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

In Re: Quincy Public Schools **BSEA # 1302133**

RULING ON MOTION FOR STAY PUT

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

INTRODUCTION

This dispute requires that I determine Student's stay-put placement.

On October 2, 2012, Student's attorney filed a motion seeking that I determine her stay-put placement to be the Clarke School for the Deaf (Clarke), and that Quincy Public Schools (Quincy) be ordered not only to pay for this placement but also to pay for Parents' living expenses in the Northampton area, where Clarke is located. On October 4, 2012, Quincy filed its opposition and later that same day, I held a telephonic hearing on Student's motion.

The underlying dispute (which will require my determination of whether Quincy's proposed IEP and placement are appropriate) is scheduled to be heard on October 22, 24 and 25, 2012. It may be unlikely that I will allow any postponement of these dates absent agreement of the parties.

FACTUAL BACKGROUND

The facts are not in dispute, except where specifically indicated that they are the allegations of a party.

Student is thirteen-years-old, 6th grader who, during the previous school year, attended Clarke as a residential student pursuant to an accepted IEP. Parents live in Quincy, MA.

Although not entirely deaf, Student presents with a bilateral, sensorineural hearing loss that is educationally significant. She is an oral learner and does not know sign language. Student also has been diagnosed with deficits in expressive and receptive language secondary to hearing loss and language-based learning disabilities.

This matter was previously before me in essentially the same posture. On May 3, 2012, Parents had filed a hearing request seeking to order Quincy to continue funding Student's placement at Clarke for the 2012-2013 school year. However, as the parties recognized, Student had previously attended Clarke as a residential student, and Clarke terminated its residential program effective the end of the previous school year. Clarke continued to offer only a day program for the 2012-2013 school year. In light of these changed circumstances, Student, through her hearing request, sought an order from the BSEA requiring payment not only of the Clarke tuition but also of Parents' living expenses in the Northampton area so that Student would have sufficient residential support from her Parents so that she could continue to attend Clarke, this time as a day student.

Prior to the scheduled hearing dates in the previous dispute and prior to the beginning of the 2012-2013 school year, the parties settled their differences. Their settlement agreement, which has been filed as an exhibit in the instant dispute, required Quincy to fund Student's tuition as a "publicly-funded residential student" at Clarke. Quincy's obligation to do so, however, was contingent upon Quincy's "obtain[ing] sole source approval for [Student's] residential placement at Clarke."

Quincy included this "sole source" language in the agreement because Clarke no longer had a residential program and, to the extent Clarke had created an as yet unapproved residential program, Quincy could not place Student there without prior approval and it could not expend public funds for the program without price authorization.[1]

After the settlement agreement was signed, Quincy completed its portion of the sole source application and forwarded the application to Clarke for it to complete its portion. Clarke did not do so. Clarke took the position that it could not complete the application because it did not have a residential program and could not develop a budget for a program it did not have.[2]

Because Quincy's payment of the Clarke tuition was made expressly contingent upon sole source approval and because sole source approval was never obtained, Quincy has not made any tuition payments to Clarke for the 2012-2013 school year. Nevertheless, apparently because the parties (and Clarke) assumed that there was an agreement pursuant to which she would attend Clarke, Student began attending Clarke as a day student at the beginning of the school year and continued to attend until September 24, 2012 when Clarke informed Parents that because it had received no tuition payment, Student must terminate immediately. Since September 24th, Student has not attended any educational program.

[1] See 808 CMR 1.06(7)(b)("DPS [Division of Purchased Services] will develop, issue and amend, as necessary, instructions for the development and authorization of prices for individual students who are placed, after approval by DOE pursuant to 603 CMR 28.500 or successor provisions thereto, by a Department in a private school which has not been approved under M.G.L. c. 71B. These placements are also referred to as "sole source" placements.")

[2] Quincy has alleged that Parents knew that Clarke was not making arrangements for Student to attend on a residential basis, and instead that Clarke intended to serve as a conduit to pass public funds received from Quincy (to the extent those funds exceeded the authorized day program rate) through to Parents to pay for their living expenses. Quincy has taken the position that it will not fund any part of Parents' living expenses.

DISCUSSION

It is not disputed that Student is an individual with a disability, falling within the purview of the IDEA and the Massachusetts special education statute.

The Individuals with Disabilities Education Act (IDEA) was enacted "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE]."[3] "The primary vehicle for delivery of a FAPE is an IEP [individualized education program]."[4] An IEP must be "tailored" to address the student's "unique" needs that result from his or her disability.[5] And, the IEP must provide "[t]o the maximum extent appropriate" that a student is taught with nondisabled children.[6] Massachusetts FAPE standards, which are found within Massachusetts statute and implementing regulations, provide protections and requirements similar to those found within the IDEA.[7]

In the instant dispute, Quincy filed the hearing request with the BSEA, seeking a determination of the appropriateness of its proposed IEP for the current school year. However, it was Parents who filed a motion to determine Student's stay-put placement and, as the moving party, Parents have the burden of persuasion on this issue.[8]

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 [emphasis supplied]."[9] 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.[10]

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[3] 20 U.S.C. § 1400 (d)(1)(A).
[4] *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) (internal quotations omitted).
[5] See *Sebastian M. v. King Philip Regional School Dist*., 685 F.3d 79, 84 (1st Cir. 2012) ("IEP must be custom-tailored to suit a particular child"); *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 4 -5, 20 (1st Dir. 2007) (FAPE includes "specially designed instruction … [t]o address the unique needs of the child that result from the child's disability") (quoting 34 C.F.R. § 300.39(b)(3)).
[6] 20 U.S.C. § 1412(a)(5)(A). See also 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 34 CFR 300.114(a)(2(i).
[7] See MGL c. 71B, s.3 (defining FAPE to mean special education and related services that meet the "education standards established by statue or established by regulation promulgated by the board of education").
[8] See *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief).
[9] 20 USC § 1415 (j). See also 34 CFR §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.").
[10] See *Verhoeven v. Brunswick School Committee*, 207 F.3d 1, 3, 10 (1st Cir. 1999).

IDEA stay-put principles that determine a student's "then-current educational placement" are neither rigid nor automatic. Rather, the specific facts of the 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.[11]

It is not disputed that Student's last agreed-upon IEP (as well as the last educational program paid for by Quincy) was a residential placement. Therefore, Student has the right to continue to attend a residential placement. At the same time, it is not disputed that Student's previous residential placement at Clarke no longer exists. Courts have made clear that in these kinds of circumstances (when it is not possible for a student to continue in her placement from the previous school year—for example, a school closes or a student is too old to continue attending a school or parents move to a different school district), the school district's stay-put obligation is to provide the student with a "comparable" educational program.[12]

One resolution of the stay-put dispute would simply be to require Quincy to locate or create a comparable residential program for Student. This is the solution that comports most closely with the legal principles set forth by the courts in their stay-put decisions. Unfortunately, however, it is a solution without practical merit for several reasons.

First, Student has only recently been terminated from her current placement (September 24, 2012) and this dispute will likely be resolved by the BSEA at a hearing later this month (or earlier by informal resolution by the parties). The relatively short period of time makes it highly unlikely that Student could be placed in a comparable residential program during this interim period.

Second, neither party has requested that the BSEA determine Student's stay-put placement to be a residential school. And, neither party has indicated any interest in even trying to identify another residential placement for Student to attend during the interim period prior to resolution of this matter on the merits. Rather, Quincy seeks determination of READS Collaborative (READS) to be Student's stay-put placement, while Parents seek

[11] See *In re: Educ. Assignment of Joseph R.*, 318 F. App'x 113, 119 (3d Cir. 2009) ("change in educational placement" is fact specific and depends upon whether the change is "likely to affect in some significant way the child's learning experience"); *Hale v. Poplar Bluff R-1 School District*, 280 F.3d 831 (8th Cir. 2002) (determination of whether there has been a change in student's "then-current educational placement" is a "fact-specific" inquiry that considers the impact of a change of placement on student's education).

[12] See *Johnson v. Special Education Hearing Office*, 287 F.3d 1176, 1181 (9th Cir. 2002) (where student "transitions between educational agencies," the transferee district "can meet the requirements of the 'stay-put' provision by providing [a] comparable educational placement"); *Tilton v. Jefferson County Bd. of Educ.*, 705 F.2d 800, 804 (6th Cir. 1983) (transfer to alternative school after closure of student's Jewel Manor program was a change in placement because alternative school was "not comparable to the Jewel Manor program"); *Henry v. School Administrative Unit No. 29*, 70 F.Supp.2d 52, 61 (D.N.H. 1999) (where student was "too old to attend Linden Hill, … local educational agency must fulfill its stay-put obligation by placing a disabled student at a comparable facility"); 34 CFR §300.323(e) and (f) (requiring that new school district provide services "comparable" to those described in the a student's IEP when student transfers to another state or to a new school district within the same state).

determination of the Clarke day program to be Student's stay-put placement, in conjunction with payment of Parents' living expenses.

As a consequence, the fundamental purpose of stay-put—that is, to preserve the status quo to the extent possible, pending resolution of a dispute between the parties—cannot be satisfied through a residential placement. I therefore turn my consideration to the stay-put placements requested by the parties.

It is not disputed that the only placement that will allow Student to have continuity of her educational program is for her to be placed at Clarke, which would have to be in its day program. In most stay-put disputes involving a residential placement, it would not be possible to conclude that a day program (even a continuation of the day program from the previous residential placement) would be a comparable placement. Typically, a residential placement is provided only when FAPE requires placement in a 24-hour educational program, often with necessary consistency and reinforcement between the day and residential portions of the program. However, in the instant dispute, a residential placement had been provided to Student at Clarke not for these reasons, but because the commuting distance between Quincy (where the family lives) and Northampton (where Clarke is located) was prohibitively long, requiring that Student spend the night at Clarke at least during the week. Accordingly, in the instant dispute, stay-put principles argue in favor of allowing Student to continue to attend the Clarke day program, while, at the same time, addressing the fact that Student can no longer reside at Clarke during the week.

Student's attorney offers two possible solutions to address the residential portion of the dispute. In her motion, her attorney requested that the stay-put order require Quincy to pay for Parents' living expenses in or near Northampton so that they would be able to support their daughter while she attends school at Clarke. During the motion hearing, however, Student's attorney further explained that if Parents' living expenses could not be ordered by the BSEA, Parents would make other arrangements to allow Student to attend Clarke at least until either the BSEA resolved this matter on the merits or the parties resolved their dispute informally, whichever occurred first.

At a hearing on the merits, I may possibly have to address the question of what liability, if any, Quincy may have to pay for Parents' living expenses so that Student can attend the Clarke day program (assuming that I were to agree with Parents that Student requires continued placement at Clarke). As the parties themselves recognize, however, this kind of relief is substantially different than the typical residential placement. It has been ordered by the BSEA in only one previous case,[13] the case law in this area is not well-developed,[14] and, as a general rule, ordering a school district to pay for a parent's living expenses (so that a

[13] *In Re: Provincetown Public Schools and Mass. Dept. of Education and Anne*, BSEA # 04-3100 & 05-0340, 10 MSER 493 (November 2, 2004).
[14] See *Bucks County Dept. of Mental Health/Mental Retardation v. Commonwealth of Pennsylvania*, 379 F.3d 61 (3rd Cir. 2004); *Union Sch. Dist. v. Smith*, 15 F.3d 1519 (9th Cir. 1994); *Hurry v. Jones*, 734 F. 2nd 879 (1st Cir. 1984).

student can attend a private school) would be an extremely unusual remedy. This kind of relief may only be considered by me after an evidentiary hearing (addressing not only the necessity for this kind of relief but also the details of the requested expenses including the nature and scope of the living expenses) and full briefing by the parties regarding my legal authority to order the requested relief; but none of this has occurred within the context of my consideration of Parents' motion for stay-put. For these reasons, I find that within the context of the instant stay-put dispute, the requested relief (of payment of Parents' living expenses) cannot now be ordered as a comparable substitute for the missing residential component of the Clarke program.

Accordingly, I decline to order Quincy, as part of Student's stay-put placement, to pay for any part of Parents' living expenses, but nevertheless conclude that because of Parents' apparent ability and willingness to support their daughter's attendance at Clarke as a day student, Clarke's day program may be considered to be Student's stay-put placement.

Finally, I turn to a consideration of Quincy's proposed stay-put placement—that is, READS, which is located in Bridgewater, MA. Quincy has proposed an IEP placing Student at the Deaf and Hard of Hearing Program at READS and through its hearing request in the instant dispute, has asked the BSEA to determine this IEP and placement to be appropriate. Parents expected to visit READS for the first time on October 9, 2012 for purposes of their consideration of it as a future placement.

During the telephonic motion hearing on Student's stay-put motion On October 4, 2012, Quincy made clear that it was no longer certain that READS is an appropriate placement for Student. For a period of time (at least since the parties entered into their settlement agreement at the end of August 2012), Quincy has been seeking updated evaluations of Student, particularly with respect to cognitive and academic testing. According to Quincy's attorney (this has been disputed by Mother), Quincy learned for the first time on October 4th, that Student had been evaluated by Children's Hospital, Boston, on April 18, 2012. Student's attorney provided this evaluation to Quincy (and to the BSEA) as an exhibit in the instant stay-put dispute on October 4th, a few hours prior to the motion hearing. Quincy has taken the position that it now needs to hold an IEP Team meeting to review this evaluation and determine whether its proposed IEP (calling for placement at READS) must be amended, and that this should occur prior to a BSEA hearing on the merits regarding the appropriateness of Quincy's proposed IEP. Thus, it would be premature for me to determine that READS is a comparable placement for purposes of stay-put.

For these reasons, I find that it is only the Clarke day program that can offer Student an educational program that is comparable to her previous residential placement at Clarke, consistent with the purpose of IDEA stay-put principles.

ORDER

Student's motion for stay-put placement is ALLOWED only with respect to my determining that the Clarke day program is Student's stay-put placement. Student's motion for stay-put placement is otherwise DENIED.

Quincy shall immediately place Student in Clarke's day program.

By the Hearing Officer,

William Crane
Dated: October 10, 2012