

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

FULLERTON ELEMENTARY SCHOOL
DISTRICT.

OAH CASE NO. 2011010214

ORDER GRANTING MOTION FOR
STAY PUT

On January 11, 2011, Student filed a Request for Due Process Hearing (complaint) against the Fullerton Elementary School District (District), and also a motion for stay put. In the motion for stay put, Student contends that his last agreed-upon and implemented educational program is the October 13, 2010 individualized education program (IEP), or in the alternative the October 15, 2009 IEP, and that these IEPs provided Student with applied behavior analysis (ABA) services from a non-public agency (NPA). On January 18, 2011, the District filed an opposition on the grounds that stay put did not require the District to provide ABA services through an NPA. On January 19, 2011, Student filed a reply brief.

APPLICABLE LAW

Until due process hearing procedures are complete, a special education student is entitled to remain in his or her current educational placement, unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006); 56505, subd. (d).) This is referred to as “stay put.” For purposes of stay put, the current educational placement is typically the placement called for in the student’s IEP, which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

In California, “specific educational placement” is defined as “that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs,” as specified in the IEP. (Cal. Code Regs., tit. 5, § 3042.)

Courts have recognized, however, that because of changing circumstances, the status quo cannot always be replicated exactly for purposes of stay put. (*Ms. S ex rel. G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35.) Progression to the next grade maintains the status quo for purposes of stay put. (*Van Scoy v. San Luis Coastal Unified Sch. Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086 [“stay put” placement was advancement to

next grade]; see also *Beth B. v. Van Clay* (N.D. Ill. 2000) 126 F. Supp.2d 532, 534; Fed.Reg., Vol. 64, No. 48, p. 12616, Comment on § 300.514 [discussing grade advancement for a child with a disability].)

In *Van Scoy, supra*, the Court acknowledged that the stay-put provision of Individuals with Disabilities Education Act entitles a student to receive a placement that, as closely as possible, replicates the placement that existed at the time the dispute arose, taking into account changed circumstances. In that case, the Student was transitioning from kindergarten to first grade. Student spent fewer hours in kindergarten in the classroom and more hours outside of the classroom with related services, than he would have in the first grade. Those additional out of class hours were the issue in the stay-put context. The Court determined that Student's stay-put required inclusion of the additional services outside the classroom in conjunction with advancement to the first grade in order to avoid a significant change in the stay-put placement

DISCUSSION

At issue in Student's motion for stay put is whether the District needs to continue providing ABA services through an NPA during the pendency of this dispute, or may the District provide these services through District personnel. The parties dispute whether the District made a formal offer of services based on the parties' discussions at the October 13, 2010 IEP meeting. The October 13, 2010 IEP provides for ABA services from Coyne & Associates (Coyne), an NPA. Even if the October 13, 2010 IEP is not Student's last agreed upon and implemented educational program, the October 15, 2009 IEP states that Student will receive ABA services from an NPA, which is specified in the meeting notes as Coyne.

The District contends that it may shift ABA services to District personnel because the October 15, 2009 IEP contained steps to prepare for a transition of service provider from Coyne to District personnel. While District personnel may now be able to provide ABA services, this does not constitute a change of circumstance set forth in *Van Scoy*. *Van Scoy* limited the change circumstance to situations, such as a student progressing to new grade or unavailability of a service provider, neither of which is at issue in this matter.

The October 15, 2009 IEP minutes stated that Student was to receive ABA services through Coyne, and he did receive these services from Coyne. Coyne was a component of Student's educational placement, and the change from NPA providers to District personnel constitutes a change in Student's program. (*Student v. Jefferson Elementary School District* (2007) Cal.Ofc.Admin.Hrngs. Case No. 2007020606.) Accordingly, Student's motion for stay put is granted.

ORDER

Student's motion for stay put is granted. The District shall provide Student with ABA services as specified in the October 15, 2009 IEP by Coyne & Associates.

Dated: January 20, 2011

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings