

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

IRVINE UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2009050088

ORDER DENYING MOTION FOR
STAY PUT

On May 6, 2009, attorney Tania L. Whiteleather, on behalf of Student, filed a motion for stay put against the Irvine Unified School District (District). On May 13, 2009, attorney Sundee M. Johnson, on behalf of the District, filed an opposition to Student's motion for stay put.

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);¹ 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 Individualized Educational 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.)

The Individuals with Disabilities Education Improvement Act of 2004 (IDEA) provides that for a student who has not yet been determined eligible for special education, stay put protections apply only if the student engaged in behavior that violated a rule or code of conduct of the local educational agency (LEA), and the LEA is deemed to have had a basis of knowledge that the student suffered from a disability before the occurrence of the behavior that prompted the disciplinary action. (§ 1415(k)(5)(B).) The LEA is deemed to have had a basis of knowledge that a student was a student with a disability if any of the following occurred before the behavior that caused the disciplinary action:

¹ All statutory citations are to Title 20 United States Code unless otherwise noted.

- (i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
- (ii) the parent of the child has requested an evaluation of the child pursuant to section 614(a)(1)(B) [20 U.S.C. § 1414(a)(1)(B)]; or
- (iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

(§ 1415(k)(5)(B); 34 C.F.R. § 300.534(b) (2006).)

A student not yet eligible for special education services is not entitled to stay put protection under specified circumstances, pursuant to Section 1415(k)(5)(C), which provides:

A local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to section 614 [20 U.S.C. § 1414] or has refused services under this part [20 U.S.C. §§ 1411, et seq.] or the child has been evaluated and it was determined that the child was not a child with a disability under this part [20 U.S.C. §§ 1411, et seq.].

(See also 34 C.F.R. 300.534(c) (2006).)

DISCUSSION

According to the parties, Student has not been determined to be eligible to receive special education services, and he was attending Northwood High School (NHS) during the 2008-2009 school year. At the end of April 2009, the District informed Student's parents that Student could no longer attend NHS due to his poor school attendance and lack of educational progress. The District transferred Student to Creekside High School (CHS), a continuation school. The District stated that once Student made up his missing credits, Student could return to NHS. Student asserts in his motion for stay put that the District could not unilaterally transfer him to CHS because the District had a basis of knowledge that Student might require special education services. Student's contention is based on his allegation that in 2008 Student's parents expressed their concern to the District that Student might require special education services.

The fact that Student's parents informed the District that Student might require special education services before the District decided to transfer Student to CHS is not the end of the basis of knowledge analysis. Section 1415(k)(5)(C) provides that the District does not have a basis of knowledge of Student's disability if Student had been evaluated previously for special education services and determined not to be eligible.

In this case, Student's parents previously requested that the District find Student eligible for special education services and Student's IEP team, at an April 1, 2008 IEP meeting, determined Student was not eligible. Student filed a request for a due process hearing on May 16, 2008, OAH Case No. 2008050679. On July 28, 2008, the parties entered into a settlement agreement that resolved OAH Case No. 2008050679. The parties agreed that Student was eligible to receive services pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.). The settlement agreement did not establish that Student was eligible for special education services under the IDEA, it did not provide Student any services under the IDEA, and it did not change the IEP team's determination of April 1, 2008, that Student was not eligible for special education services. Because the District previously evaluated Student and determined Student not eligible for special education services before deciding to unilaterally transfer Student to CHS, Student is not entitled to Stay Put.

ORDER

Student's motion for stay put is denied

Dated: May 19, 2009

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings