

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

In Re: Christa McAuliffe Regional Charter Public School

BSEA # 1300761

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 June 13, 2013 at the BSEA offices in Boston, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student's Father	Parent
Steven Imber	Educational Consultant for Parent
Elizabeth Kumpulanian	Special Education Teacher, McAuliffe Charter School
Karen Soter	Math Teacher, McAuliffe Charter School
Kathleen Clark	Director of Student Services, McAuliffe Charter School
Lauren Koelbl	Former Director of Student Services, McAuliffe Charter School
Deborah Langlois	Principal, McAuliffe Charter School
Kristin Harrison	Executive Director, McAuliffe Charter School
Jane Greenstein	Consulting Psychologist for McAuliffe Charter School
Andrea Bell	Attorney for McAuliffe Charter School

The official record of the hearing consists of documents submitted by the Parent and marked as exhibits P-1 through P-34, except P-11 which was excluded; documents submitted by the Christa McAuliffe Regional Charter Public School (McAuliffe or McAuliffe Charter School) and marked as exhibits S-1 through S-13; and approximately one day of recorded oral testimony and argument. As agreed by the parties, oral closing arguments were made at the end of the hearing on June 13, 2013, and the record closed on that date.

ISSUES

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

1. whether, as a result of alleged procedural and substantive violations, Student's 7th grade math program was inappropriate; and

2. if the 7th grade math program was inappropriate, whether Student is entitled to relief of 148 hours of compensatory math tutoring.¹

FACTUAL BACKGROUND

Student is a sixteen-year-old girl who lives with Parent in Natick, Massachusetts. Currently, she is completing the 9th grade at a private special education school. Testimony of Parent.

As referenced immediately above, the entire focus of the current dispute is the appropriateness of Student's 7th grade math instruction when she was at McAuliffe Charter School. Other than math, Parent (and his expert, Dr. Imber) took the position that Student made meaningful progress with respect to all areas addressed by her IEP during 7th grade. Testimony of Parent, Imber.

Student is conscientious and highly motivated to do well in school, with no behavior problems. All of this contributes positively towards her doing well in school. However, as reflected within the most recent psychological report in the record, she is diagnosed with a substantial intellectual deficiency, with a full scale IQ of 62. This disability generally limits her ability to make educational progress and, in particular, results in her "struggl[ing] with open-ended, abstract thinking." Testimony of Imber, Greenstein; exhibits S-1, S-10, P-5.

Student attended the Natick Public Schools as a special education student through the 5th grade. She was educated principally through a substantially-separate educational program. Parent was highly motivated to provide Student with an opportunity for her to receive her education in an inclusion setting with regular education students. Testimony of Parent; exhibit P-1.

Parent sought the assistance of Steven Imber, PhD, a highly experienced educational consultant and professor of special education. Dr. Imber conducted a comprehensive evaluation of Student in 5th grade. Testimony of Parent, Imber; exhibit P-1.

With Dr. Imber's consultation assistance, Parent decided to enroll Student in McAuliffe Charter School for 6th grade (the 2009-2010 school year). McAuliffe proposed an IEP that provided for Student to participate in all of her classes in the mainstream for 6th grade, with additional special education support in the Learning Center where Student would receive assistance from a special education teacher for English language arts and math. The IEP goals and objectives addressed deficits in language processing, math, reading comprehension and written language skills. Parent fully accepted this IEP. Testimony of Parent; exhibits S-1, P-4.

¹ Parent filed his hearing request with the BSEA, making a number of additional claims against McAuliffe. The previous BSEA Hearing Officer ruled in favor of McAuliffe in a summary judgment ruling, essentially eliminating all of Parent's claims other than the above-identified issues pertaining to 7th grade math. I incorporate into this Decision the findings of undisputed fact and the conclusions of law from the prior ruling.

The service delivery grid for this 6th grade IEP provided for the following special education and related services:

- Consultation of a half hour per month from a speech-language pathologist.
- Academic support in the regular education classroom for 55 minutes, twice per day, from a special education or regular education teacher or assistant.
- Pull-out speech-language services of 45 minutes, twice per week, from a speech-language pathologist.
- Academic support in the Learning Center for 55 minutes, twice per week by a special education teacher or assistant.

Exhibits S-1, P-4.

Dr. Imber conducted a comprehensive evaluation of Student in March of her 6th grade year. Testimony of Imber; exhibit P-2.

Student's Team met on June 4, 2010 to prepare an IEP for the 7th grade (which would be the 2010-2011 school year) and met again for this purpose on October 19, 2010. Parent did not find the 7th grade IEP acceptable, and in December 2010, he fully rejected it, while at the same time noting his specific suggestions with respect to the service delivery grid. Testimony of Parent; exhibits P-5, S-2.

Because Parent never accepted (and eventually fully rejected) the 7th grade IEP, McAuliffe implemented the 6th grade IEP as Student's stay-put IEP, including its goals and objectives and service delivery grid. Testimony of Kumpulanian.²

Parent testified that although he rejected the 7th grade IEP, he fully supported his daughter's placement in mainstream education for all of her 7th grade courses, including math. Parent and Dr. Imber knew that placement of Student in inclusion classes for all academic subjects for 7th grade would likely be a challenge for her, but they nevertheless concluded that it was appropriate to place Student in inclusion classes for all subjects, with the supports noted below. Testimony of Parent, Imber.

Student's 7th grade math class was taught by Ms. Soter. Including Student, there were between 14 and 17 students in the classroom (Ms. Soter could not remember the precise number). In order to support Student, Parent paid for a dedicated 1:1 tutor who accompanied Student in all of her math classes, sitting next to Student and assisting her in Ms. Soter's classroom. In addition, Student had the assistance of a special education teacher (Ms. Kumpulanian) within the Learning Center, as described in the 6th grade stay-put IEP discussed above. Testimony of Parent, Soter, Kumpulanian.

² The summary judgment ruling by the previous Hearing Officer determined that the 6th grade stay-put IEP, including the goals and objectives from this IEP, applied to Student's 7th grade. See footnote 1, above.

In December 2010 during 7th grade, Dr. Imber observed Student's educational program at McAuliffe, including the entire math class. Dr. Imber noted that all of the students in the classroom were working on the same material, and he was concerned that for Student, this material may have been too difficult. Dr. Imber did not prepare a written observation report and nothing in the record indicates that Dr. Imber (or Parent) directly or indirectly communicated this concern to McAuliffe during 7th grade. Student continued in the inclusion math class for the entire 7th grade school year. Testimony of Parent, Imber.

Student continued at McAuliffe for the next school year—8th grade, which was the 2011-2012 school year. Dr. Imber conducted a comprehensive evaluation of Student in February of her 8th grade year. Testimony of Parent, Imber; exhibit P-3.

Parent placed Student in a private special education school for 9th grade, which is the current school year. Testimony of Parent.

DISCUSSION

The Individuals with Disabilities Education Act (IDEA) was enacted “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE].”³ “The primary vehicle for delivery of a FAPE is an IEP [individualized education program].”⁴ An IEP must be “tailored” to address the student’s “unique” needs that result from his or her disability.⁵ A student is not entitled to the maximum educational benefit possible.⁶ “FAPE may not be the only appropriate choice, or the choice of certain selected experts, or the child's parents' first choice, or even the best choice”.⁷ Rather, the IEP must be “reasonably calculated to confer a meaningful educational benefit.”⁸

In the application of the meaningful benefit standard, “levels of progress must be judged with respect to the potential of the particular child”⁹ unless the potential is “unknowable”¹⁰

³ 20 U.S.C. § 1400 (d)(1)(A).

⁴ *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) (internal quotations omitted).

⁵ See *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 181(1982) (FAPE must be “tailored to the unique needs of the handicapped child by means of an ‘individualized educational program’ (IEP)”; *Sebastian M. v. King Philip Regional School Dist.*, 685 F.3d 79, 84 (1st Cir. 2012) (“IEP must be custom-tailored to suit a particular child”); *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 4 -5, 20 (1st Cir. 2007) (FAPE includes “specially designed instruction ... [t]o address the unique needs of the child that result from the child's disability”) (quoting 34 C.F.R. § 300.39(b)(3)).

⁶ See *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 197, n. 21 (1982) (“Whatever Congress meant by an ‘appropriate’ education, it is clear that it did not mean a potential-maximizing education.”); *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993) (“Appropriateness and adequacy are terms of moderation. It follows that ... the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential.”).

⁷ *GD v. Westmoreland School District*, 930 F.2d 942, 948 (1st Cir. 1991).

⁸ *Sebastian M.*, 685 F.3d at 84; *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012); *I.M. ex rel. C.C. v. Northampton Public Schools*, 2012 WL 2206887, *1 (D.Mass. 2012).

⁹ *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 518 F.3d 18, 29 (1st Cir. 2008). See also *D.B. v. Esposito*, 675 F.3d at 36 (“In most cases, an assessment of a child's potential will be a useful tool for evaluating the adequacy of his or her IEP.”).

¹⁰ See *D.B. v. Esposito*, 675 F.3d at 36.

because “benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between”.¹¹

The IDEA reflects a preference for mainstreaming disabled students.¹² This entails ensuring, “[t]o the maximum extent appropriate,” that disabled children are taught with nondisabled children.¹³ “The goal, then, is to find the least restrictive educational environment that will accommodate the child's legitimate needs.”¹⁴

Thus, the IEP must be tailored to the student’s unique special education needs so as to confer a meaningful educational benefit (gauged in relation to the potential of the student at issue) within the least restrictive educational environment.

Massachusetts FAPE standards (which are found within Massachusetts statute and regulations¹⁵ and which may exceed the federal floor¹⁶) seek “to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential in the least restrictive environment.”¹⁷ Massachusetts standards also require that Student’s IEP Team “include specially designed instruction or related services in the IEP designed to enable the student to progress effectively in the content areas of the general curriculum.”¹⁸

The appropriateness of McAuliffe’s IEP with respect to 7th grade math must not be “judged exclusively in hindsight. An IEP is a snapshot, not a retrospective.”¹⁹ Thus, the “IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.”²⁰

¹¹ *Rowley*, 458 U.S. at 202.

¹² 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 20 USC § 1412(a)(5).

¹³ 20 U.S.C. § 1412(a)(5)(A). See also 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 34 CFR 300.114(a)(2)(i).

¹⁴ *C.G. ex rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279, 285 (1st Cir. 2008). See also *Rafferty v. Cranston Public School Committee*, 315 F.3d 21, 26 (1st Cir. 2002) (“Mainstreaming may not be ignored, even to fulfill substantive educational criteria.”), quoting *Roland v. Concord School Committee*, 910 F.2d 983, 992-993 (1st Cir. 1990).

¹⁵ See MGL c. 71B, s.3 (defining FAPE to mean special education and related services that meet the “education standards established by statute or established by regulation promulgated by the board of education”).

¹⁶ See *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 524 (2007) (“education must ... meet the standards of the State educational agency”); *Mr. I. v. Maine School Administrative District No. 55*, 480 F.3d 1, 11 (1st Cir. 2007) (state may “calibrate its own educational standards, provided it does not set them below the minimum level prescribed by the [IDEA]”).

¹⁷ See 603 CMR 28.01(3) (“purpose of 603 CMR 28.00 is to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential in the least restrictive environment in accordance with applicable state and federal laws”). See also MGL c. 69, s. 1 (“paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential”); MGL c. 71B, s. 1 (term “special education” defined to mean “educational programs and assignments including, special classes and programs or services designed to develop the educational potential of children with disabilities”).

¹⁸ 603 CMR 28.05 (4) (b).

¹⁹ *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990) (internal quotations omitted).

²⁰ *Id.*

A Hearing Officer may order relief as a result of a procedural violation only if he finds that, as a result of the violations, there was a denial of FAPE according to the following standards:

Procedural issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies--

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.”²¹

One IDEA procedural requirement, which is at issue in the instant dispute, is that a regular education teacher must be present at the formation of a child's IEP "if the child is, or may be, participating in the regular education environment." ²²

Parent has the burden of persuasion on all issues.²³

It is not disputed that Student is (and was at the time of the dispute) an individual with a disability, falling within the purview of the IDEA and the Massachusetts special education statute.²⁴

Student's 7th grade math teacher (Ms. Soter) and the 7th grade special education teacher who assisted Student with math in the Learning Center (Ms. Kumpulanian) testified that Student made substantial progress in some areas of math instruction but not in others. Testimony of Soter, Kumpulanian.

Specifically, Ms. Soter testified (and Student's report card supports) that during 7th grade, Student made substantial progress regarding a number of 6th grade-level math skills, including understanding prime and composite numbers, prime factorization, greatest common factor, least common multiple, and divisibility rules. Ms. Soter also testified that her recent review of Student's early 8th grade math work indicates that Student must have learned 7th grade math material necessary for her to understand early 8th grade math material, indicating that Student made progress in 7th grade. However, Ms. Soter also explained (and Student's report card reflects) that Student did not make demonstrable gains regarding certain 7th grade-level math skills, including understanding and applying distributive properties. Testimony of Soter; exhibits P-16, S-6.

Ms. Kumpulanian testified (and her June 2012 progress report reflects) that Student made progress with respect to identifying and recognizing which word in a word problem is the

²¹ 20 USC § 1415(f)(3)(E)(2)(ii).

²² 20 U.S.C. § 1414(d)(1)(B)(ii).

²³ See *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief).

²⁴ MGL c. 71B.

operational word with 90 % accuracy but Student was not always able to define the word and demonstrate how to appropriately use it in order to solve a problem. In word problems, Student demonstrated the ability to identify the key words relating to addition and subtraction. She made progress towards being able to solve more difficult division problems that require long division by using dividends and divisors that are not part of the math fact family. She demonstrated substantial gains regarding adding and subtracting decimals when related to money, and her multiplication and division skills were substantially improved over the course of the school year. However, Ms. Kumpulanian testified that as problems became more abstract (for example, rounding numbers), Student struggled and required substantial teacher support. Testimony of Kumpulanian; exhibits P-23, P-24, P-25.

Parent disputes the progress reflected in the testimony and reports of these teachers on two bases. First, as noted in the previous summary judgment ruling in this dispute,²⁵ parts of the special education progress reports from December 2010, April 2011 and June 2011 indicate that by December 2010, Student had made substantial progress with respect to one-step word problems at her instructional level with a success rate of 75 to 80%, and with teacher support was able to solve two-step word problems with a success rate of 75 to 80% (and thereby nearly met two IEP benchmarks), but further indicate that Student appeared to have made no further progress in this area from December through June 2011. Exhibits P-23, P-24, P-25, P-26.

However, Ms. Kumpulanian testified that Student had in fact continued to make progress through the end of the school year, that she had prepared written progress reports that in fact reflected this continuing progress, and that she had no idea why the progress reports that she had actually written apparently were not provided to Parent. She also noted that even where Student's skills may have appeared to remain constant (as reflected in a written progress report), Student was making progress regarding increased independence in problem-solving and ability to solve problems of increased complexity. I find that the progress reports submitted into evidence (as discussed earlier) when viewed in their entirety support her testimony that Student continued to make progress throughout the school year. I find Ms. Kumpulanian's testimony to be credible and persuasive that Student continued to make progress after December 2010. Testimony of Parent, Kumpulanian; exhibits P-23, P-24, P-25, P-26.

Parent further argues that the 6th and 8th grade comprehensive evaluations conducted by Dr. Imber in March 2010 and February 2012 demonstrate lack of appreciable progress. Parent relied, in particular, on a comparison of the results from KeyMath evaluation standardized testing from these two evaluations. Dr. Imber testified in support of this argument, stating that his testing in KeyMath indicated that over a two year period, which included 7th grade, Student made only approximately a half year of progress in math as reflected in grade-equivalent test scores. Dr. Imber concluded that this was not meaningful progress and that, based upon these test scores and his 7th grade observation (discussed above in the Factual Background section), Student should have been placed in a substantially-separate math class

²⁵ See footnote 1, above.

so that her instruction could have been individualized to her academic level. Testimony of Imber; exhibits P-2, P-3, P-34.

McAuliffe's expert, Jane Greenstein, PhD,²⁶ credibly and persuasively testified that as reflected within the test manuals themselves for the test instruments used, one should be cautious about relying upon grade-equivalent test scores from Dr. Imber's standardized testing. She explained that particularly because Student's scores are on the edge (as compared to the middle) of the Bell curve of test scores for all students, the grade-equivalent test scores are not as reliable as Student's standard scores from this testing. With respect to the KeyMath scores on which Parent heavily relied, she noted that all of the subtest standard scores remained substantially the same over two years (except for one subtest where the standard scores substantially improved), demonstrating that Student has remained essentially the same compared to her same-age peers over the two-year period of testing. She explained that Dr. Imber's testing therefore demonstrated that rather than falling further behind her peers by making only a half-year's progress over two years, Student actually made substantially the same amount of progress in math as her age-peers would have been expected to make during this time period which included 7th grade. Testimony of Greenstein; exhibits P-2, P-3, P-34.

On the basis of this evidence, I find that Student made substantial progress in some areas but not in other areas with respect to 7th grade math, as reflected within the testimony of Ms. Soter, Ms. Kumpulanian and Dr. Greenstein.

Student's progress may not be considered in a vacuum. Rather as discussed above, the law requires that in order to determine whether it is meaningful, progress must be assessed within the context of Student's particular learning potential.

It is not disputed that Student had in 7th grade and continues to have an intellectual disability, with a full-scale IQ of 62 as reflected in psychological testing in 2011. As part of this disability, Student had a particular weakness in the area of perceptual reasoning. As testified persuasively by Dr. Greenstein, this means two things. First, even with appropriate instruction, Student's overall rate of progress in math would be expected to be slower than for her regular education peers. Second, Student would likely have success learning certain basic, concrete math facts such as addition and subtraction that she can learn by rote. However, when Student begins to be required to apply these math facts, for example, in word problems, and when Student is required to learn more abstract math concepts (such as rounding numbers), her intellectual disability (and, in particular, her deficit regarding perceptual reasoning) would likely impose limits on what she would be able to learn. Dr. Greenstein noted that math becomes increasingly "all about" concepts and applying what one has learned to real life situations. She explained that in 7th grade math, Student may have begun to reach a ceiling—that is, some of the concepts taught may have been unlearnable by her. Testimony of Greenstein; exhibits S-10, P-33.

²⁶ Dr. Greenstein is a clinical school psychologist who is employed by Wedikko Children's Services, Inc. and, in that capacity, provides consultation services to McAuliffe Charter School. Testimony of Greenstein.

I find that this likely accounts for the difference between Student's substantial progress with respect to certain 6th grade-level skills and her lack of demonstrable progress in other areas, including difficulty learning certain 7th grade-level skills and struggling with more abstract math concepts, all as discussed above. I therefore find that when considered within the context of her learning potential, Student's progress in math during 7th grade was meaningful and appropriate.

Parent seeks to establish that McAuliffe's IEP was flawed with respect to math, with the result that compensatory services are due. As discussed above, when determining whether a past IEP was appropriate, the IEP must be viewed from the perspective of what was reasonably known at the time that the IEP was proposed.

Dr. Imber's essential criticism is that Student should have been placed within a substantially-separate math class for 7th grade so that her math instruction could have been individualized to a lower level of difficulty. Parent relies upon this opinion to seek to establish the inappropriateness of 7th grade math. However, Dr. Imber's and Parent's opinions regarding Student's appropriate placement appear to have been arrived at in hindsight.

Dr. Imber recognized that math was Student's weakest academic area and that she might struggle, but he testified that he thought that it was worth giving math inclusion a try since one would only know how difficult it would be for Student after trying her in the inclusion class. Similarly, although Parent never accepted (and eventually fully rejected in December 2010) the proposed IEP for 7th grade, he testified that he agreed, at the time that the IEP was proposed in June 2010 as well as during the 7th grade school year, that Student should be placed within a mainstream math class. At this time, Parent continued to receive advice and consultation from Dr. Imber. To help compensate for her weakness in this area, Parent voluntarily paid for and provided a math tutor who accompanied Student in the classroom during all of her math classes. Testimony of Parent, Imber.

I find that at the time the 7th grade placement decision was made by the IEP Team, it was reasonable for the Team to conclude that a mainstream class, with support from Parent's private tutor and from Ms. Kumpulanian in the Learning Center, would be appropriate for Student. Thus, at the time that the IEP was proposed, the IEP (with respect to math) was reasonably calculated to provide Student with FAPE.

Parent raises two additional concerns which are procedural in nature. As explained above, in order to obtain relief regarding a procedural claim, Parent must demonstrate that there was a procedural violation that either resulted in educational harm to Student or substantially impeded Parent's ability to participate in educational decision-making.

First, Parent complains, and it is not disputed, that the proposed IEP for 7th grade was provided to Parent late by about seven weeks. Parent complains that he lost about five weeks of time to negotiate the IEP prior to the beginning of the school year. Testimony of Parent; exhibits S-2, P-5. Parent never accepted this IEP and eventually rejected it in full in

December of 7th grade. There is no reason to believe that any amount of additional time during the summer would have allowed the parties to reach agreement, nor is there any evidence that this had any negative impact on Student's education or Parent's ability to participate in educational decision-making.

Second, Parent notes correctly that McAuliffe violated IDEA standards by failing to include a regular education teacher at the October 2010 IEP Team meeting. However, the first IEP Team meeting to discuss the 7th grade IEP occurred on June 4, 2010 and it was at this time that decisions were made (with which Parent agreed) to place Student into a mainstream classroom for math with support from the Learning Center. During this Team meeting, a regular education teacher was present. Testimony of Parent; exhibits S-2, P-5. I find that there is nothing to suggest that the failure to include a regular education teacher in the subsequent Team meeting in October 2010 impacted in any way the content of the IEP or was in any other way prejudicial to Parent or Student.

ORDER

With respect to 7th grade math instruction, Student's IEP was reasonably calculated to provide Student with a free appropriate public education and, as such, was appropriate.

By the Hearing Officer,

William Crane
Dated: June 25, 2013

**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.