COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals**

**Bureau of Special Education Appeals**

# **In Re: Hudson Public Schools BSEA #11-6562c**

**COMPLIANCE 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 March 14, 2012 in Malden, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student

Student’s Mother

Student’s Father

Carissa Calvao Special Education Teacher, Hudson Public Schools

Patricia Bouvier Special Education Teacher, Hudson Public Schools

Kathleen Provost Reading Specialist, Hudson Public Schools

Julianna Bahosh Director of Pupil Personnel Services, Hudson Public Schools

Tami Fay Attorney for Hudson Public Schools

Mary Ellen Sowyrda Attorney for Hudson Public Schools

Darlene Coppola Court Reporter

The official record of the hearing consists of documents submitted by the Parents and marked as exhibits P-1 through P-26; documents submitted by the Hudson Public Schools (Hudson) and marked as exhibits S-1 through S-9; and approximately one-half day of recorded oral testimony and argument. As agreed by the parties, oral closing arguments were made on March 19, 2012, and the record closed on that date.

## ISSUES

This Decision addresses the question of whether Hudson has complied with my earlier decision, dated August 2, 2011. The issues to be decided in this case are the following:

1. Did Hudson assess Student’s spelling deficits and how they should be addressed, as recommended by Ms. Rielly?
2. Has Student’s special education spelling instruction been tailored to address his individual spelling needs as described by this assessment?
3. Have the IEP spelling goal and benchmarks been modified by the IEP Team to more precisely reflect this assessment and the focus of Student’s spelling instruction?

FACTUAL BACKGROUND[[1]](#footnote-1)

Student is a thirteen-year-old young man who lives with his Parents in Hudson, MA. He attends the 8th grade at the Hudson High School.

Student enjoys school and is a motivated learner. He is interested in all school subjects but particularly likes music and using his home computer.

Student has been diagnosed with a neurological disability that manifests itself in difficulties with organization, handwriting, spelling and processing speed.

His most-recently proposed IEP (for the period 4/13/11 to 4/12/12) calls for Student to be placed in a full inclusion program where he receives the following special education instruction within the general education classroom:

Assistive technology consultation for an hour, twice per month.

Special education instruction in writing for a half hour, four times per six-day cycle.

The IEP also proposes the following pull-out special education services:

Directed studies instruction from a special education teacher or paraprofessional for 90 minutes, two and one-half times per week.

Exhibits P-2, S-3.

**DISCUSSION**

It is not disputed that Student is an individual with a disability, falling within the purview of the federal Individuals with Disabilities Education Act (IDEA)[[2]](#footnote-2) and the Massachusetts special education statute.[[3]](#footnote-3)

This case focuses exclusively on whether Hudson has complied with my August 2, 2011 decision. This dispute is limited to the three issues noted above. I will address each issue in turn.

**Spelling Assessment**

On September 9, 2011, Kathleen Provost, who is a Reading Specialist and District Literacy Coach for Hudson, conducted a spelling assessment of Student, using the Words Their Way Elementary and Upper-Level Spelling Inventory.

The written assessment concluded that Student’s current spelling ability places him in the instructional level of “Syllables and Affixes” and that he successfully spelled words in the “Emergent, Letter Name-Alphabet and Within Word Pattern Stages.” Exhibit S-2.

The assessment recommended that the “Words Their Way Word Study for Phonics, Vocabulary and Spelling Instruction” book be used as a guide when working with Student on improving his spelling achievement. The assessment further stated that Student “would benefit from the following: work on r-controlled vowels, syllable junctures, unaccented final syllables and harder suffixes.” Testimony of Provost; exhibit S-2.

The assessment further recommended: “If at all possible, it will be important to work with [Student] within his authentic writing, and not all in isolation.” Ms. Provost testified that what this means is that a substantial part of Student’s spelling instruction should occur within the context of the writing that he is doing for school—for example, homework assignments—and should not focus exclusively on spelling work sheets or programs that are separate from his writing assignments. She explained that there are significant advantages (in terms of utilization and retention of spelling knowledge) when spelling is learned within the context of Student’s authentic writing. Testimony of Provost; exhibit S-2.

At the evidentiary Hearing, Parents agreed that Ms. Provost’s spelling evaluation had satisfied Hudson’s obligation to conduct a spelling assessment of their son. Parents stated that they had previously accepted this assessment. This issue therefore appeared to be resolved in Hudson’s favor.

However, during oral closing argument on March 19, 2012, Parents raised an objection to Ms. Provost’s spelling evaluation. In support of their position, Parents point to exhibit P-1, which is an excerpt from the transcript of the July 6, 2011 evidentiary hearing. More specifically, the transcript excerpt provides part of the testimony of Ms. Rielly, an expert who testified on behalf of Parents and Student.

In her testimony, Ms. Rielly recommended that Hudson “use its own resources to do their own [spelling] assessment because they would be the ones delivering the spelling instruction. It makes sense for – regardless of what the tool is, that some tool be used that identifies the spelling patterns that he has not yet mastered and that he be instructed in those.” In this testimony, Ms. Rielly made clear that she was not recommending any particular type of spelling assessment, but rather she emphasized the importance of Hudson’s conducting an assessment and that Student’s spelling instruction should then be “driven by the assessment” rather than Student being “placed in a book or a program that is scripted”. Exhibit P-1 (page 102). Parents focus on this last quoted phrase, but I understand this to refer to Student’s spelling program, rather than to the assessment itself. I can find no evidence calling into question the appropriateness of the assessment.

Accordingly, I find that Hudson assessed Student’s spelling deficits and how they should be addressed, as recommended by Ms. Rielly. I therefore find in favor of Hudson regarding the first issue.

**Spelling Instruction**

The second issue to be considered is whether Student’s special education spelling instruction has been tailored to address his individual spelling needs as described by Ms. Provost’s assessment. Student’s spelling instruction is generally provided in two ways—by Ms. Calvao, who provides spelling instruction to Student as part of the writing instruction for Student within the regular education classroom, and by Ms. Bouvier, who provides spelling instruction as part of Student’s Directed Studies program. Both Ms. Calvao and Ms. Bouvier are special education teachers. Testimony of Bouvier, Calvao.

Ms. Calvao’s special education instruction focuses exclusively on writing as compared to Ms. Bouvier’s special education instruction that focuses on a wider range of topics. Ms. Calvao testified credibly and persuasively that the spelling instruction that she provides Student follows the recommendations from Ms. Provost’s assessment, as discussed above. More specifically, Ms. Calvao testified that she uses, as a guide, the “Words Their Way Word Study for Phonics, Vocabulary and Spelling Instruction” book and that she has been working with Student on his r-controlled vowels and syllable junctures. She noted that when Student has mastered these areas, she will begin working with him on unaccented final syllables and harder suffixes. She also testified that much of her spelling work with Student is done within the context of his writing assignments—that is, his authentic writing. She explained that she works with Student on his spelling every day, typically for 10 to 15 minutes of her 30-minute writing instruction session. She noted that the IEP does not provide that any particular period of time (within the 30-minute writing instruction) address Student’s spelling needs. Testimony of Calvao; exhibit S-5.

Ms. Provost testified that she participated in the October 7, 2011 IEP Team meeting during which her assessment was discussed. She explained that Ms. Calvao was present at this meeting, and that she followed up by meeting privately with Ms. Calvao two more times (probably in October and December 2011) to continue the discussion of the writing assessment and its implementation. Ms. Provost testified that she was satisfied from these meetings that Ms. Calvao was following the recommendations contained within Ms. Provost’s spelling assessment. Ms. Provost further testified that documents (including Ms. Calvao’s January 25, 2012 spelling inventory from “Words Their Way”, worksheets and Student’s corrected papers) also indicated that the recommendations from her spelling assessment were being implemented correctly. Testimony of Provost; exhibits S-6, S-7, S-8.

Ms. Bouvier testified that spelling is one of the skills that she addresses with Student as part of the Directed Studies instruction. She further testified that she is following the recommendations from Ms. Provost’s spelling assessment. She also explained that she coordinates with Ms. Calvao to ensure that her spelling instruction is consistent with the instruction provided by Ms. Calvao. Ms. Bouvier testified that much of her spelling work with Student is done within the context of his writing assignments—that is, his authentic writing—and that she also uses spelling worksheets and specific instruction to teach Student spelling. She explained that during Student’s every-other-day 90 minutes of Directed Studies, she works with Student typically for at least 30 minutes. She noted that the IEP does not provide that any particular period of time (within the 90-minute Directed Studies period) address Student’s spelling needs. Testimony of Bouvier; exhibits S-5, S-7.

In response, Parents rely upon the above-quoted language from Ms. Rielly’s testimony that Student’s spelling instruction should be “driven by the assessment” rather than Student being “placed in a book or a program that is scripted”. Exhibit P-1 (page 102). Parents argue that the testimony in the compliance hearing supports the conclusion that at least part of Student’s spelling program is “scripted” and therefore inappropriate.

I do not understand the testimony to support Parents’ argument. To be sure, part of Student’s spelling instruction is conducted using spelling sheets that have been taken from a spelling program. However, the evidence was unrebutted that these spelling sheets are used consistently with the recommendations from Ms. Provost’s assessment. I believe that what Ms. Rielly wanted to avoid was a kind of automatic use of a pre-packaged spelling program without regard to Student’s particular spelling needs. Ms. Rielly wanted to ensure that Student’s spelling instruction was tailored to his particular needs as illuminated by a spelling assessment.

For reasons explained above, I am satisfied that Hudson is doing precisely what Ms. Rielly recommended—that is, Hudson is implementing a spelling program for Student in accordance with Ms. Provost’s assessment and recommendations; and for these purposes, there is no bar to using spelling sheets from a spelling program. Testimony of Provost, Calvao, Bouvier.

Parents also take the position that spelling instruction has been occurring for an insufficient amount of time. To be sure, Hudson cannot simply ignore Student’s spelling needs but, as discussed above, the IEP does not require that any particular amount of time be allocated to spelling instruction. More importantly, I note that the question of how much time has been spent on spelling is outside of scope of the issues addressed in the instant compliance proceeding.

The credible and persuasive evidence is unrebutted that Student’s special education spelling instruction is tailored to address his individual spelling needs as described by Ms. Provost’s assessment. I therefore find in favor of Hudson regarding the second issue.

**Spelling Goal and Benchmarks**

Finally, I consider whether Student’s IEP spelling goal and benchmarks have been modified by the IEP Team to reflect Ms. Provost’s assessment and the focus of Student’s spelling instruction. IEP goal # 2 focuses on spelling. The IEP’s description of Student’s current performance level tracks the findings of Ms. Provost’s assessment. Exhibits P-2, S-3.

The goal itself is for Student to “improve his spelling skills as measured by the benchmarks stated below.” The IEP’s three benchmarks/objectives are as follows:

1. master the “within word pattern and syllables/affixes” spelling stages with a score of 19 our of 25 on the Words Their Way Spelling Inventory Feature Guide by 6/13/12;
2. master the “within word pattern and syllables/affixes” spelling stages with a score of 16 our of 25 on the Words Their Way Upper-Level Elementary Spelling Inventory Feature Guide by 6/13/12; and
3. produce a draft without the use of spell check in one out of six observations for teacher assessment and for an instructional guide 90% of the time. [Exhibits P-2-, S-3.]

Ms. Provost testified that these are appropriate goals and benchmarks and reflected her spelling assessment of Student.

I find that Ms. Provost’s testimony was persuasive, credible and unrebutted that Student’s IEP spelling goal and benchmarks reflect her assessment and the focus of Student’s spelling instruction.[[4]](#footnote-4) I therefore find in favor of Hudson on the third issue.

**ORDER**

Hudson is in full compliance with my August 2, 2011 decision.

Accordingly, Parents’ request for a compliance order is DENIED.

By the Hearing Officer,

William Crane

Dated: March 22, 2012

# **COMMONWEALTH OF MASSACHUSETTS**

**Division of Administrative Law Appeals**

# **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 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 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. Some of the facts in this section are taken from my August 2, 2011 decision involving the parties to the instant dispute. [↑](#footnote-ref-1)
2. 20 USC 1400 *et seq*. [↑](#footnote-ref-2)
3. MGL c. 71B. [↑](#footnote-ref-3)
4. I also note that Parents have accepted these parts of the IEP. Exhibits P-3, S-4. However, during oral closing argument, Parents took the position that they accepted the IEP in order that services could begin, rather than their indicating their agreement with these parts of the IEP. Regardless of the import of Parents’ acceptance of this part of the IEP, I find the spelling goals and benchmarks to be appropriate. [↑](#footnote-ref-4)