

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

In Re: Student v.
Brookline Public Schools &
Department of Children and Families

BSEA # 1400682

**RULING ON PARENT’S MOTION FOR AN ORDER REQUIRING
MAINTENANCE OF CURRENT PLACEMENT DURING PENDENCY OF
PROCEEDING**

Parent requested a Hearing on July 23, 2013 in the above-referenced matter. On July 30, 2013, Parent filed a Motion for an Order Requiring Maintenance of Current Placement During Pendency of Proceeding, also known as a “Stay-put” Order. Parent requests that the BSEA order Brookline Public Schools (Brookline) and Department of Children and Families (DCF) to maintain Student’s current residential placement at the Glenhaven Academy/ Lanewood Program during the pendency of the dispute.

A hearing on the Motion was held on August 6, 2013. At the time of the hearing, only Parent’s Motion and Memorandum had been received by the BSEA. Brookline and DCF however, voiced their positions and were offered an opportunity to submit their respective memoranda the following day. DCF’s and Brookline’s Oppositions and memoranda of law were received on August 7, 2013. This Ruling addresses Sstay-put rights during the pendency of the proceedings before the BSEA and is issued in consideration of Parent’s, DCF’s and Brookline’s submissions and arguments during the Motion session.

FACTS:

For purposes of this Ruling, the following facts are not in dispute.

1. Student, is a seventeen year old high school senior who is a resident of Brookline, Massachusetts. She is scheduled to graduate in June 2014. Student has been found eligible for special education because of a specific learning disability in reading, and behavioral and social/ emotional needs (PE-4).
2. On or about June 9, 2011, Student was placed in DCF custody by Order of the Juvenile Court, pursuant to a Children In Need of Services (CHINS) petition, but Parent retained educational decision-making authority.

3. DCF placed Student residentially at Glenhaven Academy on or about August 8, 2011. On August 10, 2011, Brookline, having agreed to fund the day portion of Student's placement, issued a new placement page (PL1) reflecting Brookline's obligation to fund the day educational component of Student's placement at Glenhaven Academy. Parent accepted the IEP and placement on August 11, 2011 (SE-A). Thereafter, Student has continued attending Glenhaven Academy as a residential student pursuant to a cost-share agreement between Brookline and DCF through July 2013.
4. Glenhaven Academy (Glenhaven) is a Massachusetts Department of Elementary and Secondary Education (DESE) approved residential special education school.
5. At Glenhaven's residential program Student has received "a high level of structure, predictable environment, 24 hour supervision, intensive psychotherapy, and medication management" (DCFE-B).
6. In 2012 Student required hospitalization due to extremely unsafe, self-injurious behavior (SE-B).
7. Student's IEP for the period covering March 6, 2013 to March 5, 2014, calls for Student to continue her "residential" placement at Glenhaven, with the day portion funded by Brookline and the residential portion by DCF.¹
8. This IEP notes that Student requires accommodations to access therapeutic supports as well as a highly structured therapeutic educational programming. The Present Levels of Functioning, Part B explains that

[Student's] disabilities can impede her classroom performance and interaction with others across context. [Student's] emotional disabilities are the cause of inconsistent social and behavioral performance. [Student] experiences difficulty in controlling her impulses and regulating her emotions when she is frustrated. She struggles with utilizing appropriate coping strategies when escalated and can make impulsive, unsafe decisions as well as become verbally escalated toward staff. This causes [Student] to become disorganized and fall behind in her schoolwork making it overwhelming for her to keep up the classroom pace and become frustrated with school. When student

¹ Brookline submitted an IEP placement page for this same period calling for Student's placement at a "Separate Day School" Private, specifically JRI- Glenhaven Academy (SE-C). The document is not signed by Parent and there is no information as to whether Parent accepted Brookline's offer for a day placement, as the Parent did in 2011 and in 2012. In contrast, Parent produced an accepted IEP placement page calling for "residential placement" of Student at Glenhaven, which was purportedly drafted by Glenhaven (PE-4). Karen Schmukler, Assistant Superintendent for Student Services in Brookline, did not clarify whether the placement page produced by Brookline (committing Brookline to a day program) was forwarded to Parent following the March 2013 Team meeting, nor states whether Parent accepted Brookline's day placement separate from the residential placement appearing in PE-4.

becomes overwhelmed she requires intervention and supports to process her emotions (PE-4).

9. The IEP's Transitional Planning Goal includes an objective that states

[Student] will participate in independent living learning opportunities that include accessing transportation (public and personal), budgeting, etc. (PE-4).

Additionally, Student's services call for one hour per week psychiatric/ medical rounds, to be provided by a "psychiatrist, program nurse, clinicians" as well as case management consultation by the "interdepartmental-clinical, education, residential reps" and "academic instruction and social emotional/ behavioral support" to be provided by the "interdepartmental-clinical, education, residential reps." (PE-4).

10. On April 18, 2013, the Juvenile Court dismissed the CHINS Petition and Parent signed a voluntary delegation of custody of Student to DCF.
11. On May 23, 2013, Lauren Kadesh, LICSW, Student's /therapist at Glenhaven, wrote that Student had made progress at Glenhaven, albeit inconsistently, and recommended that Student transition to a group home or Intensive Foster Care (IFC) rather than returning home. Ms. Kadesh noted that Student's ability to succeed was due to the external supports inherent in the residential program without which she could decompensate. Ms. Kadesh stated that in the past the slight anticipation over a transition would cause Student to require extra supports. She also noted that Student required an opportunity to test the skills she had acquired at Glenhaven before returning home. Ms. Kadesh inquired as to whether anyone had any objections (PE-1; DCFE-B).
12. Between May 28 and July 11, 2013, a series of emails ensued between Ms. Kadesh, Parent and DCF regarding Student's move to a group home or an IFC (DCFE-C; DCFE-D; DCFE- E).
13. On June 21, 2013, Parent requested a Fair Hearing with DCF challenging termination of residential supports for Student (PE-2). DCF denied Parent's request on June 26, 2013, on the basis that pursuant to DCF's regulations (110 CMR 10.00 et seq.) the determination regarding the type of placement for a child in the care and/ or custody of DCF was not reviewable by the Fair Hearing Unit. However, Parent could file a grievance through the Director of the Area (PE-3).
14. On July 10, 2013, Ms. Kadesh notified DCF that Student had been moved by Glenhaven staff from the residence at Glenhaven to Lanewood, a group home with a high level of structure operated by Glenhaven for students attending Glenhaven Academy. Lanewood is considered a step-down from the high level of structure at Glenhaven. The move was intended to provide Student more independence within a

structured and supportive setting. According to Ms. Kadesh, the move in Student's living arrangements was intended to provide Student with "some stepping stones to prepare her for a step down" (DCFE-D). DCF was in agreement with this move and meanwhile continued to look for a viable IFC for Student. In her July 10, 2013 email, Ms. Kadesh disclosed that while Parent and Student were not yet aware, Ms. Kadesh would be moving to Walden, a sister program of Glenhaven on August 9, 2013, and would initiate transition of Student to a new clinician the following week (DCFE-D).

15. In an email from Beth Schuhle, LICSW, DCF Supervisor, to three other DCF staff (Jennifer Joseph, Crystal Monteiro and Suzanne Hauck) she stated

FYI... we got clarity from Lauren; Lanewood is still a part of Glenhaven, it is just a separate house which helps transition girls for their next move; more freedom, lower level of care, Lauren remains her clinician, she keeps the same school etc. and they know that IFC will be happening soon; so we agree with Lanewood, as they focus on helping kids transition and giving them less freedom (DCFE-E).

16. After the move to Lanewood group home, Student continued to attend her school program at Glenhaven Academy and has continued to be seen by the same clinical team at Glenhaven as she had previously. DCF continued to fund Student's residence at Lanewood, agreeing to extend Student's placement there past July 15, 2013.

17. In July 2013, DCF notified Parent that the DCF placement team was no longer supporting Student's stay at the group home. Since Student could not yet be transitioned home, DCF was recommending that she be placed in intensive foster care (IFC)(DCFE-A).

18. On August 6, 2013, Crystal Monteiro, LICSW and her supervisor, Beth Schuhle, wrote a letter stating DCF's position that Student should be stepped down to an IFC given that she turns eighteen years old in April 2014 and that the remaining time would best be used to assist her in getting ready for independent living (DCFE-F).

LEGAL CONCLUSIONS:

Parent correctly argues that the BSEA has jurisdiction over the instant case pursuant to 20 USC 1415(j), 34 CFR 300.518 and 603 CMR 28.08(7), addressing maintenance of a student's placement during the pendency of any IDEA proceeding. Additionally, Parent submits that the jurisdiction of the BSEA extends over DCF in accordance with its rules, regulations and policies, pursuant to Massachusetts special education law and regulations. In this regard, 603 CMR 28.08(3) provides in pertinent part that

In order to provide for the resolution of differences of opinion among school districts, private schools, parents, and state agencies, the Bureau of Special Education Appeals, pursuant to G L. c. 71 B, §2A, shall conduct mediations

and hearings to resolve such disputes. The jurisdiction of the Bureau of Special Education Appeals over state agencies, however, shall be exercised consistent with 34 C F R 300.154(a). The hearing officer may determine, in accordance with the rules, regulations and policies of the respective agencies, that services shall be provided by the Department of Children and Families, the Department of Developmental Disabilities, the Department of Mental Health, the Department of Public Health, or any other state agency or program, in addition to the IEP services to be provided by the school district.

To the extent that Student's placement in the instant case was initiated by DCF, and since DCF has been responsible to fund the residential portion of Student's placement, it falls under the jurisdiction of the BSEA for the purpose of ascertaining its responsibilities to Student during the pendency of the proceedings before the BSEA.

Federal and Massachusetts special education laws provide that students are entitled to remain in their then current educational program and placement during the pendency of any dispute unless the parents and the school district agree otherwise. 20 USC §1415(j); 34 CFR 300.518(a); G.L. c.71B §3; 603 CMR 28.08(7).² Therefore, Student would be entitled to remain in her current educational placement until the dispute between Parent, Brookline and DCF regarding Student's residential placement is resolved.³

Typically, a student's placement is predicated upon his or her accepted IEP, the document which dictates a school district's responsibility toward a resident student. The program and placement to which a student is entitled during the pendency of a proceeding is also predicated upon the IEP. There are however instances, such as the instant case, where the determination of a student's stay-put placement is complex because of the involvement of multiple parties and the particular circumstances presented. As such, the particular facts and circumstances must be carefully examined to ascertain the student's rights during the pendency of the dispute. See *Hale v. Poplar Bluff R-1 School District*, 280 F.3d 831 (8th Cir. 2002) (calling for the fact finder to inquire as to the specific facts of the case to examine the impact that educational changes may have on the student). In this regard, a change in the student's educational placement occurs when fundamental changes or elimination of the elements of the educational program are made leaving the student in a situation different from the previous one. See *A.D. Kirby*, 975 F.2d 193, 206 (5th Cir. 1992); see also *Luceford v. District of Columbia Bd. Of Educ.*, 745 F.2d 1577 (D.C. Cir. 1984).

While I appreciate the thorough, well researched and articulated memoranda submitted by the Parties, and while their substantive arguments may be more persuasive at the time of Hearing on the merits, determination of Student's stay-put rights requires a more narrow review. I further note that the purpose of stay-put is to maintain a student's educational situation during the pendency of an IDEA appeal, so as not to disrupt the student's life unnecessarily, especially in situations such as the one before me, which involves a fragile

² Exceptions to stay-put which relate to violations to the code of conduct are not applicable in this matter.

³ See *Verhoven v. Brunswick School Committee*, 207 F. 3d 1, 10 (1st Cir. 1999).

student who, by all accounts does not do well during transitions. Parent argues that “current educational placement” is equivalent to “the operative placement actually functioning at the time the dispute first arises”. *L.Y. ex rel. J.Y. v. Bayonne Bd. of Educ.*, 384 Fed. Appx. 58, 61, 20110 WL 2340176, *2 (3rd Cir. 2010) (quoting *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625-26 (6th Cir.) 1990). Parent seeks a strict interpretation of stay-put, asserting that the stay-put procedural protections apply to DCF and that Student is entitled to continue at the Glenhaven / Lanewood placement under the cost-share agreement between DCF and Brookline. Parent vehemently opposes DCF’s assertion that it may move Student to an intensive foster home during the pendency of the appeal. See: *In Re: Lowell Public Schools & Mass. Dept. of Children and Families*, BSEA # 12-1912 (Ruling on Request for Stay Put)(Crane, October 19, 2011); *King v. Pine Plains Cent. School Dist.*, 918 F. Supp. 772, 780 (S.D.N.Y. 1996)(finding that the IDEA applies to a local DSS office).

Brookline only opposes Parent’s Motion to the extent that the Motion may call upon Brookline to maintain and fund Student’s *full* residential placement. It argues that Student’s placement at Glenhaven has only been contemplated by Brookline as a private day placement. Brookline is committed to continuing funding of the day portion of Student’s placement during the pendency of the appeal. Brookline further argues that it has never agreed to support residential placement of Student and asserts that Student does not require residential placement at Glenhaven in order to receive a FAPE. In this regard, Brookline is getting ahead of itself as the issue of whether Student requires residential placement in order to receive a FAPE is the subject of the full Hearing on the merits in the instant case.

DCF concedes that Student is in its care and that it placed Student at Glenhaven and has funded the residential portion of her program since 2011. It opposes Parent’s Motion asserting that the stay-put relief sought by Parent exceeded the authority of the BSEA because Lanewood is simply Student’s current abode. As such, DCF argued that it is not subject to the stay-put provision of the IDEA. Moreover, DCF disputes that its placement of Student at Glenhaven is an “educational placement” within the meaning of the IDEA because stay-put relates only to the “last placement that the parents and the educational authority agreed to be appropriate” (*Drinker v. Colonial School District*, 78 F.3d 859, 865 (3rd Cir. 1996)), and Brookline, not DCF, is the educational authority. Therefore, DCF takes the position that it is not subject to stay-put provisions. DCF asserts that DCF placement of a child in its care or custody does not constitute stay-put placement because the agency does not provide educational services or placements.

DCF also argues that (to the extent that Student’s placement at Lanewood is considered Student’s educational placement), since the Lanewood placement was temporary in nature it cannot be considered Student’s stay-put placement. DCF asserts that placement of Student at Lanewood did not constitute a service but rather a determination of the child’s place of abode outside the purview of the BSEA. I find neither of these arguments persuasive regarding the issue of stay-put. First, Lanewood falls under the same governance (The van der Kolk Center) as Glenhaven, and the essential elements of Student’s program were not altered. Furthermore, it is not uncommon for residential placements to offer a variety of housing options for students depending, for instance, on age, level of care or the evolving needs of its

students. The change to Lanewood was not a change in placement within the meaning of the IDEA, it was simply a change in housing options within those offered at Glenwood Academy.

Furthermore, at the time Student was moved to Lanewood, Ms. Kadash inquired as to whether there were any objections and none were voiced. Assuming *arguendo*, that the transfer to Lanewood was somehow a change in placement, the Lanewood housing arrangement became a *de facto* agreed upon amendment to Student's IEP.

Second, the statutory jurisdiction over DCF granted to the BSEA permits Hearing Officers to enter determinations in accordance with the rules, regulations and policies of DCF regarding the services which DCF must provide in addition to the IEP services to be provided by Brookline. Given that DCF initiated Student's placement at Glenhaven and has voluntarily funded the residential portion of Student's program since 2011, it is difficult to understand how continuation of the same placement during the pendency of the appeal is inconsistent with DCF's own rules, regulations and governing statutes. DCF's position in this regard is unpersuasive.

The Parties do not dispute that at this juncture Student is not prepared to return home. Since Brookline agrees to continued funding of the day portion of her program, the case turns on whether Student may continue to be housed at Lanewood or whether she may be moved to an IFC during the pendency of the appeal. As stated earlier in this decision, the evidence shows that Student was housed at Lanewood, which falls under the same governance as Glenhaven, and which was deemed appropriate by all Parties.

The fact that DCF may have been looking for an IFC home for Student⁴, but had not yet identified one, is irrelevant. DCF is neither persuasive that it may alter Student's housing at Lanewood in favor of an IFC, nor that the Lanewood arrangement is equivalent to an IFC home. An IFC home is not equivalent to a group home. At an IFC home Student may be the only foster child and the routines and structure would be different than those offered at her placement at Lanewood. Transferring Student to an IFC would constitute a change in placement for purposes of this Ruling.

DCF initiated Student's placement at Glenhaven pursuant to a CHINS petition and then notified Brookline of its determination. Brookline in turn agreed to fund the day portion of Student's placement and remains committed to do so during the pendency of the appeal. To require Brookline to fund the entire residential placement as part of its stay-put responsibility would be unreasonable and inconsistent with Brookline's stay-put obligations. In contrast, requiring DCF to maintain its residential support of Student at Lanewood is simply a continuation of Student's total placement at Glenhaven/ Lanewood consistent with Brookline and DCF's cost-share agreement.

⁴ At the time of the Motion session, DCF had not yet identified a specific IFC home for Student but had rather asked that Student and Parent visit possible IFC locations.

In sum, Student's accepted IEP calls for her residential placement at Glenhaven under a cost-share agreement between DCF and Brookline. In entering into a cost-share agreement with Brookline, DCF became subject to the provisions of the IDEA including procedural protections such as stay-put. See: *In Re: Jeremy L.*, BSEA #93-2353 (Ruling on Motion to Join the Department of Social Services and Request for Stay Put Order under 20 U.S.C. §1415(e)(3))(Apgar, July 8, 1993).

Parent's Motion for an Order Requiring Maintenance of Current Placement during the Pendency of the Proceeding before the BSEA is hereby **GRANTED**. DCF and Brookline shall continue to cost-share Student's placement during the pendency of the dispute.

Lastly, DCF's request for postponement of the Hearing, received on August 7, 2013 is hereby Granted. By agreement of the Parties during the Motion Session on August 6, 2013, this matter will proceed as follows:

1. Exhibits and witness lists are due by the close of business on August 29, 2013.
2. A Hearing will be held on September 5 and 6, 2013 from 2:00 p.m. to 7:00 p.m., and September 11, 2013 starting at 10:00 a.m. at the DALA/BSEA Offices, One Congress St., 11th floor, Boston, MA.

So Ordered by the Hearing Officer,

Rosa I. Figueroa
Dated: August 9, 2013