

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

DRY CREEK JOINT ELEMENTARY
SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2010080365

ORDER DENYING MOTION FOR
STAY PUT

On August 9, 2010, the Dry Creek Joint Elementary School District (District) filed a request for due process hearing against Student, and a motion for stay put.

On August 16, 2010, Student filed a response to the complaint and an opposition to the motion.

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.)

DISCUSSION

On February 18, 2010, two previous disputes between the parties were decided in *Student v. Dry Creek Joint Elem. School Dist.*, Offc.Admin.Hrngs. Case No. 2009060940 (*Student I*) and *Dry Creek Joint Elem. School Dist. v. Student*, Offc.Admin.Hrngs. Case No. 2009071109 (*District I*). The decision in *District I* held that the District could implement an assessment plan proposed to Parents in April 2009 and clarified by correspondence in July 2009. It also held that an Individualized Education Program (IEP) offer made by the District on August 28, 2009, offered Student a free appropriate public education.

On or about April 19, 2010, Student filed an appeal of the decisions in *Student I* and *District I* in the Federal District Court for the Eastern District of California. Because of that federal filing, the stay put rule is in effect. (*Joshua A. v. Rocklin Unified School Dist.* (9th Cir. 2009) 559 F.3d 1036.)

The District's complaint in this new matter alleges two issues. First, the District contends that it needs to assess Student and seeks an order that it may conduct an assessment of Student. Second, the District alleges that it has "good cause" to terminate the services of and replace Suzanne Coutchie, the service provider now tutoring Student in reading.

In its stay put motion, the District states that it seeks a determination "that the District has 'good cause' to change service providers" and a statement that the stay put placement is "15 hours per week of 1:1 reading intervention provided by an educational specialist employed by the District as a credentialed teacher," a formula that excludes Ms. Coutchie.

The parties dispute whether the employment of Ms. Coutchie is part of the stay put placement, or whether the reading component of Student's program can be delivered by another qualified teacher consistent with the stay put placement. However, it is not necessary to resolve that question here. As moving party, the District has the obligation to establish the facts and law entitling it to the order it seeks. It has failed to do so.

The District does not make an adequate factual showing. It identifies the stay put placement as an IEP dated April 29, 2005. However, the District neither provides that IEP nor describes any provision it might contain concerning instruction in reading.

Nor Does the District make an adequate legal showing. Stay put is now in effect because there is a pending proceeding in the federal district court, not because the District later filed a request for due process hearing with OAH. Although the issues in the two matters are different, the stay put placement is identical. The stay put rule "functions as an 'automatic' preliminary injunction." (*Joshua A.*, *supra*, 559 F.3d at p. 1037.) In *Joshua A.*, an appeal from an OAH special education decision was pending before the district court. Stay put was automatically in effect, as it is here, because of the pendency of the federal case. The district court resolved a dispute about the stay put placement by determining that the continued employment of a particular service provider was part of that placement. (*Joshua A. v. Rocklin Unified School Dist.* (E.D.Cal.) 2007 WL 2389868 (Order Granting Plaintiff's Motion for Stay Put, etc., Aug. 20, 2007).)

Thus the federal district court has clear jurisdiction over the dispute that the District seeks to litigate here. The District has not established that OAH has concurrent jurisdiction to define or alter the stay put placement while it is part of an automatic order deemed issued by the federal district court.

The motion for stay put is denied.

Dated: August 30, 2010

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings