**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

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Student

v. BSEA No. 2403627

Boston Public Schools and The

Children’s Center for Communication

Beverly School for the Deaf

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## **RULING ON PARENTS’ EMERGENCY MOTION FOR CONTINUED PLACEMENT AND STAY-PUT**

In the instant case, Student is a seven-year-old child with multiple, significant medical conditions and related disabilities. He currently is enrolled in the Children’s Center for Communication Beverly School for the Deaf (hereafter, CCCBSD), a private, DESE-approved, day school, pursuant to an accepted Individual Education Plan (IEP) issued by the Boston Public Schools (BPS or Boston). On or about October 5, 2023, CCCBSD notified Parents of its intention to terminate Student’s placement based on upcoming tracheostomy surgery, citing a CCCBSD policy not to admit students with tracheostomies. At issue here is whether Student is entitled to “stay-put” at his current placement pending resolution of the underlying hearing request.

**PROCEDURAL HISTORY**

On October 11, 2023, Parents filed the above-numbered hearing request in which they challenged the proposal of CCCBSD to terminate Student’s placement.[[1]](#footnote-1) In pertinent part, Parents allege that Student’s situation does not meet the regulatory criteria for emergency termination, and that Student is entitled to “stay-put” in his current placement until another appropriate placement is located. The hearing was granted accelerated status, and an initial hearing date was scheduled for November 13, 2023. On October 19, 2023, Parents filed the *Emergency Motion for Continued Placement and Stay Put*  (*Motion*) that is the subject of this *Ruling.* On October 31, 2023, CCCBSD filed an *Opposition* to Parents’ *Motion.* On November 1, 2023, Boston filed a *Response* indicating that it joins in Parents’ *Motion*.

On October 31 and November 1, 2023, the parties and hearing officer participated in conference calls, during which they agreed that no hearing on this *Motion* would be necessary. On November 6, 2023, Parents filed on behalf of all parties a request to postpone the hearing from November 13, 2023, to November 16, 20, and 22, 2023. On November 7, 2023, I issued an order granting the parties’ postponement request and reminding the parties that such postponement removes the matter from the “Accelerated” scheduling track.

**FACTUAL SUMMARY**

For purposes of this *Ruling* only, the following factual statements appear to be undisputed.

1. Student is a seven-year-old child who is a Boston resident. He is eligible for special education and related services because of multiple disabilities and medical issues stemming from a genetic disorder, which significantly impair his hearing, vision, motor, communication, and adaptive skills. Specifically, Student’s conditions include history of failure to thrive, submucosal cleft palate, congenital heart abnormalities, a tethered spinal cord, congenital foot defects, obstructive sleep apnea, congestive heart failure, profound hearing loss, visual impairment, and global developmental delays. He has a central line and ostomy bag and uses a wheelchair for mobility. Student’s primary language is American Sign Language (ASL).
2. Student began his educational career within the Boston Public Schools. In or about December 2022, after one or more Team meetings, Boston sent referral packets to several out-of-district day placements, including Perkins School for the Blind, the Learning Center for the Deaf, Kennedy Day School, the Campus School at Boston College, and CCCBSD. Perkins and the Learning Center rejected Student because they could not accommodate his complex medical presentation, and neither Kennedy Day nor the Campus School could not meet his communication needs. Only CCCBSD was able to meet both his medical and communication needs.
3. In February 2023, Boston issued, and Parents accepted, Student’s current IEP covering the period from 12/12/22 to 12/11/23. This IEP provides for Student’s placement at CCCBSD, which is a DESE-approved private day school serving children with complex needs. Student began attending CCCBSD in or about March 2023.
4. In or about August 2023, Student’s medical providers determined that Student required placement of a tracheostomy tube to treat severe sleep apnea and congestive heart failure. The tracheostomy would only be used during sleep, as Student is able to breathe without it when awake. Parents notified CCCBSD and Boston of this development.
5. On September 20, 2023, counsel for Parents informed counsel for CCCBSD and Boston that Student would be undergoing the tracheostomy procedure in October 2023. In response to CCCBSD’s concerns about Student’s safety, Parents’ counsel provided letters from Student’s treaters stating that the tracheostomy tube would be plugged during the day so that Student would be breathing through his “upper airway.” As such, according to providers, the procedure “will not impact [Student’s] safety in the school setting,” and that, even if the tube becomes dislodged, the situation would be “non-critical” because Student would continue to be able to breathe until the tube could be replaced, “non-emergently,” either by an on-site nurse, or at the doctor’s office or hospital.
6. In a letter dated October 6, 2023, the CCCBSD Director informed Parents that CCCBSD would be convening a meeting to discuss “emergency termination” of Student’s placement as well as other placement options. The letter stated that Student’s last day at CCCBSD would be October 20, 2023. The stated reason for the termination was the following: “[I]t is CCCBSD’s policy that we do not enroll students who have a tracheostomy due to the level of training and care that is necessary if the trach site were to become compromised.”
7. In response to the above, Parents filed the above-numbered hearing request. The hearing is scheduled to take place on November 16, 20, and 22, 2023.
8. As of the date of the hearing request, CCCBSD had not yet convened a termination meeting. On information and belief, the parties have scheduled a meeting for November 15, 2023, to discuss plans for Student.
9. Student underwent tracheostomy surgery on October 16, 2023. On information and belief, he is still recuperating and not yet medically ready to return to school.
10. Boston has not located a successor placement for Student.

### ISSUE PRESENTED

The sole issue raised in Parents’ Motion is whether CCCBSD is Student’s stay- put placement pending resolution of the claims set forth in the hearing request and/or location of a successor placement for Student.

#### POSITION OF PARENTS

Under the stay-put doctrine articulated in relevant statutory and case law, Student has the right to remain in his current placement at CCCBSD until the litigation in this matter is completed or otherwise resolved. Student’s current, fully accepted IEP designates CCCBSD as Student’s placement. Although private schools such as CCCBSD have the right to terminate a student’s enrollment, such right does not abrogate the student’s stay-put rights, particularly where, as here, termination would leave Student with no educational placement. As such, Student must be allowed to continue in attendance at CCCBSD until a successor placement is located.

POSITION OF BOSTON PUBLIC SCHOOLS

Boston adopts the position of Parents on this issue, and agrees that CCCBSD is Student’s stay-put placement.

**POSITION OF CCCBSD**

The stay-put doctrine requires continuation of a student’s current IEP services pending resolution of a dispute but does not require that the student remain in a particular location. As such, stay-put does not require a private school, which has lawfully terminated a student’s placement, to maintain such placement after termination. To conclude otherwise would render meaningless the Massachusetts regulations governing such termination. The BSEA decisions cited by Parents in support of their position are distinguishable on their facts from the instant case, which involves a threat to Student’s health and safety if he were to remain at CCCBSD. As such, it is not the responsibility of CCCBSD to maintain Student’s placement; rather it is Boston’s responsibility to locate or create a stay-put program to ensure that Student continues to receive the services mandated by his IEP.

**DISCUSSION**

**Legal Framework, Stay-Put Rule**

The stay-put rule is a fundamental procedural protection afforded parents and students by the IDEA and the Massachusetts special education statute, G.L. c. 71B. “Stay-put” means that during the time that the parent and school district are engaged in the IDEA dispute resolution process, “unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child…” 20 U.S.C. Sec 1415(j); 34 CFR Sec. 300.514; *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline School* *Committee*, 722 f.2d 910, 918 (1st Cir, 1983); *Verhoven v. Brunswick School Committee*, 207 F.3d 1,10 (1st Cir. 1999).

Massachusetts special education regulations track the federal language, stating that “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 educational program and placement unless the parents and the school district agree otherwise.” 603 CMR 28.08(7).

The purpose of stay-put is to protect students from unilateral changes in placement by school districts and to reflect 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. *Verhoven,* *supra*. The BSEA has articulated this principle in numerous decisions and rulings. See, for example, *In Re: Boston Public Schools, Ruling on Parent’s Emergency Motion for Stay Put Clarification*, BSEA Nos. 1401653, 1503083 (Figueroa, 2015); *In Re: Abington Public Schools*, *Ruling on Father’s Motion for Clarification of Stay Put*, BSEA No. 140776320 (Figueroa, 2014); *In Re: Student v. Agawam Public Schools & Melmark New England, Ruling on Parents’ Motion to Enforce Stay Put*, BSEA No. 1504488 (Berman, 2015); *In Re Framingham Public Schools and Quin*, BSEA No. 1605247; (Reichbach, 2016); *In Re: Chelmsford Public Schools v. Swansea Wood School*, BSEA No. 2203132 (Kantor Nir, 2021); *In Re:* *Student v. N. Middlesex RSD & Dr. Franklin Perkins School*, BSEA No. 2400589 (Kantor Nir, 2023).

What constitutes a child’s “then current placement” is not always self-evident. Not every alteration in a child’s educational services—including a change in the location for providing services--necessarily constitutes a change in placement that would trigger stay put protection. The IDEA and corresponding regulations do not define the term “then current placement” or provide an exhaustive list of circumstances that do or do not constitute such a change. *Id*. Neither the First Circuit nor other courts has provided an unequivocal definition of the term. Rather, when courts throughout the country have addressed this issue, they have done so in a highly individualized and fact-dependent way. *Hale ex rel. Hale v.* *Poplar Bluff R-1 School District*, 280 F.3d 831, 834 (8th Cir. 2002).

Several general principles guide most such court decisions. First, since the purpose of stay-put is to preserve the *status quo*, courts, look for the “operative placement” or IEP that is “actually functioning at the time the dispute first arises.” *Drinker*, 78 F.3d at 867; *Thomas v.* *Cincinnati Bd. of Education*, 918 F. 2d 618. 626 (6th Cir., 1990). Second, courts inquire as to whether there is a “fundamental change in …a basic element of the educational program.” *Sherri A.D. v. Kirby*, 975 F.2d 193, 206 (5th Cir. 1992). Decisions in other circuits examine the impact of the proposed change on the student to identify a true “change in placement.” Courts have considered whether the change impacts FAPE by “diluting” the quality of services or increasing the restrictiveness of the student’s program. See, for example, *AW. v. Fairfax County School* *Board*, 41 IDELR 119 (4th Cir. 2004), *Hale v. Poplar Bluff R-1 School* *District,* *supra.*

Guided by these court decisions, BSEA hearing officers examine the unique facts and circumstances of each case to identify a student’s “operative placement,” and examine the impact on the student of the proposed alteration, in order to determine whether there is a “fundamental change in a basic element of the educational program,” that triggers stay-put rights *See Abington, supra; Agawam/Melmark New England, supra; Chelmsford/Swansea Wood, supra; N. Middlesex/Perkins, supra.* Thus, for example, a change in the location at which services are delivered may or may not constitute a change in placement, depending on the unique facts of the case.

**Stay-Put and Private Placements**

Massachusetts regulations at 603 CMR 18.05 allow private special education schools to terminate the placements of publicly funded students, provided that the private schools follow the procedures set forth in the regulations. The BSEA has consistently found, however, that because publicly funded private school students are entitled to the “full protections of state and federal special education law and regulations,”[[2]](#footnote-2) neither the status of a school as a private entity nor the existence of the termination regulations “exempt those placements from adherence to the fundamental set of special education rights that attach to and travel with the student, [including] the right to “stay put.” *In Re: Northampton Public Schools & Lolani*, BSEA No. 04-0359 (Byrne, 2003).

This does not mean that a student is necessarily entitled to stay put within a specific private school that seeks to terminate the student’s placement. *N.Middlesex/Perkins, supra*. If the student’s IEP could be implemented in a setting that is comparable to the private school without making a “fundamental change in a basic element of the educational program,” then the student’s stay- put placement might be the comparable program. See, for example, *In Re: Newton Public Schools, Southbridge Public Schools, and NECC*, BSEA No. 1306409, 1306464 (Crane, 2013); *In Re: Student v. Georgetown Public Schools and Landmark School*, BSEA No. 1408733 (Oliver, 2014).

On the other hand, if an examination of the facts reveals that transitioning a student to a different setting for implementation of the IEP would result in such “fundamental change,” would substantially disrupt the student’s educational experience, or would otherwise impact receipt of FAPE, then the private school might be deemed the stay-put placement. Factors to consider in making such a determination would include whether the student’s profile and service needs are complex, and/or whether the private school at issue is highly specialized and uniquely capable of meeting those needs, See, e.g., *Lolani* and *Agawam,* *supra*.

Lastly, consistent with the principle that all eligible students must be provided with a FAPE and cannot be left without an educational placement, Massachusetts regulations prohibit approved private schools from terminating enrollment of students, even in emergencies, “until the enrolling public school district is informed and assumes responsibility for the student.” 603 CMR 28.09(12)(b).

As such, several BSEA decisions have ruled that a private school is the stay-put placement when there is no alternative available for a student whose enrollment is to be terminated, regardless of whether the private school complied with applicable termination regulations. As hearing officer Catherine Putney-Yaceshyn stated in a case with such facts, “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.” *Framingham Public Schools & Student v. Guild for Human Services and the Department of Developmental Services*, BSEA No. 18-08824 (Putney-Yaceshyn, 2018). Similar rulings were issued in *Falmouth/Cotting*, and *North Middlesex/Perkins*, *supra*. *See also,* *Student & Quincy Public Schools v. League School of Greater Boston*, BSEA No. 2202940 (Mitchell, 2021), which states that “in situations where a student would be left without an appropriate alternate placement, the BSEA has determined that a private school may have stay-put obligations beyond those set forth in the State regulations…”

**Application of Law to Facts in This Case**

For purposes of determining Student’s stay-put placement, the facts in the instant case are analogous to those *in Lolani, Falmouth/Cotting, North Middlesex/Perkins, and Quincy/League School, supra*. If Student’s enrollment at CCCBSD is terminated, he will have no educational placement available. Such a scenario is not permissible under federal or state special education law. As such, CCCBSD is Student’s stay-put placement pending resolution of the above-entitled dispute unless the parties agree otherwise.

**ORDER**

Based on the foregoing, Student’s stay-put placement pending appeal is CCCBSD unless the parties agree otherwise. The hearing is currently scheduled for November 16, 20, and 22, 2023, beginning at 10:00 AM, and, by agreement of the parties and the hearing officer, will be conducted remotely.

By the Hearing Officer:

Sara Berman\_\_

Sara Berman Dated: November 15, 2023

1. In addition to alleging violations of federal and state special education law, the hearing request asserts that CCCBSD’s proposed termination violates Titles II and III of the Americans with Disabilities Act (ADA) and §504 of the Rehabilitation Act. Parents further claim that Boston’s failure to provide a 1:1 nurse as required by Student’s IEP violates both §504 and Title II of the ADA. [↑](#footnote-ref-1)
2. 603 CMR 28.06(2)(f), cited in *In Re Falmouth Public Schools and the Cotting School*, BSEA No. 05-1581 (Sherwood, 2004) [↑](#footnote-ref-2)