

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

In re: Quin¹

BSEA #1605247

RULING ON PARENT’S REQUEST FOR STAY PUT ORDER

This matter comes before the Hearing Officer on the Request of the Parent of Quin for a Stay Put Order (hereinafter “Request for Stay Put”), filed on January 13, 2016, along with Parent’s request for an expedited hearing on stay put only. During a Conference Call that took place on January 14, 2016 the parties agreed to offer arguments on the stay put issue during a Pre-Hearing Conference, which was scheduled for January 21, 2016, rather than through an evidentiary hearing, and the request for expedited hearing was withdrawn. The parties submitted Exhibits on January 19, 2016 (School Exhibits 1-32 and Parent Exhibits 1-13) and made arguments during the Pre-Hearing Conference on January 21, 2016. At that time the undersigned Hearing Officer ruled orally on the Parent’s Request for Stay Put. The present Ruling affirms that oral ruling and elucidates the reasoning underlying the Order.

For the reasons set forth below, Parent’s Request for Stay Put is hereby ALLOWED.

FACTUAL BACKGROUND² AND PROCEDURAL HISTORY

Quin is a six year old attending first grade at the McCarthy Elementary School in Framingham. He has been diagnosed with Generalized Anxiety Disorder and Attention-Deficit/Hyperactivity Disorder. (S-10) Quin attended kindergarten at the same school during the 2014-15 school year. During kindergarten, Quin was found eligible for special education and an Individualized Education Program (IEP) was developed that placed him in a full inclusion program. (S-8) The IEP, which was accepted by his Parent, covered the period from October 7, 2014 to October 6, 2015. (S-8)

On September 30, 2015 the Team met for Quin’s annual review and wrote the current IEP for the period from September 30, 2015 to September 29, 2016, which also placed him in a full inclusion program. (S-18) On October 21, 2015 the TEAM proposed an amendment to Quin’s IEP to include two hours per week of direct Applied Behavioral Analysis (ABA) services and thirty minutes per month of Board Certified Behavioral Analysis supervision. Parent accepted this Amendment on November 2, 2015. (S-20). Also on October 21, 2015, Parent signed a release to permit Framingham Public Schools (“District” or “Framingham”) to explore out of district day programs for Quin. (S-21)

¹ “Quin” is a pseudonym chosen by the Hearing Officers to protect the privacy of the Student in documents available to the public.

² All factual determinations recited in this Part are made for purposes of deciding this Ruling only.

On or about November 23, 2015, the District recommended that Quin receive out of school tutoring for ten hours per week (two hours per day, five days a week) pending placement in an out of district program. The Parent accepted this recommendation and signed a tutoring form on November 23, 2015.³ (S-22) It appears that Quin stopped attending school at some point between November 17 and November 23, 2015⁴ (S-27), but is unclear from the record what his Parent was told at the time about whether he would be permitted to attend if she refused tutoring.⁵ Tutoring started November 30, 2015. (Hearing Request) On December 9, 2015 the Team reconvened (S-25) and at that time, parent signed releases for exploration of assessment programs. (S-26)

On January 11, 2016 the District filed a Hearing Request, seeking findings that an inclusion classroom is not appropriate for Quin and that he requires placement in an out of district therapeutic program, as well as an Order that he be placed in one of three programs that has accepted him. The District requested expedited status. (Hearing Request) Its request for expedited status was denied, and a Hearing was scheduled for February 1, 2016.

On January 13, Parent filed her response, arguing, *inter alia*, that an out of district placement is premature at this point, that the programs located by Framingham to which Quin had been accepted were too far for a student his age to travel, that Framingham has committed procedural violations, and that further evaluation of Quin is necessary. (Parent Response to Hearing Request) As explained above, at this time she also requested a Stay Put Order.

As of January 21, 2016, the date of the Pre-Hearing Conference, Quin had been accepted to between one and three out of district programs,⁶ but the Parent had not agreed to his attendance at any of them. Discussions continued between the District and the Parent as to possible out of district programs, either as a placement or for assessment only, as the parties agreed that additional evaluations of Quin would be helpful. In the meantime, Parent's requests (through her attorney) to have Quin return to the McCarthy School had met with resistance, and she had been informed, for example, that "appropriate services are not available for the Student at McCarthy so he should not return there. Framingham continues to offer the tutoring. Framingham continues to offer placement in any of the out of district programs to which he has been accepted. Framingham continues to be open to exploring other programs. . ." (P-8, email

³ The tutoring form, submitted by the District as Exhibit 22, is dated November 23, 2015 and states simply, "The Framingham Public Schools is offering [Quin] tutoring services (2 hours per day) while awaiting the identification of an out of district placement." It contains the name (though not the signature) of Nancy Shor, Team Evaluation Coordinator-McCarthy School, and provides two lines for parent signatures, one stating "I agree to [Quin] receiving tutoring services (2 hours per day) while awaiting an out of district placement," and the other stating, "I do not agree to [Quin] receiving tutoring services (2 hours per day) while awaiting an out of district placement starting." Parent signed under the first line. (S-22)

⁴ The District submitted Quin's attendance history as Exhibit 27. This document was dated January 11, 2016 yet ended with the date of November 17, 2015.

⁵ On December 4, 2015 Counsel for the Parent and Student sent an email to Counsel for the District asking whether Quin had been suspended. Counsel for the District responded, "My understanding is that he is not suspended. Rather he is on home tutoring, pending placement, either at parent request or with parent consent." (P-4)

⁶ The District stated during arguments that Quin had been accepted to three different out of district programs, BICO, Italian Home and Dr. Franklin Perkins. Parent stated she had not visited all of these programs and believed her son had been accepted at BICO only.

from Counsel for District to Counsel for Parent, 1/8/16) At this point, Quin was receiving two hours a day of tutoring, five days a week, and had not been in school since before Thanksgiving.

DISCUSSION

A. Legal Standard for Stay Put

The Individuals with Disabilities Education Act (IDEA) contains a provision commonly referred to as “stay put,” which provides, *inter alia*, that “during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement.”⁷ “The relevant inquiry . . . thus becomes the identification of the then current educational placement” of the child.⁸ Although many cases turn on its meaning, neither the IDEA nor federal and state regulations governing stay put define the term.⁹ In determining “then-current education placement” for individual students, courts have considered the essential purpose of this provision, which is to “preserve the status quo pending resolution of” the dispute concerning that child’s placement.¹⁰ “Because the term connotes preservation of the status quo, it refers to the operative placement actually functioning at the time the dispute first arises. If an IEP has been implemented, then that program’s placement will be the one subject to the stayput (*sic*) provision.”¹¹

School districts are not permitted to make unilateral changes to a child’s educational program,¹² but this does not mean that every change with respect to a student’s operative placement constitutes a violation of the stay put mandate.¹³ The issue is individualized and “fact intensive.”¹⁴ Courts are clear, however, that a proposed change in services that would likely

⁷ 20 USC § 1415(j); 34 CFR §300.518.

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

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

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

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

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

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

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

substantially change a student's current educational services implicates stay put principles,¹⁵ as does a change in location that "results in dilution of the quality of a student's education or a departure from the student's LRE [least restrictive environment]-compliant setting."¹⁶

B. The Parties' Positions

The Parent argues that where Quin's IEP provides for his placement in McCarthy Elementary School's full inclusion program, Quin's "then-current educational placement" is an inclusion classroom in the Framingham Public Schools. She suggests that she would not object to an inclusion classroom at a different elementary school in the District, as other schools offer additional supports beyond those available at McCarthy. For example, she asserts, a full inclusion program with emotional/behavioral supports exists at Stapleton Elementary School, whereas the McCarthy's full inclusion program does not provide such supports. Parent agrees with the District's contention that additional evaluations for Quin may prove helpful, and she would like these evaluations to occur while he attends the Framingham Public Schools before she commits to placing him out of district based on potentially insufficient information.

The District does not believe that Quin should be returned to the McCarthy, or to any of its elementary schools, as he requires a therapeutic program beyond what it is able to provide. The District suggests that he should remain at home and tutoring should continue until the parties agree to an out of district placement for Quin. As to defining his "then-current educational placement" for purposes of stay put, Framingham asserts that although Quin's IEP calls for a full inclusion program, his "operative placement" is home tutoring.

C. Stay Put for Quin

There is no question Quin's last-accepted IEP calls for a full inclusion program and places him in one at McCarthy Elementary School. Although this may not be the most appropriate program for him at this time, the stay put inquiry does not entail consideration of whether the challenged program is adequate or wise.¹⁷ The home tutoring recommended by the District and accepted by the Parent was nothing more than a temporary arrangement to ensure that Quin received some services while the parties continued to explore and negotiate possible placements, and as such it does not constitute his placement for purposes of stay put.¹⁸ As the First Circuit Court of Appeals recognized in *Verhoeven v. Brunswick School Committee*:

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

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

¹⁷ See *Mr. C. v. Maine Sch. Admin. Dist. No. 6*, Civ. No. 06-198-P-H, 2007 WL 4206166, at *20 (D. Me. Nov. 28, 2007).

¹⁸ See *Verhoeven*, 207 F.2d at 8 (placement that parties agreed in settlement agreement would last only through the end of the school year "was never intended to be anything more than a temporary placement").

The policy behind section 1415(j) supports an interpretation of “current educational placement” that excludes temporary placements [such as the one before it, which was set to terminate at the end of the school year]. Section 1415(j) is designed to preserve the status quo pending resolution of administrative and judicial proceedings . . . The preservation of the status quo ensures that the student remains in the last placement that the parents and the educational authority agreed to be appropriate.¹⁹

CONCLUSION

Upon consideration of Parent’s Request for a Stay Put Order, as well as the relevant documents submitted by the parties and the arguments made, I find that an inclusion program within the Framingham Public Schools is Quin’s then-current placement for purposes of stay put. This does not necessarily mean he must return to the same classroom at the McCarthy Elementary School, but the inclusion classroom in which he is placed must “replicate[] the educational program contemplated by” his IEP.²⁰

ORDER

Quin must be returned immediately to a full inclusion classroom within the Framingham Public Schools. Unless the Parent agrees otherwise for ease of transition, Quin will return to school on Friday, January 22, 2016.

The parties have agreed that further assessments of Quin would be helpful. These assessments will include Occupational Therapy, Speech/Language Social Pragmatics, Academic – Reading/Writing/Math, a Functional Behavioral Assessment, Observation of the Student, and a Psychological Assessment that includes social/emotional and phonological components. These assessments may take place while Quin attends the Framingham Public Schools, or through an out of district extended evaluation should the parties agree to one.

The Hearing in this matter will take place on March 16, 17 and 18, 2016 at the Framingham Special Education Office. Framingham may file a motion to advance the case in the event that the evaluations are completed at an earlier date.

¹⁹ *Id.* at 10 (internal citations and quotation marks omitted).

²⁰ *Fairfax County Sch. Bd.*, 372 F.3d at 682; *id.* at 683 (“‘educational placement’ fixes the overall instructional setting in which the student receives his education, rather than the precise location of that setting”).

By the Hearing Officer:

Amy M. Reichbach
Dated: January 26, 2016