

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

MONTEBELLO UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2011070153

ORDER GRANTING DISTRICT'S
MOTION FOR STAY PUT

FACTUAL BACKGROUND

Student filed her due process complaint on June 29, 2011. On July 15, 2011, the Montebello Unified School District (District) filed a joint response to Student's complaint and motion for stay put. The Office of Administrative Hearings (OAH) denied the District's motion without prejudice on July 25, 2011, because the District had failed to provide any documentation in support of its motion. The District re-filed its motion for stay put on August 1, 2011. This second motion is supported by the declaration of District school psychologist Ana Lazo, as well as by a copy of Student's last agreed-upon and implemented individualized education program (IEP), signed by Student's parents on March 18, 2011. Student has not filed an opposition or other reply to the District's motion.

APPLICABLE LAW

Under federal and California special education law, a special education student 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); 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 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.)

Neither federal nor State law indicates that a public education agency may invoke the stay put provision. No court has construed stay put to be a remedy available to school districts. In *School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 373 [105 S.Ct. 1996], the Supreme Court stated that the stay put provision is located in a section

of the Education of the Handicapped Act (the predecessor statute to the Individuals with Disabilities Education Act (IDEA)) delineating procedural safeguards largely for the benefit of parents and their children and that the Court doubted that this provision “would authorize a court to order parents to leave their child in a particular placement.” The Supreme Court held that parental violation of the stay put provision does not operate to preclude reimbursement for a unilateral placement by the parents if the school district’s proffered placement is ultimately found to be inappropriate. (*Id.*, 471 U.S. at 370, 372.) The Court stated that parents are not required to leave their child in what may turn out to be an inappropriate placement or risk waiving reimbursement. (*Id.*, 471 U.S. at 372.) In sum, there is no authority for an order requiring a student’s parents to keep their child at a particular placement.

California Code of Regulations, title 5, section 3042, defines “educational placement” 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.

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. (See *Beth B. v. Van Clay* (N.D. Ill. 2000) 126 F. Supp.2d 532, 534.) Notably, in *Van Scoy v. San Luis Coastal Unified Sch. Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, (herein, *Van Scoy*) which the District cites in its motion, the Court explained:

Courts have recognized, however, that because of changing circumstances the status quo cannot always be exactly replicated for the purposes of stay put. *Ms. S. ex rel. G. v. Vashon Island School District*, 337 F.3d 1115, 1133-35 (9th Cir. 2003). In the present case, the circumstances have changed because [the student] has moved from kindergarten into first grade, which includes additional time in the classroom. Certainly the purpose of the stay-put provision is not that students will be kept in the same grade during the pendency of the dispute. The stay-put provision entitles the student to receive a placement that, as closely as possible, replicates the placement that existed at the time the dispute arose, taking into account the changed circumstances.

(*Id.*, 353 F.Supp.2d at p. 1086.)

DISCUSSION

As of the time she filed her complaint, Student had just finished fifth grade. Her IEP, in pertinent part, states that she is to receive 300 minutes of instruction a week in a special day class, with one, 45-minutes session of group speech and language therapy per week, along with one, 30-minute session of individual speech and language therapy per week.

Student's complaint contends that the District should retain her in the fifth grade because her academic levels are too low for her to transition to middle school. In its motion for stay put, the District states that it cannot fully implement Student's last agreed-upon IEP because she has promoted from elementary school to middle school. The District states that it can approximate Student's present program at the middle school level. The District thus contends that implementing Student's IEP at the middle school is her stay put placement

Although the District cannot force Student to attend a program during the pendency of this litigation, it is appropriate for it to file a stay put motion in order to obtain a determination as to what constitutes Student's stay put based upon the dispute between the parties. In this case, Student is not contesting that placement in a special day class with related services of group and individual speech and language therapy is inappropriate or that it does not constitute her stay put educational program. Rather, Student's complaint alleges that she should be retained in fifth grade. However, as stated in *Van Scoy*, because Student is progressing from elementary school to middle school, her stay put placement is a program that replicates as closely as possible Student's last agreed upon and implemented placement in a special day class at the elementary school. The evidence presented by the District in its motion, supports the District's contention that it is able to replicate Student's program at the middle school level.

ORDER

The District's motion for stay put is granted in so far that its SDC program at La Merced Middle School is Student's stay put placement. If Parents want Student to attend a District placement during the pendency of this dispute, that placement is in a middle school special day class. However, nothing in this Order requires Student to attend this program should Student's parents wish to place her in a program outside of the District.

Dated: August 8, 2011

/s/

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings