A. Introduction

This Ruling addresses the question of whether Parents are entitled to stay put protections on the basis of their rejecting (but not appealing to the Bureau of Special Education Appeals or BSEA) Uxbridge School District’s finding that Student is no longer eligible to receive special education services.

The factual and procedural history is not in dispute and may be briefly summarized as follows.

Student had been receiving special education and related services (including occupational therapy and speech-language services) pursuant to a fully-accepted IEP for the period from 3/13/08 to 10/29/08 and pursuant to a partially-accepted IEP for the period from 10/21/08 to 10/20/09. On April 28, 2009, Student’s IEP Team determined that Student was no longer eligible to receive special education and related services. By letter of May 13, 2009, the Team chairperson wrote Parents a letter noting the Team’s decision and explaining that Parents would have 30 days from the date of the Team decision to respond to its determination that Student is no longer eligible and that Uxbridge would continue providing services for 30 days past the April 28th Team meeting date. See Parents’ exhibits 1, 2.

By letter of May 26, 2009 (which was apparently received by Uxbridge on May 28, 2009), Father responded to the Team chairperson’s letter, explaining that he was disputing the finding of no eligibility. Uxbridge discontinued all special education and related services on or about May 28, 2009. Parents sought further re-consideration of Uxbridge’s determination of non-eligibility after its review of Parents’ independent evaluation. This review resulted in a further determination of non-eligibility which Parents verbally rejected. See Parents’ exhibits 4, 6; Uxbridge’s exhibits 2, 3.

Then, by letter of May 21, 2010, Parents’ advocate wrote the Team chairperson, taking the position that pursuant to 603 CMR 28.08(7) (quoted and discussed below), Parents were entitled to stay put protections of continued eligibility based upon Father’s rejection of the finding of his son being no longer being eligible. By letter of May 27, 2010, the Uxbridge

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1 It is unclear what could have justified Uxbridge’s making its eligibility determination during the middle of the IEP period. However, neither party has raised this as a concern, and I do not address it further.
Director of Pupil Personnel Services responded, taking the position that Parents were not entitled to stay put protections because Parents had not appealed the denial of eligibility to the BSEA and that Parents had been notified of the necessity of a BSEA appeal to trigger stay put. The Uxbridge Director of Pupil Personnel Services May 27th letter acknowledged that Parents had sought mediation to address the eligibility dispute, and then explained that Uxbridge was justified in declining mediation because of the “thorough and comprehensive” evaluations forming the basis for the determination that Student was not eligible. The May 27th letter also stated that when the IEP Team on September 17, 2009 re-considered eligibility and again found Student not to be eligible, “the family clearly told the team that they wanted to move forward to a BSEA hearing.” See Parents’ exhibits 5, 6; Uxbridge’s exhibit 5.

On August 6, 2010, Parents, for the first time, filed a hearing request with the BSEA, together with a motion for stay put. The stay put motion seeks an order requiring Uxbridge to provide services and placement immediately pursuant to Student’s stay put protections.

B. Discussion

The state special education regulations regarding stay put (603 CMR 28.08(7)) read as follows:

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

(a) If the parents are seeking initial placement in the public school, and the child is at least five years old, however, the child shall be placed in the public school program.
(b) For children three and four years of age, rights to services from the public school district are limited to children who have been found eligible for special education and have an IEP and placement proposed by the public school district and accepted by the parent.
(c) A hearing officer may order a temporary change in placement of an eligible student for reasons consistent with federal law, including but not limited to when maintaining such student in the current placement is substantially likely to result in injury to the student or others.
(d) Except as provided in 603 CMR 28.08(7)(a through c) above, any party seeking to change the eligible student's placement during the pendency of proceedings before the Bureau of Special Education Appeals or in subsequent judicial proceedings shall seek a preliminary injunction from a state or federal court of competent jurisdiction, ordering such a change in placement.

The plain and unambiguous meaning of the first sentence of the above-quoted regulation is that stay put protections are triggered as soon as there is “any dispute” between parents and a school district regarding special education services or placement. There are a number of
reasons why the phrase “any dispute” should be understood as not limited to those disputes where a request for a due process hearing has been filed with the BSEA.

First, I note that the phrase “dispute” is used in a variety of places throughout the state special education regulations. These include the following:

If, after consideration, the school district determines that the parent's failure or refusal to consent will result in a denial of a free appropriate public education to the student, it shall seek resolution of the dispute through the procedures provided in 603 CMR 28.08.\(^2\)

School districts are encouraged to develop local problem resolution procedures that allow parents to present a concern to a district representative and receive a response related to the concern. Local procedures shall not be used to delay or deny a parent's right to access other dispute resolution mechanisms.\(^3\)

A voluntary dispute resolution procedure, called mediation, shall be provided by mediators employed by the Bureau of Special Education Appeals and may be used by parents and school districts to seek resolution of their dispute.\(^4\)

Within these and other places in the state regulations, the term “dispute” is used to signify an actual disagreement between the school district and parents even though neither party has filed for a due process hearing with the BSEA and may never do so.

Second, the stay put regulatory language (quoted above) first uses the phrase “any dispute” (first sentence) and then within paragraph (d) of the same regulatory section, uses the phrase “during the pendency of proceedings before the Bureau of Special Education Appeals”. This comparison of language indicates that when the stay put state regulations intend to focus on disputes pending before the BSEA (rather than any dispute between parents and a school district), the regulations use explicit language for that purpose.

The only possible limitation to the above understanding of the breadth of the term “any dispute” is contained within the phrase “[i]n accordance with state and federal law” as a precedent to the stay put requirements relevant to “any dispute”. (See first sentence of regulatory language quoted above.)

Use of the phrase “in accordance with” means that the state regulatory standard is intended to be understood as consistent with and in harmony with state and federal law generally. See *Black’s Law Dictionary* (*6th* Ed. 1990) (“accordance” defined to mean agreement, harmony, concord, conformity).

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\(^2\) 603 CMR 28.07(1)(b).
\(^3\) 603 CMR 28.08(1).
\(^4\) 603 CMR 28.08(4).
The relevant federal law is the Individuals with Disabilities Education Act (IDEA), which includes the following stay put standard: “during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child.” The “any proceedings” language refers to any BSEA due process proceeding as well as any judicial proceeding.

The IDEA incorporates state educational standards, and the state standards may exceed the federal floor. The Massachusetts educational standards, which are incorporated into the IDEA, are found within state statute and state education regulations. Thus, a state standard that is more protective of parents’ stay put rights described within the IDEA is consistent with and in harmony with the IDEA. The state stay put standard, as discussed above, would be more protective of parents’ rights as compared to IDEA stay put standards, and thus the state stay put standards, as interpreted above, are consistent with and in harmony with federal special education law.

I further note that had the state special education regulations been written for the purpose of limiting a parent’s stay put protections to the substantive standards contained within the IDEA, the state regulations would have likely followed the pattern, found in many other parts of these state regulations, of explaining that the state standards are adopting, incorporating by reference or otherwise requiring conformance with the relevant substantive federal standard. For example, in a number of places, the state regulations reference a specific, identified section of the federal regulations that is to be utilized as the state regulatory standard; or the state regulations use language such as “shall include the … set forth in state and federal special education law” or “shall meet all of the … requirements set forth in … federal law”, thereby indicating that the federal substantive standard is to be incorporated into the state regulatory standards.

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5 20 USC § 1415(j); 34 CFR §300.518.
6 Verhoeven v. Brunswick School Committee, 207 F.3d 1, 6 (1st Cir. 1999) (federal stay put protections provide continued placement throughout both the administrative and judicial proceedings challenging a placement decision).
7 20 USC 1401(9)(b); Winkelman v. Parma City School Dist., 127 S.Ct. 1994, 2000-2001 (2007) (“education must … meet the standards of the State educational agency); Mr. I. v. Maine School Administrative District No. 55, 480 F.3d 1, 11 (1st Cir. 2007) (state may “calibrate its own educational standards, provided it does not set them below the minimum level prescribed by the [IDEA]”); Town of Burlington v. Department of Education, 736 F.2d 773, 792 (1st Cir. 1984) (states are “free to exceed, both substantively and procedurally, the protection and services to be provided to its disabled children”).
8 MGL c. 71B, ss. 1, 2, 3.
9 The Massachusetts special education regulations themselves characterize its standards as setting forth requirements that “are in addition to, or in some instances clarify or further elaborate, the special education rights and responsibilities set forth in state statute (M.G.L. c. 71B), federal statute (20 U.S.C. §1400 et seq. as amended), and federal regulations (34 CFR §300 et seq. as amended).” 603 CMR 28.01(2).
10 See, e.g., 603 CMR 28.02(7)(j) (“[u]se of the term [specific learning disability] shall meet all federal requirements given in federal law at 34 CFR §§300.8(c)(10) and 300.309”); 603 CMR 28.02(20) (“Special education shall mean specially designed instruction to meet the unique needs of the eligible student or related services necessary to access the general curriculum and shall include the programs and services set forth in state and federal special education law”); 603 CMR 28.02(21) (“Team shall mean a group of persons, meeting participant requirements of federal special education law as provided at 34 CFR §§300.321 and 300.116(a)(1 …”); 603 CMR 28.04(1)(b) (“notice required by 603 CMR 28.04(1)(a) shall meet all of the content requirements set forth in M.G.L. c. 71B, § 3, and in federal law”); 28 CMR 28 (“assessments used shall be adapted to the age of the student and all testing shall meet the
This analysis leads me to the conclusion that the phrase “in accordance with” the federal IDEA does not limit the breadth of protections found within state stay put regulations. And, I am aware of nothing within state law (other than within the above-quoted state stay put standards with state regulations) or any other federal law that is relevant to this issue, nor has either party argued that any other state or federal law should be considered.

For these reasons, I find that the phrase “in accordance with state and federal law” does not alter the above analysis regarding the meaning of the stay put protections found within the state regulations.11

Uxbridge correctly points out that the Massachusetts Department of Elementary and Secondary Education (DESE) apparently disagrees with this interpretation. In a 2001 administrative advisory regarding findings of no eligibility, Marcia Mittnacht (the State Director of Special Education) wrote: “When the Team makes a Finding of No Eligibility for a student who has been receiving special education services, the school district must continue to provide services if the parent disagrees with this Finding and appeals to the BSEA.”12 Later in the same advisory, the following, somewhat different standard is articulated: “An indication of intent to file an appeal with the BSEA requires the district to maintain the student's services until the dispute is settled.”13

The DESE advisory does not provide any analysis or explanation of the above-quoted statements, nor does the advisory reference or discuss state or federal stay put regulations or statute. As a result, the advisory provides no opportunity to determine the origin or basis of the quoted statements, or even to know whether it considered the state stay put regulations discussed above. Accordingly, it is not possible to consider these statements contained within the advisory as having any persuasive authority.14

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11 See also Charles S. & Triton Public Schools, BSEA #07-0082 (October 13, 2006) (reaching the same conclusion regarding the meaning of the state and federal stay put protections). This ruling can be found at http://www.doe.mass.edu/bsea/rulings/07-0082.doc.
12 Administrative Advisory SPED 2001-4 (March 15, 2001). The DESE advisory can be found at http://www.doe.mass.edu/sped/advisories/01_4.html.
13 Id. (emphasis supplied). Apparently, Parents did advise Uxbridge of their intent to appeal to the BSEA. In a May 27, 2010 letter to Parents’ advocate, the Uxbridge Director of Pupil Personnel Services wrote that when the IEP Team on September 17, 2009 re-considered eligibility and again found Student not to be eligible, “the family clearly told the team that they wanted to move forward to a BSEA hearing.” Parents’ exhibit 6.
14 Uxbridge also makes equitable arguments. Equitable arguments are not relevant to a stay put analysis, but may possibly be relevant to a determination of compensatory claims. See, e.g., C.G. ex rel. A.S. v. Five Town Community School Dist., 513 F.3d 279, 290 (1st Cir. 2008) (compensatory education is a “discretionary remedy”); Reid v. District of Columbia, 401 F.3d 516 (D.C. Cir. 2005); Pihl v. Mass. Dept. of Ed., 9 F.3d 184, 188 n. 8 (1st Cir.
In conclusion, I find, and it is not disputed, that there was a dispute between the parties regarding Student's eligibility. I further find that the state stay put protections were triggered as a result of this dispute, with the result that Uxbridge is obligated to provide Student with his stay put special education and related services and placement.\textsuperscript{15}

\textbf{C. Order}

Parents’ stay put motion is \textbf{ALLOWED}.

Uxbridge shall immediately commence providing Student his stay put special education and related services and placement.

By the Hearing Officer,

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William Crane  
Date: September 1, 2010
\end{flushright}

\textsuperscript{15} Uxbridge argues that allowing stay put rights regarding eligibility (and therefore services and placement) would result in Student’s receiving inappropriate special education and related services since he last received these services in May 2009. Uxbridge argues that much has changed for Student educationally since that date. I do not believe that stay put principles are as rigid as Uxbridge appears to argue. IDEA stay put principles that determine a student’s “then-current educational placement” do not necessarily rule out adjustments as a student advances in age and grade. Federal court decisions make clear that the central inquiry is the actual educational impact upon the student as a result of any change of services or setting. See, e.g., \textit{Hale v. Poplar Bluff R-1 School District}, 280 F.3d 831 (8th Cir. 2002) (determination of whether there has been a change in student’s “then-current educational placement” is a “fact-specific” inquiry that considers the impact of a change of placement on student’s education). As a general rule, the impact must be detrimental and significant in order to trigger stay put protections. See, e.g., \textit{AW v. Fairfax County School Board}, 372 F.3d 674 (4th Cir. 2004) (“where a change in location results in a dilution of the quality of a student's education …, a change in educational placement occurs”); \textit{Tennessee Department of Mental Health v. Paul B.}, 88 F.3d 1466 (6th Cir. 1996) (“must identify a detrimental change in the elements of an educational program in order for a chance to qualify for the stay put provision”); \textit{DeLeon v. Susquehanna Community School District}, 747 F.2d 149, 153-154 (3rd Cir. 1984) (“touchstone in interpreting section 1415 has to be whether the decision is likely to affect in some significant way the child's learning experience”). For example, stay put principles would be violated if there is “a fundamental change in, or elimination of, a basic element of the educational program has occurred”. \textit{Sherri A.D. v. Kirby}, 975 F.2d 193, 206 (5th Cir. 1992). See also \textit{Lunceford v. District of Columbia Bd. of Educ.}, 745 F.2d 1577, 1582 (D.C.Cir.1984) (applying same standard); \textit{Mr. C v. Maine School Administrative Dist. No. 6}, 2007 WL 4206166 (D.Me. 2007) (applying same standard). One court has concluded that where different services or setting “replicates the educational program contemplated by the student's original assignment and is consistent with the principles of mainstreaming and affording access to a FAPE,” a change of placement (for stay put purposes) has not occurred. \textit{AW v. Fairfax County School Board}, 372 F.3rd 674 (4th Cir. 2004).