COMMONWEALTH OF MASSACHUSETTS
SPECIAL EDUCATION APPEALS

In Re: Arlington Public Schools

RULING ON MOTHER'S MOTION FOR TEMPORARY RELIEF

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

The official record of the hearing on the Motion consists of testimony by Mother, Father and Marilyn Bisbicos (Director of Special Education, Arlington Public Schools); a document submitted by the Student’s mother and marked as exhibit 1 (hereafter, Exhibit P-1); documents submitted by the Arlington Public Schools and marked as exhibits 1 through 13 (hereafter, Exhibit S-1, etc.); written arguments submitted by attorneys for Mother and for Arlington; and oral argument by the attorneys.

Issue

The issue presented by Mother’s Motion for Temporary Relief is whether Student’s placement into the Hardy School in September 2001, which has been accepted by Student’s father (hereafter, Father) but rejected by Student’s mother (hereafter, Mother), should be reversed and Student returned to her previous placement at the Bishop School.

Procedural History

At the beginning of this school year in September 2001, Arlington Public Schools (hereafter, Arlington) placed Student into the Hardy School pursuant to an IEP accepted by Father but rejected by Mother. The program at Hardy School is for learning disabled children.

On September 10, 2001, Mother filed with the Bureau of Special Education Appeals (hereafter, BSEA) a Request for Hearing, contesting the placement of Student. Mother takes the position that the IEP’s placement of Student into the Hardy School is not the least restrictive environment in which Student’s educational needs can be appropriately met. She believes that Student’s needs can be appropriately met in a regular education classroom with special education supports at the Bishop School where Student had attended school the previous year.

Mother has also requested (and will privately pay for) an independent evaluation of Student. It is anticipated that this evaluation will be completed in February 2002. By request of Mother and by agreement of Arlington, a Hearing on the merits is scheduled for March 12, 13 and 15, 2002.

On October 26, 2001, Student’s Mother filed a Motion for Temporary Relief, taking the position that pending a decision by this Hearing Officer on the merits, the current placement at the Hardy School should be reversed. Mother has requested that Student be returned immediately to her previous placement at the Bishop School pending resolution by this Hearing Officer regarding Mother’s claims on the merits.

On November 6, 2001, Arlington filed an opposition to said Motion, arguing that it would be unlawful not to implement the placement proposed by Arlington and agreed to by Father. A Hearing on the Motion began on November 9, 2001 and was completed on November 20, 2001.

Statement of the Evidence

Student is an eight-year-old living with her Mother in Arlington, Massachusetts. Father lives in Maine. Through 2nd grade (the 2000-2001 school year), Student attended a mainstream public elementary classroom, with special education supports, at the Bishop School which is part of the Arlington public school system. During the 2nd grade,
Arlington became concerned about Student’s educational progress and proposed a full evaluation. Father consented to the evaluation, Mother refused; and pursuant to Father’s consent, a full evaluation was completed. Testimony of Mother, Father, Bisbicos; Exhibits S-2 (letter to Mother from Arlington re evaluations), S-4 (letter to Mother from DOE regarding consent to evaluations).

Arlington then held a Team meeting on March 29, 2001 to consider the evaluations and to develop Student’s IEP for 3rd grade. Both parents attended. At the meeting, Mother (and her attorney) recommended that Student continue to be placed at the Bishop School for 3rd grade. After considering all of the evaluations and the recommendations of school personnel, all of the other Team members (including Father) recommended that Student be placed at the Hardy School for 3rd grade. The Hardy School is a separate program, run by and within the Arlington public system, for learning disabled students. Testimony of Mother, Father; Exhibit S-9 (Student’s current IEP).

At the end of the March 29th Team meeting, Father accepted the IEP for Student to attend the Hardy School. Mother received the proposed IEP with a letter from Marilyn Bisbicos (Arlington’s Director of Special Education) dated April 6, 2001. The letter explained Mother’s right to accept or reject the IEP and included the following sentence:

Until you accept the IEP or a dispute is resolved through mediation and/or a due processing [sic] hearing, your child shall remain in his or her current education program.

Mother testified that she believed that on the basis of this letter, Student would remain in her then current placement in the Bishop School for 3rd grade if she rejected the IEP. Father testified that on the basis of his earlier experiences of Arlington’s proceeding with the consent of Father (notwithstanding rejection or refusal to consent by Mother), he anticipated that Student would be placed at the Hardy School. These previous experiences included the full evaluation of Student and the special education placement of one of their other children. On April 11, 2001, Mother rejected the IEP and returned it to Arlington. Testimony of Mother, Father; Exhibit S-5 (April 6, 2001 letter from Bisbicos).

Mother testified that she then tried to call Ms. Bisbicos several times, eventually speaking with her in mid-August 2001. Mother explained that Ms. Bisbicos never told her where her daughter would be attending school in September. Ms. Bisbicos, however, testified that she spoke with Mother at least five times from April until the end of the summer. Ms. Bisbicos explained that the first call (in April) was subsequent to a letter of April 19, 2001 from Ms. Bisbicos to a BSEA mediator, advising the mediator that Mother had rejected and Father had accepted the IEP. Ms. Bisbicos testified that during these five or more calls, she explained to Mother that Arlington would be placing Student pursuant to the IEP accepted by Father and that Mother had the right to seek resolution through mediation or a Request for Hearing before the BSEA. Testimony of Mother, Bisbicos.

Mother testified that during a telephone conversation in mid-July 2001, the Bishop School principal led her to believe that Student would be placed at the Bishop School in the fall. Ms. Bisbicos testified that the Bishop School principal recalled telling Mother only that if Student were assigned to the Bishop School, there would be a place for her there. Testimony of Mother, Bisbicos.

In August 2001, Mother and Father met with Arlington personnel (including the Superintendent). Father testified that during this meeting, there was no doubt that Student would be attending the Hardy School in September. Testimony of Mother, Father.

Mother testified that she did not receive notification in writing that Student would be attending the Hardy School until two weeks before the beginning of school when Mother received a notice of transportation for Student to attend the Hardy School, and approximately one week before the beginning of school when Mother received a postcard from the Hardy School. Testimony of Mother.

Ms. Bisbicos testified that once an IEP is accepted, a parent is not normally sent a letter with Student’s placement since to do so would be duplicative of the IEP. Testimony of Bisbicos.
In early September 2001, Student began attending the Hardy school, pursuant to the IEP accepted by Father. 
Testimony of Mother.

Since November 10, 1999, Mother and Father have been divorced. The parents have shared legal custody of Student 
pursuant to a divorce agreement which provides, in relevant part:

   By order of the Court, it is ordered that the Parties shall have shared legal custody of 
the minor children. Notwithstanding such shared legal custody, said minor children 
shall reside with the Wife who shall be the primary care parent and who shall make 
all day to day decisions regarding the children. Each Party shall be allowed [to] 
consent for emergency medical treatment of said minor children when said minor 
children are with him or her, and shall have the right to make decisions regarding 
routine and immediate issues relating to said minor children when said minor children 
are with him or her without necessarily consulting the other parent. The Parties shall, 
as necessary and advisable, consult with each other regarding the emotional and 
physical well-being of the minor children, their education and their general welfare 
and upbringing, and each Party shall continue to encourage and foster love and 
respect in said minor children for the other parent. Major decisions regarding 
elective 
medical or dental treatment, or the advisability or selection of educational institutions 
and programs shall be made by both Parties in light of the circumstances, needs and 
desires of said minor children. In the event that the Parties are unable to agree on 
such issues, they shall be submitted to the Essex Probate and Family Court by 
appropriate motion or complaint. [Exhibit P-1, emphasis supplied]

Father testified that at the time that the divorce agreement was signed, he understood that the agreement required 
that he and Mother jointly consent to educational programs for Student. Mother testified that she believed that the 
decision for Student to attend the Hardy School was a routine decision to be made exclusively by her, rather than an 
educational program decision to be made by both parents, pursuant to the divorce agreement. She also testified that 
approximately two years ago she gave to Steve Carme (Principal of the Bishop School) a copy of the above-quoted 
language from her divorce agreement. Neither parent has submitted any disagreements to the Probate and Family 
Court for resolution pursuant to the divorce agreement. Testimony of Mother, Father; Exhibit P -1.

Findings and Conclusions

1. **Authority of Father to Consent to the Educational Placement.**

The first issue raised by Mother’s Motion is whether Father has authority to consent to Student’s current educational 
placement at the Hardy School.

Mother’s position essentially is that Father is not a “parent” as that term is defined in state special education 
regulations (see definition quoted below). Therefore, Father had no authority to consent to the IEP placing Student 
at the Hardy School. Pursuant to stay-put rules, Student would then be returned to the previous placement at the 
Bishop School.¹

In general, a child’s mother and father have the authority to make educational decisions on behalf of their son or 
daughter until that authority is relinquished voluntarily or removed by court order. In the present dispute, there is 
nothing in the record to indicate that either parent has lost this authority regarding educational program decisions on 
behalf of Student.

¹ 603 CMR 28.08(7) (describing a student’s stay put rights).
Mother and Father, who are divorced and no longer live together, have a divorce agreement which apparently has been entered as an order of the Probate and Family Court. The divorce agreement is the only evidence which arguably would alter Father’s authority to consent to his daughter’s IEP and placement at the Hardy School.

The divorce agreement governs the relationship between Mother, Father and their minor children. Only a single page of this agreement was entered into evidence in the present dispute. Although there may be argument and disagreement over the terms and implications of this part of the divorce agreement, there can be little doubt that pursuant to the agreement, Mother and Father continue to share both legal custody and responsibility for deciding Student’s educational program. Exhibit P-1 (“Major decisions regarding . . . the advisability or selection of educational institutions and programs shall be made by both Parties”). This is sufficient for me to conclude that Father has not relinquished legal custody for purposes of making decisions regarding his daughter’s educational placement.

I therefore find that for purposes of Student’s educational placement, both Father and Mother meet the following definition of “parent” (included within the state special education regulations):

Parent shall mean father, mother, guardian, person acting as a parent of the child, or an educational surrogate parent appointed in accordance with federal law. When the father and mother are not living together, the parent shall be the father or mother with legal custody of the child for the purposes of educational decision-making. Legal authority of the parent shall transfer to the student when the student reaches eighteen (18) years of age.

2 603 CMR 28.02(15) (emphasis supplied). See also the definition of parent pursuant to regulations under the IDEA. 34 CFR 300.20.

The term “consent” is defined to mean “agreement by a parent . . . . ” 603 CMR 28.02(4) (emphasis supplied). Similarly, the regulations state that “a” or “the” “parent” may do the following: refer a child for evaluation (603 CMR 28.04(1)), consent to the initial evaluation (603 CMR 28.04(2)), request optional assessments or agree to a home assessment (603 CMR 28.04(2)(b)), disagree with an evaluation and request an independent evaluation (603 CMR 28.04(5)) and waive any individual assessment (603 CMR 28.07(2)).

4 603 CMR 28.05(7)(a).

5 603 CMR 28.05(7)(b). See also In Re: Arthur G., BSEA # 95-3027, 2 MSER 99 (1996) (concluding that the consent of either parent is sufficient and requires the school district to implement the accepted portions of the IEP).

6 E.g., 603 CMR 28.03(1)(3) (right to have children educated in private schools at private expense); 603 CMR 28.04(1)(a) (right to receive written notice regarding referral for evaluation to determine eligibility); 603 CMR 28.04(1)(c) (right to consult with special education administrator or designee); 603 CMR 28.05(1) (right to receive copy of proposed IEP); 603 CMR 28.05(1) (right to receive copy of summary of assessments prior to Team meeting); 603 CMR 28.07(1)(a)(3) (right to observe any proposed program); 603 CMR 28.07(2)(b) (right to waive assessments); 603 CMR 28.07(3)(3) (right to receive progress reports).

7 603 CMR 28.08(3).

8 603 CMR 28.08(5).
Father’s consent triggered Arlington’s responsibility to place Student at that School, notwithstanding Mother’s rejection of the IEP.

Mother argues to the contrary. Her position is that the divorce agreement, when read as a whole, must be understood as precluding one parent from making a unilateral educational placement decision.9 The argument continues that the agreement therefore deprives Father of the authority to consent to a special education placement unless Mother agrees to that same placement. Therefore, from Mother’s perspective, Arlington’s placement of Student at the Hardy School is precluded by the divorce agreement.

Although I understand Mother’s interpretation of the divorce agreement (and do not necessarily disagree that her interpretation reflects the understanding of the parties when they entered into the agreement), I am not persuaded that her argument should change my analysis.

The divorce agreement relied on by Mother is, essentially, a resolution by two parents of their relationship with each other and their children. Where a disagreement occurs regarding a decision to be made by Mother and Father relative to their daughter, the divorce agreement explicitly provides a vehicle for this purpose. The divorce agreement states that any such dispute “shall” be resolved through a motion to the Probate and Family Court, thereby seeking to ensure that a disagreement between the parents is not left unresolved to the detriment of their child.10 Yet, neither parent has sought to resolve their differences through this Court procedure. Testimony of Mother, Father.

If requested by motion to resolve the disagreement between the parents, presumably the Probate and Family Court would not make the decision as to which special educational placement is appropriate, but rather would determine whether it should be the Mother or Father who makes this decision. In determining which parent should make the decision, the Probate and Family Court dispute resolution process would thereby conform with the policy consistently reflected in the state special education regulatory language discussed above (see footnotes 3 through 6, and accompanying text) that the school district should accept (and act upon) consent from one parent, not both.

In contrast, were I to accept Mother’s arguments, Arlington would be required to obtain consent from both parents. Absent an order from the BSEA, Arlington would be precluded from providing additional or different services unless Mother and Father were able to agree. In other words, changes in the child’s special education would be dependent upon the divorced parents’ being able to come to agreement with each other. (I note that Mother and Father have a history of disagreement regarding the special education evaluation and services of their special needs children. Testimony of Father, Mother.) Presumably, this is precisely what the state special education regulations intended to avoid when they were written to allow the school district to proceed with consent from either parent.

Mother’s position therefore is inconsistent with (i) the divorce agreement’s provision that disagreements regarding Student’s educational program shall be submitted to the Probate and Family Court for resolution, and (ii) the regulatory policy of special education services proceeding on the basis of consent from one parent.

For these reasons, I conclude that Arlington appropriately placed Student at the Hardy School pursuant to Father’s consent.


Mother’s alternative argument for reversing the placement of her daughter at the Hardy School is that Arlington committed substantial procedural errors. There are two parts to this claim.

First, Mother argues that Arlington conspired with Father to prepare an IEP calling for placement at the Hardy School, thereby precluding Mother from effectively participating in the educational decision-making process. No

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9 Father’s testimony was not to the contrary. He stated that he understood the divorce agreement to require that educational placement decisions should be made “jointly” by both parents. Testimony of Father.
10 The relevant language from the divorce agreement (Exhibit P-1) provides: “In the event that the Parties are unable to agree on such issues, they shall be submitted to the Essex Probate and Family Court by appropriate motion or complaint.” (Emphasis supplied.)
evidence was submitted to substantiate this claim. It was demonstrated that Father and Arlington cooperated with each other and quickly reached an agreed-upon placement. This cooperative relationship is in contrast to what Mother believes that she has experienced. Testimony of Mother, Father. But, nothing in the record indicates either that Mother was denied a full opportunity to participate in the Team meeting or that the Team meeting was not used to make the decision regarding Student’s IEP and placement. Therefore this aspect of Mother’s procedural claim fails.

Second, Mother argues that from the date of the Team meeting on March 29, 2001 until approximately two weeks prior to school starting in the fall, she was not informed that her daughter would be attending the Hardy School. Mother further notes that a letter from Arlington dated April 6, 2001 included the following sentence:

> Until you accept the IEP or a dispute is resolved through mediation and/or a due processing [sic] hearing, your child shall remain in his or her current education program.

This led Mother to assume that her daughter would be attending the Bishop School (and not the Hardy School) in the fall. Testimony of Mother; Exhibit S-5.

Mother takes the position that Arlington thereby misled her, prejudicing her right to appeal more quickly Arlington’s placement decision. Mother filed her Request for Hearing on September 10, 2001, only after she was notified by the Hardy School that Student would receive transportation to that School.

I am not persuaded by these arguments for the following reasons.

Mother testified that she sought to speak by phone with Ms. Bisbicos (Arlington’s Director of Special Education) several times during the time period of late April through August 2001. Mother further testified that only after repeated attempts was she able to speak with Ms. Bisbicos and that during her conversations, Ms. Bisbicos never explained that Student would be attending the Hardy School. Ms. Bisbicos testified to the contrary, explaining that on at least five occasions from the end of April 2001 into August 2001, she spoke with Mother by phone and that during these conversations, Ms. Bisbicos made it clear that Arlington would be implementing the IEP accepted by Father and therefore Student would be placed at the Hardy School in September.\(^{11}\)

I find Ms. Bisbicos’ testimony to be more credible and therefore conclude that through her, Arlington advised Mother as early as April 2001 and repeatedly thereafter that Arlington would be placing Student at the Hardy School.

Although Arlington’s letter of April 6, 2001 (quoted above) plainly could have misled Mother, I nevertheless conclude that soon thereafter Mother was advised of Arlington’s intentions to implement the accepted IEP, and she presumably knew from her previous experiences with Arlington (noted above) that this would likely occur.

In addition, while it would have been helpful had Arlington quickly notified Mother in writing that Father had consented to the IEP and therefore Student would be placed at the Hardy School, I am aware of no legal authority (and Mother has pointed to none) pursuant to which Arlington had a responsibility to do so. Arlington’s general practice is not to send a placement letter, instead relying on the IEP for that purpose. The transportation notice, advising Mother that her daughter would be at the Hardy School, was received by Mother approximately two weeks before the beginning of school. Testimony of Mother, Bisbicos.

Finally, I note that were I to agree with Mother regarding the facts as well as Arlington’s obligation to notify her, I would seek to remedy the procedural errors by moving more quickly to hold a hearing on the merits. However,\(^{11}\)

\(^{11}\) Also, Mother testified that during a telephone conversation in mid-July 2001, the Bishop School principal led her to believe that Student would be placed at the Bishop School in the fall. Ms. Bisbicos testified that the Bishop School principal recalled telling Mother only that if Student were assigned to the Bishop School, there would be a place for her there.
Mother has not asked for this relief, instead requesting only that Arlington be ordered immediately to provide services to Student at the Bishop School.\textsuperscript{12}

At this point in these proceedings, there is no evidence indicating whether the Bishop School or the Hardy School is the appropriate placement. An order by this Hearing Officer allowing Mother’s requested relief would move Student from the Hardy School to the Bishop School. But, after a Hearing on the merits, the Hearing Officer may possibly conclude that the Hardy School is the appropriate placement and order that Student go back to that School. It would not appear to be in Student’s best interests for this Hearing Officer to begin this process of moving Student from one school to another prior to a Hearing and Decision on the merits.\textsuperscript{13}

I conclude that neither the facts nor the law support Mother’s arguments to reverse Arlington’s placement decision on the basis of Arlington’s alleged procedural irregularities.

\textsuperscript{12}Mother may at any time request quicker hearing dates.

\textsuperscript{13}I also note that procedural flaws, if demonstrated, do not automatically render an IEP ineffective. The First Circuit Court of Appeals has explained:

\begin{quote}
Before an IEP is set aside, there must be 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.
\end{quote}

\textit{Roland M. v. Concord School Committee}, 910 F.2d 983, 994 (1st Cir. 1990).
Order

For the above-stated reasons, Mother’s Motion for Temporary Relief is DENIED.

By the Hearing Officer,

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William Crane
Dated: December 6, 2001