

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

MT. DIABLO UNIFIED SCHOOL DISTRICT, TWIN RIVERS UNIFIED SCHOOL DISTRICT, SACRAMENTO COUNTY MENTAL HEALTH, SACRAMENTO COUNTY PROBATION DEPARTMENT, SACRAMENTO COUNTY OFFICE OF EDUCATION, CALIFORNIA DEPARTMENT OF MENTAL HEALTH, AND CALIFORNIA DEPARTMENT OF EDUCATION.

OAH CASE NO. 2009050043

ORDER GRANTING MOTION FOR STAY PUT

On April 28, 2009, Student filed a motion for stay put. On May 15, 2009, Twin Rivers Unified School District (Twin Rivers) filed an opposition to Student's stay put motion. On May 15, 2009, Sacramento County Department of Behavioral Health (DBH) filed an opposition.

FACTUAL BACKGROUND

Student's Current Placement

Student is eligible for special education and related services under the eligibility category of emotional disturbance. She was placed in a locked residential treatment center in Viera, Florida called Devereux School of Viera (Devereux) on or about March 27, 2008, and she remains to this day. Devereux, which is certified by the State of California as "nonpublic school," is a residential facility which serves children like Student who have emotional disturbances. According to Student, Devereux only serves Student's under age 18. Student turns 18 on June 18, 2009. Thereafter, she will be released from Devereux.

Student's Individualized Educational Program (IEP)

Student's last agreed-upon and implemented IEP is dated March 4, 2008. It states that Student's "District of attendance" was, at that time, Sacramento County Office of Education (COE). The IEP provides for placement in a "residential facility 24 hours per day, 7 days each week" and that the agency providing the placement is DBH. It also provides for 300 minutes of nonpublic school (NPS) services each day and the agency providing the

services is listed as “NPS.” The March 4, 2008 IEP was developed by Grant Union High School District which was subsequently incorporated into Twin Rivers.

Student’s last IEP meeting was held on May 7, 2009. One of the purposes of the meeting was to determine who was responsible for providing Student’s free and appropriate public education (FAPE) after her 18th birthday. DBH, Twin Rivers, Student’s grandmother, COE and Sacramento County Probation Department (Probation) participated in the meeting. Mt. Diablo Unified School District (Mt. Diablo) participated via telephone, as did Devereux.

According to the IEP, Twin Rivers is currently paying for Student’s placement at Devereux. Student is currently a ward of the Sacramento County Court, but Sacramento County Probation intends to request that Student’s ward status be terminated at a hearing scheduled for June 8, 2009. The IEP states that DBH “will then work with Probation to consider placements and options for [Student]” after the June 8, 2009 hearing. The participants at the May 2009 meeting were unable to come to a consensus about where Student will transition after her 18th birthday because, in relevant part, neither of the LEA participants (Mt. Diablo, Twin Rivers) who participated in the meeting believe they bear any responsibility for Student’s special education placement and related services after Student turns 18.

Educational Rights

At the time that the last-agreed upon and implemented IEP was developed, Student’s Mother resided within the boundaries of Grant Union High School District, which was subsequently incorporated into Twin Rivers.

On or about December 18, 2008, the Sacramento County Court removed Mother’s right to make educational decisions regarding Student, and appointed Student’s maternal grandmother, who resides in Concord, California, as Student’s educational representative. Grandmother’s residence is located within the boundaries of Mt. Diablo.

At some point during the 2008-2009 school year (SY), on a date not disclosed by the evidence, Mother moved into the geographical boundaries of another school district, Sacramento City Unified School District (Sacramento City). Sacramento City was subsequently dismissed as a party after Student failed to amend her complaint following a successful notice of insufficiency.

Student’s Contentions

Student’s stay put motion seeks a determination, in pertinent part, of what local educational agency (LEA) is responsible for Student’s stay put placement after her release from Devereux on her 18th birthday.¹ There is no dispute regarding Student’s stay put

¹ Student also seeks a determination of who is responsible for Student’s FAPE after she turns 18. This order does not address that issue, which cannot be determined prior to an evidentiary hearing.

placement until that date because Twin Rivers has assumed financial responsibility for the educational portion of that placement until the end of the 2008-2009 fiscal year. Although unclear, DBH is apparently paying for the residential portion of Student's Devereux placement as well.

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

Case law recognizes an exception to stay put under circumstances when a program is closed due to purely budgetary reasons. If the student's current educational placement becomes unavailable due to this type of school closure, the LEA is not required to maintain the student in the closed school, but instead must provide the student with a similar placement which closely replicates the last agreed-upon and implemented placement. Courts created the school closure exception to enable school districts to manage their costs and to allow districts flexibility in administering their programs. (See *McKenzie v. Smith* (D.C. Cir. 1985) 771 F.2d 1527, 1533; *Knight v. District of Columbia* (D.C. Cir. 1989) 877 F.2d 1025, 1028; *Weil v. Board of Elementary & Secondary Education* (5th Cir. 1991) 931 F.2d 1069, 1072-1073; see also *Concerned Parents & Citizens for Continuing Education at Malcolm X (PS 79) v. New York City Board of Education* (2d Cir. 1980) 629 F.2d 751, 754, cert. den. (1981) 449 U.S. 1078 [101 S.Ct. 858, 66 L.Ed.2d 801]; *Tilton v. Jefferson County Bd. of Education* (6th Cir. 1983) 705 F.2d 800, 805, cert. den. (1984) 465 U.S. 1006 [104 S.Ct. 998, 79 L.Ed.2d 231].)

In one California case, 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)...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 v. San Luis Coastal Unified Sch. Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086.)

DISCUSSION

As discussed above, the general rule is that a pupil such as Student is entitled to remain in her current educational placement during the pendency of the due process hearing.

Pursuant to the last agreed-upon and implemented IEP, Student requires placement in a residential facility 24 hours per day, 7 days per week, and 300 minutes of “NPS” services. Student has received the services described above at Devereux since March 2008, paid for by Twin Rivers and DBH. Absent some exception to the general rule, “stay put” requires that DBH and Twin Rivers continue to fund Student’s placement during the pendency of the dispute.

Neither DBH nor Twin Rivers cite any authority which establishes an exception to the general stay put rule, and the ALJ is not aware of any. Nothing in the applicable law shifts the stay put responsibility from one entity to another. Accordingly, DBH and Twin Rivers are responsible for Student’s stay put placement during the pendency of the due process hearing, unless the parties agree otherwise.

Regarding the specific nature of Student’s post-18th birthday placement, Devereux does not serve children after they turn 18 and DBH and Twin Rivers cannot maintain the exact placement during the pendency of the dispute. Because they cannot maintain Student’s Devereux placement after her birthday, DBH and Twin Rivers are required to provide Student with a placement that, as closely as possible, replicates that placement.

DBH argues that Student’s stay put placement request is “ill conceived and premature” because Student cannot remain at Devereux after age 18 and because “there is not an educational agency willing to accept responsibility for educational placement.” DBH cites no authority, and its arguments were considered and rejected for the reasons stated above.

Twin Rivers cites Education Code section 56325, subdivision (c), for the proposition that it has no stay put obligation at the end of the current fiscal year. Education Code section 56325 describes a local educational agency’s responsibility to provide a free and appropriate public education when a child who is placed out of state transfers within a school year. This statute is inapplicable because it has nothing to do with who is responsible for stay put, an obligation which was created the instant Student filed for due process. At that point, Student’s IEP was Twin River’s (and DBH’s) responsibility because it was funding the same and because it developed and implemented the last agreed upon and implemented IEP. In contrast, Education Code section 56325 describes an LEA’s FAPE obligations. While it may ultimately be determined that another educational agency is responsible for Student’s FAPE (*see, e.g.,* Education Code section 56041), this determination cannot be made until a due process hearing where witnesses are called and cross-examined and documentary evidence is

presented. During the pendency of the due process hearing, the status quo, including which LEA has to pay for the status quo, must remain the same.²

ORDER

DBH and Twin Rivers are required to provide Student with a placement that, as closely as possible, replicates her current placement at Devereux after her release on June 18, 2009, unless the parties agree otherwise.

Dated: May 27, 2009

/s/

TREVOR SKARDA
Admin Law Judge
Office of Administrative Hearings

² Twin Rivers also argues that the instant stay put motion is not ripe. It is ripe because it is not disputed that Student must exit Devereux on a date certain. If Student had to wait until that date, not only could the status quo not be maintained (to the extent possible), but Student may suffer harm.