COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Norwood Public Schools               BSEA #06-0214

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 ch. 71B), the state Administrative Procedure Act (MGL ch. 30A) and the regulations promulgated under these statutes.

A hearing was held on August 5, 2005 in Malden, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student’s Mother
Kathleen Davis  Former Out-of-District Coordinator, Norwood Public Schools
Helen Wyche  Director of Student Services, Norwood Public Schools
Tim Norris  Attorney for Norwood Public Schools

The official record of the hearing consists of documents submitted by the Parents and marked as exhibits P-1 through P-36; documents submitted by the Norwood Public Schools (Norwood) and marked as exhibits S-1 through S-7; and approximately three hours of recorded oral testimony and argument. Written closing arguments regarding the issue of summer services were due on August 9, 2005. Written arguments regarding the remaining issues were due on August 16, 2005, and the record closed on that date.

ISSUES

The issues to be decided in this case are the following:

1. **Summer services**: What is the end date of Student’s summer services? May Parent be reimbursed for expenditures she has made for summer services? Does Norwood owe Parent any additional summer services?
2. **Compensatory claim**: Is Student entitled to receive compensatory services for missed tutoring from January 6, 2005 until March 1, 2005? Have the parties resolved this matter by agreement? Does a Hearing Officer have jurisdiction over a settlement agreement related to these claims?
3. **Signature on IEP/Alteration of IEP after Team meeting**: Did the Norwood Director of Student Services appropriately revise the original IEP that had been developed as a result of a Team meeting on December 7, 2004? Should she have signed the original IEP?
4. **Tape recording of meeting**: Should Parent have been allowed to tape record a meeting on May 31, 2005.
PROCEDURAL HISTORY

Parent filed her Hearing Request with the Bureau of Special Education Appeals (BSEA) on July 11, 2005. The BSEA assigned a Hearing date of August 15, 2005. On July 15, 2005, Parent filed with the BSEA a request to advance the Hearing date in light of her concern that her son’s summer services would end prematurely on July 27, 2005. The Hearing Officer held a conference call with the parties on July 25, 2005, during which it was agreed that summer services would continue until August 12, 2005 and that this matter would proceed to Hearing on August 5, 2005, with an Order by the Hearing Officer to be issued on summer services no later than August 12, 2005.

In order to apprise the parties in a timely manner of my findings and conclusions regarding summer services, an Order was issued on August 11, 2005, in advance of the full text of this Decision. See Appendix A. The remaining three issues were not addressed in the August 11th Order.

PROFILE OF STUDENT

Student is a twelve-year-old boy who lives with his mother (Parent) in Norwood, MA. Parent is concerned that deficits in his reading and writing skills are significantly affecting his overall academic performance in every subject. Through a placement by Norwood, Student is enrolled in the Learning Prep School during the school year. Exhibit S-1, P-2.

FACTS

An IEP Team meeting was held on December 7, 2004 in order to discuss and decide Student’s special education services and placement. What occurred during that meeting is reflected within a written summary of the meeting, prepared by Gail O’Mara, Principal at the Learning Prep School (LPS). The Norwood Director of Student Services (Ms. Wyche) did not attend this Team meeting. Testimony of Parent, Davis, Wyche; exhibit P-1.

The written summary explains that the Team agreed that in addition to the needed services Student is receiving at his day placement at LPS, Student is to receive 1:1 Wilson tutoring three days per week and a summer program component. The summary provided three options for providing the 1:1 Wilson tutoring: (1) at LPS, (2) in Norwood by Norwood staff, or (3) in Norwood by an “independent tutor” at a location outside of Student’s home.

The written summary of the Team meeting further describes a “plan of action” as follows:

- Three sessions weekly reading tutorial (45 minutes) 1:1 by a Wilson certified person for the remainder of the current school year concluding 6/05 with a focus on the developing decoding and fluency skills.
- Summer tutoring “as outlined in the Agreement: (dates to run concurrently with the Norwood summer program)” of
  - Four sessions weekly of reading/writing tutoring;
  - Four sessions weekly of speech/language therapy;
Three sessions weekly of math tutoring.

Testimony of Parent, Davis; exhibit P-1.

The above-described tutoring and summer services were then reflected within an IEP as follows:

- 1:1 Wilson tutoring to be provided for 45 minutes, three times each week from January 3, 2005 to June 29, 2005.
- Summer services to include three components: (1) reading/writing tutoring for 45 minutes four times each week by a special education teacher, (2) math tutoring for 45 minutes four times each week by a special education teacher and (3) speech/language therapy for 45 minutes three times per week by a speech/language therapist.

According to the IEP, each of the above-described summer services were to be provided from July 1, 2005 to August 30, 2005, although an asterisk at end of August 30, 2005 (for each summer service) referred the reader to the following sentence at the end of the page: “The dates of the summer services would run concurrently with the Norwood summer program.” Exhibits P-2, S-1.

The Norwood staff person who chaired the December 7, 2004 Team meeting (Ms. Davis) and the Norwood Director of Student Services (Ms. Wyche) testified regarding the date of August 30, 2005, which is indicated on the IEP as the end date for each component of the summer services. They explained that at the time of the IEP Team meeting, it was not known when school would finish and therefore it was not known when the summer program would end. The date of August 30, 2005 was put in as an outside date, with the caveat (explained through the additional sentence noted by the asterisk) that the actual date for the end of the summer services would be when the Norwood summer program ends – in other words, Student’s summer services would be concurrent with the Norwood summer program. Testimony of Wyche, Davis; exhibits P-2, S-1.

When asked about this language in the IEP regarding end date for summer services, Parent testified that she understood that the date of August 30, 2005 reflected the end of summer services. When asked about the additional sentence noted by the asterisk (described above), Parent testified that she “overlooked” this sentence. She agreed that this sentence was in the IEP when she signed it. By memo dated July 29, 2005 from Parent to Norwood’s attorney, Parent stated that she accepted the IEP except that she rejected this sentence. Exhibit P-22.

The IEP was sent to the Director of LPS (Nancy Rosoff) who signed it on December 8, 2004. The IEP was then shared with Parent who signed the IEP on December 16, 2004, accepting all relevant portions of the IEP and stating in the her written comments that “I will need to meet with the district to talk about summer program.” Ms. Davis testified that the IEP was shared with Parent as a “draft” proposed IEP for Parent’s consideration, rather than as a final proposed IEP for Parent to sign. Testimony of Parent, Davis; exhibits P-2, S-1.
When the IEP was shared with the Norwood Director of Student Services (Ms. Wyche), she had concerns that placing the Wilson tutoring and summer services within the service delivery page of the IEP (as they appeared in the original IEP) may raise concerns with LPS, as it might be taken to mean that the LPS program and services were not sufficient or appropriate for Student since the tutorial and summer services were in addition to what would be provided by LPS. For this reason, Ms. Wyche modified and re-issued the IEP by deleting the Wilson tutorial and summer services from the service delivery page of the IEP and inserting language in the “additional information” section of the IEP stating that Student would be provided Wilson tutorial services for 60 minutes, two times each week by Norwood at the end of Student’s school day and further providing that Student will “require an extended school year where he continues with the Wilson tutorial 3x weekly and Speech/Language.” Ms. Wyche signed this revised IEP on February 3, 2005. Parent did not sign this IEP. Testimony of Wyche; exhibit P-10.

Ms. Wyche testified that although she signed the modified February 3, 2005 IEP and although no Norwood representative signed the original IEP, Norwood later decided to accept and implement the original IEP (exhibits P-2, S-1) in light of the fact that it had been accepted by both the LPS Director and Parent. The parties therefore agreed that this is the operative IEP for purposes of Student’s Wilson tutoring and summer services. Testimony of Wyche, Parent.

Norwood had practical difficulties implementing the Wilson tutoring described within the accepted IEP. It was first decided by Norwood that the tutoring should not occur at LPS. Norwood then sought to identify one of its own providers for this purpose, but as a result of scheduling difficulties, the only provider who could be identified was able to tutor Student twice (instead of the required three times) each week. Although Parent’s advocate and Norwood discussed the possibility of tutoring twice each week for 60 minutes instead of three times each week for 45 minutes, ultimately this was not acceptable to Parent. Parent then opted for the third option (described in the written summary of the Team meeting, above) for an “independent tutor”. Because of these difficulties in getting the tutoring started, the tutoring began on March 1, 2005 instead of January 3, 2005 as described within the IEP. Parent testified that she would have expected the tutoring to start on January 6, 2005, rather than on January 3, 2005, because of family vacation. Testimony of Parent, Wyche; exhibits P-26, P-27.

On February 3, 2005, Parent filed a complaint with Program Quality Assurance (PQA) of the Mass. Department of Education (DOE), complaining about the missed Wilson tutoring, as well as other concerns. In a letter dated April 14, 2005 from PQA to Norwood, PQA found that there had been non-compliance and that Norwood should propose to Parent and seek to obtain her agreement regarding an appropriate compensatory services plan, have Parent sign the agreement and then submit the agreement to PQA for approval. In the event that Norwood would not be able to develop such a mutually agreeable plan, PQA indicated in its letter that DOE would develop a plan and specify what compensatory services must be provided pursuant to it. Testimony of Parent; exhibit P-14.
Ms. Wyche testified that PQA had proposed that the parties look at both the issue of compensatory services claim as well as the issue of what summer services Student would receive. Knowing that Parent was interested in the summer program at the Carroll School, Ms. Wyche explored this summer program as a possible settlement option to address both issues. Ms. Wyche determined that this Carroll summer program would be a five-week, full day (8:30 AM to 4:00 PM) program that would include academics, speech/language services and counseling. Because this program at the Carroll School was significantly more comprehensive than the summer services on Student’s IEP, Ms. Wyche believed that it could provide an appropriate resolution of both Parent’s compensatory claims as well as the summer services proposed on Student’s IEP. Testimony of Wyche; exhibits S-5, S-7.

A meeting occurred on May 31, 2005 with Norwood’s out-of-district coordinator (Ms. Davis) and Parent. In their testimony, Ms. Davis and Parent agreed that this meeting was not a Team meeting. Parent testified that the meeting was for the purpose of trying to resolve both the compensatory services claim as well as what summer services Student would receive. Parent testified that at this meeting, she stated that she was willing to address the issue of summer services through placement at the Carroll School, but was not willing to address her compensatory claim. Testimony of Parent.

An IEP amendment was prepared as a result of the May 31, 2005 meeting. The relevant language regarding Parent’s compensatory claims is as follows: “[Student’s] current IEP service delivery grid reads that he will receive Wilson tutoring starting in December 2004. This amendment is to address the plan of compensatory services and to address summer services. . . . [Student] will receive summer services within the Carroll School in Lincoln, MA . . . .” Parent and Ms. Wyche signed the IEP amendment, with Parent adding language indicating that she was not giving up the summer services (listed on the IEP) that would continue after the end of the Carroll summer program. Exhibit P-17.

Parent testified that she sought permission to tape record the May 31, 2005 meeting. She explained that she wanted to tape record the meeting because English is her second language (with the result that she needs to listen to the tape of a meeting and look up any words that she does not understand) and because she does not trust Norwood to do what it says it will do. Ms. Davis testified that she denied Parent permission to tape record the meeting for personal reasons (she personally did not want to be tape-recorded) and because there was a minor (Parent’s foster child) at the meeting. Ms. Davis explained that Norwood typically tape records Team meetings with this Parent. Testimony of Parent, Davis.

Parent testified that she never agreed to resolve her compensatory claims through the Carroll School summer program, nor did she intend to give up the additional summer services on the IEP that would occur after the Carroll School program. Parent signed a letter dated June 3, 2005 essentially repeating her understanding that Student would immediately begin the Carroll School five-week program and that she refused to give up the additional four weeks of summer services on the IEP. Testimony of Parent; exhibits P-18, S-6.

Parent testified that during the last week of the Carroll summer program (which ended on July 29, 2005) in a conference call with the Hearing Officer and Norwood’s attorney, Parent
expressed the need to determine who would provide the summer services at the end of the Carroll summer program. This is further reflected in a memo from Parent to Norwood’s attorney, dated July 26, 2005. The memo refers to the telephone conference call the previous day and her need to hear from Norwood regarding summer services. Testimony of Parent; exhibit P-23.

Parent testified that she never received a response from Norwood regarding summer services to occur after July 29, 2005, and therefore she engaged a tutor (Marguerite McLaughlin) to tutor her son in reading. Parent testified that Ms. McLaughlin has tutored her son three times so far during the week of August 1, 2005. Ms. Wyche testified that she sent an e-mail to Parent on August 2, 2005, proposing summer services through a Norwood summer program, and requesting that Parent contact this program. Parent testified that she did not receive this e-mail. Testimony of Wyche, Parent.

DISCUSSION

Student is an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act1 and the state special education statute.2 As such, Student is entitled to a free appropriate public education (FAPE).3 Neither his eligibility status nor his entitlement to FAPE is in dispute.

There are four issues in dispute. I address each issue separately below.

Summer Services.

An August 11, 2005 Order was issued for the purpose of ruling on this issue in a timely manner. See Attachment A at the end of this Decision. I address the issue of summer services in greater detail below.

The initial question to be considered is the end date of the summer services that Norwood is to provide to Student.

Student attended the Carroll summer program through July 29, 2005. The parties agree that Norwood appropriately satisfied its obligations to provide summer services during the time period of this summer program. The issue in dispute pertains solely to the time period immediately following the end of the Carroll summer program -- that is, August 1 through August 30, 2005.

In resolving this issue, both parties rely on the language within the most recently accepted IEP. Exhibits P-2, S-1. As explained above in the Facts section of this Decision, the dates in the services delivery grid for each of the three summer services are July 1, 2005 (start date) to August 30, 2005 (end date). Without more, Parent would prevail. However, an asterisk

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1 20 USC 1400 et seq.
2 MGL c. 71B.
3 MGL c. 71B, ss. 1 (definition of FAPE), 2, 3. See also In re: Arlington, 37 IDELR 119, 8 MSER 187 (SEA MA 2002) (collecting cases and other authorities).
(*) next to each of the three “August 30, 2005” dates refers the reader to a sentence at the bottom of the service delivery grid, which reads as follows: “The dates of the summer services would run concurrently with the Norwood summer program.”

The Norwood witnesses credibly testified that at the time of the IEP Team meeting on December 7, 2004, it was not known when school would finish and therefore it was not known when the summer program would end. The date of August 30, 2005 was put in as an outside date, with the caveat (explained through the additional sentence noted by the asterisk) that the actual date for the end of the summer services would be the date that the Norwood summer program ends – in other words, Student’s summer services would be concurrent with the Norwood summer program. Testimony of Wyche, Davis.

The written summary of the Team meeting supports Norwood’s position. The summary does not indicate any particular end date for the summer services. The summary instead provides in relevant part as follows: “summer tutoring as outlined in the Agreement: (dates to run concurrently with the Norwood summer program)”. Exhibit P-1.

Parent testified that when she reviewed and signed the IEP, she “overlooked” this sentence. Parent provided no explanation for the meaning of this sentence. Parent would have me simply ignore this sentence.

Norwood’s explanation is a reasonable understanding of the IEP language, and the only proposed interpretation that would allow the August 30, 2005 date and the quoted sentence (above) to be read together. Otherwise, I would have to simply ignore the quoted sentence, which I decline to do.4

For this reason, I am persuaded that the above-quoted sentence modifies the ending date of August 30, 2005 for each of the three summer services. The last day of Norwood’s summer programs is August 12, 2005. Therefore, I conclude that Student’s summer services should extend to August 12, 2005.

Norwood objects to having responsibility for any summer services after July 29, 2005. Norwood takes the position that its summer services, at least for purposes of interpreting the above-quoted sentence, ended on July 29, 2005 which is the last day of the Carroll summer program. Norwood concedes that one of its summer programs continues until August 12, 2005, but argues that a more appropriate benchmark would be the Norwood summer programs that ended on July 29th because the Norwood summer program that ended on June 12th began after the beginning of the Carroll summer program.

4 Through a memo to Norwood’s attorney dated July 29, 2005, Parent sought to “reject” the above-quoted sentence. Exhibit P-22. A parent may reject part or all of an IEP at any time. A rejection of a part of the IEP may be used to decline certain services offered by a school district, but it cannot be used to re-write that part of the IEP with the result that the services are expanded beyond those services offered by the School District. For this reason, I decline to credit Parent’s rejection of this sentence for purposes of resolving the summer services dispute.
Parent cannot be expected to consent to what she has not been informed about. There is nothing in the record to indicate that Parent knew or should have known about the array of Norwood’s summer programs and their various start and stop dates. From the perspective of a layperson unfamiliar with all of the different components of Norwood’s summer services, a common sense understanding of the quoted sentence is that Student would receive summer services until Norwood completes its own summer programs, which was August 12, 2005.

For these reasons, I am not persuaded by Norwood’s arguments. Norwood’s obligations to Student for summer services therefore extends through August 12, 2005. I now consider Norwood’s obligations for the two-week period immediately following the end of the Carroll summer program on July 29, 2005 -- that is, August 1, 2005 through August 12, 2005.

Norwood did not offer appropriate summer services for this two-week time period. Norwood’s Director of Student Services testified that she wrote an e-mail to Parent on August 2, 2005 proposing that Norwood’s own summer program provide the requisite tutoring services. Parent testified that she did not receive this e-mail message or any other explanation of how the summer services for this time period would be provided by Norwood. In any event, Norwood has not put on sufficient evidence to demonstrate the appropriateness of any proposed summer program or services for this purpose, and Norwood does not argue to the contrary.

Parent engaged a private tutor (Marguerite McLaughlin) to provide reading/writing tutoring services for the two-week time period. Norwood does not dispute that Ms. McLaughlin is sufficiently qualified to provide the reading/writing tutoring services to Student. (Norwood complains that Ms. McLaughlin is over-qualified by virtue of her ability to teach the Wilson reading program; but given the lack of appropriate services offered by Norwood, Parent cannot be faulted for engaging Ms. McLaughlin.) Having failed to offer or provide appropriate summer services for the two-week period, Norwood must reimburse Parent for Ms. McLaughlin’s tutoring for the two-week period, as well as provide compensatory services to make up for its failure to offer or provide the additionally required summer services during this same two-week time period.

Accordingly, Norwood shall reimburse Parent for her out-of-pocket expenses for engaging Ms. McLaughlin for two weeks of reading/writing tutoring (4.0 x 45 minutes each week) from August 1, 2005 through August 12, 2005. Norwood shall also provide compensatory services for the following missed services from August 1, 2005 through August 12, 2005: two weeks of speech/language therapy (3.0 x 45 minutes each week) and two weeks of math tutoring (4.0 x 45 minutes each week), as reflected in the IEP (exhibits S-1, P-2).

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5 Federal regulations under the IDEA define a parent’s consent to include that the “parent has been fully informed of all information relevant to the activity for which consent is sought”. 34 CFR 300.500(b)(1)(i). The First Circuit has found this regulatory definition of consent to apply to a parent’s consent to (or acceptance of) an IEP. G.D. v. Westmoreland School District, 930 F.2d 942, 944 (1st Cir. 1991).

6 I also note that during a conference call on July 25, 2005, Norwood’s attorney made representations to Parent and to the Hearing Officer that Norwood would provide certain summer services to Student through August 12, 2005 and based upon that representation, a Hearing was scheduled for August 5, 2005, with an Order due on summer services by August 12, 2005.
Compensatory Claim.

It is not disputed by the parties that the last agreed upon IEP calls for 1:1 tutoring by a Wilson-certified teacher (3.0 x 45 minutes each week) from January 3, 2005 until June 29, 2005, that these tutoring services should have begun on January 6, 2005 (when Parent had returned from vacation), but that they did not begin until March 1, 2005.

The parties disagree, however, as to whether they have reached an informal resolution of this compensatory claim through an agreement or whether the claim is still outstanding.

As explained in the Facts section of this Decision, Parent filed a complaint with PQA in order to obtain compensatory services for the missed tutoring. PQA agreed that Parent was due compensatory services and directed Norwood to try to resolve this matter by agreement with Parent. A meeting was held on May 31, 2005 for this purpose, as well as for the purpose of considering Student’s summer services.

As a result of that meeting, Norwood agreed to provide Student with a five-week summer program at the Carroll School. Norwood made clear, through the testimony of Ms. Wyche, that it had intended to offer the Carroll program in satisfaction of both the summer services to be provided under the IEP and Parent’s compensatory claims. (The Carroll summer program is significantly more intensive than the summer services described within the last agreed upon IEP.) Norwood did offer the Carroll School summer program, it was accepted by Parent, and Student has completed this program. However, Parent testified that neither during that meeting nor at any other time, did she intend to give up her claim to compensatory services by agreeing to the Carroll program.

As a result of the discussions on May 31, 2005, a written document was produced and signed by both parties, which appears to address the issue of compensatory services. I therefore consider this document relative to the rights of the parties regarding Parent’s compensatory claims.

The form of the document signed by both parties is an IEP amendment. See Facts section of this Decision. However, the parties agree (through the testimony of Parent and Ms. Davis) that the May 31, 2005 meeting at which this was discussed and decided was not a IEP Team meeting. No IEP Team has ever reviewed or approved this document. Neither party has argued or otherwise indicated that the processes necessary for this document to amend the IEP have either occurred or been waived by the parties.

Therefore, I have no basis upon which I can conclude that this document meets the procedural requirements of an IEP amendment. Absent compliance with or waiver of these procedures, the document does not amend the IEP. In addition, I note the substance of the document (discussed below) addresses the resolution of Parent’s compensatory claims, which would appropriately be addressed through a mutually binding agreement since an IEP amendment can be revoked by Parent at any time.
For these reasons, I consider the document in question to be an agreement rather than an amendment to an IEP. I therefore turn to the question of whether I have jurisdiction to consider an agreement that purports to settle Parent’s compensatory special education claim.

BSEA Jurisdiction over a Settlement Agreement.

Within the context of another dispute, I have ruled that a BSEA Hearing Officer has jurisdiction to consider and enforce a voluntary settlement agreement.7 I do not repeat the entire discussion here, but take this opportunity to summarize and update the analysis of this issue within the context of the instant dispute.

The federal special education statute (IDEA) grants subject matter jurisdiction to a BSEA Hearing Officer with respect to “any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; . . .”8 The First Circuit Court of Appeals has noted that this grant of jurisdiction to a Hearing Officer should be understood as “broad” in scope.9

I am not aware of any federal appeals Court that has considered the question of whether a special education Hearing Officer has jurisdiction over a voluntary settlement agreement. All of the federal District Courts that have explicitly considered the question of whether the above-quoted jurisdictional language gives Hearing Officers jurisdiction over voluntary settlement agreements have concluded that it does, so long as the subject of the agreement falls within the above-quoted language (i.e., “identification, evaluation, or . . .”).10 Other federal District Courts, without referencing the jurisdictional language, have made clear their understanding that the Hearing Officer is to enforce such an agreement unless the parties have explicitly waived administrative review.11

These court decisions considered a Hearing Officer’s jurisdiction under the IDEA prior to the 2004 amendments. I therefore consider whether the 2004 amendments change the analysis.

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7 In Re: Boston Public Schools and Waltham Public Schools, BSEA # 02-4323, 8 MSER 396, 102 LRP 39658 (SEA MA 2002).
8 20 USC 1415(b)(6) (IDEA prior to the 2004 amendments); 20 USC 1415(b)(6)(A) (IDEA 2004).
9 Rose et al. v. Yeaw, 214 F.3d 206 (1st Cir. 2000) (“The scope of the due process hearing is broad, encompassing ‘complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.’ Id. § 1415(b)(6).”). See also Frazier v. Fairhaven School Committee, 122 F. Supp.2d 104 (D. Mass. 2000) (the special education administrative process “includes a hearing that is broad in scope”).
11 S.A.S. v. Hibbing Public Schools, Independent School District No. 701, Civil No. 04-3204, 105 LRP 33115, 2005 U.S. Dist. LEXIS 13437 (D. Minn. 2005) (plain language of settlement agreement prevents plaintiffs from raising any waived claims in an administrative or judicial forum); Joan R. Barrington Public Schools, 2004 U.S. Dist. LEXIS 22589, CA 02-282ML (D. R.I. 2004) (federal court affirmed Hearing Officer’s decision that school district must pay for part of student’s placement pursuant to an implied contract between the parties); Kegel v. The Santa Fe Public Schools, CA 00-1806 JP/RLP (ACE), LoisLaw Federal District Court Opinions (D.N.M. 2001) (collecting cases) (“prevailing, and most sensible, view is that post-resolution enforcement claims must comply with IDEA’s administrative process’); Mr. J. v. Board of Education, 98 F. Supp. 2d 226 (D. Conn. 2000) (“[p]ublic policy dictates that settlement agreements should be enforced” by hearing officer).
For the following reasons, I conclude that it would be inappropriate to find that the IDEA prior to the 2004 amendments grants Hearing Officers jurisdiction over settlement agreements but that the IDEA subsequent to the 2004 amendments does not. First, the 2004 amendments to the IDEA did not change the jurisdictional language quoted above.\textsuperscript{12} Second, if one accepts the analysis above that the federal District Courts have consistently interpreted the IDEA to include settlement agreements within the province of administrative due process proceedings, then Congress is presumed both to understand and to continue in effect the judicially-interpreted meaning of the IDEA when it amended this statute (without changing the operative language) in 2004.\textsuperscript{13} Third, as a general rule, Congress intended that the IDEA, as amended in 2004, provide greater, not fewer, opportunities for informal and administrative resolution of disagreements.\textsuperscript{14}

I note that the 2004 amendments to the IDEA provide that, in the event that the parties resolve their dispute through mediation or resolution session, the parties “shall execute a legally binding agreement” that is enforceable in state or federal court.\textsuperscript{15} Arguably, the failure of Congress to specify that the agreement is also enforceable in an administrative due process hearing implicitly indicates Congress’s intent not to extend a Hearing Officer’s jurisdiction to settlement agreements. However, a review of the legislative history does not support this interpretation.

The statutory history of IDEA 2004 indicates that Congress’s intent was only to make clear that the agreement reached by the parties, whether through mediation or a resolution session, should result in an agreement that is binding on the parties and enforceable in court, as with any other contractual agreement. The question of Hearing Officer enforcement of an agreement appears not to have been considered by Congress.\textsuperscript{16}

In light of the IDEA 2004 amendments clarifying that settlement agreements can be enforced in court, it should also be noted that courts have generally held the authority of a Hearing Officer in an IDEA dispute to be congruent with that of the reviewing court. There are obvious exceptions to this general rule (for example, attorney fees that are the exclusive province of the courts and monetary damages where the First Circuit has instructed Hearing Officers to create a factual record without awarding damages), but there is a clear preference for congruency of analysis of the law where the subject matter (for example, compensatory

\textsuperscript{12} Compare 20 USC 1415(b)(6) (IDEA prior to 2004 amendments) with 20 USC 1415(b)(6)(A) (IDEA 2004).  
\textsuperscript{13} Director, Office of Workers’ Compensation Programs v. Perini N. River Assocs., 459 U.S., 297, 319-20, 103 S.Ct. 634, 648 (1983) (entitled to presume legislators ”know the law” and intend meaning of statute to be consistent with prior judicial construction).  
\textsuperscript{14} 20 USC 1400(c)(8) (Congress finds that “[p]arents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways.”).  
\textsuperscript{15} 20 USC 1415(e)(2)(F) and 1415(f)(1)(B)(iii).  
\textsuperscript{16} Senate report 108-185 provides in relevant part:  
Because the committee places such a high value on the successful use of mediation, it has added a provision stating that a written mediation agreement is enforceable in court. A mediation agreement is a written contract entered into between two parties, and should be afforded the same legal protection as other binding contracts. . . . The parties shall memorialize any resolution agreement in a written document that is enforceable in court, as is any other written settlement agreement.

I found no useful references within House report 108-077.
services in the instant dispute) is to be addressed by both the Hearing Officer and the reviewing court. It benefits neither the parties, the Hearing Officer nor the reviewing court to have the BSEA determine the parties’ rights in a manner inconsistent with how a reviewing court would rule on the same disputed issue.17

Similar to the federal grant of jurisdiction to Hearing Officers under the IDEA, the Massachusetts special education regulations provide broad dispute resolution authority to BSEA Hearing Officers. The regulations extend a BSEA Hearing Officer’s jurisdiction over “any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities. . . .”18 Massachusetts special education regulations further grant to a BSEA Hearing Officer “the power and the duty to . . . ensure that the rights of all parties are protected”.19 The rights of parties pursuant to a voluntary settlement agreement relative to a compensatory education claim would appear to fall within this jurisdiction.

Finally, I consider the policy implications relevant to the instant dispute. One federal court has concluded that a Hearing Officer has jurisdiction over a settlement agreement on the basis of policy considerations.20

There are advantages to both parties, as well as to a reviewing court, if I, as the Hearing Officer, take jurisdiction over the settlement agreement in the instant dispute. Taking jurisdiction will allow me to address the entire special education dispute and issue a “final” decision within the prescribed 45-day time period.21 Prior to consideration by a court, the BSEA will have created a full administrative record through an evidentiary hearing before a decision-maker with subject matter expertise – the First Circuit has noted the advantage of creating this administrative record prior to court involvement.22

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17 Ivan v. Westport Rd. of Educ., 865 F. Supp. 74 (D.Conn. 1994) (“logical to infer that a hearing officer should have the same equitable discretion as the district court”); Cocores v. Portsmouth, N.H. Sch. Dist., 779 F. Supp. 203, 205-06 (D.N.H. 1991) (“hearing officer's ability to award relief must be coextensive with that of the court. To find otherwise "would make the 'heart of the [Act's] administrative machinery, its impartial due process hearing' less than complete" internal quotations and citations omitted); S-I v. Spangler, 650 F. Supp. 1427, 1431-33 (M.D.N.C. 1986) (“court finds no compelling reason why the state hearing officer should be deprived of the power to order a necessary and appropriate remedy. It seems incongruous that Congress intended the reviewing court to maintain greater authority to order relief than the hearing officer, especially in light of the hearing officer's expertise in the area.”), vacated on other grounds, 832 F.2d 294 (4th Cir. 1987); S-I by and through P-I v. Spangler, 650 F. Supp. 1427, 1431 (M.D.N.C. 1986), vacated as moot, 832 F.2d 294 (4th Cir. 1987). See also Policy letter issued by Department of Education, Office of Special Education and Rehabilitation Services, June 17, 1994 (stating that hearing officers have the authority to award the same forms of relief available to plaintiffs under 20 U.S.C.A. § 1415(e)(2), including reimbursement).”

18 603 CMR 28.08(3).

19 603 CMR 28.08(5)(c).


21 20 U.S.C. s.1415(i)(1)(A) (Hearing Officer’s decision “shall be final, except that any party involved in such hearing may appeal such decision” to court); 34 CFR 300.511(a)(1) (Hearing Officer must issue decision within 45 days after receipt of a hearing request unless Hearing Officer grants a postponement request by a party).

22 Frazier v. Fairhaven School Committee, 276 F.3d 52 (1st Cir. 2002) (the special education “administrative process facilitates the compilation of a fully developed record by a factfinder versed in the educational needs of disabled children — and that record is an invaluable resource for a state or federal court required to adjudicate a subsequent civil action covering the same terrain.”).
On the other hand, special education Hearing Officers may be reluctant to address settlement agreements since this would require that they understand and apply principles of contract law – an area of law not typically within their expertise. A settlement agreement may also, in certain cases, limit the rights of a party under special education law (for example, where the parties agree to give up “stay put” rights), and a Hearing Officer may be reluctant to determine that a student is entitled to less than what state and federal special education laws would otherwise provide. I understand that these considerations may be important to some Hearing Officers and may lead them to decline to accept jurisdiction. I respect this view even though I do not find it persuasive.

Special education Hearing Officers routinely take jurisdiction over IEPs (including their enforcement) even though IEPs are not specifically referenced in the jurisdictional language under the IDEA, and IEPs are a form of agreement. Settlement agreements and IEPs may address the same substantive issues -- e.g., compensatory education issues. Interpreting and enforcing a settlement agreement in certain situations may not be substantially dissimilar to a Hearing Officer enforcing an agreed-upon IEP.

If I decline to take jurisdiction over the settlement agreement, I have two options, neither of which serves well the interests of the parties or the process itself. One option would be for me to duck, temporarily, the entire issue of compensatory education until a court has ruled on the legal implications, if any, of the settlement agreement. This would force Parent, who is pro se, to proceed to state or federal court. The court would be asked to address the limited issue of the rights of the parties under the agreement, with the case then presumably returning to the BSEA for final resolution of the compensatory claim. This back-and-forth process would inevitably delay, complicate and make more expensive the ultimate resolution of the dispute.

A second option would be for the Hearing Officer to make a decision on the compensatory claim without considering the School District’s defense of the settlement agreement. In the instant dispute, this would result in a decision in Parent’s favor. However, it seems self-evident that a Hearing Officer should not order Norwood to provide compensatory educational services to Parent where the School District (as determined below) has a valid legal defense as a result of the parties’ resolution of this issue through agreement.

For these reasons, I find that section 1415(b)(6) of the IDEA, as well as the state special education regulations referenced above, grant jurisdiction to a BSEA Hearing Officer over those parts of an agreement that relate to the identification, eligibility, evaluation, placement,

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23 The First Circuit has characterized an amended IEP as an “agreement” and has required that its alleged violation be considered by a Hearing Officer before review by a court. Rose et al. v. Yeaw, 214 F.3d 206 (1st Cir. 2000).
24 For example, when a Hearing Officer precludes a parent from seeking compensatory education because the parent accepted an IEP for the relevant time period, the Hearing Officer is essentially enforcing the IEP as an agreement binding upon both parties. The accepted IEP (and its role as a defense to what might be an otherwise viable claim under the IDEA) is essentially identical to my considering the settlement agreement, in the instant dispute, as a defense against Parent’s otherwise viable claim for compensatory services.
IEP or provision of special education. I further find that the settlement agreement in the instant dispute falls within this jurisdiction.

Consideration of Parent’s Compensatory Claim in light of the Settlement Agreement.

The relevant language of the settlement agreement (which is in the form of an IEP amendment) is as follows: “[Student’s] current IEP service delivery grid reads that he will receive Wilson tutoring starting in December 2004. This amendment is to address the plan of compensatory services and to address summer services. . . . [Student] will receive summer services within the Carroll School in Lincoln, MA and Norwood will provide transportation to and from the family’s home.” Exhibit P-17.

The plain meaning of this language is that placement of Student at the Carroll summer school resolves Parent’s compensatory claim. The compensatory claim is the result of Norwood’s failure to provide the Wilson tutoring referenced in the agreement.

Parent made clear at the Hearing that she did not intend this agreement to resolve her compensatory claims. Yet, the plain meaning of an agreement determines the rights of the parties, notwithstanding any different intention of Parent.25

Norwood offered and Student did attend the Carroll summer program, in satisfaction of this agreement. Accordingly, Norwood has a valid legal defense to Parent’s compensatory claim.

For these reasons, I find that Parent is not entitled to further relief regarding her claim for compensatory education services.26

Signature on IEP/Alteration of IEP after Team meeting.

It is not disputed that there was agreement at the December 7, 2004 Team meeting regarding Student’s tutoring by a Wilson-certified teacher and Student’s summer services. The agreed-upon services were reflected within the written summary of the meeting and then within the original IEP that was signed by Parent. Testimony of Parent, Davis, Wyche; exhibits P-1, P-2, S-1.

It is also not disputed that the Norwood Director of Student Services (Ms. Wyche), who was not a member of the IEP Team, unilaterally modified this IEP (after it was drafted and shared

25 When considering and/or enforcing special education settlement agreements, it is appropriate to apply principles of contract law. Alison H. v. Byard, 163 F.3d 2 (1st Cir. 1998); D.R. v. East Brunswick Bd. Of Educ. 109 F.3d 896 (3d Cir. 1997); W. B. v. Matula, 67 F.3d 484 (3rd Cir. 1995). Where language in an agreement is clear on its face, it must be understood and enforced according to the plain meaning of the words used. Alison H. v. Byard, 163 F.3d 2 (1st Cir. 1998) (“where the wording of the contract is unambiguous, the contract must be enforced according to its terms”); Commercial Union Ins. v. Walbrook Ins. Co., 7 F.3d 1047 (1st Cir. 1993) (where contract language itself is unambiguous, “we must give the contract terms their plain meaning”); Schwanbeck v. Federal-Mogul Corp., 412 Mass. 703, 706 (1992) (unambiguous agreement must be enforced according to its terms).

26 Notwithstanding the intent of Norwood, the placement of Student at the Carroll summer program did not completely resolve Parent’s claim for summer services. In another part of the parties’ agreement, it makes clear that Parent reserved her right to additional summer services under the IEP. Exhibit P-17.
with Parent) by removing these services from the service delivery grid and addressing these services within the “other information” section of the IEP. She did this in order to address potential concerns regarding the appropriateness of Student’s placement at LPS, as explained more fully in the Facts section of this Decision. Testimony of Wyche; exhibit P-10.

When Ms. Wyche changed the IEP, she also changed the description of Student’s services. She changed the Wilson tutorial services from 45 minutes, three times each week to 60 minutes, two times each week, and in place of the specific tutorial services listed as Student’s summer services on the IEP, Ms. Wyche wrote: “require an extended school year where he continues with the Wilson tutorial 3x weekly and Speech/Language.” Ms. Wyche signed this revised IEP on February 3, 2005. Testimony of Wyche; exhibit P-10.

It is not disputed by Norwood that the actions of Ms. Wyche were inappropriate. It is the IEP Team alone that considers and decides the content of the IEP. Norwood was bound by the consensus decisions at the December 7, 2004 Team meeting, and the appropriate Norwood representative should have signed the IEP that reflected the Team’s decisions.

Norwood corrected this error by reverting to the original IEP (exhibits P-2, S-1). Although never signed by Norwood, the original IEP became Student’s operative IEP that Norwood has implemented. Testimony of Wyche, Parent.

Although Norwood acted improperly, it has resolved the procedural error before any harm occurred. The First Circuit is clear that relief may only be awarded for procedural errors when there is educational harm or the parent’s opportunity to participate was “seriously hampered.”

I can find no harm, nor has any been alleged, as a result of Norwood’s error. I therefore order no relief regarding this issue.

Tape recording of meeting.

Norwood did not allow Parent to tape record the May 31, 2005 meeting. Parent testified that she sought to tape record the meeting for two purposes – first, because English is her second language and she needs to listen to the tape of the meeting and look up any words that she does not understand and second, because she does not trust Norwood to do what it says it will do.

27 603 CMR 28.05(1), (3) and (4); In Re: Lowell Public Schools, BSEA # 99-0543, 5 MSER 5, 15 (SEA MA 1999) (“decision of a properly constituted TEAM cannot be summarily disregarded, unilaterally altered, or second-guessed if the integrity of that process is to be preserved” and school district was “bound by the consensus” of the TEAM meeting).

28 Roland M. v. Concord Sch. Comm., 910 F.2d 983, 994-95 (1st Cir. 1990) (“When parents raise procedural claims, their injuries are likewise based on harm to their child; they cannot recover unless there is "some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits."”)
Although the special education statutes and regulations do not address this issue, the US Department of Education (DOE) provided the following guidance when it promulgated its regulations under the IDEA:

21. **May IEP meetings be audio or video-tape-recorded?**

Part B does not address the use of audio or video recording devices at IEP meetings, and no other Federal statute either authorizes or prohibits the recording of an IEP meeting by either a parent or a school official. Therefore, an SEA or public agency has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings.

If a public agency has a policy that prohibits or limits the use of recording devices at IEP meetings, that policy must provide for exceptions if they are necessary to ensure that the parent understands the IEP or the IEP process or to implement other parental rights guaranteed under Part B. An SEA or school district that adopts a rule regulating the tape recording of IEP meetings also should ensure that it is uniformly applied.

Any recording of an IEP meeting that is maintained by the public agency is an "education record," within the meaning of the Family Educational Rights and Privacy Act ("FERPA"; 20 U.S.C. 1232g), and would, therefore, be subject to the confidentiality requirements of the regulations under both FERPA (34 CFR Part 99) and Part B (§§300.560-300.575).

Parents wishing to use audio or video recording devices at IEP meetings should consult State or local policies for further guidance.29

The parties agree that the May 31, 2005 meeting was not an IEP Team meeting and therefore the above guidance does not apply. However, it seems likely that the above guidance provides the outer parameters of what Norwood’s requirements would be regarding the May 31, 2005 meeting.

As the above DOE guidance makes clear, a parent does not have an absolute right to tape record an IEP Team meeting, but the school district must nevertheless make allowance to ensure that a parent understands the IEP and IEP process. Similarly, Norwood has a responsibility to ensure that Parent in the instant dispute could understand what was discussed at the May 31, 2005 meeting, particularly where Parent’s second language is English. Norwood may accomplish this through a variety of means – for example, providing an interpreter.

Parent has not alleged that she was unable to understand what occurred during the May 31, 2005 meeting or that she was otherwise limited in her ability to participate in the meeting. I

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29 64 Fed. Reg. 48, 12477 (March 12, 1999).
therefore conclude that Parent has alleged no harm and, accordingly, is not entitled to any relief with respect to this issue.

ORDER

Norwood shall reimburse Parent for her out-of-pocket expenses for engaging Ms. McLaughlin for two weeks of reading/writing tutoring (4.0 x 45 minutes each week) from August 1, 2005 through August 12, 2005.

Norwood shall also provide compensatory services for the following missed services from August 1, 2005 through August 12, 2005: two weeks of speech/language therapy (3.0 x 45 minutes each week) and two weeks of math tutoring (4.0 x 45 minutes each week), as reflected in the IEP (exhibits S-1, P-2).

Parent is not entitled to any additional relief.

By the Hearing Officer,

William Crane
Dated: August 19, 2005
In Re: Norwood Public Schools  

ORDER

In order to apprise the parties in a timely manner of my findings and conclusions, this Order is issued today, in advance of the full Decision, which I expect will be issued no later than August 19, 2005.

A hearing was held on August 5, 2005 in Malden, MA before William Crane, Hearing Officer. The official record of the hearing consists of documents submitted by the Parents and marked as exhibits P-1 through P-36; documents submitted by the Norwood Public Schools (Norwood) and marked as exhibits S-1 through S-7; and approximately three hours of recorded oral testimony and argument.

There are four issues to be decided in this case. However, the only issue that will be addressed through this Order is Parent’s right to summer services – more specifically, the end date of Student’s summer services, whether Parent may be reimbursed for expenditures she has made for summer services and whether Norwood owes Parent any additional summer services.

After careful consideration of the evidence and arguments (including written closing arguments from both parties), I make the following findings.

Summer services within the last accepted IEP (exhibits P-2, S-1) include three components: (1) reading/writing tutoring for 45 minutes four times each week by a special education teacher, (2) math tutoring for 45 minutes four times each week by a special education teacher and (3) speech/language therapy for 45 minutes three times per week by a speech/language therapist. Dates in the services delivery grid for each of the three summer services are July 1, 2005 (start date) to August 30, 2005 (end date). An asterisk (*) next to each of the three “August 30, 2005” dates refers the reader to a sentence at the bottom of the service delivery grid, which reads as follows: “The dates of the summer services would run concurrently with the Norwood summer program.”

I am persuaded that the above-quoted sentence modifies the ending date of August 30, 2005 for each of the three summer services. The last day of Norwood’s summer programs is August 12, 2005. Therefore, I will consider August 12, 2005 to be the end date of Student’s summer services. Student attended the Carroll summer program through July 29, 2005, but Norwood did not offer appropriate summer services for the subsequent time period – that is, August 1 through August 12, 2005. Parent engaged a private tutor (Marguerite McLaughlin) for the purpose of providing reading/writing tutoring services during this time period.
For these reasons, I issue the following order for the purpose of resolving the issue of summer services.

Norwood shall reimburse Parent for her out-of-pocket expenses for engaging Ms. McLaughlin for two weeks of reading/writing tutoring (4.0 x 45 minutes each week) from August 1, 2005 through August 12, 2005. Norwood shall also provide compensatory services for the following missed services from August 1, 2005 through August 12, 2005: two weeks of speech/language therapy (3.0 x 45 minutes each week) and two weeks of math tutoring (4.0 x 45 minutes each week), as reflected in the IEP (exhibits S-1, P-2).

By the Hearing Officer,

William Crane
Dated: August 11, 2005
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 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.