

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

NOVATO UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2011050282

ORDER DENYING MOTION FOR  
STAY PUT

On May 6, 2011, Student filed a Motion for Stay Put. On May 11, 2011, District filed an opposition. On May 12, 2011, Student filed a reply. For the reasons stated below, the Motion is denied.

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)<sup>1</sup>; Ed. Code, § 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.)

However, if a student’s placement in a program was intended only to be a temporary placement, such placement does not provide the basis for a student’s “stay put” placement. (*Verhoeven v. Brunswick Sch. Comm.* (1st Cir. 1999) 207 F.3d 1, 7-8; *Leonard v. McKenzie* (D.C. Cir. 1989) 869 F.2d 1558, 1563-64.)

Stay put does not apply when a child transitions from an early education program to a special education program upon reaching the age of three. (Ed. Code, § 56505, subd (d); see 34 C.F.R. § 300.518(c).)

The law permits a child’s parents to accept some IEP services, but not others. Education Code section 56346, subdivision (e), provides: “If the parent of the child consents in writing to the receipt of special education and related services for the child but does not consent to all of the components of the individualized education program, those components

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<sup>1</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

of the program to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child.”

Federal and State education laws and regulations distinguish between children in public and private schools. A child with a disability attending public school is entitled to a free appropriate public education (FAPE) at public expense. However, if District made FAPE available and a parent unilaterally chooses to send his or her child to a private school, that child is not entitled to a FAPE at public expense. (20 U.S.C. § 1412(a)(10)(C)(i); 34 C.F.R. §§ 300.137; 300.138; Ed. Code, §§ 56174; 56174.5;.) Instead, children unilaterally placed in private schools receive a proportional share of special education services under a services plan, which may provide for a different amount of service than the child would receive in public school. (See, e.g., 34 C.F.R. § 300.138.) If a child’s parents chose to place the child in a private school, the student has no right to receive services beyond the proportionate share given to private school pupils. (*Board of Education of the Appoquinimink School District v. Johnson (Appoquinimink)* (D.C.Del. 2008) 543 F.Supp.2d 351 (overturning an order requiring the district to pay for a sign language interpreter for a child at a private school).)

Parents who choose to enroll their child in a private school while a due process case is pending, do so at their own financial risk. If the decision finds that the district offered a FAPE, the child’s parents are not entitled to reimbursement from the school district. (*School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 373-374.)

## DISCUSSION

Student turned three on April 25, 2011. His initial IEP was dated April 6, 2011. Prior thereto, Student attended a general education private preschool, with nonpublic agency (NPA) services for applied behavioral analysis (ABA), occupational therapy (OT) and speech and language (LAS) therapy. This placement and services were provided through an early education program. It is undisputed that the private preschool placement and the NPA OT and LAS services were never offered by District.

The April 6, 2011, IEP offered, in pertinent part, placement in a District pre-school, with private ABA services by an NPA 10 hours per week, plus 4 hours per week consultation, and school-based group OT and LAS services.

On April 19, 2011, parents consented only to the 10 hours per week of NPA ABA behavioral services and the 4 hours per week for consultation. Parents rejected the placement and the school-based OT and LAS services.

On April 24, 2011, District wrote a letter to parents seeking a date to meet to “discuss your unique situation.”

From April 25 through April 29, 2011, District provided the 10 hours weekly ABA services in question. The parties dispute whether District made its intent clear, to provide these services only temporarily, pending legal inquiries about whether it was obligated to do so. District discontinued paying for the services after April 29, 2011.

On or around May 3, 2011, District sought informal dispute resolution and at that time informed parents that its offer of 10 hours per week NPA ABA and 4 hours consultation had been contingent on parents' acceptance of the District placement and other components of the IEP, and would not be provided independently of that.

Student remains at the general education private preschool that he previously attended. The expenses are no longer covered by Student's early education program, and are being paid by parents.

Student's Motion for Stay Put seeks a continuation of District's payment for the 10 hours per week NPA ABA services, and 4 hours consultation, during the pendency of this due process matter. Student argues that these services were offered in the April 6, 2011, IEP, consented to on April 19, 2011, and provided from April 25 through April 29, 2011. Parents argue that they need not accept the placement that was offered, in order to access these agreed-upon services offered in the IEP. Student's Motion also seeks a continuation of the NPA OT and LAS that had been part of Student's early education program, although it is undisputed District never made that offer.

As an initial matter, stay put does not apply to the NPA OT and LAS services that had been provided by Student's early education program. District never offered or provided these services. Stay put does not apply when a child transitions from an early education program to a special education program upon reaching the age of three.

As to the NPA ABA services and consultation, District apparently offered the supports and services in the IEP to assist Student in a public school placement. When parents rejected that placement, there was no "current educational placement," to which stay put applied. The ability of a parent to agree only to portions of an IEP does not apply here, to permit a parent to reject a District placement offer, but accept particular services that were offered, and obtain them as Student's stay put placement while privately placing the student. If Student's position were correct, parents would be able to place their child at a private school and then obtain all IEP services at the private school, by agreeing to everything in the IEP except the public placement. That cannot have been the intent of the law permitting a parent to accept only part of an IEP. The more logical interpretation covers a situation in which the parents of a public school child who is eligible for special education choose to accept some IEP services, but not others.

This conclusion is not altered by District's provision of the services from April 24-29, 2011. District put parents on notice on April 24, 2011 that the situation was under discussion, amounting to a sufficient indication that it was temporary.

ORDER

The Motion for Stay Put is denied.

Dated: May 16, 2011

/s/

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JUNE R LEHRMAN  
Administrative Law Judge  
Office of Administrative Hearings