

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

FRESNO UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2012120631

ORDER GRANTING STUDENT'S
MOTION FOR STAY PUT AND
DENYING DISTRICT'S MOTION FOR
STAY PUT

On January 2, 2013, Student filed a motion for stay put, asking that the Office of Administrative Hearings (OAH) order that his placement for stay put purposes is Phoenix Secondary Academy (Phoenix), a Fresno Unified School District (District) school for students in grades seven through nine who have been the subject of disciplinary proceedings in the District, i.e., a community school.

On January 4, 2013, the District filed its own motion for stay put, asking that OAH order that Student's stay put placement is a District general education high school. On January 7, 2013, the District filed an opposition to Student's motion, and on January 8, 2013, Student filed an opposition to the District's motion.

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. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

However, if a student's placement in a program was intended only to be a temporary placement, such placement does not provide the basis for a student's "stay put" placement. (*Verhoeven v. Brunswick Sch. Comm.* (1st Cir. 1999) 207 F.3d 1, 7-8; *Leonard v. McKenzie* (D.C. Cir. 1989) 869 F.2d 1558, 1563-64.)

¹ 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.)

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 [“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].)

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 educational 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.² (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.)

DISCUSSION

Procedural Background

This case presents a unique situation. It is the continuation of a dispute between Student and the District which began in May 2011, when the District began expulsion proceedings to expel Student from the middle school he was attending in the District. At that time Student was in the eighth grade.

This dispute has been the subject of two previous due process hearings in OAH Case No. 2012020842, which was filed by Student in February 2012. The first due process hearing was an expedited proceeding, and in a Decision issued April 16, 2012, Administrative Law (ALJ) Judge Peter Paul Castillo found that the District had not properly convened a manifestation determination meeting as part of the expulsion process in May 2011, and ordered

² 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.*)

the District to properly convene and conduct another manifestation determination meeting. The District did so, and again found that Student's conduct was not a manifestation of his disability. The second due process hearing dealt with issues concerning the District's provision of educational services to Student during the period of time he was suspended from school pending expulsion. The Decision in that case was issued on June 22, 2012. Neither of these Decisions are determinative of the ruling on this stay put motion, but certain Factual Findings from these decisions are contained in this discussion to the extent that they are relevant.

Student's Expulsion

In May 2011 Student was found in a bathroom stall with another student engaging in sexual activity. There was a question as to whether the conduct had been consented to by the other student. The District believed that it was not consensual activity, and Student was the perpetrator, so it instituted expulsion proceedings against Student. The District then conducted a manifestation determination meeting and found that Student's conduct was not a manifestation of his multiple disabilities. He was expelled from the District on August 17, 2011, but the expulsion was suspended so Student could attend Phoenix. He began attending Phoenix on October 6, 2011 and was eligible under the terms of the expulsion to return to a general education school in the District on December 22, 2011, upon application for readmission.

Student appealed the District's order of expulsion to the Fresno County Board of Education (County Board), and on November 17, 2011, the County Board overturned the expulsion and ordered the District to expunge the expulsion. The District apparently followed the order of the County Board and expunged the expulsion in its records, but it also filed a petition for a writ of mandate with Fresno County Superior Court, contesting the County Board's decision, pursuant to Code of Civil Procedure section 1094.5 (1094.5 petition). Although the expulsion was purportedly expunged as of November 17, 2011, neither Student nor the District took any steps to remove him from Phoenix and return him to a general education institution which, because Student was in the ninth grade, would be Hoover High School.³ Student continued to attend Phoenix, and was attending Phoenix when he filed his complaint in February 2012.

Following the April 16, 2012 OAH Decision, the District told Parents Student was to return to a District school, but because Student was doing well at Phoenix, he applied to OAH for a stay put order that would allow him to stay at Phoenix. A new manifestation determination meeting was held by the District, pursuant to ALJ Castillo's Decision, on April 27, 2012, and the District again made the determination that Student's conduct was not a manifestation of his disabilities. Student did not appeal this manifestation determination.

³ There is nothing in the material submitted by either Student or the District that Student ever applied for readmission, or that the District took any action to return him to a general education school after December 22, 2011, at least not until the issuance of the first Decision by ALJ Castillo in April 2012.

What this meant is that if the County Board's reversal of the expulsion was not allowed to stand by the Superior Court, the expulsion would be reinstated. On May 3, 2012, ALJ Castillo granted Student's stay put request, and Student remained placed at Phoenix. ALJ Castillo's non-expedited Decision was issued on June 22, 2012, and was not appealed by either party.⁴

On November 13, 2012, the Superior Court Judge granted the District's 1094.5 petition, and remanded the matter back to the County Board, ordering it to make factual findings to support its reversal of the expulsion. The parties have not provided OAH with any information concerning any action of the County Board since the writ was granted. Based on the wording of the Superior Court Order, which was submitted to OAH by both parties, and lacking any information about any other County Board action since the 1094.5 petition was granted, it is determined that for the purposes of this stay put order, the expulsion has been reinstated.

District's Current Complaint

District's complaint in this matter concerns, in part, an offer the District made at an IEP team meeting on June 21, 2012. The District asks that OAH find that this was an offer of a FAPE for Student, and that the District can implement this offer without parental consent. The District is, in part, offering Student placement in a general education high school with resource specialist program (RSP) services for part of the school day. Student's position is that the District's offered placement would not provide him with a FAPE.

Stay Put Motions

Student is asking that OAH find his stay put placement during the course of these proceedings is Phoenix. Student has attended Phoenix since October 6, 2011, with the exception of a few days in April 2012-early May 2012, pending issuance of the May 3, 2012 stay put order, when he stayed home. Student contends that this stay put order is still in effect. However, because neither party appealed the June 22, 2012 Decision, and the time for appeal has lapsed, the May 3, 2012 stay put order, is no longer in effect.

The District is asking that OAH find that stay put for Student is in a general education District high school with RSP services, pursuant to the last IEP Parents agreed to, which is dated January 19, 2011. This, of course, is consistent with the placement now being offered by the District, one of the contested issues in the complaint filed by the District. In essence the District, by way of its stay put motion, is asking OAH to decide the contested placement issue without conducting a due process hearing. This ALJ declines to do so.

⁴ This Decision required the District to provide Student with several hours compensatory education for failure of the District to provide Student with educational services that conformed to his then-current IEP of January 19, 2011, during the period of time when he was suspended in May 2011, until he began attending Phoenix.

Analysis

Student's expulsion is now in effect. There was a period of time when it was rescinded and expunged, the period of time between November 17, 2011, when the County Board reversed the expulsion, and November 13, 2012, when the Superior Court granted the 1094.5 writ. The Superior Court order effectually reinstated the expulsion. Although the expulsion by its term was to end on December 22, 2011, there was a condition that Student apply for readmission to one of the District's general education schools to finalize the termination of the expulsion. Student has not, to date, applied for readmission to a District general education school.

Student has attended Phoenix since October 6, 2011, with the exception a brief period of time in April/May 2012, prior to the issuance of the May 3, 2012 stay put order, when Parents kept him home. Following the reversal of the expulsion order by the County Board, in November 2011, the District effectually consented to Student remaining at Phoenix by not taking any action to reinstate him in a District general education school, although he was no longer technically expelled. Only after the issuance of the OAH expedited Decision on April 16, 2012, did the District notify Student that he could be placed in a general education District school, and in fact notified Parents that it intended to remove him from Phoenix to do so. This resulted in Parents keeping Student home, and filing their request that OAH order that Student remain at Phoenix as a stay put placement, as part of the ongoing litigation in OAH Case No. 2012020842.

The final Decision in OAH Case No. 2012020842 was issued on June 22, 2012. The parties had 90 days after the issuance of that Decision to file an appeal in state or federal court.⁵ When neither party filed an appeal, the May 3, 2012 stay put order, was no longer in effect. However, the District prolonged Student's placement at Phoenix by consenting to Student remaining there through the first semester of the 2012-2013 school year (SY), making this offer to Student in a letter to Parents dated August 12, 2012. Although District now contends that this made placement at Phoenix "temporary" and not stay put, and it states this in the letter, OAH determines whether a placement is stay put, not the District unilaterally.

The District also contends in its stay put motion and opposition to Student's stay put motion that, since Student is now in 10th grade, he is no longer eligible to attend Phoenix which is purportedly a community school for students in seventh through ninth grades. It argues that Student cannot be taught 10th grade material at Phoenix, but in its pleadings it states that Student is being taught some 10th and 11th grade material. Although the District has submitted several hundred pages of pleadings and exhibits in support of its own motion for stay put, and in opposition to Student's motion for stay put, nothing is said about a District community school for students in grades 10 through 12 who have had disciplinary action taken against them. Therefore, OAH has no knowledge of any other community

⁵ Ed. Code § 56505, subd. (k).

school in the District where an expelled student who has not applied for reinstatement can be placed.

The District claims that the last IEP signed by Parents in January 2011 calls for Student to be placed in a general education setting with RSP services, but the District's expulsion action effectually rescinded this IEP placement. The District also argues that placement at Phoenix denies Student a FAPE, but Student has not complained that he is being denied a FAPE at Phoenix, nor is there any evidence to that effect. In addition, the District argues that Phoenix is not the least restrictive environment (LRE) for Student. However, LRE is not a factor to be considered in determining stay put.

It is ironic that these convoluted legal proceedings began with the District taking action to expel Student and vigorously pursuing expulsion, which resulted in him being placed at Phoenix. However, once Student began advocating for continued placement at Phoenix, the District then began to take action to remove him from Phoenix, although it continued to defend its previous expulsion by filing and litigating the 1094.5 petition to overturn the County Board's reversal of the expulsion.

In making this stay put order, this ALJ finds that because the Superior Court granted the 1094.5 petition filed by the District, Student's expulsion has been reinstated. Because Student has not petitioned the District for readmission, in accordance with the terms of his expulsion, he is currently expelled. Phoenix is the only community school placement either party has suggested for placement during expulsion. Accordingly, Student's motion for stay put is granted, and District's motion for stay put is denied.

ORDER

Student shall remain at Phoenix during the pendency of these proceedings as his stay put placement, unless Student and the District agree to a different placement.

Dated: January 22, 2013

/s/

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings