

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

In re: Harrison & Isabella¹

BSEA #1504277

BSEA #1504282

RULING ON PARENTS' MOTIONS FOR STAY PUT

This matter comes before the Hearing Officers on the Motions of the Parents of Harrison and Isabella for a Stay Put During the Pendency of the Hearing (hereinafter "Motion for Stay Put").² The Motions for Stay Put were filed on March 16, 2015.³ Defendant Amego, Inc. filed its Opposition to Parents' Motion for Stay-Put on March 18, 2015. By way of a status report dated March 17, 2015, defendant Norton Public Schools indicated that it supported Parents' Motion for Stay Put. On March 23, 2015, the last day for any party to file written objections or request a hearing on the Motion pursuant to *Bureau of Special Education Appeals Hearing Rule VII(C)*, Parents filed a second document, entitled "Parent's (*sic*) Response to Amego's Motion to Oppose Parent's (*sic*) Motion for a Stay-Put and Parents (*sic*) Emergency Motion for a Stay-Put of Current Education Placement." A telephonic Motion Session was held on March 26, 2015 before Hearing Officers Catherine Putney-Yacesheyn⁴ and Amy Reichbach during which the parties had the opportunity to supplement their written submissions with oral argument. Additionally, during the conference call Amego, Inc. agreed to extend by three weeks an agreement⁵ it had previously entered into with Norton Public Schools to provide services for Harrison and Isabella, which was due to expire on March 31, 2015.

For the reasons set forth below, Parents' Motions for Stay Put Rulings are hereby ALLOWED IN PART and DENIED IN PART.

¹ "Harrison" and "Isabella" are pseudonyms chosen by the Hearing Officers to protect the privacy of the Students in documents available to the public.

² These cases were filed separately but both families are represented by the same advocate, who has filed identical pleadings in the two matters. At the request of or with the consent of all parties, several joint conference calls have taken place to address the common legal and factual issues, but a formal Motion to Consolidate (filed by defendant Amego, Inc. and opposed by the Parents and Norton Public Schools) is pending.

³ The Parents' advocate had previously tried to file the Motion for Stay-Put by way of email and/or Dropbox, but was instructed in an Order issued on March 9, 2015 that all pleadings must be filed in accordance with the Bureau of Special Education Appeals *Hearing Rules*.

⁴ BSEA # 1504282, regarding Isabella, was initially assigned to Hearing Officer Ann Scannell but was later reassigned administratively to Hearing Officer Catherine Putney-Yacesheyn.

⁵ This agreement was the outcome of a mediation session held on January 6, 2015. This mediation resulted in an agreement whereby Norton Public Schools (hereinafter "Norton") would explore successors to Amego, Inc. (hereinafter "Amego") and Amego would continue to provide services to Harrison and Isabella through the end of March, 2015. Parents submitted a partially signed copy of this agreement in support of their Motion for a Stay-Put During the Pendency of the Hearing. Norton submitted a fully executed agreement on March 17, 2015 as Exhibit A in support of its opposition to the Parents' motion to amend their hearing request.

FACTUAL BACKGROUND⁶ AND PROCEDURAL HISTORY

Harrison and Isabella (hereinafter “Students”) began receiving services from Amego, Inc. (hereinafter “Amego”) at the L.G. Nourse Elementary School, within the Norton Public Schools (hereinafter “Norton”), in or around September 2013. (Parent’s (*sic*) Response to Amego’s Motion to Oppose Parent’s (*sic*) Motion for a Stay-Put And Parents (*sic*) Emergency Motion for a Stay-Put Of Current Education Placement, Exhibit A.) John V. Stokes, Vice President of Children’s Services at Amego, Inc. and Jeanne M. Sullivan, Director of Pupil Personnel Services at Norton Public Schools signed an undated document on Amego’s letterhead entitled “Program Description, Amego Classroom” (hereinafter “Program Description”). The two and a half page document outlined the dates of the program, the staffing, the curriculum, and the services to be provided. During the 2013-2014 school year the program was to run for 196 days beginning on September 3, 2013. During the 2014-2015 school year the program was to run for 245 days. The starting and ending dates were not specified.

The Program Description specifies that the classroom be staffed by a teacher certified in “Severe Disabilities,” two direct care professionals, and a .8 Board Certified Behavior Analyst. The Program Description details the therapeutic services to be provided by Amego, including speech and language services and consultation; occupational therapy services and consultation; and physical therapy services and consultation. The Amego staff was to oversee the development and implementation of the Individualized Education Programs (“IEPs”) for students in the classroom. Norton was to serve as the family’s liaison “as if the Amego program was an out of district placement.” Students were to be provided services in accordance with their IEPs. Home services were to be provided by the direct care paraprofessionals as deemed necessary by the Team. Students would have access to hippotherapy and swimming with the Amego School. Parents would receive consultation and parent training. Norton was to provide Amego with a classroom within one of its elementary schools. According to the Program Description the “Amego classroom would be treated by the district as an out of district placement and program oversight would be provided by Amego.”

Students attended the Amego classroom throughout the 2013-2014 school year and into the 2014-2015 school year. John Stokes sent a letter dated December 16, 2014, to Jeanne Sullivan, providing thirty day written notice that Amego, Inc. was terminating its “Service Agreement” with Norton Public Schools. The letter read, in relevant part, “Due to the deteriorating relationship with the parents and advocate of the students, the program is no longer in any involved parties [*sic*] best interest.” (Answer of Norton Public Schools to Parents’ Request for Expedited Hearing, Exhibit C) Ms. Sullivan sent a letter to Parents, dated December 17, 2014, informing them of Amego’s letter. Ms. Sullivan indicated that Norton would begin exploring options for interim services and stated that the best scenario for Students would be to identify a new program as quickly as possible in order to minimize transitions. Ms. Sullivan informed Parents that her office would schedule a time to reconvene and consider options for placement, including out of district programs. (Answer of Norton Public Schools to Parents’ Request for Expedited Hearing, Exhibit D) Ms. Sullivan then sent an e-mail to Parents dated

⁶ All factual determinations recited in this Part are made for purposes of deciding this Ruling only.

December 19, 2014 indicating that Amego's last day in Norton would be February 6, 2014. (Answer of Norton Public Schools to Parents' Request for Expedited Hearing, Exhibit D)

On December 19, 2014 the Parents of Harrison and Isabella each filed a Hearing Request with the BSEA against Norton and Amego, requesting expedited status pursuant to BSEA *Hearing Rule II(C)(1)(b)(iii)* as both students would soon be without a program. Expedited status was granted and hearings in both matters were scheduled for early January 2015. After a Hearing Officer-initiated conference call on December 31, 2014, Parents' advocate requested that the matters be removed from the expedited track in order to allow the parties to engage in alternative dispute resolution.

The Parties entered into an Agreement Reached Through Mediation (hereinafter "Agreement") on January 6, 2015. According to the terms of the Agreement, the programming provided by Amego, Inc. within the Norton Public Schools would continue through the end of March 2015. Additionally, Amego was to provide up to three weeks of transitional programming "involving both the old and new service providers." (Parents' Motion for a Stay-Put During the Pendency of the Hearing, Exhibit 1)

In filing their Motions for Stay Put, Parents assert that Harrison and Isabella are entitled to continue to attend the L.G. Nourse Elementary School, with all services detailed in the Program Description and/or the children's IEPs to be provided by Amego, during the pendency of this action before the BSEA.

DISCUSSION

A. Legal Standard for Stay Put

The Individuals with Disabilities Education Act (IDEA) contains a provision commonly referred to as "stay put," which 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."⁷ "The relevant inquiry . . . thus becomes the identification of the then current educational placement" of the child.⁸ Although many cases turn on its meaning, neither the IDEA nor federal and state regulations governing stay put define the term.⁹ In determining "then-current education placement" for individual students, courts have considered the essential purpose of this provision, which is to "preserve the status quo pending resolution of" the dispute concerning that

⁷ 20 USC § 1415(j); 34 CFR §300.518.

⁸ *Drinker ex rel. Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 865 (3d Cir. 1996) (internal quotation marks omitted).

⁹ See 20 USC § 1415(j); 34 CFR §300.518; 603 CMR 28.08(7); see also *Drinker*, 78 F.3d at 865 n. 13 ("Neither the statute nor the legislative history provides guidance for a reviewing court on how to identify 'the then current educational placement'.")

child's placement.¹⁰ "Because the term connotes preservation of the status quo, it refers to the operative placement actually functioning at the time the dispute first arises. If an IEP has been implemented, then that program's placement will be the one subject to the stayput (*sic*) provision."¹¹

Although school districts are not permitted to make unilateral changes to a child's educational program¹² this does not mean that every change with respect to a student's operative placement constitutes a violation of the stay put mandate.¹³ The issue is individualized and "fact intensive."¹⁴ Courts are clear, however, that a proposed change in services that would likely substantially change a student's current educational services implicates stay put principles.¹⁵ A change in setting may be considered a change in placement under some circumstances, but not in others. "To the extent that a new setting replicates the educational program contemplated by the student's original assignment" and there is no "dilution of the quality of a student's education or . . . departure from the student's [least restrictive environment]-compliant setting," no change in educational placement has occurred.¹⁶ Furthermore, "transfer to a different school building for fiscal or other reasons unrelated to the disabled child has generally not been deemed a change in placement."¹⁷

In this case, the stay put issue is not a proposed change in program location during the pendency of the proceedings, but a potential change in service providers.

¹⁰ *Verhoeven v. Brunswick Sch. Comm.*, 207 F.2d 1, 3 (1st Cir. 1999); see *Drinker*, 78 F.3d at 864 ("The provision represents Congress' policy choice that all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved.")

¹¹ *Jackson ex rel. Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625-26 (6th Cir. 1990); see *Drinker*, 78 F.3d at 867 (internal citation omitted) ("the dispositive factor in deciding a child's 'current educational placement' should be the Individualized Education Program ('IEP'). . . actually functioning when the 'stay put' is invoked").

¹² See, e.g., *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 82 (3rd Cir. 2010); *Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 83 (3d Cir. 1996).

¹³ See *DeLeon v. Susquehanna Cmty. Sch. Dist.*, 747 F.2d 149, 154 (3d Cir. 1984) (concluding that modifications to the method of transportation to and from school did not constitute a change in placement that would violate the stay put provision); *id.* at 153 (observing that some minor decisions would not constitute a change of placement and that, for instance, "replacing one teacher or aide with another should not require a hearing").

¹⁴ *Hale ex rel. Hale v. Poplar Bluff R-I Sch. Dist.*, 280 F.3d 831, 834 (8th Cir. 2002) (whether there has been a change in student's "then-current educational placement" is a "fact-specific" inquiry that turns on the impact of change of placement on student's education).

¹⁵ See *Sherri A.D. v. Kirby*, 975 F.2d 193, 206 (5th Cir. 1992) ("an educational placement . . . is not changed unless a fundamental change in, or elimination of, a basic element of the educational program has occurred"); *DeLeon*, 747 F.2d at 154 (noting that schools may not make changes during the pendency of an appeal that "may have a significant effect on a child's learning experience").

¹⁶ *A.W. ex rel. Wilson v. Fairfax County Sch. Bd.*, 372 F.3d 674, 682 (4th Cir. 2004).

¹⁷ *Hale*, 831 F.3d at 834. See *DeLeon*, 747 F.2d at 153 (citing *Tilton v. Jefferson County Bd. of Educ.*, 705 F.2d 800, 804) (6th Cir. 1983) (observing that the Sixth Circuit has noted that stay put is focused on individual students, and that in enacting the provision Congress had not intended to interfere with a fiscal policy decision traditionally the concern of local school officials).

B. The Parties' Positions

In their Motion for Stay Put, Parents contend that until this matter is resolved by a hearing on the merits, Harrison and Isabella should continue to receive their educational program in a classroom at the L.G. Nourse Elementary School with services being delivered by Amego, Inc. They argue that Students' current placement includes Amego as the service provider and all Amego staff. According to Parents, the Program Description signed by both Jeanne Sullivan and John Stokes constitutes a contract for their benefit, and it remains in effect. They assert that the only manner in which Harrison and Isabella's IEPs can be implemented pending the hearing is for Amego to continue providing their services until the end of the 2014-2015 school year.

Although it did not formally join the Parents' Motion for Stay Put or submit its own Response, Norton has expressed its agreement that stay put for Harrison and Isabella is the "Amego classroom" within the Norton Public Schools, with all services detailed in the Program Description and/or the Students' IEPs to be provided by Amego. (Norton Public Schools Status Report Submitted on March 17, 2015 in accordance with the Hearing Officers' February 4, 2015 Order)

Amego argues that stay put does not apply to it, not because it is a private school¹⁸ but because notwithstanding the Program Description's language suggesting that Norton would treat the program "as if [it] was an out of district placement," it is in fact an in-district placement, with certain defined assistance to Norton from Amego. Amego, therefore, has been acting as a contractor, not a placement, and Norton Public Schools, not Amego, Inc. is the entity responsible for implementing Harrison and Isabella's IEPs. According to Amego, it agreed to provide certain services and staffing support to Norton for a defined period of time, with the parties agreeing that it could withdraw from L.G. Nourse Elementary School at any time, as long as it gave Norton thirty days' notice. (Amego, Inc.'s Opposition to Motion For a Stay-Put During the Pendency of the Hearing)

C. Stay Put for Harrison and Isabella

All parties to this action agree that Harrison and Isabella are entitled to stay put in their "current educational placement" pending the outcome of the hearing before the BSEA. The parties differ, however, as to the description of and scope of responsibility for providing that "current educational placement." In determining Students' "current educational placement," we keep in mind the notion that "IDEA stay put principles that determine a student's 'then-current

¹⁸ Cf. *P.N. v. Greco*, 282 F. Supp. 2d 221, 237 (D.N.J. 2003) ("As a private school accepting placements of student protected by the IDEA, [the school] is subject to IDEA regulations, and it can therefore be held liable under the IDEA for its failure to comply with the IDEA rules in connection with the termination of [the student's] placement.")

educational placement’ are neither rigid nor automatic. The specific facts of the particular case guide the determination . . .”¹⁹

Under the specific facts of this case, both Harrison and Isabella attend a program at the L.G. Nourse Elementary School.²⁰ In this program all of their special education and related services and the people who deliver those services are provided by Amego. These services are described in the Program Description and in Students’ IEPs. As discussed earlier, “the dispositive factor in deciding a child’s ‘current educational placement’ should be the Individualized Education Program (‘IEP’). . . actually functioning when the ‘stay put’ is invoked.”²¹ For this reason, the services described in Harrison and Isabella’s IEPs and provided at L.G. Nourse Elementary School constitute their educational placements.²² Since approximately September 2013, Norton has contracted with Amego to provide those services. During this time Norton (as the LEA) remained ultimately responsible for the delivery of Students’ services.²³ Upon terminating its contract with Norton, Amego ceased to have any obligation to Students with respect to future service delivery. In the absence of Amego’s services and staffing,²⁴ it will be Norton’s responsibility to replicate “the educational program contemplated by the student[s]’ original assignment[s],” without diluting the quality of their education.²⁵ In sum, Harrison and Isabella are entitled to implementation of their IEPs during the pendency of these proceedings. This means that they must attend a program at the L.G. Nourse Elementary School comprised of the services they have been receiving pursuant to their current IEPs. They are not entitled to receive these services from Amego. Norton, as the responsible LEA, must ensure that Students receive these uninterrupted services pursuant to their IEPs. It will be up to Norton to determine whether to provide Students’ services using its own staff or using contracted service providers as it did with Amego.

CONCLUSION

Upon consideration of the Parents’ Motions for Stay-Put in both cases, as well as the relevant documents submitted by the parties and the arguments made, the Parents’ Motions are **ALLOWED IN PART** and **DENIED IN PART**. To the extent the Parents seek an Order from the

¹⁹ *In Re Dracut Public Schools and Melmark New England*, 14 MSER 286, 289 (Crane 2008).

²⁰ The stay put placement is an in-district substantially separate program, as opposed to an out-of-district placement. Despite the language used in the Program Description indicating that the Parties intended to treat the placement as an out-of-district placement, there is no legal or factual basis for finding it was anything other than a substantially separate classroom operated by contractors. For purposes of this ruling, if we had agreed with Parents’ argument that the Amego classroom constituted an out-of-district placement, the Students’ stay put placement would have been an alternate out-of-district placement which could provide the services in Students’ last accepted IEPs.

²¹ *Drinker*, 78 F.3d at 867 (internal citation omitted).

²² See *id.*

²³ See 300 CFR 300.33 (including in the definition of public agencies under this section LEAs responsible for providing education to children with disabilities).

²⁴ See *DeLeon*, 747 F.2d at 153 (observing that replacing one teacher or aide with another would not constitute a change in educational placement).

²⁵ *AW ex rel. Wilson*, 372 F.3d at 682 (internal quotations omitted).

BSEA preventing Norton from changing Harrison and Isabella’s educational placement during the pendency of this proceeding, their motion is ALLOWED. However, to the extent they seek a finding that Students’ “current educational placement” requires Amego to continue to provide the services specified on their IEPs, their motion is DENIED.

ORDER

The Parents’ Motion for A Stay-Put during the Pendency of the Hearing is hereby ALLOWED IN PART and DENIED IN PART.

A conference call in this matter is scheduled to take place on April 9, 2015.

The Hearing in Harrison’s case will take place on June 9 and 10, 2015. The Hearing in Isabella’s case will take place on May 4 and 6, 2015.

By the Hearing Officers:

Catherine Putney-Yaceshyn
Dated: April 8, 2015

Amy M. Reichbach
Dated: April 8, 2015