

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BERRYESSA UNION SCHOOL
DISTRICT.

OAH CASE NO. 2012120298

ORDER FOR SUPPLEMENTAL
BRIEFING REGARDING STAY PUT
PLACEMENT

On December 7, 2012, Carolyn Nedley, Attorney at Law, filed with the Office of Administrative Hearings (OAH) a request for an expedited due process hearing on behalf of Student naming the Berryessa Union School District (District). On that same date, Student also filed a motion for stay put and a request for an order suspending expulsion proceedings.¹ Student seeks to remain placed pursuant to the last implemented and agreed upon individualized education program (IEP) dated January 18, 2012, which is attached to Student's motion. On December 11, 2012, Daniel A. Osher, Attorney at Law, filed an opposition on behalf of the District on the ground that the requested stay put placement is not available in an appeal of a manifestation determination. On December 11, 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)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.)

¹ Student's request for an order suspending expulsion proceedings will be addressed in a separate order.

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

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.)

When a child violates a code of student conduct and school personnel seek to order a change in placement that would exceed ten school days, the local education agency (LEA), the parent, and the relevant members of the IEP team shall determine whether the conduct was a manifestation of the child’s disability. A child’s parent may appeal the manifestation determination by requesting an expedited due process hearing.³ (20 U.S.C. § 1415(k); 34 C.F.R. § 300.532.) While the appeal is pending, the child shall remain in the interim alternative educational setting (IAES) pending the decision of the hearing officer or until the expiration of the 45 school-day IAES placement, whichever occurs first, unless the parent and the LEA agree otherwise. (Ed. Code, § 56505, subd. (d); see 20 U.S.C. § 1415(k)(4)(A) & 34 C.F.R. §§ 300.532, 300.533.)

School personnel may remove a student to an IAES for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability if the student:

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

(20 U.S.C. § 1415(k)(1)(G); See also 34 C.F.R. §§ 300.530(g).)

DISCUSSION

According to Student’s complaint and request for stay put, Student is a 12-year-old boy who was last attending seventh grade at Piedmont Middle School pursuant to an IEP dated January 18, 2012. Student is eligible for special education services based upon a specific learning disability. On November 15, 2012, Student engaged in a disciplinary

³ In such cases, “the State or local education agency shall arrange for an expedited hearing.” (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c).) The expedited hearing shall occur within 20 school days of the date the hearing is requested. (*Id.*)

incident and the District recommended him for expulsion. On December 4, 2012, the District convened a manifestation determination meeting and the District members of the team determined that Student's conduct was not a manifestation of his disability and that his IEP was being fully implemented. Student's suspension was extended and is to remain in effect pending the expulsion hearing.⁴ Parent seeks to reverse the findings of the manifestation determination team and filed a request for an expedited hearing with OAH.

Student requests an order for stay put at his previous general education placement at Piedmont Middle School with resource support. The District opposes Student's stay put request on the grounds that educational placements during appeals of disciplinary action are specifically excluded from the standard stay put provisions. The District indicates that it has placed Student on an extended suspension pending expulsion proceedings, and is providing him with specialized academic instruction at home. The District further indicates it has not placed Student in a special circumstances placement pursuant to title 34 of the Code of Federal Regulations, part 300.530(g) and is proceeding with disciplinary proceedings applicable to children without disabilities pursuant to part 300.530(c).

In his reply, Student concedes that the District is correct in its legal analysis that the proper stay put placement pursuant to a disciplinary removal is the IAES identified by the District. However, Student contends the District has not identified nor offered an alternative educational setting nor provided any services, and therefore Student is entitled to an order for stay put consistent with this last agreed upon and implemented IEP. Neither party has provided evidence supported by declarations under oath as to whether the District has offered an alternative educational placement pending the hearing, and the nature of that placement.

Based upon the pleadings filed by both Student and the District, it is unclear whether the IEP team has appropriately offered Student an IAES as required. (20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.531.) **Each party is ordered to provide by 3:00 p.m. on Friday, December 14, 2012, supplemental briefing supported by documentary evidence and relevant declarations under oath as to whether the placement offered by the District is consistent with title 20 of the United States Code section 1415(k)(2), and what specific placement has been offered and when.** The parties are invited to provide written factual findings by the manifestation determination team or other relevant documents such as IEP documents.

Dated: December 12, 2012

/s/

THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings

⁴ Student's expulsion hearing was originally scheduled for December 10, 2012. In its opposition, the District indicates that the expulsion hearing will be briefly continued to address parental concerns.