COMMONWEALTH OF MASSACHUSETTS

**BUREAU OF SPECIAL EDUCATION APPEALS**

# **In Re: Scituate Public Schools BSEA #07-0521**

**DECISION**

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq*.), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL c. 71B), the state Administrative Procedure Act (MGL c. 30A), and the regulations promulgated under these statutes.

A hearing was held on January 22, 2007 in Malden, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student’s Mother

Carolyn Moore Friend of Parent

Phoebe Teare Student’s private therapist

Ronald Larrivee Director of Learning Services, South Shore Charter School

John Paul Reisman Behavior Specialist, South Shore Educational Collaborative

Sandra Liberty Paraprofessional, Scituate Public Schools

Lisa Brecher School Psychologist, Scituate Public Schools

Linda Nathan Social Worker, Scituate Public Schools

Martin Grassie Principal, Jenkins Elementary School, Scituate Public Schools

Sabrina Sweeney Special Education Teacher, Scituate Public Schools

Judith Norton Director of Special Education, Scituate Public Schools

Mary Ellen Sowyrda Attorney for Scituate Public Schools

Maryellen Coughlin Court Reporter

The official record of the hearing consists of documents submitted by the Parent and marked as exhibits P-1 through P-41; documents submitted by the Scituate Public Schools (Scituate) and marked as exhibits S-1 through S-43; and one day of recorded oral testimony and argument. As agreed by the parties, oral closing arguments were made at the end of the Hearing day on January 22, 2007, and the record closed on that date.

###### INTRODUCTION

This dispute involves an eleven-year-old boy who was suspended from school for ten days as a result of a physical altercation with the principal on November 30, 2006. Student has not returned to school since then.

Scituate seeks an order placing Student at an interim alternative educational setting and, more specifically, a 22 school-days placement at the Short-Term Assessment and Return to School (STARTS) program located at the South Shore Educational Collaborative. As a necessary part of resolving this issue, I first determine whether Student carried or possessed a weapon on November 30th and whether his conduct on that date was a manifestation of his disability.

For reasons explained below, I have concluded that Student did not carry or possess a weapon, that his conduct was not a manifestation of his disability, and that I have the authority to change Student’s placement to an interim alternative educational setting (IAES) for up to 45 school days.

However, at the conclusion of the hearing, the parties agreed on Student’s next placement. Accordingly, I have not ordered an IAES placement at this time.

## ISSUES

The issues to be decided in this case are the following:

1. whether Student was carrying or possessing a weapon at school on November 30, 2007;
2. whether Student’s conduct on November 30, 2006 was a manifestation of his disability;
3. whether Student should be returned to his previous placement or placed at an interim alternative educational setting; and
4. if Student should be placed in an interim alternative educational setting, whether the setting should be the South Shore Educational Collaborative or another program.

BACKGROUND

This section describes Student’s profile, chronology of events, and procedural history, leaving additional decisional facts to be discussed in the Findings and Conclusions section, below. The facts described in this section are not in dispute.

#### **A. Profile**

Student is eleven years old (date of birth 2/10/95) and lives with his mother in Scituate. Since September 2006, he has been enrolled in the 6th grade at Scituate’s Jenkins Elementary School. However, he has not attended school since November 30, 2006 when he was suspended. Testimony of Sweeney; exhibit S-17 (IEP).

Student has been diagnosed with Asperger’s Syndrome, with significantly impaired development in social interaction and communication, inflexibility and rigid thinking, and significantly restricted repertoire of activities and interests. In addition, Student has learning disabilities, including dyslexia, dyscalculia (an impairment of the ability to solve mathematical problems), impaired working memory, and significant weaknesses in processing speed of visual information. Student also has a history of attention deficit hyperactivity disorder and difficulties with self-regulation and modulation of sensory input. He has significant difficulties maintaining an appropriate level of alertness and arousal, as well as difficulties modulating emotional intent and affect. He also has extremely disordered sleep cycles. Finally, Student has a severe level of anxiety and depression. His anxiety affects his overall feelings toward school. He has expressed suicidal ideations, often states that he hates his life, and has an extremely negative opinion of his academic abilities. Testimony of Nathan, Sweeney, Brecher, Teare; exhibits S-17 (page 4), S-23, S-24, P-32.

Test results indicate that Student is performing in the average to low-average range of intelligence. However, Student’s reading is at the 1st grade level, his writing ability is significantly below grade level, and he requires support to read and access material throughout his school day. Student has a history of academic failure, beginning in kindergarten. During the fall of 2006, Student made some progress regarding self-regulation, expression of needs, and ease and ability of interacting with his peers. At the beginning of the school year, he appeared to be shy and subdued, but by mid-October was more independent and engaged his peers appropriately, for example during recess. However, from September to the end of November 2006 (when he left school), Student made no progress regarding his writing skills, made little progress regarding reading skills, and made slow progress regarding math. Student occasionally told his teacher that he could not read and could not learn to read. His teacher testified that Student is not motivated “in any respect” regarding academics. Testimony of Sweeney; exhibit S-17.

### B. Chronology

During the 2004-2005 and the 2005-2006 school years, Student attended the South Shore Charter School in Norwell, Massachusetts. On June 19, 2006, prior to returning to the Scituate Public Schools, the IEP Team met to consider Student’s educational needs and services. Scituate proposed an eight-week, extended evaluation of Student for the purpose of determining appropriate goals/objectives, service delivery, and placement. On July 18, 2006, immediately following a mediation that resulted in an agreement regarding some of the details regarding the extended evaluation, Parent accepted this placement. Exhibits S-14, S-15.

In the fall of 2006, Student began attending the 6th grade at the Jenkins School, pursuant to the extended evaluation. Student’s program followed a partial inclusion model, with reading, writing, and math being taught separately in a pull-out classroom. Student also was assigned a 1:1 paraprofessional (Ms. Liberty) who escorted him to his classes, accompanied him during academic classes (also taking notes for Student), and provided Student with sensory breaks.

On November 2, 2006, Student was evaluated by the South Shore Mental Health Center for the purpose of a risk assessment and determination whether Student was safe to return to school. Student had previously (while in gym class) asked his school aide (Ms. Liberty) to show him the door to the roof so that he could jump off of it. The crisis evaluation forms indicate that Student was determined to be safe to return to school, but further “strongly” recommended that Student be placed in a “new, therapeutic day school setting to obviate being overwhelmed/overstressed and to provide the appropriate level of care and education.” Testimony of Liberty; exhibits S-12, S-13.

On November 13, 2006, after completion of the extended evaluation, the IEP Team met to review the results of the evaluation and prepare a new IEP. The proposed IEP, which is for the period 11/14/06 to 11/14/07, called for Student to continue to attend the Jenkins Elementary School in a partial inclusion program. Pull-out special education services were to be provided for reading, written language, math, and academic support. The IEP also called for occupational therapy, speech and language services for social skills training, and counseling by a social worker for a half hour, once each week. In addition, academic support was to be provided within regular education classes through a paraprofessional. The IEP also called for an extended school year. Parent rejected this IEP. Exhibit S-17.

Until November 30, 2006 while at the Jenkins School, Student had not been violent towards another person. He had occasionally thrown or tipped over furniture, but this was done away from others; and following each incident, Student quieted down quickly and responded well to staff intervention. In one incident (on September 28, 2006), Student approached Ms. Sweeney (his special education teacher) in a way that scared her, but this incident quickly resolved itself. On a number of occasions, Student had asked to go home prior to the end of the school day and, except in one instance, these requests had been denied. Testimony of Sweeney, Liberty, Nathan, Grassie; exhibit S-7.

During the few days prior to November 30, 2006, Student had expressed annoyance at being at Jenkins. This followed a period of time when Student had stayed home for several days. There had also been increased academic demands placed on Student during this time. Testimony of Sweeney, Liberty.

On November 30, 2006, an incident occurred that caused Student to be suspended from school. Before coming to school on that day, Student had gone to sleep at 5:00 AM, and so he was tired when he arrived at school. Testimony of Sweeney.

During the morning of November 30th, Student was in a reading tutorial in a conference room near Martin Grassie’s office. Mr. Grassie is the Jenkins School principal. Student did not want to read, and so the teacher ended the tutorial. Student then explained that he would not leave the conference room unless he could go home. Ms. Brecher and Ms. Sweeney, who were with Student, then came to Mr. Grassie and asked if he would speak with Student. Mr. Grassie came into the conference room and explained to Student that all students must stay in school until the end of the school day – that is, 2:00 PM. Mr. Grassie then left the room, as did Ms. Sweeney. By this time, Ms. Liberty had arrived at the conference room.

When Mr. Grassie heard a chair being thrown, he returned to the conference room and again spoke with Student. Student calmed down and was quiet, sitting with his fingers in his ears. Mr. Grassie and the other adults in the room tried to get Student to go to gym and lunch (which would have been the next activities on Student’s schedule), but he refused to leave the office conference room, where he had now been for approximately an hour. Mr. Grassie again left the room. Soon thereafter, Mr. Grassie heard a table being tipped over, and he returned to the conference room. At this time, the only other adult in the room was Ms. Liberty.

Mr. Grassie again spoke with Student. Student responded by asking: “Why don’t you expel me?” Mr. Grassie told Student why he could not expel him. Student then grabbed the top of Mr. Grassie’s necktie (which Mr. Grassie was wearing around his neck), and pulled hard, hanging onto the tie. Mr. Grassie reported that he could not breathe, and it “hurt a lot.” Mr. Grassie reacted quickly, pushing Student away from him, making Student release the tie.

Mr. Grassie then told Student that he would call his mother, and Student calmed down. Student went to the gym with Mr. Poirer, Mrs. Liberty, and Mr. Greer. Mr. Grassie testified that marks appeared on his neck for the next several days. Mr. Grassie did not receive any medical treatment. Testimony of Grassie, Liberty, Sweeney; exhibit S-8.

As a result of this incident, Scituate suspended Student for ten days. At Parent’s request, the manifestation determination was delayed until December 21, 2006. On that date, the IEP Team met to review the neuropsychological evaluation, conduct a manifestation determination, and discuss placement. On the basis of this meeting, Scituate determined that Student’s behavior was not a manifestation of his disability. Exhibits S-4, S-5, S-6.

Taking the position that Student’s conduct involved the use of a “weapon,” as that term is used within special education law, Scituate concluded that regardless of whether Student’s conduct was a manifestation of his disability, it had the authority to place Student unilaterally at an interim alternative education setting (IAES) for up to 45 school days. Scituate proposed placing Student at the South Shore Educational Collaborative Quest Program (Collaborative) pursuant to this authority. The Collaborative subsequently notified Scituate that it would be willing to have Student attend its program for purposes of a 22-day assessment in its Short Term Assessment with Return to School (STARTS) program. Scituate then prepared a proposed placement and extended evaluation for this purpose, which Parent rejected. Exhibits S-1, S-2.

Parent declined to send her son to the Collaborative, and Scituate precluded Student from returning to school. As a result, Student has not attended school since November 30, 2006. During part of this period of time, Scituate has provided Student with tutoring.

#### **C. Procedural History**

On January 5, 2007, Parent filed with the Bureau of Special Education Appeals (BSEA) a Hearing Request seeking (1) reversal of Scituate’s manifestation determination, (2) prospective placement at a year-round therapeutic school, (3) “1/2 day coverage year round in the form of financial expenses and transportation needs” for Student on early-release school days, (4) an “outside autism consultant” for both service planning and service delivery at school and home, and (5) various compensatory relief.

The BSEA assigned this case expedited status, with a Hearing date of January 22, 2007.

On January 10, 2007, Scituate filed its response to Parent’s Hearing Request. Scituate defended its actions and requested that the BSEA order a 22-day assessment placement at the Collaborative. Scituate also took the position that Student had used Mr. Grassie’s tie as a weapon, thereby allowing Scituate to place Student unilaterally in an interim alternative educational setting regardless of whether Student’s conduct was a manifestation of his disability.

Parent filed a request with the BSEA that this matter be bifurcated so that the expedited issues – that is, the manifestation determination and placement in an interim alternative educational setting – would be heard on January 22nd, with the remaining issues to be heard at a later date. The BSEA Hearing Officer allowed this request over Scituate’s objection.

This case was re-assigned to the present Hearing Officer on January 17, 2007. In a conference call with the Hearing Officer on January 19, 2007, the issues for hearing were clarified and informal resolution was explored. The case went forward to hearing on the expedited issues, as originally scheduled, on January 22, 2007.

**FINDINGS AND CONCLUSIONS**

A. Introduction

Student is an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act (IDEA)[[1]](#footnote-1) and the state special education statute.[[2]](#footnote-2) The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living."[[3]](#footnote-3) Neither Student’s eligibility status nor his entitlement to FAPE is in dispute.

The party seeking relief with respect to a particular claim has the burden of persuasion regarding that claim.[[4]](#footnote-4) Parent is seeking relief and therefore has the burden of persuasion regarding the manifestation issue. Scituate is seeking relief and therefore has the burden of persuasion regarding the issue of whether Student should be placed at an interim alternative educational setting and if so, whether the placement should be at the Collaborative. In addition, Scituate has sought a determination and therefore has the burden of persuasion regarding the question of whether Student carried or possessed a weapon.

###### B. Weapon

The federal special education statute and implementing regulations allow a school district to remove a student to an interim alternative educational setting regardless of whether the student’s conduct was a manifestation of his disability, provided that the student “carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency.”[[5]](#footnote-5)

In order to prevail, Scituate must persuade me both that Mr. Grassie’s necktie meets the definition of a “weapon” and that Student “carrie[d] or possesse[d]” the alleged weapon at school. I consider each part separately below.

Definition of weapon

The term “weapon” is defined by statute to have the meaning given the term “dangerous weapon” under section 930(g)(2) of title 18 of the United States Code,[[6]](#footnote-6) which reads as follows:

The term "dangerous weapon" means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length.[[7]](#footnote-7)

As explained earlier in this Decision, Student grabbed Mr. Grassie’s necktie and pulled hard, hanging onto the tie. Mr. Grassie reported that he could not breathe, and it “hurt a lot.” Mr. Grassie reacted quickly, almost immediately pushing Student away from him, and Student released the tie.

The statutory definition of “weapon” first describes the range of possible objects that could fit the definition: “weapon, device, instrument, material, or substance, animate or inanimate.” This part of the definition is sufficiently broad to include a necktie. The definition then provides the following, limiting language: “that is used for, or is readily capable of, causing death or serious bodily injury.”

In seeking to fall within this statutory standard, Scituate did not present evidence that a necktie *in general* “is used for, or is readily capable of, causing death or serious bodily injury” but instead focused on the facts of the particular incident involving Student and Mr. Grassie; and therefore I will do the same.

In the present dispute, the necktie did not cause serious injury to Mr. Grassie. I therefore consider only the “readily capable” language of the definition.

The word “readily,” in combination with the word “capable” implies that if the attacker actually engages his victim with the weapon, serious injury would likely occur. For example, a gun, knife (in excess of 2 ½ inches in length), or baseball bat might be found to meet this definition of weapon because each of these instruments could readily cause serious bodily injury if the attacker actually engaged his victim with the gun, knife, or bat, even if only for a few seconds.

In the present dispute, Student actually engaged Mr. Grassie with the alleged weapon for a few seconds but no serious bodily harm occurred. After being attacked with the necktie, Mr. Grassie was able to push Student away, causing Student to release the necktie. In short, in the factual context of the present dispute, I have no evidentiary basis from which I could conclude that the necktie was *readily* capable of causing death or serious bodily injury to Mr. Grassie. For these reasons, I find that the necktie does not fall within the statutory definition of “weapon.”

“Carries or possesses”

I further consider whether Student “carrie[d] or possesse[d]” the alleged weapon.[[8]](#footnote-8)

It is apparent that Student did not “carry” the necktie, and so I consider only whether he “possesse[d]” it. The word “possesses” was added to the IDEA effective July 1, 2005.[[9]](#footnote-9) I am not aware of any judicial or administrative decisions interpreting this word within the context of the IDEA.

Scituate takes the position that, at least for a few seconds, Student had possession of the necktie. I disagree for the following reasons.

The term “possess” is defined by Black’s Law Dictionary (7th ed. 1999) as follows: “To have in one’s actual control; to have possession of.” Massachusetts courts have noted the essential ingredient of having “control” over the property.[[10]](#footnote-10) There is no indication that when Student grabbed and pulled the necktie, he exercised control over it. Instead, he grabbed and held the tie for a few seconds while it remained around Mr. Grassie’s neck.

The use of the statutory phrase “carries or possesses a weapon” should be understood within the context and purpose of the statute.[[11]](#footnote-11) This language reflects a purpose of allowing school districts to exclude a specific group of students who are likely to be sufficiently dangerous to justify unilateral removal from their educational placement for up to 45 school days even if their conduct was a manifestation of the student’s disability.

The phrase “carries or possesses” helps to describe and thereby limits those students over whom a school district has this unilateral removal authority. Presumably the phrase was intentionally chosen (rather than a different phrase such as “utilized or attempted to utilize” a weapon) to limit, in a particular way, those student who would be subject to unilateral removal. To adopt Scituate’s argument would change and broaden a school district’s removal authority beyond what the statute has explicitly provided.

Conclusion

For these reasons, I conclude that on November 30, 2006 Student did not carry or possess a weapon to or at school, on school premises, or to or at a school function.

###### C. Manifestation of Student’s Disability

I next consider whether Student’s conduct on November 30, 2006 when he grabbed and pulled Mr. Grassie’s tie was a manifestation of Student’s disability.

The federal special education statute and implementing regulations provide that a student’s conduct is a manifestation of his disability if either of the following two requirements is satisfied:

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.[[12]](#footnote-12)

As discussed earlier in this Decision, Scituate conducted a manifestation determination on December 21, 2006, concluding that Student’s conduct was not a manifestation of his disability. Parent now bears the burden of persuasion to show that, pursuant to the above-quoted two-part federal standard, Student’s conduct was a manifestation of his disability.

Beginning with the second part of this standard, I find that there was no credible evidence presented that would support a finding that, during the time in question, Scituate failed to implement Student’s IEP. Accordingly, I conclude that Parent cannot prevail on this part of the standard.

I now turn to the first part of the standard – that is, “caused by, or had a direct and substantial relationship”. No witness or report took the position that one or more of Student’s disabilities actually “caused” the conduct on November 30th. Parent has therefore not carried her burden on this part of the standard. The more difficult question is whether there was a “direct and substantial relationship” between Student’s disabilities and the conduct in question.

Parent has persuaded me that there is a relationship, in general, between Student’s conduct (particularly when under stress) and his combination of disabilities. As explained above in the Profile subsection of this Decision, Student has extremely disordered sleep cycles; and he had arrived at school on the morning of November 30, 2006 having not gone to sleep the previous evening until 5:00 AM. His deficits also result in difficulties with self-regulation and modulating sensory input. In addition, Student has a long history of academic failure and frustration, in large part because of his disabilities, and during the few days leading up to November 30th, he had experienced increased academic demands and expressed increasing dissatisfaction with school and an increased desire not to be there. Testimony of Sweeney, Nathan. Mr. Larrivee and Ms. Teare further testified as to Student’s low frustration tolerance and his difficulty thinking things through and responding in appropriate ways when under pressure.

Nevertheless, the question is not whether at the time of the incident there was a general relationship between Student’s conduct and his disability, but whether there was a “direct and substantial” relationship between the particular conduct in question (pulling Mr. Grassie’s tie) and Student’s disabilities.

The incident on November 30th occurred within the context of Student’s repeatedly expressing his desire to leave school and go home. When the school staff refused these requests, he first threw a chair and then tipped over a desk. When Mr. Grassie continued to refuse to send him home, Student asked Mr. Grassie: “Why don’t you expel me?” Mr. Grassie’s refusal to do so was followed by Student’s grabbing Mr. Grassie’s necktie, which was then followed by Mr. Grassie’s suspending Student and sending him home.

It was apparent to the adults in the room, as well to those who knew Student’s conduct in the school environment, that Student was deliberately escalating his conduct for the purpose of obtaining the desired result of being sent home. At the time that Student grabbed the tie, he seemed calm and intentional. It was agreed by Student’s private therapist that Student likely grabbed Mr. Grassie’s tie in order to obtain a particular result. Testimony of Grassie, Nathan, Liberty, Sweeney, Teare.

The evidence does not support a conclusion that because of his disabilities, Student was unable to control sufficiently his conduct, that he unintentionally pulled Mr. Grassie’s tie, that he did not understand the seriousness or consequences of his actions, or that his actions were limited by certain rigid or inflexible thinking or responses.

Rather, the evidence strongly suggests that during the incident Student’s conduct was calm, deliberate, voluntary, and calculated; that he acted for the specific purpose of escalating his conduct until he reached the desired result of being sent home; and that he did so by moving through a stage of responses – that is, throwing a chair, then tipping over a table, then grabbing and pulling the necktie. Testimony of Grassie, Nathan, Liberty.

It is also relevant that previously when Student had become upset, he was able to talk about his feelings, and Scituate staff was able to work with him effectively. This further indicates Student’s ability to work with his emotions and control his behavior during difficult times with the assistance of Scituate staff when Student chose to do so. Testimony of Grassie, Nathan, Liberty.

For these reasons, I find that there was not a direct and substantial relationship between the conduct and the disability. Accordingly, I conclude that Student’s conduct on November 30, 2006 was not a manifestation of his disability.

### D. Removal to an Alternative Setting

I next consider whether Scituate may remove Student to an interim alternative educational setting (IAES). The federal regulations make clear my authority as follows:

(1) A hearing officer under §300.511 hears, and makes a determination regarding an appeal under paragraph (a) of this section.

(2) In making the determination under paragraph (b)(1) of this section, the hearing officer may--

(i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of §300.530 or that the child’s behavior was a manifestation of the child’s disability; or

(ii) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.[[13]](#footnote-13)

Under this standard, it must be determined whether returning Student to the Jenkins Elementary School would “substantially likely” result in “injury” to Student or to others.

This is potentially a complex question because Student committed a dangerous act, but he does not have a history of violence towards himself or others and because the November 30th incident may possibly be understood as an isolated incident that was precipitated in large part by a specific set of known circumstances. Further, there was no testimony as to whether additional services or accommodations would reduce the likelihood of further dangerous conduct.

Nevertheless, there does not appear to be any dispute regarding this issue. The Scituate witness and the Parent witness who opined on this issue agreed that Student is too potentially dangerous to return to the Jenkins School at this time. In addition, Parent has been clear throughout this litigation that she does not want her son to return to the Jenkins School. Testimony of Grassie, Teare.

For these reasons, I conclude that returning Student to the Jenkins Elementary School would substantially likely result in injury to Student or to others. Accordingly, I conclude that I have the authority to order placement at an IAES for up to 45 school days.

### E. IAES Placement

As discussed earlier in this Decision, Scituate took the position through its response to the Hearing Request that the Collaborative’s STARTS program was an appropriate interim alternative educational setting (IAES) for Student. At the hearing, in support of this position, Scituate presented the testimony of Mr. Reisman, who is a behavior specialist at the Collaborative’s Quest and STARTS programs.

The STARTS program provides 22 and 45 school day placements within the Collaborative’s Quest program. The principal differences between a placement at the STARTS program and a placement at the Quest program are that (1) the STARTS program is for a limited duration of 22 or 45 school days, (2) during the 22 or 45 days, a psychology intern observes/monitors a STARTS student’s progress, (3) evaluations (including a psychiatric consultation) are provided during the STARTS placement as needed, (4) mid-way through and at the end of the STARTS placement, meetings occur to review a student’s progress, make adjustments, and at the end, make program (but not specific placement) recommendations, and (5) students in the STARTS program, as compared to the Quest program, do not routinely receive individual counseling. Otherwise, a student placed in the STARTS program receives essentially the same special education and related services as (and are grouped with) the Quest students. Within the current 5th/6th grade class at Quest, there are six students, one of whom is a STARTS student. Testimony of Reisman.

The Quest program (and therefore the STARTS program as well) is designed to serve students with severe emotional and behavioral needs. Of the six students currently in the 5th/6th grade classroom, all but one have had at least one psychiatric hospitalization. The program also serves the needs of students on the Autism spectrum, and two of the current 5th/6th graders have diagnoses of Asperger’s Syndrome and anxiety. Several of the students in this classroom also have a diagnosis of Attention Deficit Hyperactivity Disorder. The current group of 6 students includes 3 boys and 3 girls, their ages are 11 and 12 years old, and their academic levels are generally at grade level or one to two years below grade level. The Quest program has a capacity for 8 students. Testimony of Reisman.

The Quest program considers itself to be a self-contained therapeutic program. A special education teacher and paraprofessional provide all of the academic lessons, there is a social skills group that meets twice each week, there are spontaneous opportunities during the school day to correct inappropriate social conduct and teach appropriate social conduct, three full-time social workers are on staff, there is crisis access to a clinician, and the program director (who directly supervises the psychology intern) has a PhD in psychology. Mr. Reisman, as a behavior specialist, is available to develop behavior support plans for students and to provide support and supervision to others in the program. Testimony of Reisman.

Mr. Reisman conducted a 20-minute clinical interview of Student, reviewed Student’s records, and spoke with Parent. He testified that on the basis of this process and his experience and knowledge regarding STARTS and Quest (including his knowledge of the students who have been served successfully within these programs over a period of years), he believed that Student would be an appropriate candidate for either a 22-day STARTS placement or a placement at Quest. He explained that, between the two, he preferred the Quest placement for Student since his special education needs have already been well identified, allowing Student to be appropriately placed on a more long-term basis at Quest. Testimony of Reisman.

For these reasons, this program appears, in a number of respects, to be able to address Student’s current educational and related deficits. However, for the reasons explained below, I find that the program is not appropriate at this time because it does not have the capacity to address Student’s most immediate and urgent therapeutic needs.

Ms. Teare, who is an experienced and licensed mental health counselor and who has been seeing Student privately since the summer of 2004, testified persuasively that at the present time, Student cannot access any academic curriculum. Student’s severe depression and anxiety, together with a learned helplessness in school (where he has failed for the past six years and where he now is unwilling to try) and a home environment that provides inconsistent messages to Student, have combined to create a crisis situation. Testimony of Teare.

Before Student can learn academically, his therapeutic needs must be addressed in an appropriately comprehensive and intensive manner. If his therapeutic needs are not addressed sufficiently through specific supports and interventions, they will not correct themselves, potentially leaving Student in a position of severe dysfunction and vulnerability over the long-term. The significance of what is at stake could not be over-stated by Ms. Teare.

Ms. Teare recommended that Student be placed in a program such as a day psychiatric hospital placement where the emphasis is placed on addressing Student’s therapeutic, as compared to his academic, needs. In an appropriate therapeutic environment such as a day psychiatric hospital, the academics might be provided by a tutor supplied by Scituate. Ms. Teare also noted the importance of ensuring that such a placement does not include any significant number of other students with drug or alcohol difficulties. Ms. Teare was persuasive that the therapeutic component of the Collaborative program is not sufficient to meet Student’s current needs. Testimony of Teare.

Ms. Nathan, Scituate’s social worker who had been seeing Student weekly in 1:1 counseling sessions while he attended the Jenkins School, testified prior to Ms. Teare, and then was called to testify in response to Ms. Teare’s testimony. Ms. Nathan explained that in the event that Ms. Teare’s assessment of Student is correct that Student’s therapeutic needs have been increasing since he left the Jenkins School (and Ms. Nathan had no reason to doubt this assessment), she would agree completely with Ms. Teare’s opinion regarding the critical importance of providing Student with a comprehensive and intensive therapeutic program. Ms. Nathan fully supported Ms. Teare’s recommendation that Student be placed in a setting such as a day psychiatric hospital.

During oral arguments at the conclusion of the testimony on January 22, 2007, the parties agreed to work together to place Student in a day psychiatric hospital or a similarly intensive and comprehensive therapeutic setting. For this reason, by agreement of the parties, the issue of where Student should be placed for the immediate future is withdrawn from my consideration, with the understanding that Scituate may request that I reconsider this issue at any time so long as I continue to have jurisdiction over this dispute.

In the event that I were to reconsider this issue at a future time, I would determine Student’s needs at that time and how they should be met. I defer until then any decision regarding the appropriateness of the Collaborative program to address Student’s educational needs, including his Asperger’s Syndrome and learning disabilities.[[14]](#footnote-14)

### F. Continuing Jurisdiction

Through this decision I have addressed only certain issues of immediate concern, bifurcating (and therefore not now considering) issues of Student’s ultimate educational placement and Parent’s compensatory claims. In order to address these remaining issues, I continue to have jurisdiction over this dispute. Any party may, at any time, request Hearing dates regarding the remaining issues in dispute.

**ORDER**

On November 30, 2006, Student did not carry or possess a weapon to or at school, on school premises, or to or at a school function.

Student’s conduct on November 30, 2006 was not a manifestation of his disability.

Returning Student to the Jenkins Elementary School would substantially likely result in injury to Student or to others, and I have the authority to order placement at an interim alternative educational setting for up to 45 school days.

By agreement of the parties, I do not order placement at an interim alternative educational setting at this time.

By the Hearing Officer,

William Crane

Dated: January 29, 2007

**COMMONWEALTH OF MASSACHUSETTS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

# **THE BUREAU’S DECISION, INCLUDING 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 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. 20 USC 1400 *et seq*. Congress reauthorized and amended the IDEA in 2004, with changes to take effect on July 1, 2005. Unless otherwise indicated, references in this Decision to the IDEA are to IDEA 2004. [↑](#footnote-ref-1)
2. MGL c. 71B. [↑](#footnote-ref-2)
3. 20 USC 1400(d)(1)(A). *See also* 20 USC 1412(a)(1)(A); MGL c. 71B, ss. 2, 3. [↑](#footnote-ref-3)
4. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005). [↑](#footnote-ref-4)
5. 20 USC § 1415 (k)(1)(G); 34 CFR §300.530(g)(1). [↑](#footnote-ref-5)
6. 20 USCS § 1415 (k)(7)(C). [↑](#footnote-ref-6)
7. 18 USC 930(g)(2). [↑](#footnote-ref-7)
8. 20 USC § 1415(k)(1)(G); 34 CFR §300.530(g)(1). [↑](#footnote-ref-8)
9. Previously, the IDEA provided that the special circumstances were met if “the child carries a weapon to school or to a school function under the jurisdiction of a State or a local educational agency.” [↑](#footnote-ref-9)
10. The Massachusetts Appeals Court has defined “possession” as a party's “control and power, exclusive or joint,” over an object. *Com. v. Hartfield*, 55 Mass.App.Ct. 1111, 772 N.E.2d 601 (2002). See also *Commonwealth v. Than*, 442 Mass. 748, 753-754, 817 N.E.2d 705 (2004), in which the SJC endorsed the following jury instructions:

What does it mean to possess something? A person obviously possesses something if he has direct physical control or custody of it at a given time. In that sense, you possess whatever you have in your pocket or purse at this moment. However the law does not require that someone have actual physical custody of an object to possess it. An object is considered to be in a person's possession if he has the ability to exercise control over that object either directly or through another person. For example, the law considers you to be in possession of things which you keep in your bureau drawer at home or in a safe deposit box at your bank. [↑](#footnote-ref-10)
11. *Davis v. Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). [↑](#footnote-ref-11)
12. 20 USC § 1415(k)(1)(E)(i); 34 CFR §300.530(e). [↑](#footnote-ref-12)
13. 34 CFR § 300.532(b). See also 20 USC § 1415(k)(3) providing similar language. [↑](#footnote-ref-13)
14. Ms. Teare testified that once Student’s therapeutic needs are no longer dominant, an appropriate educational program should be designed for students with Asperger’s Syndrome and learning disabilities, which are Student’s principal underlying difficulties. Mr. Reisman testified that although the Collaborative’s program’s principal focus is on children with severe emotional and behavioral difficulties, the program has the capacity to (and in fact now does) serve students with Asperger’s Syndrome and its special education staff is able to provide at least some services appropriate for a learning disabled student. However, Ms. Teare opined that the Collaborative may not be sufficiently oriented towards the needs of children with Asperger’s and learning disabilities to be appropriate for Student. This testimony raises an important question regarding the future appropriateness of the Collaborative. [↑](#footnote-ref-14)