

**COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS**

Student v. Framingham Public Schools

BSEA # 2101266

**Ruling on Framingham Public Schools' Motion to Dismiss/
Motion for Summary Judgment**

Procedural History

Parents filed an Amended Hearing Request on October 19, 2020. Framingham filed its Motion to Dismiss and/or Motion for Summary Judgment and accompanying exhibits on November 2, 2020. Parents filed their response to the Motion on November 18, 2020, which included a request for an extension of time to respond to Framingham's Motion for Summary Judgment and request for a Hearing on the Motions. The Hearing Officer allowed the Parents' request for an extension and set a deadline for them to file their response by December 11, 2020. Parents' response was received on December 11, 2020. There was a telephonic hearing on Framingham's Motion to Dismiss/Motion for Summary Judgment on December 16, 2020.

Relevant Facts¹

Student is a fifteen-year-old ninth grade student and has resided within the Framingham Public School District, (hereinafter, Framingham) at all relevant times. He currently attends Joseph P. Keefe Technical High School in Framingham. (See Amended Hearing Request (AMH) ¶ 1) Student's eligibility for special education services is not in dispute. His last accepted IEP (prior to the IEP for the 2020-2021 school year) was for the time period from March 16, 2016 through March 15, 2017, Student's fifth grade. (Framingham's Statement of Facts, A-4.) The last accepted IEP (in effect for the relevant time period) identified Student's primary disability as Communication and secondary disability as Specific Learning Disability. It noted Student's delays in expressive and receptive language. It described how "his difficulty with social language skills along with his difficulty in reading and writing impact his ability to successfully demonstrate knowledge of learned skills and interact with peers and adults through his day." It further noted that, "His language-based and executive functioning difficulties impact his ability to organize his ideas in writing and to comprehend texts without the use of interventions." (S-2) His last accepted placement within Framingham was in a substantially separate classroom. (S-2)

Parents privately placed Student at a parochial day school, the Metro West Jewish Day School, (hereinafter, MWJDS) for his sixth, seventh, and eighth grades (2017-18, 2018-19, and 2019-20) MWJDS is not approved by the state as a school for the delivery of special education services. It is not a school specifically designed for students with language-based learning disabilities. (S-18) Pursuant to a settlement agreement entered

¹ The facts are established for purposes of this Ruling only.

during the 2018-2019 school year, Framingham and Parents resolved their dispute regarding Student's second year at MWJDS, his seventh grade. (S-1, ¶ 31)

Student's three-year reevaluation was conducted in the spring of 2019. On or around May 8, 2019, Student's Team met to review the evaluations. During the three hour and fifteen minute meeting, an IEP was written for the time period from May 8, 2019 – May 17, 2020. (S-3) On August 29, 2019, Framingham received Parents' rejection of the IEP and placement along with comments about and requests for changes to the IEP. Parents also sent a letter to Laura Spear, Director of Special Education, Framingham Public Schools, dated August 13, 2019 and received by Framingham on August 29, 2019. The letter explained Parents' reasons for rejecting the IEP and requested that Framingham extend the settlement agreement it had entered during the prior school year to the next school year. (S-4)

The Team reconvened on September 11, 2019, to discuss the rejected portions of the IEP. The meeting lasted for one hour and twenty-three minutes. Framingham issued a revised IEP after the meeting. (S-7) On November 12, 2019, Parents sent Framingham a letter rejecting the revised IEP and giving notice of Student's unilateral placement for the 2019-20 school year at MWJDS. They also accepted the district's offer for compensatory services for "failure to provide ESY support in July 2019²." (S-7) In a letter dated December 16, 2019, Parents again referenced their acceptance of Framingham's offer of 57 hours of compensatory services and suggested it would be beneficial to resolve the placement dispute along with the compensatory services without litigation. (S-9)

In a January 2, 2020 email, Ms. Spears stated that the compensatory hours were available and Framingham would work with MWJDS to determine the best way to provide the services to Student. She also indicated Framingham's willingness to provide the hours for reading. She stated that Framingham would move forward with the hours once Mother confirmed that she wanted them to move forward. (S-10) In a January 7, 2020 email from Mother to Ms. Spears, Mother stated she will "hold off on deciding about the 57 compensatory tutoring hours still owed to [Student], until I consult with our attorney ... Perhaps you will reconsider our settlement request before we head down this path." (S-12) On January 27, 2020, the Team convened to discuss the Transition Assessment completed by ACCEPT Collaborative. The meeting was over two hours and resulted in the issuance of revised IEP. (S-12)

On April 11, 2020, Mother emailed Framingham's Team Evaluation Coordinator (TEC) asserting Student's right to "stay put" services and requesting "remote support for his services according to his originally proposed IEP." The TEC responded and provided Mother with information about Framingham's remote learning program, stating that Student was welcome to participate and requesting Student's email address that could be provided to teachers to enable Student's participation. (S-20) Parents did not provide

² Parents suggested that instead of receiving 57 hours of the proposed tutoring service, some of the hours be provided as reading support services. (S-7)

Student's email address and Student did not access the on-line services. (Framingham's Motion to Dismiss/for Summary Judgment, pg. 19)

On June 3, 2020, the Team held an Annual Review and Transition meeting. It lasted for approximately one and a half hours and resulted in an IEP written for the period from June 3, 2020 to June 2, 2021. (S-14) At the end of the June 3 meeting Mother stated that she did not believe that her concerns and proposals were adequately addressed. Framingham offered to schedule a reconvene of the Team meeting to further address her concerns. An additional meeting was scheduled for June 15, 2020. Mother requested that Framingham send her the IEP from the June 3, 2020 meeting prior to the June 15, 2020 reconvene meeting so she could review what had been drafted at that point. Framingham sent Parents a copy of what had been drafted prior to the reconvene meeting marked with the word "DRAFT." (S-14, S-15) The Team reconvened on June 15, 2020 to discuss Parents' concerns. Parents did not attend the meeting. (S-15) After the June 15, 2020 meeting Framingham mailed Parents the proposed IEP for the period from June 3, 2020 to June 2, 2021. They accepted the IEP services in full³ and rejected the placement. Parents attached a letter stating that they expected services to begin without delay. (S-16)

A letter dated September 25, 2020 from Laura Spear, confirmed that Framingham owed Student the following compensatory services: 57 hours of academic tutoring support for the 2019 Extended School Year (ESY) and 6 hours of speech and language services for the 2020 ESY. Framingham indicated its readiness to proceed with scheduling the services upon Parents' confirmation. (S-17)

Legal Standards

Pursuant to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3) and Rule XVI(B)(4) of the *BSEA Hearing Rules for Special Education Appeals*, a hearing officer may allow a motion to dismiss if the party requesting the appeal fails to state a claim on which relief can be granted. This rule is analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure and as such hearing officers have generally used the same standard as the courts in deciding motions to dismiss for failure to state a claim. Specifically, what is required to survive a motion to dismiss "are factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief."⁴ In evaluating the hearing request, the hearing officer must take as true "the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor."⁵ These "[f]actual allegations must be enough to raise a right to relief

³ In the response section Mother stated that she temporarily accepted the IEP as developed, "so as not to delay or deny services, but reject that is adequate for [Student]'s needs for the fall." She indicated that she would be rejecting other aspects of the IEP. (S-16)

⁴ See *Iannocchino v. Ford Motor Co.*, 451 Mass. At 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

⁵ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995)

above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . . .”⁶

Pursuant to 801 CMR 1.01(7)(h), Summary Decision may be granted when there is “no genuine issue of fact relating to all or part of a claim or defense and [the moving party] is entitled to prevail as a matter of law.” This rule of administrative practice is modeled after Rule 56 – Summary Judgment – of both the Massachusetts and Federal Rules of Civil Procedure. The party seeking summary judgment bears the burden of proof, and all evidence and inferences must be viewed in the light most favorable to the party opposing summary judgment. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252 (1986).

“If, on any motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” Rule 12(b) of the Federal Rules of Civil Procedure.

In this case, Framingham submitted its Motion to Dismiss/Motion for Summary Judgment along with exhibits marked S-1 through S-23 on November 2, 2020. Parents had been previously granted a deadline to provide their response to Framingham’s Motion by November 18, 2020. Parents submitted their response to Framingham’s Motion on November 18, 2020, along with exhibits marked P-1 through P-3. Within their response, they requested an extension to file additional evidence to support their case. Parents were allowed until December 11, 2020 to submit additional evidence (having received Framingham’s Motion on November 2, 2020). On December 11, 2020, Parents filed their supplemental response to Framingham’s Motion to Dismiss/Summary Judgment along with exhibits marked P-4 through P-10. Both Parties provided oral argument on December 16, 2020.

Analysis

Scope of the Hearing

As a preliminary matter, the Parties sought clarification of the scope of the Hearing via their Motions. Framingham notes that the Parties resolved their claims for the 2018-2019 school year. Parents’ Hearing Request states that Parents and the district reached a settlement agreement for Student’s seventh grade (which was the 2018-2019 school year.) (S-1, ¶ 31.) Additionally, Parents’ Hearing Request seeks no relief with respect to any claims arising from the 2018-2019 school year. (See Parents’ Amended Hearing Request.) On November 25, 2020, Parents made a “Motion for an Order to submit Settlement Agreement between Parents and Framingham.” Framingham opposed the

⁶ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

motion, arguing that the Settlement Agreement was irrelevant because the Parties agreed that it resolved issues for the 2018-2019 school year and Parents did not seek to raise issues for that year.

I find no basis for ordering the production of the Settlement Agreement as the Parties agree that they have settled claims for the 2018-2019 school year and Parents do not seek relief for that school year. Therefore, the 2018-2019 school year will not be an issue for the Hearing. However, Parents will not be precluded from referring to the Team meeting which occurred on May 8, 2019 with respect to their claims regarding placement for the 2019-2020 school year.

Parents initially included the 2020-2021 school year in their request for Hearing. However, as noted by Framingham, Parents accepted the 2020-2021 IEP. Additionally, Student has been enrolled in the Joseph P. Keefe Technical High School. Parents' Amended Hearing Request, filed on October 19, 2020, does not include any issues pertaining to the 2020-2021 school year. Thus, the 2020-2021 school year is not within the scope of this BSEA Hearing.

Compensatory Services

Summer 2019

The undisputed facts show the following. The IEP proposed by Framingham for the period from May 8, 2019 through May 7, 2020 did not include extended school year (ESY) services for the summer of 2019. Framingham did not provide Student services during the summer of 2019. Parents rejected that IEP by letter dated August 29, 2019. Parents notified Framingham in the fall of 2019 that Student should have received services. Framingham, via the team evaluation coordinator (TEC) acknowledged that it owed Student 57 hours (nineteen days of three hours of tutoring.) The TEC proposed a means of delivering the services whereby MWJDS's outside provider could deliver the services and bill back to Framingham, and asked Mother to confirm that she wanted to move forward with it. Mother responded that she would get back to the TEC. (S-6) Parents' November 12, 2019 letter to Laura Spear states that Parents accept Framingham's offer to provide 57 hours of tutoring. (S-7) Parents' November 13, 2019 email states that she wants to discuss compensatory services as part of a settlement of the placement dispute. (S-8) Parents' December 16, 2019 letter to Ms. Spear states that they believe it would be beneficial to the parties to resolve their dispute over placement and the compensatory hours without litigation and reiterated their request that Framingham reimburse them for the 2019-2020 school year at MWJDS. In a January 2, 2020 email, Ms. Spear informed Parents that Framingham was not in favor of repeating their settlement agreement with respect to funding MWJDS for the 2019-2020 school year, but would like to move forward with the provision of the owed compensatory services. (S-10) In her January 7, 2020 email to Ms. Spear, Mother states that she will "hold off on deciding about the 57 compensatory tutoring hours still owed to [Student], until I consult with our attorney ... regarding legal proceedings. Perhaps you will reconsider our

settlement request, before we head down that path.” (S-11) Ms. Spear emailed Parents on March 2, 2020, stating, “We have been trying to provide the compensatory ESY hours since the Fall and at any point, I can reach out to the MWJDS to arrange those services but I am concerned that we have less than four months remaining in the school year but you have wanted us to hold off on doing so.” (S-13) On September 25, 2020 Ms. Spear sent Parents a letter re-confirming that Framingham owed Student 57 hours of academic tutoring support for the 2019 ESY services. It stated that Framingham is prepared to proceed with scheduling the compensatory services and would identify appropriate Framingham staff to deliver the services upon Parents’ confirmation.⁷ (S-17)

The overwhelming and undisputed evidence submitted by the Parties shows that Framingham has acknowledged owing Student compensatory services for ESY in 2019 since as early as October 2019, and that Parents have accepted Framingham’s offer to provide Student with 57 hours of compensatory services. Framingham has suggested various options for delivery of the services and Parents have continuously delayed discussions about service delivery. Parents’ responses have ranged from, “I’ll get back to you.” to “I will hold off on deciding... until I consult with our attorney.” to stating they would like to discuss resolving the compensatory services as part of the settlement of the placement dispute. There is no genuine issue of material fact in dispute regarding the compensatory services for the summer of 2019. The services have been offered and accepted and have not yet been provided due to Parents’ refusal to engage in discussions regarding delivery of the services.

Additionally, Parents’ Amended Hearing Request includes a request to order reimbursement to Parents for out of pocket expenses in the amount of \$472.50 for reading tutoring arranged and provided privately in July 2019. Parents have not presented any evidence that said services were provided and paid for, nor have they provided any evidence that they provided notice to Framingham that they would be providing the services and seeking reimbursement. Additionally, they accepted Framingham’s offer to provide 57 hours of compensatory services for the summer of 2019. There is no genuine issue of material fact with respect to the aforementioned, Framingham is entitled to summary judgment with respect to Parents’ claim for reimbursement in the amount of \$472.50 for tutoring services privately provided.

Summer 2020

Similar to the ESY 2019 services, Framingham has acknowledged that due to a clerical error in Student’s 2020-2021 IEP, Student was entitled to receive six hours of compensatory speech and language services for 2020 ESY. This acknowledgement is found in Ms. Spears September 25, 2020 letter to Parents. As noted above, there is no genuine issue of material fact relating to the compensatory speech and language services.

⁷ The letter also confirmed Framingham’s owing Student 6 hours of compensatory speech and language sessions for 2020 ESY which be discussed below. (S-17)

Framingham's Motion for Summary Judgment is ALLOWED with respect to the compensatory services for the 2019 ESY and 2020 ESY services. The Parties shall meet as soon as practicable to determine a schedule for delivery of all offered and accepted compensatory services. The Parties are encouraged to utilize the services of a BSEA mediator if they believe it would facilitate communication regarding the delivery of services.

Covid Compensatory Services

Parents' Amended Hearing Request sought 112.5 hours of Covid compensatory services, asserting that while Student was unilaterally placed at MWJDS for the 2019-2020 school year, Framingham should have provided him with services based on an asserted stay-put claim for services under the 2016-2017 (then-last accepted) IEP. Parents' November 18, 2020 response to Framingham's Motion to Dismiss/for Summary Judgment concedes that Framingham is not responsible to provide said services. However, the claim has not been withdrawn. Regardless, there are no genuine issues of material fact in dispute regarding Student's lack of entitlement to Covid compensatory services from Framingham. Therefore, Framingham's Motion for Summary Judgment with respect to Covid compensatory services is ALLOWED.

Whether the IEPs and placement proposed for the 2019-2020 school year were reasonably calculated to provide Student with a free appropriate public education in the least restrictive setting.

Framingham argues that even if the Hearing Officer was to find a deficiency in the IEP that rose to the level of denial of FAPE, the remedies sought by Parents are not legally available or viable. It argues that the remedy of reimbursement is not available because MWJDS is not an approved special education school. It further argues that if a Hearing Officer were to find a deficiency in an IEP that rose to the level of a denial of FAPE, the typical remedy would be to revise the IEP and/or provide compensatory educational services. Framingham further argues that Parents' conduct prevented the availability of such a resolution as Parents did not file their Hearing Request until after the expiration of the IEP at issue and the end of the school year. Additionally, Framingham argues that there is no basis upon which a Hearing Officer can find that MWJDS was an appropriate placement for Student, such that Parents would be entitled to reimbursement for tuition at the MWJDS. It asserts that MWJDS is a parochial day school that is not approved by the state as a school for the delivery of special education services. Further, it is not a program specifically designed for students with language-based learning disabilities. It points to Student's schedule which shows that two of the seven academic blocks are devoted to Tefilah and Hebrew, significantly reducing available time on learning that could be used to address Student's special education needs.

Parents oppose Framingham's Motion to Dismiss/for Summary Judgment with respect to the 2019-2020 school year placement at MWJDS. They argue that Framingham's proposed IEPs would not provide Student with a free appropriate public education in the

least restrictive environment and assert that their unilateral placement at the MWJDS provided Student with a free appropriate public education in the least restrictive environment. When Parents' allegations are viewed in the light most favorable to them, they have made a preliminary showing that there are issues of material fact, at least with respect to the amount of reading services Student required, whether he required direct services in math, whether a substantially separate setting was the least restrictive appropriate environment for Student, and what services were provided to Student at MWJDS. Therefore, the granting of summary judgment with respect to the appropriateness of the IEPs and placement proposed for the 2019-2020 school year would be improper. Framingham's Motion for Summary Judgment with respect to whether the 2019-2020 IEP was reasonably calculated to provide Student with a free appropriate education in the least restrictive environment is DENIED.

Whether procedural violations denied Student FAPE during the 2019-2020 school year

Parents contend that Student was denied FAPE when there was not a general education teacher in attendance during Team meetings on May 8, 2019, September 11, 2019, January 27, 2020, and June 3, 2020. (S-3, S-5, S-12, S-15) Framingham argues it is entitled to summary judgment on this issue because, during the relevant time period, Framingham was proposing that Student receive all of his services within a substantially separate language based classroom, thus obviating the need for a general education teacher to be part of Student's Team. There is no dispute that Student's last accepted IEP included placement in a substantially separate classroom and, at all relevant times, Student was attending a private placement, MWJDS. The Team had not received any updated evaluations or other data that would change its position that it was necessary for Student to receive all his services within a substantially separate environment. Thus, in accordance with 34 CFR §300.321(2) it was not necessary for Framingham to include a regular education teacher, as Framingham had no reason to believe Student was or "may be, participating in the regular education environment." Even if Parents had shown that Framingham should have included a regular education teacher in the Team(s), they have not cited to any educational harm suffered by Student that would give rise to a claim for denial of FAPE.

Parents have also alleged procedural violations due to the absence of a reading specialist or guidance counselor at Team meetings held between May 8, 2019 and June 3, 2020. The evidence shows that Parents signed an excusal of the guidance counselor's attendance at the May 8, 2019 meeting. Additionally, it shows that Alexander Loos, an outside evaluator who had completed Student's literacy evaluation as part of his three-year evaluation, attended the May 8, 2019 meeting. (S-3) The evidence shows that the guidance counselor attended part of the September 11, 2019 meeting and that Mother signed the Statement of Attendance Excusal when she left early. It also shows that the literacy specialist was present. (S-5) With respect to the January 27, 2020 meeting, the literary specialist was present. Further, the Team reviewed a transition assessment and team members included a transition specialist and a BCBA from Accept Collaborative.

There were no services proposed or discussed for which a guidance counselor's expertise would be necessary and Parents did not allege a reason why a guidance counselor's presence would be required. Finally, attendees at the June 3, 2020 Team meeting included Student, Parents, the Walsh Middle School TEC, the Framingham High School TEC, the Director of Special Education from Keefe Technical High School, a speech language pathologist, a special education teacher, an occupational therapist, several staff members from MWJDS, and the director of Decoding Dyslexia. (S-14) Parents do not state how the absence of a reading specialist or guidance counselor from the June meeting violates the requirements of IDEA with respect to Team composition. Therefore, Framingham is entitled to summary judgment with respect to the issues pertaining to Team composition, as there is no genuine issue of material fact in dispute and Parents are not entitled to any relief based upon the undisputed facts.

Parents also argue that Framingham committed a procedural violation by not inviting Student to his annual Team meeting on May 8, 2019, and by not discussing transition services. (S-3) M.G.L. ch. 71 B, § 2 states, "Beginning at age 14 or sooner if determined appropriate by an individualized education program team, school age children with disabilities shall be entitled to transition services and measurable postsecondary goals, as provided under the federal Individual Disabilities with Education Act, 20 USC sec. 1400, et sec." At the time of the May 8, 2019 meeting, Student was 13 years old, and would not turn fourteen for over five months. Thus, there was no requirement that Student be invited to the Team, nor a requirement that transition planning begin. As with the previous issue, there is no genuine issue of material fact with respect to Parents' claim, and Parents are not entitled to any remedy under the law. Framingham is entitled to summary judgment with respect to this issue.

Parents state that Framingham was late in providing the Transition Assessment that Mother requested on or around September 23, 2019. Mother states that she reminded Framingham of her request on October 26, 2019 and the evaluation was then scheduled. She does not point to any educational harm suffered by Student as a result of the delay in scheduling the assessment. Further, the evidence shows that the Team considered the Transition Assessment during the January 27, 2020 meeting. (S-12) Similarly, although Parents raised issues with respect to two Team members not being listed on the attendance sheet for the January 27, 2020 Team meeting, and the Transition Planning form not being provided to her until on or around March 10, 2020, she does not claim that Student suffered any educational harm as a result of these issues. Thus, Framingham is entitled to summary judgment in its favor on this issue.

Parents claim that Framingham committed procedural violations when it proposed changes to Student's IEPs. Specifically, Parents point to the removal of a math goal from the IEP proposed after the May 18, 2019 meeting; the removal of ESY services from the IEP proposed after the May 18, 2019 meeting; and the removal of reading services 3 x 45 minutes per cycle on the IEP proposed after the September 11, 2019 meeting. (S-3, S-5) As Framingham responded, changes to IEPs are merely proposals, and do not take effect unless and until they are accepted by the Parents. Since Parents ultimately rejected the

IEPs at issue, the proposals did not take effect. Further, Student remained at MWJDS during the time that each of the proposals was made. Clearly Student was not denied FAPE as a result of Framingham's proposing changes to the service delivery it was offering Student as Student remained at MWJDS and the IEP was never implemented. Framingham is entitled to summary judgment on this issue.

Lastly, Parents allege that Framingham failed to submit partially and fully rejected IEPs to the BSEA during the time period from 2018-2020. The scope of this hearing is limited to the IEPs promulgated for the 2019-2020 school year. (See above.) The evidence submitted by Framingham shows that it received Parents' rejection of the IEP proposed on May 8, 2019 on August 29, 2019. (S-4) It submitted the rejected IEP to the BSEA on September 3, 2019. (S-21) Likewise, Framingham received Parents' rejection of the revised IEP produced pursuant to the September 11, 2019 Team meeting on November 13, 2019 (S-7) and submitted the rejected IEP to the BSEA on November 14, 2019. (S-21) Even if Framingham had not submitted the IEPs to the BSEA as required, s have not alleged any denial of FAPE to the Student as a result and therefore, Framingham is entitled to summary judgment as to this issue.

ORDER

Framingham's Motion for Summary Judgment is ALLOWED in part and DENIED in part.

Summary Judgment is GRANTED with respect to:

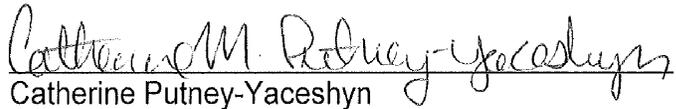
- 1) Compensatory services for summer 2019
- 2) Compensatory services for summer 2020
- 3) Covid compensatory services
- 4) Alleged procedural violations as described above

Summary Judgment is DENIED with respect to the issue of

Whether the IEPs proposed for the period from 2019-2020 were reasonably calculated to provide Student with a free and appropriate public education in the least restrictive environment and if not, whether Parents are entitled to reimbursement for their unilateral placement of Student at the Metro West Jewish Day School

The Hearing will proceed on the remaining issue on March 1, 4, and 5, 2021. This Hearing was scheduled via Order dated December 23, 2020. Parties shall refer to the Order for further information regarding the Hearing and relevant deadlines.

So ordered by the Hearing Officer,


Catherine Putney-Yaceshyn

Dated: January 25, 2021

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.