

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOOMIS ELEMENTARY SCHOOL
DISTRICT.

OAH CASE NO. 2010080999

ORDER PARTIALLY GRANTING
MOTION FOR STAY PUT

On August 26, 2010, Student filed a motion for stay put. On August 31, 2010, District filed an opposition. For the reasons discussed below, Student's motion is partially granted.

APPLICABLE LAW

Until due process hearing procedures are complete, a special education student is entitled to remain in his or her current educational placement, 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).) This is referred to as "stay put." 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.)

In California, "specific educational placement" is defined 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. (Cal. Code Regs., tit. 5, § 3042.)

Courts have recognized, however, that because of changing circumstances, the status quo cannot always be replicated exactly for purposes of stay put. (*Ms. S ex rel. G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35.) Progression to the next grade maintains the status quo for purposes of stay put. (*Van Scoy v. San Luis Coastal Unified Sch. Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086 ["stay put" placement was advancement to next grade]; see also *Beth B. v. Van Clay* (N.D. Ill. 2000) 126 F. Supp.2d 532, 534; Fed.Reg., Vol. 64, No. 48, p. 12616, Comment on § 300.514 [discussing grade advancement for a child with a disability].)

DISCUSSION

Student and District agree that Student's last agreed upon and implemented IEP was on September 17, 2009, which calls for Student's placement in first grade with related services. At Student's May 18, 2010 annual IEP meeting, District recommended that Student advance to second grade, with supports and related services. Parents disagreed, requested that Student remain in the first grade, and did not sign the IEP for the 2010-2011 school year. This due process action followed Parents' internal district administrative appeals of the retention issue.

Student's complaint raises four issues, among which is whether District denied Student FAPE by failing to grant Student's Parents' request that Student be retained in the first grade rather than matriculate to the second grade. Student argues that, because the last agreed upon IEP calls for placement in the first grade, and because the issue of retention is a major issue in this due process matter, retention in the first grade should be part of Student's stay put. Student also argues that he is presently not attending school because Parents disagree that he should be placed in second grade. District contends that maintaining the status quo in stay put does not require that Student be retained in first grade. District also argues that OAH has no jurisdiction to determine whether or not a student is retained or promoted.

Under IDEA, a stay put order is not a final adjudication of the merits of the issue of retention but serves as injunctive relief during the pendency of the due process action, to maintain the status quo. Contrary to District's argument, this Order only addresses stay put; it does not address jurisdiction or the merits of retention or promotion.

In *Van Scoy, supra*, the Court acknowledged that the stay-put provision of IDEA entitles a student to receive a placement that, as closely as possible, replicates the placement that existed at the time the dispute arose, taking into account changed circumstances. In that case, the Student was transitioning from kindergarten to first grade. Student spent fewer hours in kindergarten in the classroom and more hours outside of the classroom with related services, than he would have in the first grade. Those additional out of class hours were the issue in the stay-put context. The Court determined that Student's stay-put required inclusion of the additional services outside the classroom in conjunction with advancement to the first grade in order to avoid a significant change in the stay-put placement.

Here, Student's request for stay-put which includes retention in the first grade is based upon a physician's opinion that Student should be retained in first grade based upon Student's developmental issues. However, Student offered no evidence that Student would suffer detriment or harm, or that the status quo cannot be achieved, by a stay put order that allows him to transition to second grade with supports and related services provided for in his September 17, 2009 IEP. District, on the other hand, relies on the holding in *Van Scoy, supra*, which is persuasive and generally applicable here. The status quo can be preserved, even if Student matriculates to second grade with the same supports and services as provided for the last agreed-upon IEP. Therefore, Student is entitled to stay-put, but with the

modification that District may advance his grade level to second grade, pending resolution of this matter.

ORDER

Student's motion for stay-put is partially granted. Student's stay-put shall be as provided in the September 17, 2009 IEP, with the exception that District may advance Student to the second grade pending resolution of this matter.

Dated: September 8, 2010

/s/

ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings