**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

Whiteacre Public Schools

& BSEA No. 2303703-C

Student

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**RULING ON DISTRICT’S MOTION TO ORDER COMPLIANCE**

On April 7, 2023, the undersigned hearing officer issued a final *Decision* in the above matter. The pertinent portions[[1]](#footnote-1) of the Conclusion and Order contained in the *Decision* are reproduced below, *verbatim*:

**CONCLUSION AND ORDER**

Based on the foregoing, I conclude that the School has met its burden of proving that Student’s current services and placement do not provide Student with a FAPE and cannot feasibly be modified to do so. I further conclude that Student requires placement in an approved public or private out of district setting, which may include a private or public day school or a program within a public high school in a different district, that is designed for students with autism or related disabilities, and that can provide Student with ABA programming, expertise with the communication needs of students who are non-speaking and who use total communication and assistive communication technology, an appropriate peer grouping, necessary safety precautions and accommodations for his medical conditions, and extended school year programming.

 Therefore, I order the following:

1. The School shall broaden its search for potential programs for Student that meet the above-listed criteria that are located within an hour’s distance or less from Student’s home. Such search shall include exploration of appropriate programs within public high schools as well as private day schools and collaboratives. The School shall provide Parents with available information on all schools to which it refers Student. The School shall also inform Parents on how it complies with 603 CMR 28.06(8) with respect to transportation.
2. If and when a program meeting the above criteria becomes available, the School shall issue a placement page designating that program as Student’s placement.

On June 9, 2023, the District filed a *Motion to Order Compliance with the Decision*, in which it reports that it has located an available out-of-district placement for Student, the CAPS Collaborative, and seeks “an Order directing the Parents to comply with the April 7, 2023 Decision” by immediately “completing the required paperwork so that Student can begin attending CAPS,” and a further Order that “with the new placement, [Student] is to no longer attend his program in-district.”

 In its *Motion*, the District explains that the CAPS Collaborative has provisionally accepted Student into its Senators Program, and that Parents must complete required paperwork to finalize acceptance and establish a start date. The District further alleges that “Parents have indicated that they will not accept the CAPS placement.” (*Motion*). Attached to the *Motion* are a letter of acceptance from CAPS dated May 17, 2023, stating that CAPS had accepted Student based on information in Student’s IEP and observation by its BCBA, and that the program would schedule a start date when it receives completed intake forms and secures a 1:1 paraprofessional for Student. (*Motion*, Ex. 1)

Also attached are copies of emails from Parents dated June 7 and 8, 2023. (*Motion*, Ex. 3) Parents’ email of June 7 states the following:

We are unable to sign [Student’s] IEP at this time. It does not cover an actual placement or a willingness of the district to remove their quest to remove [Student] from the district. Since both school personnel and parents are in agreement that “[Student] is in a good place with his behaviors” as well as the caveat that “this would not be a permanent removal from the district but only until his behaviors are under control” which they are, then it appears to me/us that to best educate [Student] with FAPE would be for both parties to appear before the BSEA, requesting to vacate the outplacement order.

 Parents’ email of June 8, 2023 states:

We had a meeting with the CAPS Senators Program in Orange. They do not have staff for [Student]. They do not have an RBT or a consistent 1 to 1. The facilities are not such that [Student] would receive FAPE there.

 On June 9, 2023, Parents, filed a *Response* to the School’s *Motion*. In pertinent part, Parents state that, after a visit to CAPS, they are not prepared to agree to Student’s placement there because, at this time, CAPS does not have either a dedicated 1:1 paraprofessional or RBT for Student,[[2]](#footnote-2) because their advocate has not had an opportunity to observe the proposed placement, and because “it would not be prudent for us to sign any paperwork or agree to any placement without further information.” Lastly, Parents state that they feel they are being “coerced” into moving forward with the placement “without fully knowing what is to become of our son,” and that they “are not willing to blindly send [Student] into a substandard program which is unable to meet his needs or provide FAPE for him.”

 The District states that it does not believe a hearing is necessary on the *Motion*. On the other hand, Parents state that they believe a hearing is necessary to “show…why we have not signed anything at this time.” In a second emailed correspondence dated June 16, 2023, Parents state that they “think at this point we need a motion hearing,” and further state that they “have not refused to fill out paperwork. We merely request that the program have adequate staffing and that we get to meet the staff who would be working with him. Also that they have an alternative to an unsanitary and unsafe classroom before we can consider placement…I will not subject my son to a non-FAPE environment just because a program said yes…”

 The School’s *Motion* can be decided solely on the basis of relevant law, and a hearing is not necessary for me to issue a ruling. On the other hand, the Parents’ two responses suggest that they may believe that the program offered by the District does not meet the requirements of the Order contained in the *Decision*. If, in fact, Parents believe that this is the case, then they have the right to file a separate *Motion to Order Compliance* with the Decision pursuant to Rule XIV of the *Hearing Rules for Special Education Appe*als.

 Upon a review of the submissions of the parties currently before me, in light of relevant law, I conclude that the District’s *Motion* must be DENIED, first, because the BSEA lacks authority to “enforce” its own decisions, or to issue orders directing parents to “comply” with a BSEA decision to change a child’s placement, and, secondly, because, even if the BSEA were to have such authority, which it does not, the *Decision* does not, and cannot, require any particular action on the part of Parents. My reasoning follows.

**DISCUSSION**

 As a threshold matter, ruling on the District’s *Motion* requires analysis of Rule XIV of the BSEA *Hearing Rules for Special Education Appeals*, which governs compliance hearings, in light of statutory and regulatory provisions governing the jurisdiction and authority of the BSEA as well as the “stay put” provisions of the IDEA and corresponding state law. With respect to the hearing officer’s authority in compliance matters, Rule XIV of the *Hearing Rules*, which tracks the language of the applicable state regulation, 603 CMR 28.08(6)(b), states the following:

**RULE XIV: *Compliance with Decision***

A party contending that the Hearing Officer’s decision is not being implemented may file a motion requesting the BSEA to order compliance with the decision.

The motion shall set out the specific areas of alleged non-compliance. The Hearing Officer may convene a hearing on the motion at which the scope of inquiry will be limited to facts bearing on the issue of compliance, facts of such nature to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief and/or refer the matter to the Legal Office of the Commonwealth of Massachusetts Department of Elementary and Secondary Education for enforcement.

 At first glance, the language of this *Rule* would appear to allow a hearing officer to order not only school districts or state agencies to comply with BSEA decisions, but also to order such compliance from parents (including guardians and Special Education Surrogate Parents) and/or adult students. Such an interpretation of the *Rule*, however, would be contrary to federal and state statutory and regulatory provisions governing both the authority of the BSEA, and the “stay put” rights of students who are the subject of hearing decisions.

 I first examine the authority of BSEA hearing officers, which is governed by the IDEA and its implementing federal regulations as well as the Massachusetts special education statute and state regulations at 603 CMR 28.08. The relevant portion of the IDEA at 20 USC §1415(b)(6)(a) requires states to make procedures available, including due process hearings, to resolve disputes regarding, “any matter relating to the identification, evaluation, or educational placement of the child or the provision of a free, appropriate public education to such child…” The IDEA further sets forth the procedural requirements for such hearings at 20 USC §1415(f), including the issuance of written decisions.

The corresponding federal regulation elaborates on the statutory provision at 34 CFR §300.511-516, outlining the responsibility of the hearing officer, namely, to determine “on substantive grounds whether a child has received FAPE or, under limited circumstances, whether a child “did not receive a FAPE” due to “procedural inadequacies.” 34 CFR §300.513(a)(1)-(2). The regulation explicitly allows hearing officers to order school districts to comply with the procedures mandated by the provision, stating that “[n]othing in paragraph (a) of this section shall be construed to preclude a hearing officer from ordering *an LEA* to comply with procedural requirements under §§300.500 through 300.536.” (emphasis supplied) Nowhere, however, does the regulation authorize hearing officers to issue orders directing parents or guardians to take, or refrain from taking, any action in relation to the substance of the decision, or to “enforce” decisions with respect to any party.

Similarly, Massachusetts regulations provide the following:

The…hearing officer shall have the power and the duty to conduct a fair hearing; to ensure that the rights of all parties are protected; to define issues, to receive and consider…evidence, to ensure an orderly presentation of the evidence and the issues; to order additional evaluations…to determine the appropriate special education for the student; to reconvene the hearing…prior to the issuance of a decision; to take such other steps as are appropriate to assure the orderly presentation of evidence and protection of the parties’ rights at the hearing; to ensure a record is made of the proceedings; and to reach a fair, independent, and impartial decision based on the issues and evidence presented at the hearing and in accordance with applicable law.” 603 CMR 28.08(5)(c).

 As to decisions, the regulations provide that “the decision of the hearing officer…shall be implemented immediately and shall not be subject to reconsideration by the [BSEA] or the Department [of Elementary and Secondary Education], but may be appealed to a court of competent jurisdiction.” 603 CMR 28.08(6) The BSEA must send the “written finding of fact and decision” to the parties, along with “notification of the procedures…[for] appeal and enforcement of the decision.” 603 CMR 28.08(6)(a). Lastly, as stated above, the regulations, and corresponding Rule XIV, provide for the convening of a compliance hearing in the event of alleged non-compliance with the decision. 603 CMR 28.08(6)(b). As with the federal law, nothing in the applicable state regulations authorizes hearing officers to issue orders directing parents or guardians to “comply” with decisions relative to a child’s services or placement.[[3]](#footnote-3) In a similar vein, BSEA hearing officers, unlike courts, do not have authority to “enforce” decisions. See, for example, *Joseph v. Boston Public Schools*, BSEA No. 06-3836 (Crane, 2006), quoted in *In Re Student v. South Hadley Public Schools, Ruling on South Hadley Public Schools’ Motion to Dismiss for Lack of Jurisdiction*, BSEA No. 2311287 (Kantor Nir, June 8, 2023):

[T]he BSEA hearing officer’s jurisdiction may not extend to enforcement because a hearing officer has no mechanism to enforce an agreement (for example, through powers of contempt), *just as he/she has no mechanism to enforce an IEP or to enforce a decision of a BSEA hearing officer*…However…a hearing officer’s jurisdiction may include consideration of the legal implications of an agreement[[4]](#footnote-4) with respect to parents’ special education rights, and the hearing officer may issue orders stating what a school district must do in order to comply with these rights. (emphasis supplied).

Further, the regulation governing compliance hearings, 603 CMR 28.08 (6)(b) and the corresponding Rule XIV of the BSEA *Hearing Rules* both state that for enforcement purposes, the hearing officer may refer the matter to the legal office of the Department of Elementary and Secondary Education (DESE), which, as the agency responsible for ensuring that school districts comply with the IDEA, may take some type enforcement action regarding a school district found not to be in compliance with a hearing officer decision, but which, itself, has no such authority over parents or guardians.

To summarize, when considering a request for a compliance order, a hearing officer must consider the legal implications of the decision on the rights of parents of special education students and the metes and bounds of the school districts’ responsibility and may direct the school district to fulfill that responsibility if it has not done so. However, the applicable rule does not authorize the hearing officer to either “enforce” the decision (because there no mechanism to do so) or to issue substantive orders directing a parent or guardian to take or refrain from taking an action relative to the child’s IEP or placement.

Applying the foregoing analysis to the facts in the instant case, I conclude that while the *Decision* in this matter determines that Student was not receiving FAPE in his current placement, lists some of the basic characteristics of a placement that would provide Student with FAPE, and sets forth what the District must do to offer Student a FAPE, it does not, and cannot, require any action on the part of Parents. Moreover, neither the pertinent statutes and regulations nor Rule XIV authorize me to order or direct Parents to take any actions with respect to the IEP and placement offered by the District.

In light of the District’s request for an order directing Parents’ compliance with the *Decision*, I now turn to an analysis of Student’s “stay put” rights, which are established by 20 USC §1415(j), 34 CFR §300.518 and 603 CMR 28.08 (7). These rights are set forth in the Notice entitled *Effect of Final BSEA Actions and Right of Appeal,* which is appended to every decision or dispositive ruling issued by the BSEA, including the *Decision* in the present matter, as required by 603 CMR 28.08(6)(a). In pertinent part, this Notice states the following:

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, §14(3), appeal of a decision does not operate as a stay. This means that the decision must be implemented immediately even if the other party files an appeal in court, and implementation cannot be delayed while the appeal is being decided. Rather, a party seeking to stay—that is delay implementation of—the decision of the Bureau must request and obtain such stay from the court having jurisdiction over the party’s appeal.

Under the provisions of 20 USC §1415(j), “unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement,” while a judicial appeal of the Bureau decision is pending…

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 while judicial proceedings are pending must ask the court having jurisdiction over the appeal to grant a preliminary injunction ordering such a change in placement. *Honig v. Doe,* 484 U.S. 305 (1988); *Doe v. Brookline,* 722 F.2 910 (1st Cir. 1983).

 To summarize, the final decision of the BSEA must be implemented immediately. If the decision requires the school district to change a child’s placement, and the parents agree to the change, then the district must place the child in the new program immediately. If the parents do not agree with the change in placement, then they may file an appeal in Federal District Court or the Massachusetts Superior Court within 90 days from the date of the issuance of the decision. If Parents file such a judicial appeal, then the student’s current placement remains his/her “stay put” placement for the duration of the appeal, and the student’s placement may not be changed unless the (a) the parents and district agree to change the placement, or (b) the school district seeks and obtains an injunction in a court with jurisdiction over the appeal.

**CONCLUSION AND ORDER**

Based on the analysis set forth above, the School’s *Motion to Order Compliance with Decisio*n is DENIED because the BSEA lacks authority to order Parents to “[complete] the required paperwork so that Student can begin attending CAPS.” Further, the BSEA lacks authority to issue an “Order that with the new placement, [Student] is to no longer attend his program in-district.” Lastly, the *Decision* itself does not and cannot require Parents to take any action.[[5]](#footnote-5)

 If Parents believe that the placement offered by the District does not comply with the Order contained in the *Decision*, they may file a separate *Motion to Order Compliance with the Decision* that conforms with the requirements of Rule XIV.

By the Hearing Officer,

Sara Berman

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Dated: June 22, 2023

Sara Berman

1. Paragraphs 3-5 of the Conclusion and Order directed the School to offer certain staff trainings and a home assessment, and encouraged Parents to share a private evaluation with the District when it is completed. These provisions are not relevant to the instant *Motion*. [↑](#footnote-ref-1)
2. Parents state that CAPS informed them that it would hire additional 1:1 staff, but Parents’ Response is unclear as to whether CAPS intends to hire a paraprofessional, an RBT, or both. [↑](#footnote-ref-2)
3. Hearing officers must and do have authority to issue orders to both parents and school districts regarding the procedural aspects of a hearing, *e.g*., to meet filing deadlines, conduct themselves with decorum during the hearing, and the like. Such authority is necessary to enable hearing officers to perform their responsibility to conduct fair and impartial hearings, and the consequences for not obeying such orders relate only to the hearing itself, such as dismissal of the hearing request or exclusion of certain evidence from the record. This clearly differs from authority to order parents to comply with substantive decisions about services and/or placement. [↑](#footnote-ref-3)
4. The same analysis used with respect to settlement or mediation agreements applies to decisions. [↑](#footnote-ref-4)
5. I note in this regard that the 90 days has yet to elapse since issuance of the *Decision* in this matter. As stated in the above-referenced Notice, which was attached to the *Decision*, if Parents file a timely judicial appeal, *i.e*., within 90 days from issuance of the *Decision*, then Student’s current placement remains his program at the Whiteacre high school, which cannot be changed while the judicial appeal is pending, unless the parties agree otherwise, or unless the District applies for and receives a preliminary injunction from the court having of competent jurisdiction. [↑](#footnote-ref-5)