

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

TEMECULA VALLEY UNIFIED
SCHOOL DISTRICT.

OAH CASE NO. 2011080662

ORDER GRANTING MOTION FOR
STAY PUT

On August 16, 2011, Student filed a motion for stay put against the Temecula Valley Unified School District (District) that requested that Student remain in her preschool placement as her last agreed-upon and implemented educational program pursuant to the October 12, 2010 individualized education program (IEP). On August 19, 2011, the District filed an opposition, which contends that Student should advance to kindergarten as her stay put placement, especially because Parents consented to the District's May 10, 2011 IEP, with the exception of Student advancing to kindergarten.

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, § 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 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.)

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.) The 1999 federal regulations to the Individuals with Disabilities in Education Act (IDEA) state, "[I]t 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.” (*Federal Register*, Comment on § 300.514, Vol. 64, No. 48, p. 12616.) In most instances, progression to the next grade adheres to the status quo for purposes of stay put. (See *Beth B. v. Van Clay*, 126 F. Supp.2d 532, 534 (N.D. Ill. 2000).) Progression to the next grade 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].)

DISCUSSION

The parties dispute whether Student should advance to kindergarten. Student contends in her complaint and motion for stay put that the appropriate placement for her during the 2011-2012 school year is a continuation of her existing preschool program due to her physical disabilities, small size and late birthday, as she will turn five in late October 2011. The District asserts that Student has not establish sufficient reasons why she should not advance to kindergarten and that the District can meet her unique needs, especially those related to safety, in the proposed special day class.

The District relies on language in *Van Scoy* that presumes that for purposes of stay put that a student should advance to the next grade to maintain the status quo. However, the factual distinctions between *Van Scoy* and this matter do not support the District’s position. In *Van Scoy*, parents did not object to student advancing into the first grade. The issue was the amount of behavioral services outside the school day because of the increase of the school day from kindergarten to first grade. Parents asserted that the amount of behavioral services should remain the same, while the school district wished to reduce this service. The court granted Parents’ request to maintain the level of outside behavioral services as student’s advancement to first grade did not necessitate a change of this service level for purposes of stay put. Nothing in the language of *Van Scoy*, or applicable comments to the Federal Regulations, mandate grade advancement for purposes of stay put, but rather create the presumption that grade advancement is appropriate for stay put.

In this matter, the gravamen of Student’s complaint is whether she should advance to kindergarten or remain in preschool to receive a free appropriate public education as the parties dispute whether she is ready to move onto kindergarten. Student overcomes the presumption of grade advancement because a dispute exists whether she should be promoted to kindergarten, serious issues regarding Student’s safety due to her small size, her late birthday and the fact that parents of general education children with Student’s birthday often decide not to enroll their children into kindergarten due to school readiness issues. As to the May 10, 2011 IEP, with the service changes Parents requested, even though Parent consented to nearly all of the IEP, this IEP was never implemented because Student never attended kindergarten. Accordingly, maintenance of the status quo during the pendency of this action necessitates that Student continue to attend preschool pursuant to the October 12, 2010.

ORDER

Student's motion for stay put is granted as her last agreed-upon and implemented educational program is the October 12, 2010 IEP in her preschool placement.

Dated: August 23, 2011

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings