COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Student v. Scituate Public Schools **BSEA No. 2212421**

DECISION

INTRODUCTION AND PROCEDURAL HISTORY

This decision is issued pursuant to the Individuals with Disabilities Education Act or IDEA (20 USC Sec. 1400 et seq.); Section 504 of the Rehabilitation Act of 1973 (29 USC Sec. 794); the Massachusetts special education statute or "Chapter 766" (MGL c. 71B), the Massachusetts Administrative Procedures Act (MGL c. 30A) and the regulations promulgated under these statutes.

Student is a sixteen-year-old high school junior enrolled in the Scituate Public Schools (Scituate, District, or School). She has never been evaluated for or received special education services, and was recently found ineligible for a Section 504 accommodation plan. Student's parents (Parents) are divorced, with joint legal custody and shared educational decision-making authority with respect to Student. At all relevant times, Father has had temporary primary physical custody of Student.

Mother believes Student has one or more disabilities and should receive special education services under an IEP. Father disagrees with both assertions. In February 2022, Mother requested that Scituate conduct an initial special education evaluation of Student and provided written consent for such evaluation. Father refused to consent, contending that an evaluation was unnecessary and would be potentially detrimental to Student. Based on Father's refusal of consent, and its own observation of Student's academic and social/emotional functioning, Scituate declined to conduct the special education evaluation. Mother filed the instant appeal to contest Scituate's refusal to evaluate Student.

The primary issue in this case is whether Scituate was obligated to conduct an initial special education evaluation of Student given Mother's written consent and state regulations requiring school districts to conduct an initial evaluation whenever one parent consents to same, or whether the District could properly decline to evaluate Student based on the totality of circumstances, including Father's refusal to consent, Student's reported refusal to be evaluated, and the Team's assessment that Student does not appear to have a disability and functions well in school. A secondary issue is whether Scituate systemically failed to identify children in need of special education in a manner that had an adverse impact on Student.

On June 23, 2022, Mother filed a hearing request with the BSEA in which she alleged that in March 2022, Scituate refused to evaluate Student for special education eligibility. Mother's hearing request contained numerous other allegations relating to Scituate's alleged failure to adequately respond to a 2015 incident involving Student, as

well as "serious civil and human rights violations," including fraudulent police and 51A reports, inappropriate intervention in a custody matter between the Parents, misappropriation of funds and "cover-ups" of alleged wrongdoings by two named universities. Upon receipt of the hearing request, the BSEA scheduled a hearing date of July 28, 2022.

On July 18, 2022, Scituate filed a *Motion to Dismiss* all of Mother's claims other than those related to Scituate's refusal to evaluate Student, based on failure to state a claim upon which relief could be granted and lack of jurisdiction, as well as because some claims were barred by the statute of limitations. In a *Ruling* dated July 25, 2022, the undersigned hearing officer dismissed all of Mother's claims, with prejudice, with the exception of the following: (1) that Scituate's March 2022 refusal to conduct a special education evaluation of Student violated her rights under federal and Massachusetts special education law and (2) that Scituate refused to "identify students for special education" in a manner adversely affecting Student in particular.

The hearing in this matter took place on July 28, August 10, and August 11, 2022. The hearing was conducted remotely on a Zoom platform before certified court reporters. Mother participated telephonically. Mother proceeded *pro se* and Scituate was represented by counsel. Both parties had an opportunity to examine and cross-examine witnesses as well as to submit documentary evidence for consideration by the Hearing Officer. On August 11, 2022, the School requested and was granted a postponement until August 29, 2022 to file written closing arguments. The BSEA received arguments from both parties and closed the record on that day. The record in this case consists of Mother's Exhibits P-1 through P-5, School's Exhibits S-1 through S-15, as well as stenographically-recorded witness testimony. Those present for all or part of the proceeding were:

Mother	
Father	
Michele Boebert	Director of Special Education, Scituate Public Schools
Ryan Beattie	Middle School Principal, Scituate Public Schools
Rosalind Kimani	Counselor, Scituate High School
Lisa Maguire	Principal, Scituate High School
Marianne Peters	Attorney for Scituate Public Schools
Paige Tobin	Attorney for Scituate Public Schools
Michelle Coste	Court Reporter
Carol Kusinitz	Court Reporter
Sara Berman	BSEA Hearing Officer

ISSUES PRESENTED

The issues for hearing were the following:

1. Whether the March 2022 refusal of the Scituate Public Schools to conduct a special education evaluation of Student deprived Student of a free, appropriate public education (FAPE).

2. Whether the Scituate Public Schools has failed to identify children for special education in a manner that deprived Student of a FAPE.

POSITION OF MOTHER

Mother and Father have joint legal custody of Student. Parents' divorce decree makes clear that educational decision-making authority is shared equally by both Parents. As such, when Mother consented to Scituate's proposed initial special education evaluation of Student, Scituate was required to evaluate Student, pursuant to relevant state regulations. Scituate's refusal to do so based on Father's opposition violated these regulations and deprived Student of a free, appropriate public education.

POSITION OF SCHOOL

Student is a very bright, high performing teenager who earns excellent grades in a rigorous general education program. Neither her teachers nor her guidance counselor at Scituate High School have observed any indications that Student has a disability affecting either her academic performance or her social/emotional functioning. Student has stated that she is unwilling to be evaluated because she feels it would be disruptive and unnecessary. Father, who has primary physical custody of Student, supports Student's position, and believes an evaluation would be both unnecessary and contrary to Student's best interests. Scituate conducted a Section 504 evaluation that determined that Student does not have a disability. Lastly, DESE conducted an investigation pursuant to a PRS complaint filed by Mother, and determined that Scituate had acted properly in declining to evaluate Student. Scituate fulfilled its "child find" obligations when it accepted Parent's consent to evaluate Student but acted appropriately under the circumstances when it declined to conduct the evaluation.

SUMMARY OF THE EVIDENCE

1. Student is a sixteen-year-old girl attending her junior year at Scituate High School. Student lives with Father in Scituate. Student's Mother also lives in Scituate. As such, the Scituate Public Schools are responsible for Student's education, including providing her with FAPE if she is referred for, or found eligible for, special education.

2. Student's Parents have been divorced since 2011. The Agreement attached to the original divorce decree stipulates that the "Husband and Wife shall have joint legal custody of the children." (S-15). As to educational decisions, the Agreement states that [t]he parties shall mutually agree on significant issues concerning the welfare of the children, including but not limited to their medical care, mental health, and dental treatment; educational choices and alternatives, and social and religious and recreational activities. The parties agree that in all such matters, the interests and desires of the children shall be determined and given

primary consideration." (S-15) Mother, Father and Scituate all interpret the Agreement to grant equal educational decision-making authority to Mother and Father. (Mother, Father, Boebert).

3. On July 9, 2021, pursuant to a Complaint for Modification filed in April 2021, the Probate and Family Court for Norfolk County issued Further Temporary Orders which provided, in pertinent part, "Father shall continue to have Temporary Primary Physical Custody of the Minor Child, [Student],…all provisions of the prior Judgment not modified herein remain in full force." (S-12).

4. While the July 2021 Order stated that Father would "continue to have temporary primary physical custody," of Student, the Order made no additions or other changes to the original Agreement regarding legal custody or educational decision-making authority. I credit the testimony of both Parents that there exist no other court orders, agreements, or other documents that change the joint legal custody and shared educational decision-making authority set forth in the original Agreement. (S-1(A), S-15, Mother, Father).

5. Student lives exclusively with Father, who makes day-to-day parenting decisions for Student, keeps track of her educational progress, communicates with teachers and School administrators when necessary, and is familiar with her functioning both in and outside of school. (Father) Student has twice-monthly parenting time with Mother and speaks with her daily by telephone. Mother also has contact with Student's teachers. (Mother, Boebert).

6. Student has been enrolled in the Scituate Public Schools since Kindergarten. Persons who know and work with Student describe her as a bright, hard-working, high-achieving student who performs well in a demanding and rigorous high school program. Student is somewhat quiet and shy, but has friends, interacts appropriately with peers and adults, and has shown no indications of social/emotional difficulties affecting her educational progress. (Kimani, Boebert, Beattie, Maguire, Father).

   During Student's ninth grade year (2020-2021), Student's academic courses consisted of English I, Geometry, Spanish 2, World History, and Biology 9, all at the "Honors" level, in addition to Symphonic Band, Guitar Workshop, Physical Education and Health. Her grades were A's, B's and C's. (S-2).

   The following year (tenth grade, 2121-2022), Student was enrolled in five academic courses: English 2, Algebra 2, Spanish 3, U.S. History I, and Chemistry, each at the "Honors" level. Student's final grades were A's in English, Algebra and Spanish and B+ in History and Chemistry. Student also earned A's in her

music, physical education, and health classes. All teachers commented that Student was a "pleasure to have in class." Additional comments included "quiet but engaged in class," "pleased with progress," and "enthusiastic/frequent participation." As of the hearing dates, Student had passed all MCAS examinations. (S-1, 2, 3).

Scituate has never diagnosed or identified Student as having a disability. Scituate has never conducted a special education evaluation of Student and has never found her eligible for either an Individualized Education Program (IEP) or Section 504 Plan. The record contains no other evidence (such as reports from private evaluators) that Student has a disability. Student did receive some support from a reading specialist in early elementary school; however, these reading interventions were considered general education supports, and not special education services.

7. Mother testified that Student has a disability in the area of reading but has not provided any evaluations or other documentation to support this assertion. (Mother, Boebert). She bases her belief that Student has a disability on several events or situations.

   First, when Student was in early elementary school, she received support from a District reading specialist. Parent assumed that because Student received this support, she must have a disability affecting reading and must have had an IEP; however, as stated above, Student's reading support was part of the general education program. (Mother, Boebert).

   At various times in elementary and/or middle school, Student has been lonely, and has needed help with math. Additionally, Student either did or does read slowly. (Mother).

   Further, in February 2020, when Student was in eighth grade, she participated in a group art project that involved sewing dog toys for an animal shelter. Parent felt that Student's sewing skills were not as good as those of her peers, that she was socially isolated from the other children in the group, and that this reflected a disability, to which Scituate should have responded. (Mother, P-3).

Mother testified that Student has a disability in the area of reading but has not provided any evaluations or other documentation to support this assertion. (Mother, Boebert).

At the beginning of Student's sophomore year (2021-2022), Student was enrolled in 5 academic courses comprising four "Honors" level classes as well as Advanced Placement ("AP") Chemistry. Students who take AP Chemistry may earn college credit for the course. Early in the first quarter, Student began struggling

in the AP Chemistry class, finding that the amount of material covered and the rapid pace of instruction were overwhelming. She earned poor grades in the AP Chemistry class and the amount of time she spent trying to keep up in that course affected her grades in her other courses. After consulting with the Chemistry teacher, science department head, and guidance counselor, Student decided to drop one level to Honors Chemistry in or about November 2021. Student's performance immediately improved, and she earned grades of A and B in all academic subjects for the remainder of the 2021-2022 school year. (Kimani, Father, Maguire).

Lastly, in or about January or February 2022, Mother became aware of a survey from the Scituate Parents' Advisory Council asking parents of students with disabilities to give feedback on their satisfaction with services their children were receiving. Parent reasoned that she would not have learned about the survey unless Scituate had identified Student as having a disability. (Mother).

8. Father supported Student's decision to substitute Honors Chemistry for AP Chemistry. (Father) Mother disagreed and testified that she believes Student's struggles in the AP class were caused by a learning disability, and that rather than being allowed or encouraged to drop the course, Student should have been offered accommodations, or allowed to take two Chemistry classes, AP Chemistry with accommodations and Honors Chemistry. Mother also testified that she believes that the rapid rise in Student's grades after she changed course levels was not genuine; rather, she believes that the District inflated her grades so that it could avoid providing special education supports or accommodations in the AP class. (Mother). Parent provided no witness testimony or documents such as evaluations to support her assertions about Student's performance in AP Chemistry or subsequent improvement in grades.

   Student's guidance counselor and principal disagree with Mother's assessment and attribute the rise in grades to Student's having more time and energy available to focus on all subjects once she no longer was under the pressure of the AP Chemistry class. (Kimani, Maguire). Further, the principal testified that AP Chemistry is usually taken by juniors and seniors, not freshmen and sophomores, and that it would not be unusual for a tenth grader to transfer from AP to Honors Chemistry. (Maguire). I credit the testimony of the guidance counselor and principal over Mother's uncorroborated testimony on this issue because the former have first-hand knowledge of the level of difficulty presented by the AP course, of Student's functioning in school, and of other students making similar course level changes.

9. In or about early February 2022, Mother told Scituate's Director of Special Education, Michele Bobert, that she wanted Student to receive services pursuant to an IEP. On February 15, 2022, after learning from Dr. Boebert that Student

would first need to be evaluated, Mother requested an evaluation. (Boebert, S-5).

10. On February 28, 2022, the District sent an N-1 form to both Parents proposing an initial evaluation for Student to answer the question "[d]oes [Student] have a specific learning disability in reading?" (S-6). The proposed assessments were cognitive testing by the school psychologist, achievement testing in reading, specific learning disability observations by a special education teacher, and educational assessments by classroom teachers. (S-6). On or about March 8, 2022, Mother consented, in writing, to the proposed evaluation. (S-7). The previous day, March 7, 2022, Father refused consent to the evaluation. (S-8). In a subsequent email to the Team chair, dated March 14, 2022, Father stated, in pertinent part, that, evaluation "is not in [Student's] best interests," "[Student] has told me that she will refuse to voluntarily participate in such an evaluation," "as demonstrated by her latest report card, [Student] is excelling in her schoolwork…[and] nearly holds a straight-A average in honors level courses. It should be obvious to any reasonable person that she does not require such help." (S-8).

11. Father testified that Student told him that she did not wish to be evaluated because she was having no problems in school and did not need additional help. Father suggested to Student that she "just go through the motions" with the process, but Student was adamant that she did not wish to do so, and Father supported her position. Student also told her guidance counselor, Rosalind Kimani, that she did not wish to be evaluated. After consulting with Student's teachers, Ms. Kimani agreed that Student was making effective progress in her general education classes, did not present with a suspected disability, and did not need to be evaluated for special education. (Father, Kimani).

12. On March 22, 2022, Scituate issued an N-2 form entitled "Refusal of School District to Act," which stated the following:

    1. The district refuses to conduct an evaluation to determine eligibility for special education on behalf of [Student] which was requested by [Student's]
    Mother...
    2. The district refuses to complete the evaluation because [Student's] father, who has physical custody, has rejected the consent for evaluation. He stated that his daughter will refuse to participate in testing. There are concerns of emotional harm in undergoing the testing.
    3. The district rejects the completion of the evaluation because the custodial parent rejects it and it is not in the best interest of the child.

4. The refusal to act is based on custodial parent request and the best interests of the child.
5. Other factors include the student's effective progress in the general education curriculum, and that there are no concerns of a disability on the part of the teachers nor the custodial parent.
6. The next step is for you to review the Parents' Procedural safeguards and take advantage of any dispute mechanism that you feel is appropriate, if you disagree with the district's decision. (S-10).

13. The Special Education Director, Dr. Michele Boebert, testified that given all of the circumstances, including Father's refusal of consent and Student's unwillingness to be evaluated, such evaluation would be contrary to Student's best interests. (Boebert).

14. On April 1, 2022, after receiving the N-2 form referenced above, Mother filed a complaint with the Problem Resolution System (PRS) of the Department of Elementary and Secondary Education (DESE), in which she objected to Scituate's refusal to evaluate Student. (S-13B). The District filed its response ("Local Report") on May 10, 2022. (S-13A).

    On June 28, 2022, PRS issued a Letter of Finding in which it determined that Scituate had complied with the applicable regulation, 603 CMR 28.04 by issuing appropriate notices and consent forms to both Parents upon receipt of Mother's request for evaluation. The Letter of Finding also stated the following:

> The Department notes that the District did not provide any information that asserts that the non-custodial parent lacks education decision making rights. In such circumstances, where one parent refuses consent and the other provides consent and both retain educational decision-making rights, the District should proceed to the Bureau of Special Education Appeals (BSEA) to resolve the dispute. (S-13B).

15. Meanwhile, on May 16, 2022, Scituate conducted a meeting to determine if Student might be eligible for a Section 504 Plan. Mother attended this meeting, as did Ms. Kimani, a second counselor, and three of Student's general education teachers. The 504 Team reviewed reports from Student's five general education teachers, all of whom stated that, academically, Student was progressing as well as or, in some cases, better than, her classmates, and showed no signs of problems with attention, memory, communication, or interpersonal skills. Student was able to complete assignments and tests without extended time. (S-11).

16. On May 19, 2022, Scituate issued a determination that Student was not eligible for a Section 504 Accommodation Plan. As such Student completed the 2021-2022 school year and would begin the 2022-2023 school year as a general education student without either an IEP or a Section 504 Plan. (S-11).

LEGAL FRAMEWORK

Relevant Components of FAPE

Pursuant to the IDEA, 20 USC Section 1400, *et seq*., and the Massachusetts special education statute, M.G.L. c. 71B ("Chapter 766"), school-aged children with disabilities who have been determined eligible as defined by those provisions, are entitled to a free appropriate public education (FAPE), which "comprises 'special education and related services'--both 'instruction' tailored to meet a child's 'unique needs' and sufficient 'supportive services' to permit the child to benefit from that instruction."[1] An eligible child's IEP, which is "the primary vehicle for delivery of FAPE, must be "reasonably calculated to enable [the child] to make progress appropriate in light of [the child's] circumstances."[2]

Under the pertinent statutes, FAPE entails not only the substantive component outlined above, but procedural protections designed to support the parent-school collaboration envisioned by federal and state special education statutes. Parental participation in the planning, developing, delivery, and monitoring of special education services is embedded throughout the IDEA, MGL c. 71B, and corresponding regulations.

Courts have consistently emphasized the centrality of parental participation to the IDEA scheme. In *Bd.of Education of the Hendrick Hudson Central School District v. Rowley*, 458 US 176, 201 (1982) the Supreme Court stated "…Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process…as it did upon the measurement of the resulting IEP against a substantive standard." See also: *In Re Framingham Public Schools and Quin,* 22 MSER 137 at 142 (Reichbach, 2016), and cases cited therein.

Child Find

As a condition of receiving federal funding, the IDEA 20 USC §1412(a)(3)(A) imposes a "child find" mandate on participating states such as Massachusetts. This mandate requires states and school districts to ensure that:

> All children with disabilities residing in the state, including children who are homeless children or who are wards of the State and children with disabilities attending private schools, regardless of the

[1] *C.D. v. Natick Public School District, et al*., No. 18-1794, at 4 (1st Cir. 2019), quoting *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 748-749 (2017); and 20 USC§1401 (9), (26), (29).

[2] *C.D. v. Natick*, 18-1794 at 4, quoting *Endrew F. v. Douglas County School District RE-1,* 137 S. Ct. 988, 1001 (2017).

> severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

The corresponding Federal regulation, 34 CFR §300.111(a), requires all states "to have in effect policies and procedures to ensure that (i) all children with disabilities residing in the State…who are in need of special education and related services, are identified, located, and evaluated." The Massachusetts special education statute, MGL c. 71B, §3, similarly provides that:

> …the school committee of every city, town, or school district shall identify the school age children residing therein who have a disability… diagnose and evaluate the needs of such children propose a special education program to meet those needs [and] provide or arrange for the provision of such special education program…. Until proven otherwise, every child shall be presumed to be appropriately assigned to a regular education program and presumed not to be a school age child with a disability or a school age child requiring special education.

Examples of "child find" activities include public information campaigns by school districts in partnership with parent organizations, outreach to programs serving children such as preschools and Early Intervention providers, social service agencies, and private schools.[3]

Referral and Evaluation

No child may be provided with special education services or placement unless an IEP Team determines that the child is eligible for special education.[4] The Team must determine, after reviewing evaluations, that the child (a) has a disability listed in the pertinent regulation, 603 CMR 28.02(7) and, (b) as a result of the disability, requires specialized instruction to progress effectively in the general education program, or requires a related service to access the general education curriculum.[5] "Progress effectively in the general education program" is defined by Massachusetts regulations as "make documented growth in the acquisition of knowledge and skills including social/emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the student, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district."[6]

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[3] See, for example, *Child Find Fact Sheet*, issued by the Masssachusetts Department of Elementary and Secondary Education (DESE) on November 15, 2022; *Return to School Roadmap; Child Find Under Part B of the Individuals With Disabilities Education Act (IDEA*); U.S. Department of Education Office of Special Education and Rehabilitative Services (OSERS) (August 2021).
[4] MGL c. 71B, §3, 20 USC §1414(a)(1).
[5] 603 CMR 28.02(9).
[6] 603 CMR 28.02(17).

The eligibility process begins with a referral, that is, a request to school personnel to have a child evaluated, made by a parent "or any person in a caregiving or professional position concerned with the student's development."[7] Within five school days of the referral, the school is required to send a notice to parent(s) "that shall seek the consent of a parent for the evaluation to occur, and provide the parents with the opportunity to express any concerns or provide information on the student's skills or abilities."[8] (Emphasis supplied).

School districts must evaluate children whenever a parent with educational decision-making authority consents to an initial evaluation: "Upon consent of a parent, the school district shall provide or arrange for the evaluation of the student by a multidisciplinary school team within 30 school days." [9] (Emphasis supplied). Within 45 school working days after receipt of consent from a parent, the school is required to complete the evaluations, convene a Team meeting, determine eligibility and, if the Team finds the child eligible for special education, develop an IEP for the child.[10]

The regulatory language referenced above is mandatory.[11] Upon receipt of consent of a parent, a school district must conduct an evaluation within 30 school days. It is well settled that a school district does not have discretion to refuse to evaluate a child, or to delay such evaluation beyond the 30-school day timeline if a parent has provided consent. The BSEA addressed this issue in *In Re: Boston Public Schools, Ruling on Parent's Motion for Partial Summary Judgment,* BSEA No. 01-2461 (Crane, 2001). In that case, the hearing officer ruled that under Massachusetts law, the right to an evaluation is "unequivocal," and that the Boston Public Schools violated state law when it refused to evaluate a student until it had completed "pre-referral" activities, stating "I conclude that under state special education law, BPS had no choice but to evaluate [two students]…referred to BPS by their Parents or Guardian *Ad Litem*, assuming the Parents consent to the evaluation." *Id.*

Hearing Officer Crane reached his conclusion after explaining that while the federal statutory and regulatory language appears to allow discretion to a school district to deny an initial evaluation as long as it provides the parent with adequate notice and an opportunity to contest the denial at a due process hearing, the Massachusetts statute and regulations do not grant districts such discretion, notwithstanding then-existing DESE guidance to the contrary. Since the state law provides greater protection for students and parents than the "floor" established by federal law, the state provisions must be "incorporated into and is enforced as part of a federal right" in Massachusetts. *Id*., citing *David D. v. Dartmouth School Committee,* 775 F. 2d 411, 416-423 (1st Cir., 1985), *cert. den*., 475 US 1140 (1986); *Town of Burlington v. Department of Education*, 736 F.2d 773, 792 (1st Cir. 1984).

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[7] MGL c. 71B, §3; 603 CMR 28.04(1).
[8] 603 CMR 28.04(1)(b).
[9] 603 CMR 28.04(2).
[10] 603 CMR 28,05(1).
[11] Conversely, a school district may not seek relief before the BSEA against a parent who refuses consent to an initial evaluation. 603 CMR 28.

Parental Consent

Parental consent is one of the cornerstones of the special education scheme created by federal and state law. and is a pre-requisite for evaluation, provision of services, placement, and change in services or placement. As stated by BSEA Hearing Officer Lindsay Byrne in *In Re: Tyler v. Berkshire Hills Regional School District, Corrected Ruling on School's Motion to Proceed* , BSEA No. 2008730 (Byrne, 2020):[12]

> School districts are required to obtain a parent's informed consent, in writing, for any evaluation, any placement outside a general education classroom, and even any significant variance in the timelines and procedures set out in the federal and state regulations governing special education. Consent obtained for one component of the comprehensive special education process does not equal, or imply, consent for any other component. Consent, once given, may be revoked at any time. 20 USC §1414(a)(1)(D); 34 CFR 300.300(a)(ii); 34 CFR 300.300.9, 603 CMR 28.02(4); 603 CMR 28.07(1)(a)(2).

More specifically, the IDEA states the following with respect to consent for initial evaluations to determine eligibility for special education:

> The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability as defined in section 1401 of this title shall obtain informed consent from the parent of such child before conducting the evaluation. Parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services.[13]

The corresponding federal regulation tracks the statutory language, stating that "the public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability…must, after providing notice…obtain informed consent, consistent with §300.9, from the parent of the child before conducting the evaluation." [14] "Informed consent" is defined as follows at 34 CFR §300.9(a)-(c):

> *Consent* means that-
> (a) The Parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or through another mode of communication;
> (b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom;
> (c)

[12] *See also In Re: Student v. Brockton Public Schools*, BSEA No. 12-4761 (Figueroa, 2015).
[13] 20 USC §1414(a)(D)(i)(I).
[14] 34 CFR §300.300(a)(1)(i)

(1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time;
(2) If a parent revokes consent that revocation is not retroactive (*i.e.*, it does not negate an action that has occurred after the consent was given and before the consent was revoked).
(3) If the parent revokes consent in writing for the child's receipt of special educational services…the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education…

The applicable Massachusetts statute and regulations similarly require informed consent of a parent prior to conducting an evaluation of a child as well prior to implementing, changing or removing services set forth in an IEP or changing an eligible child's placement.[15] The state regulations define consent as "agreement by a parent who has been fully informed of all information relevant to the activity for which consent is sought…understands and agrees in writing to the carrying out of the activity, and understands that the granting of consent is voluntary and may be revoked at any time…" [16]

Notably, the language in the above-cited statutes and regulations uses the singular form of "parent" with respect to consent for an evaluation, indicating that the consent of *only* one parent is required. This is in contrast to some other provisions in the state regulations, which use the plural form, "parents", when discussing activities such as providing parents with copies of evaluation reports prior to an IEP meeting or sending parents two copies of the proposed IEP. The BSEA has long interpreted the regulations to mean that if one parent with educational decision-making authority consents to an evaluation, then, absent a court order or other mandate to the contrary (such as an order giving the non-consenting parent sole educational decision-making authority), a district must implement the evaluation to which the parent has consented.

Burden of Proof

In a due process proceeding to determine whether a school district has offered or provided FAPE to an eligible child or complied with the procedural requirements of the IDEA and state special education law, the burden of proof is on the party seeking to challenge the *status quo*. In the instant case, as the moving party challenging the Scituate Public Schools' refusal to evaluate Student, as well alleging that Scituate has failed to identify students with disabilities to the detriment of Student, Mother bears this burden. That is, in order to prevail on her claims, Mother must prove, by a preponderance of the evidence, that Scituate's refusal to evaluate Student deprived her of a free, appropriate public education (FAPE), and, further, that Scituate failed to identify children with disabilities in a manner that deprived Student of FAPE. *Schaffer v. Weast*, 546 U.S. 49 (2005)

DISCUSSION AND ANALYSIS

[15] MGL c. 71B, §3, 603 CMR 28.04(1)., 603 CMR 28.07.
[16] 603 CMR 28.01(d).

After careful consideration of the record in this case and the arguments of the parties, analyzed in light of the applicable law summarized above, I conclude that as to issue No. 1, the Scituate Public Schools erred when it refused to provide a special education evaluation to Student. With respect to Issue No. 2, I conclude that Mother did not meet her burden of proving that Scituate failed to identify students for special education in a manner that deprived Student of a FAPE. My reasoning follows.

Issue No. 1, Whether the March 2022 refusal of the Scituate Public Schools to conduct a special education evaluation of Student deprived Student of a free, appropriate public education (FAPE).

As stated above, it is well-settled that the language of 603 CMR 28.04(b) unequivocally requires school districts to conduct initial evaluations within 30 days of receipt of consent of a parent. While federal law may allow school districts some discretion to delay or to refuse to conduct an evaluation, Massachusetts law allows no such latitude. *In Re: Boston Public Schools, supra.* Further, it is clear that if a regulation requires a school district to take an action such as an evaluation upon consent of a parent, then it must do so.

In the instant case, Mother, who holds shared legal custody and educational decision-making authority with Father, consented in writing to an initial special education evaluation of Student. Upon receipt of such consent, Scituate had no choice under 603 CMR 28.04(b) but to conduct the evaluation, regardless of Father's refusal of consent and its own assessment based on observation that Student does not have a qualifying disability.[17] In fact, such refusal in this situation is tantamount to the District's bypassing the Team process to find Student ineligible, contrary to statutory and regulatory provisions outlined above. *See also In Re Boston Public Schools, supra.* [18]

By its refusal to evaluate Student as summarized above, Scituate committed a violation of procedural rights guaranteed under the IDEA and MGL c. 71B, and must immediately arrange to offer an evaluation as set forth in the N-1 form issued on February 28, 2022. The record establishes that Student, who is 16 years old, does not wish to be evaluated, and this Decision in no way suggests that she be forced to do so. However, the District must comply with the applicable regulations by *offering* to Student the evaluation originally proposed in the N-1 form issued on February 28, 2022, conducting the evaluation if Student is willing, documenting actions taken to make the evaluation available, regardless of Student's willingness to participate, and conducting the evaluation if Student is willing to participate. If the District does so, it will have

[17] The PRS Letter of Finding of June 28, 2022 appears to misread or misinterpret the unequivocal mandate of 603 CMR 28.04(2). If Father disagrees with Mother's request for evaluation, the appropriate forum to resolve such disagreement is the Probate and Family Court, not the BSEA.

[18] In its closing brief, Scituate argues that the instant case is "parallel" to a prior BSEA decision, *In Re*: *Wallis v. Lincoln-Sudbury RSD*, BSEA No. 1502427 (Byrne, 2016). In that case, the hearing officer found that the school district had not violated federal or state law when it did not evaluate or provide an IEP or 504 plan to a high-achieving general education student whose performance did not diminish after a concussion. *Lincoln-Sudbury* is distinguishable because, unlike the instant case, the parents in *Lincoln-Sudbury* neither formally requested, nor consented to, an evaluation for special education.

fulfilled its obligation to evaluate under the IDEA and MGL c. 71B, regardless of whether the evaluation ultimately comes to fruition.

Issue No. 2: Whether the Scituate Public Schools has failed to identify children for special education in a manner that deprived Student of a FAPE.

Mother's allegation that Scituate failed to identify children in need of special education, and that such failure deprived Student of a FAPE, constitutes a claim that Scituate failed to fulfill its "child find" obligations outlined above. Mother's allegation is not supported by the record. Mother presented no credible evidence suggesting that Student had or has a disability that should have been affirmatively recognized and acted upon by the District prior to Mother's request for an evaluation. As soon as Mother informed Dr. Boebert that she sought special education for Student, the latter advised her that an evaluation would be necessary and provided both Parents with the necessary consent forms. Mother has not met her burden of proof and does not prevail on this claim.

CONCLUSION AND ORDER

Based on the foregoing, I conclude that the Scituate Public Schools violated the procedural rights afforded to Mother and Student under the IDEA and MGL c. 71 B when it refused to evaluate Student contrary to the mandate set forth in 603 CMR 28.04(b). Therefore, Scituate is ordered to offer to conduct the evaluation described in the N-1 form issued on February 28, 2022 and accepted by Mother on or about March 8, 2022. If Student is not willing to participate in all or some of the evaluation, she may not be forced or coerced into doing so. The District shall document all efforts to offer the evaluation to Student, as well as Student's responses. If Scituate makes the above-referenced evaluation available, and documents its efforts and Student's response as described above, it shall have fulfilled its obligations under relevant portions of the IDEA and MGL c. 71B. I further conclude that Scituate has not failed to comply with "child find" requirements of the IDEA and MGL c. 71B with respect to Student.

By the Hearing Officer,

Sara Berman

Sara Berman

Dated: October 7. 2022

COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS

EFFECT OF FINAL BSEA ACTIONS AND RIGHTS OF APPEAL

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

20 USC §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, 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, §14(3), appeal of a 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 USC §1415(j), "unless the State or local educational 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 th 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.2 910 (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 Appels 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 referring 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 in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts for review. 20 USC §1415(i)(2).

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 ijpound 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.