COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Wakefield Public Schools            BSEA #06-5946 and #06-5993

DECISION

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

A hearing was held on June 22, 2006 in Malden, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Kristen Abdow  First Grade Teacher, Wakefield Public Schools
Tiffany Giannato  Special Education Teacher, Wakefield Public Schools
Pamela Martin  Speech and Language Pathologist, Wakefield Public Schools
Nora Shine  School Psychologist, Wakefield Public Schools
Joan Landers  Assistant Superintendent for Student Services, Wakefield Public Schools
Catherine Lyons  Attorney for Wakefield Public Schools

The official record of the hearing consists of documents submitted by the Wakefield Public Schools (Wakefield) and marked as exhibits S-1 through S-15; and approximately three hours of recorded oral testimony and argument.

NATURE OF THE DISPUTE AND POSITIONS OF THE PARTIES

The principal dispute in this case is whether the current IEP and placement for Student, including a language-based program, are appropriate and can be provided in a manner that is safe for Student.

In their Hearing Request, Parents take the position that another student (in Student’s classroom at the Greenwood School) is a danger to Student and, as a result, Wakefield is not able to provide an appropriate education for their son in his current placement. Parents have requested that their son be transferred to the Woodville School, which is another elementary school within the Wakefield public school system. Parents have requested that their son not receive special education services, apparently believing that their son does not require the language-based special education program available only at the Greenwood School.
Wakefield takes the position that Student is safe at the Greenwood School, that he requires the special education services that are available only at his current placement at Greenwood, and that his IEP provides Student with a free appropriate public education.

Parents seek to have their son removed from special education so that he may be transferred to a different elementary school that does not include a language-based program. Wakefield seeks an order that Student return to his current special education placement.

**PROCEDURAL HISTORY**

On June 1, 2006, Wakefield initiated this action by filing with the Bureau of Special Education Appeals (BSEA) a Hearing Request alleging that Parents are refusing to allow their son to attend school, thereby denying him the opportunity to receive FAPE.\(^1\) Wakefield sought an order from the BSEA determining that its IEP and placement are appropriate and directing Parents to return their son to school.

On June 5, 2006, Parents filed with the BSEA their own Hearing Request alleging that their son was assaulted by a boy who attends their son’s school. Parents requested that their son be transferred to the Woodville School. The two Hearing Requests were consolidated by the BSEA.

On June 7 and 16, 2006, a BSEA Hearing Officer conducted several telephone conference calls with Wakefield’s attorney and the attorney who was then representing Parents. The conference calls were for the purpose of determining whether the dispute could be informally resolved, clarifying the issues to be addressed at hearing, and scheduling Hearing dates as well as dates for exchange of witness lists and proposed exhibits prior to the Hearing. On June 20, 2006, this matter was re-assigned to the present Hearing Officer.

At approximately 10:30 AM on June 22, 2006 when Parents had not arrived for the 10:00 AM Hearing, the Hearing Officer spoke by telephone with Parents’ attorney who advised the Hearing Officer that Parents would not be represented at the Hearing and that he had expected Mother to attend the Hearing. The Hearing Officer then sought, unsuccessfully, to reach Parents by telephone.

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\(^1\) Wakefield filed its Hearing Request pursuant to Massachusetts special education regulations that provide, in relevant part, as follows:

> If, subsequent to . . . initial placement and after following the procedures required by 603 CMR 28.00, . . . the parent revokes consent to . . . placement [in a special education program subsequent to the initial placement], the school district shall consider with the parent whether such action will result in the denial of a free appropriate public education [FAPE] to the student. If, after consideration, the school district determines that the parent’s failure or refusal to consent will result in a denial of a free appropriate public education to the student, it shall seek resolution of the dispute through the procedures provided in 603 CMR 28.08. 603 CMR 28.07(1)(b).

The above-referenced 603 CMR 28.08 regulatory section describes the dispute resolution processes, including the filing of a Hearing Request with the BSEA.
Parents had not requested a postponement of the June 22, 2006 Hearing. Neither the Parents nor their attorney were present for any part of the Hearing. They also had not provided a witness list or proposed exhibits prior to the Hearing.

Pursuant to BSEA Hearing Rule XF, the Hearing Officer held the Hearing on the scheduled Hearing day of June 22, 2006, taking evidence from Wakefield.2

Later that same day, the Hearing Officer issued an Order advising Parents of their right to request, with sufficient reasons, that the Hearing remain open so that they have an opportunity to cross-examine Wakefield’s witnesses, present their own witnesses, and/or present written documents as evidence. The Order also advised Parents of the deadline of July 3, 2006 for submission of written arguments. The audiotapes of the Hearing were sent to Parents on or about June 22, 2006.

Wakefield filed its closing argument on July 3, 2006, and the record closed on that date.

On July 5, 2006, Parents filed a request to submit their written closing argument two weeks after the July 3, 2006 deadline. On July 6, 2006, the Hearing Officer denied Parents’ request. Parents have not filed a request to keep the record open for purposes of submitting testimonial or documentary evidence.

**ISSUES**

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

1. Do Wakefield’s IEP and educational placement provide Student with a free appropriate public education in the least restrictive environment?

2. Can Wakefield’s IEP be implemented safely within Student’s current placement?

3. If not, can accommodations or other modifications be made to Student’s services or placement?

4. If not, can Student’s IEP be implemented at another elementary school within the Wakefield public school system?

**PROFILE, SERVICES, AND IEP**

Student is a seven-year-old boy (date of birth 1/11/99) who lives with his Parents in Wakefield, MA. Student is polite, cooperative, and social. Exhibit S-1.

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2 BSEA Hearing Rule XF provides: “[i]f a party fails to appear at the scheduled hearing, the Hearing Officer may take evidence and issue such orders as may be necessary including, but not limited to, ordering an educational program or placement for the student or defaulting the absent party.”
Student has been diagnosed with a learning disability, evidenced by weaknesses in his numerical operations, oral expression, and listening comprehension. He requires services regarding language processing in order to address these deficits. Testimony of Shine, Martin, Giannato; exhibits S-1, S-8, S-9.

Pursuant to his current IEP, Student is to receive part of his education in a general education 1st grade classroom and part of his education at the Language Based Program. Student also receives support and accommodations for language, speech, and academic development. All of Student’s educational services are to be provided at the Greenwood School, which is part of the Wakefield public school system. Testimony of Abdow, Shine, Martin, Giannato; exhibit S-1.

More specifically, Student’s current IEP calls for the following special education services to be provided within the general education classroom: language-based math services for one hour each day, and receptive/expressive/fluency services from a speech and language pathologist for a half hour once in each six-day cycle. The IEP further calls for the following special education services to be provided outside of the regular education classroom: language-based services from a special education teacher for ninety minutes each day, counseling individually or in a small group for a half hour once in each six-day cycle, and speech services from a speech and language pathologist for a half hour twice in each six-day cycle. The IEP also calls for summer services. It has been anticipated that Student would attend an academic program during the summer of 2006 that would begin July 3, 2006. Testimony of Abdow, Martin, Giannato; exhibit S-1.

Student’s most recent IEP is for the period 12/2/05 to 12/1/06. On December 20, 2005, Father fully accepted the IEP as well as placement at the Language Based Program at the Greenwood School. Exhibit S-1.

FACTS

In October and November 2004, a Wakefield school psychologist (Linda Caldwell) conducted a psychological evaluation of Student that included the Wechsler Preschool and Primary Scale of Intelligence – Third Edition, Bender Visual Motor Gestalt Test: Second Edition, Draw a Person, observations in class, and review of records. Ms. Caldwell concluded that although Student had made much improvement in the amount and use of language, he continued to present with significant language needs that impact his ability to communicate. At the time of the evaluation, Student was receiving special education services (including speech services) in a full-day integrated kindergarten program. The evaluation report indicates that during an October 14, 2004 Team meeting, Mother “firmly questioned” the need for Student’s then current special education program. Exhibit S-8.

Also in October and November 2004, a Wakefield speech and language pathologist (Kristin Tierney) conducted a speech and language evaluation of Student that included the Clinical Evaluation of Language Fundamentals – 4, Peabody Picture Vocabulary Test – Third Edition, Goldman Fristoe Test of Articulation – 2, and Developmental Checklist/Clinical Observations. Ms. Tierney concluded that her testing indicated severe receptive and
expressive language impairments characterized by difficulties responding to directions, comprehending concepts and sentence structures, expressing relationships between words, recalling sentences and expressing his ideas with appropriate form and content. On-going speech and language services were recommended to address these impairments and to provide strategies to maximize his communication abilities in social situations. Exhibit S-9.

The above-described 2004 psychological evaluation and the 2004 speech and language evaluation are the only formal evaluations of Student’s learning strengths and weaknesses that have been submitted into the evidentiary record.

In May 2005, Student’s IEP Team met and decided to place Student at the Language Based Program at the Greenwood School in order to address Student’s language-based learning deficits during the 2005-2006 school year. Testimony of Giannato.

In August 2005, Ms. Landers (Wakefield’s administrator of special education services) met with Parents who advised her that they would like their son to be “dropped from special education” and transferred to Woodville School. By email letter of September 2, 2005, Ms. Landers explained to Parents that Student “cannot be dismissed from special education services if it was decided by the team that he needs such services and specialized instruction in order to make effective progress.” She advised Parents that their son would be placed at the Greenwood School for the 2005-2006 school year, where he would receive services pursuant to his last-accepted IEP. Testimony of Landers; exhibit S-6.

In the same letter of September 2, 2005, Ms. Landers advised Parents that Wakefield would pay for Parents’ requested independent evaluation. Apparently, Parents have not yet arranged for the requested evaluation, and it therefore has not occurred. Testimony of Landers; exhibit S-6.

In September 2005, Student began attending 1st grade at the Language Based Program at the Greenwood School. This program was created by Wakefield to provide special education services for children with intensive language-based learning disabilities. Testimony of Landers. Pursuant to his IEP, Student received ninety minutes per day of small-group specialized instruction to address his language needs, particularly regarding decoding and encoding skills. Math instruction was provided within the regular education classroom, with the assistance of an aide to adapt the content of the instruction as necessary. Speech and language services were provided to Student in a small group setting outside of the regular education classroom for a half hour, twice during each six-day cycle. Testimony of Giannato, Abdow, Martin.

On December 2, 2005, Student’s IEP Team met to review Student’s special education services and placement. At the request of Father, who attended the meeting, services were increased by adding a half hour of speech and language services within the regular education classroom. These services would occur during science class where the speech and language pathologist would preview and review what was taught, and work on communication and comprehension strategies. On December 20, 2005, Father fully accepted the proposed IEP for the period 12/2/05 to 12/1/06 and Student’s placement at Greenwood. This IEP is...
substantially the same as the previous IEP, except for the addition of increased speech and language services requested by Father. (Content of the IEP is described above.) Testimony of Giannato; exhibit S-1.

Progress reports dated December 8, 2005, February 15, 2006, and April 15, 2006 indicate that Student was making substantial progress with respect to language arts, reading, and communication, and adequate progress with respect to mathematics and social skills. Exhibit S-7.

On April 3, 2006, Parents advised Ms. Giannato (the Language Based Program teacher) of their concerns regarding the relationship between their son and another student in his classroom. Ms. Giannato advised Dr. Shine (School Psychologist for Greenwood School) of Parents’ concerns, and Dr. Shine (whose responsibilities include addressing any conflicts between students) then spoke with Student’s teachers and aides. Dr. Shine was informed consistently that Student and the other student in his classroom were friends and sought each other out in order to play, for example, at recess. Testimony of Giannato, Shine.

On several occasions soon after April 3, 2006, Dr. Shine observed the two students during the school day and found that they appeared to be friendly towards each other.

On or about April 5, 2006, Dr. Shine spoke with Mother and was able to reassure her regarding the safety of her son at school. On or about April 7, 2006, Dr. Shine spoke again with Mother. During this conversation, Dr. Shine found Mother to be extremely concerned about bullying of her son at school by the other student whom Mother had previously identified. During this conversation, Mother requested that her son be transferred to another school within Wakefield. Testimony of Shine.

The Wakefield witnesses explained that there were occasionally “minor issues” between the two students, which were considered by Wakefield staff to be typical of children at this age, but nothing more serious. The only physical altercation that Wakefield staff observed between these two children occurred when the classroom teacher took away a toy from the other student and then upon returning to his desk, the other student intentionally “bumped” into Student. The bump did not knock over Student or appear to harm him in any way, and soon thereafter the two boys were observed to be friendly towards each other. Testimony of Shine, Giannato, Abdow.

On April 13, 2006, Father came to school and met with Ms. Giannato and Dr. Shine. Father stated that his wife and daughter had observed, at the end of a physical education class, the other (previously identified) student pushing Student to the ground and hitting him. Soon thereafter, Dr. Shine contacted the physical education teacher and the aide who would have been present during physical education. The teacher and aide were not aware of any altercation between the two students, and there was no report of Student’s requiring attention from the school nurse. Testimony of Shine.

Student did not attend school after April 13, 2006. Testimony of Shine; exhibit S-2.
Wakefield then assigned a dedicated aide to the other student to observe whether the student was dangerous or harmful to others. Although this student has, at times, demonstrated aggressive behaviors, he has not hurt anyone. Testimony of Abdow.

On April 26, 2006, Parents met with Dr. Maynard Suffredini (the Wakefield Superintendent of Schools). By letter to Parents dated May 5, 2006, Dr. Suffredini thanked Parents for meeting with him and advised Parents that, after consultation with others in Wakefield, he believed that Student required the language-based program that was available only at Greenwood School, that Parents reside in the Greenwood District (making Greenwood Student’s “school of residence”), and that appropriate precautions have been taken with respect to Student’s safety and security. Exhibit S-5.

By letter to Parents of May 17, 2006, Ms. Landers responded to Parents’ request that their son “be removed from any and all special education services at this time.” Ms. Landers explained that Student’s IEP Team believes that due to the nature of his disability, he requires specialized instruction in order to make effective educational progress, and that pending resolution of this matter, Wakefield would continue to provide Student with services pursuant to his last accepted IEP, which runs from 12/2/05 through 12/1/06. Testimony of Landers; exhibit S-4.

On May 26, 2006, there was a hearing in state Superior court to consider Parents’ request for a restraining order against the other student. Both the Student and the other student were present in the courtroom and were observed to be friendly towards each other. After a hearing on the matter, the judge denied the requested restraining order. Testimony of Shine, Landers; exhibit S-3.

On May 31, 2006, Ms. Landers spoke by telephone with Parents who said that their son did not need special education services. Parents requested that their son be placed in a different school. Testimony of Landers.

Through their May 2006 correspondence with the Wakefield director of special education (Ms. Landers) and through their Hearing Request in the instant dispute, Parents have effectively rejected the IEP and placement.

Student has not attended school from April 14, 2006 through the date of the Hearing in the instant dispute (June 22, 2006). Testimony of Shine; exhibit S-2.

**DISCUSSION**

A. **Introduction.**

Student is an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act\(^3\) and the state special education statute.\(^4\) As such, Student is

\(^3\) 20 USC 1400 et seq.

\(^4\) MGL c. 71B.
entitled to a "free appropriate public education [FAPE] that emphasizes special education and related services designed to meet [his] unique needs and prepare [him] for further education, employment, and independent living."\textsuperscript{5} Neither his eligibility status nor his entitlement to FAPE is in dispute.

FAPE requires, in general, the delivery of “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.”\textsuperscript{6} More specifically under Massachusetts and federal special education law, FAPE requires an individualized education program (IEP) that is tailored to address the student’s unique needs in a way reasonably calculated to enable the student to make meaningful and effective educational progress in the least restrictive environment.\textsuperscript{7}

B. Appropriateness of the IEP and placement.

The initial issue presented is whether the programming and specialized services embodied in Wakefield’s current IEP are consistent with the above-described legal standard regarding FAPE. Wakefield has the burden of persuading me that the IEP meets this standard.\textsuperscript{8}

Student has substantial language-based learning disabilities. These disabilities are manifested in limitations regarding language processing with respect to both receptive and expressive communication. Student also demonstrates weaknesses in his numerical operations. These disabilities have been identified at least since October/November 2004 and are likely to be long-lasting learning deficits. Testimony of Shine, Martin, Giannato; exhibits S-1, S-8, S-9.

In order to make effective educational progress, Student requires special education services regarding language processing. More specifically, it is necessary for Student to receive language-based instruction in order to understand the content of instruction and to learn strategies for remedying his language deficits. Testimony of Landers, Martin, Giannato; exhibits S-1, S-8, S-9.

\textsuperscript{5} 20 USC 1400(d)(1)(A). \textit{See also} 20 USC 1412(a)(1)(A); MGL c. 71B, ss. 2, 3.
\textsuperscript{7} For an explanation of this standard and the legal authorities upon which it is based, see \textit{In re: Arlington}, 37 IDELR 119, 8 MSER 187, 193-195 (SEA MA 2002). \textit{See also} the following federal decisions not referenced in \textit{Arlington}: 20 USC 1400(d)(4) (a purpose of the federal law is “to assess, and ensure the effectiveness of, efforts to educate children with disabilities”); \textit{Board of Education of Hendrick Hudson Central School District v. Rowley}, 458 U.S. 176, 192 (1982) (goal of Congress in passing IDEA was to make access to education "meaningful"); \textit{L.E. v. Ramsey Board of Education}, 435 F.3d 384 (3rd Cir. 2006) (education must confer meaningful benefit); \textit{Deal v. Hamilton County Board of Education}, 392 F.3d 840 (6th Cir. 2004) (“IDEA requires an IEP to confer a ‘meaningful educational benefit’ gauged in relation to the potential of the child at issue”); \textit{Shore Regional High School Bd. of Educ. v. P.S.}, 381 F.3d 194, 198 (3d Cir. 2004) (“IEP must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student’s intellectual potential”) (Alito, J.).
\textsuperscript{8} \textit{Schaffer v. Weast}, 126 S. Ct. 528, 534, 537 (2005) (burden of persuasion in an administrative hearing regarding an IEP is placed upon the party seeking relief; a party who has the burden of persuasion “loses if the evidence is closely balanced”).
The special education and related services provided by Wakefield pursuant to Student’s current IEP are well-suited for these purposes. The language-based instruction for ninety minutes each day, the assistance of an aide during math instruction, the speech and language services both within and outside the regular education classroom, and the numerous accommodations listed within Student’s IEP are appropriate for Student and have resulted in meaningful progress during the time that Student has attended school during the current school year (September 2005 to April 13, 2006). Testimony of Giannato, Martin, Abdow; exhibit S-7 (progress reports).

For these reasons, I find that Wakefield’s current IEP and educational placement, as reflected within exhibit S-1, provide Student with a free appropriate public education in the least restrictive environment.

C. Safety of Student.

In their Hearing Request and indirectly through the testimony of Wakefield witnesses, Parents have raised safety concerns. The main thrust of Parents’ Hearing Request is that this other student assaulted their son, presumably that the other student presents an on-going danger to their son, and that their son should not be further educated with this other student.

I note, at the outset, that safety concerns may be appropriately considered by a BSEA Hearing Officer in a special education dispute since these kinds of concerns, if substantiated, may preclude a student from receiving FAPE.

Parents have the burden of persuasion regarding this issue.

Parents brought their safety concern to the attention of various school personnel in early- and mid-April 2006. The Wakefield staff promptly took steps to find out as much information as possible about the other student and to assess whether he posed a danger to Student. All relevant teachers and aides were interviewed. Both students were observed while at school, and a 1:1 aide was subsequently assigned to the other student for several months as a precautionary measure and to monitor his behavior. Testimony of Shine, Landers, Giannato.

The most that has been observed by Wakefield witnesses was an isolated “bump” of Student by the other student. This occurred when the other student was returning to his desk after the

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9 See Lillbask v. Connecticut Department of Education, 397 F.3d 77, 93 (2nd Cir., 2005) (IDEA’s “broad language suggests that Congress did not intend to exclude from consideration any subject matter - including safety concerns - that could interfere with a disabled child's right to receive a free appropriate public education”); A.S. and W.S. v. Trumbull Board of Education, 106 LRP 7804, U.S. District Court, Connecticut, February 9, 2006 (if the proposed placement . . . threatened [students’] health in a manner undermining their ability to learn, such a placement would deny the children the benefits that the IDEA guarantees”). See also cases discussing claims of school-related harassment or hostile learning environment. Stringer v. St. James R-I School District, 2006 U.S. App. LEXIS 10950 (8th Cir. 2006); Guckenberger v. Boston University, 957 F.Supp. 306, 313 (D.Mass. 1997); In Re: Peabody Public Schools, BSEA # 01-3945, 8 MSER 108, 128 (SEA MA 2002).

10 Schaffer v. Weast, 126 S. Ct. 528, 534, 537 (2005) (burden of persuasion in an administrative hearing regarding an IEP is placed upon the party seeking relief; a party who has the burden of persuasion “loses if the evidence is closely balanced”).
classroom teacher had taken away a toy. The bump did not knock over Student or appear to harm him in any way, and soon thereafter the two were observed to be friendly towards each other. Testimony of Shine, Giannato, Abdow.

The consistent testimony of the Wakefield staff who are working with these children during the school day was that not only is there no animosity between them, but they are friendly towards each other, even seeking out each other to play. It also is noted that Parents were unsuccessful in seeking a court-ordered restraining order against the other student. Testimony of Abdow, Giannato, Shine; exhibit S-3.

Presumably, Parents strongly disagree. However, by not appearing at the Hearing and engaging in cross-examination of the Wakefield witnesses and by not testifying or submitting any other evidence upon which I might reach a different conclusion, Parents have failed to rebut the credible testimony of Wakefield witnesses and have failed to carry their burden of persuasion regarding this issue.

I find that the evidence does not support any significant safety concerns within Student’s current placement. I conclude that Wakefield’s IEP may be implemented safely within Student’s current placement.

D. Requested relief.

Through correspondence with the Wakefield director of special education (Ms. Landers) in May 2006 and through their Hearing Request, Parents have asked that Student’s special education services be discontinued and that he be transferred to a different elementary school within Wakefield – specifically, the Woodville School. Through its Hearing Request, Wakefield has sought an order that Student return to his current special education program at the Greenwood School.

Location of Student’s school placement. The federal regulations under the IDEA provide a preference for placement in the school that the student would attend if he/she did not require special education services, subject to any competing special education needs.11 Greenwood School is Student’s elementary school based upon Parents’ street address in Wakefield. Exhibit S-5. In the event that Student did not have special education needs, presumably he would attend this school.

In addition, the Language Based Program that Student requires to make effective progress is located only at the Greenwood School. For reasons explained above, the evidence was persuasive that Student requires the special education services, including a language-based classroom, that is reflected within his current IEP and placement. Wakefield would not be able to provide Student with appropriate educational services and programming at the Greenwood School.

11 34 CFR 300.552 (“each public agency [governed by the Act] shall ensure that: (a) The placement decision . . . . (3) Is as close as possible to the child's home. . . . (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.”).
Woodville School, where he could receive related services such as speech and language services but would not receive language-based instruction. Testimony of Landers, Giannato.

Therefore, based both upon Parents’ street address and upon Student’s special education needs, Greenwood is the appropriate elementary school.

Discontinuation of special education services. Parents seek to discontinue all special education services, perhaps hoping that this would allow Student to attend a different school, while Wakefield seeks an order that Student return to his current special education placement. The relief being sought by both parties pertains to the rights of parents to consent to (and refuse) special education services.

As a general rule, Wakefield may provide special education services to Student only with the consent of one or both Parents. Massachusetts special education regulations specifically address the facts of the instant dispute:

The school district shall obtain written parental consent before conducting an initial evaluation or making an initial placement of a student in a special education program under 603 CMR 28.00. Written parental consent shall be obtained before conducting a reevaluation and before placing a student in a special education placement subsequent to the initial placement in special education.

The regulations also make clear that consent may be revoked at any time.

These same state regulations further require Wakefield, after determining that Parents’ refusal to consent results in a denial of FAPE, to utilize the procedures set forth within 603 CMR 28.08, which include the BSEA due process procedures. Although these procedures allow a BSEA Hearing Officer to determine the appropriateness of Wakefield’s current IEP and placement, I find no authority for a BSEA Hearing Officer to override Parents’ lack of consent or to otherwise issue an order that Student be returned to his special education placement.

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12 20 USC 1414(a)(1)(D)(i)(II) and 1414(a)(1)(D)(ii)(II) (requiring consent prior to providing special education services); MGL s. 71B, s. 3 (requiring consent prior to placement in a special education program); 603 CMR 28.07 (describing parents’ rights regarding consent). Cf. 20 USC 1400(d)(1)(A) (principal purpose of IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education . . . ”) (emphasis supplied). But see 20 USC 1415(k) (involuntary placement in alternative education setting allowed under certain circumstances); 34 CFR 300.300(b) (proposed federal regulations interpreting consent rights under IDEA 2004 as applying only to initial placement).

13 603 CMR 28.07(1)(a) (emphasis supplied). See also MGL s. 71B, s. 3 (expressly giving the state Department of Education the authority to promulgate regulations relative to consent).

14 603 CMR 28.07(1)(a2).

15 603 CMR 28.07(1)(b).

16 See also 20 USC 1414(a)(1)(D)(i)(II) and 1414(a)(1)(D)(ii)(II) (precluding use of BSEA due process proceedings to override parent’s refusal to consent to special education services). But see 34 CFR 300.300(b) (proposed federal regulations interpreting 20 USC 1414(a)(1)(D)(i)(II) and 1414(a)(1)(D)(ii)(II) as applying only to initial placement).
Similarly, Parents may decide to refuse all special education and related services, thereby withdrawing their son entirely from special education and asserting their right to have him educated only within regular education. Although a court may possibly limit Parents’ right to return their son to regular education, I have no such authority as a BSEA Hearing Officer.17

In the event that Parents choose to refuse all special education services, any subsequent services and placement (for example, a determination as to whether Student would be placed at the Greenwood or Woodville schools) would no longer be a matter to be determined under special education law and therefore would not be within the province of the BSEA. In the event that Parents choose not to withdraw their son from all special education, the appropriate services and placement, as already determined within this Decision, are reflected within Wakefield’s current IEP.

ORDER

Wakefield’s current IEP and educational placement, as reflected within exhibit S-1, provide Student with a free appropriate public education in the least restrictive environment.

Wakefield’s IEP may be implemented safely within Student’s current placement.

By the Hearing Officer,

William Crane
Dated: July 7, 2006

17 MGL c. 71B, s. 3 (“If rejected, and the program desired by the parents . . . is a regular education program, the . . . local school committee shall provide the child with the educational program chosen by the parent . . . except where such placement would . . . deny the child a free appropriate public education. In such circumstances the local school committee may proceed to the superior court with jurisdiction over the residence of the child to make such showing. Said court upon such showing shall be authorized to place the child in an appropriate education program.”)
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.