

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

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IN RE: HARLAN<sup>1</sup>

BSEA #1306803

&

SHREWSBURY PUBLIC SCHOOLS

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**RULING ON SCHOOL’S MOTION FOR CLARIFICATION OF**  
**“STAY PUT” PLACEMENT**

This matter comes before the BSEA on the Motion of the Shrewsbury Public Schools for Clarification of the Student’s “stay put” placement pursuant to 603 CMR 28.08 (7). Both parties submitted written arguments and exhibits in support of their positions. No oral arguments were heard.

**LEGAL FRAMEWORK**

“Stay Put” is special education shorthand for one of the fundamental procedural protections available to students with disabilities under the IDEA and MGL c.71 B. Unless the parents and the local educational agency/state agree to a different placement, an eligible student is entitled to remain in the last educational program accepted by the parents while dispute resolution proceedings unfold or until a superseding program is accepted by the parents. 20 U.S.C. § 1414(j); 34 CFR § 300.518.

Massachusetts extends “stay put” protections to eligible students whenever the parents and responsible school districts disagree even apart from formal due process proceedings under the IDEA and MGL c. 71 B. 603 CMR 28.08 (7) provides:

In accordance with state and federal law, during the pendency of *any* dispute regarding placement or services the eligible student shall remain in his or her then current education program and placement unless the parents and the school district agree otherwise. (Emphasis added)

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<sup>1</sup> “Harlan is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

Generally, the terms of the last accepted IEP should be enforced as the “stay put” relief. Preservation of the “status quo” assures that the student “stays put” in the last placement the parents and the School agreed was appropriate for him. *Doe v. Brookline School Committee*, 722 F.2d 910 (1<sup>st</sup> Cir. 1983).

## FACTUAL BACKGROUND

1. Harlan is a nine year old student who has been receiving special education services through the Shrewsbury Public Schools since preschool. Harlan has been determined to have autism spectrum disorder and significant developmental delays. He is non-verbal and uses a variety of techniques to communicate including a PECS systems and a speech-generating device called a TOBI.
2. The Team met on April 27, 2010 to develop an IEP for Harlan. At that time he was a 6 year old pre-kindergartener. The Team developed an IEP calling for a full day “partial inclusion” placement in the “ELC” program. The ELC program is based on ABA principles and includes intensive discrete trial training, a sensory diet, and a behavior support plan. The IEP calls for, and the ELC program uses, a total communication approach. In addition to the special education teacher the IEP provided that Harlan would have a one-to-one ABA technician with him at all times during school, including when receiving related services. (S-1)
3. The 2010 – 2011 IEP provides for: one 30-minute session of direct speech-language services in the general education classroom and two 30-minute sessions of speech-language therapy in a specialized setting. The PLEP-A and PLEP-B explain the speech-language services outlined in the service delivery grid: “Speech and language therapy is conducted with the 1:1 technician present on an individual basis and in small/large groups that provide typical peer language models.” (S-1)
4. The service delivery grid also includes direct occupational therapy services once a week for thirty minutes in a specialized setting. The PLEP-A and PLEP-B sections of the IEP explain: “Occupational therapy takes place with the 1:1 technician present so that carryover and generalization of skills occurs across settings.” (S-1)
5. The 2010 – 2011 IEP notes that Harlan will have access to a variety of communication modalities including “verbal, sign, PECS and AT devices.” There is no identification of, nor limitation as to, the type, nature, function or brand of the AT device(s) contemplated in the IEP. (S-1)
6. The IEP developed at and proposed as a result as a result of the April 27, 2010 meeting was accepted in full on May 9, 2010. The IEP period was April 27, 2010 to January 26, 2011. It was the last fully accepted IEP for Harlan. (S-1)

7. The Team met on March 4, 2011 to develop a new IEP for Harlan. The proposed IEP, running from March 4, 2011 to March 3, 2012, was substantially similar to that then being delivered to Harlan. It was rejected in full on March 23, 2011. (S-2; P-2; P-4)
8. On May 24, 2011 the IEP was revised based on the Guardian's comments. The revised IEP was rejected in full on June 16, 2011. (S-3)
9. The Team met on September 16, 2011 to re-determine Harlan's eligibility for special education and to develop a new IEP for him. At that time Harlan was 7 years old and in the 1<sup>st</sup> grade. The proposed IEP, running from September 16, 2011 to September 16, 2012 continued the ELC program and partial inclusion placement in which Harlan was then participating. In a letter setting out 19 concerns the Guardian rejected the program and placement as well as the failure to identify a particular type/brand of speech generating device and the lack of a home training component. (S-4)
10. On October 27, 2011 the Guardian consented to the continuation of the partial inclusion ELC placement Harlan was then attending. (P-7)
11. The Team met again on February 14, 2012. The IEP proposed as a result of that Team meeting continued the ELC program and partial inclusion placement for Harlan. The proposed February 2012-February 2013 IEP contained all the significant elements of the last accepted IEP: ABA/discrete trials, 1:1 ABA technician services, total communication approach, occupational therapy services and extended year services. The sole service change was the elimination of one 30 minute direct speech-language therapy session in the inclusion setting. The proposed IEP included a list of more than 101 concerns the Guardian had previously submitted to the district. These concerns ranged from: "I'm concerned that I have not been included in the district's decision to the rejected placement for [Harlan]" (sic); and "I'm concerned about the quality of the reproductions (maps, assignments) used in school and for homework"; and "I'm concerned that the following are not in the IEP: educational and nonverbal challenges; communication and language; behavior intervention; augmentative devices and software, sensory diet, bullying plan and social integration falls short of implementing and achieving effective goals" (sic); to "I am concerned that [Harlan]'s peers may attempt to "explain" or "communicate" for him without having full knowledge of [Harlan]'s intentions; and "I have concerns about the size of the font used for the IEP hard copy which is undersized and difficult to read." The Guardian rejected the IEP in full on April 9, 2012. (S-5)
12. Harlan continued to receive the type, level and frequency of special education services outlined in the accepted 2010 – 2011 IEP during the ensuing ten months.
13. The Team met on January 30, 2013 to develop a new IEP for Harlan. At that time Harlan was an 8 year old 2<sup>nd</sup> grade student. He continued to receive the special education services outlined in the April 2010- January 2011 IEP in a partial inclusion ELC program. The proposed IEP continued the program and placement Harlan had been attending; reinstated the weekly speech-language therapy in the inclusion setting and

included the list of concerns generated by the Guardian the previous year. The Guardian submitted inconsistent responses to the proposed January 2013- January 2014 IEP. On March 20 2013 the Guardian wrote to the district rejecting all IEP Goals and Objectives with the exception of Goal # 5, Fine and Visual Motor Skills, and requesting an independent educational evaluation. (S-8) On March 22, 2013 the Guardian refused the placement and requested a meeting after an independent evaluation had been completed. She also indicated that she rejected portions of the IEP but “postpone additional rejection comments until completion of an independent educational evaluation.” (S-8) Harlan continued to receive the special education services outlined in the April 2010- January 2011 IEP in a partial inclusion ELC program during this time.

14. On May 28, 2013 the Guardian requested a BSEA Hearing on two issues: Whether Shrewsbury should arrange for a contract for an independent augmentative and alternative communication evaluation outside of the reimbursement rates established by the Massachusetts Rate Setting Commission? And Whether Harlan is entitled to one-to-one speech therapy sessions? This matter was assigned BSEA # 13-06803.
15. On July 15, 2013 Shrewsbury requested a BSEA Hearing to determine whether the most recently proposed IEP (January 30, 2013-January 29, 2014. See ¶ 12) provided a free appropriate public education to Harlan. This matter was assigned BSEA # 14-00252. On August 2, 2013, by agreement, the two appeals were consolidated. A hearing on all outstanding issues is scheduled to take place in February 2014.
16. At all times Harlan has remained in the partial inclusion ABA-based ELC program first proposed for him and accepted by the Guardian in May, 2010.
17. There have been no fully accepted IEP’s, nor has there been any BSEA Order, since May 2010 that would in any way alter the program, placement or services set out in the April/May 2010 IEP.

## DISCUSSION

The Parties agree that the last IEP developed by Shrewsbury and accepted by the Guardian is the one that ran from April 27, 2010- January 26, 2011. (S-1). The Parties also agree that Shrewsbury has been substantially implementing that IEP since it was first accepted and that Harlan has been participating continuously, without interruption, in the partial inclusion ELC program outlined in that IEP. Though there have been two changes in the physical location of the ELC program since Harlan began attending in 2010, neither the restrictiveness of the setting nor the constellation of services has changed. Mere change in the physical location of a special education program, absent a showing of an alteration in the nature, type, level, frequency, intensity or duration of targeted special education services, does not constitute a “change in placement” for the purposes of “stay put” analysis. *Spilburg v. District of Columbia*, 307 F.2d 22 (D.D.C. 2004).

The Guardian's repeated rejections of subsequent IEP's demonstrate her misgivings about the appropriateness of the ELC program for Harlan. The misgivings, however, did not prompt her to advocate for a change in placement or services. A close review of the five IEPs developed by Shrewsbury, and the Guardian's objections thereto, reveals that the Guardian did not refuse any fundamental component of the special education program she accepted for Harlan in 2010. Therefore Shrewsbury was justified, indeed obligated, to continue implementation of the April 2010 IEP for Harlan. The technical rejections of the goals, objectives and methodologies proposed for Harlan required that the district work on areas and with tools deemed appropriate for Harlan three years earlier. (See *eg.* S-8) However illogical and potentially limiting this result may be, it is consistent with the district's obligations under "stay put" principles and provides a ready shield against any claims the guardian may have concerning lack of effective educational progress during this time.

The Guardian argues that, at some point, Shrewsbury failed to provide the 1:1 speech therapy services to which Harlan is entitled under the "stay put" implementation of the 2010 IEP. My examination of that IEP does not support the Guardian's premise. According to the service delivery grid Harlan is to receive three 30 minute sessions of direct speech-language therapy weekly: one session in the inclusion setting, two in the substantially separate setting. The methodology section explains that Harlan's 1:1 ABA Technician will attend the sessions with him. The sessions will be conducted on an "individual basis and in small/large groups." (S-1 p. 4 & 7, emphasis added) I read that clause to indicate that speech-language therapy may be delivered in any of the referenced settings/methods as appropriate. There is no guarantee in Harlan's IEP that all, or even any, speech-language therapy sessions will be conducted individually. That determination is left to the professional judgment of the treating speech-language pathologist. Therefore I find that the Guardian has not shown that Shrewsbury failed to implement Harlan's "stay put" IEP in any material aspect.

## ORDER

The IEP developed in April 2010 and accepted in May 2010 is the "last accepted IEP" for "stay put" purposes. The setting and services outlined therein were not materially altered by the Guardian's rejections and acceptances of the four subsequently developed IEPs. Shrewsbury has fulfilled its obligation to maintain the "status quo" during the pendency of those disputed IEPs by providing Harlan with the special education program and services set out in the 2010 IEP continuously to date.

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December 9, 2013

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Lindsay Byrne  
Hearing Officer

