BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SAN FRANCISCO UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2011060553 ORDER GRANTING MOTION FOR STAY PUT

On July 14, 2011, Student filed a motion for stay put with the Office of Administrative Hearings (OAH), asking that OAH order the District to continue Student's placement at a nonpublic school (NPS), Erikson School (Erikson). On July 19, 2011, San Francisco Unified School District (District) filed an opposition to the motion for stay put. On July 22, 2011, Student filed a reply to the District's opposition, and the District responded on the same date. On July 25, 2011, the undersigned Administrative Law Judge (ALJ) requested supplemental briefing as to whether an annual individualized education program (IEP) team meeting had been held in February 2011. Student filed an explanatory letter on July 26, 2011, and the District filed an explanatory letter on July 29, 2011. On August 17, 2011, Student submitted supplemental briefing and a motion for reconsideration.[1] The District filed a response on August 19, 2011, and Student filed a response to that on August 23, 2011.

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

[1] Student is one of several District pupils who attended Erikson for the 2010-2011 school year (SY) and filed motions for stay put with OAH. This ALJ had not issued a final order ruling on the stay put motion in this matter when Student's new motion, based in part on an OAH stay put ruling in another pupil's case, was filed on August 17, 2011. Therefore, there is no order to be reconsidered. Accordingly, this is the original order regarding Student's motion for stay put, and all responses and supplemental filings have been considered.

otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006)[2]; Ed. Code, § 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.) If a student receives services from a nonpublic agency (NPA), or a NPS that placement may be a stay put placement, even if a school district has terminated its contract with the NPA or NPS. (*Joshua A. v. Rocklin Unified Sch. Dist.* (E.D. Cal. August 20, 2007) 2007 WL 238968, ** 2-4, affd. *Joshua A. v. Rocklin Unified Sch. Dist.* (9th Cir. 2009) 559 F.3d 1036 (hereafter referred to as *Joshua A.*).) However, if a school district terminates its contract with an NPA or NPS and can establish that it had good cause to do so, such as malfeasance by the NPA or NPS, stay put may not apply. (*Student v. Newport Mesa School District* (2009) Cal.Ofc.Admin.Hrngs.Case No. 2009020296; *Newport Mesa School District* (2007) Cal.Ofc.Admin.Hrngs. Case No. 2007070057).

It does not violate stay put if a school is closed for budget reasons and the child is provided a comparable program in another location. (See *McKenzie v. Smith* (D.C. Cir. 1985) 771 F.2d 1527, 1533; *Knight v. District of Columbia* (D.C. Cir. 1989) 877 F.2d 1025, 1028; *Weil v. Board of Elementary & Secondary Education* (5th Cir. 1991) 931 F.2d 1069, 1072-1073; see also *Concerned Parents & Citizens for Continuing Education at Malcolm X (PS 79) v. New York City Board of Education* (2d Cir. 1980) 629 F.2d 751, 754, cert. den. (1981) 449 U.S. 1078 [101 S.Ct. 858, 66 L.Ed.2d 801]; *Tilton v. Jefferson County Bd. of Education* (6th Cir. 1983) 705 F.2d 800, 805, cert. den. (1984) 465 U.S. 1006 [104 S.Ct. 998, 79 L.Ed.2d 231].)

Education Code section 56366.4, subdivision (a)(5)(B), states that a NPA or NPS can lose state certification from the California Department of Education (CDE) if it fails to notify CDE within 45 days of a "major modification or relocation of facilities." In other words, there is no provision in the Education Code for the decertification of an NPA or NPS on the ground that it moves from one location to another, unless they entity fails to notify the CDE of the move.

DISCUSSION

Student is 11 years of age and is eligible for special education under the category of intellectual disability. He is in the sixth grade and attended Erikson for most of the 2010-2011 school year. He also attended Erikson during the 2009-2010 school year, until

[2] All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

February, at which time he moved out of the District. His last annual IEP team meeting was held in September 2010, after he had moved back into the District boundaries, and an addendum meeting was held on December 13, 2010. The Notes from both IEP team meetings demonstrate that Student was specifically placed at Erikson because it met his unique needs, and afforded him educational benefit. At Erikson he received individual counseling twice a week, and participated in group counseling once a week. Student had a behavior support plan.

On May 9, 2011, the District sent Student's mother (Parent) a letter informing her that the District would not be renewing its contract with Erikson School. Although there is evidence that the District and Erikson continued contract negotiations after that date, Parent filed her request for due process (complaint), on June 9, 2011. The District formally notified Erikson on June 30, 2011, that it was terminating its contract. The District notified Student that it intended to place him at another NPS, RISE Institute, but Student is asking that Erikson be found to be his stay put placement.

The District's opposition to Student's stay put motion filed on July 19, 2011, is multi-faceted. First, the District argues that the placement section of the IEP calls for Student to be placed at an NPS under contract with the special education local area plan (SELPA), and Erikson is not specifically mentioned as his placement in that section of the IEP. However, in another part of the IEP, Student's "school of residence" is described as "Nps – Erikson." Further, as previously discussed, the notes section from the September and December 2010 IEP team meeting make it clear that the IEP team specifically intended for Student to be placed at Erikson through the extended school year of 2011, and for the 2011-2012 school year. The IEP states that "The IEP team agrees that [Student] will continue to receive a FAPE (free and appropriate public education) at Erikson NPS. . . ."

In its July 19, 2011 opposition, the District claims that it decided not to renew its contract with Erikson "due to space and budgetary concerns." The District had been allowing Erikson to use an unoccupied former middle school as facilities for the NPS. However, the District had decided to let a charter school occupy the premises. This was when the District sent the May 2011 letter to Parent. Apparently, however, there were ongoing negotiations between the District and Erikson after that date, and it does not appear that a final decision was made to terminate the Erikson contract until the end of June 2011. This situation does not replicate the closing of a public school, which might justify a change of placement to another comparable placement, notwithstanding stay put. Rather, the termination of the District's contract with Erikson at the end of June is similar to the situation in *Joshua A.*, in which the school district decided to replace the NPA that had previously been providing aide services to a child with a disability with another unnamed NPA. The Court held that stay put applied, and the district was required to continue using the first NPA.

The District then argues in its July 19, 2011 opposition, that it terminated the contract with Erikson "for cause." On July 11, 2011, a District administrator filed a complaint with the CDE. The administrator filed her complaint with the CDE only after the District had formally terminated its contract with Erikson. Apparently this administrator had visited the

middle school site many times from January through June 2011, because she was locating facilities for charter schools. There is a declaration from this administrator describing numerous observations she had which led her to believe students were not being properly supervised or instructed at Erikson. Further she reports that she was told by a charter school employee that he had observed a student on the Erikson campus appearing to roll a marijuana joint and smoke it.

The District's administrator claims that she complained to the District's special education director on numerous occasions between January and June 2011 about her observations and concerns about Erikson. However, in the letter the District's special education director sent to Erikson terminating the contract, dated June 30, 2011, the special education director states that the contract is being terminated "Due to the current budget crisis and the District's growing need for facility space. . . ." The letter concludes by saying "SFUSD appreciates your hard work and service to SFUSD students; we wish you great success and appreciate your cooperation during this challenging time." The District did not provide sufficient information to establish that it had "good cause" to terminate the contract with Erikson, and it did not establish that Erikson has been decertified or otherwise disciplined by the CDE.

The District contends in its opposition filed on July 19, 2011, that Erikson was "closed," and is no longer certified because it has moved to another location. However, the Education Code does not provide for the automatic decertification of a NPA or NPS because it changes the location of its facilities. Rather, the NPS continues to be certified, although certain updated information and clearances must then be provided to the CDE concerning the new location.

Student has now provided evidence that Erikson's relocation was approved by CDE on August 9, 2011. There is evidence that CDE personnel visited the new site. Although the District contends in its response filed August 19, 2011, that it had additional cause to terminate its contract with Erikson, and provides purported evidence of record-keeping irregularities at Erikson to support these allegations, this is not sufficient reason to deny Student's request for stay put. The evidence establishes that CDE certified Erikson at its new location on August 9, 2011. This occurred four weeks after the District filed its July 11, 2011complaint, with CDE against Erikson. Accordingly, Student's motion for stay put is granted, and there is no need to consider whether RISE Institute is a comparable placement.

ORDER

Student's stay put placement is Erikson School and Student shall be placed there pending the outcome of this case. Should Erikson subsequently be decertified during the pendency of this proceeding, stay put shall no longer apply.

IT IS SO ORDERED.

Dated: August 26, 2011

/s/

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings