**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

Student v. Public Schools of BSEA No. 2504230

Northborough and Southborough

## 

**DECISION ON ACCELERATED ISSUES BASED ON WRITTEN SUBMISSIONS**

In the instant case, Student is a nineteen-year-old student with significant disabilities that affect his cognitive, behavioral, and adaptive functioning. Student was discharged from his residential placement at New England Center for Children (NECC) and has “bounced” between the home where he resides with his Father and Stepmother, and where the District has proposed and/or provided interim home-based services, and psychiatric hospitals. Student is currently hospitalized in a psychiatric unit at Rhode Island Hospital. At issue here is whether Student is entitled to “stay-put” services from the District comprising housing in an apartment or house, with 24/7 staffing to implement IEP goals pending identification of a successor residential school placement.

**PROCEDURAL HISTORY**

On or about July 24, 2024, NECC discharged Student from its residential program, where he had been enrolled since 2018. Neither Parents nor the District requested a due process hearing before the Bureau of Special Education Appeals (BSEA) or otherwise contested the termination of the NECC placement. Despite an extensive search on the part of the District, no successor residential program was available from the time of discharge to the present. As such, when Student has not been in hospitals, he has been living in his home with Father and Stepmother, receiving some home-based care and services.

On October 11, 2024, Parents[[1]](#footnote-1) filed the above-numbered hearing request in which they asserted that Student requires placement in a “comprehensive, specialized residential program for students with complex disabilities, including Autism Spectrum Disorder (ASD), Obsessive-Compulsive Disorder (OCD), Intellectual Disabilities (ID), and emotional issues. Such program must provide Student with around-the-clock services utilizing the methodologies of Exposure and Response Prevention (ERP), and Applied Behavioral Analysis (ABA), and also must provide individualized instruction, small classes, an appropriate peer group, and “special educators and related service provider with extensive experience meeting the needs of such students around the clock.”

In addition, Parents asserted that Student’s IEPs for school years 6/14/2022-6/13/2023, 6/6/2023-6/5/2024, and 6/5/2024-6/5/2025, all of which called for Student’s residential placement at NECC, were inappropriate, and that Student’s NECC placement was unable to provide Student with the level or intensity of services that he requires in order to receive a FAPE.

Further, Parents claimed that Student has been without an educational program since his discharge from NECC. Specifically, he received no educational services while hospitalized. Parents alleged that since his discharge from the hospital in September 2024, the in-home services the District offered and/or provided since NECC’s termination have been inadequate. Specifically, Parents alleged that while the District has offered to fund in-home staff, there is no indication that, as of the date of the hearing request, the District had posted open positions on its website, and all staff have been secured by Student’s family. Further, the District has maintained that Student’s situation is temporary, and has refused to provide the 24/7 services set forth in the accepted portions of Student’s most recent IEP.

The relief requested by Parents includes determinations that the three IEPs referenced above were not reasonably calculated to provide Student with a FAPE, and that Northborough-Southborough committed procedural violations which led to a substantive denial of FAPE. Parents seek relief including an order that the District modify Student’s IEP to add direct ERP services, fully implement Student’s IEP--which would require a 24-hour special education program--provide compensatory services, and to “prospectively develop and fund an individualized residential placement for [Student] if an established residential program is unable to accept him within a reasonable period of time.”

On October 21, 2024, Parents filed a *Motion for Preliminary Injunction* (*Motion*) and supporting Memorandum in which they reported that on October 12, 2024, one day after Parents’ filed their hearing request, Student was transported to the emergency room at Metro West Medical Center, where he was being held pursuant to MGL c. 123 §12 while awaiting a psychiatric bed.[[2]](#footnote-2) In their *Motion*, Parents sought an order requiring the District to fully implement Student’s most recent, partially accepted IEP, which provides for placement in a residential school, even if that requires the District to create a program for Student.

On the same date that Parents filed their *Motion*, the District filed its *Response* to Parents’ hearing request in which it stated, among other things, that since March 2024, the District has sent referral packets to thirty (30) residential programs in seventeen (17) states in an effort to secure a successor placement for Student.

On October 31, 2024, the District filed its *Opposition to the Parents’ Motion for a* *Preliminary Injunction* (*Opposition*) in which it argued that Parents’ failure to either object to NECC’s termination of Student’s placement, or to seek a hearing at the BSEA to pursue a stay-put order pending location of a successor placement, together with Parents’ unwillingness to return Student to NECC, has thwarted Northborough-Southborough’s ability to implement Student’s stay put services. As such, the District should not be liable for interim services, and the request for a “preliminary injunction” should be denied.

Further, Parents’ request for the creation of a 24-hour program consisting of a house or apartment and a variety of services is impossible, because the program would not be DESE approved; as such, the BSEA could not order the creation of such program prospectively. Further, such an order would be “extreme” and unwarranted without a full evidentiary hearing.

Despite Parents’ failure to seek or allow a “stay put” order for NECC, the District has cast a wide net to identify a new residential program, with the help of DESE and the Complex Case Management Division of the Massachusetts Executive Office of Human Services (EOHHS). In the interim, the District has offered to provide up to 15 hours per day of home-based services including up to 30 hours per week of a Behavior Technician (BT), oversight by a Board Certified Behavior Analyst (BCBA), Safety Care training for Parents and Parent-identified home care staff. It has also approved funding for Parents’ outside consultant, Dr. Nancy Gajee, to provide Parents and home-care staff training.

During a conference call held on, October 30, 2024, the parties and Hearing Officer agreed that the *Motion* *for Preliminary Injunction* would be construed as a *Motion* for a “stay-put” order, in that Parents, in essence, are seeking a determination by the BSEA as to Student’s “stay-put” placement pending resolution of this matter and/or securing a successor residential program for Student. The parties also specified that they do not dispute Student’s profile, his need for and entitlement to a residential educational placement, or that such placement is currently unavailable despite a nationwide search conducted by the District.

As such, the parties and Hearing Officer agreed to bifurcate BSEA No. 250423, such that the “accelerated” issue, namely, identification of Student’s “stay put” status would be addressed according to the “accelerated” schedule set forth in Rule I.D. of the *Hearing Rules for Special Education Appeals*, and that the remaining issues would be scheduled according to the standard track. Lastly, the parties and Hearing Officer agreed that the parties would file a joint statement of stipulated facts with respect to the “accelerated” issue, with each party filing individual supporting memoranda of law.

On November 12, 2024, the parties submitted their *Joint Stipulations of Fact*, together with ten attached exhibits and individual supporting memoranda, and the record as to the accelerated portion of the hearing closed on that date.

The record in this case consists of the *Joint Stipulation of Facts*, Attachments 1-11, and additional facts gleaned from these Attachments, pleadings and memoranda of the parties.

### ISSUE PRESENTED

The issue for determination is whether, pending resolution of this matter and/or the District’s securing a residential placement for Student, the District is required to provide a “stay-put” placement for Student that entails a rented apartment or house with 24/7 staff.

#### POSITION OF PARENTS

Under the stay-put doctrine articulated in relevant statutory and case law, Northborough-Southborough must implement the programming prescribed by Student’s accepted IEP, namely, 24/7 services in a residential setting. In light of the nature and extent of Student’s disabilities, his IEP cannot be effectively implemented through home-based services, as provided by Northborough-Southborough. The number of hours of service is insufficient, and Student must be in an out-of-home setting to be able to benefit from such services.

POSITION OF NORTHBOROUGH-SOUTHBOROUGH PUBLIC SCHOOLS

Northborough-Southborough’s position is outlined in *its Response* as well as its *Opposition* to Parents’ *Motion for Preliminary Injunction*. Additionally, the District states that the IDEA’s “stay put” provision does not impose an affirmative duty to provide an alternative residential program when Student’s last agreed-upon placement has become unavailable for reasons beyond the District’s control. Northborough-Southborough is not obligated to create and implement a quasi-residential, 24-hour program in a house or apartment it rents for Student while it searches for a new, long-term placement.

**STIPULATED FACTS[[3]](#footnote-3)**

Parents and legal guardians of Student, the moving party in this matter, with the assent of the Public Schools of Northborough and Southborough (“District”), stipulate the following facts for determining whether and to what extent “stay put” imposes obligations on the District when Student’s last agreed-upon educational placement is no longer available.

Background

1. [Student] is a 19-year-old (DOB 2/1/2005) identified as a student with disabilities under the Individuals with Disabilities Education Act (“IDEA”) as a result of his Autism, Obsessive Compulsive Disorder (OCD”) and Intellectual Disability (“ID”).
2. [Student] presents with delayed cognitive abilities across domains, which impact his ability to problem solve and respond appropriately to daily tasks. He demonstrates basic academic and self-care skills. He communicates verbally, though his language-based skills are well below average. [Student’s] diminished adaptive skills are lower than expected. He requires around-the-clock support in all facets of life, from toileting and bathing to safety, social skills and emotional regulation.
3. [Student] has a history of challenging, ritualistic behaviors that can keep him paralyzed for hours at a time to entire days. He may fixate on attaining a specific food, or need to disrobe and pace the halls at any time, including overnight. When unable to complete a ritual, he may bolt, elope, self-harm, and/or become aggressive. This significantly impacts his emotional well-being, ability to access peers, and educational services, and overall quality of his life.
4. Due to his high levels of need, [Student] was placed at the New England Center for Children (“NECC”) from 1/3/2018 until his termination on 7/16/2024.
5. [Student] presented to the emergency room less than a month after his discharge from Fuller Hospital, and again approximately two weeks after his discharge from HFSC.
6. [Student]is currently at Rhode Island Hospital (“RIH”). He was originally admitted to the geriatric unit, which provided the calm environment he required with staff that could tend to his toileting and showering needs. However, after keeping the entire unit awake for 3 nights, [Student] was moved to the psychiatric unit.
7. To date, [Student] remains without an educational placement.

Termination from NECC

1. Due to challenging behavior on 6/25/2024, NECC applied for authorization for a temporary involuntary hospitalization under MGL c. 123, §12 (“Section 12”) and [Student] was transported to UMass Worcester’s emergency room.
2. On 6/28/2024, during a virtual meeting between the hospital, District, DDS, MHBH, and his family, NECC terminated [Student’s] placement. NECC rescinded termination the same day when they learned [Student] was only entitled to a promised psychiatric bed at Fuller Hospital (“Fuller”) if he had a placement to return to.
3. Student did not receive any educational or related services during his admission at Fuller.
4. NECC staff observed [Student] at Fuller on 7/15/2024 prior to his anticipated discharge.
5. On 7/16/2024, the District, NECC, Fuller, DDS, MGBH, and [Student’s] family met virtually. Fuller reported that [Student] was ready for discharge. He was at a stable dose of antipsychotic medication, and they did not feel he was well served in their environment. NECC indicated, however, they were not ready to receive [Student] if discharged that day based upon continued ritualistic behaviors. They were concerned that [Student] still disrobed and would not clean up after toileting accidents quickly enough. Fuller indicated [Student] could be redirected within a few minutes when naked by offering him a pull up or clothes. DDS had no services available. The District reported that they would continue to seek an appropriate placement and work collaboratively with the family. The District clarified NECC’s request for Fuller to keep [Student] longer to see if they could stabilize him enough for NECC to do another observation. Fuller offered to keep [Student] longer, but was concerned that their environment with a lot of behaviorally uncontrolled people was too stimulating, and thus not appropriate. The Parents asked if Fuller was ready to discharge [Student] and Fuller said yes. The Parents indicated [Student] would go home because NECC would not take him.
6. NECC terminated [Student’s] placement that same day. They stated they were unable to keep him safe and meet his needs resulting from “ongoing high level of aggressive and interfering ritualistic behavior.”
7. Neither the District nor [Student’s] Parents objected to his termination from NECC. The District did not request that NECC delay termination for up to two weeks. Neither party sought a hearing to pursue stay-put at NECC.
8. [Student’s} family picked him up from Fuller Hospital upon discharge on 7/16/2024. He moved into his father and stepmother’s house in Southborough, MA. At that time, he and his family were provided with no support, directly or indirectly, from the District or DDS to address [Student’s] need for direct care and support 24/7.
9. Upon [Student’s] discharge, the District indicated it would collaborate with the Parents to find in-home services, while continuing to look for new placements. The District did not initially indicate the extent or limits of services that it would provide to [Student] while looking for alternate placements.

Efforts to provide services and secure new placement

1. The District has been committed to identifying a different residential placement for the Student since the Student’s termination from NECC. To date, they have sent out more than thirty (30) referral packets across seventeen (17) states. However, the Student has not been accepted by a residential placement despite the best efforts of the District.
2. The District agreed to provide up to fifteen (15) hours per day of home services to the Student. They also agreed to take over case management, provide safety-care training to staff secured by the family, and increase/add consultative services with a BCBA and specified OCD specialist. They also agreed to contract with an ABA company.
3. The District did not agree to the Parents’ request for twenty-four (24) hours per day services. Nor did the District agree to the Parents’ request to rent an apartment for [Student] until a new placement could be secured. It maintained that the interim support it agreed to provide was not meant to replicate a residential placement. The District also agreed [Student] would be owed compensatory services.
4. To bolster its efforts to identify a new residential placement for the Student, the District has consulted with Janelle Robers, Acting Director of the Office of Approved Special Education Schools (“OASES”), at the Massachusetts Department of Elementary and Secondary Education (“DESE”) and with Jamie Camacho, Director for the Office of Special education Planning and Policy for DESE. The District has also consulted with Kim Irving, who serves as Director of Complex Case Management for the Massachusetts Executive Office of Human Services. However, she indicated that she was unable to offer additional help as of 10/9/2024.
5. [Student’s] step-mother [“Stepmother”], has also been instrumental in arranging for services and care since his discharge from Fuller. This has included sourcing staff, as well as arranging and coordinating their schedules for trainings on [Student’s] programming, including ERP.

Agreed-upon Portions of the IEP

1. [Student] has a partially accepted IEP dated from 6/6/2024 to 6/5/2025, which provides goals and services to address Communication and ELA, Math, Social Behavior, Self Help, PT and Ot, Community and Leisure, and Vocational Skills at a residential school.

Consultative Services

Speech/language speech/language pathologist 180 mins/mo.

Occupational Therapy Occupational Therapist 30 mins./mo.

Physical Therapy Physical Therapist 15 mins./mo.

Case Management Case manager and other staff 480 mins./mo.

Supervision/Program Program Specialist & Director, 270 min/mo.

Monitoring LABA, Res. & Day Coord., Ed. Coord/

SpEd Teacher

Direct Services

ELA, Social Behavior & SpEd Teacher & Staff 230 min/day x 7 days

Communication

Math, Social Behavior & SpEd Teacher & Staff 150 min/day x 7 days

Communication

Self Help, Social Behavior SpEd Teacher & Staff 230 min/day x 7 days

& Communication

Phys. Ed. & Motor Skills, SpEd Teacher & Staff 30 min/day x 5 days

Social Behavior &

Communication

Vocational, Social Behavior, SpEd Teacher & Staff 30 min/day x 5 days

& Communication

Behavioral Support SpEd Teacher & Staff 5.71 hours/dayx7 da

(6/6/24-9/6/24)

### Accepted portions of [Student’s] IEP methodology indicates that he requires direct instruction from licensed, trained, and supervised teachers; services delivered consistently by the same teachers across settings and time (school, residence, evenings and weekends); and 24 hours/day (including awake overnight staff) and 7 days/week coverage. His IEP stresses: “These supports are critical in maintaining his safety and ensuring [Student’s] progress.”

1. [Student’s] IEP further provides that “during episodes of challenging behavior, [he] requires 2-6 staff to safely manage his behavior. “
2. When the IEP was developed on 6/6/2024, his IEP Team continued to recommend a residential placement at the New England Center for Children (hereafter, “NECC”). In the N1, the District stated that it proposed three (3) one-hour consultative sessions between Dr. Gajee and NECC in the spirit of collaboration.
3. By letter dated 7/9/2024, [Father] and [Mother] accepted the IEP in part, rejected the IEP in part, and refused the placement. They rejected omissions of the following:
4. Consultations with Dr. Gajee regarding ERP services;
5. ERP and Cognitive Behavior Therapy (CBT) methodologies;
6. Meaningful Communication goal benchmarks.
7. Measurable Math benchmarks;
8. Appropriate teaching methodologies for coping skills and reducing ritualistic behaviors;
9. Self-help skills, which eliminate staff hands on [Student’s] bare body for toileting, showering, etc.;
10. Goal 6 in its entirety, which previously targeted community and leisure;
11. An approach for [Student] to meaningfully participate in vocational programming that enables development of self-determination skills;
12. Recommendations by Dr. Gajee, include[ing] activities to reduce anxiety, anxiety prevention strategies, and an individualized ERP program; and,
13. Recommendations by Dr. Castro, include[ing] prioritizing communication, adapted therapeutic support informed by ERP, self-monitoring emotions, and learning calm down routines.
14. On or about 7/18/2024, Parents, through [Student’s] stepmother [Stepmother], requested his IEP services be delivered without delay in his home or an alternate location.
15. On or about 7/18/2024, [Student’s] Parents, through [Stepmother], sent a demand letter to the District requesting:
16. District funds a short term living situation in the form of house/apartment rental.
17. We transition [Student] to the new living situation so he can have a fresh start ([Stepmother] and [Father] take tuns staying with [Student] so we can fade [Student’s] need to co-regulate.
18. Simultaneously the District funds Nancy Gajee to create an ERP program suitable for [Student].
19. District funds staff that we source/hire to execute modified ERP program.
20. District finds a temporary day placement for [Student] to provide daily transition opportunities to break up his rituals.
21. We maintain [Student] in improvised clinical environment until a suitable placement or DDS house can be obtained.
22. The demand letter further provided: “I’m respectfully giving the District 10 business days from today (7/23/2024) to action the above. After that we’ll be forced to execute this plan as a unilateral placement to provide [Student] with an appropriate education.”
23. By letter dated 9/26/2024, [Father] and [Mother] further partially rejected the IEP and continued to refuse the placement. They rejected the omission of the following:
24. Additional A-Grid consultation time for case management, program development and coordination, and oversight of all staff.
25. Safety-care training for all staff working with [Student] as well as his father and stepmother;
26. Weekly consultative services by Dr. Nancy Gajee;
27. Weekly consultative services by a BCBA
28. Direct BCBA services.

### ADDITIONAL FACTS GLEANED FROM ATTACHMENTS, PLEADINGS, AND MEMORANDA

The following factual assertions are gleaned from the Attachments, pleadings, and memoranda submitted by the parties, appear to be undisputed, and are assumed to be true for purposes of this portion of the Decision, only.

1. Student’s mother (“Mother”), who lives in Connecticut, and his father (“Father”) are his co-guardians with authority to make educational decisions for Student. Student lives with Father and Stepmother in Southborough, MA.
2. Student’s partially-accepted IEP covering 6/6/2024 to 6/5/2025 states, in Present Levels of Educational Performance, A (“PLEP A”), that “[d]uring the overnight, [Student] requires supervision by an awake overnight staff. Another staff is at the residence to assist as needed and residential supervisors are on call. These supports are critical in maintaining his safety and ensuring [Student’s] progress. During episodes of challenging behavior, [Student] requires 2-6 staff to safely manage his behavior.” In the section of the IEP entitled “Schedule Modification,” states: “[Student] requires a 24-hour, 365 day program. [Student] requires structured programming and supervision by staff familiar with autism and trained in…applied behavior analysis during all school hours in order to progress on goals and objectives, as well as to maintain previously acquired skills…” (Joint Attachment 2)
3. According to the Psychiatric Discharge Summary issued by NECC on 8/13/24, Student “had been in crisis since February 2024. [Student] presented as extremely challenging with dangerous ritualistic behavior and needed extremely restrictive programming that exceeded the typical programming at NECC. When rituals were interrupted or unable to be honored, [Student] would become self-injurious and aggressive to staff. This had resulted In staff injuries…” (*Stipulated Facts*, Attachment 11)
4. On October 4, 2024, the District issued an N1 Form reflecting discussions that took place at a Team meeting on September 27, 2024, anticipating Student’s discharge from a hospital to his home on 9/30/24. Among other things, the N1 form reported that Parents had requested 24/7 coverage for Student in his home since his placement is residential. The District responded that “these interim supports are not meant to replace a residential placement. As such, the District has agreed to supporting [Student] in the home for up to 15 hours/day, 7/days a week…” (*Stipulated Facts*, Attachment 6)

**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 v. Colonial School District,* 78 F.3d 859, 867 (3d Cir., 1996), *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,”[[4]](#footnote-4) 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); *In Re: Chelmsford Public Schools v. Swansea Wood School*, *supra*.

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 Nos. 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 *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). Notably, this regulation does not condition the public school district’s assumption of responsibility on parent’s requesting a due process hearing to invoke “stay-put” at the private school.

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…”

**Stay Put When Placement Becomes Unavailable**

The BSEA has interpreted the “stay-put” principles set forth in the IDEA and its implementing regulations to require school districts to provide a comparable program in situations where the student’s pre-dispute placement is unavailable for one of a variety of reasons, such as program closure, or the student’s “aging out” of the placement.[[5]](#footnote-5) For example, in the matter of *Pilar & Agawam Public Schools, Ruling on Motion for Stay-Put*, BSEA No. 12-1714 (Byrne, 2011), Hearing Officer Lindsay Byrne defined “comparability” as follows:

Generally, the terms of the last accepted IEP should be enforced as the “stay put” relief. Where, however, the precise terms previously agreed to cannot be implemented, a school district’s obligation to maintain the status quo may be fulfilled by identifying and providing a “comparable” program. A “comparable” special education program is one which matches as closely as possible the setting, the type and level of service delivery, the degree of mainstream contact, the methodology and teaching approach, the staff-student ratio, the instructional and therapeutic expertise, and the duration of direct and incidental teaching the Student received in the placement in which the Student was enrolled at the time the dispute or placement interruption occurred… Determining what constitutes a “comparable” stay put placement is fact-specific. The critical inquiry is whether a proposed change of setting or service would significantly depart from the parameters of the special education services to which the parties previously agreed, would have a substantial, detrimental effect on the Student’s learning, or would result in a more restrictive educational program.

The *Pilar* ruling further states that:

“Stay put” is not an equitable remedy. It is a procedural guarantee. In most circumstances determination of the proper “stay put” placement is mechanistic. The parties implement the last accepted IEP until another one is agreed to or ordered after administrative or judicial intervention. Only when there is true impossibility of performance, as here, does the inquiry become more nuanced. Then the parties, and if necessary the Hearing Officer, must weigh the critical attributes of a proposed substitute for the placement that would have been the statutory/regulatory “stay put”placement had it not ceased to exist.

In determining what constitutes a comparable placement for “stay put” purposes the Hearing Officer does not consider the motivations of or degree of cooperation between the parties. Neither does she consider the fiscal, programmatic or staff resources available to them, or even the hardship that might result to the adult parties from the “stay put” placement. The sole measure is comparability. *Id.*

Other BSEA decisions and rulings have adapted the principles set forth in *Pilar, supra*, to the facts of particular cases. For example, in the case of *In Re: Quincy Public Schools*, *Ruling on Motion for Stay-Put*, BSEA No. 1302133 (Crane, 2012), the student attended Clarke School for the Deaf as a residential student, not because she required residential educational services, but because she did require Clarke’s day school program to receive FAPE, but the distance between Clarke and the student’s home was too great for daily commuting. After Clarke closed its residential services, the Hearing Officer determined that “stay put” would be Clarke’s day program on comparability grounds. (Parents had made arrangements for nearby temporary housing, for which the Hearing Officer did not order reimbursement). See also, *In Re: Newton Public Schools, Southbridge Public Schools, and NECC*, *supra*, *In Re: Student v. Georgetown Public Schools and Landmark School*, *supra*.

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

The initial step in determining the District’s “stay put” obligation to Student is to identify Student’s last agreed-upon placement. This placement was NECC, which terminated Student’s enrollment on or about July 16, 2024. In the typical BSEA case with a fact pattern similar to that in the instant case, NECC would have been named as a party, either in the first instance or via a *Motion to Join*. Depending on such factors as whether NECC complied with applicable regulations governing termination, whether supplemental services from the District would mitigate the safety concerns motivating the termination decision, and whether a similar or comparable successor program was available on an interim or long-term basis, the Hearing Officer might order NECC to reinstate Student, and possibly order the District to provide additional supports to maintain the placement until a new program could be located. Alternatively, if the record showed that a comparable placement was immediately available, the Hearing Officer might order an interim placement in that program.

The instant case is complicated by several factors. First, NECC is not named as a party, and neither Parents nor the District has pursued its joinder. Second, the record does not indicate whether or not NECC complied with applicable regulations when it terminated Student’s placement. Lastly, neither Parents nor the District objected to the termination or asserted Student’s “stay-put” rights at NECC, via a due process hearing request or complaint with DESE’s Problem Resolution System.

I note that in the *Chelmsford Public Schools/Swansea Woods* decision, *supra*, which involved a fact pattern similar to that of the instant case, the private school (Swansea Woods), which was a party to the proceeding, had terminated the student’s placement and had filled the vacant slot created by the student’s discharge, rendering Swansea Woods at least theoretically “unavailable.” Nonetheless, Hearing Officer Kantor-Nir ordered Swansea Woods to re-enroll the student (with additional supports as determined by the Team), because, otherwise, the student would have no placement.[[6]](#footnote-6)

In this case, however, NECC, as a non-party, is not subject to an order from the BSEA. Further, Parents have indicated that they oppose returning Student to NECC because NECC would simply have him re-hospitalized. While the District claims that Parents’ position in this regard has thwarted its efforts to serve Student, it has not moved to join NECC as a party, nor has it disputed Parents’ assertion that NECC would simply have Student re-hospitalized if he were to return there.

I conclude, therefore, that, if NECC were a party in this case, I might well have identified NECC as Student’s “stay-put” placement, but I cannot do so given the present posture of the case. Based on these circumstances, I find that NECC is currently unavailable to Student.

Given NECC’s unavailability, I now turn to the extent of the District’s “stay put” obligation. Student’s current, IEP, covering June 2024-June 2025, provides for “24 hours/day (including awake overnight staff) and 7 days/week coverage,” and states that, “[t]hese supports are critical in maintaining his safety and ensuring [Student’s] progress.” (Stipulated Facts at Paragraph 23. See also Stipulated Facts, Paragraph 32).

While it would be virtually impossible for the District to implement fully every accepted portion of Student’s IEP in the same manner as a residential school, “comparability” does require, at a minimum, the 24/7 coverage, including awake overnight staff, contained in that IEP, unless the parties agree otherwise. The 15 hours of coverage per day proposed by the District does not fulfill the “stay-put” mandate and is inadequate, given Student’s history of extremely challenging behavior associated with his disabilities.

Parents assert that to meet its “stay put” obligation, the District must provide Student with an apartment or house, because IEP goals cannot be implemented while Student is in his comfortable and familiar home. The record does not support this conclusion. While an order directing the District to create a program that includes a housing arrangement may not be out of the question at some point in the future, it would be premature to order creation of such a program at this point in time, as a “stay put” measure. Rather, even assuming, *arguendo*, that a Hearing Officer could order the creation of such a placement, this could take place only after (1) a Team review of evaluations that recommend such placement and, (2) if the parties did not reach agreement at the Team level, Parents proving, at an evidentiary hearing, that such program is necessary to provide Student with FAPE.

**CONCLUSION AND ORDER**

Based on the foregoing, Student’s stay-put placement pending appeal is the services offered by Northborough-Southborough as set forth in services proposed by Northborough-Southborough as described in Paragraph 18 of the *Stipulated Facts*, except that the number of coverage hours shall be increased to 24 hours/7 days per week, including awake overnight staff. The parties may contract with and/or collaborate with other agencies to provide necessary staff.

By the Hearing Officer:

*Sara Berman*\_\_

Sara Berman Dated: November 29, 2024

1. Student’s father (“Father”) and mother (“Mother”) are Student’s co-guardians with educational decision-making authority. Mother lives in Connecticut. Student’s primary residence is with Father and Stepmother in Southborough, MA. [↑](#footnote-ref-1)
2. As stated in the Stipulated Facts, below, Student is currently housed in a psychiatric unit at Rhode Island Hospital. [↑](#footnote-ref-2)
3. The Stipulated Facts submitted by the parties are reproduced verbatim, with the exception of some formatting changes (numbering of paragraphs), and substituting the names of the Student and family members with the terms “Student,” “Mother,” “Father,” and “Stepmother.” [↑](#footnote-ref-3)
4. 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-4)
5. As Parents noted in their *Memorandum* *in Support of Student’s Right to Stay-Put*, the First Circuit has not definitively opined on the obligations of a school district if the pre-dispute placement becomes unavailable for reasons outside of the school district’s control, or when the accepted IEP cannot be implemented in an interim setting. and other circuits which have considered the issue are split. The Seventh, Ninth, and Eleventh Circuits have held that school districts must replicate pre-dispute placements “as closely as possible.” *L.J. ex rel. N.N. J. v. Sch. Bd. of Broward County,* 927 F.3d 1203, 1213 (11th Cir. 2019). By way of contrast, the Fourth, Fifth, Sixth, and D.C. Circuits have determined that school districts have no obligation to students whose placements end by no fault of the district, or when the IEP cannot be fully implemented in an interim placement. *Wagner v. Board of Education of Montgomery County*, 335 F.3d 297 (4th Cir. 2003); *Davis v. District of Columbia*, 80 F.4th 321, 330 (D.C. Cir., 2023). While the BSEA is not bound by decisions of circuits outside of the First Circuit, BSEA decisions utilize the same principles articulated by the Seventh, Ninth, and Eleventh Circuits, and reject the District’s assertion that it has no “stay-put” obligations to Student if his termination from NECC was not the fault of the District, and the District is searching for a new program. The case cited by the District in support of its position, *Davis v.* *District of Columbia*, supra, is not applicable here. [↑](#footnote-ref-5)
6. The District’s reliance on *Davis v. D.C.,* *supra*, for the proposition that it is not required to provide “stay-put” services where Student’s termination from NECC was beyond its control, and it is actively searching for a new placement, is misplaced. This, because *Davis*, which was decided by the D.C. Circuit, is not binding on the BSEA, and, while prior BSEA decisions are not binding on individual BSEA Hearing Officers, they may be used as guidance. I find no legal basis to depart from the BSEA’s consistent principle that school districts are not immunized from “stay-put” obligations under circumstances such as those presented in the instant case. I find that the above-cited BSEA rulings and decisions are legally supportable, and note that to my knowledge, none has been reversed on appeal. [↑](#footnote-ref-6)