

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

**In Re: ABC Public Schools<sup>1</sup>**

**BSEA # 1303742**

**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 31, 2013 in ABC Public Schools, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student's Mother

Student's Father

Ben Craighead<sup>2</sup>

EP

KR

Clinical Manager, Center for Autism and Related Disorders

School Psychologist, ABC Public Schools

School Psychologist, ABC Public Schools

BCBA, ABC Public Schools

Communication Specialist, ABC Public Schools<sup>3</sup>

Out-of-District Supervisor, ABC Public Schools

Director of Student Services, ABC Public Schools

Clinical Director, XYZ Private School

Executive Director, XYZ Private School

Joan Stein

Attorney for ABC Public Schools

Katie Meinelt

Attorney for ABC Public Schools

Roderick MacLeish

Attorney for XYZ Private School

Amy Rumbo

Court Reporter

The official record of the hearing consists of documents submitted by the Parents and marked as exhibits P-1 through P-36; documents submitted by the ABC Public Schools and marked as exhibits S-1 through S-57; and approximately one day of recorded oral testimony and argument. As agreed by the parties, written arguments were due on February 4, 2013, and the record closed on that date.

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<sup>1</sup> By request of Parents and agreement of the School District, the names of the School District, the private school and their staff have been removed from this decision.

<sup>2</sup> Mr. Craighead testified by conference call.

<sup>3</sup> This witness testified by conference call.

## **INRODUCTION**

This decision addresses the question of whether ABC Public Schools may conduct certain evaluations and whether it must conduct others—that is, certain evaluations are sought by ABC Public Schools and other evaluations are sought by Parents through their counterclaims. With respect to many of the disputed evaluations, the parties do not disagree regarding whether the evaluation should occur, but they disagree as to what discretion ABC Public Schools should have (and what rights Parents should have) to control what specific test instruments will be used as part of a particular evaluation and how the evaluation is to be administered.

## **PROCEDURAL HISTORY**

This dispute began as a request by ABC Public Schools to conduct certain evaluations and assessments for Student who was then placed by ABC Public Schools at XYZ Private School for Children, a private special education day school located in Massachusetts. The hearing request, filed by ABC Public Schools on November 28, 2012, was prompted by its belief that because of apparently irreconcilable differences between Parents and XYZ Private School, ABC Public Schools would need to place Student at a different private school. Student was attending XYZ Private School at ABC Public Schools' expense pursuant to a settlement agreement between Parents and ABC Public Schools.

In its hearing request, ABC Public Schools took the position that it did not have first-hand knowledge of Student's education needs and how they should be met, and that it had not conducted a three-year evaluation of Student since May 2008. ABC Public Schools sought permission from the BSEA to conduct certain evaluations and assessments in order to gain information needed to develop an IEP and place Student. Parents had consented to certain evaluations and assessments but not others, and had placed certain conditions on several of the proposed evaluations and assessments.

On December 12, 2012, XYZ Private School filed a motion to intervene, stating that it was seeking termination of the Student's placement and had an interest in the outcome of the BSEA dispute.

On December 17, 2012, Parents filed a response to ABC Public Schools' hearing requests, making it clear that although they had many complaints regarding their son's education at XYZ Private School, they would oppose XYZ Private School's attempt to discharge Student and would continue to seek to place certain limitations on ABC Public Schools' proposed testing of Student. Their response to the hearing requests also included substantial counterclaims with respect to both ABC Public Schools and XYZ Private School, including allegations of discrimination and failure to provide appropriate educational services. Parents also sought fact-finding for purposes of supporting a monetary damages claim in court. Parents also asked the BSEA for a stay-put order to allow Student to continue at XYZ Private School.

On December 19, 2012, XYZ Private School filed its own hearing request, seeking an expedited hearing regarding the issue of its proposed discharging of Student by January 25, 2013.

On December 20, 2012, I allowed XYZ Private School's motion to intervene in the dispute initiated by ABC Public Schools' hearing request so that XYZ Private School could respond to Parents' counterclaims and otherwise participate in the proceedings regarding Student's evaluations.

On December 20, 2012, ABC Public Schools sought to amend its hearing request for the purpose of seeking a BSEA order that would allow it to send referral packets to possible private schools notwithstanding Parents' refusal to provide consent.

On December 20, 2012, Parents filed a motion asking the BSEA to order payment of sufficient funds for Parents to hire their own monitors to send to XYZ Private School "to ensure [Student's] safety while due process continues, and prohibiting additional abuse." ABC Public Schools and XYZ Private School filed oppositions to the motion. In a ruling dated January 7, 2013, I denied Parents' motion.

On January 2, 2013, Parents filed an opposition to ABC Public Schools' proposed amendment to its hearing request and, as part of their opposition, they filed new, substantial counterclaims against ABC Public Schools and XYZ Private School. Parents' counterclaims against ABC Public Schools included its alleged failure to provide one Student with any academic services while he was home for four months and its alleged denial of a free appropriate public education (FAPE) to Student. Parents' counterclaims against XYZ Private School included its alleged undermining the settlement agreements between ABC Public Schools and Parents and its denial of FAPE to Student. Parents' counterclaims against ABC Public Schools and XYZ Private School sought "compensatory education or monetary compensation" as well as "prospective tuition and fees" to be paid to Parents. Parents' counterclaims made clear (and Parents later clarified this during a January 3, 2013 conference call) that these counterclaims took the place of their previously-filed counterclaims.

Parents' counterclaims also included a request that ABC Public Schools be ordered to conduct certain evaluations to which Parents had already consented. Parents sought the following evaluations:

1. educational assessment; and
2. physical therapy assessment.

On January 3, 2013, I allowed ABC Public Schools' request to amend its hearing request.

During an in-person conference with the parties at the BSEA offices on January 4, 2013, the parties resolved their dispute regarding ABC Public Schools' sending packets to private schools for their consideration of Student's possible placement.<sup>4</sup>

Also on January 4, 2013, Parents stated that they would be filing revised counterclaims. I then advised ABC Public Schools and XYZ Private School that they need not respond to Parents' counterclaims until Parents had filed their revised counterclaims.

Also on January 4, 2013, XYZ Private School withdrew its hearing request and filed a new hearing request on the same issues, but changing its proposed termination of Student to February 8, 2013.

ABC Public Schools' original hearing request had sought permission to conduct a number of assessments, including all of the assessments (noted above) that Parents sought through their counterclaims. However, during the January 4<sup>th</sup> conference, ABC Public Schools made clear that it was now seeking an order to allow it to conduct only the following evaluations:

1. psychological assessment, including full IQ testing; and
2. functional behavioral assessment, including a functional assessment if recommended by the evaluator.

On January 9, 2013, Parents filed a letter explaining that Student was not then attending XYZ Private School and that Parents did not intend to have Student return to XYZ Private School. Parents took the position that the stay-put claims were therefore moot.

On January 10, 2013, XYZ Private School filed a "Notice of Withdrawal" of its January 4, 2013 hearing request, stating that because Parents "have stated that the issues raised in the hearing request are now moot and that [Student] will not be returning to XYZ Private School, the hearing request is withdrawn." By Notice to the parties of January 10, 2013, XYZ Private School's January 4, 2013 hearing request was administratively closed as a result of its withdrawal of its hearing request.

On January 14, 2013, XYZ Private School filed what was entitled *Withdrawal of Intervenor*, taking the position that it "no longer seeks relief against any party and no counterclaims are pending against XYZ Private School". I advised the parties that because there were outstanding counterclaims against XYZ Private School, it would remain a party until I allowed its request to withdraw.

On January 16, 2013, Parents filed their revised counterclaims against ABC Public Schools and XYZ Private School. Parents' counterclaims made clear (and Parents confirmed during

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<sup>4</sup> The parties arrived at the BSEA on January 4<sup>th</sup> for purposes of an evidentiary hearing on the merits of ABC Public Schools' hearing request, but ended up using the time to try to settle the dispute. The dispute appeared to have been settled by the end of the day, but in later days, it became apparent that Parents were not satisfied with what had been verbally agreed upon regarding the evaluations to be done for Student. ABC Public Schools did not seek to rely upon this verbal agreement, but instead chose to proceed to hearing on its original hearing request.

a conference call on January 17, 2013) that they were no longer asserting any counterclaims against XYZ Private School. Accordingly, by Order of January 17, 2013, XYZ Private School's request to withdraw from the instant dispute between ABC Public Schools and Parents was allowed.

During the conference call on January 17, 2013, Parents requested more time to provide greater specificity to their counterclaims against ABC Public Schools, and they were given until January 22, 2013 to do so. On January 23, 2013, Parents withdrew their counterclaims against ABC Public Schools, with the result that the only issues in dispute are the ones enumerated below and addressed through the instant decision.

The dispute proceeded to an evidentiary hearing on January 31, 2013, with closing written arguments filed on February 4, 2013.

Throughout these proceedings, ABC Public Schools was represented by Attorneys Joan Stein and Katie Meinelt. XYZ Private School was represented by Attorneys Roderick MacLeish and Michael Rossi.<sup>5</sup> Parents were *pro se*.<sup>6</sup>

## ISSUES

The issues to be addressed through the instant decision are as follows:

1. May ABC Public Schools conduct a comprehensive psychological evaluation (including cognitive testing for purpose of establishing IQ scores) and a functional behavioral assessment or FBA (including a further functional assessment if recommended by the person conducting the functional behavioral assessment) for Student?

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<sup>5</sup> Both attorneys represented XYZ Private School throughout the BSEA proceedings. However, only Attorney MacLeish appeared at the hearing. This was solely for the purpose of his representing XYZ Private School employees during their testimony.

<sup>6</sup> I note that this case included an unusual amount of procedural issues and controversy, particularly given the narrow scope of ABC Public Schools' hearing request. It has been challenging for Parents, without the benefit of legal counsel, to keep up with the various procedural and substantive requirements of the BSEA processes, particularly with the involvement of XYZ Private School as a third party-intervenor during most of the proceedings, and with both ABC Public Schools and XYZ Private School represented by two attorneys. Parents, who are both exceptionally devoted to their two sons, were conscientious, diligent, responsive and proactive throughout the BSEA proceedings. This is easily seen, for example, in the quality of their written closing argument in the instant dispute. I also note that at times during these proceedings, Parents made strong statements regarding their criticisms of XYZ Private School and ABC Public Schools, and at times, these criticisms resulted in substantial rebuttals, particularly from XYZ Private School. I have no doubt that all of the Parents' criticisms and their other actions in these proceedings were made in good faith and were motivated by a desire to ensure safe and effective educational services and placement for their son and other children who might find themselves in a similar situation. If they have made errors with respect to claims made, relief requested or arguments in support of those claims and relief, it may well be that this was simply the result of their not having access to legal counsel. I also do not doubt that XYZ Private School believed that, with sufficient parental support and consent, it could have appropriately educated Student. See testimony of the XYZ Private School's Executive Director. There was simply an honest difference of opinion between Parents and XYZ Private School.

2. Is ABC Public Schools required to conduct an educational assessment and physical therapy assessment for Student?
3. If ABC Public Schools may or must conduct one or more of the above-referenced assessments, are there any limitations on ABC Public Schools in conducting any of these assessments—for example, should ABC Public Schools be precluded from using certain evaluators or required to use only certain evaluators or precluded from using certain test instruments or required to use certain test instruments?<sup>7</sup>

### **EDUCATIONAL PROFILE AND HISTORY**

Student lives with his Parents within the ABC School District in Massachusetts. He is thirteen years old and is in the 6<sup>th</sup> grade. Currently, he is not attending any educational placement. Testimony of Mother.

Student is diagnosed with Pervasive Developmental Disorder (which is on the autism spectrum) with co-occurring intellectual disability. He enjoys spending time on the playground and watching movies. He has limited ability to express himself and to function independently. He engages in behaviors that interfere with his learning, including verbal and motor stereotypy, aggression and, more recently, self-injury. Testimony of XYZ Private School's Clinical Director; exhibit P-14.

Parents moved to the ABC School District in April 2008. ABC Public Schools placed Student in a School District program for students with autism. In May 2008, ABC Public Schools conducted a full evaluation of Student. In December 2008, Parents had Student privately assessed by Kelley Henry, Psy.D., and Rafael Castro, PhD, of the Integrated Center for Child Development. They conducted a comprehensive neuropsychological assessment of Student to gain an updated assessment of his developmental functioning and to provide educational and programming recommendations. Testimony of Mother, ABC Public Schools' Out-of-District Supervisor; exhibit P-14.

In January 2010, Parents had Student privately assessed again by Dr. Castro. He conducted another comprehensive neuropsychological assessment of Student to monitor his current functioning and abilities. The evaluation made recommendations for full-time placement in a substantially-separate classroom that strictly adheres to the principles of applied behavior analysis. Exhibit P-14.

In July 2010, Parents arranged for Student to receive a communication consultation from the Augmentative Communication Program at Children's Hospital Boston in Waltham. Exhibit P-14.

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<sup>7</sup> This statement of the issues was developed with input from both parties.

On April 11, 2011, Student was placed by ABC Public Schools at XYZ Private School. Previously, Student had been placed at another private, special education school in Massachusetts. Exhibits P-14, S-55.

During the same month (April 2011), XYZ Private School conducted a series of initial evaluations, as is its general practice for newly admitted students. Student was assessed using the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) to ensure developmentally appropriate progression of teaching was used for Student. Through the VB-MAPP, Student's abilities were tested regarding functional areas of language, social skills, play skills, group skills, visual perceptual skills, academic skills, linguistic skills and barriers to learning. Exhibit P-14.

Additional, initial evaluations by XYZ Private School at this time included the following: a social skills assessment, a group skills assessment, a functional behavioral assessment, a speech-language assessment (using the Assessment of Basic Language and Learning Skills, Revised), an occupational therapy assessment (through clinical observations), a physical therapy assessment, and an adapted physical education assessment. Exhibit P-14.

On July 22, 2011, Parents and ABC Public Schools settled an education dispute regarding Student. The agreement's principal purpose was to resolve the issue of home-based services. However, the agreement also reflected ABC Public Schools' responsibility to continue paying for Student's educational placement at XYZ Private School through September 14, 2013, except as provided in paragraph 6 of the agreement. Paragraph 6 of the agreement provided that in the event Student did not complete the school years covered by the agreement at XYZ Private School, ABC Public Schools would continue to have responsibility for providing special education services to Student (so long as he resided in ABC School District), and ABC Public Schools would have "the right to evaluate and to develop an IEP, including home programming, for the school year involved as required by state and federal law". Exhibits P-30, S-22.

In February 2012, Dr. Moldover provided a neuropsychological consultation of Student at Parents' request in order to monitor Student's developmental progress and to discuss programming. This included an in-class observation and selected neuropsychological tests, including the Test of Visual Motor Integration. Exhibit P-14.

ABC Public Schools then proposed assessments in the following areas: augmentative communication, speech-language, occupational therapy, educational and psychological, and an observation of Student. On August 16, 2012, Mother responded by rejecting the psychological assessment, accepting the other assessments with certain limitations and asking for further information prior to making a decision regarding the observation. Exhibit S-39.

In September and October 2012, XYZ Private School completed the following additional assessments of Student: VB-MAPP, Practical Assessment Exploration System and a Transition Assessment. In October 2012, XYZ Private School conducted a functional

behavioral assessment of Student in order to understand the causes of his aggression towards others and self-injurious behavior. Testimony of XYZ Private School's Clinical Director; exhibit P-14.

On October 12, 2012, Mother signed a new consent form from ABC Public Schools for evaluations, agreeing only to certain specific tests such as the Vineland Adaptive Behavior Scales, 2<sup>nd</sup> ed. that would be performed as part of Student's psychological evaluation. By letter of October 15, 2012, Parents further explained that they did not want ABC Public Schools to duplicate the comprehensive assessments that had been performed by XYZ Private School in March 2011 as part of its normal intake process for new students. Parents explained that XYZ Private School's evaluations had included the following: speech therapy, occupational therapy, physical therapy and various other assessments. Exhibits S-44, S-46, S-47.

By letter of November 1, 2012, the XYZ Private School's Executive Director wrote ABC Public Schools' Out-of-District Supervisor that XYZ Private School had reached the conclusion that it "is no longer the best placement for [Student]." The letter explained that Parents' "expectations are not consistent with XYZ Private School's delivery of educational services, philosophy, and policies" and that XYZ Private School was unable "to reach agreement on provision of services". XYZ Private School's letter then proposed to ABC Public Schools' Out-of-District Supervisor that there be a process for terminating Student. Exhibit S-50.

On November 2, 2012, Mother signed a new consent form from ABC Public Schools for evaluations. Through this consent, Mother agreed to physical therapy and educational evaluations and certain specific tests such as the Vineland, and otherwise rejected a psychological evaluation. She also specified that certain evaluations were to be conducted by ABC Public Schools. Exhibit S-51.

By letter of November 14, 2012 to ABC Public Schools' Out-of-District Supervisor, Parents requested that ABC Public Schools conduct a speech-language evaluation, occupational therapy evaluation, physical therapy evaluation and certain tests (including the Vineland) that may be part of a psychological assessment. Testimony of ABC Public Schools' Out-of-District Supervisor; exhibit P-14.

In late December 2012, Student left XYZ Private School and has not been placed in another educational setting.

## **DISCUSSION**

It is not disputed that Student is an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act (IDEA) and the Massachusetts special education statute.



The IDEA was enacted “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE].”<sup>8</sup> “The primary vehicle for delivery of a FAPE is an IEP [individualized education program].”<sup>9</sup> An IEP must be “tailored” to address the student’s “unique” needs that result from his or her disability.<sup>10</sup>

A student is not entitled to the maximum educational benefit possible.<sup>11</sup> Rather, the IEP must be “reasonably calculated to confer a meaningful educational benefit.”<sup>12</sup> And, the IEP must provide “[t]o the maximum extent appropriate” that a student is taught with nondisabled children.<sup>13</sup>

Massachusetts FAPE standards, which are found within Massachusetts statute and implementing special education regulations of the Massachusetts Department of Elementary and Secondary Education’s, provide protections and requirements similar to those found within the IDEA.<sup>14</sup>

With respect to reevaluations, Massachusetts special education regulations specifically require that “every three years, or sooner if necessary, the school district shall, with parental consent, conduct a full three-year reevaluation consistent with the requirements of federal law.”<sup>15</sup>

Although Parents and XYZ Private School have conducted a number of evaluations over the past four years (as discussed in the above sections entitled “Educational Profile and History”), it is not disputed that ABC Public Schools has not conducted a three-year reevaluation of Student since May of 2008. ABC Public Schools now seeks to conduct a psychological evaluation and functional behavioral assessment (FBA) as part of its three-year reevaluation of Student. Parents have provided consent (with certain qualifications) to a three-year reevaluation (including parts of a psychological evaluation for Student), but have not consented to an FBA for Student. Because Parents’ consent has been qualified and has

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<sup>8</sup> 20 U.S.C. § 1400 (d)(1)(A).

<sup>9</sup> *D.B. v. Esposito*, 675 F.3d 26, 34 (1<sup>st</sup> Cir. 2012) (internal quotations omitted).

<sup>10</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> 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)).

<sup>11</sup> 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 (1<sup>st</sup> 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.”).

<sup>12</sup> *Sebastian M.*, 685 F.3d at 84; *D.B. v. Esposito*, 675 F.3d 26, 34 (1<sup>st</sup> Cir. 2012); *I.M. ex rel. C.C. v. Northampton Public Schools*, 869 F.Supp.2d 174, 177 (D.Mass. 2012).

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

<sup>14</sup> 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”); 603 CMR 28.01 *et seq.*

<sup>15</sup> 603 CMR 28.04(3).

not included all evaluations requested by ABC Public Schools (as discussed in the above sections entitled “Educational Profile and History”), the instant decision will consider whether ABC Public Schools may conduct these two evaluations and assessments notwithstanding Parents’ declining to give full consent.

Although Massachusetts special education regulations quoted above require that ABC Public Schools conduct its three-year reevaluation “with parental consent”, both Massachusetts and federal special education regulations make clear that a parent’s refusal to consent to a *reevaluation* (as compared to the *initial* evaluation) does not necessarily preclude the reevaluation from occurring.

Massachusetts special education regulations provide, in relevant part, that “[i]f, after consideration, the school district determines that the parent's failure or refusal to consent will result in a denial of a free appropriate public education to the student, it shall seek resolution of the dispute through the procedures provided in 603 CMR 28.08.”<sup>16</sup> The referenced regulations (603 CMR 28.08, entitled “Continuum of Options for Dispute Resolution”) include the right of a school district to file a hearing request with the BSEA to resolve disputes with parents.<sup>17</sup>

Similarly, federal special education regulations provide, in relevant part, as follows:

*Parental consent for reevaluations.* (1) Subject to paragraph (c)(2) of this section, each public agency--

(i) Must obtain informed parental consent, in accordance with §300.300(a)(1), prior to conducting any reevaluation of a child with a disability.

(ii) If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures described in paragraph (a)(3) of this section [referring to the due process procedures].<sup>18</sup>

In other words, although ABC Public Schools was required to seek consent from Parents for the three-year reevaluation, ABC Public Schools may seek an order from the BSEA allowing it to conduct the reevaluation if ABC Public Schools determines that Parents’ refusal will likely result in a denial of FAPE to Student. ABC Public Schools has made this determination and therefore has properly brought this issue before the BSEA.

In addition, the settlement agreement between ABC Public Schools and Parents with respect to Student provides, in relevant part, that because Student is no longer placed at XYZ Private School, ABC Public Schools has “the right to evaluate and to develop an IEP ... as required

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<sup>16</sup> 603 CMR 28:07(1)(b).

<sup>17</sup> 603 CMR 28.08(3) specifically precludes a school district from requesting a hearing on a parent's failure or refusal to consent to initial evaluation or initial placement of a student in a special education program, but no such prohibition applies where, in the instant dispute, ABC Public Schools seeks consent for evaluations other than the initial evaluations of Student.

<sup>18</sup> 34 CFR 300.300(c).

by state and federal law”. Exhibits P-30, S-22 (discussed in the above sections entitled “Educational Profile and History”).

As discussed in the above sections entitled “Educational Profile and History”, Parents and XYZ Private School have already conducted extensive evaluations of Student. Parents may be correct that these evaluations, if fully accepted by ABC Public Schools, could provide sufficient information from which ABC Public Schools could write an appropriate IEP for Student.<sup>19</sup>

However, court decisions have consistently made clear that as the school district responsible for providing FAPE to Student, ABC Public Schools has the right to conduct its own evaluations. Parents may not force ABC Public Schools to utilize and rely upon the evaluations of others, whether they are Parents’ private evaluations or XYZ Private School’s evaluations. It is irrelevant that Parents’ and XYZ Private School’s evaluations may arguably be comprehensive and may arguably be sufficient to allow ABC Public Schools to write a new IEP and make a placement decision. The courts have left little doubt that in the instant dispute, ABC Public Schools must be allowed to conduct its own evaluations unless Parents choose to forfeit their right to receive all special education services for Student.<sup>20</sup>

ABC Public Schools is entitled to conduct its own evaluations so that it may do what it is required to do under the IDEA and state special education law—that is, to conduct a full three-year reevaluation of Student so that it may propose an IEP (and placement) that are reasonably calculated to provide FAPE to Student. In fulfilling this mandate, ABC Public Schools is not necessarily obligated to provide FAPE in the manner requested by Parents or Parents’ experts (even if this would be the “best choice” for Student), so long as ABC Public Schools’ proposed IEPs satisfy the FAPE standards discussed at the beginning of this section.<sup>21</sup>

It follows that ABC Public Schools has the authority to choose what evaluations it needs as part of its three-year reevaluation in order to develop an appropriate IEP even if the

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<sup>19</sup> The testimony of Ben Craighead supports Parents’ position. Mr. Craighead, who is the Clinical Manager of the Center for Autism and Related Disorders, testified that since June 2012, he has served as the home supervisor for the home-based programs for Student. He has participated in IEP Team meetings for Student, and he has observed Student in the home and community. Mr. Craighead is a BCBA. Mr. Craighead prepared a statement and testified that he was familiar with the evaluations that have been done for Student, as well as the Parents’ concerns regarding IEPs, special education services and evaluations. He stated that his agency requires a “complete battery of assessments” prior to his agency starting services “in order to have a well rounded view of the child’s strengths and weaknesses.” Mr. Craighead further stated that it was his “professional opinion that the testing that was completed for [Student] was sufficient to write appropriate IEP goals without the delay of further assessments.” Testimony of Craighead; exhibit P-28.

<sup>20</sup> See *M.T.V. v. Dekalb County School District*, 446 F.3d 1153, 1160 (11<sup>th</sup> Cir. 2006) (“Every court to consider the IDEA’s reevaluation requirements has concluded if a student’s parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation.”) (internal quotations and citations omitted); *Johnson by Johnson v. Duneland Sch. Corp.*, 92 F.3d 554, 558 (7<sup>th</sup> Cir. 1996) (school district has the right to conduct its own evaluation).

<sup>21</sup> See also *GD v. Westmoreland School District*, 930 F.2d 942, 948 (1<sup>st</sup> Cir. 1991) (“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”).

evaluations do not comport with Parents' view (or Parents' experts' view or XYZ Private School's view) of what evaluations should occur or what information is needed in order to write appropriate IEPs. In other words, just as Parents cannot control ABC Public Schools' choice of proposed services and placement so long as they are reasonably calculated to provide FAPE, Parents cannot control the evaluations that ABC Public Schools reasonably identifies as necessary to determine its proposed services and placement.

At the same time, ABC Public Schools' authority is not unlimited. ABC Public Schools' evaluations cannot be extended to areas outside of its responsibility to conduct a three-year reevaluation and provide FAPE for Student. For example, ABC Public Schools could not obtain an order from the BSEA for an occupational therapy assessment for Student if no occupational therapy services have been proposed or provided, and if there were nothing to indicate that this is a suspected area of disability or need for purposes of providing FAPE to Student.

It is not disputed that ABC Public Schools' own evaluations are not current. ABC Public Schools last conducted a three-year evaluation of Student in 2008. In order to write IEPs that address Student's current special education needs, ABC Public Schools "is entitled to up-to-date evaluative data".<sup>22</sup>

As part of its right to conduct its own evaluations, ABC Public Schools "may insist on evaluation by qualified professionals who are satisfactory to the school officials."<sup>23</sup> ABC Public Schools may allow its qualified professional evaluator to exercise his or her professional judgment to determine the design of the evaluation and how the evaluation is to be conducted—for example, the test instruments to be used, the location of the evaluation and the persons who may be present during the evaluation.<sup>24</sup>

Parents understandably would like to control ABC Public Schools' evaluations since these evaluations may influence ABC Public Schools' understanding of Student's special education needs and how those needs should be met through services and placement. But, the IDEA and Massachusetts special education law simply do not allow for this to happen. Instead, Parents have comparable rights of their own. That is, they have the right to conduct their own, independent evaluations, as they have done numerous times in the past, with their

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<sup>22</sup> *Dubois v. Connecticut State Bd. of Educ.*, 727 F.2d 44, 48 (2<sup>nd</sup> Cir. 1984).

<sup>23</sup> See *Dubois v. Connecticut State Bd. of Educ.*, 727 F.2d 44, 48 (2<sup>nd</sup> Cir. 1984). See also *M.T.V. v. Dekalb County School District*, 446 F.3d 1153, 1160 (11<sup>th</sup> Cir. 2006) ("School District was entitled to reevaluate M.T.V. by an expert of its choice"); *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176, 178-79 (5<sup>th</sup> Cir. 1995) (school district has the right to reevaluate a student using its own personnel); *Vander Malle v. Ambach*, 673 F.2d 49, 53 (2<sup>nd</sup> Cir. 1982) (school is entitled to have student examined by qualified psychiatrist of their choosing).

<sup>24</sup> See *In Re: Boston Public Schools*, BSEA # 99-4652, 5 MSER 144, 146 (October 26, 1999) ("The selection of the evaluation method, technique, setting, timing, sequence, process, instruments, etc. is committed to the discretion of the individual evaluator. Evaluation design is based on professional practice, experience, expertise, goals, practioner and student need and preferences, and a range of other factors best considered by those actually engaged in the task.").

own evaluators determining the design of the evaluations and how the evaluations are to be conducted.<sup>25</sup>

Turning to the facts of the instant dispute, I first consider the relevance of a comprehensive psychological evaluation including cognitive testing for the purpose of establishing IQ scores. It is not disputed that Student has complex deficits that have significantly limited his educational development, that these deficits require an array of intensive special education services and that the deficits include the possibility of cognitive limitations. Testimony of KR, EP; exhibit P-14.

Dr. Moldover conducted a 2012 psychological evaluation of Student but, in the words of Dr. Moldover, the evaluation included only “selected” neuropsychological tests. The ABC Public Schools’ School Psychologist who may be conducting ABC Public Schools’ psychological evaluation (EP) testified that ABC Public Schools would likely choose to use different or additional tests for purpose of providing a more comprehensive psychological evaluation of Student. Exhibit P-14.

According to Dr. Moldover’s neuropsychological evaluation on February 7, 2012, Student is diagnosed with a co-occurring intellectual disability. Exhibit P-14. Yet, ABC Public Schools’ School Psychologist (KR) testified that this evaluation provides little insight into the nature and extent of this intellectual disability. Testimony of KR. EP testified that an assessment of cognitive abilities is critical to ABC Public Schools’ development of appropriate services for Student. Testimony of EP.

ABC Public Schools’ Out-of-District Supervisor, who has supervised out-of-district placements for ABC Public Schools for many years and who has responsibility to assist with the placement of Student, testified that in her experience, information from these psychological evaluations (including IQ testing) will likely help ABC Public Schools determine what educational placement (including peer group) may be appropriately proposed by Student’s IEP Team in order to address Student’s unique educational profile and learning needs. In their testimony, ABC Public Schools’ School Psychologists (EP and KR) agreed. Testimony of ABC Public Schools’ Out-of-District Supervisor, EP, KR; exhibit S-2.<sup>26</sup>

For these reasons, I find that a comprehensive psychological evaluation (including cognitive testing for purpose of establishing IQ scores) is needed for ABC Public Schools to understand Student’s educational profile and special education needs, how those needs may be appropriately addressed through an IEP, and where Student may be appropriately placed.

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<sup>25</sup> See 603 CMR 28.04 (5) (allowing Parents to “obtain an independent education evaluation at private expense at any time” and to obtain public funding of an independent evaluation if certain regulatory criteria are met).

<sup>26</sup> ABC Public Schools’ Out-of-District Supervisor, EP and KR further testified that this information may also be needed to develop required transition planning for Student, including consideration of future eligibility for services from the Massachusetts Department of Developmental Services. Transition planning is part of the IEP planning process.

I conclude that there is ample support for ABC Public Schools' request that it be allowed to conduct the requested psychological evaluation as part of its three-year reevaluation of Student. ABC Public Schools may choose any professional who is qualified to conduct this evaluation (for example, a licensed psychologist or licensed school psychologist) who may determine in his or her professional discretion the design of the evaluation (including, for example, the test instruments to be used) and how the evaluation is to be conducted (including, for example, the location of the evaluation and the persons who may be present during the evaluation).

I now consider the need for a functional behavior assessment (FBA) for Student. An FBA is an assessment tool to isolate and understand the functions of a student's challenging (or non-compliant) behaviors—that is, behaviors that interfere with a student's ability to participate in an educational setting or otherwise interfere with learning. The FBA assists one to understand the antecedents (and causes) of a student's challenging behaviors so that the behavior challenges may be appropriately resolved through individual behavioral planning and intervention. Testimony of XYZ Private School's Clinical Director, ABC Public Schools' BCBA.<sup>27</sup>

An FBA has several parts that are typically done in stages, beginning with indirect measures such as collecting information through surveys and observations of a student. If these indirect measures do not provide sufficient information to understand a student's challenging behaviors, the evaluator may propose, as part of the FBA, to conduct an analogue functional assessment (or FA). An FA may involve manipulating the student's environment for the purpose of intentionally exposing the student to one or more situations in which the student may respond with a challenging behavior. As a result, an FA may carry certain risks to the student or staff working with the student because the FA may precipitate one or more challenging behaviors. (Of course, regardless of whether an FA is conducted, a student may be exposed to these same kinds of situations that trigger a challenging behavior.) The advantage of the FA (as compared to the indirect measures) is that the evaluator can observe, in real time, how the student actually responds in certain selected situations, thereby allowing the evaluator to gain knowledge that may not be available through indirect measures. Because of the additional risks (both to the student and those near the student), an FA is generally not utilized unless the above-described indirect processes are used and found to be insufficient for purposes of understanding a student's behavior. Testimony of XYZ Private School's Clinical Director, ABC Public Schools' BCBA.

It is not disputed that Student has demonstrated behavior deficits and that his behavioral needs should be addressed through his IEP. Student engages in behaviors that interfere with his learning, including verbal and motor stereotypy, aggression towards others and, more recently, self-injury. The self-injurious behavior is particularly concerning, prompting XYZ Private School to propose (and then conduct) an FBA for Student (while he was in school at

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<sup>27</sup> The XYZ Private School's Clinical Director and ABC Public Schools' BCBA are each a Board Certified Behavior Analyst (BCBA) with significant experience conducting FBAs. Testimony of XYZ Private School's Clinical Director, ABC Public Schools' BCBA; exhibits S-2, S-3.

XYZ Private School) in order to understand the causes of this behavior. Testimony of XYZ Private School's Clinical Director; exhibit P-14.

Student attended XYZ Private School, which provides behaviorally-oriented education, including a behavioral management plan for Student. Testimony of XYZ Private School's Clinical Director, ABC Public Schools' Out-of-District Supervisor; exhibits S-19A, S-57. Moreover, Mr. Craighead (who was Parents' expert witness, is a BCBA, has reviewed Student's evaluations and has observed Student in the home and community) testified that an FBA for Student would likely provide useful information regarding his behaviors and how to address them. Mr. Craighead testified that an FA may also be needed for Student. Testimony of Craighead.

ABC Public Schools' Out-of-District Supervisor testified that information from an FBA will likely help ABC Public Schools determine what educational placement (including peer group) may be proposed by the Student's IEP Team in order to address Student's unique educational profile and learning needs. Mr. Craighead and ABC Public Schools' BCBA testified that an FBA would likely assist Student's next educational placement to address appropriately his challenging behaviors. Testimony of ABC Public Schools' Out-of-District Supervisor, Craighead, ABC Public Schools' BCBA.

For these reasons, I find that there is ample support for ABC Public Schools' request that it be allowed to conduct an FBA for Student.

I now consider whether ABC Public Schools should also be allowed to conduct an FA (as part of the FBA) for Student. As discussed above, the Clinical Director of XYZ Private School testified that an FBA (up to but not including an FA) had been conducted for Student. The XYZ Private School's Clinical Director further testified that he recommended that an FA occur for Student because, after XYZ Private School completed the first parts of an FBA, he concluded that he still needed to "dig deeper" to find the causes of Student's challenging behaviors, particularly his self-injurious behavior that was most concerning to him. The XYZ Private School's Clinical Director proposed to Parents that XYZ Private School conduct an FA, but Parents declined to consent to the FA, and therefore no FA was conducted by XYZ Private School (XYZ Private School has a general practice of only conducting evaluations and assessments with parental consent). Testimony of XYZ Private School's Clinical Director.

The Clinical Director of XYZ Private School is a behavioral expert with knowledge of Student's behavioral challenges and needs, he has substantial expertise regarding FBAs, and he reviewed Student's FBA. Testimony of XYZ Private School's Clinical Director. Under these circumstances where XYZ Private School's Clinical Director recommended an FA as necessary to understand Student's challenging behaviors, I find that an FA may be warranted for Student in the event that ABC Public Schools conducts an FBA and the evaluator similarly concludes that an FA is needed to understand Student's challenging behaviors.

As with the psychological evaluation discussed above, ABC Public Schools may choose any professional who is qualified to conduct this assessment (for example, a Board Certified Behavior Analyst) who may determine in his or her professional discretion the design of the assessment (including, for example, the assessment instruments to be used) and how the assessment is to be conducted (including, for example, the location of the assessment and the persons who may be present during the assessment).

I now turn to the question of whether ABC Public Schools should be required to conduct an educational assessment and physical therapy assessment for Student. Parents brought forward these issues through their counterclaims. Parents have consented (with qualifications) to these evaluations, they have requested that ABC Public Schools conduct these evaluations consistent with their consent, and Parents now seek an order from the BSEA requiring ABC Public Schools to conduct them.

Parents did not present evidence regarding the need for these evaluations. Instead, they rely upon their qualified consent for the evaluations, taking the position that their consent alone is sufficient to require ABC Public Schools to conduct the evaluations.<sup>28</sup>

Massachusetts special education regulations do not support Parents' position. As discussed above, Massachusetts regulations governing reevaluations provide that "every three years, or sooner if necessary, the school district shall, with parental consent, conduct a full three-year reevaluation consistent with the requirements of federal law."<sup>29</sup> In other words, ABC Public Schools' obligation to reevaluate is not triggered by Parents' consent. Rather, ABC Public Schools' obligation is dependent upon the amount of time that has passed (three years) since the previous three-year evaluation or by the need to conduct reevaluations sooner. This may be compared with initial evaluations, where a parent's request for (and consent to) the evaluation is sufficient to require the school district to proceed to complete an initial evaluation of the student and determine special education eligibility.<sup>30</sup>

Parents rely upon 603 CMR 28.05(1). This section provides some support for Parents' position since it states, in part: "Within 45 school working days after receipt of a parent's written consent to an initial evaluation or reevaluation, the school district shall: provide an evaluation ...." However, when the state regulations are read in their entirety, the intent of this regulatory section is clear that it serves the purpose of establishing timeframes for conducting evaluations, rather than mandating that simply on the basis of parental consent, a reevaluation must occur.<sup>31</sup>

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<sup>28</sup> During (and previous to) the evidentiary hearing, ABC Public Schools' attorney took the position that ABC Public Schools was willing to conduct each of the requested evaluations if Parents provided consent without qualification or limitation.

<sup>29</sup> 603 CMR 28.04(3).

<sup>30</sup> See 603 CMR 28.04 (1) and (2).

<sup>31</sup> Compare, for example, 603 CMR 28.04 (1) and (2) with 603 CMR 28.04(3) (making a distinction between initial evaluations and reevaluations), discussed in the text that follows above.



As discussed above, it is undisputed that ABC Public Schools has not done its own three-year evaluation of Student since May of 2008. ABC Public Schools has the responsibility to ensure that such an evaluation is completed every three years, but ABC Public Schools may choose to rely upon others' evaluations for part or all of this evaluation or to conduct its own evaluations. Thus, for example, ABC Public Schools has made clear its desire to conduct its own psychological evaluation and FBA, but may also choose to rely on others' evaluations that address other areas of need.

With respect to physical therapy, there is evidence that Student received a physical therapy assessment soon after being placed at XYZ Private School in 2011. Exhibit P-14. But, there is no evidence that any further physical therapy assessment has occurred, and there is no evidence regarding the need for a current evaluation in this area for Student.

For these reasons, I conclude that Parents have not sustained their burden of persuasion to demonstrate that ABC Public Schools has an obligation to provide a physical therapy evaluation for Student.

With respect to the need for educational evaluations for Student, Parents did not present any evidence regarding the need for an updated educational evaluation for Student. However, the testimony of ABC Public Schools' Out-of-District Supervisor addressed this issue. When asked by the Hearing Officer, the ABC Public Schools' Out-of-District Supervisor testified that there was no current educational evaluation for Student and that such an evaluation was needed for purposes of determining Student's educational services and placements. This testimony was undisputed.

For these reasons, I find that ABC Public Schools has an obligation to conduct an educational evaluation for Student. As with the psychological evaluation and FBA, ABC Public Schools may choose any professional who is qualified to conduct the educational evaluation and this evaluator may determine in his or her professional discretion the design of the evaluation (including, for example, the test instruments to be used) and how the evaluation is to be conducted (including, for example, the location of the evaluation and the persons who may be present during the evaluation).

## **ORDER**

ABC Public Schools may conduct a comprehensive psychological evaluation (including cognitive testing for purpose of establishing IQ scores) and a functional behavioral assessment (including a further functional assessment if recommended by the person conducting the functional behavioral assessment) for Student.

ABC Public Schools shall conduct an educational assessment for Student.

ABC Public Schools is not required to conduct a physical therapy assessment for Student.

With respect to the psychological evaluation, functional behavioral assessment and education evaluation, ABC Public Schools may choose any professional who is qualified to conduct the evaluation or assessment, and the evaluator may determine in his or her professional discretion the design of the evaluation or assessment (including, for example, the test instruments to be used) and how the evaluation or assessment is to be conducted (including, for example, the location of the evaluation or assessment, and the persons who may be present during the evaluation or assessment).

By the Hearing Officer,

William Crane

Dated: February 7, 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.