

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

CUPERTINO UNION SCHOOL
DISTRICT.

OAH CASE NO. 2008070758

ORDER GRANTING IN PART AND
DENYING IN PART STUDENT'S
MOTION FOR STAY PUT

On July 25, 2008, attorney Drew D. Massey, on behalf of Student, filed a motion for stay put. The same day, Rodney L. Levin, on behalf of the Cupertino Union School District (District), filed an opposition to Student's stay put motion. Student filed a reply brief on July 28, 2008.

APPLICABLE LAW

Under federal and California special education law, a special education student is entitled to remain in his or her current educational placement pending the completion of due process hearing procedures unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006); Ed. Code, §§ 48915.5, 56505, subd. (d).) The purpose of stay put is to maintain the status quo of the student's educational program pending resolution of the due process hearing. (*Stacey G. v. Pasadena Independent School Dist.* (5th Cir. 1983) 695 F.2d 949, 953; *Zvi D. v. Ambach* (2d Cir. 1982) 694 F.2d 904, 906.) 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.) If a school district has made clear that a placement is temporary, that placement does not constitute the "current educational placement" for purposes of stay put. (*See, Zvi D. v. Gordon Ambach, supra*, 694 F.2d at p. 907; *Leonard v. McKenzie* (D.C. Cir. 1989) 869 F.2d 1558, 1564; *Verhoeven v. Brunswick School Committee* (1st Cr. 1999) 207 F.3d 1.)

California Code of Regulations, title 5, section 3042, defines "educational placement" 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.

Under stay put, "it 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.” (Fed.Reg., Vol. 64, No. 48, p. 12616, Comment on § 300.514.) In most instances, progression to the next grade adheres to the status quo for purposes of stay put. (See *Beth B. v. Van Clay* (N.D. Ill. 2000) 126 F. Supp.2d 532, 534.) Notably, in *Van Scoy v. San Luis Coastal Unified Sch. Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, the Court explained as follows:

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.)

Joshua A. v. Rocklin Unified Sch. Dist. (E.D. Cal. 2007) 2007 U.S. Dist. Lexis 63978, involves an appeal from a due process decision in favor of the school district. While the appeal was pending, the district notified the parents of Joshua A. that it would be changing from one non-public agency (NPA) to another, but would not alter the amount or quality of services to him. In *Joshua A.*, the court concluded that the NPA was part of the then-current educational program of student, since the NPA participated in an IEP and was referenced in the IEP document, even though the IEP called for the services to be delivered by an NPA without specifically stating which NPA. The Court granted the request for stay put noting that Rocklin had not identified a new NPA or provided information that the new NPA would comply with the IEP or provide adequate services. The Court further found that identical services were available and that Joshua A. had not changed circumstances, but acknowledged there are circumstances that warrant a change in placement for stay put purposes.

The interpretation of settlement agreements is based on familiar and well-established principles of contract law. (*Miller v. Fairchild Indus.* (9th Cir. 1986) 797 F.2d 727, 733; see also *Jeff D. v. Andrus* (9th Cir. 1990) 899 F.2d 753, 759.) If a written agreement is not equivocal or ambiguous, “the writing or writings will constitute the contract of the parties, and one party is not permitted to escape from its obligations by showing that he did not intend to do what his words bound him to do.” (*Brant v. California Dairies, Inc.* (1935) 4 Cal.2d 128, 134; see also 1 Witkin, Summary of Cal. Law, Contracts, § 89 [Ordinarily, one who accepts or signs an instrument, which on its fact is a contract, is deemed to assent to all its terms]); cf. *Skrbina v. Fleming Co., Inc.* (1996) 45 Cal.App.4th 1353, 1368 [releases must be “clear, explicit and comprehensible in each of their essential details”].) By entering into a settlement agreement, each party agrees to “extinguish those legal rights it sought to enforce through litigation in exchange for rights secured by the contract.” (*Village of*

Kaktovik v. Watt (D.C.Cir. 1982) 689 F.2d 222, 230.) In addition, parties may waive claims that, at the time of the settlement agreement, are unknown to them. (Civ. Code, § 1542.)

DISCUSSION

The parties dispute whether the November 1, 2007 settlement agreement (Agreement) constitutes Student's stay put educational program for the 2008-2009 school year. Student requests that the District continue to reimburse Parents for Applied Behavioral Analysis (ABA), occupational therapy and speech and language services provided by a NPA chosen by Parents based on a 47-week school program. The District asserts that the Agreement does not constitute Student's current educational program because the parties intended the Agreement to cover Student's educational program only through the end of the 2008 Extended School Year (ESY). Student asserts that the Agreement's provision that the District would fund certain services through the end of the 2008 ESY is no different than a typical IEP that is only for a school year, but enforced as a student's current educational program if parents do not consent to the IEP for the next school year.

The parties do not dispute that Student's placement will change from his present private preschool to a District school for kindergarten. In fact, the Agreement provides that Student's preschool placement would not constitute Student's stay put placement should a disagreement arise in the future. The Agreement does not contain similar language regarding Student's ABA, occupational therapy and speech and language services. The Agreement only provides that the District reserves the right change Student's occupational therapy and speech and language services providers if the District has a reasonable basis to change providers and if the change would not prevent Student's ability to meaningfully benefit from the services and program outlined in the Agreement. The Agreement does not permit the District to change Student's ABA provider.

Regarding whether the Agreement constitutes Student's last agreed upon and implemented educational program, the language of the Agreement does not support the District's assertion that the parties intended that Student's educational program in the Agreement be temporary in nature. If the parties intended that the educational program only last through the end of 2008 ESY, the parties would not need language that Student's private preschool would not be his stay put placement because the October 4, 2005 IEP, which placed Student in a District preschool, would be Student's last agreed upon and implement educational program. Additionally, the fact that the Agreement covered Student's placement and services through the end of 2008 ESY is no different than an IEP providing for placement and services for a particular school year, and constituting a Student's stay put educational program when the parties cannot agree on an IEP for the next school year. Therefore, the Agreement constitutes Student's last agreed upon and implemented educational placement for purposes of determining Student's present stay put.

Student asserts that the District does not have a reasonable basis to switch Student's occupational therapy and speech and language providers, pursuant to the terms of the

Agreement. However, as stated in the Declaration of Debbie Textor, the District's Director of Special Education, the District has a reasonable basis to switch Student's occupational therapy and speech and language providers to District personnel because Student will be attending a District kindergarten classroom. The District personnel will be able to provide Student with occupational therapy and speech and language services at the school in manner that is integrated with Student's school program. In fact, Parents consented to a portion of the May 21, 2008 IEP to allow Student to participate in group occupational therapy activities during his kindergarten class. Therefore, pursuant to the terms of the Agreement, the District may switch Student's occupational therapy and speech and language providers. However, the District shall provide Student with the level of service provided in paragraph 3(C) of the Agreement because the Agreement only permitted the District to change providers, not change the level of service.

Regarding Student's ABA services, the Agreement did not contain a provision to allow the District to switch providers. The Agreement states that the District will reimburse Parents for an ABA-trained school aide for ten hours a week, and that these hours may be delivered in Student's home should school not be in session. The District would also reimburse Parents for 15 hours a week of ABA therapy and six hours a month of ABA supervision. Finally, the District would reimburse Parents for six hours a month for aide time and three hours a month for supervisor time for ABA team meetings. Student contends that the ten hour a week aide was actually a full-time aide for when Student attended preschool, and therefore the District must provide Student during kindergarten, 200 minutes a day, with a full-time aide supplied by the NPA selected by Parents. However, the Motion for stay put does not contain any evidence the aide provided in the Agreement was a full-time aide that Student needed to attend preschool. Indeed, Mr. Massey's June 10, 2008 letter to the District only requested the ABA-trained aide for ten hours a week for kindergarten as Student's stay put, and made no mention that Student required this aide for an entire school day.

Student's reliance on *Newport-Mesa Unified School District v. Student* (2007) N2007070057 is misplaced for the proposition that Student's stay put educational program for kindergarten requires a full-time aide for the entire school day. In *Newport-Mesa*, the student's last agreed upon and implemented IEP explicitly provided for a full-time aide for the entire kindergarten school day. The parties subsequently could not agree upon an IEP for first grade. Parents did not object to Student moving to first grade, but requested a full-time aide for student's entire school day. Because first grade has a longer school day than kindergarten, OAH ordered that the school district provide student with an aide for the longer first grade school day. Unlike the last agreed upon and implemented educational program in *Newport-Mesa*, the Agreement in this case did not specify a full-time aide while Student attended preschool. The Agreement explicitly limited the school aide to ten hours a week. Therefore, Student's stay put educational program for ABA services are those services listed in the Agreement for the hours stated in the Agreement

ORDER

1. Student's Motion for Stay Put is granted in part and denied in part.
2. The District may change Student's occupational therapy and speech and language providers, but shall provide the same level of service stated in paragraph 3(C) of the Agreement.
3. Regarding Student's ABA services, Student's stay put shall be a NPA selected by Parents at the same level of service specified in paragraphs 3(B)(i) through (iv) in the Agreement.
4. The District shall provide the ABA, occupational therapy and speech and language services in paragraphs 2 and 3 of this Order based on a 47-week school calendar in paragraph 4 in the Agreement.

Dated: July 31, 2008

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings