COMMONWEALTH OF MASSACHUSETTS
SPECIAL EDUCATION APPEALS

Student v. Pembroke Public Schools BSEA #1510495

DECISION

This decision is issued pursuant to M.G.L. c. 71B and 30A, 20 U.S.C. § 1401 et seq., 29 U.S.C. § 794, and the regulations promulgated under said statutes.

By agreement of the parties and pursuant to BSEA Hearing Rule XII, this matter is decided solely on the basis of documents that have been filed by Parent and that are administratively marked as Parent Exhibit 1, and exhibits that have been filed by the School District and that are marked as School Exhibits 1 through 12.

PROCEDURAL HISTORY

Parent requested a hearing on June 22, 2015 and a hearing was scheduled to occur on July 27, 2015 before Hearing Officer Amy Reichbach. Pembroke filed a Challenge to the Sufficiency of the Hearing Request on June 26, 2015 which was denied on July 1, 2015. On July 6, 2015, Parent requested that the status of the hearing be changed to expedited. On July 10, 2015, Pembroke requested a postponement of the hearing. On July 15, 2015, the hearing officer denied Parent's request for expedited status and allowed Pembroke's postponement request. The hearing was scheduled for July 29, 2015.

On July 16, 2015, the case was administratively reassigned to the undersigned hearing officer. On July 27, 2015, Parent requested a postponement of the hearing which Pembroke did not oppose. During an August 11, 2015 telephone conference the Parties agreed that the matter could be determined based upon submission of documents and that witness testimony would not be necessary. The hearing officer allowed the Parties until August 14, 2015 to submit any documents they wished for the hearing officer to consider. The record closed on August 14, 2015.

ISSUE

Whether the Student's rights pursuant to the stay put provision of the IDEA entitled him to receive 50 hours of Lindamood Bell services during the summer of 2015.

SUMMARY OF THE EVIDENCE

1. The instant parties were previously before the BSEA in a matter that resulted in a Decision dated October 31, 2013. The relevant portion of the decision required Pembroke to arrange for Student to be evaluated through a Lindamood Phoneme Sequencing program and ordered Pembroke to provide the instruction required by

that evaluation. It further ordered that if the evaluation did not recommend instruction that the Team would re-convene with Parent and her expert to determine what other explicit instruction would be utilized to address Student's phonological weakness. It further ordered the incorporation of a reading fluency program into the direct reading instructional session at least twice weekly. (S-1)

2. That case came before the BSEA again on the issue of compliance and a hearing was held on March 13, 2014. The decision stated that Pembroke had arranged for Student to be evaluated through a LiPS program and that the evaluation made recommendations for services other than LiPs instruction. Subsequently, Pembroke sought to convene a Team meeting that would include Parent's evaluator as required by the October 31, 2013 BSEA decision. The hearing officer found that Pembroke was in compliance with the October 31, 2013 decision. (See BSEA # 1310012c[1])

3. The Team convened on April 9, 2014. (S-2) The meeting summary written pursuant to the meeting states as follows: "Team agrees to fund 50 hours at Lindamood Bell. In lieu of ESL services for summer 2014 family assumes responsibility for transportation. No additional ESL services will be provided for summer 2014." The Team summary appears to contain the signatures of Parent and the Coordinator of Special Education. (S-2)

4. The Parties were the subject of another BSEA hearing which resulted in a decision issued on November 25, 2014. In this decision the hearing officer referenced the previous BSEA decisions in this matter and noted that "an IEP reflecting the services the Hearing Officer found to be appropriate, as well as the Amendments ordered by the Hearing Officer, was developed by Pembroke and proposed to the Parent on November 5, 2013. The Parent has taken no action on that proposed IEP." (S-4)

5. She additionally found that the Parties had agreed to provide fifty hours of Lindamood Bell instruction to Student over the course of the summer of 2014 and that Student had participated in the services. (See BSEA #1310012C.) The hearing officer found that Pembroke was in compliance with the two prior BSEA decisions. (S-4)

6. A facilitated Team meeting was held on March 25, 2015. (S-5)

7. Pembroke sent a letter to Mother dated April 13, 2015. The letter stated that Student was scheduled to attend a summer program at Pembroke High School which would consist of Student receiving Orton-Gillingham reading services for 1 hour on Tuesdays and Thursdays from 11:30 until 12:30, beginning on July 7 and ending on August 6. (S-7)

8. In a letter dated June 2, 2015, Jessica Duncanson, Director of Student Services for Pembroke, responded to messages Parent had left on her voicemail requesting that

[1] This decision was not included in the record, and the undersigned took administrative notice of its findings. 20 MSER 60 (2014)

Pembroke provide Student with 50 hours of Lindamood Bell services during the summer of 2015. Ms. Duncanson's letter clarified Pembroke's position that the 50 hours of Lindamood Bell services provided during the summer of 2014 was part of a separate agreement for the summer of 2014 based upon the BSEA decision issued in October 2013, and thus there was no stay put right associated with those services. Ms. Duncanson then cited to the November 25, 2014 BSEA decision in the matter of BSEA # 1310012C in which the hearing officer found Pembroke to have complied with all prior BSEA decisions. (S-8)

FINDINGS AND CONCLUSIONS:

Student is an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act (IDEA)[2] and the state special education statute.[3] As such, he is entitled to a free appropriate public education (FAPE). Neither his status nor her entitlement is in dispute.

Under the Individuals with Disabilities Education Act (IDEA) and Massachusetts law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); (M.G.L. ch. 71B.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

The burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49*,* 126 S. Ct. 528, 534, 537 (2005) In this case, Parent is the party seeking relief, and thus has the burden of persuading the hearing officer of her position.

The IDEA's stay-put provision 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 of such child."[4] Its essential purpose is to preserve the status quo pending resolution of a dispute between the parties, thereby preventing unilateral action by a school district in contravention of a student's or parent's objection, until

[2] 20 USC 1400 *et seq*.
[3] MGL c. 71B.
[4] 20 U.S.C. § 1415(j) ("Except as provided in subsection (k)(4), during the pendency of any proceeding 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 of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed."). *See also*, 34 C.F.R. § 300.518 ("Except as provided in § 300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.").

the completion of due process proceedings.[5] Generally, the terms of the last accepted IEP should be enforced as the "stay put" relief.

In the case at hand, Parent seeks to use the stay put provision to argue that Student is entitled to receive the same 50 hours of Lindamood Bell services during summer 2015 that he received during the summer of 2014. Her argument is not supported by the record.

Student received fifty hours of Lindamood Bell services during the summer of 2014 in lieu of ESY services which Pembroke would have otherwise provided him during that time, pursuant to a Team meeting summary written on April 9, 2014 and signed by the Parties. The Team meeting was held in compliance with a BSEA Order which required that Pembroke provide a Lindamood Bell evaluation and in consultation with Parent's evaluator, provide services as recommended. As the hearing officer in the matter of BSEA # 1310012C found, Pembroke developed and proposed an IEP on November 5, 2013 that included the Amendments ordered by the Hearing Officer in the matter of BSEA #1310012. Also, see S-11, which shows an increase in direct reading services from 3 x 55 minutes/7 day cycle proposed by the prior IEP (S-12) to 5 x 55 minutes per 7 day cycle.

The hearing officer's Order was not directed at ESY services. Rather, it required that provision of services as directed by the Team in consultation with Parent's expert be included in the IEP. The Parent has not provided any basis for finding that Student was entitled to "stay put" ESY services with respect to the 50 hours of Lindamood Bell services provided by Pembroke in lieu of extended year services during the summer of 2014. That Pembroke and Parent agreed to provide the required services during the summer of 2014 does not have any bearing on the obligation to provide the ordered additional services as ESY services.

By the Hearing Officer,

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Catherine M. Putney-Yaceshyn
Dated: September 22, 2015

[5] *See C.P. v. Leon Cnty. Sch. Bd. Florida*, 483 F.3d 1151, 1156 (11th Cir. 2007) ("provision amounts to, in effect, an automatic preliminary injunction, maintaining the status quo and ensuring that schools cannot exclude a disabled student or change his placement without complying with due process requirements"); *Verhoeven v. Brunswick Sch. Comm.*, 207 F.3d 1, 3 (1st cir. 1999) (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).