COMMONWEALTH OF MASSACHUSETTS
SPECIAL EDUCATION APPEALS

In Re: North Reading Public Schools          BSEA #01-5381

DECISION

This decision is issued pursuant to 20 USC 1400 et seq. (Individuals with Disabilities Education Act), 29 USC 794 (Section 504 of the Rehabilitation Act), MGL chs. 30A (state administrative procedure act) and 71B (state special education law), and the regulations promulgated under said statutes.

A hearing was held on August 16, 2001 in Malden, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student’s Mother
Student’s Father
Arnold Tarlow Attorney for Parents and Student
Thomas Nuttall Attorney for North Reading Public Schools
Sabatino Bolognese Director of Pupil Personnel Services, North Reading Public Schools
James Canino Assistant to the Director of Pupil Personnel Services, North Reading
William Leccese Principal of the Little School, North Reading Public Schools
Marie Taras Clinical Psychologist and Consultant to North Reading Public Schools
Pearl Feeney-Grater Speech-Language Pathologist, North Reading Public Schools
Joline Romano School Psychologist, North Reading Public Schools
Carol Scalisi Teacher, North Reading Public Schools
Andrea Hachey Learning Disability Specialist, North Reading Public Schools
Joyce Lorton Paraprofessional, North Reading Public Schools

The official record of the hearing consists of documents submitted by the Parents and marked as exhibits 1 through 3 (hereafter, P-1, etc.); documents submitted by the North Reading Public Schools (hereafter, North Reading) and marked as exhibits 1 through 6 (hereafter, Exhibit S-1, etc.); and approximately four hours of recorded oral testimony and argument. Oral closing arguments were made on August 16, 2001, and North Reading also filed a written argument on that date. The record closed on August 16, 2001.

ISSUE PRESENTED

Has North Reading appropriately assigned Student to a particular classroom? If not, should Student be assigned to the classroom requested by Parents?

POSITIONS OF THE PARTIES

Parents’ position: Parents believe that the IEP Team made a unanimous decision that Student should be assigned a particular teacher (Mr. Frane) for the 2001-2002 school year, and in the event that Mr. Frane should become unavailable to teach 5th grade, Student should be assigned to his replacement. Without involving the Team, the Principal assigned Student
to a different teacher (Miss Devecis). Miss Devecis’ classroom includes a behaviorally-involved child. Placement of Student with this child would be detrimental to Student’s educational progress. Student should be placed in the classroom determined by the Team.

Public Schools’ position: North Reading believes that the public school retains the right to determine Student’s classroom teacher. Of the 5th grade teachers, the teacher assigned to Student (Miss Devecis) is the most qualified and most appropriate for Student. This classroom includes an appropriate peer group for Student. The classroom and teacher assigned for Student are appropriate.

PROFILE AND HISTORY

Student is a special needs child living with his Parents in North Reading, MA. Student’s disabilities include deficits regarding social pragmatics and peer relationships, and he is unable to decipher the intent in some of the materials used for 5th grade. His services include speech and language services, learning disability support by a learning disability specialist within the inclusion classroom, and consultation from a behavior specialist. Student will be in a 5th grade inclusion class for the 2001-2002 school year. (Mother, Father, S-1, P-1)

On June 25, 2001, Parents filed with the Bureau of Special Education Appeals a request for hearing. Attached and incorporated into the request for a hearing was a letter of June 24, 2001 from Parents to the North Reading Director of Pupil Personnel Services (Mr. Bolognese), detailing Parents’ concerns. The concerns covered a range of issues, including an objection to the teacher selected for their son for the 2001-2002 school year and an objection to the assigned classroom based on the student make-up of this classroom.

Through mediation and other meetings between Parents and school officials, the issues identified in Parents’ request for hearing were informally resolved by the parties, except for the concerns regarding teacher and classroom assignment.

Parents made clear at the Hearing that they do not object to any of the three possible 5th grade teachers, per se. That is, they make no argument that any of the possible 5th grade teachers is not sufficiently qualified or experienced. Rather, their concern, and the subject of this appeal, concerns the appropriateness of the classroom assignment by the Principal because of the class make-up of the other children.

STATEMENT OF THE EVIDENCE

A Team meeting was held on April 24, 2001. Parents testified that at this meeting, Mother explained that a particular teacher (Mr. Frane) is recommended for her son and that in the event that this teacher would not be teaching 5th grade, that his replacement be Student’s teacher. Parents testified that there was no further discussion of this issue, and no member of the Team objected to this assignment of teacher(s). Parents therefore believed that the Team had made a unanimous decision. (Mother, Father) All of the other witnesses who attended that meeting testified that during that Team meeting, there was no discussion of specific teachers for Student. (Canino, Feeney-Grater, Scalisi, Hachey, Lorton)
At a meeting on May 9, 2001, the Principal (upon advice of all those present) assigned Student to Mr. Frane (the 5th grade classroom teacher requested by Parents). Those attending this meeting were the Principal, the three 4th grade Teachers, the Speech-Language Therapist, School Psychologist, Resource Room Teacher, Reading Specialist and Paraprofessional. (Leccese)

Subsequently, the assigned teacher (Mr. Frane) took another position, making him unavailable to teach 5th grade. Most of those who had met on May 9th re-convened in June 2001 to re-consider the classroom teacher for Student. Attending this meeting (or later consulting with the Principal) were all those attending the May 9th meeting except for the School Psychologist. The consensus of all involved and the decision of the Principal was that Student should be assigned to Miss Devecis’ classroom because she was the most experienced of the 5th grade teachers and would provide the best match of teaching styles and Student’s learning needs. (Leccese, Hachey, Scalisi, Feeney-Grater) Miss Devecis was not the teacher replacing Mr. Frane, and Parents therefore objected to their son being assigned to Miss Devecis’ classroom. (Mother, Father)

Parents learned that a particular child, with whom they are familiar, was also assigned to Miss Devecis’ classroom. Parents had observed this other child outside of school because he and their son are on the same Little League baseball team, and Father is the assistant coach. Parents testified as to the inappropriate behavior of this child during the baseball games, including throwing dirt, sand and rocks at other children, using profanity, ganging up on other children, and grabbing “private parts” of other children. Parents expressed concern to North Reading as to the appropriateness of this child being placed in the same classroom as their son because of the vulnerability of their son and the educational importance of his being placed with appropriate peer models because of their son’s deficits regarding social pragmatics and peer relationships. (Mother, Father)

Dr. Taras, the Clinical Psychologist who has consulted to North Reading regarding Student since the end of his kindergarten year, testified that Student should not be placed in a classroom with any child whose behavior is outside the normal range of 5th grade behaviors. She explained that Student imitates and otherwise learns from his peers and since he is on the autism spectrum, he would likely imitate without understanding the motives of the other child. She explained, however, that she has no knowledge of the child about whom Parents have expressed concerns.

A number of the school witnesses are familiar with the child about whom the Parents have concerns. Ms. Scalisi, Student’s 4th grade teacher, testified that she taught social studies to this other child the last academic year. She noted that she did not observe this child exhibiting any behavior problems in social studies class throughout the year. Ms. Hachey, Student’s 4th grade Learning Disability Specialist, testified that she observed this other child three to six times per week during the normal course of her work throughout the school year, and she never observed any behavior problems. Ms. Romano, the School Psychologist, testified that her responsibilities include observing recess and lunch and in particular looking out for any behavioral difficulties that might require intervention. She observed Student as well as the other child during recess on a daily basis during the past school year. She testified that she never observed the other child exhibiting behavior problems. Similarly, Ms.
Lorton, Student’s 4th grade Paraprofessional, testified that she regularly observed 4th grade bus, lunch and recess last year and never observed this child exhibiting any behavior problems.

A speech/language evaluation of Student in April and May 2000 by North Reading recommends that to assist with pragmatic skills, a child should be grouped with good role models and be protected from classroom “bullies” in order to avoid the negative influence of these children. (P-3)

Last year’s IEP provides that Student “imitates language; behavior and actions of his peers and therefore, this should be used as a positive teaching method throughout each activity in his school day.” (S-3, P-2 at page 2b)

FINDINGS AND CONCLUSIONS

1. Introduction.

Student is an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act (IDEA)¹ and the state special education statute.² As such, he is entitled to a free, appropriate public education. Neither his status nor his entitlement is in dispute.

The issue in dispute is whether North Reading has appropriately assigned Student to a particular 5th grade classroom.

2. Law.

In general, Student is entitled to a free, appropriate public education which is reasonably calculated to assure maximum possible educational development in the least restrictive environment consistent with that goal.³

With respect to placement of a child, the federal special education statute (the IDEA)⁴, the federal regulations promulgated under the IDEA⁵, the federal Department of Education’s interpretation of its regulations⁶ and federal guidelines⁷ provide that placement decisions regarding a student may only be made by a group of people (for example, the IEP Team) that includes parents.

Consistent with this federal requirement, the state special education regulations provide that the IEP Team is the appropriate entity to make placement decisions.⁸ The state regulations

¹ 20 USC 1400 et seq.
² MGL c. 71B.
³ David D. v. Dartmouth School Committee, 775 F.2d 411, 423 (1st Cir. 1985).
⁴ 20 USC 1414(f).
⁵ 34 CFR 300.552(a)(1)
⁸ 603 CMR 28.05(6), 28.06(2) and 28.06(2)(e).
further state: “The placement decision made by the Team shall indicate the specific program setting in which services will be provided.” The regulations explain that an in-district placement setting could include, for example, a general education classroom, a resource setting, or a separate classroom.

Section 28.06(2)(d)1 of the state regulations then addresses the issue of assignment of a specific classroom teacher. These regulations provide that assignment of instructional personnel is to be determined by the school district:

The school district shall determine specific instructional personnel and shall work jointly with the Team to arrange the specific classroom or school, in order to implement the placement decision and to assure that services begin promptly when parental consent to the IEP and placement has been received.

3. Analysis.

On April 24, 2001, the Team met and determined that Student should be placed in a regular education classroom for the next academic year. With respect to the specific teacher to be assigned to Student in the regular education classroom, there is conflicting testimony. Parents believe that the issue was specifically addressed and unanimously decided, while others believe that no specific teachers were discussed at the meeting. (Mother, Father, Leccese, Hachey, Scalisi, Feeney-Grater)

I need not resolve this controversy. The regulations quoted above in subsection 2 are clear that once the Team makes the placement decision (in this instance, to place Student in the regular education classroom for 5th grade), it then becomes the responsibility of the school district to “determine specific instructional personnel”.

The Principal, in consultation with other school personnel, appropriately made the determination of Student’s 5th grade homeroom teacher at a meeting on May 9, 2001 and then again in June 2001. Not only was this decision within the province of the Principal, but the evidence is persuasive that he assigned to Student the teacher (Miss Devecis) who is most experienced and best suited to work with Student. (Leccese, Hachey, Scalisi, Feeney-Grater)

Although the present dispute has been characterized by both parties as a disagreement over teacher assignment, Parents do not actually object to Miss Devecis being their son’s teacher. They have no reason to believe that she is not an appropriate person to teach their son 5th grade. Rather, Mother and Father, who are obviously both committed and caring parents, are concerned about the composition of the children in Miss Devecis’ classroom. (Mother, Father)

9 603 CMR 28.06(2)(d).
10 Id.
11 603 CMR 28.06(2)(d)(1) (emphasis supplied). The language regarding the specific classroom presumably refers to the physical classroom rather than the composition of the children who are assigned to it.
12 603 CMR 28.06(2)(d)(1).
Parents’ concerns stems from their direct knowledge of a child who is scheduled to be in Miss Devecis’ classroom. Parents have recently observed this child exhibiting antisocial, unruly and disruptive behavior on numerous occasions outside of school. The testimony of Dr. Taras indicated that a child who exhibits these kinds of behaviors within the classroom should not be placed with Student as it would likely be inconsistent with his maximum educational development. Student has particular special education needs regarding social pragmatics and peer relationships which could be exacerbated with an inappropriate peer grouping in the classroom. (Mother, Father, Taras).

Parents have provided persuasive testimony regarding problematic behaviors of this other child outside of the public school environment. However, they provided no credible evidence to indicate that any of these behaviors have occurred or would likely occur within the public school environment. (Mother, Father)\textsuperscript{13}

In contrast, North Reading has provided testimony from four teachers/staff who are familiar with this other child and who would likely have seen disruptive behavior of this child if it had occurred in a number of different places during this past academic year. Their testimony was consistent that they have observed no such inappropriate behavior by this child during the entire 4\textsuperscript{th} grade year. (Scalisi, Hachey, Romano, Lorton)\textsuperscript{14}

Ultimately, the issue is not what behavior a child might exhibit outside of school, but rather the behavior of Student’s peers within the classroom environment. I have no basis for concluding that this child or any other child with whom Student has been placed in Miss Devecis’ class would constitute an inappropriate peer group so as to compromise Student’s right to special education.

Therefore, I conclude that the classroom assignment by North Reading is appropriate.

**ORDER**

The school district’s placement of Student in Miss Devecis’ 5\textsuperscript{th} grade class is upheld.

By the Hearing Officer,

William Crane
Dated: August 17, 2001

\textsuperscript{13} The only evidence that could arguably support the conclusion that this behavior would likely occur in the classroom was the statement of Dr. Taras that, in general, past behavior is the best indicator of a child’s future behavior. However, Dr. Taras is not familiar with the child in question and therefore could have no opinion regarding the likelihood of future disruptive behavior outside of school or the likelihood that the behavior outside of school would replicate itself within the classroom.

\textsuperscript{14} Ms. Romano, the School Psychologist and Adjustment Counselor, testified as to what steps she and others would take in the event that inappropriate behavior were to occur in the classroom and the teacher was not able to address it satisfactorily.
EFFECT OF BUREAU DECISION AND RIGHTS OF APPEAL

The decision of the Bureau of Special Education Appeals is final and is not subject to further agency review. Because 20 USC s. 1415(i)(1)(B) requires the Bureau decision to be final and subject to no further agency review, the Bureau cannot permit motions to reconsider or to re-open a Bureau decision, once it is issued. Any party aggrieved by the Bureau decision may file a complaint in the Superior Court of competent jurisdiction or in the District Court of the United States for Massachusetts for review of the Bureau decision. 20 USC s. 1415(i)(2). Under Massachusetts General Laws, Chapter 30A, Section 14(1), appeal of a final Bureau decision must be filed within 30 days of receipt of the decision.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Under 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 seek such stay from the court having jurisdiction over the party's appeal.

Under the provisions of 20 USC 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," 20 USC s. 1415(j). 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. Doe v. Brookline, 722 F.2d 910 (1st Cir. 1983); Honig v. Doe, 484 U.S. 305 (1988).

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 MGL c.30A, ss. 11(6) and 14(4), an appealing party seeking a certified written transcription of the entire proceedings, must arrange for the transcription, or portion thereof, by a certified court reporter, at his/her own expense. Transcripts prepared by the party must then be submitted to the Bureau of Special Education Appeals with appropriate court reporter certification for final review and certification. A party unduly burdened by the cost of preparation of a written transcript of the sound recordings may petition the Bureau of Special Education Appeals for relief.
COMPLIANCE

A party contending that a decision of the BSEA is not being implemented may file a complaint with the Department, whose responsibility it shall be to investigate such complaint. 603 CMR s. 28.00, par. 407.0.

In addition, the party shall have the option of filing a motion with the Bureau of Special Education Appeals, requesting the Bureau to order compliance with the decision. The motion shall set out the specific area of alleged non-compliance. The Hearing Officer may convene a hearing at which the scope of inquiry will be limited to facts bearing on the issue of compliance, facts of such nature as to excuse performance and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief and refer the matter to the Legal Office of the Department of Education for enforcement.

CONFIDENTIALITY

In order to preserve the confidentiality of the child 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.

NOTICE OF REVISED BUREAU PROCEDURES ON RECONSIDERATION/REHEARING

The United States Department of Education, Office of Special Education Programs (OSEP) in its 1990 Monitoring Report, issued July 17, 1991, ordered the Bureau to amend its procedures to eliminate the availability of reconsideration or re-opening as post-decision procedures in the Bureau cases. Accordingly, parties are notified that the Bureau will not entertain motions for reconsideration or to re-open. Bureau decisions are final decisions subject only to judicial review.

In addition, parties should be aware that the federal Courts have ruled that the time period for filing a judicial appeal of a Bureau decision is thirty (30) days, as provided in the Massachusetts Administrative Procedures Act, MGL c.30A. See, Amann v. Town of Stow, 991 F.2d 929 (1st Cir. 1993); Gertel v. School Committee of Brookline, 783 F. Supp. 701 (D. Mass. 1992). Therefore, an appeal of a Bureau decision to state superior court or to federal district court must be filed within thirty (30) days of receipt of the Bureau decision by the appealing party.