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

In Re: Pembroke Public Schools **BSEA # 1310012c**

DECISION

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

A hearing was held on March 13, 2014 in Boston, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student's Mother
Aron Blidner Special Education Coordinator, Pembroke Public Schools

Neither party was represented by an attorney or advocate. The official record of the hearing consists of documents submitted by the Pembroke Public Schools (hereinafter, Pembroke) and marked as exhibits S-1 through S-7; and approximately one hour of recorded oral testimony and argument. Parent did not submit documents. The record closed at the end of the hearing.

ISSUE

The issue to be decided in this case is whether Pembroke is in compliance with my Decision dated October 31, 2013, resolving a prior dispute between the parties (hereinafter, October 31, 2013 Decision).

FACTUAL AND PROCEDURAL BACKGROUND

Student resides with his Mother in Pembroke, MA, and attends the 10th grade of a substantially-separate, language-based program at Pembroke High School. Student hopes to attend college after he graduates from Pembroke High School. See October 31, 2013 Decision.

Student has a diagnosis of Specific Learning Disability (Dyslexia), Auditory Processing Disorder and Communication Disorder. He has a history of severe difficulties acquiring basic literacy skills. Student is highly motivated to remediate his learning deficits. See October 31, 2013 Decision.

Beginning in the 2012-2013 school year and continuing in the current school year, Student has attended a language-based program at Pembroke High School. The program is only for students with specific reading, written language and language learning disabilities who, as a result of these deficits, are functioning significantly below grade level in reading and written language but who can access grade-level curriculum. See October 31, 2013 Decision.

In order to make Student's language-based educational program appropriate, the October 31, 2013 Decision required that Student be evaluated through a Lindamood Phoneme Sequencing (LiPS) program and that Pembroke provide intensive tutorial instruction in the amount recommended by that evaluation. However, if the evaluation did not recommend LiPS instruction, then the IEP Team was required to re-convene with Parent and Catherine Mason[1] to determine what other additional, explicit instruction must be utilized to address Student's phonological weaknesses. See October 31, 2013 Decision.

The Decision also required that Pembroke provide Student with a reading fluency program (such as the Read Naturally program) at least twice each week. See October 31, 2013 Decision.

DISCUSSION

The only issue to be addressed is whether Pembroke has complied with the October 31, 2013 Decision.

It is not disputed that Pembroke has implemented the requirement of providing Student with a reading fluency program.

It is also not disputed that Pembroke arranged for Student to be evaluated through a LiPS program and that the evaluation made recommendations for services other than LiPS instruction. Accordingly, Pembroke sought to convene an IEP Team meeting that would include Ms. Mason, for purposes of deciding what explicit instruction would be added to Student's IEP in order to address his phonological weaknesses. There does not appear to be any dispute that this is precisely what Pembroke was required to do under the October 31, 2013 Decision. Exhibits S-2, S-3.

However, a disagreement arose regarding the scheduling of this IEP Team meeting.

Parent's motion alleging lack of compliance, filed on February 25, 2014, states that Pembroke had scheduled an IEP Team meeting (that would include Ms. Mason) for January 29, 2014. Parent's compliance motion then states that this meeting was "abruptly cancelled" and has never been rescheduled. She takes the position that instead of scheduling a Team

[1] Ms. Mason is an Educational Specialist at the Floating Hospital for Children at Tufts Medical Center. Ms. Mason has evaluated Student, and she testified at the previous Hearing. The requirement (within the October 31, 2013 Decision) that Student receive additional, explicit instruction to address his phonological weaknesses was based upon Ms. Mason's recommendations. See October 31, 2013 Decision.

meeting, Pembroke inappropriately arranged for mediation to occur on March 4, 2014, which Parent declined to attend. Parent requested a hearing to address this alleged lack of compliance. Testimony of Parent.

Pembroke's responsive filing states that it cancelled the January 29, 2014 IEP Team meeting because on the day before the meeting, Parent had verbally threatened to harm Dr. Blidner (Pembroke's Special Education Coordinator) if he were to attend the meeting. Pembroke took the position that Dr. Blidner needed to be at the meeting and sought to re-schedule the meeting for March 4, 2014 when a Bureau of Special Education Appeals (BSEA) mediator could attend. Testimony of Blidner; exhibit S-5.

During the evidentiary hearing on this compliance dispute on March 13, 2014, it became evident that there had been miscommunication between Pembroke and Parent. Pembroke had not intended to change the Team meeting to a mediation session by inviting a BSEA mediator to attend the Team meeting, but rather was intending that the mediator's presence would assist the parties to have a successful meeting. However, when Parent learned that a BSEA mediator would be present on March 4th, it appeared that Pembroke was changing the Team meeting to a mediation session. Mother then insisted on having an IEP Team meeting (which was her right under the October 31, 2013 Decision) rather than to participate in mediation (which she had the right not to participate in). Testimony of Parent, Blidner.

At the hearing on March 13, 2014, the parties agreed to schedule a facilitated IEP Team meeting. Specifically, the rescheduled IEP Team meeting would include Marc Sevigny (BSEA Director of Mediation) for purposes of facilitating it. Parent made clear the importance of having Ms. Mason at the Team meeting (her participation is required by the October 31, 2103 Decision), and Pembroke re-confirmed its intent to invite (and pay for) Ms. Mason to attend the meeting. At the end of the hearing, the parties contacted Mr. Sevigny and identified dates in April when both he and Ms. Mason may be available.

I find that Pembroke had good cause to cancel the January 29, 2014 IEP Team meeting, that there was a misunderstanding regarding what Pembroke proposed to do to reschedule the meeting, and that the parties have resolved this misunderstanding by agreeing to schedule a facilitated Team meeting that includes Ms. Mason and Mr. Sevigny.

ORDER

Pembroke is in compliance with the October 31, 2013 Decision.

By the Hearing Officer,

William Crane
Dated: March 26, 2014

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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.