**COMMONWEALTH OF MASSACHUSETTS**

***DIVISION OF ADMINISTRATIVE LAW APPEALS***

**BUREAU OF SPECIAL EDUCATION APPEALS**

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**IN RE:    Student**

**v. BSEA #2103476**

**Belmont Public Schools &**

**Devereux Advanced Behavioral Health**

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**RULING ON PARENTS’ MOTION FOR STAY PUT**

On November 6, 2020, Parents filed a *Request for An Accelerated Hearing and Motion for Stay Put* seeking, in part, an interim order entitling Student to stay-put at Devereux during the pendency of this dispute; an order entitling Student to stay-put at Devereux until another appropriate placement is identified and becomes available; and an order compelling Belmont to arrange and fund any additional personnel or services to maintain Student’s and others’ health and safety while he remains at Devereux. In support of their position, Parents argued that Student is entitled to stay-put at Devereux during the pendency of this dispute as “Student has no other placement available to him and is unable to safely return home.”

On November 25, 2020, the Belmont Public Schools (Belmont) responded that it is not opposed to funding any additional staff (as deemed necessary by the Team) to maintain the Student’s placement at Devereux Advanced Behavioral Health (Devereux). Belmont also noted that it had sent out referrals to over twenty (20) placements and had only identified The Judge Rottenberg Center (JRC) as a possible appropriate placement. However, JRC has informed Belmont that they currently have a waiting list and cannot ascertain the amount of time that Student may be on the waiting list, but that the typical length of time is approximately two months and placement thereon is conditional on the Student’s medical clearance and formal acceptance. Belmont also indicated that it has engaged in discussions with the Department of Developmental Disabilities (DDS) regarding funding a DDS placement until the Student turned 22 years of age.

On December 2, 2020, Parents requested that the matter be removed from the accelerated calendar and proceed in accordance with the timelines set forth in federal and state law, pursuant to BESA Hearing Rule II(D)(4)(b). Parents also requested a postponement of the Hearing scheduled for December 7, 2020.

On December 2, 2020, Devereux responded in opposition to Parents’ request and argued that stay-put is a requirement imposed on the LEA and that a private program is not subject to stay-put but is, instead, subject to DESE regulations that authorize emergency termination. Devereux further asserted that stay-put is “not absolute. Rather, public school officials are entitled to exclude students when the interests of maintaining a safe learning environment outweigh the dangerous child’s right to receive a free and appropriate public education.” In support of its argument, Devereux noted that Student is dangerous to himself and others and has received limited education in 2020.

Following a Zoom conference on December 4, 2020, during which the Parties’ concerns were discussed, the Hearing Officer granted Parents’ request to take this matter off the accelerated track and to have it placed under regular IDEA timelines. The Hearing Officer also granted Parents’ request for postponement of the Hearing scheduled for December 7, 2020 and continued the matter to January 6 and 7, 2021, dates selected by the Parties during the December 4, 2020, Zoom conference.

During the Zoom conference the Parties reiterated their request for a ruling on *Parents’ Motion for Stay Put*.[[1]](#footnote-1) At that time, the Parties did not request an opportunity to put forth oral and/or written arguments on the *Motion*.

 This *Ruling* addresses Parents’ *Motion* for clarification of Student’s sta-put. After careful consideration of the information before me, Parents’ request for an interim order entitling Student to stay-put at Devereux during the pendency of this dispute is hereby **GRANTED**. While Student may remain at Devereux during the pendency of the instant matter, I note that the Parties are currently working on identifying an alternative placementwhich may become available. Its availability and appropriateness may then be ascertained at the evidentiary hearing scheduled for January 2021**.**

FACTUAL BACKGROUND

The facts appearing herein are considered to be true for purposes of this Ruling only.

1. Student is a twenty-one (21) year old man who will turn 22 in November of 2021 and who is currently placed as a residential student at Devereaux in Rutland, Massachusetts pursuant to a fully accepted IEP dated 1/15/2020-1/14/2021.
2. Student has been attending Devereux since March 2017.
3. Belmont is the LEA responsible for providing Student with a FAPE.
4. On July 20, 2020 as a result of Student’s increasingly unsafe behaviors, including but not limited to aggression toward staff, medication refusal, bolting, and refusal to attend school, Devereux issued an emergency discharge letter to Parents and to Belmont.
5. An emergency Team meeting was held on August 5, 2020, but, on or about September 15, 2020, Devereux extended the timeframe for termination because the Team appeared to be in the process of securing a placement.
6. Although Belmont has sent out referral packets to multiple potential placements, only JRC in Canton, MA emerged as a potential option.
7. On or about October 20, 2020, concerned that Parents were not participating in the admission process with JRC, Devereux issued a termination deadline for Student for November 14, 2020.
8. JRC has a waitlist and placement therein is conditioned on a medical clearance and formal acceptance.
9. Devereux continues to cite daily episodes of physical aggression, bolting and property destruction by Student. Student’s behaviors require multiple staff to manage him safely. Student’s aggression toward staff has necessitated staff members pursuing medical care.
10. Because of his aggression, bolting behavior and property destruction, Student has received limited access to education during calendar year 2020.

LEGAL FRAMEWORK

1. *Stay-Put Provision.*

The IDEA’s “stay-put” provision requires that unless the State or local educational agency and the parents otherwise agree, during the time that a parent and school district are engaged in an IDEA dispute resolution process, “the child shall remain in the then-current educational placement of the child….” 20 U.S.C. §1415(j); 34 CFR §300.514; *Honig v. Doe*, 484 U.S. 305 (1988); *Verhoven v. Brunswick School Committee*, 207 F.3d 1, 10 (1st Cir. 1999); *M.R. and J.R. v. Ridley School District*, 744 F.3d 112 (3d Cir. 2014); M.G.L. c. 71B; 603 CMR 28.08(7); *In Re: Abington Public Schools*, 20 MSER 198 (2014); *In Re: Framingham Public Schools and Quin*, BSEA**#**1605247, 22 MSER 12 (2016).  To determine a child’s “stay-put” placement, courts look to the IEP that is “actually functioning at the time the dispute first arises.” *Drinker v. Colonial School District*, 73 F.3d 859, 867 (3rd Cir. 1996). Preservation of the “status quo” assures that the student “stays put” in the last placement the parents and the local education agency (LEA) agreed was appropriate for him. See *Doe* v. *Brookline School Committee*, 722 F.2d 910 (1st Cir. 1983). In addition, the stay-put provision reflects “the preference of Congress for maintaining the stability of a disabled child’s placement and minimizing disruption to the child while the parents and school are resolving disputes.” *Student & Concord & Natick Public Schools*, BSEA # 18-00182, 23 MSER 210 (2017) (*Corrected Ruling on Mother’s Request for “Stay Put” Order*). Recent decisions in other circuits and at the BSEA focus on the impact of the proposed change on the student.  *See* *AW. v. Fairfax County School* *Board*, 41 IDELR 119 (4th Cir. 2004); *In Re: Agawam Public Schools and Melmark-New England,* BSEA #1504488,21 MSER 81 (2015).

1. *Stay-Put as to Location versus Program.*

Although neither the IDEA nor the Part B regulations define the term "current educational placement,” most courts have interpreted the term to mean the type of program the student is receiving as opposed to a specific school or classroom. See*, e.g.,* *N.D. v. State of Hawaii, Dep't of Educ.*,[54 IDELR 111](https://www.specialedconnection.com/LrpSecStoryTool/servlet/GetCase?cite=54+IDELR+111)(9th Cir. 2010) (holding that a change in placement occurs when a student is moved to a different type of program or when there is a significant alteration of the student's program even though he stays in the same setting); *AW v. Fairfax County Sch. Bd.*,[41 IDELR 119](https://www.specialedconnection.com/LrpSecStoryTool/servlet/GetCase?cite=41+IDELR+119)(4th Cir. 2004) (finding that a Virginia district's decision to transfer a gifted student with an emotional disability to a similar gifted and talented program at another school didn't violate the IDEA's stay-put provision). As used in the stay-put provision, the word "current" generally means the placement and services that are in effect when the parents file their due process complaint, and in most instances, these services will be found in the student's most recently implemented IEP. See*, e.g.,* *John M. v. Board of Educ. of the Evanston Twp. High Sch. Dist. No. 202*,[48 IDELR 177](https://www.specialedconnection.com/LrpSecStoryTool/servlet/GetCase?cite=48+IDELR+177)(7th Cir. 2007) (holding that the IDEA's stay-put provision does not apply to services provided outside of an IEP). Similarly, BSEA decisions have suggested that “the ‘stay-put’ right does not necessarily ensure staying at the same location, but rather, ensures the same program and kind of placement - that, potentially, can be provided at a different location.” *In re: Falmouth Public Schools, the Cotting School, and Susan,* BSEA #05-1581, 10 MSER 496 (2004) (referring to federal commentary, volume 64 of the federal register at page 12616); see also *In Re: Georgetown Public Schools and Landmark School,* BSEA #1408733, 20 MSER 169 (2014). In other words, a student's stay-put placement may refer to the type of special educational program and services rather than to a specific school. See *In re: Dracut Public Schools and Melmark,* BSEA #091566, 14 MSER 286 (2008) (holding that Melmark School, Student's then current private school, did not constitute Student's stay-put placement).“To the extent that a new setting replicates the educational program contemplated by the student's original assignment and is consistent with the principles of mainstreaming and affording access to a FAPE, the goal of protecting the student's educational placement served by the stay-put provision appears to be met.” *A.W. v Fairfax County School Board*, 372 F.3d 674, 682 (4th Cir. 2004); see also *In re: Dracut Public Schools and Melmark,* BSEA #091566, 14 MSER 286 (2008) (finding that “IDEA stay-put principles that determine a student's ‘then-current educational placement’ are neither rigid nor automatic”). Hence, whether “a student’s specific school placement must be maintained as his or her stay-put placement” is a case-specific inquiry. *In Re: Dracut Public Schools and Melmark New England*, BSEA # 091566, 14 MSER 286 (2008). Nevertheless, although BSEA cases have determined that the "stay-put" requirements could be fulfilled by providing student with services that were "comparable" to those he or she had been receiving, but in a different location, such cases depend on the availability of another “viable” placement. *In Re: Framingham Public Schools, Guild for Human Services, Inc. and the Department of Developmental Services,* BSEA # 1808824, 24 MSER 68 (2018) (finding that “the comparability line of cases does not pertain to the instant case, because there simply is no other placement available to Student. If there was a viable option of placing Student in another residential school which could implement his accepted IEP, there would be no dispute in this matter”.)

1. *Stay-Put and Publicly Funded Private Programs.*

Massachusetts regulations provide that “Students in out-of-district placements shall be entitled to the full protections of state and federal special education law and regulation.” 603 CMR 28.06(2)(f)(1). Under both federal and state special education law, an eligible student who challenges any aspect of her special education program through a due process proceeding is entitled to remain in the program in which the student is then currently enrolled until the dispute is resolved by an administrative or judicial officer, or by an agreement. See20 U.S.C. §1415 (j); 34 CFR § 300.514; 603 CMR 28.08 (7). The regulatory language presents this right as unequivocal. See *Honig v. Doe*,[559 IDELR 231](https://www.specialedconnection.com/LrpSecStoryTool/servlet/GetCase?cite=559+IDELR+231)(U.S. 1988). “There are no qualifiers. [The regulatory language] does not distinguish between types of placement: public or private; day or residential; home-based or center-based.” *In Re: Northampton Public Schools & Lolani*, BSEA#04-0359, 9 MSER 397 (2003) (finding that to “fail to extend the same measure of ‘stay-put’ protection to an eligible student who, because of the nature or extent of her disability cannot be educated within the public school system, as is without question enjoyed by students attending public school programs, would be to fail to deliver on the IDEA's promise of equal education for all students with disabilities”); see also *In Re: Framingham Public Schools, Guild for Human Services, Inc. and the Department of Developmental Services,* BSEA # 1808824, 24 MSER 68 (2018) (finding that the regulations governing private special education schools “relate back to the general special education regulations found at 603 CMR § 28.00, which includes the ‘stay-put’ provision and do [not] provide for any exemption for publicly placed private school students”.)

1. *Exception to Stay-Put Provision.*

Pursuant to 20 U.S.C. § 1415(k)(3)(B)(ii)(II), a Hearing Officer may order a change of placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the Hearing Officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others. See20 U.S.C. § 1415(k)(3)(B)(ii)(II); 603 CMR § 28.08(7)(c); see also*, In Re: Mercy Centre & Brockton Public* Schools, BSEA #1304173, 19 MSER 142 (2013) (finding “ample evidence” that maintaining student’s placement “even for a two week period would have presented an unreasonable risk of harm to the students and staff at Mercy Centre” and to the student herself); see also*, In Re: Dracut Public Schools and Melmark New England,* BSEA # 091566, 14 MSER 286 (2008) (holding that notwithstanding the difficulty of a scenario where “if Melmark is not considered [s]tudent’s stay-put placement, [s]tudent may possibly be left with no educational program,… it cannot justify a stay-put placement into a program that has been demonstrated to be unsafe”.) Nevertheless, the interim alternative educational setting must be “appropriate” for the student and offer a free and appropriate public education (FAPE). 20 U.S.C. § 1415(k)(3)(B)(ii)(II);see *In re: Falmouth Public Schools, the Cotting School, and Susan,* BSEA #05-1581, 10 MSER 496 (2004) (finding that “neither a lengthy stay at Cotting nor moving [the student] to a different program is in her interest unless it is deemed to be FAPE.”)

In addition, a student’s right to stay-put does not bar a publicly funded private program from terminating a student appropriately. See *In Re: Georgetown Public Schools and Landmark School,* BSEA #1408733, 20 MSER 169 (2014). Massachusetts regulations allow private special education schools to terminate students for safety concerns but condition such termination on providing the public school sufficient time to search for an alternative placement and assume responsibility for the student. See603 CMR 28.09(12); *see* *also* *In re: Falmouth Public Schools, the Cotting School, and Susan,* BSEA #05-1581, 10 MSER 496 (2004). However, even where a private program follows 603 CMR 28.09(12) and its own termination policy, under certain unique circumstances where a student has no other placement available to him and is unable to return home safely, his “stay-put” placement has to be the then-current placement at the private school until a new appropriate placement is identified. See *In Re: Framingham Public Schools, Guild for Human Services, Inc. and the Department of Developmental Services,* BSEA # 1808824, 24 MSER 68 (2018) (“As a matter of public policy and if the IDEA’s stay-put provisions are to have any meaning, the BSEA cannot issue a decision finding that Student does not have any placement in which to remain during the pendency of this matter”); see also, *In Re: Northampton Public Schools & Lolani*, BSEA#04-0359, 9 MSER 397 (2003) (as “there has been no showing of an existing, comparable special education program, the only appropriate interim relief the Bureau could order would be continued placement at Clarke. Were Clarke relieved of its responsibility to maintain the Student’s status quo placement, it is likely Student would be without a free, appropriate public education for an indefinite period of time”); *In Re: Quincy Public Schools,* BSEA # 2005974, 26 MSER 50 (2020) (finding that although the district “has met its burden of showing that maintaining Student's placement … is substantially likely to result in injury to Student or others, … it did not present evidence that Student has been accepted into any program” thereby preventing the Hearing Officer from ordering “placement in a specific program”.)

**DISCUSSION:**

When establishing the stay-put provision of the IDEA, Congress intended to minimize the disruption to a student’s education during the pendency of a dispute. While there may be case-specific exceptions to this mandate, I find that in the instant case, Student’s stay-put placement, consistent with Congressional intent, is Devereux. My reasoning follows.

Student has been attending Devereux since March 2017. His last accepted IEP, dated 1/15/2020-1/14/2021, identifies Devereux as Student’s placement. Hence, the IEP dated 1/15/2020-1/14/2021 is the “actually functioning” IEP at the time that the present dispute arose. See *Doe* v. *Brookline School Committee*, 722 F.2d 910 (1st Cir. 1983). Devereux’s standing as a private special education program does not shield it from the IDEA’s stay-put provision. See *In Re: Northampton Public Schools & Lolani*, BSEA#04-0359, 9 MSER 397 (2003). Student is entitled to all the protections of the IDEA, including the key procedural safeguard of having his “status quo” maintained during the pendency of this dispute. *See* 20 U.S.C. §1415 (j); 34 CFR § 300.514; 603 CMR §28.08 (7); *Honig v. Doe*,[559 IDELR 231](https://www.specialedconnection.com/LrpSecStoryTool/servlet/GetCase?cite=559+IDELR+231)(U.S. 1988).

Nevertheless, even though Devereux is the last placement accepted for Student, its continued appropriateness is questionable. See *In Re: Dracut Public Schools and Melmark New England,* BSEA # 091566, 14 MSER 286 (2008) (finding that a stay-put placement cannot be one that “has been demonstrated to be unsafe”). In addition, Devereux is correct that, as an exception to the stay-put provision, a hearing officer may order a temporary change in placement of an eligible student for reasons consistent with federal law, including but not limited to, when maintaining such student in the current placement is substantially likely to result in injury to the student or others. *See* 603 CMR 28.08(7)(c). Devereux insists that Student’s continued placement there is substantially likely to result in injury to himself or others, and, indeed, the limited facts before me suggest that Student has been struggling with respect to safe behaviors at Devereux. Daily, Student exhibits dangerous behaviors that have resulted in injury to himself and others. In addition, because of his unsafe behaviors, Student has had limited access to education, and has made limited educational progress.

In the context of disciplinary matters (which is not the case in the case at bar) a student must remain in his/her then current educational placement unless the parents and the district agree on a different placement. 34 CFR 300.518 (a). In circumstances when parents and districts agree that a child needs a change in placement but cannot agree on an appropriate alternative placement, the student is entitled to remain in the then current, albeit inappropriate, placement under the student’s stay-put IEP. See *CP v. Leon County Sch. Bd. Fla*., 47 IDELR 212 (11th Cir. 2007), cert. denied, 112 LRP 1231, 552 U.S. 903 (2007); see also *M.M. v. Special Sch. Dist. No.1*, 4DELR 61 (8th Cir. 2008), cert denied, 108 LRP 68182, 129 S. Ct. 452 (U.S. 2008). If the child continues to misbehave in ways that endanger him/herself, other students, or staff, or if the district (and/or private school) believes that the then current placement is so inappropriate that it is dangerous, their recourse lies in filing for preliminary injunction per *Honig v. Doe*, 559 IDELR 231 (U.S. 1988).

As noted above, this matter does not involve disciplinary action. Therefore, absent the existence of an alternative appropriate placement, or the Parties’ agreement to an alternative interim placement, Student’s right to stay-put at Devereux may not be altered by the BSEA.

Whether “a student’s specific school placement must be maintained as his or her stay-put placement” is a case-specific inquiry. *In Re: Dracut Public Schools and Melmark New England*, BSEA # 091566, 14 MSER 286 (2008). In the instant case, no placement other than Student’s “specific school placement” is available. As in *Framingham*, in *Quincy*, and in *Dracut*, a comparable program to the educational program contemplated by Student's currently functioning IEP has yet to be identified despite consistent efforts by Belmont. Although JRC has been identified as a potential option, Student has yet to be medically cleared and formally accepted. Even then, Student would be placed on a waiting list. As such, there is presently no comparable program to contemplate for Student’s stay-put placement. While I am sensitive to the safety concerns raised by Devereux, the facts before me simply do not demonstrate the availability of any other appropriate program at this time. Although, as stated in *Dracut*, “IDEA’s stay-put principles that determine a student’s ‘then-current educational placement’ are neither rigid nor automatic,” the reality is that Student currently has no other possible stay-put option. *In Re: Dracut Public Schools and Melmark New England*, BSEA # 091566, 14 MSER 286 (2008). At this time, and until the full Hearing on the merits (currently scheduled for January 6 and 7, 2021)*,* I am precludedfrom ordering an alternative stay-put placement for Student. Since Student has no other placement available to him and is unable to return home safely, his “stay-put” placement, during the pendency of thisHearing, must be Devereux. See *In Re: Framingham Public Schools, Guild for Human Services, Inc. and the Department of Developmental Services,* BSEA # 1808824, 24 MSER 68 (2018); see also *In Re: Quincy Public Schools,* BSEA # 2005974, 26 MSER 50 (2020).

Lastly, I note that Belmont has remained fully committed to support Student’s placement at Devereux by agreeing to arrange and fund any additional services and/or personnel to assure Student’s health and safety, as well as that of others, in addition to continuing to facilitate and support Student’s possible placement at a different school.

**ORDERS**:

1. Parents’ request for an interim order entitling Student to stay-put at Devereux during the pendency of this dispute is hereby **GRANTED**. Specifically, for the duration of the appeal before me, Student shall remain placed at Devereux consistent with the stay-put provisions of the IDEA and MGL c. 71B.
2. The issue regarding an alternative placement and its appropriateness for Student will be addressed at the hearing on the merits currently scheduled for January 6 and 7, 2021.
3. Belmont shall work together with Devereux to arrange for and or fund any additional personnel and/ or services necessary to support Student’s stay-put placement at Devereux safely.

By the Hearing Officer,

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Rosa I. Figueroa

Dated: December 8, 2020

1. I note that Parents’ initial Hearing Request solely addresses the question of stay-put. Thereafter, Parents wrote to the BSEA noting that they also intended to challenge the appropriateness of JRC, a potential placement, at the Hearing. Parents have not yet Amended their Request for Hearing to include this challenge and were advised to do so promptly if they wished to challenge this placement at Hearing. [↑](#footnote-ref-1)