

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

MORENO VALLEY UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2010021027

ORDER GRANTING MOTION FOR
STAY PUT

On February 23, 2010, Student filed a Due Process Hearing Request alleging that District denied Student a free appropriate public education by not finding him eligible for, and providing, special education prior to February of 2010, when Student was subject to expulsion from Vista Heights Middle School for violating school rules. As part of the hearing request, Student made a motion for stay put on the ground that Student is entitled to IDEA procedural protections because the District was on notice that Student might be eligible for special education. In particular, Student produced evidence of a 2002 District-generated behavior assessment noting a likelihood of ADHD; a January 12, 2010 student study team (SST) referral; and a January 14, 2010 behavior support plan (BSP). The SST referral reflected that Student had been suspended for 12 days during this school year, and was being referred for behavior and discipline problems. The SST referral was signed by a District administrator and a school counselor. The BSP was intended to address “defiant behavior” and “aggressive interaction with peers.”

On March 4, 2010, District filed an opposition to Student’s stay put motion. District contends that it was not on notice that Student might be eligible for special education because the SST referral did not meet the statutory definition of notice, which required an expression of concern directly to “the director of special education” or “to other supervisory personnel of the agency.” District interprets “other supervisory personnel of the agency” as meaning “special education supervisory personnel.” To demonstrate that District could not have been on notice from a request for assessment, District also provided evidence that Student’s mother requested special education assessments on February 18, 2010, after the school discipline incidents at issue occurred. District alternatively opposed stay put on the grounds that: 1) the motion for stay put requested placement at “Sunnymeade Middle School,” which was not Student’s current placement; and 2) after filing his request for due process hearing, Student has sought alternative placements through a medical excuse and/or the resolution session process. District’s contention that Student is seeking some other middle school placement is not born out by documents filed by Student with OAH. Nothing in the combined February 23, 2010 Due Process Hearing Request / Motion for Stay Put, references “Sunnymeade Middle School.” Moreover, District cites no legal authority for

why its alternative argument is relevant to the determination of stay put and it will not be considered. For the reasons set forth below, Student's request for stay put is granted.

APPLICABLE LAW

Under federal and California special education law, a special education student is entitled to "stay put," i.e., is entitled to remain in his or her current educational placement pending the completion of due process hearing procedures unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006); Ed. Code, §§ 48915.5, 56505, subd. (d).) The purpose of stay put is to maintain the status quo of the student's educational program pending resolution of the due process hearing. (*Stacey G. v. Pasadena Independent School Dist.* (5th Cir. 1983) 695 F.2d 949, 953; *D. v. Ambach* (2d Cir. 1982) 694 F.2d 904, 906.) 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.)

When the issues in a due process hearing request involve student discipline for violating school conduct rules, and the student was not identified as being eligible for special education at the time of the discipline incident, stay put applies only if the local educational agency (LEA) is "deemed to have had a basis of knowledge that the student suffered from a disability before the occurrence of the behavior that prompted the disciplinary action." (20 U.S.C. § 1415(k)(5).) The LEA is "deemed to have had a basis of knowledge that a student was a student with a disability" if any of the following occurred before the behavior that caused the disciplinary action: 1) parent expressed a concern in writing that the child needed special education; 2) the parent requested a special education assessment; or 3) "the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency." (20 U.S.C. § 1415(k)(5)(B); 34 C.F.R. § 300.534(b).)

In general, without violating stay put, school personnel may remove a child with disabilities from the current placement to an interim alternative educational setting for less than 10 days for code of conduct violations. (see 20 U.S.C. § 1415 (k)(1)(B).) If the removal is for 10 days or more, a "manifestation determination" meeting must be held in which relevant personnel determine whether or not the conduct is a manifestation of the child's disability. (20 U.S.C. § 1415(k)(1)(E).) If the conduct is determined not to be a manifestation of disability, then discipline can be applied in the same manner as with other students. (20 U.S.C. section 1415 (k)(1)(C).) If the conduct is determined to be a manifestation of the child's disability, then certain behavioral assessments are legally required and, in most instances, the student is returned to the current educational placement, barring "special circumstances" involving weapon use, serious bodily injury, or drugs. (20 U.S.C. section 1415 (k)(1).) After a manifestation determination, a student has a right to an expedited appeal of the manifestation determination. (20 U.S.C. § 1415(k)(1)(G).)

DISCUSSION

Here, Student has presented facts establishing that District should be “deemed to have had a basis of knowledge that a student was a student with a disability” as of January 14, 2010, prior to the disciplinary action that resulted in the due process hearing request. In particular, District was on notice of a possibility of ADHD based on the results of the 2002 evaluation. In addition, the behavior plan developed for Student was based on a recent related pattern of behavior and was signed by a school administrator and a counselor. Contrary to District’s position, the plain language of the statute does not require notice to “special education supervisory personnel” but merely “to other supervisory personnel of the agency.” (20 U.S.C. § 1415(k)(5)(B); 34 C.F.R. § 300.534(b).) A school administrator and/or school counselor fit within the plain meaning of “other supervisory personnel of the agency,” particularly when District was also on notice of its own ADHD assessment results. Under these facts, Student is entitled to stay put protection while the due process hearing is pending.

Student’s placement prior to the due process hearing request was in general education. However, as discussed above, although he has not yet demonstrated that he should have been eligible for special education, he has made a preliminary showing that he is entitled to the same procedural protections as a student who is eligible for special education. Thus, Student’s stay put placement is general education at Vista Heights Middle School and any discipline incidents must be addressed by adhering to the protections of title 34, Code of Federal Regulations, part 300.530.

In addition to the above, in ruling on the motion, the ALJ determined that an expedited hearing is not required because no manifestation determination was held from which Student could take an expedited appeal under title 34, Code of Federal Regulations, part 300.530. Simultaneously, Student withdrew the expedited hearing request during a mediation on March 9, 2010. Accordingly, all expedited hearing dates are vacated.

ORDER

1. Student's Motion for Stay Put is granted.
2. Student's stay put placement is general education at Vista Heights Middle School. While in the stay put placement, Student is entitled to all applicable protections of title 34, Code of Federal Regulations, part 300.530, for discipline incidents that arose prior to, or after, the filing of the due process hearing request.
3. All expedited hearing dates are vacated.

IT IS SO ORDERED.

Dated: March 9, 2010

/s/

RICHARD T. BREEN
Administrative Law Judge
Office of Administrative Hearings