

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

BENICIA UNIFIED SCHOOL DISTRICT.

OAH Case No. 2016010842

ORDER GRANTING STUDENT'S
REQUEST TO HAVE ADDITIONAL
BRIEFING CONSIDERED; ORDER
DENYING REQUEST FOR
RECONSIDERATION

PROCEDURAL BACKGROUND

Student filed a motion for stay put on January 26, 2016, which was opposed by the Benicia Unified School District. On February 2, 2016, the undersigned administrative law judge issued an order for further briefing. District timely filed its briefing, but the Office of Administrative Hearings did not receive any further briefing from Student. On February 17, 2016, the undersigned ALJ issued an order denying Student's motion for stay put.

On February 19, 2016, Student filed a request for reconsideration of the order denying stay put. Student moves first to be permitted to submit and have considered his further briefing, which he states his educational advocate attempted to file in a timely manner. Second, he requests that his motion for stay put be granted based on what Student asserts was a mistake by his advocate.

District has not filed a response to Student's motion for reconsideration.

APPLICABLE LAW REGARDING MOTIONS FOR RECONSIDERATION

OAH will generally reconsider a ruling upon a showing of new or different facts, circumstances, or law justifying reconsideration, when the party seeks reconsideration within a reasonable period of time. (See, e.g., Gov. Code, § 11521; Code Civ. Proc., § 1008.) The party seeking reconsideration may also be required to provide an explanation for its failure to previously provide the different facts, circumstances or law. (See *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1199-1200.)

DISCUSSION

Failure to Timely File Further Briefing

Student states that his advocate attempted multiple times to send his response to the order requiring further briefing. She first made multiple attempts to transmit the documentation by facsimile to the proper OAH telephone number, but the transmissions failed each time. Student's advocate then attempted to email the documentation to OAH, but she inadvertently failed to use the correct email address. Student provided copies of the facsimile transmission records that demonstrate the many attempts made to send the documentation, as well as the email to OAH indicating the incorrect address. Student further provided a declaration from his advocate detailing the filing attempts. Student also provided a declaration from an attorney who frequently practices before OAH, who reiterated the difficulty she had transmitting documents to OAH by facsimile during the same time frame.

Student has provided sufficient support for his contention that he made valid attempts to comply with the order for further briefing. The briefing therefore has been considered as if filed on time. For the following reasons, Student has failed to provide sufficient support for his contention that his stay put placement is in a District certificate of completion adult program.

Motion for Stay Put

APPLICABLE LAW REGARDING STAY PUT

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 individualized education program, which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

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 School Committee* (1st Cir. 1999) 207 F.3d 1, 7-8; *Leonard by Leonard v. McKenzie* (D.C. Cir. 1989) 869 F.2d 1558, 1563-64.)

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, subd. (a).)

Stay put may apply when a child with a disability files for a due process hearing on the issue of whether graduation from high school (which ends Individuals with Disabilities

Education Act eligibility) is appropriate. (*Cronin v. Bd. of Educ. of East Ramapo Cent. Sch. Dist.* (S.D.N.Y. 1988) 689 F.Supp. 197, 202, fn. 4 (*Cronin*); see also *R.Y. v. Hawaii* (D. Hawaii February 17, 2010, Civ. No. 09-00242) 2010 WL 558552 (*R.Y.*.) Stay put applies because if it did not, schools would be able to end special education eligibility for students by unilaterally graduating them from high school. (*Ibid.*)

FACTUAL BACKGROUND

District provided a declaration from Dr. Carolyn Patton, its Director of Special Education, copies of portions of several of Student's IEP's, and copies of correspondence, in support of its opposition to Student's motion for stay put. The evidence established the following facts. Student is presently 20 years old. On October 22, 2014, District convened an IEP team meeting to review Student's triennial assessment. At the time of this meeting, Student was in a diploma track placement. However, his parents expressed concern that Student was not ready to graduate and asked that he be permitted to remain at school after 12th grade. District agreed to the change in Student's IEP in an IEP amendment dated October 27, 2014. Although neither Student nor his parents initialed the October 27, 2014 amendment, District believed that they were in agreement to change Student from a diploma track placement to an adult transition program after Student completed 12th grade because they signed the amendment page. The change in programming meant Student would eventually receive a certificate of completion rather than a diploma.

District convened another IEP team meeting for Student on May 27, 2015. His IEP team confirmed that Student was on a certificate of completion track. The IEP team confirmed that Student would participate in an adult transition program called the Bridge program, offered through the Solano County Office of Education, for the 2015-2016 school year. For the second semester of the school year Student would attend the adult program three days a week, and attend a college class two days a week. Student and his parent signed the May 27, 2015 IEP amendment, but did not initial it. However, District believed that they had consented to the amendment and implemented it for the fall semester of the 2015-2016 school year.

District convened an annual IEP team meeting for Student on October 13, 2015. At that time, his IEP team clarified Student's educational program. The program consisted of Student's placement in the Bridge program, but included a provision indicating Student would work at a preschool four mornings a week before attending the Bridge program about an hour a day. In the afternoons, Student worked at his family's day care business. On Fridays, Student worked in the community during the morning. Neither Student nor his parents contested the programming.

On December 13, 2015, Student's advocate wrote a letter to District. The advocate indicated that she represented Student and his mother regarding Student's educational needs, and attached documents supporting her representation. The letter asserted that District had mismanaged Student's education. Student's advocate then stated that "the most significant problem is the fact that the District dropped [Student] from the diploma track during his

senior year and, at the same time, failed to provide prior written notice regarding the change from the diploma track.” (Emphasis in the original.) Student’s advocate then described what is stated on the notes of Student’s IEP’s from 2014 and 2015. She contested the fact that District moved Student from a diploma track to a certificate of completion track in spite of Student’s receipt of passing grades, having passed the English language arts portion of the California High School Exit Exam, and having average intelligence.

Student’s advocate then stated in the letter that Student’s parents “***did not give informed consent to this decision and are rescinding it!***” (Emphasis, bold, and italics in the original.) After discussing several issues regarding assessments, Student’s advocate closed the letter by stating, in pertinent part, that Student and his mother believed that Student should graduate with a diploma.

District responded to Student’s December 13, 2015 letter shortly after its winter break ended. It convened an IEP team meeting for January 11, 2016, to discuss Student’s rescission of his agreement to move to a certificate of completion program. By the time the IEP team met, District had confirmed that Student had completed all coursework for a regular diploma as of June 2015. Student had sufficient course credits. Although he had not passed the English Language Arts portion of the California High School Exit Exam by a few points (he had passed the math portion), as a student with an IEP, passing the exam was not a graduation requirement for him. Therefore, District determined that Student would receive a diploma and was no longer eligible to remain at High School.

At the January 11, 2016 IEP team meeting, Student, his mother, and his advocate agreed that Student was being moved to a diploma track. However, they requested that receipt of the diploma be delayed. Student has not filed additional briefing as directed, so it is not known why he wanted the diploma delayed, for how long he wanted it delayed, or what programming or placement he believed District should have provided him at the time. In any case, District declined to delay conferring the diploma on Student. It granted the diploma and thereafter informed Student that he was no longer able to attend any type of classes or program, including the Bridge program. Neither Student nor his parents signed the January 11, 2016 IEP.

STUDENT’S ADDITIONAL EVIDENCE

In his additional briefing Student makes two primary contentions. First, he contends that the statement by his advocate rescinding his and/or his mother’s consent to changing his program from a diploma track to a certificate of completion track was in error. Second, Student contends that the rescission did not result in a written consent to anything through a signed IEP by either Student or his mother. Therefore, because the rescission was made in a letter rather than through a signed IEP, the rescission is not valid. Neither contention is persuasive.

Although Student now attempts to characterize the rescission of his consent to being on a certificate of completion track as an “error,” his advocate’s December 13, 2015 letter to

District, as described above, was very emphatic that Student and his parents were rescinding consent to each of the IEP's that first discussed, then moved Student from a diploma program to a certificate of completion program. There is no way to interpret the letter as an "error." Student simply now regrets what was stated in the letter. His present reconsideration of what may have been a rash decision does not result in that being an "error" than can now be modified because Student no longer believes the decision was to his benefit.

Student's contention that his rescission of consent is not valid because it was made through a letter from his educational advocate who clearly represented him and continues to represent him, rather than through a signed IEP, is equally unpersuasive. That position has been rejected by at least two district courts judges for Central District of California. In two separate cases involving parents of disabled children, the attorney for the parents advised her clients not to sign IEP documents as a means of consenting to them. Rather, the attorney sent letters to the school districts advising that the parents consented to the IEP's. The attorney for the parents took the position that as agent for the parents, she was authorized to give consent by way of her letters. The school districts objected to receiving consent through correspondence, and insisted that the parents had to sign the IEP documents for consent to the IEP to be in effect. The school districts prevailed at the administrative hearings, but those decisions were overturned by the district courts. Although these unpublished court orders are not binding legal precedent, they are highly persuasive on the proper interpretation of the law on this issue.

On May 4, 2012, United States District Court for the Central District of California, in *A.T. v. East Whittier City School District*, Case number CV 10-10030-GHK(Ex) (*East Whittier*), considered the question of whether an attorney's letter consenting to a district's assessment plan, without a parent's signature on the plan, constituted valid consent. The court found that the letter was sufficient to constitute consent. It overturned the OAH decision to the contrary, finding that:

In reaching a contrary decision, the ALJ emphasized that Plaintiff's parents never returned a signed copy of the Assessment Plan, as requested by District in its February 18, 2010 letter. However, we believe that analysis improperly elevates form over substance, as the consent granted in the March 1 letter was clear.

In a ruling in *J.L. v. Downey Unified School District*, case number CV 12-2285-GW(SSx) (*Downey*), the United States District Court for the Central District of California, also found that California agency law applies to special education documents such as assessment plans and IEP's. The court's decision overturned the December 21, 2011 OAH decision in *Parent on Behalf of Student v. Downey Unified School District*, OAH consolidated case numbers 2011050579, 2010100321 and 2011030557. The court's ruling found that the child's mother could give valid consent to documents such as assessment plans and IEP's through an attorney's consent letter under California agency laws. (See also, *Student v. Garden Grove Unified Sch. Dist., et al.* (2012) Cal.Offc.Admin.Hrngs Case No. 2012060342, at pp. 42-46.)

By analogy, if consent to an IEP may be made through a letter to a district by a student's agent – here, clearly Student's advocate as demonstrated by the letters giving her the authority to represent Student and his mother – then rescission of consent may be made in a similar fashion.

Student, through his agent (his educational advocate), clearly and unequivocally revoked consent to being placed on a certificate of completion educational track. Student's placement then reverted to the placement stated in the last signed and implemented IEP in place. That IEP placed Student on a diploma track. Student's stay put placement therefore is diploma track. He is not entitled to stay put in the certificate of completion program, to which he and his parent revoked consent.

Student's motion for stay put is therefore denied.¹

ORDER

1. Student's request for reconsideration requesting that his additional briefing be considered is granted. His additional briefing has been considered as if timely filed, and the February 17, 2016 Order Denying Stay Put is set aside.

2. After reconsideration, Student's motion for stay put is denied.

DATE: February 26, 2016

DocuSigned by:

Darrell Lepkowsky

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DARRELL LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings

¹ This order does not address whether District's decision to graduate Student denied him a free appropriate public education.