

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals
Bureau of Special Education Appeals

In Re: Student v.
Boston Public Schools

BSEA #2110952

**Ruling on Boston Public Schools' Motion to Dismiss and Parent's/ Student's
Motion for Stay-Put Order**

On June 1, 2021, Parent filed a Hearing Request in the above-referenced matter. On June 9, 2021, Parent filed a Motion for Stay-Put seeking extension of Student's placement at Ivy Street School beyond June 30, 2021.

On June 11, 2021, Boston Public Schools (Boston or the District) filed a Motion to Dismiss and Opposition to Parent's Stay-Put Motion on the basis that Parent's Hearing Request failed to state a claim for which relief can be granted because the Parties had entered into a settlement agreement which was controlling of the Parties conduct. Parent opposed Boston's Motion to Dismiss on June 17, 2021.

The Parties filed a joint request for postponement of the Hearing on July 2, 2021. The Parties also requested that a Motion Session be scheduled prior to the Hearing. The Parties' requests were granted via Order issued on July 2, 2021. The Motion Session was scheduled to proceed on August 24, 2021 and the Hearing on September 28 and 29, 2021.

On August 16 and 18, 2021, Parent requested a postponement of the Motion Session, which request was Granted via Order issued on or about August 19, 2021. The Motion Session was rescheduled for September 16, 2021, and the Hearing dates established per the previous Order remained the same.

Parent amended her Hearing Request on September 3, 2021 and on September 15, 2021, requested a postponement of the Hearing through late October 2021. This request was granted for good cause on September 22, 2021.¹ Thereafter, on October 14, 2021, the Parties filed a joint request for postponement of the Hearing through November 2021. This request was granted on October 25, 2021, and the Hearing on the merits was scheduled for November 10 and 12, 2021.

The Motion Session/ Hearing on Boston's Motion to Dismiss and Parent's Motion for Stay-Put Order was held on September 16, 2021, via Zoom before Hearing Officer Rosa I. Figueroa. Those present for all or part of the proceeding were:

Parent
Student
Noreen Curran Parent/ Student Advocate

¹ A Corrected Order was issued on October 25, 2021 as the previous Order contained the wrong date for submission of exhibits and witness lists. The dates previously designated for Hearing remained the same.

Rafael Castro, PhD. Clinical Neuropsychologist
Kelsey LoDuca, Esq. Attorney for Boston Public Schools
Mary S. Marcella Assistant Director of Special Education, Boston Public Schools
Cindy Nielson Former Assistant Superintendent of Special Education, Boston Public Schools
Elliott Nerland, MS.Ed. BCBA, Boston Public Schools
Marguerite Mitchell BSEA Hearing Officer, Observer

The official record for this Ruling consists of Parent's Motion for Stay-Put, Boston's Motion to Dismiss and Opposition to Parent's Motion for Stay-Put, Parent's Opposition to Boston's Motion to Dismiss, Parent's Hearing Request, and subsequent Amendment to the Hearing Request, documents submitted by Parent/ Student marked as exhibits PE-1 through PE-11, Boston's documents marked as exhibits SE-1 through SE-14, recorded oral testimony offered during the Motion Session, and the oral arguments proffered by the Parties.

FACTS:

(The facts appearing herein are accepted for purposes of this Ruling only.)

1. Student is a twenty-one-year-old resident of Boston, Massachusetts. He has been described as polite, kind and engaging.²
2. Student has been diagnosed with Autism Spectrum Disorder (ASD), Attention Deficit Hyperactivity Disorder- Inattentive Type (ADHD), Obsessive Compulsive Disorder (OCD), Unspecified Depressive Disorder, and Specific Learning Disability in reading and written expression (PE-8).
3. Student currently attends the Ivy Street School (Ivy Street) in Brookline, Massachusetts, pursuant to a Settlement Agreement (the Agreement) reached between the Parties in January 2020.
4. During the 2015-2016 school year, prior to entering the Agreement, Student received educational services at the Mary Lyon Pilot School (Mary Lyon) in Brighton, Massachusetts.
5. While at Mary Lyon, Student received special education services in a supported inclusion setting. Student's IEP for the period from March 18, 2019 to March 17, 2020 notes that Student qualifies for special education services under the categories of Autism, Specific Learning and Emotional Impairment (SE-9).
6. At Mary Lyon, Student received supported interventions through which he made academic and social/ emotional gains, and he passed the MCAS. Student's Team

² Student's high level of empathy and deep connection with Parent has been noted by evaluators (such as Dr. Castro) and was observed during the Motion Hearing when at one point, when his mother became upset, Student expressed concern for her well-being and later sat quietly beside her with his arm around her shoulder. It is clear that Student possesses strengths beyond the academic and cognitive strengths discussed later in this Ruling.

concurrently noted concerns that Student displayed significant avoidance behaviors such as running away from a person or a place, making comments relative to seeing or hearing somebody's voice (usually a family member), and displaying ritualistic behaviors such as washing his hands or face, protecting himself from perceived harm, and making comments relative to harming himself dependent upon a specific event. The Team made recommendations to address the aforementioned concerns resulting in the implementation of interventions to address self-regulation, executive functioning, and transition skills.

7. In October of 2017 Student was admitted to Bournemouth Hospital for a seven day psychiatric hospitalization due to worsening depression, suicidal ideation, and an attempt to commit suicide (PE-8).
8. Student's Team convened on March 18, 2019, and offered Student participation in a full inclusion program at Mary Lyon with special education services and supports to address self-regulation skills, executive functioning skills, counseling/ therapeutic support, and transition skills (SE-9).
9. In March of 2019, Elliott Nerland, M.S.Ed., BCBA, conducted a Functional Behavioral Assessment (FBA) (SE-10). Mr. Nerland is Boston's Program Director for Applied Behavior. Mr. Nerland conducted Student's 30-day FBA to assess Student's challenging/ interfering behaviors (Nerland).
10. Student's FBA focused on environmental variables that contributed to maintenance of identified passive and active behaviors warranting intervention, including Student's ritualistic behaviors. Among the active behaviors to address in school were: active running away from an individual or a location; attempting to leave or leaving the school building; making negative statements about what an individual did to him; and, verbally refusing to follow directions given by an adult or transition from class to class. The at home active behaviors to identify were: actively running away from a person or community location; making repetitive comments as to whether or not he saw someone or heard their voice (i.e., his sibling or uncle), whether or not he is safe from harm; and, verbally refusing to leave his home or transition to a different part of the community (e.g., visiting a relative or running an errand). Student's behaviors were primarily related to avoiding interactions with his uncle, his sibling, a particular teacher or peer, making comments about wanting to hurt himself based upon whether he saw a particular individual or was exposed to a particular event, and repetitively engaging in the comment until he was able to speak with Parent and was assured that everything was fine. A behavior support plan to address the aforementioned passive and active behaviors in school and at home was recommended (SE-10; Nerland).
11. Parent rejected Student's proposed IEP and placement on May 13, 2019. Thereafter, on July 25, 2019 she further noted her opinion that Student required a "comprehensive intensive, structured transition program to work on academic,

vocational, independent living skills, social skills, emotional/ behavioral/ coping skills...” (SE-9).

12. On May 8, 2018, Student participated in a neuropsychological evaluation with Pamela Wineman, PhD. (PE-1; SE-11). The report notes that Student was participating in outpatient therapy and pharmacological management for a new medication regime as his affective symptoms had intensified over the previous year resulting in strained familial relationships and a psychiatric hospitalization. Student’s emotional vulnerabilities manifested as anxious and depressive behaviors suggesting that Student was experiencing a great deal of distress and he lacked the necessary coping strategies to manage his distress resorting to impulsive and reactive behaviors inclusive of obsessive ritualistic behaviors (PE-1; SE-11). According to Parent, Student’s OCD symptoms remained pronounced as he continued to demonstrate a preoccupation with germs and rules associated with food, and he engaged in a number of rituals including fluctuating motor movement and counting which interfered with his ability to move about his day. Parent also reported that Student’s intense dislike of his sibling, inability to speak to or about her or be around her had not improved. According to Parent, Student’s OCD symptoms remained pronounced and he demonstrated regression relative to his social-emotional symptoms (PE-1; SE-11). Cognitive and academic testing results placed Student’s abilities generally within the average range despite some variabilities across reading tasks involving decoding during which he applied a “methodical and deliberate approach” when sounding out unfamiliar words (PE-1; SE-11). Student’s reading difficulties impacted comprehension. Dr. Wineman recommended specialized programming and instruction that addressed Student’s educational and social-emotional weaknesses and offered transitional and independent living skills instruction, and she also recommended continuation of outside therapy and pharmacological management (*Id.*).
13. Student was offered his diploma at the end of the 2018-2019 school year, but he rejected it. Parent/ Student requested additional supports to which Boston later acquiesced. According to Mary Marcella, Assistant Director of Special Education, Student’s Team convened sometime in June of 2019 and Student, who according to Ms. Marcella, displayed strong self-advocacy skills, was offered three options: a) a full time, small group, school-based life-transition/ vocational program; b) dual enrollment in school (Mary Lyon) and a non-credit college program; and c) a community-based work program at New England Baptist Hospital (SE-14; Marcella). According to Ms. Marcella, while this offer was not incorporated into Student’s IEP, it was detailed in Student’s Transition Service Plan (Marcella).
14. During the summer of 2019, Student participated in an internship through Project SEARCH at the New England Baptist Hospital. Project SEARCH allowed Student to work with a job specialist and receive supervision from a Boston special education teacher as he rotated among varying internship opportunities at the hospital (SE-14; Marcella).

15. On July 25, 2019, Parent rejected Student's proposed IEP for the period from March 2019 to March 2020, because, according to Parent, Student needed "a comprehensive, intensive, very structured transition program to work on academic, vocational, independent living skills, social skills, emotional/ behavioral/ coping skills as a comprehensive transition program" (SE-9).
16. In July of 2019, Student and Parent requested a hearing before the BSEA (BSEA #2000681).
17. Student participated in another neuropsychological evaluation with Dr. Wineman on August 8 and 19, 2019. Dr. Wineman diagnosed Student with ASD, OCD, ADHD and learning disabilities, and she noted that Student presented with executive functioning challenges (most salient inability to plan and organize himself in the absence of structure) and social difficulties. Parental concerns triggering this evaluation involved Student's difficulties managing anxiety, coupled with rigid and ruminative thinking, and significant difficulties with independent living skills. Student was also evidencing anger and depression. Projective testing conducted during the evaluation suggested that Student became overwhelmed when trying to make sense of the world around him (PE-1; SE-8).
18. In September of 2019, as part of his transition programming, Student was offered continued participation in the internship program through Project SEARCH along with participation in a daily work readiness class (SE-14). In addition to participation in STRIVE, Student was offered participation in a travel training program. The aforementioned services were offered instead of participation in a supported college transitional program during a gap year which Student preferred. Around this time, Student also completed an application to the Department of Developmental Services (DDS) (PE-1).
19. The Parties participated in a Pre-Hearing Conference in BSEA #2000681 in mid-September of 2019. Ms. Marcella and Cindy Neilson (Assistant Superintendent for Special Education during 2019-2020) who were in attendance, testified that Student appeared extremely withdrawn, stressed, sad, lethargic, and uncomfortable. He spent a great deal of the time looking at a plant and responded in short phrases when asked questions. It was reported that at the time, Student was not leaving the house much, he did not wish to socialize and was isolated (Marcella; Neilson).
20. On January 14, 2020, the Parties participated in a Settlement Conference in hopes of resolving their dispute "by mutual agreement, expeditiously and without the time, cost and uncertainty of litigation" (PE-2; SE-1, preamble; Neilson).

21. Both, Parent and Boston were represented by attorneys at the Settlement Agreement as reflected at paragraph #11 (PE-2; SE-1).³

22. Both Parties acknowledged that after negotiating the terms, they were agreeing to enter a legally binding contract that fully resolved their dispute, and they further acknowledged that they were entering the agreement freely, voluntarily and with full understanding of its terms (PE-2; SE-1, paragraph #1# and #11). Specifically, Paragraph #1 of the Agreement provided

This Agreement is entered into in full settlement of any and all claims which the Parent and/or Student has or might have or assert against Boston, its officers both elected and appointed, its agents, employees, and/or attorneys pertaining to and/or arising out of any and all obligations which Boston had or now has to provide a free appropriate public education to Student, both substantively and procedurally, including, but not limited to, the provision of regular and special education and or related services and or transitional services for any and all periods since he became enrolled as a student in Boston up to and including the date of this Agreement. Without limiting the foregoing, Student and Parent specifically acknowledge that they waive any and all rights and or claims against Boston which might have accrued on behalf of Student or to Student under MGL c. 30A, 71, 71B, 76, 231 and 258, 20 USC §1400 et seq., 20 USC §1983, section 504 of the Rehabilitation Act of 1973, the American with Disabilities Act, and any and all other related acts, laws, and regulations up to the date of this Agreement. (PE-2; SE-1).

23. Pursuant to the Agreement, Boston agreed to fully fund Student's out-of-district, day placement at a private special education school (PE-2; SE-1, paragraph #2). The agreed upon placement was Ivy Street, a Massachusetts Department of Elementary and Secondary Education (DESE) approved private special education school, through June 30, 2021. Ivy Street was Parent's and Student's preferred placement as they anticipated that it would offer Student very specialized transition services and would allow Student to solidify the skills he would need as an adult (Parent).

³ "The Parties acknowledge that this Agreement is a legally binding contract. Student and Parent acknowledge that they have been represented by an attorney for the purpose of resolving the matters in dispute and negotiating the terms of this Agreement. The Parties further acknowledge that they have entered into this Agreement freely and voluntarily, with full understanding of its terms and without any other inducements or promises except those set forth herein," (PE-2; SE-1, paragraph #11).

24. Per the Agreement, Boston also agreed to provide Student door-to-door transportation from his home to the out-of-district, private day placement consistent with a standard school day schedule (PE-2; SE-1, paragraph #4).
25. In exchange for the aforementioned funding for the placement and transportation, Parent and Student agreed to waive any and all annual review meetings, district evaluations, independent evaluations, and any and all team meetings for Student (PE-2; SE-1, paragraph #3). Parties further agreed to waive the convening of the Team once Student was accepted at the private school, agreeing that Boston would amend Student's IEP administratively without the need to convene the Team for this purpose. The Service Delivery Grid in the out-of-district placement IEP would reflect the services and methodology implemented at the out-of-district placement (P-2; SE-1, paragraph #3).
26. Parent and Student further agreed to waive any and all additional services by Boston "including compensatory services, additional extended school year services, general education services, special education services and/ or transition services" agreeing that Boston's funding of this placement through June 30, 2021, fulfilled Boston's entire obligation to provide Student with a FAPE (PE-2; SE-1, paragraph #7).
27. The Agreement further noted that in the event of an unforeseen significant medical change for Student, which caused a substantial and material change in the nature of his disability, Boston would agree to convene a Team to consider the material change (PE-2; SE-1, paragraph #8). However, the Agreement specifically provided that,

Exacerbation of current conditions shall not constitute a material change in the nature of the Student's disability (PE-2; SE-1, paragraph #8).

According to Ms. Neilson, the provision involving a substantial and material change in the nature of the disability was intended to protect Student for instance in the event he suffered a traumatic brain injury and the like (Neilson). On cross examination, Ms. Neilson stated her opinion that "depression" did not qualify as a material change in the nature of Student's disability and that it fell under the emotional impairment category previously identified in Student's IEPs (Neilson).

28. Paragraph #7 in this Agreement provides that Student's eligibility for services ends at the conclusion of the Agreement, that is, on June 30, 2021, or upon Student's voluntary, involuntary, removal, withdrawal, or failure to comply with the attendance policy, whichever event occurs first. If any of the aforementioned events occurred, Parent and Student agreed that Student would accept his diploma from Mary Lyon (PE-2; SE-1).
29. Paragraph #8 of the Agreement further provided that if the outside placement was not able to complete the agreed upon education for reasons beyond Student's control

during the period for which Boston was responsible for Student, upon notice to Boston, Boston would send out referral packets to comparable out of district day placements so that the substitute placement offered Student his education for the remainder of the duration of the Agreement, that is, through June 30, 2021 (PE-2; SE-1).

30. Parent testified that during the Settlement Conference she was provided access to a room at the BSEA where she met privately with her attorney and advocate. She conceded that she was given a paper copy of the Agreement which she signed on her own behalf (Parent). The Settlement Conference lasted approximately five hours (Neilson).
31. Upon full execution of the Agreement, Parent/Student withdrew their Hearing Request in BSEA #2000681 with prejudice, and Boston promptly sent out referral packets to potential day school placements including Ivy Street, the placement favored by Parent and Student (PE-2; SE-1, paragraph 15; Neilson).
32. Student was accepted to Ivy Street, and he began attending Ivy Street in February of 2020 (Marcella; Neilson). Boston funded this placement and offered Student transportation (*Id.*).
33. In mid-March of 2020, Ivy Street temporarily closed for all in-person instruction as a result of the COVID-19 state health emergency. Upon reopening, Ivy Street offered day students instruction through a remote learning model, which model remained in place through the end of the 2019-2020 school year (PE-5a). A Remote Learning Plan with a start date of March 17, 2020 was forwarded to Parent/Student explaining how remote instruction would be offered and clarifying that this plan did not constitute an amendment to Student's IEP. The Plan would be modified as remote systems were further developed and improved, and the schedules would be flexible whenever possible. On April 24, 2021, Ivy Street students were informed that remote instruction would remain in place through the end of the school year per the Massachusetts Governor's state mandate (PE-5a).
34. Despite not being responsible for convening any further Team meetings once Student was placed at Ivy Street per the terms of the Agreement, on April 3, 2020, Boston convened a virtual meeting for Student, including participants from his outside placement, to develop a new IEP. Student's service delivery included counseling, transitional education, speech and language therapy, vocational skills, and behavioral consultation by a BCBA and consultation by the special education teacher and the clinician. The IEP included a Transitional Planning Form noting Student's desire to attend college and pursue a career in computer design (PE-3; SE-8).
35. Student's participation in remote learning was inconsistent, with him accessing his programming approximately fifty per cent of the time (Marcella).

36. On June 18, 2020, Parent fully accepted the proposed day placement at Ivy Street, but she rejected the IEP noting that

Due to the pandemic and the process of learning from home vs. at school, Boston Public Schools will extend [Student's] graduation day by [a] few months at Ivy [Street] School to make up the time away from the school – which [is] important for his learning needs at school setting from his future regression... did not notice any add reading decoding objectives, I know it hard since it [is] on-line learning to implement my request, but hopefully once [Student] is back at school we can work on this portions of his goals... (PE-6; SE-8).

Parent further requested that the goals and objectives in the IEP be updated to reflect Ivy Street as opposed to those implemented at Mary Lyon (*Id.*). Boston rejected Parent's request to extend Student's Placement at Ivy Street "by a few months".

37. Ivy Street initiated the 2020-2021 school year offering remote learning to its day students including Student.
38. In August of 2020 Ivy Street issued a report card for Student for the period comprising the 2019-2020 school year/ Summer of 2020. Student received a C in math, science and transition/vocation, and a C- in English and social science. Student's teacher noted Student's limited participation in remote learning (PE-7b; SE-7).
39. Progress Reports for the period ending on August 20, 2020 note Student's participation in remote instruction indicating that communication has been a barrier toward Student's progress with reading and writing skills and noting difficulties with communication and participation in sessions to address self-regulation skills. This report notes inability to work on Student's executive functioning goals via remote instruction. Student struggled with self-advocacy but did not display significant outbursts during this period (PE-7a).
40. On or about September 2, 2020, Ivy Street issued a Day Student Hybrid Learning Plan which offered a combination of in-person and remote learning experiences on alternating weeks (PE-5b). Ivy Street also offered students the opportunity to continue to receive their education fully remotely. Parent opted to have Student continue to receive his education through remote learning during the following two months owing to Student's extreme fear of COVID and because he had not yet been vaccinated (Marcella, Parent).
41. On September 11, 2020, Boston communicated with DESE seeking guidance regarding the District's obligations in cases involving settlement agreements in light of DESE's Guidance on Covid-19 Compensatory Services. DESE offered no

clarification except to note that terms of settlement agreements and the individual's circumstances varied greatly from case to case (SE-13).

42. Student returned to in-person education in November of 2020 (Marcella, Parent).
43. Student's Ivy Street November report card for the 2020-2021 school year shows that he earned a B+ in Math, B in English, B in Social Science, B+ in Science and B in Transition/ Vocation. Student's teacher commented that Student demonstrated strong improvement in his participation and assignment completion during the period up to November 2020 when learning remotely and that he accepted and requested assistance when participating in in-person instruction (PE-7b; SE-4).
44. On January 14, 2021, Student had a telemedicine visit with Joshua R. Smith, M.D., Resident in Psychiatry at the Department of Mental Health's (DMH) Bressler Clinic. The purpose of the visit was to conduct an interview as consultation for outpatient services by DMH. The prescriber conducted a records review that noted Student's difficulties with showering, which he would only do once per week due to hearing voices. The prescriber further noted that

Chronic issues include struggles with sounds similar to his [sibling's] name. Notes also suggest that [Student's] suicide attempt in 2017 was [due] to being pushed too hard academically at school. The prescriber had recommended that [Student] have intensive full day appropriate transitional program with social/ emotional and academic supports (PE-8).

During the interview, Student noted that he had no friends, that he greatly relied on Parent to help him understand things, and that he was fine with psychiatric medication. Student asked Dr. Smith not to use words that sounded like his sibling's name even after the interview ended. When questioned about activities of daily living, Student left the visit abruptly. While Dr. Smith interviewed Parent, Student went to the bathroom and opened all the faucets to avoid hearing the conversation. Parent shared her concern regarding Student's lack of friends, limited family relations, difficulties with ADLs and noted that while Student did not have a history of visual hallucinations, he infrequently, "when very stressed [he] hears a woman's voice stating only, 'I am here.'" (PE-8). Parent further shared concerns about what will happen to Student and who will care for him as he enters adulthood (PE-8).

45. DMH's Bressler Clinic psychiatric evaluation assessment notes Student's longstanding history of ASD including sensitivity to sounds/ odors/ foods, social pragmatic challenges, restricted interests, fixation, and difficulties with verbal expression as well as other learning challenges including a specific learning disability in reading and written expression. Since starting high school, Student struggled with OCD which has worsened and interferes with completion of ADLs.

Student also presents with ADHD, inattentive type and an unspecified depressive disorder. Dr. Smith recommended continued academic supports; Department of Developmental Services (DDS) supports after high school; consideration of residential LOC for OCD symptoms; and GAB Anergic-based treatments to address social-emotional, ASD and OCD symptoms (PE-8).

46. Student has taken numerous medications including psychotropic medications such as Prozac, Zoloft, Klonopin, Pistiq and Geodon. As of January of 2021, he was on Lexapro and Abilify (PE-8).
47. Student's Progress Reports for the period ending in February of 2021 note that Student was politely rejecting assistance with reading and writing skills. The IEP for which the Progress Reports was provided contains two distinct self-regulation goals: goal #2 and goal #5. Student's self-regulation goal #2 addressed his negative response to changes in his routine which caused him to become agitated, make threats, skip class or run around the building in an attempt to avoid others. The February report notes that Student was using self-calming coping strategies, was seeking staff support, and had become more flexible and accepting to change. On the weeks when he received in-person instruction, he had remained regulated in his mood and had not exhibited anger when his routine was disturbed. The second self-regulation goal, #5 addressed his personal therapeutic goals for counseling involving solution-focused interventions, cognitive behavioral therapy and solution-focused problem solving. The February 2021 report notes that Student was able to "sit feelings of angst" and that when overwhelmed his feelings were presenting as stress and at times, he was able to seek preferred staff for processing those feelings. During this period of time, Student had been able to get through the counseling sessions without needing to call Parent. He had not exhibited threatening behavior, and remained open to help despite not always accepting the advice. He was better able to adjust to changes in routine independently, refraining from shutting down and without displaying anxiety or significant outbursts. He used CBT strategies for problem solving in two out of three instances and he demonstrated significant progress in accessing CBT strategies. Overall, Student "demonstrated capacities that promote[d] age appropriate behaviors" (PE-7C; SE-5). Student's ability to complete work and do so in a timely manner improved with in-person learning (*Id.*).
48. The February 20, 2021 Progress Report with respect to the transition skills goals notes that in January Student had accepted assistance when working on his assignments independently. Further, he had been able to "register for the Mass Bay Community College Composition class, completed the college's Accuplacer exam and attend[ed] an accommodation meeting" (SE-5). The Progress Report for his communication goal notes that despite the highest level of support in his Mass Bay class, the class was very challenging for him. Tutoring was being offered through Mass Bay. The report further notes that Student could respond to explicit grade level questions, but he struggled with abstract ones requiring explanations and additional prompts to get to the answer. It was noted that he was able to advocate for himself to

familiar staff (SE-5). The report pertaining to his self-advocacy goal aimed at resolving conflicts with peers and addressing problematic peer relationships notes that Student had no confrontation with his peers during the review period (SE-5).

49. On March 16, 25 and April 1, 2021, Student participated in a neuropsychological evaluation with Rafael Castro, Ph.D., Clinical Neuropsychologist, and Lorraine Ruocco, PsyD. (PE-9; SE-12). Parent sought this evaluation out of concern that Student's symptomatology increased during the pandemic. Evaluation test results were similar to previous ones continuing to show weaknesses in emotional and social domains, executive functioning, and adaptive functioning skills showing exacerbation in some areas. Student's cognitive abilities were adequately developed across all areas and he demonstrated positive academic progress in numerous areas. The evaluators noted Student's historical emotional challenges which worsened during the pandemic with heightened levels of sadness, feelings of worthlessness and an increase in the frequency with which he heard voices, as a result of which the evaluators opined that Student's symptomatology was consistent with Major Depressive Disorder with Psychotic Features (PE-9; SE-12).
50. Dr. Castro recommended adjustment of Student's pharmacological regime and residential placement in a therapeutic program with qualified clinical professionals that could address his vulnerabilities and current presentation across domains, and support Student's vocational aspirations (PE-9; SE-12). Dr. Castro testified that his report became available approximately four weeks following the evaluation (Castro). Boston received Dr. Castro's report sometime in May of 2021 (Marcella).
51. Dr. Castro testified that he met Student in 2021 but that he was aware of Dr. Wineman's previous evaluation and diagnoses of Student as she was a former employee of the Integrated Center for Child Development (ICCD), Dr. Castro's practice. He opined that Student's experiences and lack of participation in his educational programming during the COVID-19 pandemic were responsible for the "accentuation" of Student's depressive nature and psychotic features, noting that if the depression subsided, Student's psychotic features would too. Dr. Castro was hopeful that with the right supports in place, Student was capable of improvement (Castro).
52. Ivy Street issued a Learning Plan for the period starting on April 20, 2021 through the end of that school year. This plan offered a choice of full-time in-person instruction or a flexible, integrated remote/ in-person learning schedule whereby students attended school in-person on alternate weeks and participated in remote learning on others. Related services, such as speech and language, group therapy, behavior and clinical consultation were offered consistent with the preferred instructional choice (SE-3).
53. In anticipation of Student's graduation, on or about May 16, 2021, DDS requested that Boston hold a transition meeting for Student (PE-10). Despite having no

obligation to convene per the Agreement, Boston convened a meeting inclusive of DMH, DDS and Ivy Street representatives, making it clear that the meeting was not a convening of Student's Team in the conventional sense and that it was solely intended to help with Student's transition to adult services (Marcella).

54. On June 1, 2021, the BSEA received Parent's Hearing Request in the instant matter. Boston received Parent's Hearing Request on May 31, 2021, the Memorial Day Holiday.⁴
55. Parent's/ Student's Hearing Request sought to have the Parties' Agreement set aside because of Student's regression due to lack of structure and difficulties associated with remote learning implemented by Ivy Street shortly after Student began his placement at that school. Relying on Dr. Castro's neuropsychological evaluation, Parent/Student specifically referred to the portion of the Agreement providing that in the event of a medical change, Boston was required to meet to discuss the change. Parent/ Student requested Student's participation in a comprehensive 24/7 residential program that offered Student supports and structure beyond the expiration of the Agreement.
56. On June 8, 2021, Parent/Student filed a Motion for Stay-put noting that they were "rejecting the Settlement Agreement that they signed just prior to COVID" and noting that said Agreement "end[ed Student's] eligibility to special education 14 months before Student's 22nd [birthday]".
57. On June 15, 2021, Boston issued Student his high school diploma (SE-2).
58. Following the filing of the instant Motion to Dismiss and Parent's/Student's Motion for Stay-Put Order, on September 3, 2021, Parent's/Student's advocate filed an Amendment⁵ to the Hearing Request asserting Boston's non-compliance with federal guidance and DESE's Technical Advisories on school responsibility for students on IEPs during the year and a half of the COVID-19 pandemic. Parent/ Student now sought funding for two years of therapeutic residential placement for Student in addition to attorney's fees and related costs. Furthermore, Parent/ Student stated their intent to recover damages pursuant to Section 504 of the Rehabilitation Act of 1973.⁶

CONCLUSIONS:

A. Legal Standard on Motions to Dismiss:

⁴ The date on Parent's/ Student's Hearing Request is May 28, 2021.

⁵ Parent's/ Student's Advocate called this document "addenda".

⁶ As explained in numerous BSEA Decisions and Rulings, the BSEA is not authorized to award damages.

Pursuant to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3) and Rule XVII A and B of the BSEA *Hearing Rules for Special Education Appeals*, a hearing officer may allow a motion to dismiss if the party requesting the hearing fails to state a claim upon which relief may be granted. As has been explained before, this rule is analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure and as such the same standards used by the courts are generally used by BSEA hearing officers in deciding motions to dismiss based on allegations of failure to state a claim.

Specifically, what is required to survive a motion to dismiss “are factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”⁷ In evaluating the complaint, the hearing officer must take as true “the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff’s favor.”⁸ These “[f]actual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . . .”⁹

In order to withstand a motion to dismiss, the hearing officer must be able to grant relief consistent with the federal and state statutes and regulations addressing special education, i.e., the IDEA, M.G.L. c. 71B, and Section 504 of the Rehabilitation Act of 1973.¹⁰ However, if the facts raised by the party opposing the motion to dismiss (herein Parent) raise even the plausibility of a viable claim giving rise to some form of relief under any of the aforementioned statutes, the case may not be dismissed. See, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).¹¹

B. Stay-Put:

Federal and Massachusetts special education laws provide that students are entitled to remain in their then-current educational program and placement during the pendency of any dispute unless the parents and the school district agree otherwise. 20 USC § 1415(j); 34 CFR 300.518(a); G.L. c. 71B §3; 603 CMR 28.08(7).¹²

The purpose of stay-put is to maintain a student’s educational placement during the pendency of an IDEA appeal, so as not to disrupt the student’s life unnecessarily. In this sense, “current educational placement” is equivalent to “the operative placement actually functioning at the time the dispute first arises.”¹³

⁷ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

⁸ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

⁹ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

¹⁰ See *Calderon-Ortiz v. Laboy-Alvarado*, 300 F.3d 60 (1st Cir. 2002); *Whitinsville Plaza Inc. v. Kotseas*, 378 Mass. 85, 89 (1979); *Norfolk County Agricultural School*, 45 IDELR 26 (2005).

¹¹ Denying dismissal if “accepting as true all well-pleaded factual averments and indulging all reasonable inference in the plaintiff’s favor . . . recovery can be justified under any applicable legal theory”.

¹² Exceptions to stay-put which relate to violations to the code of conduct are not applicable in this matter.

¹³ *L.Y. ex rel. J.Y. v. Bayonne Bd. of Educ.*, 384 Fed. Appx. 58, 61, 20110 WL 2340176, *2 (3rd Cir. 2010) (quoting *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625-26 (6th Cir) (1990).

In this sense, a student's placement is typically predicated upon the last agreed upon/ accepted IEP, the document which dictates the school district's responsibility toward a resident student. A stay-put determination requires careful examination of the particular facts and circumstances surrounding the program and placement to which the student is entitled during the pendency of the dispute and the particular circumstances of the case.¹⁴

Stay-put rights cannot be viewed in a vacuum, but rather the totality of the circumstances impacting a student's placement must be considered. The instant case is one such case as Student's right to stay-put must be viewed in the context of the January 2020 Agreement between the Parties, which expressly sets out the obligations of the Parties, thus impacting stay-put.

Discussion:

A. Dismissal:

In the instant matter Parent/ Student seek funding for two additional years of residential private placement for Student because Ivy Street allegedly breached the terms of the Agreement during the COVID-19 pandemic.¹⁵ While acknowledging the existence of the Agreement, Parent/ Student argue that Student's medical condition substantially changed during the pandemic, that Student has a new diagnosis, and that this situation warrants setting aside the Parties' Agreement. To support their allegations, Parent/ Student rely on a neuropsychological evaluation conducted by Dr. Castro. According to Parent/ Student, owing to COVID, Boston and Ivy Street failed to fulfill their contractual agreements as the educational services offered Student were minimal and Student was unable to access his education remotely. As such, Parent/ Student requested that the Agreement be declared null and void, and opposed Boston's Motion to Dismiss.

Boston seeks dismissal on the basis that in January of 2020, the Parties, then duly represented by counsel, voluntarily participated in a Settlement Conference at the BSEA that resulted in a fully executed Agreement, which agreement altered the positions of the Parties and Boston's responsibilities to Student. Moreover, after Boston (and Parent) had substantially performed their contractual obligations under the Agreement, Parent/ Student sought to have the Agreement set aside and/ or changed just a month short of its expiration, requesting significantly more services than those initially negotiated and agreed to in good faith by the Parties.

According to Boston, per the Agreement, once Student was accepted at Ivy Street, Boston's legal obligation was limited to funding said day placement through June of 2021 and

¹⁴ See *Hale v. Poplar Bluff R-1 School District*, 280 F.3d 831 (8th Cir. 2002) (requiring that the fact finder look at the specific facts of the case to examine the impact that educational changes may have on the student in the context of stay-put).

¹⁵ Parent/ Student further noted their intent to pursue damages for Student and Parent, attorney's fees, advocate's fees, and related costs.

providing Student with transportation. Boston disputes Parent's/ Student's allegation that Student presents with a new medical diagnosis that changes the nature of his disability or even that Student's symptoms exacerbated during the pandemic, adding that even if they had exacerbated, that would still fail to trigger any additional obligation on Boston's part under the Agreement.

I begin my analysis by looking at the Agreement entered into by the Parties.

The Agreement acknowledges that both Parties were represented by attorneys at the time the Agreement was negotiated, drafted, and executed. The Parties acknowledge entering into the negotiations of their own volition, knowing that the final result would be a legally binding contract that fully resolved their dispute. Having had the opportunity to discuss the terms of the Agreement with their representatives, the Parties acknowledge that they were entering the agreement freely, voluntarily and with full understanding of its terms (PE-2; SE-1, paragraph #11). At all times during the negotiations, the Parties had the option of not entering into an agreement; however, they affirmatively chose to resolve their dispute via an agreement.

Upon execution of the Agreement, Boston immediately sent out packets to potential private day schools including Ivy Street, Parent's preferred placement. Student was accepted at Ivy Street and he began attending Ivy Street in February of 2020. Boston fully funded Student's Ivy Street placement per the terms of the Agreement through June 30, 2021 and offered Student transportation during this time.

At the time the Parties entered into their Agreement neither Party (nor in fact anyone) could have foreseen the COVID-19 pandemic or its effects on schools (and hence Student), calling for unprecedented state-wide school closures and innovative ways to offer educational services to all students throughout the commonwealth. Nevertheless, the terms of the Agreement expressly accounted for unforeseen situations (PE-2; SE-1, paragraph #8). By the time the COVID pandemic unraveled, the Parties had already partially performed on their obligations per the Agreement: Boston had sent packets to private placements, identified Ivy Street, placed Student, began funding said private day placement and transporting Student there; and in consideration of said performance by Boston, Parent withdrew BSEA #2000681 with prejudice and agreed to waive any and all additional Team meetings, general education, special education, extended school year services, transitional educational services, evaluations and compensatory services. Parent/ Student agreed that Boston's funding of Ivy Street through June 2021, fulfilled Boston's entire obligation to provide Student a FAPE (PE-2; SE-1).

Pursuant to its agreed upon terms, the only way Parent/ Student could set aside the Agreement was to demonstrate that Student suffered an unforeseen medical change which caused a material and substantial change in the nature of his disability consistent with paragraph #8 of the Agreement. Exacerbation of a pre-existing or current condition was

expressly excluded as a qualifying event triggering the Parties' ability to set aside the Agreement.¹⁶

Thus, the inquiry in the instant matter turns on whether Student experienced an exacerbation of pre-existing symptomatology/ diagnoses, or whether he suffered an a) unforeseen, b) medical change that c) caused a material and substantial change in the nature of his disability.

The evidence is clear that at the time the Parties entered into their Agreement in January 2020, Student carried diagnoses of ASD, OCD, ADHD, Specific Learning Disability in reading and writing, and Unspecified Depressive Disorder. He had been psychiatrically hospitalized in 2017 for "suicidal ideation and attempt due to worsening depression", and he was reporting hearing a woman's voice telling him, "I am here" (PE-8). By January 2020, Student presented with social-emotional deficits and a history of actively running from persons or locations in school and in the community, making repetitive comments on whether or not he saw someone or heard their voice (auditory hallucinations, related to specific family members) and ritualistic behaviors such as repetitive washing of hands and face, making comments related to self-harm and/or a need to protect himself from harm or whether he was safe from harm, verbally refusing to leave his home or to transition to a different part of the community, and having difficulties performing ADLs regularly (SE-9; PE-9). These behaviors had been noted by Student's Team at Mary Lyon and an FBA had been conducted. Said FBA hypothesized that Student's ritualistic and avoidance behaviors were the result of heightened anxiety triggered by antecedents such as perceived harm. The FBA recommended implementation of a behavioral plan to address Student's active and passive avoidance behaviors (SE-9). By 2019, Student was already experiencing feelings of anxiety, worthlessness, frustration, stress, distrust of adults and significant dependence on Parent. He was seeing an outside private therapist and was being managed pharmacologically (PE-8).

Parent/ Student argued that Dr. Castro's Major Depressive Disorder with Psychotic Features diagnosis must thus be examined in light of Student's presentation *prior* to COVID at the time the Parties entered into their Agreement. Dr. Castro bases his diagnosis on "significant increases" in Student's pre-existing symptomatology, noting that "following the start of the Coronavirus pandemic [Student's] affective symptomatology [-] continued to worsen", that Student was experiencing "heightened levels of sadness and pronounced feelings of worthlessness" (PE-9; SE-12). Dr. Castro also states that Student's reports of hearing voices "appear to have increased in frequency". A new medical diagnosis or symptomatology that substantially changes the nature of Student's disability does not appear anywhere in Dr. Castro's report. Throughout the report he uses terms such as "increase", "worsen" and/ or "heighten" to describe Student's presentation forming the basis of his diagnosis. The aforementioned terms are all synonymous with "exacerbation". It is clear that while Student's symptoms, including his OCD, may have increased during the pandemic, not one

¹⁶ "...Exacerbation of current conditions shall not constitute a material change in the nature of Student's disability." (PE-2; SE-1, paragraph #8).

of the symptoms mentioned by Dr. Castro is a *new* medical condition, nor does he identify any of Student's symptoms as new in his report.

The Parties' Agreement specifies that to trigger the exception mentioned in Paragraph #8 of the Agreement, an *unforeseen medical condition* that causes a *material and substantial change in the nature of Student's disability*, must occur, not, as here, that an unforeseen event (herein the pandemic) that causes an exacerbation of pre-existing conditions and symptomatology occurs; the latter is expressly excluded from the Agreement. The evidence is convincing that despite the new label, everything Student may have experienced as a result of educational interruptions and instructional modifications due to COVID was part and parcel of his pre-existing disabilities, was not a material change in the nature of his disability, and while terribly unfortunate, was insufficient to trigger the exception specified in the Parties' Agreement.

In order to overcome a Motion to Dismiss, Parent/ Student had to prove some set of facts in support of their claim entitling them to the relief that the BSEA has authority to offer. Parent/Student presented no such set of facts. Even taking as true everything set forth in Dr. Castro's report, there is no set of facts that would entitle Parent/ Student to the relief sought by them, that is, funding for two additional years at a private residential placement. In light of this, the Parties' unambiguous agreement is controlling.¹⁷

At a hearing on the merits Parent/Student would carry the burden of persuasion consistent with *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005), requiring them to prove their case by a preponderance of the evidence. Parent/ Student have made it clear that they rely on Dr. Castro's evaluation and report to support their position. Dr. Castro's evaluation and report does not support Parent's/ Student's claim, but rather, supports a finding that Student experienced an exacerbation of pre-existing conditions which does not trigger additional responsibilities by Boston per the Agreement

Having heard evidence, inclusive of Dr. Castro's testimony, I am not persuaded that Parent has stated a claim for which relief may be granted against Boston. At this juncture, allowing Parent's/ Student's claim to proceed, "would undermine the integrity and efficacy of the settlement process". *In Re: Longmeadow Public Schools*, 14 MSER 249 (Crane, 2008). Doing so, would afford Parent/ Student rights beyond those originally agreed to by them. See *In Re: Lynn Public Schools*, BSEA #1500643 (2015). A settlement agreement

[w]ould be meaningless if [the party] could nonetheless turn around the next day and demand the foregone [terms] anew. We cannot accept [this] reading of the Agreement, as we find it difficult to

¹⁷ See *Alison H. v. Byard*, 163 F. 3d 2, 6 (1st Cir. 1998), noting that in Massachusetts contracts must be enforced according to its terms when those terms are unambiguous).

suppose the parties intended such a meaningless outcome of their negotiations.¹⁸

The clear intent of the Parties at the time the Agreement was signed in January of 2020 was for Boston to fund Student's private *day* placement and transportation through June 30, 2021, 14 months shy of Student's 22nd birthday, not to offer Student two additional years of residential placement. Moreover, Boston fully funded Student's placement for the term of the Agreement at the placement preferred by Parent/ Student. Additionally, the plain, unambiguous language in the Agreement expressly provided Parent's waiver of numerous rights, including additional educational, transitional or compensatory services beyond expiration of the agreement. The evidence is overwhelming that Boston upheld its obligations under the Agreement.

Parent's claim that Ivy Street broke the terms of the Agreement during COVID is unpersuasive as Ivy Street was never a party or signatory to the Agreement; only Parent and Boston were parties. It is, however, unclear whether Parent/ Student may have compensatory claims against Ivy Street, an entity that is not a Party to this proceeding and over which the BSEA may exert its jurisdictional authority in situations where the private special education school accepts public funding for placement of IDEA eligible Massachusetts students.¹⁹ The evidence shows that Ivy Street, a DESE approved private special education school in Massachusetts, accepted public funding for Student's placement, drafted an IEP, and presumably delivered services per its IEP. In doing so, it was subject to the state and federal mandates regarding provision/ delivery of special education in private schools, including

¹⁸ See *AccuSoft Corp. v. Palo*, 237 F.3d 31, 40 (1st Cir. 2001) (explaining that intent of the parties is one factor in interpreting a settlement agreement).

¹⁹ During the Hearing on the Motion Parent testified that Ivy Street had not been able to deliver some of Student's IEP services during the pandemic, including community-based experiences (a critical service pursuant to Student's IEP), until April of 2021 due to COVID related restrictions accessing the community and travelling in vans (Parent).

COVID related federal guidance,²⁰ and the requirements embodied in the DESE Advisory (Advisory) regarding provision of education in the times of COVID.²¹

Ivy Street's potential procedural and substantive responsibilities for providing Student a FAPE is not a question before me, and as previously stated, Ivy Street is not a Party to this proceeding. As such, I enter no determination regarding Ivy Street. Issue(s) regarding Ivy Street, if any, is a matter for another time and another proceeding should Parent desire to pursue it.²²

Lastly, regarding Parent's/ Student's claims for damages pursuant to Section 504 of the Rehabilitation Act of 1973, such grant falls outside the jurisdictional authority of the BSEA. Moreover, consistent with this Ruling and in light of the Agreement between the Parties, it is doubtful that Parent may have a claim against Boston in this regard as such claims are expressly waived at paragraph #1 of the Parties' Agreement (PE-2; SE-1).

For the reasons stated above, Boston's Motion to Dismiss Parent's Hearing Request with prejudice is **GRANTED**.

B. Stay-put:

In the instant matter Parent/ Student filed a Hearing Request solely against Boston shortly before expiration of Boston's responsibility toward Student under the Agreement.

²⁰ Acknowledging that "exceptional circumstances" could affect how specific services were provided during the COVID-19 shutdown, in its March 2020 *Questions and Answers on Providing Services to Children with Disabilities During a COVID-19 Outbreak* and its March 16, 2020 *Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students*, the U.S. Department of Education (Department) indicated that if a student does not receive services after an extended period of time, the student's IEP Team, or appropriate personnel under Section 504, must make an individualized determination whether and to what extent compensatory services are needed consistent with the respective applicable requirements, including to make up for any skills that may have been lost.

²¹ DESE's *Coronavirus (COVID-19) Special Education Technical Assistance Advisory 2021-1: COVID-19 Compensatory Services and Recovery Support for Students with IEPs*, charged school districts with developing plans for IEP Teams to assess the needs of students with IEPs for COVID-19 Compensatory Services (CCS). DESE instructed school districts and various educational entities, including leaders of approved special education schools (such as Ivy Street), to begin with the "high needs" populations, including but not limited to students with complex and significant needs; students who could not engage in remote learning due to their disability-related needs or technology barriers; students who primarily use aided and augmentative communication; students who are homeless; students in foster care or congregate care; students dually identified as English Learners; and students who turned 22 during the suspension of in-person education or who would turn 22 during the first three months of the 2020-21 school year, and whose transition programs were interrupted or suspended before they aged out. Arguably, Student would have qualified as a "high needs student" warranting the aforementioned consideration. CCS determinations for these prioritized students were to be completed no later than December 15, 2020.

²² Despite Parent's assertion that due to the complexities presented by Student adult service agencies, i.e., DMH, DDS and MRC (Massachusetts Rehabilitation Commission) are not able to appropriately provide services to Student, Parent/ Student are encouraged to actively work with them in preparation for provision of adult services to which Student may be entitled beyond the age of special education entitlement.

Parent/ Student then filed a Motion for Stay-Put arguing that since they were rejecting the Agreement, Boston should continue to fund Student's placement at Ivy Street during the pendency of the instant dispute.

Boston opposed Parent's/ Student's Motion, noting that the Agreement between the Parties expressly provided that services to Student would cease upon the conclusion of the Agreement, that is, June 30, 2021.

Per the unambiguous terms of the Agreement, by operation of law, Student's stay-put rights to Ivy Street, and all of Boston's educational responsibility to Student, ended on June 30, 2021.

As such, Parent's Motion for Stay-put is **DENIED**.

ORDER:

1. Parent's Hearing Request is **DISMISSED with Prejudice**.
2. Parent's Motion for Stay-Put is **DENIED**.

So Ordered by the Hearing Officer,

Rosa I. Figueroa
Rosa I. Figueroa

Dated: November 4, 2021

**.COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS**

EFFECT OF FINAL BSEA ACTIONS AND RIGHTS OF APPEAL

Effect of BSEA Decision, Dismissal with Prejudice and Allowance of Motion for Summary Judgment

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. Similarly, a Ruling Dismissing a Matter with Prejudice and a Ruling Allowing a Motion for Summary Judgment are final agency actions. If a ruling orders Dismissal with Prejudice of some, but not all claims in the hearing request, or if a ruling orders Summary Judgment with respect to some but not all claims, the ruling of Dismissal with Prejudice or Summary Judgment is final with respect to those claims only.

Accordingly, the Bureau cannot permit motions to reconsider or to re-open either a Bureau decision or the Rulings set forth above once they have issued. They are final subject only to judicial (court) 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. This means that the decision must be implemented immediately even if the other party files an appeal in court, and implementation cannot be delayed while the appeal is being decided. Rather, a party seeking to stay—that is, delay implementation of-- the decision of the Bureau must request and 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,” while a judicial appeal of the Bureau decision is pending, 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 while judicial proceedings are pending must ask the court having jurisdiction over the appeal to grant a preliminary injunction ordering such a change in placement. *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 Elementary and Secondary Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

Rights of Appeal

Any party aggrieved by a final agency action by the Bureau of Special Education Appeals may file a complaint for review in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts. 20 U.S.C. s. 1415(i)(2).

An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

Confidentiality

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove School District v. Pulitzer Publishing Company*, 898 F.2d 1371 (8th. Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

Record of the Hearing

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to federal law, upon receipt of a written request from any party, the Bureau of Special Education Appeals will arrange for and provide a certified written transcription of the entire proceedings by a certified court reporter, free of charge.