COMMONWEALTH OF MASSACHUSETTS
SPECIAL EDUCATION APPEALS

In Re: Student
Wachusett Public Schools District

BSEA # 02-0865

RULING ON MOTION FOR PLACEMENT PENDING APPEALS
ORDER

On August 16, 2001, the Bureau of Special Education Appeals (hereinafter, “BSEA”)
received the Parent’s request for Hearing in the above referenced matter. On Friday
August 17th the BSEA issued its Notice of Hearing. That same date the Parents filed a
Motion for Stay Put Order. In its request the Parents’ attorney requested that if oral
arguments were required that this be scheduled for sometime before the following Friday,
August 24th after which date he would be on vacation. In the alternative he agreed to
present arguments via conference call. A second letter was received from the Parents’
attorney on Wednesday August 22nd stating that he understood that a conference call
would be scheduled to address the Stay Put issue. That same date he was notified that
Attorney Regina Tate would represent Wachusett Public Schools District (hereinafter,
“Wachusett”). On Thursday August 23rd, the BSEA requested that Attorney Howard, the
Parents’ attorney, fax his request for Hearing and the Motion for Stay Put Order to
attorney Tate. This was done in the afternoon of August 23rd. On August 23rd the BSEA
also issued an Order setting the matter for a telephone Conference Call on Friday, August
24th at 10:00 am.

During the Conference call it was agreed that since Attorney Tate had just received the
Parents’ request for Hearing, BSEA notice of Hearing and Motion for Stay Put Order the
previous afternoon and had not had an opportunity to prepare a response, a written
Response would be forwarded to the BSEA later that day before she left for vacation.
Wachusett’s Opposition to the Parent’s Motion for Stay Put Order was received on
Friday, August 24th, 2001.

Consistent with the Administrative Rules, the Hearing Rules for Special Education
Appeals provide that any party wishing to file a written objection to allowance of a
motion must do so within seven days of the day of receipt and may request a hearing on
the motion. Rule 6. C. A Hearing Officer may then rule on a motion without hearing oral
arguments. Rule 6. D. In the case at bar since counsel for Wachusett did not receive any
of the documents pertaining to the hearing until the afternoon of August 23rd and since
both counsel were unavailable the following week due to previously scheduled vacations,
the parties agreed to forego oral arguments during the week of September 3rd. Since the issue to be decided is Stay Put, the same could be adjudicated through written arguments and accompanying exhibits.

FACTUAL BACKGROUND:

1. Born on 11/17/1989 Student is an 11 and a half year old fourth grader in the Wachusett school district. (PE-A) There is no dispute between the parties regarding the Student’s entitlement to special education services or that his areas of need involve global developmental delays, receptive/expressive language deficits moderately-severe in nature and Attention Deficit Hyperactivity Disorder. (PE-A)

2. Following a re-evaluation, the Student’s Team met on 11/08/2000 and drafted an IEP calling for the Student to receive services at the Houghton/Chocksett School. (PE-A) This IEP states on the Parent’s concern sheet that improvement in social skills and pragmatic language skills was desired with emphasis on increasing positive peer relations through participation in inclusion and social groups. (Id.)

3. The Houghton/Chocksett School is physically connected to the Houghton Elementary School.

4. Test results from both Wachusett and the Independent Evaluator, Dr. Marilyn Engleman, place the Student’s reading skills at approximately the second grade level and broad knowledge at approximately the first grade level. (PE-A; Parent’s Argument) He presents with difficulty sustaining attention to task and completing them, understanding abstract concepts, delays in fine motor skills, and a number of other issues. According to Wachusett, he would benefit from small group, self-contained classroom instruction for all content areas, with a behavioral management program in place. (PE-A) Participation in an inclusion classroom should be limited to Art, Music, Gym and Science. (Id.)

5. The Service Delivery Grid of this IEP calls for consultation for OT, PT and Speech and Language, special education services in general education with direct services for speech and language, and, special education services with direct services in other settings for academics, OT and Speech and Language. (PE-A) The additional information page states that the Student “will be fully included within the 4th grade Science, Art, Music, and Gym classes. Instruction will be provided by the regular education teacher with augmentation and modifications made when needed. In addition, consultation will be provided to the regular education teacher by the Developmental teacher on a weekly basis and as needed. [Student] will also receive additional academic support within the Science curriculum within the Developmental Class.” (PE-A)

6. This IEP covered the period of November 8, 2000 through October 26, 2001. (PE-A) The IEP, forwarded by Wachusett on November 22, 2001 was accepted in full by the Parent on December 14, 2000. (Id.)

7. The Student’s Team met again on May 23, 2001 and discussed transferring the Student to the Central Tree Middle School (hereinafter, “Central Tree”) located in Rutland, MA. The Student would receive direct special education services for math and reading. Academic subjects at Central Tree are not provided in an inclusion
model. The Team did not reach a consensus as to whether the Student should attend Central Tree or the Chocksett School. (PE-B)

8. In the late Spring of 2001, Wachusett issued a Team Determination of Type of Placement Form calling for placement of the Student in a substantially separate classroom at Central Tree for the period covering from November 8, 2000 through October 26, 2001. (PE-B) Seven months had lapsed since the original IEP covering the same time period had been issued. The Determination of Type of Placement also called for the Student to have opportunities for inclusion with age appropriate peers. The Parents rejected the proposal on June 5, 2001. (Id.)

9. The Student attended the summer school program at the middle school during the summer of 2001. (School’s Opposition Memorandum)

10. On August 23, 2001 the Parents’ filed a request for Hearing and then filed a Motion for Stay Put Order on August 24, 2001.

**RULING:**

Wachusett argues first, that the principles of Stay Put do not apply to the facts of this case. The Student is by age a middle school student and the services provided in the middle school are the same as he ones provided at the elementary level. Therefore, the change from the elementary to the middle school level is a change in the location of services rather than a change in placement. Wachusett asserts that Stay Put applies only to actual services, not to the location for delivery of the service.

Second, Wachusett states that the developmental class for Student’s age group is at Central Tree and that the services at the middle school would be the same as at the elementary school. The only difference would be his ability to participate in a school with age-appropriate peers. According to the Parents, Student is the only child his age (11.9) at Central Tree. The Parents wish for the Student’s IEP to be implemented at Chocksett and further argue that the Student’s emotional well-being would be seriously disrupted by a transfer to Central Tree. The Parents invoke their right to have their son remain in the program/school designated in his last accepted IEP (PE-A) and seek an order that he stay at Houghton/Chocksett during the pendency of their appeal.

The Stay Put provisions of the IDEA, provide that:

> During the pendency of any proceeding conducted pursuant to section 1415, unless the State or local educational agency and the parents or guardians otherwise agree, the child shall remain in the then current educational placement of such child… 20 U.S.C. s. 1415(j)

In Massachusetts, 603 CMR 28.08 (7) establishes the school district’s obligations during the pendency of an appeal. This Regulation states that:

> In accordance with state and federal law, during the pendency of any dispute regarding placement or services, the eligible student shall remain in his or her
then current education program and placement unless the parents and the school
district agree otherwise.

A temporary change in placement may be ordered by a hearing officer in certain
situations consistent with federal law where for example maintaining the placement of the
student would result in substantial likelihood of injury to the student or others. 603 CMR
28.08 (7) (c)

Both the IDEA and the Massachusetts 766 Regulations cited above establish a Student’s
right to remain in the current educational program and placement during the pendency of
an administrative proceeding. This procedural safeguard is unequivocal and is intended to
reduce the disruption of educational services to a student when a new placement is being
challenged. Burlington School Committee vs. Massachusetts Department of Education,
471 U.S. 359, 368 (1985) Wachusett is therefore incorrect in its statement that Stay Put
does not apply to the facts of this case. Since in Massachusetts, the Bureau of Special
Education Appeals has been granted the authority to resolve all disputes regarding special
education cases, the parties are before the appropriate forum to resolve their dispute. 603
CMR 28.08 (3)

The first issue to be decided is what program and placement is the Student entitled to
under the Stay Put provisions. On December 14, 2000 the Parents accepted an IEP which
covered the period from November 8, 2000 through October 26, 2001. (PE-A) This IEP
called for a combination of direct and inclusion services to the Student as described in
Fact # 5 Supra. While there seems to be no dispute between the parties that the Student
is entitled to the services in this IEP, they disagree in their interpretation of the location in
which those services should be delivered. While Wachusett proposes the district’s
program at Central Tree the Parents favor a program at the Chocksett School and assert
that that location constitutes the last agreed upon placement.

While I sympathize with the Parents’ wish to maintain their son in his neighborhood
school, I am not persuaded that placement is equivalent to building location. Under
federal law placement refers to whether the program is offered in district or out of
district, the level of services to which the Student is entitled and the amount of integration
to the mainstream delineated in a student’s IEP, but not the building in which these
services are to be provided. To the extent that Massachusetts appears to be inconsistent
with Federal Law when it made a distinction between program and placement, the
intention of the drafters was to bring all of Massachusetts practice in line with Federal
law. As such, this regulation must be read in accordance with the Federal standards.

So long as Wachusett can offer the Student the level of direct and inclusion services for
the amounts of time delineated in the grid of the Student’s IEP at Central Tree, an in-
district middle school, this constitutes the placement to which the Student is entitled to
during the pendency of the appeal. The analogy here is similar to that of a student aging
out of a pre-school program and proceeding to the next level, in that the Student is
moving from the elementary school to the middle school.
Upon review of the statutes, documents and arguments proffered by the parties I am persuaded that Wachusett is responsible to deliver all of the services delineated under the Student’s IEP accepted on December 14, 2000 which may be offered at Central Tree. (See services in Fact #5 Supra; PE-A) Whether or not this placement is ultimately appropriate for the Student will be adjudicated following a full hearing on the merits which will take place at a later time. So Ordered.

This case is further scheduled to proceed to a Pre-Hearing Conference to be held on September 28, 2001 at 10:00 a.m. at the BSEA, 350 Main St., Malden, MA.

So Ordered by the Hearing Officer,

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Rosa I. Figueroa
Hearing Officer
Dated: August 31, 2001