

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2011080528

ORDER GRANTING IN PART AND
DENYING IN PART STUDENT'S
MOTION FOR STAY PUT

INTRODUCTION

On August 26, 2011, telephonic oral argument addressing Student's motion for stay put was held before Administrative Law Judge (ALJ) Darrell Lepkowsky, Office of Administrative Hearings, Special Education Division. Student and his parents were represented by attorney Susan Foley. The San Jose Unified School District (District) was represented by attorney Rodney L. Levin. The ALJ recorded the proceedings. Based upon the parties' pleadings, the documentary evidence, including supporting declarations, and oral argument, the ALJ grants in part and denies in part Student's motion for stay put.

FACTUAL BACKGROUND

On August 13, 2011, Student filed his motion for stay put. Student contends that his stay put placement and services are those defined in his individualized education program (IEP) dated November 16, 2009, which Student contends is his last agreed-upon and implemented IEP. Student states that the placement and services from that IEP consist of the following:

1. Placement in a District pre-school special day class;
2. Twenty-five minutes per week of individual speech and language therapy;
3. Twenty-five minutes per week of group speech and language therapy;
4. Forty-five minutes per week of individual occupational therapy; and
5. Twenty-five hours per week of in-home applied behavior analysis (ABA) services with a non-public agency, which Student states is presently Stepping Stones.

On August 18, 2011, the District filed an opposition to Student's motion. The District contends that it made another IEP offer to Student through an IEP dated November 15, 2010, and March 24, 2011 (sometimes referred to herein as the 2010-2011 IEP). The District contends that Student's parents accepted this IEP, with the exception of the District's

proposed reduction of Student's ABA services from 25 hours a week to 12 hours a week. The District states that Student's parents accepted this latter IEP, as qualified, on March 29, 2011, which then became Student's IEP for the remainder of the 2010-2011 school year, with placement and services as follows:

1. Resource specialist support at a District elementary school, three sessions a week, for 160 minutes per session;
2. Group speech and language therapy twice a week for 25 minutes each session;
3. Group occupational therapy for one, 30-minute session per week; and
4. In-home ABA therapy for 25 hours per week.

The District then states it convened another IEP meeting for Student on May 17, 2011. It contends that at that time, it offered Student a placement in an autism specific kindergarten special day class with an embedded ABA program for five hours a day, five days a week, in lieu of Student's present in-home ABA services. The District contends that it made it abundantly clear, as indicated in the IEP meeting notes and correspondence between the parties, that it was offering this placement in lieu of Student's in-home ABA program. The District then states that Student's parents later accepted this offer of placement and Student, in fact, began attending the placement on August 16, 2011. It is the District's position that once Student accepted placement in the kindergarten special day class, he waived any right to his in-home ABA services through stay put.

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; 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. (*A.M. , et al. v. Monrovia Unified School District* (9th Cir. 2010) 627 F.3d 773; *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.)

Courts have recognized, however, that because of changing circumstances, the status quo cannot always be replicated exactly for purposes of stay put. (*Ms. S ex rel. G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35.) Progression to the next grade

¹ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

maintains 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 [“stay put” placement was advancement to next grade]; see also *Beth B. v. Van Clay* (N.D. Ill. 2000) 126 F. Supp.2d 532, 534; Fed.Reg., Vol. 64, No. 48, p. 12616, Comment on § 300.514 [discussing grade advancement for a child with a disability].)

Additionally, it is clear under California statutes, that a parent of a special education student may accept portions of a proposed IEP but reject other portions of it:

If the parent of a child consents in writing to the receipt of special education and related services for the child but does not consent to all of the components of the individualized education program, those components of the program to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child. (Ed. Code, § 56346, subd. (a).)

DISCUSSION

Although Student contends that his November 16, 2009 IEP was his last agree-upon and implemented IEP, the evidence indicates otherwise. On March 29, 2011, by letter to the District, Student’s parents accepted the District’s IEP offer dated November 15, 2010, as modified on March 24, 2011, with the exception of the District’s proposal to decrease Student’s in-home ABA services from 25 hours a week to 12 hours a week. Student remained in that placement from the beginning of April, 2011, to the end of the 2010-2011 school year. Therefore, as of the end of the 2010-2011 school year, the 2010-2011 IEP, with a continuation of Student’s 25-hour a week in-home ABA program, was Student’s stay put IEP.

The pivotal issue is therefore what affect if any, did the acceptance by Student’s parents of the District’s offer of placement in a kindergarten special day class, have on the contours of what constitutes Student’s stay put with regard to his related services?

The District contends that Student cannot, in effect, “have his cake and eat it too.” Since the District made clear during the IEP process, as reiterated in subsequent correspondence, that its offer of a kindergarten special day class was in lieu of Student’s in-home ABA program, it contends that by accepting the placement, Student has waived his right to the in-home ABA services. The District offers no apposite support for its argument. Student did not accept the entirety of the District’s offer. He only accepted the *placement* portion of the offer. Student specifically declined any proposed changes to his related services. Therefore, his stay put for his related services are those delineated in the November 15, 2010/March 24, 2011 IEP.

The District has not provided any persuasive authority for its argument that Student’s stay put *placement* was his 25-hour per week in-home ABA services. Although it is conceivable that in another context an in-home ABA program might be

a student's *school placement*, the evidence indicates that such is not the case with regard to Student's 2010-2011 IEP. That IEP specifically provided for Student to be placed at a District elementary school in a resource specialist program for three, 160-minute sessions per week. It is clear that Student's in-home ABA program was considered a related service just as his speech and language and occupational therapy sessions were. In fact, in her August 18, 2011 declaration in support of the District's opposition to Student's motion for stay put, District Special Education Manager Patsy Storie states, at paragraph five, that "Petitioner's parents accepted some of this IEP [the 2010-2011 IEP] offer by letter dated March 29, 2011. Specifically, Petitioner's parents accepted all related services, *except for the reduction in home ABA programming.*" (Emphasis added.) It is clear that Student's in-home ABA program, at least as it pertains to the 2010-2011 IEP, was considered by all parties to the IEP to be a related service.

Therefore, Student's acceptance of the District's offer of *placement* in a kindergarten SDC, does not mean he has waived his right to stay put with regard to any of his related services, which include his ABA in-home program. The fact that the District meant its offer to ultimately be in lieu of Student's in-home ABA program is not dispositive of what constitutes Student's stay put.

The District also argues that it is inappropriate for a child to receive both a full-time school placement and a 25-hour per week home ABA program. The District offers no persuasive authority for its position. Ninth Circuit case law supports the position that a school district must maintain a stay put in-home ABA service through a final court decision, even if an administrative body or a district court has found that a district's placement offer reducing or deleting ABA services, constituted a FAPE. In *Joshua A. v. Rocklin Unified School District* (9th Cir. 2009) 559 F.3d 1036, 1039 (*Rocklin*), the Ninth Circuit found that a school district was required to fund a 40 hour per week ABA program for the student through the end of the appeal process, even where the District had prevailed both at the administrative level and in the district court. The court found that the purpose of the stay put requirement was to prevent any irreparable harm to a child that was inherent in the child's premature removal from an appropriate educational setting a potentially inappropriate one. The court state that "In light of this risk, the stay put provision acts as a powerful protective measure to prevent disruption of the child's education throughout the dispute process." (*Ibid.*) The court found that stay put is designed to prevent parents from choosing between accepting what might ultimately be determined to not meet minimal educational standards and having to pay for the cost themselves of an appropriate education for their child. (*Ibid.*) Student here is therefore entitled to his stay put related service of 25 hours per week of in-home ABA programming.

However, assuming, arguendo, that there was no meeting of the minds and that Student did not accept the placement that the District offered, Student would still be entitled to a stay put placement and related services based upon the 2010-2011 IEP, as implemented. Student was offered, and accepted on March 29, 2011, eight hours a week at a District pre-school in a resource specialist placement. Since Student has

advanced from pre-school to kindergarten,² his stay put placement must include a full-time kindergarten placement. The District argues that a special day class is not Student's stay put placement since his last agreed-upon and implemented IEP described the placement as that of a resource specialist program. However, Student is entitled under *Van Scoy* to a full-time kindergarten program. The District is therefore obligated to provide him with one.

The final issue to address is who is required to provide the in-home ABA services to Student. In his motion, Student contends that his ABA services must be provided by a non-public agency. However, Student has failed to provide persuasive support for this contention. Both Student's November 16, 2009 IEP and his 2010-2011 IEP indicate that the provider of Student's in-home ABA program would be "District of Service." There is no indication in the IEP's service pages, or even in the IEP notes, that the District specifically agreed that the services would be provided by a non-public agency. A school district has the right to select a program and/or service provider for a special education student, as long as the program and/or provider is able to meet the student's needs; IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216.) That the District in this case has previously contracted with Stepping Stones, a non-public agency, to provide in-home ABA services to Student, does not compel them to do so in the future. The District is free to provide Student's in-home ABA services through the individual or agency of its choice, as long as the person or agency selected is appropriately trained in applied behavior analysis.

ORDER

Student's motion for stay put is granted in part and denied in part. Student has accepted the District's offer of placement in a kindergarten special day class. A special day class therefore is now Student's stay put educational placement.

With regard to his related services, Student's stay put is the following:

1. Twenty-five hours a week of in-home ABA services, provided by a non-public agency or by an appropriately trained District ABA therapist, at the District's choice;

² Student has already been retained a year in pre-school. Neither party contends that Student should be retained in pre-school for another year.

2. Two, 25-minutes sessions per week of group speech and language therapy; and
3. One, 30-minute session per week of group occupational therapy.

Dated: August 26, 2011

/s/

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings