

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. 2009070537

ORDER DENYING REQUEST TO  
STAY EXPULSION HEARING

On July 15, 2009, attorney Kathleen M. Loyer, on behalf of Student, filed a motion against the Irvine Unified School District (District) to stay the District's pending expulsion hearing against Student. To date, the District has not filed an opposition to Student's motion.

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);<sup>1</sup> 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:

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<sup>1</sup> 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 who has been determined to be ineligible for special education services is not entitled to stay put protection under the “bais of knowledge” exception described above, 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

Student requests an order to stay the District’s July 21, 2009 expulsion hearing pending the completion of this due process action on the grounds that the District should have found Student eligible to receive special education services. According to the complaint, the District assessed Student for initial special education eligibility and held an IEP meeting on June 11, 2009. At this IEP meeting, the District determined that Student was not eligible for special education services. On June 16, 2009, the District informed Student’s parents that the District would hold an expulsion hearing.

Student’s motion does not provide any legal authority for the proposition that a school district must stay its expulsion hearing process if a student who might be eligible for special education services pending the resolution of a due process hearing request to determine a student’s eligibility for special education services. Instead, Student’s request is better framed as a motion for stay put for Student to remain in his present educational placement because the District had a basis of knowledge that Student might be eligible to receive special

education services. However, the fact that Student's parents informed the District that Student might require special education services and the District assessed Student is not the end of the basis of knowledge analysis. Section 1415(k)(5)(C) provides that the District is deemed not to have a basis of knowledge of Student's disability if Student has been evaluated previously for special education services and determined not to be eligible. In this case, the District assessed Student and determined that he was not eligible for special education services at the June 11, 2009 IEP meeting, which was just over five weeks ago. Because the District previously evaluated Student and determined Student not eligible for special education services before instituting the expulsion hearing process, Student is not entitled to a stay of the expulsion hearing.

As stated above, OAH does not have jurisdiction to stay an expulsion hearing, and Student has provided no authority to the contrary. However, a student who is facing disciplinary action or has been disciplined and is claiming that a district should have had a basis of knowledge that the student had a disability would be entitled to an expedited hearing on the issue of whether the evidence establishes that District had a basis of knowledge. However, Student in this matter has not raised that issue in his complaint. Therefore, an expedited hearing has not been set.

#### ORDER

Student's motion to stay the expulsion hearing is denied.

Dated: July 21, 2009

/s/

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PETER PAUL CASTILLO  
Administrative Law Judge  
Office of Administrative Hearings