

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT on behalf of STUDENT,

vs.

CAMBRIAN ELEMENTARY SCHOOL  
DISTRICT,

OAH CASE NO. 2009080375

---

CAMBRIAN ELEMENTARY SCHOOL  
DISTRICT,

vs.

PARENT on behalf of STUDENT.

OAH CASE NO. 2009090090

ORDER GRANTING STUDENT'S  
MOTION FOR STAY PUT PURSUANT  
TO ORDER FOR RECONSIDERATION

On August 28, 2009, Student filed a motion for stay put. On September 2, 2009, the District filed an opposition to Student's stay put motion. On September 15, 2009, this ALJ issued an order denying Student's motion. On September 23, 2009, Student filed a motion for reconsideration. On September 28, 2009, the District filed an opposition to Student's motion for reconsideration. On September 28, 2009, this ALJ granted Student's motion for reconsideration. Reconsideration is as follows.

APPLICABLE LAW

Under federal and California 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.)

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 former § 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 Vashion 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.)

A district is not required to pay for the cost of education, including special education and related services of a child with a disability at a private school if the district made a free appropriate public education (FAPE) available to the child and parents elected to place the child in a private school. (34 C.F.R § 300.148(a)(2006).) Further, disagreements between the parents and the district regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to due process procedures. (34 C.F.R. § 300.148(b)(2006).)

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool elementary school or secondary school without the consent or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the costs of that enrollment if the court or hearing officer finds that the public agency had not made FAPE available to the child in a timely manner prior to such enrollment, and the private placement is appropriate. (34 C.F.R. § 300.148(c)(2006).) This right to reimbursement may be limited by a variety of factors, including failure to provide the district with a 10 day prior written notice. (34 C.F.R. § 300.148(d)(i)(ii)(2006).)

As noted in the *Joshua A.* decision, “Ultimately, refusing to enforce the stay put provision (during the appeals process) would force parents to choose between leaving their children in an education setting which potentially fails to meet minimum legal standards and

placing the child in private school at their own cost. Congress sought to eliminate this dilemma through its enactment of § 1415(j).” (*Joshua A. v. Rocklin School District* (9th Cir. 2009) 559 F.3d 1036, 1040.)

## DISCUSSION

Parents contend that Student’s IEP fails to provide Student a FAPE for a variety of reasons which are the subject of the due process complaints in these consolidated matters. On August 7, 2009, Student’s parents provided the District with written notice of their intent to place Student at Arbor Bay School for the 2009-2010 school year, as well as their intent to seek reimbursement from the District for such placement. On August 28, 2009, Student filed his cross-complaint and requested stay put consisting of 22 hours per week of ABA services provided by Enriching Lives of Children with Autism (ELCA) to be provided to Student at his placement site of Arbor Bay School. The District contends that parents have opted for a unilateral placement, thereby terminating the District’s obligations under stay put.

As of August 4, 2009, the District made an offer of FAPE which Student rejected. On August 7, 2009, parents notify the District of their intent to place Student at Arbor Bay, a non-public school, and requested the continuation of the 22 hours of ABA services as stay put. Determination of whether Student’s placement at Arbor Bay constitutes a “unilateral” placement and reimbursement for placement are issues for determination at due process hearing.

The purpose of stay put is injunctive in nature, and is intended to maintain the status quo of the student’s educational program pending resolution of the due process hearing. For purposes of stay put, a student’s current educational placement is typically the placement which has been implemented prior to the dispute arising. In this matter, the parties reached an agreement on August 28, 2008, which provided that Student would attend a non-public pre-school funded by the parents, and the District would provide Student with 22 hours of direct ABA services from ECLA. It is undisputed that the August 2008 agreement represents Student’s most recently implemented educational program, and therefore constitutes his most recently implemented IEP.

It is also undisputed that Student is moving from pre-school to kindergarten, which invokes the reasoning of the *Van Scoy* and *Vashion Island* decisions. Specifically, changes in circumstances, such as advancing from grade to grade, may prevent a student’s most recently implemented IEP from being exactly replicated for the purposes of stay put. Rather, 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 changes in circumstances.

Further, while *Joshua A.* addresses stay put in an appellate setting, its reiteration and emphasis of the need for maintaining the status quo at all stages of a due process proceeding is significant. In the case at hand, in Student’s prior education plan, the District agreed to a non-public placement paid for by the parents with 22 hours of ABA services provided by the

District. Given that Student is advancing from preschool to kindergarten, the selection of another non-public school is not unreasonable to maintain Student's status quo as closely as possible. The District cannot now argue that the parents have forfeited their rights to stay put in changing from one non-public placement to another. Nor can it be determined, without hearing, that parent's notification to the District of Student's placement at Arbor Bay is a unilateral placement or is prior written notice as required by federal regulation. Pending final resolution of Student's due process proceeding, the District is obligated to implement stay put and provide Student with 22 hours of ABA services from ELCA, as had been provided to Student in the August 28, 2008 agreement.

#### ORDER

1. The prior order issued on September 15, 2009, denying Student's motion for stay put is vacated.
2. Student's motion for stay put upon reconsideration is granted.
3. The District is ordered to provide Student with the ABA services from ELCA as described in his August 28, 2008 Settlement Agreement.

Dated: September 30, 2009

/s/

---

JUDITH PASEWARK  
Administrative Law Judge  
Office of Administrative Hearings