

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

In re: Pembroke Public Schools v.
Student

BSEA #1911125

**RULING ON PARENT'S PRE-HEARING MOTION FOR STAY-PUT ON THE
LAST ACCEPTED IEP**

On June 19, 2019, Parent filed a Pre-hearing Motion For Stay-Put On The Last Accepted IEP. According to Parent, Evergreen School (Evergreen), where Student is placed residentially, is not implementing the services in Student's last accepted IEP (which includes a behavior support plan). Also, according to Parent, non-provision of services is causing Student to exhibit inappropriate behaviors.

Pembroke Public Schools responded to Parent's Motion on June 19, 2019 requesting denial of the motion and disputing Parent's adverse allegations against Pembroke or its agents. Pembroke further asserts that it has been providing Student services in conformity with the last conditionally accepted IEP and notes that it has previously provided this documentation to Parent's advocate and the BSEA.

Facts:

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

1. Student is a nineteen year old eligible student currently placed residentially at Evergreen.
2. Parent asserts that the last fully accepted IEP is the one resulting from a Team meeting on October 31, 2013.
3. The IEP resulting from the October 31, 2013 meeting offered Student an IEP calling for a day placement at Amego, Inc., a private day school. The IEP, which covered the period from October 31, 2013 to October 30, 2014 offered Student: 30 minutes per week each of speech and language, BCBA and occupational therapy consultation; 30 minutes twice per week of speech/communication; 45 minute three times per week of APE; 6 hours (360 minutes) daily of behavior support; five and $\frac{3}{4}$ hours (285 minutes) daily of functional academics; and 42 minutes (210 minutes) daily of activities of daily living. The aforementioned services were based on a five day cycle. The IEP also contained a Behavior Support Plan.
4. On or about November 11, 2013, Parent accepted the IEP and day placement proposed by Pembroke.

5. The record is silent as to any IEPs promulgated by Pembroke, whether accepted or rejected by Parent, until the IEP promulgated in September 2017.
6. On July 28, 2017, Parent visited Evergreen Center (Evergreen), a Massachusetts Department of Elementary and Secondary Education approved special education private school located in Massachusetts. During this pre-enrollment meeting it was explained to Parent that

...therapy services at Evergreen are provided under a consultation (indirect service) model which incorporates therapy goals within other life skill goals, thereby embedding them within functional daily routines.

Prior to the July 28, 2017 meeting, Parent had been provided with an electronic handbook which described Evergreen's Therapy Services Treatment Modality policy on July 21, 2017. This Modality policy was provided again during the meeting *in vivo*.

7. Student began attending Evergreen Center (Evergreen) on or about August 1, 2017. During the first 30 days at Evergreen, the school conducted testing to ascertain Student's then current performance levels. The information gathered was later discussed during a Team meeting held on or about September 18, 2017.
8. On or about September 2017, Pembroke offered Student residential placement at Evergreen, consistent with Evergreen's consultation model, for the period from September 7, 2018 to September 17, 2018. This IEP offered Student once per month consultation to school personnel and Parents, as well as direct services as follows: 27.5 hours per week of educational services; 140.5 hours per week residential services; and thirty minute motor therapy sessions three times per week. This IEP was based on a seven day cycle.
9. On September 27, 2017, Parent consented to Student's placement at Evergreen Center and rejected the IEP (program) on the basis that OT, PT and speech and language services had been removed from the grid.
10. Parent also forwarded an email to Pembroke on September 27, 2017, stating that she rejected Pembroke's decision to remove OT, PT and speech and language from Student's IEP. Parent however, noted her expectation that all other parts of the IEP be implemented.
11. On or about October 30, 2017, Nicole Alton-Moore, MPA, LSW, Director of Family Services and Admissions at Evergreen Center, wrote to Parent once again explaining Evergreen's Therapy Services Treatment Modality policy. The letter informed Parent that Student had been accepted to Evergreen because the staff believed that Student's

needs could be met through its model. Moreover, Ms. Alton-Moore noted that an alternative placement would be necessary if Parent believed that Student needed direct services or “pullout” therapy services. Ms. Alton-Moore further noted that

Student had demonstrated progress in a number of areas including functional academics, community behavior, social competence, and independence with activities of daily living.

Lastly, Ms. Alton-Moore advised Parent that a signed IEP, consistent Evergreen’s service model, would have to be signed for Student to maintain his placement at Evergreen.

12. Pembroke filed a request for Hearing on November 10, 2017, seeking substitute consent to implement its IEP.
13. On December 13, 2017 Parent filed a Motion to Dismiss raising jurisdictional challenges similar to those raised in the instant case¹, and stating that

Parent does not dispute that her son is a child with a disability. Parent has not disputed the district’s evaluations and Parent accepted placement. Therefore, the district’s complaint must be dismissed as it is without merit. (Administrative Notice of BSEA#1804120, Parent’s Motion to Dismiss).

14. Pembroke assented to the Motion to Dismiss on January 23, 2018 asserting that there was no denial of FAPE to Student then receiving services at Evergreen. (Administrative Notice of BSEA#1804120).
15. BSEA #1804120 was dismissed on January 23, 2018 and the case was closed at the BSEA.
16. On June 5, 2018 Parent forwarded an email to the BSEA Director inquiring about an “Interim Agreement”. The Director responded on June 12, 2018 that the BSEA file did not contain any such document and forwarded a copy of an email between the Parties predating Parent’s filing of her Motion to Dismiss.
17. On September 7, 2018, Student’s Team convened to discuss an annual residential assessment. As a result of the meeting, Pembroke offered Student continued residential placement at Evergreen (consistent with Evergreen’s consultation model) for the period from September 7, 2018 to September 6, 2019. This IEP, as its predecessor, offered Student a once per month consultation for school personnel and

¹ A Ruling on Parent’s Motion to Dismiss in the instant case is being issued separately.

Parents, and direct services as follows: 27.5 hours per week of educational services; 140.5 hours per week residential services and three times per week, thirty minute motor therapy sessions three times per week. This IEP was based on a seven day cycle.

18. On October 15, 2018, Parent rejected the IEP because of the IEP's failure to offer direct services in speech and language, occupational therapy and physical therapy, but consented to the placement at Evergreen.
19. Speech and language therapy services flow charts submitted by Pembroke document the provision of indirect and consultation services at Evergreen consistent with the IEP proposed in 2017 and 2018.
20. On April 13, 2019, the Massachusetts Department of Elementary and Secondary Education's (DESE) Program Resolution System (PRS) conducted an investigation in response to a complaint² filed by Parent alleging Pembroke's noncompliance with 603 CMR 28.05(7)(b). The PRS investigation resulted in a finding of non-compliance, requiring that Pembroke provide Student with compensatory services owed since February 2018, and giving Pembroke until May 17, 2019 to submit a corrective action plan. This finding is currently under appeal and awaiting DESE's determination.
21. On May 21, 2019, Pembroke filed the instant case.

Legal Standard for Placement Pending Appeal:

Federal and Massachusetts special education laws entitle students to remain in their then-current educational program and placement during the pendency of any dispute unless the parents and the school district agree otherwise. 20 USC §1415(j); 34 CFR 300.518(a); G.L. c.71B §3; 603 CMR 28.08(7).³

This right, commonly known as "Stay-put", seeks to maintain a student's educational situation during the pendency of an IDEA appeal. The intent is to not disrupt the student's life unnecessarily while a dispute is being litigated. In this sense, "current educational placement" is equivalent to "the operative placement actually functioning at the time the dispute first arises". *L.Y. ex rel. J.Y. v. Bayonne Bd. of Educ.*, 384 Fed. Appx. 58, 61, 20110 WL 2340176, *2 (3rd Cir. 2010) (quoting *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625-26 (6th Cir.) 1990).

Generally, a student's placement is predicated upon the accepted IEP, the document which dictates the school district's responsibility toward a resident student. While one must certainly look at the last agreed upon IEP for guidance in determining the program and placement to which a student is entitled during the pendency of a proceeding, a

² The complaint alleged in part non-compliance with 34 CFR 300.503, requiring districts to provide prior written notice before changing a student's placement or provision of FAPE and sought compensatory services.

³ Exceptions to Stay-put which relate to violations of the code of conduct are not applicable in this matter.

determination regarding Stay-put requires careful examination of the particular facts and circumstances surrounding the program and placement to which the student is entitled during the pendency of a dispute. See *Hale v. Poplar Bluff R-1 School District*, 280 F.3d 831 (8th Cir. 2002) (calling for the fact finder to inquire as to the specific facts of the case to examine the impact that educational changes may have on the student).

With this guidance I examine the particular facts and circumstances in the case at bar.

Discussion:

Parent argues that once Evergreen agreed to accept Student it became obligated to provide the agreed upon direct services and that Evergreen was aware of the process required to dispense with the direct services. According to Parent, neither Evergreen nor Pembroke informed Parent that Student would not be receiving “the direct services”, supports or supplemental aides he previously received while at his day placement at Amego.

Parent alleges that Pembroke never informed her of this, thereby depriving Parent of a meaningful opportunity to participate in the placement process. Parent asserts that after having rejected placement at Evergreen in February 2019, she later accepted said placement.⁴

In her Motion, Parent relies on a Massachusetts Department of Elementary and Secondary Education (DESE) Program Resolution System (PRS) investigation resulting in a finding of non-compliance and finding Pembroke responsible to provide Student compensatory services dating back to February 2018. PRS instructed Pembroke to submit a corrective action plan by May 17, 2019. Pembroke appealed DESE’s PRS findings and this appeal is currently pending.

Relying on PRS’ findings, Parent seeks implementation of the last accepted IEP, which in her view is the 2013 to 2014 IEP. Lastly, Parent notes

...Parent is requesting that the Hearing Officer issue a Stay-Put Order, preliminary injunction for the last accepted IEP and any failure to do so would be a denial of FAPE by the SEA/BSEA in favor of the school district to assist them in forcing a hearing that does not comply to federal regulations pursuant to 34 CFR 300.507 and denies the Parent the right to a fair and impartial hearing and the student the right to continue in his previous special education program that was last accepted by both parties prior to the district filing for a hearing. Therefore, Parent’s Motion for a Stay-Put for the last accepted IEP must be GRANTED without undue delay.

⁴ In the instant Motion, Parent once again mentions her request that the instant matter be dismissed. As noted earlier, Parent’s dismissal motion is being addressed through a separate Ruling and as such, not discussed here.

Pembroke, in turn, states that it has been providing services to Student in conformity with the last conditionally accepted IEP and that Parent and the BSEA have previously been provided documentation to support its position. It appears from Pembroke's pleadings that during a telephone conference call on November 21, 2017 in the previous matter (BSEA #1804120), the Parties entered into a verbal agreement for conditional implementation of the consultation model at Evergreen so that Student could be served. While there is no documentation of the Parties' understanding of what transpired during the telephone call of November 2017, the IEP signed by Parent on September 27, 2017 and her email dated the same date show that Parent accepted the placement at Evergreen (including the consultative model) and thereafter requested dismissal of BSEA #1804120, a Hearing Request initiated by Pembroke, on the basis that the BSEA lacked jurisdiction as there was no dispute between the Parties. Moreover, Parent has not, to date, requested a Hearing with the BSEA challenging the services at Evergreen or the placement itself. Both matters, BSEA #1911125 and BSEA #1804120 were initiated by Pembroke.

As explained by the Court in *Hale v. Poplar Bluff R-1 School District*, the fact finder is called upon to engage in careful examination of the facts and the unique circumstances surrounding the program and placement to which a student is entitled during the pendency of an appeal. *Hale v. Poplar Bluff R-1 School District*, 280 F.3d 831 (8th Cir. 2002).

While the IEP is one of the elements to be evaluated, this document cannot be considered in a vacuum. The totality of the factor must be considered and the impact that educational changes may have on the student certainly cannot be ignored. The hearing officer's inquiry must be careful in keeping with the intent of Stay-put, which is not to disturb the Student's placement and programming, that is, the situation in which the student finds him/herself at the time the appeal is initiated. The student is entitled to continuation of said situation during the dispute arose, unless the parties agree otherwise (which is not the case in the instant matter). Stay-put is maintenance of the *status quo*.

The PRS finding is distinguished from this Ruling in the former offered only technical relief apparently based on the grid of the IEPs submitted, whereas as discussed in this Ruling, my analysis involves a broader inquiry as to the totality of the circumstance.

The record in the instant case reflects that in 2013 Student began attending Amego pursuant to an accepted IEP that offered him day placement with a direct related services model. At some point, not contained in the record, Student stopped attending Amego.

In late July of 2017, Parent visited Evergreen and met with staff who explained Evergreen's consultative model (Fact #5). Prior to the July meeting, Parent had been provided with an electronic copy of Evergreen's handbook describing its treatment modality and a hardcopy was provided during her visit to Evergreen.

On or about August 1, 2017, Parent consented to Student attending Evergreen and updated testing was conducted during the initial 30 days. Student's Team convened in September 2017 to discuss the result of Student's testing and the resulting IEP offered Student continued

placement at Evergreen. Thereafter, on September 27, 2017 Parent formally consented to placement at Evergreen. When she later inquired about direct services directly with Evergreen in October 2017, she was once again advised about Evergreen's treatment modality policy and told that if she wanted a direct service model Student would have to be placed in a different residential school. Parent did not reject placement nor has she at any time Requested a Hearing with the BSEA. I note that these events occurred prior to Pembroke's filing of BSEA #1804120.

Pembroke has now offered Student two IEPs (the first covering the period from September 18, 2017 to September 17, 2018, and the second for September 2018 to September 2019) calling for Student's placement at Evergreen, a residential school that offers services consistent with a consultative model.

As discussed above, the facts in this case show that since July of 2017 Parent has been fully aware that Evergreen only offers an indirect service, consultation model. The program is not designed to offer direct services and this information has been explained and reiterated to Parent on numerous occasions. In July and October of 2017 she visited, met and corresponded with Evergreen staff. In October 2017, Parent was advised by Ms. Alton-Moore that if Parent wished for Student to access a direct service model, Student would have to attend a different school. Parent has known that the services at Evergreen are inextricably intertwined within a consultation model, and knowing this, she has accepted this placement twice since 2017 and has consented to Student staying there. It is impossible for Pembroke and Evergreen to implement a direct services model within an indirect services model program. Given this impossibility, Parent's rejection of the program model in favor of direct services creates a difficult tension. While parents always have the right to accept or reject portions of an IEP, or the entire IEP, there are circumstances (such as the one in the instant case) where the program model and placement are so interdependent that acceptance of one and not the other results in the impossibility of implementation. Such is the case here and this could ultimately call for the entire IEP to be set aside. The parties would then be returned to the proverbial "drawing board" to start their search for a program and placement anew. This however, is a determination for another day.

The facts in the instant case are that at the time of Pembroke's filings of its Hearing Requests in 2017 and 2019 Student was residentially placed at Evergreen and he has at all times been receiving services pursuant to their consultative model. Starting on August 1, 2017, Parent twice accepted the Evergreen placement for Student and has consented to Student residing there and receiving services through the consultation model and, during this time, Parent, who has been represented by a special education advocate, has never requested a Hearing before the BSEA to clarify Student's/ her rights, or to challenge the appropriateness of the IEP and/or placement. As such, for purposes of Stay-put, Parent's actions can only be construed as constructive acceptance of Evergreen's program and placement.

Evergreen is Student's Stay-put program and placement during the pendency of this appeal. Thus, Parent's Motion for Stay-put on the last accepted IEP (which Parent deems to be the IEP dating back to 2013) is **DENIED**.

If Parent believes that Student requires a direct services model instead of a consultative model, she may reject the IEP in its entirety and if unable to resolve the matter with Pembroke, file a Hearing Request with the BSEA.

ORDER:

Parent's Motion for Stay-put on the last accepted IEP is **DENIED** consistent with this Ruling.

Pembroke is responsible to continue offering Student placement at Evergreen (under the consultative model) during the pendency of this appeal.

So Ordered by the Hearing Officer,

Rosa I. Figueroa
Dated: July 1, 2019