

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

WEST CONTRA COSTA UNIFIED  
SCHOOL DISTRICT.

OAH CASE NO. 2012080793

ORDER GRANTING, IN PART,  
MOTION FOR STAY PUT

On August 23, 2012, Student’s parents on behalf of Student (Student) filed a motion for stay put. On August 28, 2012, West Contra Costa Unified School District (District) filed an opposition to the motion. On August 29, 2012, Student filed a reply.

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)<sup>1</sup>; 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.)

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 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 (*Van Scoy*) [“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; 64 Fed.Reg. 12616 (March 12, 1999) [discussing grade advancement for a child with a disability].)

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

## DISCUSSION

Student is a five-year-old child who has been receiving special education services from the District in preschool for the last two years. Student's preschool program consisted of placement in an autism specific special day class, as well as a developmental, after-school program referred to as "SMILE," speech and language therapy, and occupational therapy, all provided by the District.

Student is now old enough for kindergarten, but Student's parents believe it would be more appropriate to keep Student in his preschool placement for another year. The District proposed an IEP in 2012 that would place Student in a special day class in a K-2 classroom (containing kindergarten through second grade children). The parties dispute whether that IEP offer is appropriate.

While the dispute is pending, Student seeks to remain in his last agreed-upon and implemented IEP placement in the preschool program. Student argues that he is only five years old and is not even required to attend school until he is six. Student contends that Student's developmental age is at a preschool level and that he is making progress in his preschool setting. In particular, Student argues:

Parents believe that the early intervention preschool program at Downer Elementary is the appropriate placement for [Student], as he is not ready yet for a Kindergarten program, is beginning to show progress and potential in his current preschool program and may suffer a setback/regression in the recent development and social gains he has made if he matriculates to a Kindergarten program at this time.

The District opposes Student's motion. The District contends that Student has reached kindergarten age and is ready for kindergarten in a special day class, so Student should matriculate to kindergarten. The District maintains that it can provide the supports and services from Student's last agreed-upon IEP in the kindergarten setting, so Student's "status quo" will be maintained in that new setting during this due process proceeding.

Although stay put is generally automatic when a due process case is filed, stay put was never intended to prevent a child from advancing from one grade to another. As the court stated in *Van Scoy*:

The purpose of the stay-put provision is to maintain the status quo and to prevent the school district from unilaterally denying placement to a student while a dispute over the placement is being resolved. 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.

(*Van Scoy, supra*, 353 F.Supp.2d at p. 1086.)

The comments to the federal regulations also address this issue.

The term “current placement” is not readily defined. While it includes the IEP and the setting in which the IEP is implemented, such as a regular classroom or a self-contained classroom, the term is generally not considered to be location-specific. In addition, it is not intended that a child with disabilities remain in a specific grade and class pending an appeal if he or she would be eligible to proceed to the next grade and the corresponding classroom within that grade.

(64 Fed.Reg. 12616 (March 12, 1999).)

However, at times the facts of a case may warrant an exception to the rule that a child automatically advances to the next grade. For example, Student relies upon the OAH order granting stay put in *Parent on Behalf of Student v. Temecula Valley Unified School District (Temecula Valley)* (2011) OAH case number 2011080662. In that case, OAH ordered that a preschool program was the child’s stay put placement based on the child’s unique circumstances. The ALJ considered the child’s late birthday (in October) and concluded, in part:

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.

In the instant case, there are factual circumstances that favor maintaining Student in his preschool placement pending a decision in the due process case. Student was provided with an after school program in the preschool setting (the SMILE program) which does not exist in the kindergarten setting. The class into which the District seeks to place Student is a K-2 combined class, and Student’s parents believe that Student may regress if placed in that classroom. As in the *Temecula Valley* case discussed above, the dispute between the parties involves whether Student should matriculate to the next grade.

On the other hand, there are also differences between the *Temecula Valley* case and the instant case. In the instant case, Student does not have a late birthday, but instead has an April birthday and is the correct age to enter kindergarten. There is no indication in the

instant case that Student is unusually small or would be in any danger from the children in the K-2 classroom. The District represents that it is capable of providing the same supports and services from the SMILE program (as well as Student's other agreed-upon IEP services) in the kindergarten setting. Student does not dispute the District's ability to provide those supports and services in either his moving papers or his reply. Student simply argues that he will gain greater benefit in the preschool classroom because he is at a preschool level developmentally.

Under these circumstances, Student has not made a sufficient factual or legal showing to prevent him from matriculating to kindergarten while this case is pending.<sup>2</sup>

However, even in the new setting, the District must still provide equivalent services to those contained in the last agreed-upon IEP, including services, methodologies, and curriculum equivalent to the SMILE program, the same amount of mainstreaming opportunities, and the same supplemental aides and supports. The only change permitted while this case is pending is the matriculation of Student from preschool to kindergarten.

#### ORDER

The request for stay put is granted in part. The District may matriculate Student to kindergarten, but the District must continue to provide supports and services which are the same as or equivalent to those contained in the last agreed-upon IEP.

Dated: August 30, 2012

/s/

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SUSAN RUFF

Administrative Law Judge

Office of Administrative Hearings

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<sup>2</sup> Nothing in this Order is intended to decide the ultimate dispute in this case, regarding whether the District's offer constituted a free appropriate public education. This Order is intended to decide only what constitutes the "status quo" for Student while this case is pending.