**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In re: Student v. Newburyport Public Schools BSEA # 2311471, 2401600**

**RULING ON PARENTS’ MOTION TO CREATE STUDENT PROGRAMMING**

**AND FOR COMPENSATORY SERVICES**

This matter comes before the Hearing Officer on the August 18, 2023Parents’ *Motion To Create Student Programming And For Compensatory Services*  (hereinafter, *Motion*). Specifically, Parents contend that

“[p]ursuant to BSEA Rule VI and 801 CMR 1.01 (7), Petitioners move for an interim resolution on Student’s placement and compensatory services. ‘If warranted a hearing officer may order… a school to locate or create an appropriate placement; order a school to provide certain special education services; or order a school to reimburse a parent for providing such necessary services.’”[[1]](#footnote-1)

Parents assert, in part, that

“An interim home-based program was implemented for Student from April 2020 to November 2021 under the supervision of an education consultant with subsequent progress reports documenting Student’s progress, abilities and academic capability. This program was funded and overseen by the District. Student needs consistency in providers and will continue with the same providers for education consultation, occupational therapy, speech therapy, physical fitness at the YWCA, respite, and equine facilitated psychotherapy. Student has made progress with these limited medical services and consistency of providers is a key to success for Student with her programming.

Petitioners move for District to support these services above in the interim of the proceedings before the BSEA as well as provide a special education teacher, BCBA, 1:1 ABA support to Student and transportation services as contracted in her IEP (with a nurse and monitor) during the hours of a normal school day. Currently, Student is on hiatus from ABA support due to staffing; additionally, the current provider cannot be authorized by insurance to provide any educational support to Student as such would be under the provision of the IDEA and contracted in Student’s 2022-2023 IEP and not a medical service. There is clearly a danger that Student will regress should the lack of full services continue unabated due to the District’s failure to support a Student under their jurisdiction.”

On August 25, 2023, Newburyport Public Schools (Newburyport or the District) responded with *The Newburyport Public Schools’ Objection To The Parents’ Motion To Create Student Programming And For Compensatory Services*, opposing the *Motion* (*Opposition*) and asserting that

“[t]he Parents’ Motion is a transparent attempt to change the Student’s last agreed upon (i.e., ‘stay-put’) placement to a home setting pending resolution of the dispute currently before the Hearing Officer. As a matter of law, under the present circumstances, the requested relief is prohibited by the Individuals with Disabilities Act (IDEA). The Parents fail to provide a legal basis justifying alteration of the status quo of the Student’s ‘stay-put’ placement. Moreover, the Parents’ failure to avail themselves of the Student’s last agreed upon program, and their obstruction of the District’s ability locate an alternative placement preclude them from obtaining the requested relief.”[[2]](#footnote-2)

Parents requested a hearing on the *Motion*. Because neither testimony nor oral argument would advance the Hearing Officer’s understanding of the issues involved, this Ruling is issued without a hearing, pursuant to Bureau of Special Education Appeals Hearing Rule VII(D).

For the reasons set forth below, Parent’s *Motion* is hereby DENIED.

**PROCEDURAL HISTORY AND RELEVANT FACTS[[3]](#footnote-3):**

1. Student is a 15-year-old resident of Newburyport, Massachusetts, who is diagnosed with Autism Spectrum Disorder, Epilepsy, and Attention Deficit Hyperactivity Disorder (ADHD). She is currently receiving home-based non-educational services through insurance after she was unilaterally removed by Parents from her placement at Legacy by Gersh/Crotched Mountain (hereinafter, Crotched Mountain) in July 2022. She had been placed by the District at Crotched Mountain on November 29, 2021, pursuant to a fully accepted IEP.
2. The parties agree that Crotched Mountain is Student’s “stay-put” placement.
3. Prior to said placement, on September 2, 2021, the parties participated in a mediation relative to past payment for a home-based program and prospective placement. The parties executed an agreement relative to September 2021 only, and referral packets were sent to proposed day placements.
4. In May 2022, the Team convened, and the District proposed an IEP dated May 13, 2022 to May 12, 2023, calling for a private day placement at Crotched Mountain. Parents partially rejected the IEP on or about June 23, 2022, and did not indicate a response to the proposed placement.
5. On or about May 23, 2022, the parties entered into a Settlement Agreement which included a release of any and all claims the Parents had or may have against the District through the date of execution of the Agreement.[[4]](#footnote-4)
6. On June 30, 2022, Parents rejected the placement at Crotched Mountain, and, on or about July 5, 2022, Parents unilaterally removed Student from her agreed upon program and placement at Crotched Mountain.
7. On July 8, 2022, a mediation was scheduled for July 26, 2022. At Parent’s request the mediation was postponed due to a change in staffing in Newburyport’s central office. The mediation was subsequently held in October 2022 but was unsuccessful in resolving the issues between the parties.
8. In the fall of 2022, the District reaffirmed that it would provide Student with her "stay put" placement. The District also offered to send formal referral packets to additional programs. Parents consented to referral packets for Melmark and NECC.
9. From July 2022 to December 2022, Student was provided with BCBA support and a 1:1 aide to provide some educational services not covered by insurance for a maximum of 12 hours/week when staff was available, this at cost to Parents. Parents also taught Student until October 2022, limited to fill-in services while ABA services increased due to provider availability.
10. On January 24, 2023, a Team meeting was held to review the June 2022 BCBA Observation Report. Newburyport offered to send referral packets for Student. Parents agreed provided the referrals were to day programs within driving proximity.
11. On May 18, 2023, Parents filed a Hearing Request[[5]](#footnote-5) (BSEA # 2311471) asserting, in part, claims relative to procedural violations and failure to maintain Student’s stay-put placement.
12. In May 2023, the District failed to reconvene the TEAM for an annual IEP Meeting, including but not limited to, developing the Student’s 2023-2024 IEP. There is no active IEP for the 2023-2024 School Year.
13. On August 4, 2023, in response to the District’s Motion to Dismiss certain claims, the undersigned Hearing Officer issued *Ruling on Newburyport Public Schools’ Motion to Dismiss* delineating the following issues for Hearing:

1) Whether the District failed to offer Student a FAPE in the LRE during the 2022-2023 school year by “blatantly ignoring the BCBA observation report received by the District in June 2022”; failing to inquire “about Student whom to the District's knowledge was without a placement for more than 90 days to first meeting with new District personnel”; unilaterally postponing the IEP meeting by six months; denying Parents of meaningful participation by “not inviting stay-put placement (formerly Crotched Mountain and at the time, Seven Hills) to an IEP meeting while the District continued to propose the placement at the same meeting”; and/or misrepresenting and omitting information in the N1 for January 24, 2023 IEP meeting; and, if so, whether the District acted with deliberate indifference in violation of Section 504 of the Rehabilitation Act?

2) Whether the District failed to offer Student the opportunity to ‘stay-put’ in her last agreed upon placement from on or about July 1, 2022, when the Parents removed her from Crotched Mountain?

3) Whether the District denied Parents/Student meaningful participation during the January 24, 2023, IEP meeting; and whether this IEP meeting's subsequent N1 written by the District contains egregious misrepresentations and/or omissions and those misrepresentations and/or omissions impede Student's and Parents' rights?

4) If the answer to either/and/or (1), (2) and (3) is in the affirmative, what is the appropriate remedy? and,

5) Whether the District's offer of a prospective residential placement offers Student FAPE, whether required for substantive reasons or due to proximity between home and school?

1. BSEA Matter No. 2311471 proceeded to Hearing on August 7 and 8, 2023. It is scheduled to continue on November 8, 17 and 20, 2023.
2. On August 15, 2023, Parents filed another Hearing Request (BSEA # 2401600), seeking expedited status and asserting, in part, that Newburyport’s IEPs for the 2022-2023 and 2023-2024 school years were/are not reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment.

Also on August 15, 2023, Parents filed a Motion to Consolidate the two matters.[[6]](#footnote-6)

On August 16, 2023, BSEA Matter No. 2401600 was denied expedited hearing status. However, the hearing request appeared to qualify, in part, for accelerated status, pursuant to Rule II D of the Hearing Rules for Special Education Appeals. The remaining issues were processed on a regular track.[[7]](#footnote-7)

On August 18, 2023, Parents filed the instant *Motion* requesting

“reimbursement for compensatory services, necessary services to Student from July 2022 to present; home-based programming to provide a FAPE to Student; District funding and staffing for the home-based program; and District-funded continuity of current service providers to tend to Student’s immediate need to receive a FAPE until the hearing may continue as scheduled currently for November 8, 17 and 20, 2023.”

**LEGAL STANDARDS:**

Interim orders for additional services are rare at the BSEA, because “there is a risk of prejudice to the non-moving party if such an order is entered prior to a full hearing on the merits, [and, ] in most cases, both prospective and compensatory services are appropriate remedies for any past denials of FAPE to a student who prevails on the merits.”[[8]](#footnote-8) In *In Re: Quincy Public Schools (Ruling on Motion for Interim Services),* BSEA #03-4007 (2003), the Hearing Officer granted an interim order but indicated that she “reach[ed[ the conclusion that interim services [were] warranted, [because the] this case involve[d] a highly unusual set of circumstances that are unlikely to recur frequently.”[[9]](#footnote-9)

**APPLICATION OF LEGAL STANDARDS**:

After reviewing the facts in this matter and the legal standards described *supra*, I find that Parents’ Motion must be **DENIED**.

Parents’ request for an interim order for home-based programming would have the effect of circumventing state and federal law regarding stay put, which provide that during the pendency of any proceeding conducted pursuant to section 1415, unless the State or local educational agency and the parents or guardians otherwise agree, the child shall remain in the then current educational placement of such child.[[10]](#footnote-10)

Massachusetts allows for a temporary change in placement to be ordered by a hearing officer in certain situations consistent with federal law where, for example, maintaining the placement of the student would result in substantial likelihood of injury to the student or others.[[11]](#footnote-11) However, the case at bar does not meet the criteria embodied in 603 CMR 28.08(7)(c). Nor is the matter analogous to In *In Re: Quincy Public Schools (Ruling on Motion for Interim Services),* BSEA #03-4007 (2003).

Student’s stay put is the last accepted IEP and placement, herein, Crotched Mountain, or a comparable private day program, with supports and services delineated in the IEP last accepted by Parents on November 29, 2021. Whether or not placement at Crotched Mountain is appropriate and able to provide Student with a FAPE in the LRE is indeed one of the issues upon which both BSEA Matter No. 2311471 and BSEA Matter No. 2401600 are predicated, but it is irrelevant to the issue of stay put.[[12]](#footnote-12)

Moreover, although it appears that no program has been proposed for Student for the 2023-2024 school year, such issue is currently scheduled for Hearing to begin on September 14, 2023 pursuant to an accelerated schedule (BSEA Matter No 2401600). The remaining issues in BSEA Matter No. 2401600 are scheduled for Hearing on September 19, 2023. Moreover, BSEA Matter No. 2311471 is continuing to Hearing on November 8, 17, and 20, 2023. Until a Decision is issued on the merits, Student’s stay-put placement is Crotched Mountain with the services delineated in the last agreed upon IEP.

**ORDER**:

Parents’ *Motion* is DENIED.

So ordered,

By the Hearing Officer,

s/ *Alina Kantor Nir*
Alina Kantor Nir

Date: August 28, 2023

1. Internal citations omitted. [↑](#footnote-ref-1)
2. Internal citations omitted. [↑](#footnote-ref-2)
3. The information in this section is drawn from the parties’ pleadings and is subject to revision in further proceedings. [↑](#footnote-ref-3)
4. This agreement was a resolution of BSEA # 2205014. [↑](#footnote-ref-4)
5. On May 18, 2023, the Director of the Bureau of Special Education Appeals determined that matter did not meet the standard for an accelerated hearing. [↑](#footnote-ref-5)
6. A ruling is pending. [↑](#footnote-ref-6)
7. On August 21, 2023, the District filed a motion asserting, in part, that none of the issues asserted in the August 15, 2023 Hearing Request meet the accelerated status standard. A ruling is pending. [↑](#footnote-ref-7)
8. *In Re: Quincy Public Schools (Ruling on Motion for Interim Services),* BSEA #03-4007 (2003). [↑](#footnote-ref-8)
9. In that case, during the pendency of the dispute, Student began undergoing an experimental steroid treatment for a short and finite period of time, and Parents sought an interim order requiring the school district to provide Applied Behavior Analysis (ABA) and speech and language services for the duration of the treatment, arguing that by the time a decision on the merits was issued, the treatment would have ended. Following a hearing on the motion, which included the presentation of testimony and evidence, the Hearing Officer found that “Parents [had] shown, by a preponderance of evidence, that Student [would] be irreparably harmed unless he receive[d] a significant amount of one-to-one behavioral [and speech and language] therapy” because “any window of opportunity for language acquisition that [might] be ope[n] by steroid treatment necessarily [would] be closed when the treatment end[ed], and any harm from denial of ABA services during that period [would] not likely be remedied by prospective or compensatory relief if the Student prevail[ed] on the merits.” She ordered that “[s]uch therapy should continue until Student finishes steroid treatment or until a full decision on the merits, whichever is earlier.” [↑](#footnote-ref-9)
10. See 20 U.S.C. s. 1415(j); 603 CMR 28.08 (7). [↑](#footnote-ref-10)
11. 603 CMR 28.08 (7) (c). [↑](#footnote-ref-11)
12. See *In Re: Student and Quincy Public Schools and League School of Greater Boston*, BSEA #22-02940 (Mitchell 2021)(finding that despite a student’s significant aggressive and assaultive behaviors, no emergency constituting a threat to the health and safety of others existed justifying termination and a change in “stay-put”). [↑](#footnote-ref-12)