# **COMMONWEALTH OF MASSACHUSETTS**

**Division of Administrative Law Appeals**

# **Bureau of Special Education Appeals**

**In Re: Leominster Public Schools BSEA #12-7450**

### RULING ON MOTION FOR STAY PUT

This ruling is issued pursuant to the Individuals with Disabilities Education Act (20 U.S.C. 1400 *et seq*.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), the state special education law (M.G.L. c. 71B), the state Administrative Procedure Act (M.G.L. c. 30A), and the regulations promulgated under these statutes.

The question to be addressed by this Ruling is whether the School District’s proposed change of summer placement for Student from a 165 hour[[1]](#footnote-1) Pervasive Developmental Disorder (PDD) program to a 108 hour[[2]](#footnote-2) Autism Spectrum Disorder (ASD) program violates Student’s stay-put rights under federal special education law.[[3]](#footnote-3)

**PROCEDURAL BACKGROUND**

# On June 29, 2012, Parents filed a *Motion to Order Stay-Put Placement*, taking the position that Leominster Public Schools (Leominster) was proposing to change their son’s summer placement from the FLLAC PDD program for 5.5 hours per day, 5 days a week to the FLLAC ASD program for 4.5 hours per day, 4 days a week; that the change in program would have a substantial, negative impact on Student’s education in violation of stay-put principles under federal special education law; and therefore, that Student should be placed in the CAPS Collaborative or the Darnell School, a private special education school.

# On July 6, 2012, Leominster filed an opposition, taking the position that Student would not receive a free appropriate public education (FAPE) in the PDD program because Student would be the only child in the program; that the ASD program is substantially similar to the PDD program; and therefore, that Student’s stay-put protections do not preclude Leominster’s proposed ASD placement. On July 11, 2012, there was a telephonic hearing on Parents’ motion.

In order to apprise the parties in a timely manner of my ruling in this case, I issued a Summary Ruling in advance of a full Ruling. The Summary Ruling is attached as Appendix A.

**FACTUAL BACKGROUND**

The following facts are not in dispute. Student is an individual with a disability, falling within the purview of the IDEA[[4]](#footnote-4) and the Massachusetts special education statute.[[5]](#footnote-5) Student is 10 years old and will enter the 5th grade for the 2012-2013 school year. He has a diagnosis of Autism Spectrum Disorder and experiences difficulty with language expression, language comprehension, and following social cues. Exhibits 9/30/10-9/29/11 IEP; 3/6/12-6/30/12 IEP.

Student was provided an individualized education program (IEP) dated 9/30/10 to 9/29/11. Parents rejected portions of this IEP. Exhibit 9/30/10-9/29/11 IEP. On April 19, 2011, a BSEA Hearing Officer found that the 9/30/10 to 9/29/11 IEP was reasonably calculated to provide Student with FAPE in the least restrictive environment.[[6]](#footnote-6)

This IEP placed Student in a 208-day program, which included the extended school year PDD programming for 5.5 hours per day, 5 days a week for 6 weeks. Student attended this program during the 2011 summer. Exhibits 9/30/10-9/29/11 IEP.

After delays in coordinating a convenient time for Team members, a Team meeting was held in December 2011 to develop Student’s new IEP. The Team was unable to finish drafting the IEP at this point. In March 2012, the Team reconvened and developed an IEP for 3/6/12 to 6/30/12. This IEP provided Student with the same summer services as those proposed in the 9/30/10-9/29/11 IEP.[[7]](#footnote-7) Parents rejected the IEP as developed. Exhibit 3/6/12-6/30/12 IEP.

On June 15, 2012, FLLAC wrote to Parents to inform them that no other students had enrolled in the PDD 2012 summer program. As such, FLLAC proposed Student attend its ASD summer program. The ASD program would begin on July 2, 2012, and meet for 4.5 hours per day, 4 days a week for 6 weeks. FLLAC also wrote that it had spoken with the Leominster Special Education Director and could “discuss providing [Student] with some additional time/services at the end of the summer program.” Exhibit FLLAC Letter.

Student began attending the ASD program on July 2, 2012.

**DISCUSSION**

The IDEA’s stay-put provision provides, *inter alia*, that “during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child.”[[8]](#footnote-8) Its essential purpose is to preserve the status quo pending resolution of a dispute between the parties, thereby preventing unilateral action by a school district in contravention of a student’s or parent’s objection, until the completion of due process proceedings.[[9]](#footnote-9)

IDEA stay-put principles that determine a student’s “then-current educational placement” are neither rigid nor automatic. Rather, the specific facts of a particular case guide the determination of whether proposed changes to services or setting would constitute a change of placement that would be precluded by stay-put principles.[[10]](#footnote-10)

The central inquiry is the educational impact upon the student as a result of the change of services or settings.[[11]](#footnote-11)As a general rule, the educational impact must be substantial.[[12]](#footnote-12) In considering what level of change has legal significance under stay-put, a number of courts have articulated the standard as “a fundamental change in, or elimination of, a basic element of the educational program.”[[13]](#footnote-13)

If a school district cannot implement the IEP as written, the school district may fulfill its “stay-put” obligations by providing the student with a similar placement on an interim basis.[[14]](#footnote-14) The school district “cannot avoid the stay-put requirement merely by coming up with a different FAPE.” Rather, the proposed program must be substantially similar.[[15]](#footnote-15)

Because Parents rejected the 3/6/12-6/30/12 IEP, the 9/30/10-9/29/11 IEP was the last accepted and implemented IEP pursuant to a BSEA Hearing Officer’s decision.[[16]](#footnote-16) Therefore, the 9/30/10-9/29/11 IEP is the controlling IEP for purposes of stay-put analysis.

Student’s stay-put IEP places Student in the PDD summer program for 5.5 hours per day, 5 days a week for 6 weeks. The IEP contains goals relating to functional academics, behavior/social emotions, communication, occupational therapy, physical therapy, and self-care. Some of the specific measureable goals for Student include augmenting his ability to greet others; to successfully turn-take and share materials in group activities; and to improve communication skills across all school settings.

For all practical purposes, the PDD program became unavailable for Student when no other students enrolled for the 2012 summer. It is evident from Student’s goals that he needs appropriate peer interaction to receive FAPE. During the motion hearing, neither party suggested that Student should remain in the PDD program.

Because the PDD program was not a viable option for the 2012 summer, Leominster’s obligation was to propose a summer program substantially similar to the PDD program. I must thus determine if the proposed ASD program satisfies this standard.

In the ASD program, Student would have the same teacher, speech language pathologist, and BCBA that he was slated to have in the PDD program. Parents do not assert any substantive differences between the ASD and PDD summer programs other than the number of hours. As aforementioned, the PDD program offers 165 hours over the summer, while the ASD program offers only 108 hours. This results in a loss of 57 hours of instructional time for Student over the course of the 6 week summer program.

While there is no clear standard to determine when there is a substantial change between the stay-put IEP and that which is implemented,[[17]](#footnote-17) I find this reduction in hours is more than *de minimis* and falls significantly short of the hours required by the IEP. Student would lose over 34 percent of his instructional time from the stay-put IEP if enrolled in the ASD program. Because of the significant reduction in time, I find that the proposed placement results in such a substantial change in educational programming as to violate Student’s stay-put rights. As such, I conclude that Student’s stay-put IEP cannot be implemented in the proposed ASD program.

Parents assert that, owing to this stay-put violation, Student should be placed in the CAPS Collaborative or Darnell School, a private special education school. Parents, however, have not met their burden of proof for these alternative placements.[[18]](#footnote-18) Parents have not provided any evidence that suggests either of these programs is appropriate for Student, that Student would be accepted to these programs, or that these programs have a current vacancy.

By the date of the motion hearing (July 11, 2012), Student had been attending the ASD summer program since July 2, 2012. There was insufficient time for Leominster to locate and/or create a summer program that satisfied stay-put standards; nor would it be possible to expand Student’s current summer program to provide him with substantially equivalent services. As such, I find that Leominster shall continue to provide summer services to Student through the ASD program despite the stay-put violation.

Compensatory services can serve as equitable relief[[19]](#footnote-19) for the “warranted education” that Student is missing from his stay-put IEP.[[20]](#footnote-20) Generally, compensatory services are designed to “elevate [the student] to the position he would have occupied absent the school district’s failures.”[[21]](#footnote-21) On the basis of the evidentiary record, I find that the only relief that may appropriately compensate Student is additional hours of special education services.

Therefore, I conclude that Leominster shall provide Student with 57 hours of compensatory services. I will leave the specifics of these services to the discretion of the team.[[22]](#footnote-22) Prior to the start of the 2012-2013 school year, the IEP Team shall determine what services are to be provided and a timeline of when these services will be delivered. The IEP Team shall explore providing home-based services (possibly even during this summer), which both parties suggested as an option during the motion hearing, as well as extended day services, which Parents suggested as an option during the motion hearing.

**ORDER**

For these reasons, Parents’ *Motion to Order Stay-Put Placement* is ALLOWED in part, and DENIED in part, as follows.

Leominster shall continue to provide summer services to Student through the ASD program. Leominster shall provide 57 hours of compensatory services. By the start of the 2012-2013 school year, the IEP Team shall meet and determine which services will be implemented and a timeline for the delivery of these services.

By the Hearing Officer,

William Crane

Date: December 30, 2015

**Appendix A**

# **COMMONWEALTH OF MASSACHUSETTS**

**Division of Administrative Law Appeals**

# **Bureau of Special Education Appeals**

**In Re: Leominster Public Schools BSEA # 12-7450**

### SUMMARY RULING ON MOTION FOR STAY PUT

In order to apprise the parties in a timely manner of my ruling in this case, this Summary Ruling is issued in advance of a full Ruling. By July 26, 2012, I expect to issue a full Ruling, which will explain the bases for the findings and conclusions in the instant Ruling.

# On June 29, 2012, Parents filed a *Motion to Order Stay-Put Placement*, taking the position that Leominster Public Schools (Leominster) was proposing to change their son’s 2012 summer placement from the FLLAC Pervasive Developmental Disorder (PDD) program for 5.5 hours per day, 5 days a week to the FLLAC Autism Spectrum Disorder (ASD) program for 4.5 hours per day, 4 days a week; that the proposed program would have a substantial, negative impact on Student’s education in violation of stay-put principles under federal special education law; and therefore, that Student should be placed in the CAPS Collaborative or the Darnell School, a private special education school.

# On July 6, 2012, Leominster filed an opposition, taking the position that Student would not receive a free appropriate public education in the PDD program because Student would be the only child in the program; that the ASD program is substantially similar to the PDD program; and therefore, that Student’s stay-put protections do not preclude Leominster’s proposed ASD placement. On July 11, 2012, there was a telephonic hearing on Parents’ motion.

I have had an opportunity to review and consider the entire record, as well as the arguments of both parties. On the basis of this review, I find that Leominster has proposed to place Student in an ASD summer program for 57 less hours than the previously accepted and implemented PDD summer program; that Student’s stay-put IEP cannot be implemented in the proposed ASD program because of this significant reduction in hours; and therefore, that the proposed placement results in such a substantial change in educational programming as to violate Student’s stay-put rights.

Student began attending the ASD program on July 2, 2012, and it is uncertain whether, at this late date, Student would be able to attend any other appropriate summer program. Therefore, Leominster shall continue to provide summer services to Student through the ASD program.

Leominster shall also provide Student with 57 hours of compensatory services. I will leave it within the discretion of the Team to decide the details of these services. However, prior to the start of the 2012-2013 school year, the Team shall determine what services are to be provided and a timeline of when these services will be delivered. The Team shall explore providing home-based services (possibly even during this summer), which both parties suggested as an option during the motion hearing, as well as extended day services, which Parents suggested as an option during the motion hearing.

For these reasons, Parents’ *Motion to Order Stay-Put Placement* is ALLOWED in part, and DENIED in part.

By the Hearing Officer,

William Crane

Dated: July 12, 2012

1. This number represents a 5.5 hour per day, 5 day per week, 6 week summer program. [↑](#footnote-ref-1)
2. This number represents a 4.5 hour per day, 4 day per week, 6 week summer program. [↑](#footnote-ref-2)
3. Parents were pro se. Leominster Public Schools was represented by attorney Carolyn Lyons. I note, with appreciation, the significant assistance from BSEA Legal Intern Shaina Wamsley in my preparation of this Ruling. [↑](#footnote-ref-3)
4. 20 U.S.C. § 1400 *et seq*. [↑](#footnote-ref-4)
5. Mass. Gen. Laws ch. 71B. [↑](#footnote-ref-5)
6. *In Re: Leominster Public Schools*, BSEA # 11-5122 (April 19, 2011). [↑](#footnote-ref-6)
7. Although the end date on the service delivery grid of this IEP is 6/30/12, the schedule modification section of the IEP describes a summer program from July 2, 2012, through August 10, 2012, Monday through Friday, 8:00 a.m. to 1:30 p.m. [↑](#footnote-ref-7)
8. 20 U.S.C. § 1415(j) (“Except as provided in subsection (k)(4), during the pendency of any proceeding conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.”). *See also*, 34 C.F.R. § 300.518 (“Except as provided in § 300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.”). [↑](#footnote-ref-8)
9. *See C.P. v. Leon Cnty. Sch. Bd. Florida*, 483 F.3d 1151, 1156 (11th Cir. 2007) (“provision amounts to, in effect, an automatic preliminary injunction, maintaining the status quo and ensuring that schools cannot exclude a disabled student or change his placement without complying with due process requirements”); *Verhoeven v. Brunswick Sch. Comm.*, 207 F.3d 1, 3 (1st cir. 1999) (preservation of the status quo ensures that the student remains in the last placement that the parents and the educational authority agreed to be appropriate). [↑](#footnote-ref-9)
10. *See, e.g.*, *Hale v. Popular Bluff R-1 Sch. Dist.*, 280 F.3d 831, 833 (8th Cir. 2002) (considering the determination of whether there has been a change in student’s “then-current educational placement” as a “fact-specific” inquiry that considers the impact of a change of placement on student’s education). [↑](#footnote-ref-10)
11. *Id*. [↑](#footnote-ref-11)
12. *See, e.g.*, *A.W. v. Fairfax Cnty. Sch. Bd.*, 372 F.3d 674 (4th Cir. 2004) (“where a change in location results in a dilution of the quality of a student’s education . . . a change in educational placement occurs”); *Tennessee Dep’t of Mental Health v. Paul B.*, 88 F.3d 1466 (6th Cir. 1996) (“must identify a detrimental change in the elements of an educational program in order for a chance to qualify for the stay put provision”); *DeLeon v. Susquehanna Community Sch. Dist.*, 747 F.2d 149, 153-54 (3rd Cir. 1984) (“touchstone in interpreting section 1415 has to be whether the decision is likely to affect in some significant way the child’s learning experience”). [↑](#footnote-ref-12)
13. *Sherri A.D. v. Kirby*, 975 F.2d 193, 206 (5th Cir. 1992). *See also*, *Lunceford v. District of Columbia Bd. of Educ.*, 745 F.2d 1577, 1582 (D.C.Cir. 1984) (applying same standard); *Mr. C. v. Maine Sch. Admin. Dist. No. 6*, 2007 WL 4206166 (D.Me. 2007) (applying same standard). [↑](#footnote-ref-13)
14. *Knight ex rel. Knight v. District of Columbia*, 877 F.2d 1025, 1029 (D.C.Cir. 1989) (court rejecting parents arguments that “a public placement is inherently dissimilar to a private placement for the purpose of satisfying the school district’s obligation to provide a ‘similar’ placement, on an interim basis, when a child’s prior placement is no longer available”). *See also*, *M.K. v. Roselle Park Bd. of Educ.*, No. 06-4499 (JAG), 2006 WL 3193915, \*10 (D.N.J. 2006) (court stating “if a child’s then-current educational placement is not available, the school system must provide the student with placement in a similar program during the pendency of administrative and judicial proceedings on the merits of his due process challenge to the proposed IEP”); *R.B. ex rel. Parent v. Mastery Charter Sch.*, 762 F. Supp. 2d 745, 761 (E.D. Pa. 2010) (“Even where a child’s then-current educational placement is simply no longer available, the LEA retains responsibility for providing the student with placement in a similar program during the pendency of the proceedings.); *Van Scoy ex rel. Van Scoy v. San Luis Coastal Unified Sch. Dist*., 353 F. Supp. 2d 1083, 1086 (C.D. Cal. 2005) (“The stay-put provision entitles the student to receive a placement that, as closely as possible, replicates the placement that existed at the time the dispute arose, taking into account the changed circumstances.”). [↑](#footnote-ref-14)
15. *C. v. Maine Sch. Admin. Dist. No. 6*, 582 F. Supp. 2d 65, 68 (D. Me. 2008). *See also*, *W.R. v. Union Beach Bd. of Educ.*, No. CIV A 09-2268 MLC, 2009 WL 4042715 (D.N.J. Nov. 19, 2009) (“No change in placement occurs when a Student’s IEP and classes remain substantially similar.”); *Van Duyn v. Baker Sch. Dist.* *5J*, 502 F.3d 811, 815 (9th Cir. 2007) (holding “district does not violate the IDEA unless it is shown to have materially failed to implement the child’s IEP). *Houston Indep. Sch. Dist. V. Bobby R.*, 200 F.3d 341, 348-49 (5th Cir. 2000) (holding school violates IDEA if failed to implement “substantial or significant provisions of the IEP”); *Melissa S. v. Sch. Dist. of Pittsburgh*, No. 05-1579, 2006 WL 1558900 (3rd Cir. 2006) (adopting *Bobby R.* standard). [↑](#footnote-ref-15)
16. *In Re: Leominster Public Schools*, BSEA # 11-5122 (April 19, 2011). [↑](#footnote-ref-16)
17. *Van Duyn*, 502 F.3d at 828 (Ferguson, J., dissenting) (asserting that the majority’s standard of “more than a minor discrepancy” is vague; questioning how to determine if “an IEP that requires ten hours per week of math tutoring” and the school provides “only nine hours [would] be ‘more than a minor discrepancy’”). [↑](#footnote-ref-17)
18. *See, e.g.*, *Schaffer ex rel. Schaffer v. Weast*, 456 U.S. 49, 57-58 (2005) (“Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.”). [↑](#footnote-ref-18)
19. *See Mr. I. ex rel. L.I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 25 (1st Cir. 2007) (“Compensatory education, like reimbursement, is a form of equitable relief.”). [↑](#footnote-ref-19)
20. *C.G. ex rel. A.S. v. Five Town Comm. Sch. Dist.*, 513 F.3d 279, 290 (1st Cir. 2008). *See also*, *Maine Sch. Admin. Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 17-18 (1st Cir. 2003) (“a child eligible for special education services . . . may be entitled to further services, in compensation for past deprivations); *Pihl v. Mass. Dept. of Educ.*, 9 F.3d 184, 189 (1st Cir. 1993) (“If an IEP from a past year is found to be deficient, the Act may require services at a future time to compensate for what was lost.”). [↑](#footnote-ref-20)
21. *Reid v. District of Columbia*, 401 F.3d 516, 527 (D.C.Cir. 2005). *See also*, *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1289-90 (11th Cir. 2008) (applying samestandard); *Bd. of Educ. of Fayette Cnty., Ky. v. L.M.*, 478 F.3d 307, 316 (6th Cir. 2007) (applying same standard). [↑](#footnote-ref-21)
22. *See Mr. I*, 480 F.3d 1 at 26 (1st. Cir. 2007) (court finding it “sensible” and “not an abuse of discretion” for trial court to order team meeting to determine compensatory relief). [↑](#footnote-ref-22)