**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

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 **DECISION**

**IN RE: GREATER COMMONWEALTH VIRTUAL SCHOOL**

**BSEA # 2411692**

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

**BEFORE**

**HEARING OFFICER**

**ALINA KANTOR NIR**

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

**PARENT, PRO SE**

**FELICIA VASUDEVAN, ATTORNEY FOR GREATER COMMONWEALTH VIRTUAL SCHOOL**

**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Greater Commonwealth Virtual School BSEA # 2411692**

**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 in the above-noted matter was held via a virtual platform on June 14, 2024 before Hearing Officer Alina Kantor Nir. Parent did not attend the Hearing. Greater Commonwealth Virtual School (Greater Commonwealth or the District) was represented by counsel. Those present for all or part of the proceedings, all of whom agreed to participate virtually, were:

Leah Stefanov Case Manager and Special Education Teacher, Greater Commonwealth

Darlene Thorpe Director of Special Education, Greater Commonwealth

Felicia Vasudevan Attorney for Greater Commonwealth

Julianne Ryan Court Reporter

The official record of the hearing consists of documents submitted by Greater Commonwealth and marked as Exhibits S-1 to S-12[[1]](#footnote-1), and a single volume transcript produced by a court reporter. Greater Commonwealth’s Counsel made her closing argument orally, and the record closed on June 14, 2024.[[2]](#footnote-2)

**ISSUE IN DISPUTE**:

The issue to be decided is whether Parent’s refusal to consent to the re-evaluation proposed by Greater Commonwealth, will result in the denial of a free appropriate public education (FAPE) to Student, and, thus, substitute consent should be awarded.

**RELEVANT PROCEDURAL HISTORY:**

On April 24, 2024, the District filed a Hearing Request with the Bureau of Special Education Appeals (BSEA) seeking substitute consent to re-evaluate Student. Parent did not submit a formal response but indicated, via subsequent email communications, that he was pursuing his own testing of Student and would not agree to the District’s evaluation. Specifically, on April 26, 2024, Parent wrote:

“I don't see wasting tax payer money I've tried to be compliant but no results from school. [T]he basic request is irrelevant to neuropsych [sic] testing being done by family doctors [,] and we will provide them what's needed to adjust supports. [H]owever I have requested the actual iq [sic] testing to be done as that is where my sons [sic] strengths and weaknesses academically can be found to be addressed. [T]his has been refused for ‘behavior’ testing that my son has no issues in. [H]e is autistic and has learning disabilities[.] [H]is struggles in the academic [r]ealm can only be narrowed down with an IQ test[.] [A]utism cannot be fixed ever and our neurologists are more [s]uited to address the issue. [T]he school should be more focused on his academics and the IQ testing needed to narrow down where his struggles lie in their domain.”

On May 6, 2024, pursuant to the District’s request, the matter was postponed to June 14, 2024 for good cause.

On June 3, 2024, the Hearing Officer sent out an email reminder of the upcoming Hearing and followed up with a formal Reminder Order on June 4. Parent indicated via email dated June 7, 2024 that he would not participate absent “legal summons from a court and judge … to demand [his] presence and cooperation.”

When the Hearing began on June 14, 2024, Parent was not present. The Hearing Officer attempted to contact Parent via email and telephone to remind him of the Hearing and allowed additional time for him to join the proceeding. Parent did not respond to the email. Parent’s home phone number was not in service, and his work phone number had a full voicemail. Greater Commonwealth’s Case Manager and Special Education Teacher, Leah Stefanov, attempted to text Parent as well. Parent did not respond nor did he attend the Hearing. The matter therefore proceeded in his absence.

**FACTUAL FINDINGS:**

1. Student is a resident of New Bedford, Massachusetts, currently in the 8th grade. He has been attending a full inclusion placement at Greater Commonwealth since 2nd grade. (Stefanov, Thorpe, S-6) Student is pleasant, hard-working, enthusiastic and engaged. (S-6)
2. Prior to Greater Commonwealth, Student attended the New Bedford Public Schools. (S-11)
3. Parent does not feel that Student is performing well in his current placement. (Stefanov, Thorpe, S-6, S-7, S-8) Parent believes that Student requires a tutor.(S-5) He has expressed concern regarding Student’s behavior and his transposition of letters and numbers. (Stefanov)
4. On multiple occasions, Parent indicated that he would “not sign anything [Greater Commonwealth would] send him.” (Stefanov, Thorpe, S-8)
5. Student’s last psychological evaluation was conducted in January 2018.[[3]](#footnote-3) Student demonstrated average cognitive skills and solid academic skills with some weaknesses in recall of information, processing speed and written expression. The examiner expressed some additional concerns with handwriting, physical fatigue after writing, and reversals in writing. In addition, distractibility and varied motivation to complete tasks, as well as off-topic verbal tangents were noted. (Thorpe, S-10)
6. In March 2018, Greater Commonwealth proposed, and Parent fully accepted, the IEP for the period 3/2/2018 to 3/1/2019, calling for a full inclusion placement and including goals and services in the areas of Reading Comprehension, Written Language, School Behavior. This IEP notes that Student has a diagnosis of Attention-Deficit/Hyperactivity Disorder (ADHD) and is eligible for special education pursuant to the Heath disability category. (Stefanov, Thorpe, S-10) This IEP expired on March 1, 2019. (Stefanov, Thorpe, S-11) At the time the initial IEP was proposed, the District also proposed additional testing in the areas of functional behavior and occupational therapy, but Parent declined to grant consent for these evaluations. (S-11)
7. Darlene Thorpe is Greater Commonwealth’s Director of Special Education.[[4]](#footnote-4) She has served in this role for 4 years. In this capacity, Ms. Thorpe oversees special education staffing and monitors evaluation team leaders to ensure that students at Greater Commonwealth are supported. (Thorpe)
8. The District has utilized email, text, US mail, and Team meetings to attempt to obtain Parent’s consent to evaluate. The District has also provided such consent forms to Parent during Student’s in-person 1:1 MCAS testing. Greater Commonwealth has, moreover, embedded its request for consent in progress reports and N1 notices sent to Parent. (Stefanov, Thorpe, S-4, S-5, S-7, S-8, S-9, S-12)
9. Parent has refused to sign any consent to evaluate forms or to consent to any IEP proposed since March 14, 2018. (Stefanov, Thorpe, S-7, S-8, S-11, S-12)
10. During Student’s 6 years at Greater Commonwealth, Parent has only attended two annual IEP meetings. (Stefanov, Thorpe) During one of these meetings, Parent became aggressive and threatening toward staff. (Thorpe)
11. Parent has refused any attempts by the District to mediate or come to an agreement regarding testing of Student. (Thorpe, S-9, S-12)
12. Parent’s email/text and in-person/phone communications with District staff have been “volatile,” “aggressive,” and “threatening.” (Stefanov, Thorpe)
13. The District proposed an IEP for Student following an Annual Review held on March 24, 2020. Parent did not sign the IEP. (Thorpe, S-12)
14. On December 29, 2020, the District proposed a three-year re-evaluation which included Educational Diagnostic, Educational, Psychological, and Health assessments. Parent did not sign the consent. (Thorpe, S-1) Ms. Thorpe testified that the District outsources psychoeducational and occupational therapy testing to Presence Learning and Greater Commonwealth’s nurse would complete the health assessment. The individual evaluators, after speaking with Parent and staff, would be responsible for deciding which assessment tools to utilize. (Thorpe)
15. The District proposed an IEP for Student following an Annual Review held on May 21, 2020. Parent was present but indicated that that “if the Team did not agree to what he was saying, which was that he wanted the school to provide a tutor for his son, he had nothing to say or listen to.” Parent then left. He did not sign the IEP. (Thorpe, S-12)
16. On December 14, 2021, the District proposed a three-year re-evaluation which included Educational Diagnostic, Behavior Rating Scales, Educational, and Health assessments. The proposal offered “a social/emotional portion, … if needed.” Parent did not sign the consent. (Thorpe, S-2)
17. Leah Stefanov is Student’s Special Education Case Manager and special education teacher.[[5]](#footnote-5) In this role[[6]](#footnote-6), she oversees Student’s Team meetings and provides him with push-in support. She also ensures that his accommodations and modifications are provided. Ms. Stefanov has worked with Student in this capacity since September 2023, but, during the 2022-2023 school year, she served as Student’s Evaluation Team Chair. (Stefanov)
18. On September 13, 2023, the District proposed an Occupational Therapy (OT) assessment to determine whether Student required occupational therapy services. Ms. Stefanov testified that, at that time, she proposed the single assessment “in order to encourage Parent to consent” thinking he might be more willing to provide consent to one assessment at a time. Parent did not sign the consent. (Stefanov, S-3)
19. On or about October 2023, Parent indicated that if the District requires consent for an OT Evaluation, he would “get a doctor’s order and reach out when [he has] it in hand.” Ms. Stefanov explained that a doctor’s order was not necessary; if Parent consented to the evaluation proposal, the occupational therapist would complete the assessment. Parent insisted that he did not understand “what the testing entails that has not already been sufficiently justified….[Student] is autistic with a neurological disorder … and this alone suggest[s] that an evaluation is not needed [but rather] that treatment is sought.” Parent insisted that Student had been “properly diagnosed with autism”, adding, “I told you the problems[;] address them.” Parent indicated he already had his own OT testing conducted and additional testing was not needed. In response to Ms. Stefanov’s request to review the report of the completed assessment, Parent declined citing “HIPPA” protections. He also indicated that he was pursuing testing at that time and would let the District “know what our doctors have ordered.” (Stefanov, S-5)
20. On April 28, 2024, the District re-sent Parent a consent to evaluate form for the OT evaluation. The District provided the consent form to Parent both via email (utilizing DocuServe) and via US mail, per his request. Parent did not provide consent. He indicated that he was doing his own testing. (Stefanov, S-4, S-5)
21. On May 2, 2024, the Team reconvened for an annual Team meeting.[[7]](#footnote-7) Parent did not attend. The Team expressed concern that the proposed IEP may no longer be appropriate for Student but that additional testing was required to identify and determine Student’s current needs. Parent had previously expressed concern regarding Student’s “foundational” skills. The IEP proposed for the period 5/2/2024 to 5/1/2025 calls for a full inclusion placement and includes goals and services in the areas of English, Executive Functioning, and Mathematics. Parent has not responded to the IEP. (Stefanov, S-12)
22. Parent has often indicated that he is in the process of having Student evaluated by a private provider and that he would share the results with the District when these become available. Parent has yet to provide any report to the District in connection with testing. (Stefanov, Thorpe, S-8)
23. District staff testified that updated testing is necessary for Student. (Stefanov, Thorpe) Specifically, his last completed testing from 2018 is now “irrelevant”. Informal teacher observations and Student’s classroom work product are insufficient to assess Student’s individual skills. In addition, a health assessment is necessary as Student has an ADHD diagnosis for which he takes medication. (Stefanov, Thorpe)

**LEGAL STANDARDS AND DISCUSSION:**

1. ***Legal Standards***
2. *Free Appropriate Public Education in the Least Restrictive Environment*

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).[[8]](#footnote-8) To provide a student with a FAPE, a school district must follow identification, evaluation, program design, and implementation practices that ensure that each student with a disability receives an IEP that is: custom tailored to the student's unique learning needs; "reasonably calculated to confer a meaningful educational benefit"; and ensures access to and participation in the general education setting and curriculum as appropriate for that student so as "to enable the student to progress effectively in the content areas of the general curriculum.”[[9]](#footnote-9)  Under state and federal special education law, a school district has an obligation to provide the services that comprise FAPE in the "least restrictive environment."[[10]](#footnote-10) This means that to the maximum extent appropriate, a student must be educated with other students who do not have disabilities, and that "removal . . . from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services, cannot be achieved satisfactorily."[[11]](#footnote-11)

An IEP must be individually tailored for the student for whom it is created.[[12]](#footnote-12)  When developing the IEP, the Team must consider parental concerns; the student's strengths, disabilities, recent evaluations, and present level of achievement; the academic, developmental, and functional needs of the child; and the child’s potential for growth.[[13]](#footnote-13) Evaluating an IEP requires viewing it as a "a snapshot, not a retrospective. In striving for 'appropriateness,’ an IEP must take into account what was … objectively reasonable … at the time the IEP was promulgated.”[[14]](#footnote-14) At the same time, a FAPE does not require a school district to provide special education and related services that will maximize a student’s educational potential.[[15]](#footnote-15) In *Endrew F. v. Douglas County Regional School District,* the SupremeCourt explained that appropriate progress will look different depending on the student.[[16]](#footnote-16)

1. *Legal Standard for Substitute Consent*

Although parental consent is generally required for an evaluation to occur, a school district may secure substitute consent through the hearing process in order to reevaluate a student without parental consent when the evaluation is "warranted."[[17]](#footnote-17)17 Massachusetts law limits the availability of substitute consent for evaluations to situations in which school district personnel believe an evaluation, other than an initial evaluation, is necessary for the district to provide a FAPE.[[18]](#footnote-18)18 In these circumstances, the district may proceed to the BSEA for a hearing if, “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.”[[19]](#footnote-19)19

In accordance with the legal standard set forth above, to prevail, Greater Commonwealth must prove by a preponderance of the evidence that: 1) the District provided Parent with prior written notice of its intent to conduct an evaluation; 2) Parent refused to provide consent for the evaluation; and 3) failure to conduct the evaluation would result in a denial of a FAPE to Student.[[20]](#footnote-20)20

1. *Burden of Persuasion*

In a due process proceeding, the burden of persuasion is on the moving party.[[21]](#footnote-21)21 Here, the District, as the moving party, must prove its case by a preponderance of the evidence.

1. ***Application of Legal Standards:***

It is undisputed that Student is a student with a disability who is entitled to special education services under state and federal law. The issue in dispute is whether Parent’s refusal to consent to the re-evaluation proposed by Greater Commonwealth will result in the denial of a FAPE to Student, and thus, should substitute consent be awarded. Based upon approximately one hour of oral testimony, the exhibits introduced into evidence by Greater Commonwealth, and a review of the applicable law, I conclude thatGreater Commonwealth has satisfied its evidentiary burden of persuasion. As such, Greater Commonwealth is entitled to substitute consent to proceed with its proposed evaluation of Student.

I found the District’s witnesses to be credible and knowledgeable. I place great weight on the testimony of Leah Stefanov whom I found to have significant personal knowledge of Student and his educational needs. I also place weight on the testimony of Darlene Thorpe, who has known Student since his start at Greater Commonwealth and who was able to provide extensive testimony regarding the attempts made by the District to secure Parent’s consent for testing. Parent failed to participate in the Hearing (despite multiple reminders) and did not submit documentary evidence. As such, no evidence was offered to contradict or rebut any of the District’s documentary evidence or witness testimony.

There is no dispute that Greater Commonwealth provided Parent with prior written notices of its evaluation proposal and that Parent refused, on multiple occasions, to grant his consent. Greater Commonwealth made reasonable efforts to obtain such consent, attempting to solicit consent via email, mail, during in-person MCAS testing, and during Team meetings.[[22]](#footnote-22)22 Parent has not only failed to provide consent but has also blatantly stated that he would not grant consent, this despite his expressing concern relative to Student’s behavior and academic skills.[[23]](#footnote-23)23

It is also undisputed that, as Student’s Local Education Agency (LEA), Greater Commonwealth has an obligation to reevaluate Student at least every three years to determine whether his needs have changed[[24]](#footnote-24)24, and to ensure that his IEP is reasonably calculated to enable him to make progress that is appropriate in light of his circumstances.[[25]](#footnote-25)25 Specifically, updated testing is necessary to determine whether Student continues to have a disability, whether Student continues to need special education and related services, and whether any additions or modifications to his special education and related services are needed to enable him to meet the measurable annual goals set out in his IEP and to participate, as appropriate, in the general education curriculum.[[26]](#footnote-26)26 Here, the District has proposed testing in the areas of Educational Diagnostic, Behavior Rating Scales, Educational, Health, Social/Emotional, and Occupational Therapy. I find these to be reasonable areas for assessment as Parent has expressed concern regarding Student’s behavior and his transposition of letters and numbers. District staff also testified that Student’s IEP goals and objectives, which expired over 5 years ago, are now irrelevant and that informal observations and classroom work are insufficient to assess individual skills. In addition, Student has an ADHD diagnosis for which he takes medication, rendering a Health assessment reasonable.[[27]](#footnote-27)27

Due to Parent’s refusal to grant consent, Student has not been assessed by the District since 2018, when he was in the 2nd grade; he is currently concluding his 8th grade year and is 14 years old, transition age. As Student’s needs have presumptively changed during this extensive time period, Greater Commonwealth cannot be reasonably expected to develop an individually tailored IEP in the absence of updated testing.[[28]](#footnote-28)28 Indeed, Parent himself has expressed concern that the current placement is not meeting Student’s needs, and has additionally asserted that Student has a diagnosis of autism and neurological disability. If so, the District should assess Student for a potential disability-related change in his educational profile and needs.[[29]](#footnote-29)29 Yet, without proper testing, it is impossible for the Team to determine what those needs are and how to appropriately address them.[[30]](#footnote-30)30

Even if Parent is in the process of obtaining a private evaluation of Student, it is well established that the District has the right to conduct its own testing utilizing its qualified evaluators.[[31]](#footnote-31)31 I therefore find that a reevaluation is warranted and necessary for Student’s Team to determine what services or placement will provide him with a FAPE.[[32]](#footnote-32)32 The District has met its evidentiary burden.

**ORDER**:

Greater Commonwealth is granted substitute consent to conduct a reevaluation of Student, as proposed.

So Ordered,

By the Hearing Officer,

/s/ Alina Kantor Nir

Alina Kantor Nir

June 20, 2024

**COMMONWEALTH OF MASSACHUSETTS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**EFFECT OF FINAL BSEA ACTIONS AND RIGHTS OF APPEAL**

**Effect of BSEA Decision, Dismissal with Prejudice and Allowance of Motion for Summary Judgment**

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. Similarly, a Ruling Dismissing a Matter with Prejudice and a Ruling Allowing a Motion for Summary Judgment are final agency actions. If a ruling orders Dismissal with Prejudice of some, but not all claims in the hearing request, or if a ruling orders Summary Judgment with respect to some but not all claims, the ruling of Dismissal with Prejudice or Summary Judgment is final with respect to those claims only.

Accordingly~~,~~ the Bureau cannot permit motions to reconsider or to re-open either a Bureau decision or the Rulings set forth above once they have issued. They are final subject only to judicial (court) 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. 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 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,” while a judicial appeal of the Bureau decision is pending, 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 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.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 of Special Education Appeals 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 Elementary and Secondary Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

**Rights of Appeal**

Any party aggrieved by a final agency action by the Bureau of Special Education Appeals may file a complaint for review in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts. 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.

COMMONWEALTH OF MASSACHUSETTS

BUREAU OF SPECIAL EDUCATION APPEALS

EFFECT OF BUREAU DECISION AND 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 of Special Education Appeals 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 Elementary and Secondary 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 superior court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review of the Bureau decision. 20 U.S.C. s. 1415(i)(2).

An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

# Confidentiality

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove\_School District v. Pulitzer Publishing*

*Company*, 898 F.2d 1371 (8th. Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

Record of the Hearing

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to federal law, upon receipt of a written request from any party, the Bureau of Special Education Appeals will arrange for and provide a certified written transcription of the entire proceedings by a certified court reporter, free of charge.

1. Parent did not submit any exhibits despite multiple reminders by the Hearing Officer. [↑](#footnote-ref-1)
2. Parent did not ask to file any closing arguments in writing or otherwise contact the Hearing Officer regarding his nonattendance at Hearing. [↑](#footnote-ref-2)
3. The evaluation included the following assessments: Woodcock Johnson Tests of Cognitive Abilities, Fourth Edition (WJ-IV COG) Woodcock Johnson Tests of Achievement, Fourth Edition (WJ-IV AC). [↑](#footnote-ref-3)
4. Ms. Thorpe has a master’s degree in special education and holds multiple licenses from the Department of Elementary and Secondary Education (DESE). (Thorpe) [↑](#footnote-ref-4)
5. Ms. Stefanov has a master’s degree in education and holds multiple licenses from the DESE. (Stefanov) [↑](#footnote-ref-5)
6. Ms. Stefanov has worked as a teacher since 2011, the last three years in the District. (Stefanov) [↑](#footnote-ref-6)
7. This meeting was delayed due to Parent’s non-responsiveness regarding scheduling. (S-12) [↑](#footnote-ref-7)
8. Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 (d)(1)(A). [↑](#footnote-ref-8)
9. See 20 USC §1401 (9), (26), (29); 603 CMR 28.05(4)(b); C.D. v. Natick Pub. Sch. Dist., 924 F.3d 621, 624 (1st Cir. 2019); Sebastian M. v. King Philip Reg'l Sch. Dist., 685 F.3d 84, 84 (1st Cir. 2012); *C.G. v. Five Town Comty. Sch. Dist.,* 513 F. 3d 279, 285 (1st Cir. 2008); *In Re: Chicopee Public Schools,* BSEA #1307346 (Byrne, 2013). [↑](#footnote-ref-9)
10. 20 U.S.C § 1412(a)(5)(A); 34 CFR 300.114(a)(2)(i); M.G.L. c. 71 B, §§ 2, 3; 603 CMR 28.06(2)(c). [↑](#footnote-ref-10)
11. 20 U.S.C. 1412(a)(5)(A); *C.D.*, 924 F. 3d at 631 (internal citations omitted). [↑](#footnote-ref-11)
12. *Endrew F. v. Douglas Cty. Reg'l Sch. Dist.*, 137 S. Ct. 988, 1001 (2017). [↑](#footnote-ref-12)
13. See 34 CFR §300.324(a)(i-v); *Endrew F.,* 137 S. Ct. at 999; *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012); *N. Reading Sch. Comm. v. Bureau of Special Educ. Appeals*, 480 F. Supp. 2d 479, 489 (D. Mass. 2007) (“The First Circuit has characterized the federal floor, which defines the minimum that must be offered to all handicapped children, as providing a meaningful, beneficial educational opportunity, and that court has stated that a handicapped child's educational program must be reasonably calculated to provide effective results and demonstrable improvement in the various educational and personal skills identified as special needs”) (internal citations and quotations omitted). [↑](#footnote-ref-13)
14. *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). [↑](#footnote-ref-14)
15. See *Bd. of Educ. 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”); see *N. Reading Sch. Comm.*, 480 F. Supp. 2d at 488 (“The focus of inquiry under 20 U.S.C. § 1415(e)(i) must recognize the IDEA's modest goal of an appropriate, rather than an ideal, education”). [↑](#footnote-ref-15)
16. *Endrew F.*, 137 S. Ct. at 992; see also 603 CMR 28.02(17). [↑](#footnote-ref-16)
17. 17 34 C.F.R. § 300.303 (a)(1); see *West-Linn Wilsonville School District v. Student*, 63 IDELR 251 (D. Ore. 2014) (reevaluation was warranted when Student’s behaviors escalated significantly and the principal informed the director of student services that the special education teacher felt unsafe around the child). [↑](#footnote-ref-17)
18. 18 See, e.g., *Lowell Pub. Sch.*, BSEA #110039 (Crane, 2010) (granting the District substitute consent for an updated three-year evaluation, which parents refused, as this was necessary to determine what educational services and placement were appropriate for the student, and reasoning that "[w]ithout new evaluations, it simply is not possible to do what state and federal special education law require - that is, to determine whether special education or related services are needed, and to tailor any needed special education and related services to Student's current strengths and weaknesses"); *In Re: Maynard Pub. Sch.*, BSEA #106645 (Scannell, 2010) (finding that "many of the assessments requested by Maynard in the three year reevaluation proposal [were] necessary to determine [the student's] current functioning so that the proper special education services [could] be provided to him"); *In Re: Duxbury Pub. Sch. & Ishmael*, BSEA #072419 (Byrne, 2007) (granting substitute consent for a comprehensive psychiatric evaluation based upon the District’s concern about conflicting and missing information regarding Student’s mental status and health as this was the primary disability affecting his education). [↑](#footnote-ref-18)
19. 19 603 CMR 28.07(1)(b). [↑](#footnote-ref-19)
20. 20 See *In Re: Lowell Pub. Sch.*, BSEA #110039 (Crane, 2010) (summarizing standard for substitute consent). [↑](#footnote-ref-20)
21. 21 See *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). [↑](#footnote-ref-21)
22. 22 See 34 CFR 300.300 (c)(2)(i). [↑](#footnote-ref-22)
23. 23 See 20 USC 1414 (c)(3); 34 CFR 300.300 (c)(2). [↑](#footnote-ref-23)
24. 24 See 34 CFR 300.536 (b). [↑](#footnote-ref-24)
25. 25 See *Endrew F.*, 137 S. Ct. at 992. [↑](#footnote-ref-25)
26. 26 See 34 CFR 300.305 (a)(2)(i)(B), 34 CFR 300.305 (a)(2)(iii)(B), and 34 CFR 300.305 (a)(2)(iii)(iv). [↑](#footnote-ref-26)
27. 27 See *Shelby S. v. Conroe Indep. Sch. Dist.,* 454 F.3d 450, 455 (5th Cir.2006) (“We ... conclude that where a school district articulates reasonable grounds for its necessity to conduct a medical reevaluation of a student, a lack of parental consent will not bar it from doing so”). [↑](#footnote-ref-27)
28. 28 See *Johnson v. Duneland Sch. Corp.,* 92 F.3d 554, 557-8 (7th Cir. 1996) (affirming Hearing Officer's order, under previous version of IDEA, that a three-year evaluation take place absent parental consent where a student's "condition had changed since he last attended school"). [↑](#footnote-ref-28)
29. 29 See *Timothy O. v. Paso Robles Unified Sch. Dist.,* 822 F.3d 1105, 1118–19 (9th Cir. 2016) (“The IDEA requires that, if a school district has notice that a child has displayed symptoms of a covered disability, it must assess that child in all areas of that disability using the thorough and reliable procedures specified in the Act”); see also *Clark County Sch. Dist.*, 122 LRP 45275 (SEA NV 2022) (Because a Nevada district was well aware of a teenager's escalating behavioral problems and his private diagnosis of ADHD more than two years earlier, it should have conducted additional assessments of the student's behavioral needs). [↑](#footnote-ref-29)
30. 30 See *Schaffer,* 546 U.S. at 53 (the IDEA requires school districts to reevaluate students with disabilities at least once every three years to ensure that educational programs are “well-suited” to the student's evolving needs). In addition, in the instant matter, Student is approaching transition-age and may require additional transition testing. See 34 CFR 300.320 (b) (beginning not later than the first IEP to be in effect when the child turns 16, or, in Massachusetts, 14, and updated annually thereafter, the IEP must include appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills; and the transition services (including courses of study) needed to assist the child in reaching those goals); see also *Butte Sch. Dist. No. 1 v. C.S.*, 817 F. App'x 321 (9th Cir. 2020) (failure to base a student's IEP on an age-appropriate transition assessment is a procedural violation of the IDEA); *C.M.E. v. Shoreline Sch. Dist.*, No. 219CV02019RAJBAT, 2020 WL 10141433, at \*6 (W.D. Wash. Nov. 9, 2020), *report and recommendation adopted*, No. 219CV02019RAJBAT, 2021 WL 2530395 (W.D. Wash. June 21, 2021), *aff'd sub nom. C.M.E. v. Shoreline Sch. Dist.,* No. 21-35538, 2023 WL 2493826 (9th Cir. Mar. 14, 2023) (where the District was procedurally required to complete an age-appropriate transition assessment if a new IEP is to be developed for Student, the ALJ appropriately found that the District's proposed evaluation was reasonable and necessary, and appropriately ordered the evaluation over Parent's refusal to consent). [↑](#footnote-ref-30)
31. 31 See, e.g., *Gregory K. v. Longview School Dist.,* 811 F.2d 1307, 1315 (9th Cir.1987) (a parent seeking special education services for their child under the IDEA must allow the school to evaluate the student and cannot force the school to rely solely on an independent evaluation); *Andress v. Cleveland Indep. Sch. Dist.,* 64 F.3d 176, 178 (5th Cir. 1995) (“[i]f a student's parents want [her] 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”); *Dubois v. Conn. State Bd. of Ed.,* 727 F.2d 44, 48 (2d Cir. 1984) (interpreting the IDEA's predecessor and holding that the school system may insist on evaluations by qualified professionals). [↑](#footnote-ref-31)
32. 32 See, e.g., *Shelby S v. Conroe Indep. Sch. Dist*., 454 F.3d at 454 (allowing reevaluation where without one the Team would not “know how to formulate an IEP consistent with Shelby's extreme symptoms”); *M.L. v. El Paso Indep. Sch. Dist*., 610 F. Supp. 2d 582, 598–99 (W.D. Tex. 2009), *aff'd sub nom. M.L. v. El Paso Indep. Sch. Dist*., 369 F. App'x 573 (5th Cir. 2010) (Hearing Officer may override Parent’s lack of consent “particularly [] in a case such as this one, where failure to reevaluate A.L. for more than a year has resulted in A.L. continuing to receive services he does not need but potentially depriving him of services he may need”); *Brock v. New York City Dep't of Educ*., No. 13 CIV. 8673 GBD DF, 2015 WL 1516602, at \*7 (S.D.N.Y. Mar. 31, 2015) (upholding a hearing officer's finding that without the requisite evaluations, there is no reliable way of analyzing the FAPE). *Cf. M.L.. v. El Paso Indep. Sch. Dist*., 610 F. Supp. at 599 (“Of course, Plaintiff may continue to refuse consent for a reevaluation. But then EPISD shall not be considered to be in violation of the requirement to make available a [FAPE] for A.L. Plaintiff is also not obligated to accept any disability services the IEP team determines may be necessary after such an evaluation, and Plaintiff may withdraw A.L. from all additional services. What Plaintiff may not continue to do, however, is assert that A.L. is entitled to special education services while simultaneously refusing to allow EPISD to evaluate A.L. to determine what those services may be”) (internal citations omitted). [↑](#footnote-ref-32)