

On February 21, 2014, H.H. filed a Due Process Hearing Request (Complaint) contending that Defendant had violated H.H.'s rights under IDEIA related to educational placement. The Complaint was received by the District on February 25, 2014.

The parties participated in an unsuccessful resolution session on March 7, 2014, followed by an unsuccessful mediation session on April 1, 2014. The court then scheduled a hearing for May 9, 2014. On April 18, 2014, H.H. filed a request for an expedited hearing to address the question of H.H.'s "stay-put" placement because the parties were in disagreement as to whether H.H. should be permitted to remain at the out-of-state residential facility pending a final decision in this case. The court scheduled an expedited hearing to address the stay-put issue for April 24, 2014. Defendant requested a continuance, indicating that H.H.'s Parent's had not previously requested an expedited hearing and that it would cause Defendant an undue hardship to prepare for the hearing on such short notice. During a pre-hearing telephone conference held on April 22, 2014, it was agreed that the hearing scheduled for April 24, would be canceled, and that the parties would appear on May 9, to address the stay-put issue. Then, depending on the outcome of that hearing, the parties would advise the court if the matter could be settled or whether another hearing date would be necessary to address the merits of the case.

After careful consideration of the evidence and arguments presented, and for the reasons set forth below, the court concludes that H.H.'s stay-put placement is his current placement, C [REDACTED] P [REDACTED] Residential Treatment Facility in Florida. H.H. is entitled to remain at such placement until such time that the transition period discussed during the December 13, 2013 IEP meeting, and incorporated into the December 13, 2013 IEP meeting minutes, can be accomplished when school resumes in August 2014. If, due to illness or other unforeseen circumstances, the transition period is not completed by September 30, 2014, then the IEP Team

shall reconvene to develop a new IEP and determine the best procedure to ensure a speedy and successful transition from C █ P █ to E █ Middle School. Additionally, Defendant is required to continue to fund H.H.'s educational placement at Carlton Palms pursuant to IDEIA's stay-put mandate while this appeal is pending.

II. FINDINGS OF FACT

1.

H.H. is 13 years old. He has reported diagnoses of autism and epilepsy. *H.H.'s Due Process Hearing Request; H.H.'s Request for Expedited Hearing.*

2.

Approximately four and one-half years ago, Defendant placed H.H. at The L █ T █ a residential facility in Alabama. According to M █ B █ P █ County School District's Executive Director of Student Services, the parties attended mediation one year later. During mediation, the parties agreed that C █ P █ a residential treatment facility in Florida, would be the most appropriate placement for H.H. at that time. He was then transferred to C █ P █ so the staff could address H.H.'s negative behaviors, including self-injurious behaviors and elopement. *Testimony of M █ B █ Tr. 17, lines 20-21; Tr. 19, lines 7-16; Tr. 25, lines 23-25; Tr. 26, lines 1, 11-20.*

3.

H.H. has continuously resided at C █ P █ for the past three and one-half years, even though the parties originally agreed that the placement would be for only one year. According to Ms. B █ H.H. remained at the facility past the initial year in response to another due process complaint that H.H.'s parents filed at the end of H.H.'s first year at C █ P █ *Testimony of M █ B █; Tr. 19, lines 7-9, 16-17, 21-25.*

4.

During the time H.H. has attended C [REDACTED] P [REDACTED] he has occasionally returned home for visitation periods of short duration. For example, he has visited his home every Christmas.

Testimony of Lynn Higgins; Testimony of B [REDACTED]; Tr. 34, lines 8-16.

5.

Beginning in October, 2013, the parties began discussing H.H.'s return to the P [REDACTED] County School District. Because H.H.'s parents were concerned that H.H. would resume his negative behaviors, which had decreased while H.H. attended C [REDACTED] P [REDACTED] Defendant retained the services of a private Board Certified Behavioral Analyst (BCBA), who was to meet with H.H. and his family over the winter break in December, 2013.¹ Defendant also worked with C [REDACTED] F [REDACTED] to set-up H.H.'s classroom in his local school to mirror the classroom he attends at C [REDACTED] P [REDACTED]. *Testimony of Bealings-Sayles; Tr. 20, lines 18-19, 21-25; Tr. 21, lines 1-2; Tr. 22, lines 9-20; Tr. 25, lines 23-25; Tr. 26, line 1; Tr. 31, lines 9-13; Tr. 34, lines 14-16.*

6.

On December 13, 2013, an IEP meeting was held to further detail H.H.'s transition from C [REDACTED] F [REDACTED] to Defendant's local school district. Defendant sought to expedite H.H.'s return to its district, in part, because Defendant had determined that C [REDACTED] P [REDACTED] was no longer an appropriate placement for H.H.² Defendant based its determination on the fact that C [REDACTED] P [REDACTED] is an extremely restrictive environment that provides no access to non-disabled students. *Testimony of B [REDACTED]; Tr. 21, lines 6-12; Tr. 26, lines 7-20.*

¹ H.H. was home from December 22 to December 28, 2013. The BCBA met with H.H.'s parents on December 23, 2013. *Testimony of B [REDACTED]; Tr. 22, lines 21-25; Tr. 33, lines 20-25.*

7.

In H.H.'s most recent Individual Education Program (IEP), developed on December 13, 2013, the IEP team agreed to allow H.H. to make three visits to his local school to assist him in the transition process. The first visit home was set to take place from January 9 through January 14, 2014 during which time H.H. would attend school in P [REDACTED] County on January 10 and 13. A second visit was scheduled to occur from January 23 through January 28, 2014 during which time H.H. would attend P [REDACTED] County School District on January 24 and 27. H.H.'s third visit home would be from February 9 through February 16, 2014. During that time, H.H. would attend P [REDACTED] County Schools from February 10 through February 14, 2014, and he would ride the bus for the first time. After the third transition period, H.H. would be discharged from C [REDACTED] P [REDACTED], on or about February 22, 2014, and return to his local school full-time beginning on February 24, 2014.³ *Testimony of B [REDACTED]* Tr. 22, lines 3-8; Tr. 35, lines 12-25; Tr. 47, lines 2-4; Tr. 48, lines 12-25; Tr. 49, lines 1-10.

8.

H.H. attended his local P [REDACTED] County school on January 10 and 13, as well as January 24 and 27. During these transition periods, the school observed H.H. exhibit self-injurious behaviors when he was initially dropped off at school. However, his self-injurious behaviors ceased shortly afterward. Thus, Defendant considered the two first transition periods to be successful. *Testimony of B [REDACTED]*; Tr. 23, lines 20-22; Tr. 24, lines 9-11; Tr. 25, lines 7-15; Tr. 29, lines 6-10.

² As part of the transition process, C [REDACTED] P [REDACTED] was supposed to send material to H.H.'s family to assist them in preparing for the transition. However, H.H.'s parents moved and they did not receive the materials until February, 2013. *Testimony of I [REDACTED]*; *Testimony of B [REDACTED]* Tr. 34, lines 21-25; Tr. 35, lines 1-4.

9.

The IEP team met on February 3, 2014, to discuss the data gathered from the first two transition periods. During this time it was also expected that the IEP team would determine what supports H.H. would require for his third, and final, transition period, which was scheduled to take place February 10 through February 14.⁴ *Testimony of E [REDACTED] Tr. 24, lines 19-25; Tr. 25, line 1.*

10.

H.H.'s parents did not pick him up on February 9, as originally planned, because they received a call from C [REDACTED] P [REDACTED] on the evening of February 6, 2014, informing them that H.H. was suffering from a fever of 101 degrees. On February 7, 2014, C [REDACTED] P [REDACTED] informed H.H.'s parents that H.H. had tested negative for the flu, but that he still had a fever. H.H.'s parents determined that it would be unsafe for H.H. to travel while ill, especially due to his epilepsy, and called Defendant to advise that H.H. would not be able to attend the local school on Monday, February 10. *Testimony of L [REDACTED] H [REDACTED]; Testimony of B [REDACTED]; Tr. 27, lines 3-5; Tr. 51, lines 22-25; Tr. 52, lines 1-20.*

11.

On February 10, C [REDACTED] P [REDACTED] called H.H.'s parents again to inform them that H.H.'s fever had increased to 102 degrees, and that they had begun to administer Tamiflu to H.H. as a precautionary measure. By February 12, H.H.'s fever had increased to 103 degrees. He was taken to the emergency room and tested for pneumonia, which came back negative. He

³ P [REDACTED] County had a February break that ran from February 17 through February 21, 2014. *Testimony of L [REDACTED] H [REDACTED] Tr. 63, lines 5-6.*

⁴ No evidence was presented to establish what, if any, supports were decided upon at the February 3, 2014 meeting.

eventually recovered, and his health had significantly improved by the end of February 2014.

Testimony of L [REDACTED] H [REDACTED]; Tr. 52, lines 19-25; Tr. 53, lines 1-10.

12.

After H.H.'s parents informed Defendant that H.H. would be unable to attend school on February 10, Ms. B [REDACTED] contacted C [REDACTED] P [REDACTED] to "ascertain exactly what was happening." She was advised that the facility had experienced an outbreak of the flu. She was further advised that H.H. was experiencing a fever,⁵ but that he had twice been swabbed for the flu and that he had tested negative. Based on this conversation, Ms. B [REDACTED] understood that H.H. could travel home if his parents wanted to take him. However, H.H. was experiencing a high fever and was otherwise ill on Friday, February 7, and he continued to be ill with fever through Wednesday, February 12. If H.H. had traveled home over the weekend, it is unlikely he would have been able to attend his local school on Monday, when his fever exceeded 101 degrees. Additionally, even if H.H. had been able to travel home, the school was closed for three days that week due to weather conditions. Thus, even if he had not been ill, H.H. would not have been able to complete his final and third transition period, which was to provide him the opportunity to attend the local school for one full week prior to returning full-time. *Testimony of L [REDACTED] H [REDACTED]; Testimony of B [REDACTED]; Tr. 27, lines 5-16; Tr. 28, lines 4-7; Tr. 35, lines 7-11; Tr. 53, lines 2-10.*

⁵ Ms. B [REDACTED] at times testified that she was informed that H.H. had a fever, but at other times suggested he did not have a fever. At Tr. 27, line 11, Ms. B [REDACTED] testified that C [REDACTED] P [REDACTED] informed her that H.H. had "exhibited some signs" of the flu, but had tested negative for the flu. At Tr. 35, lines 7-8, Ms. B [REDACTED] testified that C [REDACTED] P [REDACTED] had informed her H.H. "demonstrated a fever or signs of the flu." However, at Tr. 41, lines 21-23, Ms. B [REDACTED] testified that her conversation with the representative from C [REDACTED] P [REDACTED] "was in regard to a fever. So when [C [REDACTED] P [REDACTED]] said safe to travel, [Ms. B [REDACTED]] supposition was that [H.H.] did not have a fever."

13.

H.H.'s parents assumed that the third transition period would be postponed to the week of February 24, 2014, and that following that transition week he would return to P ██████ County School District full-time. However, H.H.'s mother received notice that Defendant had sent C ██████ P ██████ a discharge notice for February 22, 2014, even though the third transition week had not taken place due to the unforeseen circumstances of H.H.'s illness. When H.H.'s parents received notice of the discharge, H.H.'s mother called Defendant. At that time, Defendant advised H.H.'s parents that the transition period was important but not essential, and that H.H. would be expected to begin attending P ██████ County Schools full-time on February 24, 2014. Defendant further advised H.H.'s parents that Defendant would request that H.H. be discharged from C ██████ P ██████ no later than February 22, 2014. *Testimony of L ██████ H ██████; Testimony of B ██████ Tr. 28, lines 14-19; Tr. 29, lines 11-22; Tr. 30, lines 1-3, 8-22; Tr. 36, lines 1-5, 9-25; Tr. 38, lines 5-7; Tr. 47, lines 7-13; Tr. 54, lines 9-11; Tr. 59, lines 19-24; Tr. 62, lines 13-25; Tr. 63, lines 13-19.*

14.

At the hearing, Ms. B ██████ opined that removing H.H. from the restrictive environment where he currently resides outweighs the need for any transition period. She prioritizes removing a child from a restrictive environment over following the IEP's team's agreed upon transition periods. Ms. B ██████ believes that the longer H.H. resides in an extremely restrictive environment the more harm it will cause his educational development. According to Ms. B ██████, a transition period may be ideal, but it is not essential when determining educational placement of a student with disabilities because the highest priority is to get the student into the least restrictive environment as quickly as possible. *Testimony of L ██████ H ██████*

Testimony of B [REDACTED]; Tr. 28, lines 14-19; Tr. 29, lines 11-22; Tr. 30, lines 1-3, 8-22; Tr. 36, lines 1-5, 9-25; Tr. 38, lines 5-7; Tr. 47, lines 7-13; Tr. 54, lines 9-11; Tr. 59, lines 19-24; Tr. 62, lines 13-25; Tr. 63, lines 13-19.

15.

H.H.'s mother testified that she understood Ms. B [REDACTED] position that H.H. should be placed in the least restrictive environment as soon as possible. However, she also felt that since he has been residing at C [REDACTED] P [REDACTED] for over three years, it was reasonable to ask for a two week delay in the transition period to ensure that H.H. had the opportunity to complete his third visit home and to experience one full week at the local school prior to transitioning back full-time to the P [REDACTED] County School District. H.H.'s mother testified she felt that Defendant was more focused on the date stated in the IEP rather than ensuring that the transition period was completed. At no time did Defendant attempt to reconvene the IEP team to discuss H.H.'s placement, the inability to complete the transition period, or any amendments to the previously agreed-upon terms for transition. Instead, Ms. E [REDACTED] determined that the transition period was not necessary, that the terms of the IEP were not essential, and that H.H. should begin attending P [REDACTED] County Schools on February 24, 2014 regardless of whether he had completed the third transition period. *Testimony of L [REDACTED] H [REDACTED] Tr. 54, lines 11-23.*

16.

H.H.'s parents filed a due process complaint on February 21, 2014, alleging that Defendant violated H.H.'s rights in regard to educational placement by insisting that he resume attendance at a P [REDACTED] County school full-time prior to completing the agreed-upon transition period. At the time the dispute arose and H.H. filed his due process request, his operative educational placement was C [REDACTED] P [REDACTED], where he continued to receive educational services.

III. CONCLUSIONS OF LAW

1.

IDEIA's "stay-put" provision, found at 20 U.S.C. § 1415(j), provides that "during the pendency of any proceedings . . . , 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 . . . until all such proceedings have been completed."⁶ The "stay-put" provision is a right afforded to parents to protect children with disabilities from being subjected to a new program that parents believe to be inappropriate." *Special School District No. 1 v. E.N.*, 620 N.W. 2d 65 (Minn. Ct. App. 2000).

2.

Even if a parent and school agree as to the ultimate placement of a child, if the "very important formula of how [the transition will] happen" awaits the court's resolution, then the "stay-put" provision must be complied with to allow the child to remain in his current placement. *Special School District No. 1, supra*. Here, H.H.'s parents and the School District both agree that he is ready to begin transitioning back to his local school. However, in dispute is whether the transition period contemplated by the IEP team, and included in his most recent IEP executed on December 13, 2013, must be strictly complied with. Accordingly, the "stay-put" provision is applicable and it affords H.H. the right to remain in his "current educational placement."

⁶ In addition to a change in placement occurring upon the consent of the State or local educational agency and the parents, a court can change the placement of a child notwithstanding the "stay-put" provision only upon a showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself, herself, or to others. *Honig v. DOE*, 484 U.S. 305 (1988). Here, although Defendant's Educational Director believes H.H. will be harmed by remaining in a more restrictive environment, Defendant has not presented sufficient evidence that allowing H.H. to remain in his current placement is substantially likely to result in injury to H.H. or others.

3.

The “relevant inquiry . . . thus becomes the identification of [H.H.’s] current educational placement and, further, the identification of who should pay for it.” *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 (3d Cir. 1996).

4.

IDEIA is well settled that the school district must fund a student’s “stay-put” placement.

“Implicit in the maintenance of the status quo [as provided for by the “stay-put” provision] is the requirement that a school district continue to finance an educational placement made by the agency and consented to by the parent before the parent requested a due process hearing. To cut off public funds would amount to a unilateral change in placement, prohibited by [IDEIA].”

W.E.B. v. Appoquinimink Sch. Dist., 2002 U.S. Dist. LEXIS 22526 (U.S. District Ct. of Delaware, 2002); *Drinker v. Colonial Sch. Dist.* 78 F.3d 859 (3d Cir. 1996), citing to *Zvi D. v. Ambach*, 694 F.2d 904 (2d Cir. 1982). Therefore, in this matter, Defendant must continue to fund H.H.’s educational placement as it existed before he requested a due process hearing. That placement is C [REDACTED] P [REDACTED].

5.

Defendant argued that it is authorized to cease paying for H.H.’s placement at C [REDACTED] P [REDACTED] as of February 22, 2014, because the IEP provided that he would be discharged from C [REDACTED] P [REDACTED] on February 22, 2014, and return to the local school system on February 24, 2014. However, the same IEP provided for a transition period prior to implementation of the change in placement. Through no fault of either party, the contemplated transition period was not completed. Rather, H.H. became ill shortly before the last transition period was set to take place. Additionally, the school was closed for 3 days. These events prevented H.H. from completing the last transition period. At no time did Defendant reconvene the IEP Team to discuss the implications of not

completing the transition period that had been agreed upon and discussed in the IEP. Because the transition did not take place, the change in placement did not take effect at that time. *Drinker v. Colonial Sch. Dist.* 78 F.3d 859 (3d Cir. 1996) (when a dispute arises before an IEP has been implemented, the “current educational placement” will be the operative placement under which the child is actually receiving instruction at the time the dispute arises”). *See also Thomas v. Cincinnati Bd. of Ed.* 918 F.2d 618 (6 Cir., 1990) (“stay-put” connotes preservation of the status quo). Thus, H.H.’s current educational placement is C█████ Pa█████ where he has been placed for more than three years, where he was expected to remain until the transition period was completed, and where he was receiving instruction at the time the dispute arose.

6.

Defendant also argued that it is not required to complete the contemplated three-part transition period prior to implementing the change of placement. According to Defendant, the third part of the transition period would be ideal, but is not necessary, for the change in placement to take place. However, no one person has the authority to decide what provisions in an IEP are essential and which ones can be disregarded as inconvenient or unnecessary. If an IEP team meets, agrees upon certain provisions, and then includes those provisions in a written IEP, this court presumes that the IEP team found each of those provisions to be an important component of the IEP. In fact, “[t]ransition periods and timing of placement are integral elements of any educational program,” and if these elements are in dispute, then the child is afforded the protection of “stay-put” to remain in his educational placement until such issues are resolved. *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 (3d Cir. 1996). Thus, the provisions provided for in H.H.’s IEP regarding transition periods are an integral element of his IEP and must be followed.

7.

Defendant further argued that allowing H.H. to remain at C [REDACTED] P [REDACTED] is detrimental to his educational well-being because he is in a more restrictive environment than he requires at this time. However, this situation has arisen due to Defendant's unwillingness to postpone the third transition period by two weeks to allow H.H. to complete the transition period at a time when he is healthy. Moreover, Defendant has not presented sufficient evidence that H.H. is being harmed by remaining at C [REDACTED] P [REDACTED].

IV. ORDER

H.H. is entitled to remain in his current educational placement, C [REDACTED] P [REDACTED] Residential Facility in Florida, until such time that the transition period provided for in H.H.'s December 13, 2013 IEP can be completed. Defendant shall be responsible for the cost of H.H.'s educational placement at C [REDACTED] P [REDACTED] until this matter is fully resolved, in accordance with the "stay-put" provision of IDEIA.

Regarding H.H.'s transition period, the court hereby recommends that H.H.'s first visit take place August 7 through August 12, with H.H. attending the local school system on August 8 and August 11. H.H.'s second visit would then take place from August 21 through August 26, with H.H. attending the local school system on August 22 and August 25. H.H.'s third and final visit would take place September 7 through September 13, with H.H. attending the local school system from September 8 through September 12, including riding the bus. Any and all supports that were in place, or were intended to be in place, during the transition periods originally agreed upon in January and February 2014, shall be made available for the transition periods in August

and September 2014. If, due to unforeseen circumstances that are not the fault of either party, the transition period is not completed by September 30, 2014, then the IEP Team shall reconvene to develop a new IEP and determine the best procedure to ensure a speedy and successful transition from C [REDACTED] P [REDACTED] to E [REDACTED] Middle School.

SO ORDERED, this 26th day of June, 2014.



Ana P. Kennedy
Administrative Law Judge