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 said statutes.

A hearing was held on July 16, 20 and 22, 2004 in Malden, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student’s Mother
Student’s Father
Alison Schonwald  Developmental Behavioral Pediatrician, Children’s Hospital Boston
Jennifer Gower¹  Coordinator of Social Services, May Institute
Jennie Doyle  Teacher, Haverhill Public Schools
Staci Barchi  Teacher, Haverhill Public Schools
Mary Levasseur  Speech and Language Pathologist, Haverhill Public Schools
Thomas Benjamin  Consultant to Haverhill Public Schools
Maurice Covino  Director of Special Education, Haverhill Public Schools
Janet Burt  Attorney for Parents and Student
Ellen Fotino  Advocate working with Ms. Burt
Mary Joann Reedy  Attorney for Haverhill Public Schools

The official record of the hearing consists of documents submitted by the Parents and marked as exhibits P-1 through P-7; documents submitted by the Haverhill Public Schools (Haverhill) and marked as exhibits S-1 through S-19; and three days of oral testimony and argument. Oral closing arguments were made at the end of the Hearing day on July 22, 2004, and the record closed on that date.

In order to apprise the parties in a timely manner of my findings and conclusions in this case, an Order was issued on July 23, 2004, in advance of the full text of this Decision. See Appendix A.

¹ Ms. Gower participated in the Hearing via a telephone conference call.
ISSUES

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

1. Is the IEP proposed by Haverhill for the 2004-2005 school year reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment?
2. If not, can additions or other modifications be made to the IEP in order to satisfy this standard?
3. If not, would placement at the May Institute satisfy this standard?

PROFILE, HISTORY AND IEPS

Student is a six-year old boy (date of birth 7/27/98) who lives with his parents (Parents) in Haverhill, MA. He is an affectionate, warm and enthusiastic child. Testimony of Mother; exhibit S-7.

Student presents with global delays, including severely impaired language and social interaction skills. He has demonstrated significant regression in communication since the fall of 2003, so that he is now communicating at a prelanguage level. Student has decreased sensory modulation and fine motor skills, limiting his ability to maintain attention and focus, and has regressed to the point of being unable to tolerate any activity greater than 20 to 30 seconds. He has decreased motor control and balance, impeding his gross motor skills and functional independence. His behavior has regressed, resulting in hitting and biting others. Testimony of Mother; exhibits S-1, S-3, S-5, S-6, S-8, S-9, S-10, P-2, P-3, P-4, P-5.

Pursuant to an accepted IEP, Student attended a two-part educational program during the 2003-2004 school year -- a language program for twelve hours per week in the morning, and an integrated pre-kindergarten program for ten hours per week in the afternoon. Additional related services described within the IEP are as follows: occupational therapy for thirty minutes, twice per week; speech/language services for thirty minutes, three times per week; and physical therapy for thirty minutes, twice per week. Parents accepted this IEP in full. Exhibit S-4.

Pursuant to an April 1, 2004 Team meeting, Haverhill proposed an IEP with placement continuing at the Moody School until June 2004 and then placement at the Golden Hill School from 9/04 to 4/05. Although the IEP called for summer services, no summer placement was identified. Pursuant to this IEP, Student would participate in an integrated pre-school program for half the day (fifteen hours per week, including related services) and a program for developmentally delayed children for half the day (fifteen hours per week, including related services). The related services would be the same services provided pursuant to the previous IEP (exhibit S-4) described above. Exhibit S-3.

Pursuant to an accepted IEP, Student has been attending an extended year program at the Therapeutic Educational Assessment Center of Haverhill (TEACH) program at the St. James

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2 Although compensatory claims were identified in the Hearing Request, Parents’ attorney stated at the beginning of the Hearing that she was only seeking prospective relief.
School during the summer of 2004. The IEP provides for “Dev Delay” services from 9:00 AM to 3:00 PM, and a continuation of the related services from the previous two IEPs (exhibits S-3, S-4). The IEP is to run for the period from 6/04 to 8/04 according to the placement page although according to the service delivery grid and in other places within the IEP, the IEP is to run from 6/16/04 to 9/1/04. Exhibit S-1.

On the June 9, 2004 cover sheet of the summer IEP, there is a hand-written notation in the upper right hand corner stating “draft” and in the bottom part of the cover sheet the following handwritten words: “IEP Goals will be developed further and mutually agreed to. Team will reconvene on 7/13/04 at 11:15.” Within this notice (second page) are the following sentences: “The Team will reconvene in August to write an IEP for the ’04-’05 school year. This IEP reflects the St. James school as [Student’s] summer placement.” Exhibit S-1.

Another version of the summer IEP was prepared which is the same as the previous summer IEP (exhibit S-1) except that the revised IEP includes new goals and objectives. This IEP was not signed by Parents. Exhibit S-19.

**FACTS**

1. Student’s mother (Mother) testified that during her son’s first year of schooling (2001-2002 school year when he was three years old), his speech was at the level of an eighteen month old child and he was placed in an integrated classroom. She noted that by the end of the school year, her son was able to say approximately 38 words or word approximations.

2. Mother testified that during her son’s second year of schooling (2002-2003 school year when he was four years old), his goals and objectives on his IEP (as well as his educational services) were essentially the same as for the previous year and his services. She noted that by the end of the school year, her son began showing signs of regression and was able to say approximately 25 words or word approximations.

3. Mother testified that prior to her son’s third year of schooling (2003-2004 school year when he was five years old), a hearing request had been filed with the BSEA and negotiations with Haverhill led to an accepted IEP which included a full-day program, as well as additional therapies. She noted that by the end of the school year, her son had substantially regressed, losing all of his words and becoming withdrawn and aggressive.

4. Mother testified that she met with Haverhill staff in June 2004. She stated that she was not told that this was a Team meeting and was told by Haverhill staff that the meeting was only for the purpose of determining her son’s summer services. She explained that there was a subsequent meeting on July 7, 2004 when she signed an IEP (exhibit S-1) as a “draft” (she noted that the word “draft” was written on the front page of the document). She believed that this IEP was only for the purpose of providing summer services. She noted that she signed this IEP not because she believed it proposed appropriate services for her son but because she understood that it would only be through signing the IEP that her son would receive summer services. She noted that although she signed the draft IEP, she did not indicate (above her signature) that she was either accepting or rejecting the IEP. She explained that there was a third meeting (later in July) to discuss certain details of the summer program.
5. Mother testified that she visited and observed her son’s current summer placement at the TEACH program at the St. James School on June 14, 2004, spending approximately one and one half hours in his classroom. She noticed that all of the children were non-verbal and were older than her son.

6. Mother testified that she visited the May Institute in April 2004 for approximately one and one half hours, touring the school and observing the classroom that her son would attend if he were placed there. She noticed the 1:1 instruction provided to each student in the classroom. She noted that the classroom appeared to have children whose ages and needs were similar to her son. She stated that ABA services would be provided to her son throughout the day, and that most of her son’s instruction would be with a teacher on a 1:1 basis.

7. Mother testified that when she arrived at the first day of the Hearing in this matter on July 16, 2004, she believed that Haverhill’s proposed placement for her son for the 2004-2005 school year was the Golden Hill School because this was the placement listed within the proposed IEP for the next school year (exhibit S-3). She stated that it was only during the testimony of Mr. Covino during the second day of the Hearing (July 20, 2004) that she learned that Haverhill was proposing the TEACH program for the 2004-2005 school year.

8. Student’s father (Father) testified as to the reasons he believes that the program proposed by Haverhill is not appropriate to meet the needs of his son and the reasons that the May Institute would be appropriate. He explained that Haverhill has done its best, but his son has regressed significantly, and now it is time for his son to be placed at a program outside of the Haverhill school district.

9. Thomas Benjamin testified that currently and for the past two years he has provided consulting services to Haverhill’s TEACH program at the St. James School. He explained that he consults to teachers and staff at this program for one day (six hours) each week. Mr. Benjamin testified that he holds a masters of science in human services degree and is a Board Certified Behavior Analyst (BCBA). He explained that currently he consults to approximately twenty public and private schools in New England. He stated that he has been working with Applied Behavior Analysis (ABA) for twenty years.

10. Mr. Benjamin testified that he is involved with assisting and training staff at TEACH through drafting (with IEP Teams) education programs and service plans for individual students, reviewing these programs/plans with TEACH staff, role modeling the programs/plans, and then observing the implementation of the program/plans by the staff in the classroom. (Ms. Barchi also testified that Mr. Benjamin provides occasional half-day trainings to TEACH staff two or three times per year and that some of these trainings are on the general principles of ABA.)

11. Mr. Benjamin testified that he became involved with Student on June 3, 2004 when he first met Mother and discussed Student’s needs and how they should be addressed. Mr. Benjamin developed a skill development program to facilitate functional communication at home (document dated June 14, 2004). Mr. Benjamin explained the need for home services to ensure generalization of skills learned within the school setting although no home services were actually provided.
12. Mr. Benjamin testified that he also developed expanded behavioral teaching strategies to be implemented for Student at the TEACH program. He explained that the purpose of these strategies is to provide Student with more effective ways for him to communicate. Mr. Benjamin developed a program model for Student, beginning with teaching imitation skills, for Student’s teachers. He explained that these are the kinds of programs that he recommends for children who are on the autism spectrum – through these teaching programs, the child is taught the “learning to learn” skills. He noted that the programs are designed to encourage Student to want to communicate, utilizing both sign language and verbal behavior. The programs are incorporated into the revised, unsigned IEP for Student’s summer program at TEACH. Exhibit S-19.

13. Mr. Benjamin testified that the above-described programs were developed during two meetings which included Mother, Mr. Covino (the Haverhill Director of Special Education) and Ms. Barchi (the TEACH program teacher working with Student). The meetings were on July 6 and 13, 2004. Mr. Benjamin explained that he has been engaged by Haverhill to continue to consult regarding Student and other children at the TEACH program during his six hours per week at the program.

14. Mr. Benjamin testified that based on his experience, he “would push the communication piece” for Student with respect to both receptive and expressive language. He noted his agreement with the template (to address these issues) described within the evaluation report of March 5, 2004 of Jean Funk, the Children’s Hospital Boston speech and language pathologist. Exhibit S-10. He explained that many of Ms. Funk’s recommendations would be implemented at the TEACH program, including utilization of a total communication approach and ABA services to facilitate social interactions.

15. Mr. Benjamin testified that the classroom teacher at the TEACH program is providing ABA services to Student although he stated that he did not know how much of the day Student is receiving ABA services.

16. Mr. Benjamin testified that he has reviewed a number of other written evaluations of Student (exhibits S-5 through S-9, S-12, S-13, S-15, S-16 and P-6). Based on these evaluations, his experience and his understanding of Student, Mr. Benjamin concluded that the TEACH program is appropriate to address Student’s needs.

17. Mr. Benjamin testified that he is familiar with the May Institute through visits and conversations with May Institute staff. He noted that he is generally familiar with the services provided at the May Institute in that they use an ABA approach and “are quite good at it”. He also noted some familiarity with the May Institute Arlington location at which Parents seek placement. He opined that the May Institute would be an appropriate program for Student.

18. Staci Barchi testified that she has an undergraduate degree in education and has completed one year of course work in her severe special needs masters program, which she expects to complete in May 2005. She has completed course work towards a degree in counseling and has participated in a variety of in-service trainings. She explained that she has had no formal training regarding ABA nor has she taken a course on ABA methodology,
although she has attended one or more in-service trainings from Mr. Benjamin which addressed ABA principles. She stated that this is her third year as a teacher in the TEACH program and that she previously worked as a special education teacher and teacher assistant in the Amherst Public Schools, working with special needs children, some of whom had disabilities on the autism spectrum.

19. Ms. Barchi testified that she is the classroom teacher for Student this summer, in a class of six students with ages from five to ten years old, with five full-time and one part-time assistants helping her in the classroom. She explained that at all times, Student has a teacher, assistant or therapist with him.

20. Ms. Barchi testified that she will continue to be the classroom teacher for some of these children for the 2004-2005 school year when she expects there to be four children (not including Student) ages seven to ten, all of whom have disabilities on the autism spectrum. She explained that two of these children are non-verbal, the third child speaks at the level of a three or four year old child using short sentences as well as signs and pictures, and the fourth child has some speech but speaks only with the assistance of pictures. She noted that she expects to have three or four assistants working with her during the 2004-2005 school year. She stated that she is not aware of what training her assistants may have received, other than the instruction provided by Mr. Benjamin within the TEACH program.

21. Ms. Barchi testified as to the daily schedule followed in her classroom during the summer, as reflected in the weekly schedule. She explained that throughout Student’s day, she and her assistants are implementing Mr. Benjamin’s program for Student and teaching him skills identified within this program. The Monday schedule, for example, begins at 9:00 AM and includes the following half hour segments: morning circle routine, “Skills Box”, snack/story, structured play, social skills, “Skills Box”, lunch/hygiene, co-treat by the speech and physical therapists, “Skills Box” and language arts weekly theme, with dismissal at 2:00 PM. Exhibit P-7. Ms. Barchi stated that the program during the academic year is similar although more “intensive” and continues until 3:00 PM instead of 2:00 PM each day.

22. Ms. Barchi testified that ABA principles are incorporated into Student’s entire program, and therefore ABA services are being provided to Student throughout his entire day. Ms. Barchi stated that Student is receiving more formal ABA therapy during the “Skills Box” periods on his schedule, which she explained is the only time that Student is removed from the other children and data collection is used to track Student’s responses.

23. Ms. Barchi testified that the “Skills Box” sessions work on Mr. Benjamin’s program to develop specific skills for Student. She stated that these sessions occur during three half hour periods per day. However, the weekly schedule indicates that on several days, the “Skills Box” sessions occur once or twice rather than three times, so that the total time per week spent on “Skills Box” is ten half hour sessions or a total of five hours per week. Exhibit P-7.

24. Ms. Barchi testified that the data collection for these more formal ABA sessions is being used currently to establish a base-line for Student. She stated that once a base-line for Student is established, she “assumed” that Mr. Benjamin would significantly increase the amount of time spent in the more formal ABA sessions.
25. Ms. Barchi testified that she believes that so far during the summer, Student has made progress regarding his toileting skills and has become more acclimated to the TEACH program.

26. Ms. Barchi testified that as reflected at the bottom of Student’s weekly schedule (exhibit P-7), there are weekly meetings among Student’s teachers as well as meetings with Student’s therapists.

27. Ms. Barchi testified that she attended meetings with Mother, Mr. Benjamin and Mr. Covino Student on July 7 and 13, 2004 to discuss Student’s program that would be implemented in her classroom. She recalled that during these meetings there was no discussion of Student’s services or placement for the 2004-2005 school year although she assumed that Student would continue in the TEACH program after the summer.

28. Mary Levasseur testified that she is currently employed by Haverhill as a speech and language pathologist. She noted that she has a masters degree in communication disorders and is licensed as a speech-language pathologist. Ms. Levasseur explained that she provides direct speech-language services and also supervises the speech-language services which are provided to the pre-school children at the TEACH program.

29. Ms. Levasseur testified that she provided speech-language services to Student when he was three years old; and at that time, he presented like many other children with speech-language delays. She noted that he was non-verbal at that time but was socially interactive with his peers and adults.

30. Ms. Levasseur testified that recently she has begun again to provide speech-language services directly to Student (fifteen minutes per week in a group and a half hour individually), and she supervises the speech-language assistants who provide Student with two half-hour sessions per week at the TEACH program.

31. Ms. Levasseur testified that she agrees with the recommendations described within the evaluation report of March 5, 2004 of Jean Funk, the Children’s Hospital Boston speech and language pathologist. Exhibit S-11. She explained that she has helped implement Ms. Funk’s speech-language recommendations for Student.

32. Ms. Levasseur testified that she has also reviewed other written evaluations of Student (exhibits S-5, S-8) and has seen the programs developed by Mr. Benjamin for the purpose of enhancing Student’s communication.

33. Ms. Levasseur testified that she believes that the speech-language services being implemented this summer at the TEACH program are appropriate for Student.

34. Maurice Covino testified that currently and for the past eight years he has been Haverhill’s Director of Special Education, and before that for five years was Haverhill’s assistant director for special education. He explained that he received his masters degree in special education in 1980 and has completed all but his dissertation in a PhD program in special education at Boston University. Mr. Covino stated that his present responsibilities
include staff evaluation, program development, and working with parents, teachers and principals regarding difficult or disputed cases involving special education students.

35. Mr. Covino testified that he got involved with Student starting with a Team meeting regarding Student on April 1, 2004. He recalled that at this meeting, Student’s needs were discussed, including his need for ABA services and the need for a full-time self-contained class. He explained that as a result of the meeting, he looked into a full-time, self-contained program at the Golden Hill School. He explained that the April 1st meeting occurred because Student had made initial progress in his program at the Moody School but then regressed for most of the 2003-2004 school year.

36. Mr. Covino testified that he then wrote a letter to Parents, dated June 7, 2004, inviting them to a Team meeting. The letter states, in part: “We would like to reconvene a Team meeting to discuss placing [Student] in fully self-contained classroom next year. Mary Beth Soterion will be remaining at Golden Hill as a self-contained teacher next year.” Exhibit S-2.

37. Mr. Covino testified that the Team meeting was held on June 16, 2004, with Parents, himself and other Haverhill staff. He explained that at the meeting, Parents indicated that they believed their son needed to be placed in a program that serves children with a disability on the autism spectrum and at the meeting Parents indicated that they wanted to have their son attend the May Institute.

38. Mr. Covino testified that in response to Parents’ concerns, he changed his mind about exploring the self-contained program at the Golden School since it serves children with developmental disabilities, and at the meeting, he suggested to Parents that they consider Haverhill’s TEACH program since it provides services to children on the autism spectrum, and Mr. Covino believes this program to be superior to the May Institute.

39. Mr. Covino testified that it had been agreed that during the June 16, 2004 meeting there would be a discussion only of Student’s summer services and program. He also explained, however, that at the meeting, there was discussion of reconvening the Team in August to write an IEP for the 2004-2005 school year, and that in the parent notice (second page) for both summer IEPs, it is written that the Team will reconvene in August for this purpose. Exhibits S-1, S-19.

40. Mr. Covino testified that he hoped that if Student were successful at the TEACH program during the summer, it would become Student’s program for the 2004-2005 school year, but he made clear in his testimony that the appropriateness of the TEACH program for the 2004-2005 school year would be determined on the basis of Student’s experience during the summer, and therefore in August 2004 when the Team reconvened, the TEACH program might or might not be determined to be an appropriate program for Student for the 2004-2005 school year.

41. Mr. Covino testified that, as a result of the June 16th meeting, a “draft” IEP was prepared which provided for Student to be placed during the summer of 2004 at the TEACH program. Exhibit S-1. He explained that this IEP was given to Mother when she visited the TEACH program on June 22, 2004.
42. Mr. Covino testified that the Team met again on July 7, 2004; the meeting included himself, Mother, Mr. Benjamin and Ms. Barchi. He explained that he had prepared the goals for the draft IEP (exhibit S-1), and that the purpose of the July 7th meeting was to re-write the goals and objectives with the assistance of Mr. Benjamin and others at the meeting. He noted that this process was not completed at the meeting, and so a second meeting for July 13, 2004 was scheduled for this purpose. As a result of these two meetings, a revised IEP (exhibit S-19) was developed.

43. Mr. Covino testified that during the July 7, 2004 meeting, he wrote on the first of the two IEPs for the summer of 2004 (exhibit S-1) indicating that it was a draft and that the goals would be developed further at the July 13, 2004 meeting. During the July 7th meeting, he explained to Mother that she needed to sign the IEP for her son to remain in the TEACH program (Student had already begun receiving summer services there), and Mother did sign the IEP (exhibit S-1) on July 7, 2004, agreeing to the summer placement at TEACH.

44. Alison Schonwald testified that after completing her undergraduate degree at Yale University, she received her medical degree in 1995 from the University of Pennsylvania, and then spent six years in training at Children’s Hospital Boston. She explained that the first three of those six years were in general pediatrics and the last three were in the area of developmental pediatrics which included interdisciplinary training in the area of special education; she is board certified in both pediatrics and developmental pediatrics. She testified that after completing her training, she began the position which she currently holds (and has held for the past three years) as a staff developmental behavioral pediatrician at Children’s Hospital Boston; and in this position, she supervises the residents in developmental pediatrics, runs the school clinic program and participates in special education evaluations. She explained that the school clinic program works with local public schools (principally Boston) to evaluate about 140 children each year, determine the problems of these children and how they can be addressed by the local school. She explained that she lectures on special education, evaluates children related to their special education needs and works with other specialists (including psychologists and educational specialists), and this collaboration allows for the continuation of her interdisciplinary training.

45. Dr. Schonwald testified with respect to her experience regarding Applied Behavior Analysis (ABA). She explained that in her position at Children’s Hospital Boston, she works closely and on a regular basis with psychologists who are certified behavioral therapists. She explained that she works together with these psychologists as a team, and as a team, they develop recommendations regarding services and interventions, including ABA services. She explained that from her working with the psychologists, she has learned what specific behavior interventions are useful for a particular child. She noted, however, that she is not a certified behavior therapist.

46. Dr. Schonwald testified that she began seeing Student on November 5, 2001. On that date, a team of clinicians (including Dr. Schonwald) from Children’s Hospital Developmental Medicine Center evaluated Student specifically for the purpose of addressing Student’s delayed language skills. Exhibit S-18. Dr. Schonwald testified that she has been treating Student since that evaluation through the present.
47. Dr. Schonwald testified that at age three and four (which was prior to the significant regression which has occurred more recently), Student was diagnosed with general developmental delay and significant language delay. At that time, he was socially engaged. She opined that all of the clinical reports (that she is aware of) from this time period (including the speech and language evaluations by Ms. Funk, exhibits S-10 and S-12) were accurate at that time.

48. Dr. Schonwald testified that Student does not now have a definitive diagnosis, but the diagnosis which best fits him is Childhood Disintegrative Disorder – a diagnosis which typically includes substantial regression after age two years (usually at age 3 to 4 years), often with the appearance of autism and without any other explanation. She noted that this diagnosis was first made, in writing, in her letter of June 17, 2004 (exhibit P-6). Dr. Schonwald testified that this very recent diagnosis does not change what Student needs. She explained that the fact that he is regressing is the problem which needs to be addressed. She testified that there is no explanation for Student’s regression.

49. Dr. Schonwald testified that Student’s disorder substantially impairs his ability to make effective educational progress because he is so impaired across all areas (including language, developmental, cognitive, social and fine motor areas) and, as a result, requires educational services from providers who are experienced with children who are this complicated. In a letter “To Whom It May Concern”, dated March 27, 2004, Dr. Schonwald wrote for the purpose of documenting concerns and recommendations regarding Student’s educational services. In her letter, Dr. Schonwald explained that although Student is six years old and has spent a year in language based pre-school, he “has no language” and “remains nonverbal”. She noted that Student’s language and behavior have “regressed substantially” in the past year. Dr. Schonwald concluded her March 27, 2004 letter as follows: “[Student’s] presentation is highly concerning, and his progress depends on immediate, sophisticated, highly specialized educational services.” Exhibit P-2.

50. In her March 27, 2004 letter and in her testimony, Dr. Schonwald recommended a “full-day, full-year, specifically designed program to meet [Student’s current] complex and concerning needs.” She noted the following requisites of such a program:

- High degree of student supervision, with a total communication approach.
- Thirty to thirty-five hours per week of individual teaching based on the principles of Applied Behavior Analysis (ABA).
- Student’s language services must be implemented throughout the day, focusing on functional communication.
- Ongoing physical and occupational therapy for his motor delays.
- All staff (working with Student) trained to teach children with complex, multidimensional neurological needs. Exhibit P-2.

51. Dr. Schonwald testified that, in her opinion, the only way that Student will likely make progress is through a significant amount of 1:1 teaching by highly trained educators, whose training includes ABA methods. She testified to the importance of providing ABA services to Student by explaining that one treats children with Childhood Disintegrative Disorders the same way that one would treat children with autism, and that ABA interventions have been demonstrated to be effective with children with autism. She recommends 30 to 35 hours of
ABA services per week because it is only this amount that has been demonstrated, through
the literature, to be effective for children with autism.

52. Dr. Schonwald testified that ABA is a kind of behavior treatment to help a child develop
skills, through a significant amount of repetition and reinforcement. She stated that ABA
targets particular areas through a carefully monitored process which includes someone
recording data on what is occurring and then a great deal of data analysis. She explained that
this is the professional standard of care for children with Student’s diagnosis. She stated
that, in her opinion, there would be no professional basis to believe that any other
intervention would likely be effective and appropriate to address Student’s particular
disabilities. She explained that she reached this conclusion on the basis of the professional
literature, her experience working with similar children and the strategies and interventions
which have already been tried with Student.

53. Dr. Schonwald testified that if educational services are provided that are less than what
she has recommended (regarding the intensity of individual services, including 30 to 35
hours per week of ABA services, by qualified staff in a classroom setting focused on
Student’s level of communication needs), she believes that it would be unlikely that Student
would make progress.

54. Dr. Schonwald testified that Student has a “window of opportunity” to receive and
benefit from appropriate services, and that this window of opportunity is passing “very
quickly” for Student, given his age of nearly six years. Dr. Schonwald explained that with
respect to all children with developmental disabilities, the more intensive services that are
provided to the child at a younger age, the better the outcome because the brain is more
plastic when it is younger; and as a child becomes older and his needs are not addressed
effectively, the child becomes frustrated which creates another difficulty to overcome.

55. Dr. Schonwald testified that the special education services which she has recommended
could be provided at the May Institute since these are the services that the May Institute
typically provides to its students. Dr. Schonwald stated in her March 27, 2004 letter and in
her testimony that she is familiar with the May Institute through her patients who have
received services there. She also noted that she has seen the data collection of May Institute
staff, she has had “a lot of communication” with their teachers, and she is familiar with their
credentials in general. In her opinion, the May Institute would provide Student with an
appropriate education.

56. Dr. Schonwald testified that she knows from her experience that the May Institute has
children who are impaired in a way that is similar to Student, including non-verbal and
autistic children. She noted that it is not necessary that there be other children in Student’s
class who have Childhood Disintegrative Disorder in order that he have appropriate peers
since the appropriateness of his peers depends on the areas (and degree) of needs of the other
children, and this could occur with other children who have a diagnosis of autism, severe
language disorder or pervasive developmental disorder (PDD). She explained that her
experience with children similar to Student, is that the May Institute has been very
successful.
57. Dr. Schonwald testified (and also stated in her March 27, 2004 letter) that the placement for children with developmental delays at the Golden Hill School, which Haverhill had proposed for Student for the 2004-2005 school year, would not be appropriate for Student because in the classroom, most of Student’s peers would be verbal and as a result, such a classroom’s primary focus would therefore not be on Student’s mode of communication. Dr. Schonwald explained that Student’s classroom should be for children with primary communication disorders, where all of the staff within the class would be trained and knowledgeable in communicating with Student at his level. She noted that in such a classroom, there would be communication supports, which would be what Student needs, that would be intrinsic to the classroom. She explained that this is what would occur at the May Institute.

58. Dr. Schonwald testified that, in her opinion, the placement proposed by Haverhill for the 2004-2005 school year would also not be appropriate because it would not include the requisite intensity of individual teaching and that there would not be teachers trained in ABA methods who would be with him throughout the day. She explained that in the program proposed by Haverhill, the lead teacher may be as qualified as the lead teacher at the May Institute, but the critical difference between placements would be the rest of the staff, the overall school day and the entire school that is at a different level at the May Institute. She explained that every person in the classroom at the May Institute is highly trained, and there is individual treatment for the children, together with cross-communication with highly trained behavior specialists who are on site all day, every day. As a result, behavior intervention plans are developed and modified to address a student’s current behavior in an efficient and timely manner.

59. Dr. Schonwald testified that she reviewed the schedule for Student’s current summer placement and from this schedule, she cannot tell whether the services would be appropriate since the schedule does not explain how much individual instruction is provided Student, nor does it describe the credentials of the staff. She testified that she has never visited Student’s current summer program.

60. Dr. Schonwald was advised during her testimony that the Haverhill classroom teacher’s progress report (exhibit P-5) noted Student’s medication and that concurrently with certain medication changes (regarding Clonidine and Tenex), there was, at times, more sleepiness. Dr. Schonwald stated that she is familiar with these medications, and that although these medications might make Student sleepier during the school time, the degree of Student’s regression regarding social relatedness and education and his overall degree of deterioration “absolutely” could not be explained by these medications.

61. In her testimony, Dr. Schonwald explained why she has been donating her time to testify at this Hearing and to attend meetings regarding Student. She stated that the deterioration demonstrated by Student is every parent’s “worst nightmare” and that this particular student is her “absolute most concerning patient that [she has] ever seen with a developmental disability”. Dr. Schonwald testified that Student is “incredibly impaired and [she] cannot understand if we don’t give services to this kind of child, what are we doing? . . . Who should we be giving our intensive services to if not this child?”
Jennifer Gower testified that currently and for approximately one year she has been employed by the May Institute in Arlington, MA, as its coordinator of social services, and in that role, she coordinates the admission process. She explained that immediately prior to this position, she was employed by the May Institute as a teacher for four years. She noted that she holds a masters in intensive special needs.

Ms. Gower testified that currently and for the past fifty years, the May Institute has focused on serving children with developmental disabilities, which includes the autism spectrum. She noted that the May Institute in Arlington, MA, currently has 48 children.

Ms. Gower testified that Student has been evaluated by the May Institute and accepted for admission. She noted that there currently is an opening available for Student but the May Institute does not hold places for prospective students – spaces are filled on a first-come, first-served basis.

Ms. Gower testified that for each child within its care, the May Institute utilizes ABA principles throughout the day to teach skills; this is the only teaching method used at the May Institute. She explained that the ABA services include collection of data throughout the day regarding skills that are being taught and the child’s behavior.

Ms. Gower testified that all of the teachers at the May Institute are trained to use ABA principles through forty hours of in-service education per year. She stated that the full-time classroom supervisor has a masters degree in special education and is experienced with ABA; the full-time clinical director has a masters degree in clinical psychology and is sitting for his ABA certification in December 2004; the Director (who provides clinical consultation to staff as needed) is ABA certified; and the Senior Vice President for Applied Research (who consults for a half day each month) is ABA certified.

Ms. Gower testified that currently there are five other children who would be in Student’s class in the event he were to attend the May Institute in Arlington, MA, for the 2004-2005 school year. She explained that these five children have mixed communication skills – some are verbal and some are not. Ms. Gower explained that in this classroom, there will be four teachers and up to eight students; two of the teachers have masters degrees (intensive special needs and counseling) and two of the teachers have their undergraduate degrees. She noted that no related therapies (such as speech-language therapy) are provided by the May Institute, nor does the May Institute provide an extended day program or a home component.

Haverhill’s classroom teacher assessment of Student, dated March 5, 2004, was done by Jennie Doyle. The assessment report explains that since the beginning of the 2003-2004 school year, Student has attended a morning Language Program and an afternoon Integrated Preschool 4 Program. The report describes Student’s classroom as a highly structured environment with language/communication and educational demands. Exhibits S-8, P-5 (page 1).

The teacher assessment report explains that when Student began school in September 2003, he was communicating with thirteen different words. He was alert, maintained good eye contact, independently manipulated his schedule board with a verbal prompt, was stimulated by his peers, and had little resistance to table work. He was reported to be making
“good progress” in his “skill box”, quickly moving from matching items from a field of two to a field of six by mid-October. In November, Student continued to demonstrate progress, with increased spontaneous verbalizations, he was putting together word combinations, and he was making progress with toilet training. Exhibits S-8, P-5 (pages 3-4).

70. The teacher assessment reports that Student began to regress in December 2003 when he started to become resistant to table work and any demands that were placed on him; he started becoming tired and wanting to sleep during school; he showed regression in his self-help skills (pulling up/down pants, hanging up coat and backpack, and getting his lunch box); and his toilet training and verbalization decreased. Exhibits S-8, P-5 (page 4).

71. The report explains that in January, when Student started taking Tenex to help him sleep at night, his behavior “dramatically changed”. He began hitting, making open mouth skin contact with his teachers and having outbursts of screaming/laughter. He started to become unsafe on the stairs, leaning and crossing his legs, and he began lying down on the floor. His verbalization throughout his day significantly decreased. In February, “all skills areas decreased to mostly manual assistance.” Exhibits S-8, P-5 (page 4).

72. The report explains that classroom staff observed changes in Student’s level of independent functioning since September 2003 and an increased dependency on adults to motivate, organize and carry out simple daily activities. It is further noted that Student has shown a decreased interest in his peers and their activities. For example, in September he would demonstrate that he was happy to see several of his peers by smiling or trying to touch them, would share materials and with adult support would respond to requests from peers. “Now he does not respond to adult support to share materials and doesn’t make eye contact when supported to respond to peer initiation.” Exhibits S-8, P-5 (page 5).

73. The report describes additional areas of regression. He demonstrates a decreased ability to communicate his wants and needs, he has a decreased ability to participate in personal management skills (for example, washing hands and cleaning up after snack), he has increased impulsive physical behavior with adults and peers (in January, Student began hitting peers, and biting adults and peers when there was no provocation), his energy level has decreased, and he has increased mouthing of objects (for example, rocks, mulch and playdough), requiring monitoring for safety. Exhibits S-8, P-5 (pages 6-7).

74. An Early Childhood Education Assessment of Student was performed on May 28 and 29, 2004 at Student’s preschool classroom at the Moody School by Gerry Silgar. Mr. Silgar’s title is Early Childhood Supervisor. In his written report, Mr. Silgar observed that Student is a warm and enthusiastic child who responds to his teachers positively and gains their attention, although he is resistant to teacher-directed activities. The report concluded that Student’s skills “cluster up to the 2-year-old range”, that he has made progress in several areas of development, and that he continues to need the close adult supervision that he has been receiving in as many settings as possible. This supervision is needed in order “to expand Student’s knowledge and his repertoire of behaviors, and to improve his willingness to engage in non-preferred activities.” Exhibit S-7 (page 4).

75. Haverhill’s speech and language re-evaluation of Student was conducted on March 16, 2004 by Sherry Comerchero, CCC-SLP. The evaluation report states, at the outset, that
Student “has demonstrated speech and language regression”. Ms. Comerchero further explained:

From the onset of this school year, steady deterioration of communication and pre-language skills has occurred. From Sept. to Mid-October, he was using a limited repertoire of repetitive words with repeated initial syllables to express his needs. This is no longer occurring. He also played with cars and trucks in a somewhat purposeful manner at the onset of the school year. Presently he does not engage in meaningful play with toy objects such as cars and trucks. [Exhibits S-5, P-4 (page 1).]

76. The speech and language report describes the following clinical impressions:

[Student's] communicative functioning appears to be at a pre-language level, with the sporadic presence of communicative intent through his use of picture communication selection and signs. Significant communicative regression appears to have occurred since spring, 2003, when his communication status was last documented. [Exhibits S-5, P-4 (page 3).]

77. The speech and language report makes recommendations that include developing appropriate object use and functional communication, and indirect language stimulation. Exhibits S-5, P-4 (page 4).

78. Another speech-language evaluation of Student was conducted at Children’s Hospital Boston on March 5, 2004 by Jean Funk, MS, CCC-SLP. Ms. Funk’s written summary report and her complete written report explain that a prior speech-language evaluation in March 2003 by the same clinician concluded that Student’s receptive language skills were at the late one year to early two year level, expressive language skills were at the early to mid one year level, pragmatic skills were an area of strength, and play skills were in the 19-22 month range, with Student beginning to engage in pretend play. Exhibits S-10 (page 1), S-11 (page 1), S-12.

79. During the March 5, 2004 evaluation, Student was observed by Ms. Funk as having difficulty attending to language and engaging with others. She noted in her reports that Student did not play with toys in a functional way, as he did in his March 2003 evaluation. His receptive language skills were now the one year level and were generally consistent with a nine month level. Student had significant difficulty attending to language in play and often required hand-over-hand assistance to complete simple requests (for example, “put the star on the pole”). Student’s expressive skills were also found to have regressed and were generally at the six month level. Overall, the summary report concluded that Student presented with severely impaired language and social interaction skills, with a regression in all areas of language skills which now fall below a 12 month level. Exhibits S-10 (page 1), S-11 (pages 2, 3, 4).

80. Ms. Funk, in her reports, recommended speech-language therapy three times per week to focus on receptive and expressive language and play deficits, utilizing a total communication approach. She noted that Student may also benefit from training in Applied Behavior Analysis in his preschool program in order to improve his attention to language and social interactions. Exhibits S-10 (pages 1-2), S-11 (page 4, 5). Ms. Funk’s complete written
report further recommends that Student be enrolled in an intensive language-based program, with a classroom that has a small student to teacher ratio and is well structured. Exhibit S-11 (page 7).

81. In her March 2003 evaluation report, Ms. Funk recommended that Student attend a full-day, full-year school program, and that he also receive intensive speech-language therapy at least three times per week with at least two individual sessions. Exhibit S-11 (page 4).

82. Haverhill’s physical therapy three-year evaluation of Student was conducted on February 24, 2004 by Mary Fournier, RPT. Ms. Fournier’s written report begins by explaining that Student displayed a decreased ability to attend to requested tasks and was unable to tolerate any activity greater than 20 to 30 seconds. She further explained: “[Student] was unable to follow simple directions consistently enough to perform any standardized testing. He appeared not to understand many simple requests and was unresponsive to them.” Exhibits S-6, P-3.

83. The physical therapy report listed the following as Student’s strengths:

- General functional strength and proximal stability on testing.
- Functional mobility with supervision.
- Independent motor play especially on the playscape.
- Body alignment in classroom chair.
- Ability to seek out proprioceptive input independently as needed. Exhibits S-6, P-3.

84. The physical therapy report listed the following “concerns” regarding Student:

- Lethargy that appears to have developed over the course of the school year.
- Unreliability around safety issues due to decreased focus and attention.
- Development of occasional scissoring during gait.
- In the school setting, the decreased ability to pedal and maneuver a tricycle. Exhibits S-6, P-3.

85. The physical therapy report recommended (a) physical therapy services, (b) proper positioning throughout the day, (c) close supervision on stairs and motor equipment, (d) provision of proprioceptive activity list for teacher and home, and (e) continued opportunity for independent motor play at home and school. Exhibit P-3.

86. Haverhill’s occupational therapy three-year evaluation of Student was conducted on March 26, 2004 by Deborah Williams, OTR/L. Ms. Williams’ written report concludes by explaining that Student demonstrates significant delays in fine and perceptual-motor skills, resulting in his inability to tolerate or attend structured activities. “These delays greatly impact his ability to access education at the level of his peers.” Exhibit S-9.
DISCUSSION

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 entitled to a free appropriate public education (FAPE).\(^5\) Neither his eligibility status nor his entitlement to FAPE is in dispute.

FAPE requires that Student have an individualized education program (IEP) which is tailored to address his unique needs in a way reasonably calculated to enable him to make meaningful and effective educational progress in the least restrictive environment.\(^6\)

A. Purposes of the IEP

I review, at the outset, the various purposes of the IEP.

The IEP is a written statement that includes the special education and related services to be provided to the student, as well as the anticipated frequency, location, and duration of those services.\(^7\) The statutory definition of FAPE also makes clear that the IEP is the vehicle pursuant to which FAPE is implemented:

The term “free appropriate public education” means special education and related services that . . . are provided in conformity with the individualized education program required under section 614(d).\(^8\)

Parents are members of the IEP Team which bears the responsibility for developing the IEP. It is through this IEP Team process that parents participate with school district staff and others in decision-making regarding their son or daughter’s special education and related services.\(^9\)

The First Circuit Court of Appeals, relying on US Supreme Court decisions, has made clear the primary role of the IEP for purpose of describing the special education to be provided a student and safeguarding the procedural rights of parents:

\(^3\) 20 USC 1400 et seq.
\(^4\) MGL c. 71B.
\(^5\) MGL c. 71B, ss. 1 (definition of FAPE), 2, 3.
\(^6\) For a more complete explanation of this standard and the legal authorities upon which it is based, see In re: Arlington, 37 IDELR 119, 8 MSER 187, 193-195 (SEA MA 2002). See also the following regulatory provisions not referenced in Arlington: 603 CMR 28.05(4)(b) (Student’s IEP must be “designed to enable the student to progress effectively in the content areas of the general curriculum”); 603 CMR 28.02(9) (“An eligible student shall have the right to receive special education and any related services that are necessary for the student to benefit from special education or that are necessary for the student to access the general curriculum.”); 603 CMR 28.02(18) (defining the phrase “progress effectively in the general education program”).
\(^7\) 20 USC 1414(d)(A)(iii) and (vi). The implementing regulations include similar language. 34 CFR 300.347(a)(3) and (6).
\(^8\) 33 USC 1401(8). The implementing regulations include a similar definition of FAPE. 34 CFR 300.13. See also Honig v. Doe, 484 U.S. 305, 311 (1988) (IEP is the “primary vehicle” for the IDEA's implementation).
\(^9\) Federal regulations provide that an IEP is a “written statement . . . that is developed . . . in a meeting in accordance with ss. 300.341-300.350.” 34 CFR 300.340(a). Sections 300.341-300.350 include requirements of participation by parents in the Team meeting at which the IEP is developed. 34 CFR 300.345.

Part of the procedural safeguards secured through the IEP, as reflected in the above-quoted excerpt from a First Circuit decision, is the opportunity for parents to know, through the IEP, what special education and related services and placement are being offered by the school district, and then to appeal the school district’s proposed IEP to the BSEA (and, if necessary, to court) in order to resolve any “complaints” regarding the school district’s proposed educational services and placement. Consequently, when a dispute enters litigation, either before the BSEA or on an appeal to court, the central issue to be determined is the appropriateness of the IEP (including the services and placement reflected within it) that is proposed by the school district.11 And, it is the school district which bears the burden of persuading the hearing officer that this IEP appropriately addresses the student’s educational needs.12

B. Appropriateness of Haverhill’s Proposed IEP for the 2004-2005 School Year

Through this BSEA appeal, Parents placed in issue Haverhill’s proposed services and placement for the 2004-2005 school year. Parents are seeking a finding that Haverhill’s proposed IEP for this time period is not reasonably calculated to provide Student with FAPE and an order requiring that Student be placed at the May Institute for the 2004-2005 school year. These are the only issues before me. Therefore, I first consider the appropriateness of Haverhill’s proposed IEP.

In most cases before the BSEA, it is self-evident what IEP is being proposed by the school district for the time period in question. In the instant dispute, this question must be answered at the outset.

11 Roland v. Concord School Committee, 910 F.2d 983, 990 (1st Cir. 1990) (“ultimate question for a court under the Act is whether a proposed IEP is adequate and appropriate for a particular child . . .”).
12 T.B. v. Warwick School Committee, 361 F.3d 80, 82 n.1 (1st Cir. 2004) (“school district always bears the burden in the due process hearing of showing that its proposed IEP is adequate”) and cases cited therein. For a comprehensive discussion of this issue, see Weas v. Schaeffer, 240 F. Supp. 2d 396 (DC Md. 2002).
There is only one IEP which, on its face, addresses the 2004-2005 school year. This IEP was developed for Student as a result of a Team meeting held on April 1, 2004. Exhibit S-3. Haverhill acknowledges that this IEP was appropriately developed and proposed to Parents for the 2004-2005 school year but takes the position that it has been “superseded and supplanted” by two subsequent IEPs. To consider Haverhill’s arguments, I will review the history of the development of the first IEP (exhibit S-3), as well as the two subsequent IEPs (exhibits S-1, S-19).

During the 2003-2004 school year, Student was in a full-day program which was split between a half-day self-contained, language-based classroom and a half-day integrated preschool program at Haverhill’s Moody School. Exhibit S-4. It is not disputed that after some initial educational gains, Student’s language abilities, behaviors and social skills regressed quite significantly during this school year at the Moody School.

The IEP Team met on April 1, 2004 to discuss Student’s educational needs. As a result of this meeting, an IEP was developed, calling for a change to a fully-self-contained, full-day program for children with developmental delays at the Golden Hill School beginning in September 2004, presumably for the purpose of responding appropriately to Student’s significant regression and changing educational needs. This is the only IEP which, on its face, addresses the 2004-2005 school year. Exhibit S-3.

The next Team meeting was held on June 16, 2004. During this meeting Parents made clear their concern that their son should receive services appropriate for children with disabilities on the autism spectrum and requested placement at the May Institute, a private day school which provides services to such children. In response, the Haverhill Director of Special Education (Mr. Covino) proposed, for the first time, that the TEACH program be considered. The TEACH program is operated by Haverhill and provides educational services to children with disabilities on the autism spectrum. The TEACH program was then discussed by the Team as a possible placement for the summer of 2004. Although the Team meeting notice indicated that the 2004-2005 school year placement (presumably at Golden Hill) was the purpose of the meeting, the discussion at the Team meeting regarding placement was limited to the summer of 2004. The Team also discussed the need to later re-convene (in August 2004) to revise the IEP for the 2004-2005 school year. Testimony of Covino, Mother; exhibit S-2. See Facts section of this decision (Facts), pars. 4, 37, 38, 39.

As a result of the June 16th meeting, a “draft” IEP was developed for the summer of 2004, placing Student at the TEACH program. The “draft” IEP was signed by Parents on July 7, 2004. Exhibit S-1. Parent explained in her testimony that she did not believe the placement described within the IEP was appropriate for her son and understood the IEP to be a “draft”, but felt pressured by Mr. Covino to sign the IEP in order to obtain any summer program for her son. Testimony of Mother. See Facts, par. 4.

The “draft” IEP for the summer of 2004 did not include appropriate goals and objectives for Student. Mr. Covino testified that he had written the goals and objectives himself, apparently outside of the Team process. Mr. Covino arranged for two subsequent meetings (July 7 and 13, 2004) with Parent, Mr. Benjamin (Haverhill’s consultant), himself and others for the purpose of developing appropriate goals and objectives for the summer IEP. Haverhill then revised the IEP to include new goals and objectives for Student at the TEACH
program for the summer of 2004. Exhibit S-19. Parents first received this revised summer IEP on July 16, 2004 at the Hearing in this dispute, and have not signed it. Testimony of Mother, Covino. See Facts, pars. 4, 41, 42, 43.

On July 16, 2004 (the first day of Hearing), Haverhill made clear informally to Parents (and made clear formally on July 20, 2004 when it made its opening argument and began the presentation of its case) that it did not intend to defend the only IEP which appears, on its face, to pertain to the 2004-2005 school year (exhibit S-3). Haverhill, through its attorney during its opening and closing arguments, took the position that this IEP (exhibit S-3) and the placement at the Golden Hill School (identified within the IEP) were no longer appropriate because they did not provide sufficiently intensive services. Haverhill explained that it had come to agree with Parents that Student required services appropriate for children with disabilities on the autism spectrum rather than the special education services and placement for developmentally delayed children that are provided at the Golden Hill School. Haverhill further took the position that the appropriate services and placement for Student for the 2004-2005 school should be those reflected within its most recently proposed IEP for the summer of 2004 (exhibit S-19).

Haverhill therefore takes the position that the summer IEPs placing Student at TEACH (exhibits S-1, S-19) “superseded and supplanted” the earlier IEP for the 2004-2005 school year (exhibit S-3). Haverhill would have the more recent of the summer IEPs (exhibit S-19) be considered to be the IEP that it is defending for purposes of the 2004-2005 school year. I find no basis for this position. My reasoning follows.

It is undisputed that the IEP Team did not make any decisions regarding Student’s services and placement for the 2004-2005 school year, except during the April 1, 2004 meeting which resulted in the IEP calling for placement at Golden Hill (exhibit S-3). It is also not disputed that there is no IEP which proposes placement at the TEACH program for the 2004-2005 school year, and it is not disputed that the IEP Team never discussed the TEACH program as the appropriate placement for the 2004-2005 school year.

Haverhill has no authority to make decisions regarding the IEP (including school placement) outside of the IEP Team process. Just as an IEP (and the placement included within it) can only be developed by an IEP Team, it is only the IEP Team which can amend it or supplant it with another IEP. The only IEP developed by the IEP Team for the 2004-2005 school year is exhibit S-3. The IEP Team has never amended this IEP, other than with respect to summer services which are not the subject of the current dispute, nor has the IEP Team ever discussed other services or placement or developed another IEP for the 2004-2005 school year. Testimony of Covino, Mother.

The exhibit (S-19) includes a signature page with Parent’s signature and the date of July 7, 2004. During the Hearing, it became clear that Haverhill had inappropriately included in this IEP the signature page from the earlier “draft” summer IEP (exhibit S-1). Haverhill acknowledged that this should be corrected.

See part A above. See also In Re: George and Boston Public Schools (Ruling on Motion for Partial Summary Decision), BSEA # 04-2506, 104 LRP 35963 (July 30, 2004) (school district violated state and federal special education law by determining student’s school placement outside of the IEP Team process) and authorities cited therein.
Haverhill points out, correctly, that there was discussion during several meetings (and it is reflected within the parent notices within exhibits S-1 and S-19) that the IEP Team would reconvene in August 2004 to write an IEP for the 2004-2005 school year. Through these discussions and parent notices, Parents were put on notice that Haverhill’s proposed IEP for the 2004-2005 (exhibit S-3) would likely change through the process of re-convening of the Team in August. It also seems likely that Parents knew or should have known that the Haverhill Director of Special Education (Mr. Covino) would not be proposing the Golden Hill program at the August meeting and instead would be proposing a placement which provides services to children on the autism spectrum.

Haverhill argues from these facts that its IEP for the 2004-2005 school year (exhibit S-3) was no longer in effect. However, it is self-evident that the mere intent to re-write the IEP for the 2004-2005 school year together with the likelihood that the Director of Special Education will not be recommending the placement identified within the existing 2004-2005 IEP does not, by itself, amend or otherwise nullify the existing IEP for this time period. In addition, if I were to agree with Haverhill that exhibit S-3 is no longer in effect, there would then be no proposed IEP for the 2004-2005 school year, a result which would leave Parents with no IEP from which they could appeal.

Haverhill disagrees. Haverhill points out, correctly, that a new IEP was developed for the TEACH program for the summer of 2004 and that its revised IEP (exhibit S-19) reflects Haverhill’s view of Student’s educational needs and how they should be met for the summer of 2004. Haverhill argues from this that the summer IEP (exhibit S-19) should take the place of the previous IEP (exhibit S-3) with respect to the 2004-2005 school year, and it would be this IEP from which Parents are appealing.

However, it is undisputed that the IEP Team never determined, either implicitly or explicitly, that its summer IEP (exhibit S-19) would apply to the 2004-2005 school year, nor has the IEP Team determined that the TEACH program would be appropriate for Student for the 2004-2005 school year. As noted above in footnote 14 and accompanying text, Haverhill cannot make IEP or placement decisions outside of the IEP Team process. In addition, as Mr. Covino explained in his testimony, it is not possible to conclude that when the IEP Team re-convenes in August 2004, an IEP will be written for the TEACH (or any other particular program) for the 2004-2005 school year.15

I find that, despite the apparent notice to Parents regarding Haverhill’s views of Student’s needs and how those needs should be addressed and despite what presumably were the good faith intentions and efforts of Haverhill and its Director of Special Education (Mr. Covino) to respond to Parents’ concerns, there simply is no basis pursuant to which Haverhill may transform its summer IEP (exhibit S-19) into its proposed IEP for the 2004-2005 school year.

I therefore conclude that exhibit S-3 continues in effect as Haverhill’s only proposed IEP for the 2004-2005 school year. Haverhill concedes, and it is not otherwise disputed, that this IEP (and the Golden Hill placement described within it) are not appropriate for Student for

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15 Mr. Covino explained in his testimony that any placement decision for the 2004-2005 would have to consider (and would be influenced by) Student’s summer experience at the TEACH program. However, Mr. Covino made clear that he could not predict whether Student’s IEP would be written for the TEACH program (or some other program) for the 2004-2005 when the IEP Team reconvenes in August 2004. Testimony of Covino. See Facts, par. 40.
the 2004-2005 school year. I therefore further conclude that Haverhill’s proposed IEP for the 2004-2005 school year is not reasonably calculated to provide Student with FAPE.

**B. Additions or Other Modifications to Haverhill’s IEP in order to make it Appropriate**

1. **Introduction.**

As explained in the statement of issues (near the beginning of this Decision), in the event that Haverhill’s proposed IEP for the 2004-2005 school year is determined not to be appropriate, the next step in the analysis is for me to determine whether any additions or modifications may be made to the proposed IEP in order to make it appropriate.

I must now consider whether, in the instant dispute, it would be appropriate for me to order the TEACH placement and services reflected within the summer IEP (exhibit S-19) as a modification of Haverhill’s IEP for the 2004-2005 school year.

Typically, a BSEA Hearing Officer considers ordering certain additions or modifications to an IEP for the purpose of adjusting the school district’s proposed IEP in certain ways so as to make it appropriate – for example, more services, different staffing or modification of the teaching modalities. Haverhill would have me take the unusual step of essentially ordering a new IEP which has not been discussed by the IEP Team for the 2004-2005 school year.

In order to determine whether to consider Haverhill’s proposed services and placement, I review Parents’ due process rights and the sufficiency of the evidentiary record.

2. **Parents’ due process rights.**

As discussed above in part A of this Decision, the IEP presents the services and placement which are proposed by a school district and from which parents take their appeal.

Parents and their attorney came to the Hearing in this case on July 16, 2004, believing that Haverhill would be defending the IEP which, on its face, pertains to the 2004-2005 school year (exhibit S-3). Testimony of Mother. See Facts, par. 7. For reasons explained in part B above, Parents correctly understood this IEP (exhibit S-3) to reflect the services and programs that Haverhill would need to defend at the Hearing.

Parents and their attorney prepared to demonstrate through their documents and witnesses at the Hearing that Haverhill’s proposed IEP and placement (Golden Hill) for the 2004-2005 school year (exhibit S-3) would not appropriately address Student’s educational needs and that the May Institute would appropriately address his educational needs.

It was not until the first day of the Hearing (July 16, 2004) that Parents received from Haverhill the IEP (exhibit S-19) which Haverhill would seek to have ordered by the Hearing Officer. This IEP was allowed into evidence, without objection from Parents’ attorney, based upon representations from Haverhill’s attorney at the Hearing that this IEP was essentially the same as the “draft” summer IEP (exhibit S-1) with revised goals and objectives. It was only during the opening argument of Haverhill’s attorney on July 20, 2004
(after Parents had presented their witnesses other than Ms. Gower), that it became clear to me, as the Hearing Officer, that Haverhill would be asking me to order the revised summer IEP (exhibit S-19) as the services and placement for the 2004-2005 school year.

The only expert who testified on behalf of Parents (Dr. Schonwald) addressed the inadequacies of the Golden Hill program, which was proposed by Haverhill through its 2004-2005 IEP (exhibit S-3). Dr. Schonwald had no knowledge of and could not testify regarding the adequacy of the TEACH program and Student’s services there. She simply was not prepared to do so. Testimony of Schonwald. See Facts, pars. 57, 58, 59.

Similarly, Parents’ attorney came to the Hearing presumably prepared to cross-examine Haverhill’s witnesses for the purpose of discrediting the Golden Hill program, only to learn at the Hearing that Haverhill would seek to defend the appropriateness of the TEACH program for the 2004-2005 school year.

One might argue that Parents, through discovery, would likely have learned that Haverhill would be proposing the TEACH program (rather than Golden Hill) at the Hearing, and could have prepared accordingly. I suggest, however, that Parents and their attorney should have been able to rely upon Haverhill’s proposed IEP for the 2004-2005 school year as describing the services and placement which Haverhill is proposing for Student and would defend at Hearing. Discovery should not be required in order for parents to know what services and placement are being proposed by the school district. As discussed above in part A of this Decision, one of the essential purposes of the IEP is to set forth the school district’s proposed services and placement for a student, and it is from this IEP that parents’ appeal is taken.

For these reasons, I find that Parents’ due process rights would be violated by my considering the substitution of the educational services and placement described within Haverhill’s proposed IEP for the summer of 2004 (exhibit S-19) for the educational services and placement described in Haverhill’s proposed IEP the 2004-2005 school year (S-3).

3. Sufficiency of the evidentiary record to determine that TEACH is appropriate.

I now turn to the evidentiary record regarding the TEACH program. I may consider the TEACH program only if the record is sufficiently complete regarding the appropriateness of the TEACH program. This question is closely related to the above discussion regarding Parents’ due process rights, since it is only through adequate presentation of evidence by both attorneys that I am likely to obtain a sufficient record from which I am able to make a fair and objective determination regarding Haverhill’s proposed placement. To consider this question, I first review the facts relevant to Student’s educational needs.

Student began the 2003-2004 school year with a diagnosis of developmental delay. His area of most concern was language -- in September 2004, he was communicating with only thirteen different words. Nevertheless, he was an alert, engaged and socially appropriate student who was stimulated by his peers, had little resistance to learning and, perhaps most importantly, was demonstrating educational progress. For example, in September 2003 at the Moody School, he was reported to be making “good progress” in his “skill box”, quickly moving from matching items from a field of two to a field of six by mid-October. In November, Student continued to demonstrate progress, with increased spontaneous
verbalizations, he was putting together word combinations, and he was making progress with toilet training. Exhibits S-8, P-5 (pages 3-4). See Facts, par. 69.

However, in December 2003, Student began to regress. He started to become resistant to table work and any demands that were placed on him; he started becoming tired and wanting to sleep during school; he showed regression in his self-help skills (pulling up/down pants, hanging up coat and backpack, and getting his lunch box); and his toilet training skills and verbalization decreased. Exhibits S-8, P-5 (page 4). See Facts, par. 70.

By the end of the 2003-2004 school year, Student had regressed further. He had become completely non-verbal, and had decreased ability to communicate his wants and needs. His skill level had further decreased in a variety of areas (for example personal management skills). He showed significantly decreased interest in his peers. His behavior had dramatically changed – hitting and biting without provocation, making open mouth skin contact with his teachers and having outbursts of screaming/laughter. He was unsafe on the stairs, leaning and crossing his legs, and he began lying down on the floor. Exhibits S-5, S-8, P-4, P-5 (pages 4-7). See Facts, pars. 71, 72, 73, 75, 76.

Student’s severe regression was not Parents’ only concern. Student presents the highly unusual characteristic of regression at the age of five and a half to six years, as compared to the pattern of earlier regression that may occur with children diagnosed with autism. Now at the age of six years old, Student has a “window of opportunity” to receive and benefit from appropriate services which, according to Dr. Schonwald, is “very quickly” passing. Testimony of Schonwald. See Facts, par. 54.

Dr. Schonwald concluded in her testimony that this particular student is her “absolute most concerning patient that [she has] ever seen with a developmental disability” because of the combination of severe regression and limited window of opportunity remaining to provide meaningful education. Similarly, Dr. Schonwald had concluded in a March 27, 2004 letter that “[Student’s] presentation is highly concerning, and his progress depends on immediate, sophisticated, highly specialized educational services.” Testimony of Schonwald; exhibit P-2. See Facts, pars. 49, 61.

Haverhill’s expert witness (Mr. Benjamin) has significant experience and expertise as a behavior analyst. This experience and expertise includes consulting for Haverhill at the TEACH program which provides educational services for students with disabilities on the autism spectrum. Mr. Benjamin understands Student through a review of evaluations and meetings with Parents. Mr. Benjamin developed a behavioral program which is being implemented for Student during the summer at TEACH. Testimony of Benjamin. See Facts, pars. 9-13.

Mr. Benjamin was the only Haverhill witness qualified to provide expert testimony regarding the appropriateness of the TEACH program (other than the speech language services). He testified that, in his opinion, the TEACH program would provide appropriate services to Student. Testimony of Benjamin. See Facts, par. 16. With all due respect to Mr. Benjamin, I am not prepared to conclude that TEACH is an appropriate program for Student on the basis of his testimony.
Parents’ expert (Dr. Schonwald) demonstrated greater depth of understanding of Student and his educational needs. As compared to Mr. Benjamin who first became involved with Student in June 3, 2004 and who has never evaluated Student, Dr. Schonwald began seeing Student in November 5, 2001 when she and others from Children’s Hospital Developmental Medicine Center evaluated Student for the purpose of addressing Student’s delayed language skills. Exhibit S-18. Dr. Schonwald has been treating Student since that evaluation through the present, giving her the opportunity to know Student over a significant period of time when different educational approaches were tried by Haverhill. Equally important, Dr. Schonwald’s understanding of Student is broader in scope. As compared to Mr. Benjamin who is a behavior analyst, Dr. Schonwald is a developmental behavioral pediatrician with extensive cross-disciplinary training that includes developmental disabilities and special education. She also has the advantage of working with and developing recommendations as part of a team of clinicians at Children’s Hospital Boston. Her team includes behaviorally trained psychologists and educational specialists. Testimony of Benjamin, Schonwald. See Facts, pars. 9, 44, 45, 46. For these reasons, I find Dr. Schonwald to be a more credible witness regarding this Student’s particular educational needs, and I therefore rely on Dr. Schonwald’s expertise to provide guidance as to the particular educational services that are necessary to provide Student with the requisite educational services.

I am persuaded by Dr. Schonwald that, because of Student’s severe regression and limited “window of opportunity”, discussed above, it would be difficult to over-emphasize the importance of my making a correct placement decision so that Student will be provided with a meaningful opportunity to make effective educational progress in the coming school year.16

Within this context, the inability of Dr. Schonwald to testify regarding the TEACH program takes on added significance, limiting my ability to determine, with sufficient confidence, whether this program would be appropriate for Student. In addition, there are two substantive concerns (discussed below) which raise unanswered questions regarding the appropriateness of the TEACH program.

16 Federal Courts and Massachusetts Hearing Officers have recognized the importance of considering a student’s “window of opportunity” when determining what special education and related services should be provided. See, e.g., TH v. Board of Education of Palatine, 55 F. Supp.2d 830 (N.D.Ill. 1999):

The experts testified that there is a critical developmental window for autistic children with language and behavioral deficits. Without sufficient adult intervention now to help reprogram [student’s] young brain, his opportunity for "meaningful access to education" may be permanently foreclosed. [Citations omitted.]

See also JH v. Henrico County School Board, 326 F.3d 560 (4th Cir. 2003) (“window of opportunity” is relevant in determining the level of services needed to prevent student’s progress from being “significantly jeopardized”); Lawyer v. Chesterfield County School Board, 19 IDELR 904 (E.D. Va. 1993) (court first notes “a small, but vital, window of opportunity in which [students with moderate to severe childhood autism] can effectively learn”... and then concludes that “it is extremely important that at this critical stage of development, [student] receive uninterrupted speech language therapy”); In Re: Revere Public Schools, 38 IDELR 116 (SEA MA 2002) (student is “in a critical period of child development and this valuable window of opportunity for Student to receive FAPE must be fully utilized”); In Re: Belmont Public Schools, 35 IDELR 77 (SEA MA 2001) (because of Student’s window of opportunity to absorb more education now than when she reaches age 7 or 8, it is “particularly important to provide Student at this point in time with all of those educational services from which she can benefit” [emphasis in original]); In Re: Winthrop Public Schools, 29 IDELR 558 (SEA MA 1998) (“there is a narrow window of opportunity which must be capitalized upon in educating children, such as Student, who present with autism/PDD, if their educational development and potential is to be maximized”); In Re: Watertown Public Schools, 24 IDELR 92 (SEA MA 1996) (“Children with PDD and autism have a window of opportunity from the ages of roughly three to seven in which their capacity to learn is at their greatest. Once the window of opportunity closes, hope for further development is greatly limited.”).
In her testimony, Dr. Schonwald made general recommendations as to what, at a minimum, would be necessary for Student to likely make educational progress. The heart of the program needed by Student, as described by Dr. Schonwald, is 30 to 35 hours of teaching based on ABA principles. She made clear that what is necessarily a part of the ABA instruction is continual data collection and analysis so that the teachers keep track of, in a systematic manner, how Student is responding to each behavior prompt. Testimony of Schonwald; exhibit P-2. Facts, pars. 50, 51, 52, 53, 58.

Also essential to this model, as explained by Dr. Schonwald, is sufficient expertise on site in order to analyze this data and make any necessary adjustment’s to Student’s ABA program in a timely manner. She noted, for example, the importance of the May Institute having staff with this expertise on-site who are continually available for this purpose. Testimony of Schonwald. Facts, pars. 52, 58.

In contrast to what Dr. Schonwald recommended, the TEACH program is providing Student with only five hours of ABA services per week during which data is being collected. The teacher (Ms. Barchi) testified that she “assumed” that this would be significantly increased after base-line data is obtained, but she apparently had no knowledge as to when this would occur or how much ABA services with data collection would eventually be provided. In addition, no one on site at the TEACH program has been trained in ABA methodology. Any data analysis and adjustment of Student’s ABA program could be done only by Mr. Benjamin who is available to the TEACH staff for six hours during one day each week. Testimony of Barchi; exhibit P-7. See Facts, pars. 18, 20, 23, 24.

From this factual record, I find that there may be significant deficiencies regarding the ability of the TEACH program to provide FAPE to Student.

I conclude that I do not have a sufficient evidentiary record from which I am able to determine that the TEACH program is appropriate for Student.

4. Re-opening the Hearing.

The concerns discussed above (Haverhill’s proposed placement being made outside of the IEP Team process, Parents’ due process rights, the lack of an adequate evidentiary record) might possibly be remedied by delaying the conclusion of the Hearing in this dispute and re-open the Hearing in order to allow the IEP Team and Dr. Schonwald to consider TEACH as a 2004-2005 school year placement, and then to take further testimony. However, for the following reasons, I decline to delay the conclusion of the Hearing for the purpose of re-opening these proceedings.

First, no party has requested such a re-opening of these proceedings. Second, Parents are entitled to a prompt resolution of this dispute. Third, in order for Student to have a place at the May Institute, Haverhill must make a commitment to the May Institute that Student will attend, and any commitment from Haverhill would only come after a final decision in this dispute. The May Institute does not hold open spaces for potential students, even where the student has been admitted. Testimony of Gower. See Facts, par. 64. A delay in the conclusion of these proceedings would risk foreclosing the possibility that Student attend the
May Institute which, for reasons explained below in part D, would be an appropriate program for Student.

5. Conclusion.

For these reasons, I am not able to make any additions or modifications to Haverhill’s proposed IEP in order to make it appropriate. I therefore turn to the final issue – that is, the appropriateness of the May Institute as a placement for Student.

D. Appropriateness of the May Institute

In important respects, the May Institute is an ideal placement for Student. As discussed above, the heart of Student’s educational program is 30 to 35 hours of teaching with ABA methods. The May Institute utilizes ABA principles throughout the day to teach skills for each child within its care. ABA is the only teaching method used at the May Institute. Testimony of Gower. See Facts, par. 65.

The ability of the May Institute to provide ABA services to Student is supported by testimony of Ms. Gower, the person who coordinates its admission process. She explained that ABA services at the May Institute include the collection of data throughout the day. All of the teachers at the May Institute are trained to use ABA principles. The full-time classroom supervisor has a masters degree in special education and is experienced with ABA; the full-time clinical director has a masters degree in clinical psychology and is sitting for his ABA certification in December 2004; the Director (who provides clinical consultation to staff as needed) is ABA certified; and the Senior Vice President for Applied Research (who consults for a half day each month) is ABA certified. Testimony of Gower. See Facts, pars. 65, 66.

Haverhill’s expert (Mr. Benjamin) testified that he is generally familiar with the ABA services provided at the May Institute and that, in his opinion, they “are quite good at it”. See Facts, par. 17. It is therefore not disputed and I so find that at the May Institute, Student would receive the 30 to 35 hours per week of ABA-based educational services recommended by Dr. Schonwald.

In other respects, the May Institute would be appropriate for Student. In his classroom at the May Institute, there would be a total of no more than eight students. Four teachers are assigned to this classroom -- two of the teachers have masters degrees (intensive special needs and counseling) and two of the teachers have their undergraduate degrees. This would allow for sufficient individual attention for Student. Testimony of Gower. See Facts, par. 67.

In other respects, the services at the May Institute would need to be supplemented by Haverhill. The May Institute does not provide any related therapies (such as speech-language therapy), nor does the May Institute provide an extended day program or a home component. These additional services would need to be provided by Haverhill, presumably during an extended school day. Testimony of Gower. See Facts, par. 67.
Finally, I note that the only experts (Dr. Schonwald, Mr. Benjamin) who testified regarding the appropriateness of the May Institute, stated that they are familiar with the May Institute and believe it to be an appropriate placement for Student. The only other person who testified relative to the appropriateness of the May Institute (Ms. Gower who coordinates the May Institute admissions) stated that Student has been evaluated by the May Institute and was found to be appropriate for placement there. Testimony of Benjamin, Schonwald, Gower. See Facts, pars. 17, 55, 56, 57, 58, 64.

For these reasons, I find that the May Institute would be an appropriate placement for Student for the 2004-2005 school year.

ORDER

Haverhill’s proposed IEP for the 2004-2005 school year (exhibit S-3) is not reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment. This IEP cannot be amended or modified to meet this standard.

Placement at the May Institute is reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment.

Accordingly, Haverhill’s proposed IEP for the 2004-2005 school year (exhibit S-3) shall be amended to provide for placement of Student at the May Institute. Haverhill shall immediately arrange for placement of Student at the May Institute. Placement shall commence at the beginning of the 2004-2005 school year.

Additional services needed by Student (such as related services) which are not provided by the May Institute shall be provided by Haverhill pursuant to an IEP.

By the Hearing Officer,

William Crane
Dated: August 5, 2004

17 I note, with appreciation, the assistance of BSEA legal intern Kirsten Dovenberg regarding legal research used in this Decision.
ORDER

In order to apprise the parties in a timely manner of my findings and conclusions in the case, this Order is issued today, in advance of the full Decision, which I expect will be issued no later than August 13, 2004.

A hearing was held on July 16, 20 and 22, 2004 in Malden, MA before me as a BSEA Hearing Officer. The official record of the hearing consists of documents submitted by the Parents and marked as exhibits P-1 through P-7; documents submitted by the Haverhill Public Schools (Haverhill) and marked as exhibits S-1 through S-19; and two and half days of oral testimony and argument. Oral closing arguments were made at the end of the Hearing day on July 22, 2004, and the record closed on that date.

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

1. Is the IEP proposed by Haverhill for the 2004-2005 school year reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment?
2. If not, can additions or other modifications be made to the IEP in order to satisfy this standard?
3. If not, would placement at the May Institute satisfy this standard?

After careful consideration of the evidence and arguments, I make the following findings:

1. The IEP proposed by Haverhill for the 2004-2005 school year is not reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment.
2. Additions or other modifications cannot be made to the IEP in order to satisfy this standard.
3. Placement at the May Institute satisfies this standard.

Accordingly, Haverhill shall immediately arrange for placement of Student at the May Institute. Placement shall commence at the beginning of the 2004-2005 school year.

By the Hearing Officer,

William Crane
Dated: July 23, 2004
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).

Under Massachusetts General Laws, Chapter 30A, Section 14(1), appeal of a final Bureau decision to state superior court must be filed within thirty (30) days of receipt of the decision. The federal courts have ruled that the time period for filing a judicial appeal of a Bureau decision in federal district court is also thirty (30) days of receipt of the decision, as provided in the Massachusetts Administrative Procedures Act, M.G.L. c.30A. Amann v. Town of Stow, 991 F.2d 929 (1st Cir. 1993); Gertel v. School Committee of Brookline, 783 F. Supp. 701 (D. Mass. 1992).

Therefore, an appeal of a Bureau decision to state superior court or to federal district court must be filed within thirty (30) days of receipt of the Bureau decision by the appealing party.

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.