

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

In re: Quin¹

BSEA #1605247

DECISION

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

A hearing was held on June 8, 2016 before Hearing Officer Amy Reichbach. Those present for all or part of the proceedings were:

Student's Mother	
Student's Grandfather	
Ildefonso Arellano	Assistant Director of Special Education, Framingham Public Schools
Shawna Graham	Teacher, Framingham Public Schools
Nancy Shor	Team Evaluation Chair, Framingham Public Schools
Laura Spear	Director of Special Education, Framingham Public Schools
Philip Benjamin, Esq.,	Attorney for Framingham Public Schools
Ellen Crowley Koltun, Esq.	Attorney for Parent
Gary O'Brien, Esq.	Attorney for Child
Kristyn Snyer McKenna, Esq.	Guardian <i>Ad Litem</i> for Child
Danielle Lubin	Intern, BSEA
Gwen O'Keefe	Intern, Metrowest Legal Services

The official record of the hearing consists of documents submitted by the Framingham Public Schools and marked as Exhibits S-1 to S-39; documents submitted by Parent and marked as Exhibits P-1 to P-28; one day of recorded oral testimony and argument; and a one volume transcript produced by a court reporter. As agreed to by the parties the record was held open until June 17, 2016 for submission of closing arguments. Closing arguments were received and the record closed on that date.²

¹ "Quin" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

² On June 9, 2016, Parent filed a Motion to Reopen the evidence to allow submission of additional telephone records. The District filed its Opposition to Parent's Motion on June 13, 2016. In a Ruling dated July 8, 2016, I denied Parent's Motion.

INTRODUCTION

The procedural history of this matter is complex. It began with the filing of a Hearing Request by Framingham Public Schools (“Framingham” or “District”) on January 11, 2016. At the time, then six-year-old Quin had been out of school since November 17, 2015. He had been receiving out-of-school tutoring two hours a day, for a total of ten hours a week, since November 30, 2015. Parent requested a ruling on the issue of stay put, which was issued orally after arguments on January 21, 2016 and a written Ruling followed on January 26, 2016. On January 22, 2016, Quin returned to his first grade full inclusion classroom at McCarthy Elementary School (“McCarthy” or “McCarthy Elementary”) in Framingham.

On February 23, 2016, Parent filed a counterclaim seeking services to compensate for Quin’s exclusion from school for thirty-four (34) days between November 17, 2015 and January 22, 2016. After the District withdrew its Hearing Request on March 18, 2016 the Parties filed Cross-Motions for Summary Judgment. In allowing Parent’s Motion in part and denying the District’s Motion, I came to several conclusions; as such, only one issue was preserved for Hearing.³ In my Summary Judgment Ruling, issued on June 6, 2016, I concluded: (1) a change in Quin’s placement had occurred when he stopped attending first grade at McCarthy Elementary (where he received 300 minutes of behavioral services, 150 minutes of reading instruction, 120 minutes of math instruction, 120 minutes of Applied Behavioral Analysis (ABA) services, and approximately 7.5 minutes of Board Certified Behavioral Analysis (BCBA) supervision per week pursuant to his last accepted IEP, as amended), and instead received ten hours per week of one to one instruction; (2) the change in placement from full inclusion to home tutoring did not occur through the Team process; and (3) the change in placement was not the result of a properly conducted disciplinary process. As I ruled, because Quin’s change from a full inclusion program to home tutoring “was not accomplished through a procedurally adequate Team or disciplinary process, for it to have been proper, it had to have been an ‘otherwise agreed upon’ change in placement.”

For the reasons below, I find that Quin’s home tutoring was not an “otherwise agreed upon” change in placement.

FINDINGS OF FACT

Quin’s Attendance at McCarthy Elementary School Before November 17, 2015

1. Quin is a seven-year-old boy who has been diagnosed with Generalized Anxiety Disorder and Attention-Deficit/Hyperactivity Disorder. (S-10; S-15) He attended kindergarten at the McCarthy Elementary School in Framingham, Massachusetts during the 2014-2015 school year. (S-7; Shor)
2. During Quin’s kindergarten year, he was found eligible for special education and an Individualized Education Program (IEP) was developed that placed him in a full inclusion

³ The Summary Judgment Ruling also addressed the issue of standing.

program. (S-8; Shor). The IEP, which was accepted by his Parent, covered the period from October 7, 2014 to October 6, 2015. (S-8; P-11)

3. Quin began first grade on this IEP at the McCarthy. (Shor; Graham)
4. Quin had a difficult transition to first grade. (S-19; S-28; P-13; Graham) He displayed disruptive behaviors, including several instances in the classroom where he was crying and clinging to furniture and/or his teacher. At times he needed to be carried out of the room. (S-19; S-28; P-13; Graham; Shor) Shawna Graham, Quin's classroom teacher,⁴ tried several different methods to address Quin's behaviors; despite her tremendous efforts, Quin's behaviors did not improve.⁵ (P-13; Graham; Shor). Ms. Graham began to feel that Quin needed more support than she was able to provide. (P-13; Graham)
5. On September 30, 2015, shortly after the beginning of the school year, Quin's IEP Team met for his annual review. Team members discussed Quin's behavior and emotional dysregulation, then wrote an IEP for the period from September 30, 2015 to September 29, 2016 that placed him in a full inclusion program at McCarthy Elementary. This IEP was accepted by Parent. (S-18; P-1; Shor; Graham)
6. On October 21, 2015, the Team reconvened to discuss Quin's escalating behaviors and an "ABA Screening" that had been conducted. (S-19; S-20; Shor; Graham). The District expressed its belief that Quin's current placement was not appropriate for him because he was not able to access his educational services effectively in the inclusion classroom at the McCarthy and recommended referral to an out-of-district program. Parent expressed her belief that Quin could succeed at the McCarthy if he were provided with additional support.⁶ Pursuant to this discussion, the Team proposed an amendment to Quin's IEP to include two hours per week of direct ABA services and thirty minutes per month of BCBA supervision, which Parent accepted on November 2, 2015. (S-20; P-20; Shor)
7. Also as a result of this meeting, Parent signed a Release Form to permit the District to explore out-of-district programs for Quin. (S-20; S-21; P-9; Shor) At this time Parent gave permission for Quin's referral packet to be sent to the ACCEPT Collaborative at the Pittaway School. ("ACCEPT") only. (Shor)
8. No other changes were made to Quin's IEP at this time. As such, as of October 21, 2015, Quin's IEP called for a full inclusion placement. Specifically, pursuant to his IEP Quin received 300 minutes of behavioral services, 150 minutes of reading instruction, 120 minutes

⁴ Shawna Graham, who testified at the Hearing, is the general educator in a first grade inclusion classroom at the McCarthy School. She is certified K through 12, has a Master's degree in literacy and language, and has been teaching at the McCarthy for twelve years. (Graham)

⁵ Ms. Graham tried implementing several different behavior systems to assist Quin in controlling his behaviors, such as a timer system, picture cues, movement breaks, earned breaks for preferred activities, a swivel seat, etc., but she found that the "current classroom accommodation[s] and supports that [she] was using were not effective, and [she] needed more support." (Graham)

⁶ Parent testified at hearing that she "wasn't being listened to" with regard to discussions involving educational decision-making on behalf of Quin. (Parent)

of math instruction, 120 minutes of ABA services and approximately 7.5 minutes of BCBA supervision per week. (P-20)

Quin's Change in Placement

9. On or about November 19, 2015,⁷ Nancy Shor, McCarthy's Team Evaluation Coordinator, called Parent to inform her that Quin had not been accepted to the ACCEPT program. (Shor)
10. On or about November 20, 2015,⁸ Ms. Shor called Parent and proposed that, given Quin's escalating behaviors in the classroom and the recent news of the ACCEPT Program's denial of his application, Quin receive home tutoring.⁹ During the phone call, which lasted no more than a few minutes, Ms. Shor told Parent that home tutoring was an "option." Ms. Shor did not expressly communicate to Parent that other options existed or that Parent had the right to reject her proposal. Ms. Shor did not explain to Parent what would happen should she reject home tutoring for Quin. (Shor; Parent)
11. During this phone call, Parent indicated to Ms. Shor that she would accept home tutoring. She did not ask any questions about the tutoring at this time. (Shor; Parent)¹⁰ Ms. Shor told Parent she would need to sign a tutoring consent form in order for tutoring to begin. She did not discuss with Parent whether Quin would return to school in the interim. Ms. Shor did not provide Parent with any of the details regarding the proposed home tutoring placement (i.e. location, hours, content, identity of tutor), as they had not yet been determined. (Shor)
12. When Parent indicated to Ms. Shor that she would accept home tutoring for Quin, she did so under the impression that she had no other choice, as she believed Quin was being suspended and that if she rejected the tutoring proposal, Quin would have no educational placement at all. At Hearing, Parent testified, "The way [Ms. Shor] phrased it was either he was going to have the tutoring or he was going to be stuck home with nothing until [they] found a[n] [out-of-district] placement." Parent felt her "hands were tied behind [her] back". (Parent)
13. Ms. Shor saw Parent on a bench outside the front office at school dismissal, presumably picking up Quin's sibling, on November 23, 2015. Ms. Shor printed out a piece of paper

⁷ By way of affidavit submitted by the District on or about April 28, 2016 and entered into evidence as School Exhibit 38, Ms. Shor testified that on November 17, 2015, she called Parent to discuss ACCEPT's denial of Quin's application, the District's desire to send additional referral packets, and tutoring. (S-38) At Hearing, she testified that the conversation about ACCEPT and additional referrals took place on November 19, 2015 and that a separate conversation regarding tutoring occurred the next day.

⁸ See note 7, *supra*.

⁹ The District initially referred to home tutoring as Quin's placement in its arguments regarding stay put, but later asserted that Quin's placement had not been changed when he began receiving home tutoring in lieu of his full inclusion program at the McCarthy. In my Ruling on Cross-Motions for Summary Judgment, dated June 6, 2016, I concluded that a change in placement had occurred.

¹⁰ Ms. Shor testified that Parent had no questions. Parent testified that upon receiving the phone call, she became so upset she began crying and had to hang up. (Shor; Parent)

(referred to as the “tutoring consent form”), showed it to Parent at a desk in the front office, and told her, “This is what it says. Here’s, you know, a box to check if you accept; here’s a box to check if you do not accept; and this is where you need to sign.”¹¹ (Shor)

14. This form, incorrectly dated “November 23, 2105,” is untitled. It is not on Framingham Public Schools letterhead. It states simply, “The Framingham Public Schools is offering [Quin] tutoring services (2 hours per day) while awaiting the identification of an out of district placement.” The form contains the name (though not the signature) of Nancy Shor, and provides two lines for parent signatures, one stating “I agree to [Quin] receiving tutoring services (2 hours per day) while awaiting an out of district placement,” and the other stating, “I do not agree to [Quin] receiving tutoring services (2 hours per day) while awaiting an out of district placement starting” (*sic*). Parent signed under the first line. (S-22; Shor) The form contained no additional information.
15. Parent, who had “little to no experience with special education,” signed the consent form, believing that “the only choice [she] had was to put Quin in tutoring.” (Parent)
16. Neither Ms. Shor nor anyone else from the McCarthy School or from the District told Parent that she had the option to return Quin to his inclusion classroom, nor did anyone tell her that if she were to agree to the tutoring, her consent was voluntary and could be revoked at any time.¹² (Shor; Parent)
17. When Parent was asked to sign the tutoring consent form on November 23, 2015, the District had not yet determined the identity of the tutor, or the location or content of the tutoring.¹³ (Shor; Parent)
18. Pursuant to her belief that Quin had been suspended, or at the least, was not welcome back at the McCarthy, Parent kept Quin home the week of November 23-25, 2015.¹⁴ No one from the McCarthy School contacted Parent find out why Quin was not in school. (Shor; Parent)
19. McCarthy Elementary stopped taking attendance for Quin after November 17, 2015, yet Ms. Shor did not call Parent to propose tutoring until November 20, 2015, and Quin’s tutoring program did not begin until November 30, 2015. (S-27) When asked directly about

¹¹ Ms. Shor testified that prior to November 23, 2015, presumably after she spoke with Parent on November 20, 2015, a piece of paper (referred to as the tutoring consent form) was sent home in Quin’s sibling’s backpack. Ms. Shor had not received the signed form back yet when she saw Parent on a bench outside the front office at school dismissal on November 23, 2015.

¹² Asked at Hearing whether she told Parent that consenting to the tutoring option, was voluntary, Ms. Shor responded “I didn’t use the words ‘completely voluntary’ . . . I think ‘option’ in my mind means that you have a choice.” (Shor)

¹³ Ms. Shor testified that as of November 23, 2015, all the District knew was that the tutor, whoever it would be, would consult with Quin’s classroom teacher for the educational materials. Confusion existed about whether the tutoring would take place at Quin’s home, the Boys and Girls Club, or McCarthy Elementary. (Shor; Parent)

¹⁴ The school week was shortened due to the Thanksgiving Holiday.

this anomaly at Hearing, no one from Framingham Public Schools was able to offer an explanation as to why Quin's attendance was not recorded.¹⁵ (Arellano; Shor)

20. On November 30, 2015, Quin began receiving home tutoring for two hours a day, five days a week, after school hours.¹⁶ (Shor; Parent) Quin's tutoring was provided by McCarthy Elementary School behavior interventionist Ron Johnson. (Shor; Parent) Mr. Johnson does not have a teaching degree, nor does he have ABA training. Before he became the school's behavior interventionist, Mr. Johnson taught his own behavior class for six years, then worked as a teaching assistant. (Shor) Mr. Johnson consulted with Quin's classroom teacher, Ms. Graham, and his special educator, Ms. Gloski, to choose materials for Quin. (S-28, ¶¶20, 21; Shor; Graham; Parent)
21. On December 1, 2015, Quin's grandfather left a message for Ildefonso Arellano, Framingham Public Schools Assistant Director of Special Education, requesting a call back to discuss Quin and the issues going on at McCarthy. (Arellano)
22. On December 2, 2015, prior to obtaining legal counsel, Parent called Mr. Arellano and left a message stating that she wanted Quin transferred to Woodrow Wilson Elementary School, which she believed offered a "two-teacher model" inclusion program. (Parent; Arellano) When Mr. Arellano returned Parent's phone call the next day, Parent was crying and upset. She stated that she wanted Quin "out of McCarthy" and at Woodrow Wilson. At Hearing, Parent testified that what she meant by this was that she did not want her son to return to McCarthy just to "be a target." (Parent)
23. During their conversation on December 3, 2015, Mr. Arellano informed Parent and Quin's grandfather that Woodrow Wilson¹⁷ would not be an appropriate placement for Quin, "because of the . . . placement that had been recommended by the Team." Parent and grandfather told Mr. Arellano that they were dissatisfied with the out-of-district programs recommended by the Team. Mr. Arellano determined it would be appropriate to reconvene the Team. (Arellano)
24. An email exchange took place between Counsel for the Parent and Counsel for the District regarding Quin's status on December 4, 2015. Counsel for Parent emailed Counsel for the District noting that Quin was not in school "for reasons that are troubling." She requested that the District send a referral packet to TEC Collaborative. Counsel for the District responded that Quin was not in school as he was receiving "tutoring services, with parental consent, pending [out-of-district] placement." Upon receiving this information, Counsel for Parent asked whether Quin was suspended. Counsel for the District answered that it was "[his] understanding that he [was] not suspended. Rather he is on home tutoring, either at parent request or with parent consent." (P-4).

¹⁵ Ms. Shor testified that she does not know why the school stopped taking Quin's attendance, and stated that she "cannot answer for what [the] secretaries chose to do." (Shor)

¹⁶ The tutoring started at the Boys and Girls club, but was moved to the McCarthy school after Parent expressed concerns about transportation at a Team meeting on December 9, 2015.

¹⁷ During their conversation on December 3, 2015, Mr. Arellano informed Parent that the "two-teacher" inclusion model at Woodrow Wilson no longer existed. (Arellano)

December Team Meeting

25. On December 9, 2015, the Team convened to explore assessment and out-of-district placements. (S-25; Shor; Arellano; Parent) The meeting lasted approximately thirty (30) minutes, ending early as Parent became very emotional and upset. (Parent; Arellano) Parent confronted Ms. Shor about whether Quin was allowed back in school. (Shor; Parent) Ms. Shor did not expressly communicate to Parent at that time that Quin could return to school.¹⁸ (Shor; Parent) Parent became upset and called Ms. Shor a liar, which Ms. Shor testified she believed was in reference to Parent's feeling that she had been told Quin could not come back to school. (Shor)
26. During this Team meeting, Parent requested that Quin attend a full inclusion program with emotional/behavioral supports at Stapleton Elementary School in Framingham. (Parent; Shor; Arellano) Parent was told that Stapleton was not an appropriate placement for Quin, "with no explanation [as to] why."¹⁹ (Parent)
27. During the meeting, Parent expressed concerns about the location and timing of tutoring, including the cost of transportation. (Shor)
28. At no point during this meeting did Parent explicitly express that she wanted Quin to continue to receive tutoring. (Shor; Arellano; Parent)
29. At no point during this meeting, or at any time before the meeting, did the District explicitly express that it would allow Quin back at the McCarthy School. (Shor; Arellano; Parent)
30. At no point during this meeting, or at any time before the meeting, was Parent informed that the tutoring arrangement was completely voluntary or that she could revoke it at any time. (Shor)

District Refuses Request of Parent, Through Counsel, to Return Quin to School

31. On January 7, 2016, Parent invoked her right to stay put, through Counsel, who told Counsel for the District that she "spoke with Parent. She wants [Quin] to go back to McCarthy on Monday, she says tutoring is not better for the child and his tutoring is not by a special educator, and she wants him in school so he can have access to academic subjects. She suggests that the District assign him a 1:1 aid (*sic*)." (P-8; S-31).
32. On January 8, 2016, the District, through Counsel, denied Quin entry back into the McCarthy School, stating that "appropriate services are not available for the Student at McCarthy so he should not return there. Framingham continues to offer the tutoring.

¹⁸ Parent testified that during this meeting, she demanded that Quin be returned to school. On cross-examination, Ms. Shor testified that she recalled Parent asking that Quin be permitted to attend the Stapleton School, but did not remember whether Parent had demanded that Quin be returned to the McCarthy. (Parent; Shor)

¹⁹ Parent had originally rejected the option for Quin to attend the Stapleton School at the September Team meeting, but changed her mind in response to Quin's change in placement to out-of-school tutoring.

Framingham continues to offer placement in any of the out of district programs to which he has been accepted. Framingham continues to be open to exploring other programs. . .” (P-8).

33. In response to Counsel for Parent’s letter invoking Quin’s right to stay put, the District’s Counsel responded that “[Parent’s] request ignores the reality of the situation. When the Student was in the inclusion classroom his anxiety and behaviors substantially interfered with his ability to access education. The student is receiving more education services through the tutoring than he was receiving when he was in school in the inclusion classroom at McCarthy.” (S-32)
34. Quin was not permitted to return to school until January 22, 2016,²⁰ the day after the Pre-Hearing Conference at which the undersigned Hearing Officer issued a Stay Put Ruling ordering Framingham to allow Quin to return to school immediately.²¹ (Stay Put Ruling)
35. At no point in time between November 17, 2015 and January 22, 2016, did any Framingham Public Schools employee tell Parent that Quin could return to school. (Shor) At no time during this period was Quin invited to the school for school functions. Quin himself believed that he had been kicked out of school and was not welcome there. (Parent)

DISCUSSION

A. The Parties’ Positions

Parent asserts that the District failed to provide her with the procedural safeguards required to obtain meaningful consent to a change in Quin’s placement, even on an interim basis, and as such she felt she had no choice but to accept ten hours of tutoring a week if she did not want her son at home without services for an unspecified period of time. According to Parent, this was the impression she gathered from a brief phone call with Ms. Shor and a tutoring form that gave her only two options, to accept or reject an offer of tutoring; it did not contain an option to have Quin continue attending McCarthy Elementary, and she was unaware of any right she may have had to send Quin to school even after she was provided with the form. She emphasizes that no one from the District informed her at any point that she had the right to send Quin to school rather than accept or refuse to continue the tutoring, even after she explicitly requested during the December Team meeting that he return to school.

The District contends that the evidence taken as a whole, in combination with the circumstances of the school year to that point, demonstrates that it reached an agreement with Parent that Quin would receive tutoring services while the parties searched for an out-of-district placement for him, and that this agreement remained in effect until Parent changed her mind in

²⁰ At no point in time, from November 20, 2015 to January 22, 2016, did any Framingham Public School employee tell Parent that Quin could return the school. (Shor)

²¹ The District added an ABA-trained, certified special education teacher to Quin’s classroom upon his return to the McCarthy. She was available to all students, but spent most of her time with Quin. (Graham)

January and demanded stay put.²² Framingham points to Parent’s signature on release forms permitting the District to send referral packets to potential out of District placements for Quin as evidence that she agreed with the District that his full inclusion placement at McCarthy Elementary was not working for Quin, and asserts that her signature on a tutoring form demonstrates that the parties had reached an agreement for tutoring for Quin while the District conducted a search for an out of district placement. Moreover it argues that Parent’s failure to object to tutoring or demand that Quin return to the McCarthy before early January 2016 is a “telling and significant fact that confirms there was an agreement.”²³

B. Backdrop: FAPE, LRE, Parental Participation and the Right to Stay Put

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).²⁴ FAPE is delivered primarily through a child’s individualized education program (IEP).²⁵ An IEP must be tailored to address each student’s unique needs that result from his or her disability.²⁶ The IEP must be “reasonably calculated to confer a meaningful educational benefit.”²⁷

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.”²⁸ 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.”²⁹ “The goal, then, is to find the least restrictive educational environment that will accommodate the child’s legitimate needs.”³⁰ Removing a child from the mainstream setting is permissible when “any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting . . .”³¹

Furthermore, when a school district proposes a change in placement for a student receiving special education pursuant to an accepted IEP but the parent does not agree to that change, the IDEA prevents the school district from initiating the change absent parental consent. Commonly known as the “stay put” provision, 20 USC § 1415(j) provides, *inter alia*, that

²² In its Closing Argument, the District appears to ask me to infer from Parent’s presentation at the Hearing and the testimony of witnesses about her emotionality and apparent anger stemming from the events concerning her son that Parent is not in fact trying to obtain compensatory services for Quin but instead “seeking validation of her perception of being victimized by Framingham. “ Although it is clear that the relationship between Parent and Framingham Public Schools is strained, I decline – particularly in the highly-charged environment of a BSEA proceeding – to draw the requested inference.

²³ District’s Closing Argument.

²⁴ 20 U.S.C. § 1400(d)(1)(A).

²⁵ *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012).

²⁶ See *Bd. of Educ. of 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”).

²⁷ *Sebastian M. v. King Philip Reg’l Sch. Dist.*, 685 F.3d 84, 84 (1st Cir. 2012).

²⁸ 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).

²⁹ 20 U.S.C. § 1412(a)(5)(A).

³⁰ *C.G. ex rel. A.S. v. Five Town Comty. Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2008).

³¹ *Pachl v. Seagren*, 453 F.3d 1064, 1068 (8th Cir. 2006) (internal citation omitted).

“during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents agree, the child shall remain in the then-current educational placement.” In enacting this provision, “Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school.”³² Even so, Congress recognized that barring schools from changing a student’s placement over his parent’s objection meant that the parties would have to engage in review proceedings that could be “long and tedious” before reaching resolution.³³ The IDEA’s drafters “did not intend [stay put] to operate inflexibly;” in order to balance the interests at stake, “they . . . allowed for interim placements where parents and school officials are able to agree on one.”³⁴ Massachusetts law describes stay put as follows: “[i]n accordance with state and federal law, during the pendency of any dispute regarding placement or services, the eligible student shall remain in his or her then current education program and placement unless the parents and the school district agree otherwise.”³⁵ For ease of reference, I use the terms “otherwise agreed upon” change in placement or “agreement otherwise” as shorthand for an interim placement to which both parent and school district agree, which is not enacted through an amendment to or rewriting of an IEP.

As the party challenging the status quo in this matter, Parent bears the burden of proof.³⁶ As such, to prevail, she must prove – by a preponderance of the evidence – that the District’s change in Quin’s placement was not accomplished properly.³⁷

C. “Otherwise Agreed Upon” Change in Placement

Although the language of the IDEA allows for an interim change in a student’s then-current educational placement outside of the IEP or disciplinary processes, it permits such a change only “where parents and school officials are able to agree on one.”³⁸ In requiring a parent’s agreement before a student’s placement is changed even temporarily, this provision is consistent with the IDEA’s emphasis on parental involvement.³⁹ Neither state nor federal law, however, defines the term “otherwise agreed upon” for purposes of a change in placement.

In determining the meaning of “otherwise agreed upon,” I bear in mind that these interim placements occur outside of the Team process, such that an “agreement otherwise” in essence constitutes a waiver of the many procedural protections inherent in that process. Under Massachusetts law, “[w]aiver has often been defined as the voluntary relinquishment of a known

³² *Honig v. Doe*, 484 U.S. 305, 323 (1998).

³³ *Id.* at 324.

³⁴ *Id.* at 324-25 (commenting on remarks of Sen. Stafford, *see* 121 Cong. Rec. 37412 (1975)).

³⁵ 603 CMR 28.08(7).

³⁶ *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2008).

³⁷ *See id.*

³⁸ *Honig*, 484 U.S. at 324-25.

³⁹ *See, e.g., Rowley*, 458 U.S. at 205-06 (“It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard”); *Doug C. v. Hawaii Dep’t of Educ.*, 720 F.3d 1038, 1040 (9th Cir. 2013) (“Parental participation in the IEP and educational placement process is central to the IDEA’s goal of protecting disabled students’ rights and providing each disabled student with a FAPE”).

right.”⁴⁰ At least one Circuit Court of Appeals has concluded, in the context of a settlement agreement between a parent and a school district, that waiver of rights under the IDEA and state special education law must be voluntary and knowing.⁴¹ Hearing Officer William Crane applied this standard in determining whether parents had waived IDEA rights when they entered into a mediation agreement with a school district, finding that “for the mediation agreement to have effectively waived Parents’ rights . . . , the language in the agreement must, at a minimum, have been sufficiently clear and specific so that Parents would have known what they were giving up by entering into the agreement.”⁴²

An “otherwise agreed upon” change in placement, however, is often the result of a process less formal than settlement or mediation, and often occurs in the absence of lawyers trained in the language of waivers and contract law.⁴³ With this in mind, I turn to federal and state definitions of “consent” for purposes of the IDEA and state special education law, which aim for “full participation of concerned parties throughout the development of the IEP.”⁴⁴ In this context, federal regulations define consent to mean that:

- (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or through another mode of communication;
- (b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and
- (c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.⁴⁵

⁴⁰ *Samuel v. Page-Storms Drop Forge Co.*, 243 Mass. 133, 136 (1922); see *Merrimack Mut. Fire Ins. Co. v. Nonaka*, 414 Mass. 187, 189 (1993).

⁴¹ See *W.B. ex rel. E.J. v. Matula*, 67 F.3d 484, 498 (3rd Cir. 1995) (abrogated on other grounds by *A.W. v. Jersey City Pub.Sch.*, 486 F.3d 791 (3rd Cir. 2007)). A central holding in *Matula*, that an action under § 1983 is available to remedy alleged violations of IDEA-created rights, has since been overturned by *Jersey City Public Schools*, but in the latter case the Third Circuit did not revisit the applicability of the former’s standard by which to measure a waiver of rights. In the alternative, the validity of a waiver in the context of a settlement agreement would turn on “the intent of the parties as manifested in the language of the agreement.” *Matula*, 67 F.3d at 497.

⁴² *In Re Wayland Sch. Dist.*, BSEA #1403324 (Crane 2014)

⁴³ Were I inclined to evaluate whether an “otherwise agreed upon” change in placement had occurred through the lens of contract law, I would look to state law, *cf. Gates Corp. v. Bando Chem. Indus., Ltd.*, 4 Fed.Appx. 676, 682 (10th Cir. 2001) (“Issues involving the formation and construction of a purported settlement agreement are resolved by applying state contract law even when there are federal causes of action in the underlying litigation”), under which an enforceable agreement requires mutual assent to its material terms. See *Situation Mgmt. Sys., Inc. v. Malouf, Inc.*, 430 Mass. 875, 878 (2000) (“It is axiomatic that to create an enforceable contract, there must be agreement between the parties on the material terms of that contract, and the parties must have a present intention to be bound by that agreement”); *Constantino v. Frechette*, 73 Mass. App. Ct. 351, 356 (2008) (“A binding contract requires mutual assent to all essential provisions”).

⁴⁴ *Rowley*, 458 U.S. at 206.

⁴⁵ 34 CFR § 300.9. Massachusetts law defines consent to mean “agreement by a parent who has been fully informed of all information relevant to the activity for which consent is sought, in his/her native language or other mode of communication, understands and agrees in writing to the carrying out of the activity, and understands that the granting of consent is voluntary and may be revoked at any time. The consent describes the activity and lists the records (if any) that will be released and to whom.” 603 CMR 28.02(4).

Whether viewed through the lens of contract law or IDEA consent, an “otherwise agreed upon” change in placement requires that a parent be an informed, voluntary participant in the decision to change her child’s placement. If a school district fails to obtain a parent’s informed, voluntary consent to an interim change in placement, it is not an “otherwise agreed upon” change in placement pursuant to the IDEA. This standard accommodates both the IDEA’s emphasis on procedural safeguards⁴⁶ and the need for flexibility recognized by Congress.⁴⁷

D. Quin’s Home Tutoring Did Not Constitute An “Otherwise Agreed Upon” Change in Placement

To determine whether, as the District asserts, Quin’s home tutoring constituted an “otherwise agreed upon” change in placement, I must ascertain whether Parent in fact agreed to the District’s proposal that Quin receive home tutoring in lieu of the full inclusion program to which he was entitled under his IEP. As I have concluded that an “agreement otherwise” requires parental consent, I apply the three-pronged standard for consent elucidated in Part C, above, to the evidence before me.⁴⁸

1. *Parent was not fully informed of all information relevant to the activity for which her consent was sought.*

The context in which the District proposed home tutoring for Quin suggests that important information was lacking, including the consequences of refusing the District’s proposal. Home tutoring was proposed to Parent by Ms. Shor during a phone call that lasted for a few minutes. Parent did not know beforehand that she would be asked to consent to tutoring for Quin. Following this phone call, the District then provided Parent with a tutoring consent form that contained little information. The form stated that the District was offering Quin two hours a day of tutoring services while awaiting the identification of an out-of-district placement. There was no start or end point for the tutoring, and Parent had not been presented with IEP that provided for an out-of-district placement. The form contained two places for her signature: she could sign “I consent to tutoring,” or “I do not consent to tutoring.” Parent believed that if she did not consent to tutoring, Quin would receive no services; she was not informed during the phone call, by way of the tutoring consent form, or at any meeting subsequent to the commencement of tutoring that she had any other options.

When Ms. Shor requested that Parent consent to tutoring, she did not explain that this was only one of several options. Parent could have continued to send Quin to his full inclusion placement at the McCarthy and asked for additional referral packets to be sent, for example, or she could have requested that the Team reconvene to discuss interim measures to assist Quin in accessing his education at school while awaiting the identification of an out-of-district placement. No one from the District told Parent explicitly that Quin could not return to school,

⁴⁶ See *Rowley*, 458 U.S. at 205 (“When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid”).

⁴⁷ See *Honig*, 484 U.S. at 324-25.

⁴⁸ Although Parent’s signature appears on the tutoring form, satisfying part of prong (b), due to the District’s failure to satisfy prongs (a) and (c) of 34 CFR § 300.9, I need not determine whether the remainder of (b) has been satisfied.

but no one told her that he could. This omission could have been remedied had Ms. Shor, or anyone from the District, informed Parent that she had available to her a range of options, including home tutoring. Instead, in the context of the previous relationship among the parties, which included the District's expressed belief that Quin's current placement was no longer appropriate for him and its explanation that it was proposing home tutoring because Quin could not access his education due to his "escalating behaviors," Parent believed that Quin was being removed from school on the basis of his behavior. Although no one from the District ever expressly told Parent that Quin was being suspended or removed for behavioral reasons, no one from the District ever said anything to negate Parent's belief that this was the case.

Given the brevity of the conversation in which the District proposed home tutoring, the lack of detail in the tutoring consent form Parent was asked to sign, the fact that many of the details of the tutoring arrangement had not been established at the time Parent was asked to consent to it, and the overall context, which failed to communicate to Parent that home tutoring was one of several options, I find that the District did not fully inform Parent of all information relevant to the activity for which her consent was sought.

2. *Parent did not understand that granting of consent was voluntary and could be revoked at any time.*

The IDEA requires prior written notice whenever a school district proposes to initiate or change a student's educational placement, program or services.⁴⁹ In addition to a statement that parents have protection under procedural safeguards, such prior written notice must include, among other things, a description of the action proposed or refused; an explanation of why it is being proposed or refused; and a description of any other options the district considered and why it rejected those options.⁵⁰ These procedural safeguards aim to inform parents of both the range of options a school district has considered in addition to the one proposed by the Team, and the fact that they have the ability to both disagree with the action proposed by the District, and to refuse to accept it. Although an "agreement otherwise" is intended to operate flexibly and thus may not require strict adherence to all of these procedural safeguards this flexibility must be balanced against the purpose of the safeguards, which ensures that parents are active participants in the crafting of, and changes to, their children's educational programs. The burden to ensure that a parent is part of the process falls upon districts, as all of the safeguards impose obligations on school districts rather than on parents. As such, it was Framingham's obligation to ensure that Parent understood that she had other options, and could have refused to consent to Quin's change in placement.

In this case, Parent was never informed that she could opt to have Quin continue to attend the McCarthy, rather than receive home tutoring, while the District searched for an out-of-district placement for him, nor was she informed that if she consented to tutoring at one point, she could change her mind. Believing, as she did, that her choices were between keeping Quin at home where he would receive no educational program and allowing him to receive tutoring, she chose the latter. That Parent kept Quin home after the phone call on November 20, 2015, in the context of ongoing discussions in which the District expressed its concern regarding Quin's escalating

⁴⁹ 20 U.S.C. 1415(b)(3).

⁵⁰ 20 U.S.C. 1415(c).

behaviors and its belief that his full inclusion placement was not appropriate for him, suggests that Parent believed Quin was not permitted to return to school. When she accepted the District's proposal for tutoring, she "felt like [her] hands were tied."

Furthermore, the District did nothing to counter Parent's belief that Quin was being removed from school, and that she had no option but tutoring for him to receive any services. Ms. Shor did not expressly state to Parent during the November 20th phone call that Quin could return to school. The tutoring form did not contain this option. In fact, the District never informed Parent that she was able to send Quin to school until after the Stay Put Ruling was issued. Had the District explained to Parent that she had the ability to maintain Quin's then-current educational placement in a full inclusion program while the District searched for an out-of-district placement, her choice to have him receive tutoring instead would have been voluntary.

Moreover, it was not just the District's failure to expressly inform Parent of her options that led her to believe she had no meaningful choice regarding tutoring. Up until Parent received Ms. Shor's phone call and the tutoring consent form, she had been given prior written notice, invited to a Team meeting to discuss options, provided with a written IEP and given thirty days to respond to the IEP, whenever the District proposed to act with regard to Quin's educational program. Here, Ms. Shor called Parent in the middle of the day, with no prior notice, to tell her that the District recommended tutoring for Quin. As such, it appeared to Parent that the District had made this decision already, completely excluding her from the process.

Parent's behavior at the Team meeting on December 9, 2015 made clear to the District that she did not believe she had the choice to reject tutoring and insist that Quin be returned to school. Parent expressed concern with the details of the tutoring arrangement and became upset and frustrated to the point where she was in tears. Parent asked if Quin could be placed at another District school, Stapleton Elementary, after having asked for placement at Woodrow Wilson earlier in the month. The District did not inform her at that time that to the extent she may have agreed to tutoring initially, which Ms. Shor believed she had done, Parent had the right to change her mind and send Quin back to school. Even when Parent's attorney explicitly invoked her right to stay put, she was informed that Parent had consented to tutoring. At that time, the District made no mention of Parent's ability to revoke her consent. As such, Parent did not understand that the granting of her consent was voluntary and could be revoked at any time.

Because Parent was not fully informed of all information relevant to the activity for which her consent was sought, and because she did not understand that granting of consent was voluntary and could be revoked at any time, she did not consent to an "otherwise agreed upon" change in placement.

CONCLUSION

For the reasons above, I find that Parent has met her burden to prove that Quin's removal from a full inclusion program at the McCarthy Elementary School to home tutoring was not an "otherwise agreed upon" change in placement. As this change in placement was not

accomplished properly, Quin is entitled to compensatory services for the thirty-four school days he received home tutoring rather than the program and services to which his IEP entitled him.

ORDER

Quin's Team is hereby directed to convene to determine the manner in which Framingham Public Schools will deliver the services it owes to Quin.⁵¹

By the Hearing Officer:⁵²

Amy M. Reichbach
Dated: July 22, 2016

⁵¹ Because no testimony was offered as to the content of the tutoring Quin received for ten hours per week, I leave it to his Team to determine the nature of the ABA, behavioral and academic services he is owed.

⁵² The Hearing Officer gratefully acknowledges the diligent assistance of legal intern Danielle Lubin in the preparation of this Decision.