Officer is “broad” as is the Hearing Officer’s “equitable authority.”³³ Nevertheless, in the context of systemic claims, the BSEA limits its consideration to those claims “that are relevant to Student’s individual dispute with [a school district].”³⁴

Therefore, in the present matter, any systemic complaint that is irrelevant to the specific claims regarding Student’s rights is hereby DISMISSED.

²⁸ *In Re: Dracut Pub. Sch.*, BSEA # 08-5330c (Crane, 2009) (citing *Pihl v. Mass. Dept. of Ed.*, 9 F.3d 184, 188 (1 st Cir. 1993) and *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516 (D.C. Cir. 2005)).

²⁹ *Id.*

³⁰ *Iannocchino*, 451 Mass. at 636.

³¹ M.G.L. c. 71B, § 3.

³² *In Re: Georgetown Pub. Sch.*, BSEA #1405352 (Berman, 2014).

³³ *In Re: Dracut Pub. Sch.*, BSEA # 08-5330c (Crane, 2009).

³⁴ *In Re: Boston Pub. Sch.*, BSEA # 11-4676 (Crane, 2011); see also *In Re: Greater New Bedford Reg’l Voc. Tech.*, BSEA # 1308227 (Crane 2013).

5. The District’s Motion to Dismiss Parents’ Claim Seeking to Allow Student to Register for His Classes at Westfield High School Is Allowed.

The District argues that Parents’ claim relative to Student’s registration for classes should be dismissed, as “Parents raised this issue during the June 23 conference call and District counsel has followed-up with District[, and it] is anticipated that this registration will be completed forthwith.”

As explained *supra*, the BSEA may only assert jurisdiction over currently existing, or live, disputes. As both parties agree that Student must be (and will be) able to register for classes, there is no existing controversy, and the claim must be DISMISSED.

6. The District’s Motion to Dismiss Parents’ Claim Seeking to Return Student to School, Provide an Appropriate Continuum of Services And Supports That Will Allow Him to Attend His Neighborhood School in Order to Be in the LRE with His Peers Is Allowed, In Part, and, Denied, In Part.

Parents seek Student’s return to his neighborhood school, Westfield High School. The District argues that Parents’ claim relative to Student’s return to Westfield High School must be dismissed as “this issue is not contested.”

Pursuant to both state and federal special education law, the BSEA has jurisdiction over “any matter relating to the identification, evaluation or educational placement of the child or the provision of a free and appropriate public education.”³⁵ “Any matter” refers to a current, live dispute between the parties; the IDEA states that “a due process complaint must allege a violation...”³⁶ Massachusetts law provides for hearings to resolve disputes.³⁷ Nothing under either federal or state law authorizes the BSEA to take jurisdiction of potential future matters over which no dispute currently exists.

As both parties agree that Student’s stay-put placement is Westfield High School and that he must return there in the fall, no dispute exists as to this issue, and said claim must be DISMISSED.

Although Parents do not explicitly assert a claim relative to whether Student’s current IEP offers him a FAPE in the LRE, they implicitly³⁸ assert so in stating that Westfield should “provide [Student] an appropriate continuum of services and supports that [would] allow him to attend his neighborhood school in order to be in the LRE to attend his neighborhood school in order to be in the LRE with his peers.” Specifically, Parents are concerned that the District’s proposal for an extended evaluation in a therapeutic milieu is an attempt to “trick” Parents into accepting an

³⁵ See 20 U.S.C. §1415(b)(6)(A); 34 CFR §300.507(a); M.G.L. c71B, §2A(a)(i); 603 CMR §28.03.

³⁶ See 20 U.S.C. §1415(b)(6)(B); 34 CFR §507(a)(2).

³⁷ See 603 CMR §28.03.

³⁸ Where a parent proceeds pro se, a Hearing Request should be construed liberally. See *Ahmed v. Rosenblatt*, 118 F.3d 886, 890 (1st Cir. 1997). “The policy behind affording pro se plaintiffs liberal interpretation is that if they present sufficient facts [to state a claim], the court may intuit the correct cause of action, even if it was imperfectly pled.” *Id.* This principle aligns with “[o]ur judicial system [, which] zealously guards the attempts of pro se litigants on their own behalf” while not ignoring the need for compliance with procedural and substantive law. *Id.*

“out-of-district placement that they [do] not believe would meet the needs [of] or be beneficial to [Student].” At the same time, Parents are “extremely concerned that [Student’s] learning disabilities are not being serviced and will continue to not be addressed if he is denied access to staff who are appropriately certified to meet these challenges.”

Therefore, I read Parents’ claim for Student’s continued placement at Westfield High School with a continuum of services and supports as a claim relative to the appropriateness of his current program, and, specifically, whether Student requires additional supports and services at his current placement at Westfield High School in order to receive a FAPE in the LRE. As this issue present a live controversy, it must proceed to hearing, and, as such, survives dismissal.³⁹

7. The District’s Motion to Dismiss Parents’ Claim Seeking Reimbursement of All Legal Fees Incurred by Parents Since 2019 Is Allowed.

The District asserts that Parents are not currently represented by counsel and that the BSEA does not have the authority to award attorney's fees. Therefore, this claim must be dismissed. Although Parents concede that the BSEA does not have the authority to award attorney’s fees, they argue they “need BSEA fact finding in order to comply with the exhaustion requirements of a potential reviewing court.”

Pursuant to the IDEA, “the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.”⁴⁰ No such discretion is extended by federal or Massachusetts law to BSEA Hearing Officers.⁴¹ In addition, as is evident from this statutory language of the IDEA, determination of "prevailing party" status is “an essential ingredient to making a successful claim for attorney fees and the subsidiary issue of whether Parents are a prevailing party for purposes of 20 USC 1415(i)(3)(B) cannot be addressed simply through findings of fact by [the Hearing Officer] or resolution by [same] of the merits of the dispute before the BSEA but rather requires a separate, ‘qualitative inquiry’, interpreting and applying a term of art as that term is used by the courts in federal fee-shifting statutes.”⁴² Parents can pursue other remedies without exhaustion of this claim at a due process hearing; they may go to a court of appropriate jurisdiction to argue their request for attorney's fees.⁴³

Even if the BSEA had the authority to award attorney fees, I could not do so in this case, as Parents have indicated that they have not engaged the services of an attorney to represent them in the instant appeal. Generally, attorney's fees are not awarded for any work relating to any meeting of the IEP team unless such meeting is convened as a result of an administrative proceeding or judicial action.⁴⁴ Hence, even if I were to take as true “the allegations of the

³⁹ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

⁴⁰ See 20 USC 1415(i)(3)(B)(emphasis added); 34 CFR 300.517(a)(1).

⁴¹ See 20 USC 1415(b)(6) and (f)(1); 34 CFR 300.507; 603 CMR 28.08(3); see, e.g., *In Re: Rockport Pub. Sch.*, BSEA # 01-4954 (Crane, 2002) (citing to additional decisions).

⁴² *In Re: Nahant Pub. Sch.*, BSEA # 04-1098 (Crane 2003) (citing to *Maine Sch. Ad. D. No. 35 v. Mr. and Mrs. R.*, 321 F.3d 9 (1st Cir. 2003)).

⁴³ See, e.g., *In Re: Acton-Boxborough Reg'l Sch. Dist.*, BSEA # 2103253 (Figueroa, 2021); *In Re: Duxbury Pub. Sch. and Ishmael*, BSEA #08-3479 & BSEA #08-4805 (Beron, 2008).

⁴⁴ 34 CFR 300.517 (c)(2)(ii).

complaint, as well as such inferences as may be drawn therefrom in [Parents'] favor,"⁴⁵ I could not find that Parents have asserted "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief."⁴⁶

Therefore, Parents' claim seeking reimbursement of all legal fees incurred by them since 2019 is DISMISSED.

CONCLUSION:

Based upon the above, the issues remaining for Hearing are limited to the following:

- A. Whether the District discriminated against Student in violation of § 504 of the Rehabilitation Act of 1973 on the basis of his disability through a pattern of excessive/disproportionate suspensions between June 17, 2019 and June 17, 2022, inclusive of beginning and end dates?
- B. Whether the District denied Student a FAPE, during the time he was not attending school as a result of being suspended between June 17, 2020 and June 17, 2022, inclusive of beginning and end dates?
- C. If the answer to (A) or (B) is yes, what is the appropriate remedy?
- D. Whether Student requires additional supports and services at his current placement at Westfield High School in order to receive a FAPE in the LRE?
- E. Whether an extended evaluation in a therapeutic milieu is necessary to ensure that Student is able to receive a FAPE, in which case substitute consent is appropriate?

ORDER:

The District's *Motion to Dismiss* is ALLOWED, in part, and DENIED, in part. The hearing scheduled for October 5 and 7, 2022 will proceed on the issues delineated in the **CONCLUSION** section, *supra*. All other claims are dismissed with prejudice.

So ordered,

By the Hearing Officer,

s/ Alina Kantor Nir

Alina Kantor Nir

Date: July 26, 2022

⁴⁵ *Blank*, 420 Mass. at 407.

⁴⁶ *Iannocchino*, 451 Mass. at 636 (2008).

.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.