

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

FREMONT UNION HIGH SCHOOL
DISTRICT.

OAH CASE NO. 2011050469

ORDER GRANTING IN PART AND
DENYING IN PART MOTION FOR
STAY PUT

On May 11, 2011, Student filed a motion for stay put against the Fremont Union High School District (District). On May 16, 2011, the District filed an opposition to Student's motion for stay put. On May 18, 2011, 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);¹ 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.)

However, if a student's placement in a program was intended only to be a temporary placement, such placement does not provide the basis for a student's "stay put" placement. (*Verhoeven v. Brunswick Sch. Comm.* (1st Cir. 1999) 207 F.3d 1, 7-8; *Leonard v. McKenzie* (D.C. Cir. 1989) 869 F.2d 1558, 1563-64.)

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.)

¹ All subsequent references to the Code of Federal Regulations are to the 2006 version.

When a child violates a code of student conduct and school personnel seek to order a change in placement that would exceed ten school days, the local educational agency (LEA), the parent, and the relevant members of the IEP team shall determine whether the conduct was a manifestation of the child's disability. A child's parent may appeal the manifestation determination by requesting an expedited due process hearing.² (20 U.S.C. § 1415(k); 34 C.F.R. § 300.532.) While the appeal is pending, the child shall remain in the interim alternative educational setting (IAES) pending the decision of the hearing officer or until the expiration of the 45 school-day IAES placement, whichever occurs first, unless the parent and the LEA agree otherwise. (Ed. Code, § 56505, subd. (d); see 20 U.S.C. § 1415(k)(4)(A) & 34 C.F.R. §§ 300.532, 300.533.)

School personnel may remove a student to an IAES for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability if the student:

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

(20 U.S.C. § 1415(k)(1)(G); See also 34 C.F.R. §§ 300.530(j).)

DISCUSSION

The dispute in this matter concerns what is Student's last agreed-upon and implemented educational program as the parties dispute whether the June 10, 2010 or March 28, 2011 IEP constitute the last agreed-upon and implemented educational program or if one or both of these IEPs were only intended as temporary placements. Student asserts that the March 28, 2011 IEP was Student's last agreed-upon and implemented educational program because the parties did not intend for his placement in a special day class (SDC) at Fremont High School to be just a temporary, diagnostic placement. The District contends that March 28, 2011 IEP was a temporary placement to evaluate Student's suitability to

² In such cases, "the State or local education agency shall arrange for an expedited hearing." (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c).) The expedited hearing shall occur within 20 school days of the date the hearing is requested. (*Id.*)

attend the SDC at Fremont High School, and that the last agreed-upon and implemented educational program was the June 10, 2010 IEP, which placed Student at the Morgan Center, a non-public school. Student counters that even if the March 28, 2011 IEP is only a temporary placement, and therefore not stay put, that the June 10, 2010 IEP cannot be considered as stay put because the parties agreed to the Morgan Center as only a diagnostic placement for the 2010 extended school year (ESY), and that the January 8, 2010 IEP is then Student's stay put placement.

The undisputed facts in this matter are that Student and the District agreed at the January 8, 2010 IEP team meeting that Student would attend a SDC at Cupertino High School. Student attended Cupertino High School through the end of the 2009-2010 school year (SY). At the end of SY 2009-2010, the parties agreed that Student would attend Room 10 at the Morgan Center for the 2010 ESY. The IEP team agreed to the change in placement because of changes in Student's behavior due to modifications in his medication regimen. Room 10 is a class for higher functioning autistic students, and the District agreed to that placement for 2010 ESY even though it felt Student be in a class with lower functioning students. Student continued to attend the Morgan Center during SY 2010-2011, until January 13, 2011, when he punched a teacher. Student was then on a home program. On March 28, 2011, the parties agreed that Student would attend the Academic Community Transition Program at Fremont High School. Because of Student's conduct at Fremont High School, the District suspended Student and refused to permit his return, and stated that he needed to return to the Morgan Center as his last agreed-upon and implemented educational program. The District did not offer a placement at an IAES.

The January 27, 2011 IEP is clear that Student's placement at Fremont High School was intended to be a temporary, diagnostic placement as evidenced by the IEP team meeting notes and District's placement offer. As to the June 10, 2010 IEP, the District's offer states that Student would attend Room 10 at the Morgan Center for the 2010 ESY as a diagnostic placement. The June 10, 2010 IEP addendum clearly states that Student's placement in Room 10 was only a diagnostic placement for the 2010 ESY, and that the IEP team would meet before the start of SY 2010-2011 to discuss whether Student should remain in Room 10. However, the June 10, 2010 IEP does not state what would be Student's educational placement after this meeting as there are no IEP meeting notes to indicate whether such a meeting took place and if Student continued to attend Room 10 after the 2010 ESY. While the declarations of District personnel indicate that the parties intended at the June 10, 2010 IEP meeting for Student's continued placement at the Morgan Center at the start of SY 2010-2011, the declarations do not state that the District convened the promised IEP team meeting, or which room at the Morgan Center that Student attended during SY 2010-2011. The parties had several IEP team meetings in early 2011, before and after the January 13, 2011 incident, and the IEP notes do not reflect whether the parties considered Student's placement at the Morgan Center a temporary or permanent placement.

Because the ambiguities in Student's IEPs from June 10, 2010, onwards regarding Student's placement at the Morgan Center were the result of how the IEPs were drafted by the District, any ambiguities are interpreted against the District as the drafter of the IEP.

(See Civ. Code, § 1654.) The declarations from District personnel do not sufficiently establish that Student's placement at the Morgan Center was not a temporary placement until Student's medication regime stabilized, and with it his behavior. Because Student's placement at Fremont High School and the Morgan Center were temporary placements, Student's last agreed-upon and implemented educational program is the SDC at Cupertino High School pursuant to the January 8, 2010 IEP. Accordingly, Student's motion for stay put is granted in part in that the Morgan Center is not Student's stay put placement and denied in part as Student's stay put placement is not Fremont High School.

ORDER

Student's motion for stay put is granted in part and denied in part as his stay put placement is the SDC at Cupertino High School pursuant to his January 8, 2010 IEP.

Dated: May 20, 2011

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings