

**ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING**

O [REDACTED] Y [REDACTED], Student,)	
)	
v.)	CASE NO. 2009-0110
)	
CITY OF CHICAGO PUBLIC SCHOOL DISTRICT 299, Local School District.)	MARY SCHWARTZ Impartial Hearing Officer

**INTERIM ORDER: PARENT'S MOTION FOR STAY PUT ORDER
DURING PENDENCY OF PROCEEDING**

The undersigned has jurisdiction over this matter pursuant to the Individuals with Disabilities Education improvement Act ("IDEA"), 20 U.S.C. §1400 *et. seq.*, the Illinois School Code, 105 ILCS 5/14-8.02a, and her appointment on September 23, 2008, as hearing officer in this matter by the Illinois State Board of Education.

Procedural Background

The parent, through her attorney, filed a due process complaint on September 16, 2008, and an amended complaint on September 25th. She also filed a Motion for Stay Put Order During Pendency of Proceeding ("Motion") with her original complaint, on September 16th. The district responded to the parent's motion on October 3, 2008. The parent then requested time to reply and did so on October 3rd. The district was offered time to respond but declined to do so.

The parent argues that the student's educational program includes a private nurse assistant, as set forth in the student's October 3, 2007 IEP and a 2000 settlement agreement between the district and the parent. The parent both hires and pays the private nurse assistant. According to the parent, the private nurse assistant has accompanied the student on the bus and throughout the school day in his current school, Blue Cap, since he began there in 2003. The parent further asserts that the private nurse assistant accompanied the student at the beginning of the current school year until August 29th, when the bus driver refused to let her on the bus with the student.

The parent contends that the student's educational program includes the modifications and accommodations section of the October 3rd IEP, which states that the "parent provides individual nursing services." Additionally, the parent

points to the 2000 settlement agreement, which states that the student is “entitled to attend public school accompanied by a private nurse’s aide hired and paid for by the Parent.” The parent asserts that these two documents require a stay put ruling that the student’s private nurse assistant can accompany him on the bus to and from school and throughout the school day.

The district argues that a stay put order is not required because it has not changed the student’s placement. The district maintains that the student is attending the same school, Blue Cap, and receiving all the services listed in his October 3rd IEP. The district contends that the October 3rd IEP requires a personal aide on the bus for the student’s safety and a 1:1 paraprofessional throughout the school day but does not require a full-time nurse for medical reasons or to help the student access the curriculum. As to the IEP statement regarding the private nurse assistant, the district maintains that the statement is “mere” documentation of the fact that the parent has been allowed to provide a private nurse assistant for the last eight years for the student. In the alternative, should the hearing officer find that the stay put placement includes nursing services on the bus and at school, the district contends that the undersigned has no jurisdiction to order specific service providers. Therefore, the district asserts that it should be able to select the provider.

Discussion

The student in this matter is 16 years old. He is non-verbal and has multiple disabilities. He is eligible for special education and related services under the following categories: severe/profound cognitive impairment; hearing impairment; physical impairment, speech/language impairment; and, other health impairment. He is dependent on others for all daily living skills, including basic safety. The district placed the student in the Blue Cap school program in academic year 2003-04, and he has attended Blue Cap since then. Both the student’s initial Blue Cap IEP, developed on November 24, 2003, and the October 3rd IEP at issue here indicate that the parent provides a private nurse assistant for the student. The private nurse assistant has accompanied the student both on the bus to and from school and within the school building since he began attending Blue Cap, up to and including the first two school days in the current academic year.

The IDEA requires, in what has become known as the stay put provision, that a student shall remain in his “then current educational placement” during the pendency of due process proceedings, unless the parent and district agree otherwise or certain disciplinary matters are at issue. 20 U.S.C. §1415(j). The parties herein have made no such agreement, and the statutory exceptions for disciplinary reasons are inapplicable to this matter. 20 U.S.C. §1415(k)(4). The stay put provision applies to a student who is placed in a private school by his public school district. 34 C.F.R. §300.146. While the statute unequivocally requires that a student remain in his then current educational placement, it does

not define “educational placement.”

The Seventh Circuit uses a fact driven approach to determine a student’s educational placement for purposes of the stay put provision. *John M. v. Bd. of Educ. of Evanston Township High School Dist. 202* (“John M.”), 48 IDELR 177, p.4 (7th Cir. 2007). The stay put placement “must produce as closely as possible the overall educational experience enjoyed by the child under his previous IEP.” *Id.* While the analysis of a student’s educational placement begins with the last agreed upon IEP, it may go beyond the document’s four corners to extrinsic evidence if the IEP is vague. *Id.* at p.5. Extrinsic evidence may include information known to parents and administrators but not contained within the IEP document itself. *Id.*

The modifications and accommodations section of the October 3rd IEP states that the parent provides “individual nurse services” for the student. These services are provided by the private nurse assistant. The IEP does not indicate, however, what services the private nurse assistant provides for the student. Because of this vagueness, extrinsic evidence is necessary to establish her role in the student’s educational placement. The private nurse assistant is with the student from the start of his school day to the end. She accompanies him from home to school and back and also throughout the school day within the building. Thus, she is an integral part of the student’s overall educational experience. She has part of the student’s educational experience for the entire time he has been at Blue Cap, including the first two days of school this year. The undersigned finds the district’s assertion that the IEP statement “merely” documents the fact that the parent provides a private nurse assistant disingenuous. The district has not only known of the private nurse assistant’s services to the student for the past five years but has also, by its actions, agreed to her providing these services as part of his educational program. The undersigned finds that the private nurse’s assistant is part of the student’s “overall educational experience” - and thus his educational placement - provided in his October 3rd IEP.

The fact that the October 3rd IEP documents the private nurse assistant in the modifications and accommodations section does not negate the finding that she is part of the student’s educational experience. The IDEA requires a district to provide a free appropriate public education to students with disabilities who are eligible for special education and related services. 20 U.S.C. §1412(a)(1). Because the parent hired and paid the private nurse assistant, the private nurse assistant could not be listed as a related service provider or paraprofessional, both of whom must be provided at no cost to the parent. Despite this, the IEP team decided to memorialize her services to the student within the IEP document. They were not required to do so in the October 3rd IEP nor in the prior IEPs, yet they decided to do so. Again, this is more than “mere” documentation.

It is notable that until August 29, 2008, the district apparently had no

objection to the student being accompanied by the private nurse assistant and no problem including her in the IEP. The district offers no credible explanation as to why suddenly – several days into a new school year – the private nurse assistant could no longer be part of the student’s educational experience. The district’s contention that its policies and liability concerns prevent private parties from riding school buses or being at schools is not credible. It is improbable that such policies arose between August 28th, when the private nurse assistant was permitted on the bus and in school, and August 29th, when she was not allowed to accompany the student. Additionally, the district has not identified specific policies supporting its position. Regardless of whether there are such policies, the fact remains that the district has permitted the private nurse assistant to be part of the student’s educational placement.

To be clear to both parties, this order addresses only the student’s stay put placement. The right to stay put is not dependent on the merits, or lack thereof, of issues in the due process proceeding. *Cara B. v. Mundelein High Sch. Dist. 120 Bd. of Educ.*, 20 IDELR 263 (N.D. Ill. 1993). The questions of whether the district has breached the settlement agreement or whether the student requires nursing service on the bus and at school are not part of the stay put analysis and thus were not considered. This order decides the student’s stay put placement and nothing more than that.

IT IS ORDERED THAT: the student’s educational placement for stay put purposes includes the private nurse assistant, who is hired and paid by the parent, as memorialized in the October 3, 2007 IEP. The private nurse assistant may accompany the student to and from school and throughout the school day during the pendency of this due process proceeding.

ISSUED: October 8, 2008

Mary Schwartz
Impartial Hearing Officer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Interim Order: Parent's Motion for Stay Put Order During Pendency of Proceedings was placed in the U.S. Mail at Chicago, Illinois, with first class postage prepaid and directed to:

Ms. Sara Mauk, Esq.
Mauk & O'Connor LLP
1427 W. Howard Street
Chicago, Illinois 60626

Ms. Kristy Shrode, Esq.
Due Process & Mediation
Chicago Public Schools
125 S. Clark Street, 8th Floor
Chicago, Illinois 60603

Mr. Andrew Eulass
Due Process Coordinator
Illinois State Board of Education
100 North First Street
Springfield, Illinois 62777-0001

before 6:00 p.m. on October 8, 2008.

Mary Schwartz
Impartial Hearing Officer
6116 S. University Ave., 2N
Chicago, Illinois 60637
773.684.3035 (facsimile)
708.912.0755 (cellular)
maryschwartz@gmail.com