

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

NEWPORT-MESA UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2010071343

ORDER GRANTING MOTION FOR  
STAY PUT

On August 6, 2010, Bruce Bothwell, attorney for Student, filed a motion for stay put. On August 12, 2010, S. Daniel Harbottle, attorney for the Newport-Mesa Unified School District (District) filed a non-opposition in part and an opposition in part to the motion. On August 13, 2010, Student filed a reply to District's opposition in part.

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); Ed. Code, §§ 48915.5, 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 individualized education program (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.)

Under stay put, "it is not intended that a child with disabilities remain in a specific grade or class pending appeal if he or she would be eligible to proceed to the next grade and the corresponding classroom within that grade." (Fed.Reg., Vol. 64, No. 48, p. 12616, Comment on § 300.514.) In most instances, progression to the next grade adheres to 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; *Beth B. v. Van Clay* (N.D. Ill. 2000) 126 F. Supp.2d 532, 534.)

A student's special education placement set forth in a settlement agreement reached by the parties may constitute the student's current educational placement, and may be found to be the student's stay put placement in a subsequent dispute. (*Casey K. v. St. Anne Comty. High Sch. Dist. No. 302* (7th Cir. 2005) 400 F.3d 508, 513; *Doe by Doe v. Independent Sch. Dist. No. 9* (N.D.Okla. 1996) 938 F.Supp. 758, 761; *Evans v. Bd. of Educ.* (S.D.N.Y. [DATE?]) 921 F.Supp. 1184, 1188; see also, *Jacobsen v. District of Columbia Bd. of Education* (D.D.C. 1983) 564 F.Supp. 166, 171-173.)

Courts in other cases have determined, based on the facts in those cases, that a student's placement, as described in a settlement agreement, is not the student's current educational placement and is not the student's stay put placement. (*Zvi D. v. Ambach, supra*, 694 F.2d at p. 908; see also, *Verhoeven v. Brunswick Sch. Comm.* (1st Cir. 1999) 207 F.3d 1, 9-10 [dicta]; *Leonard v. McKenzie* (D.C. Cir. 1989) 869 F.2d 1558, 1564 [hearing officer's prior decision does not constitute current educational placement for stay put purposes].)

Settlement agreements are interpreted using the same rules that apply to interpretation of contracts. (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 686, citing *Adams v. Johns-Manville Corp.* (9th Cir. 1989) 876 F.2d 702, 704.) "Ordinarily, the words of the document are to be given their plain meaning and understood in their common sense; the parties' expressed objective intent, not their unexpressed subjective intent, governs." (*Id.* at p. 686.) If a contract is ambiguous, i.e., susceptible to more than one interpretation, then extrinsic evidence may be used to interpret it. (*Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 37-40.) Even if a contract appears to be unambiguous on its face, a party may offer relevant extrinsic evidence to demonstrate that the contract contains a latent ambiguity; however, to demonstrate an ambiguity, the contract must be "reasonably susceptible" to the interpretation offered by the party introducing extrinsic evidence. (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391, 393.)

## DISCUSSION

District offered Student placement and services pursuant to an IEP developed on June 3, 2009. Parents did not consent to the June 3, 2009 IEP. On September 16, 2009, the parties entered into a settlement agreement (agreement) wherein Parents agreed to the placement and services offered in the June 3, 2009 IEP, with modifications and additions as set forth in the agreement. The June 3, 2009 IEP was incorporated into the agreement. On December 18, 2009, and March 25, 2010, the parties developed addendums to the June 3, 2009 IEP. Parents consented to both addendums. On May 18 and June 23, 2010, the parties developed an IEP for Student, to which Parents did not consent. Student now moves for stay put of the following services ;<sup>1</sup>

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<sup>1</sup> District has offered Student 60 minutes per month of group collaboration clinic meetings between Parents and school staff at Eastbluff Elementary School. However, Student has not requested this as a stay put service and it is not addressed in this order.

1. Placement in general education first grade class at Eastbluff Elementary School.
2. A one-to-one Applied Behavior Analysis (ABA)-trained classroom aide employed by District for Student's entire school day. However, in the event that District must permanently replace its classroom aide more than twice in any 60-day time period, Student shall be provided aide support for his entire school day by an ABA-trained aide from Creative Solutions for Autism (Creative Solutions).
3. Five hours per week of ABA intervention in Student's home from Creative Solutions.
4. Eight hours per month of ABA supervision by a Creative Solutions supervisor, 10 hours of initial aide training by a Creative Solutions supervisor and two hours per month of clinic training through Creative Solutions.<sup>2</sup>
5. Two sessions per week of individual direct occupational therapy, 45 minutes per session.
6. One 30-minute session per month of individual occupational therapy collaboration in the regular education classroom.
7. One 30-minute session per month of individual speech and language therapy collaboration in the regular education classroom.
8. One 30-minute session per week of group speech and language therapy in the regular education classroom.
9. One 30-minute session per week of individual speech and language therapy in the regular education classroom.
10. One 30-minute session per week of group adapted physical education.
11. 60 minutes per month of individual autism team support collaboration in the regular education classroom.

District's response states that it does not dispute Student's right to stay put placement and services as listed above, except as to its obligation to provide a Creative Solutions aide as set forth in item two above. District does not specifically state that it contests Student's advancement to first grade for the 2010-2011 school year (SY) as part of stay put, however, under its list of placement and services that District contends to be stay put, it has listed placement in kindergarten for the 2010-2011 SY. While this may be a clerical error, for

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<sup>2</sup> The agreement identifies a specific Creative Solutions supervisor by name.

purposes of this motion, the issue of advancement to first grade will be considered as contested stay put placement.

### *Placement in First Grade*

Student has completed kindergarten and requests his stay put placement and services be delivered in first grade. Stay put will not prevent the advancement of a student from one grade to the next during the pendency of the dispute, if the student would otherwise be eligible for proceed to the next grade. Student has submitted a copy of the May 18 and June 23, 2010 IEP, wherein District recommends regular education first grade placement for the 2010-2011 SY. District has provided no factual basis or legal authority to retain Student in kindergarten. Accordingly, Student's request to be advanced to regular education first grade for the 2010-2011 SY, during the pendency of this dispute, is granted.

### *Aide Support*

District concedes that the agreement provided for the provision of an ABA-trained aide from Creative Solutions, if the condition precedent described in item two above were to occur. However, District contends that the parties modified the term in the agreement through the December 18, 2009, and March 25, 2010 addendum IEPs to the June 3, 2009 IEP. The June 3, 2009 IEP document lists aide support as "Int. Ind. Service – IF" at the rate of 30 hours per week. The December 18, 2009, and March 25, 2010 addendum IEPs change the title of the service to "ABA Aide" services for 30 hours per week. Neither addendum IEP contains notes showing the parties discussed the aide support change and that by writing "ABA Aide" services in such a format, the parties knowingly modified the agreement.

District contends that when Parents consented to the December 18, 2009 IEP addendum to the June 3, 2009 IEP, it effectively replaced the June 3, 2009 IEP and any right to stay put stemmed from the placement and services agreed to in the December 18, 2009 addendum IEP. Similarly, District asserts that when Parents consented to the March 25, 2010 addendum IEP, it extinguished any right to stay put based upon the June 3, 2009 IEP or the December 18, 2009 addendum IEP. Furthermore, District asserts that the September 16, 2009 agreement contained language that any alterations, changes or modifications to the terms of the agreement required written consent of the parties and the December 18, 2009, and March 25, 2010 addendum IEPs constitute such written consent. District's contentions are incorrect.

District's contention that only the March 25, 2010 addendum IEP can be used to determine stay put is incorrect. The agreement explicitly incorporates the June 3, 2009 IEP into the agreement. The December 18, 2009, and March 25, 2010 addendum IEPs are read in conjunction with the June 3, 2009 IEP and the agreement because on September 16, 2009, those two documents became Student's agreed-upon placement for the 2009-2010 SY.

In order for there to be a modification of the terms of the agreement and the June 3, 2009 IEP, the modification had to be in writing. The intention of the parties to modify a

previously agreed upon term must be evident from the writing. Here, no such intent can be ascertained from either the December 18, 2009, or the March 25, 2010 addendum IEPs. Neither document shows the parties discussed removing the conditions under which District would be required to provide an ABA-trained aide from Creative Solution. The mere recitation of “ABA Aide” in the IEP document amongst a list of services for Student does not display knowing and voluntary modification of the - agreement by the parties. This is further supported by the treatment given by the parties to resource specialist program (RSP) services. The June 3, 2009 IEP offered Student RSP services, which Student accepted through the - agreement. In March 2010 the parties decided Student no longer required RSP services. The March 25, 2010 addendum IEP specifically documents the parties’ discussion and agreement to remove RSP services from Student’s program.

Similarly, had there been an agreement between the parties to remove the condition that would require an ABA-trained aide from Creative Solutions, it would have been clearly documented. Absent such documentation, any intention to modify the - agreement with respect to an ABA-trained aide would be a subjective intention on the part of District, without consent from Student. Accordingly, Student’s motion for stay put is granted.

#### ORDER

1. Student’s motion for stay put is granted.
2. During the pendency of this dispute, District shall provide the following placement and services.
  - a. Placement in general education first grade class at Eastbluff Elementary School.
  - b. A one-to-one ABA-trained classroom aide employed by District for Student’s entire school day. However, in the event that District must permanently replace its classroom aide more than twice in any 60 day time period, Student shall be provided aide support for his entire school day by an ABA-trained aide from Creative Solutions.
  - c. Five hours per week of ABA intervention in Student’s home from Creative Solutions.
  - d. Eight hours per month of ABA supervision by a Creative Solutions supervisor, 10 hours of initial aide training by a Creative Solutions supervisor and two hours per month of clinic training through Creative Solutions.
  - e. Two sessions per week of individual direct occupational therapy, 45 minutes per session.

- f. One 30-minute session per month of individual occupational therapy collaboration in the regular education classroom.
- g. One 30-minute session per month of individual speech and language therapy collaboration in the regular education classroom.
- h. One 30-minute session per week of group speech and language therapy in the regular education classroom.
- i. One 30-minute session per week of individual speech and language therapy in the regular education classroom.
- j. One 30-minute session per week of group adapted physical education.
- k. 60 minutes per month of individual autism team support collaboration in the regular education classroom.

Dated: August 23, 2010

/s/

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BOB VARMA  
Administrative Law Judge  
Office of Administrative Hearings