

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN FRANCISCO UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2011060521

ORDER GRANTING REQUEST FOR  
RECONSIDERATION AND  
GRANTING MOTION FOR STAY PUT

On July 22, 2011, the undersigned administrative law judge issued an order that denied Student's motion for stay put against the San Francisco Unified School District (District) because the last agreed-upon and implemented educational program, the Erikson School, a non-public school, did not have a present certificate to operate by the California Department of Education (CDE). On August 16, 2011, Student filed a request for reconsideration as the Erikson School received its certificate to operate on August 9, 2011 from CDE. The District did not file a response.

APPLICABLE LAW

The Office of Administrative Hearings will generally reconsider a ruling upon a showing of new or different facts, circumstances, or law justifying reconsideration, when the party seeks reconsideration within a reasonable period of time. (See, e.g., Gov. Code, § 11521; Code Civ. Proc., § 1008.) The party seeking reconsideration may also be required to provide an explanation for its failure to previously provide the different facts, circumstances or law. (See *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1199-1200.)

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, § 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.)

It does not violate stay put if a school is closed for budget reasons and the child is provided a comparable program in another location. (See *McKenzie v. Smith* (D.C. Cir. 1985) 771 F.2d 1527, 1533; *Knight v. District of Columbia* (D.C. Cir. 1989) 877 F.2d 1025, 1028; *Weil v. Board of Elementary & Secondary Education* (5th Cir. 1991) 931 F.2d 1069, 1072-1073; see also *Concerned Parents & Citizens for Continuing Education at Malcolm X (PS 79) v. New York City Board of Education* (2d Cir. 1980) 629 F.2d 751, 754, cert. den. (1981) 449 U.S. 1078 [101 S.Ct. 858, 66 L.Ed.2d 801]; *Tilton v. Jefferson County Bd. of Education* (6th Cir. 1983) 705 F.2d 800, 805, cert. den. (1984) 465 U.S. 1006 [104 S.Ct. 998, 79 L.Ed.2d 231].)

A student is not entitled to the identical services pursuant to his or her IEP when those services are no longer possible or practicable. (*Ms. S. v. Vashon Island* (9th Cir. 2003) 337 F.3d 1115, 1133-1134.) When a student’s “current educational placement” becomes unavailable, the local educational agency must provide the student with a similar placement in the interim. (See *Knight v. District of Columbia* (D.C. Cir. 1989) 877 F.2d 1025, 1028; *McKenzie v. Smith* (D.C. Cir. 1985) 771 F.2d 1527, 1533.)

## DISCUSSION

### *Reconsideration*

Student alleges new facts, circumstances, or law in support of the request reconsideration because Student established that the Erikson School received, on August 9, 2011, its certificate to operate from CDE. The July 22, 2011 order denied Student’s motion for stay put, even though the order found that the Erikson School was Student’s last agreed-upon and implemented educational program, because the Erikson School was not presently certified by CDE. Accordingly, Student motion for reconsideration is granted as Student presented new evidence, that was lacking on July 22, 2011, that the Erikson School has a valid certificate.

### *Stay Put*

The parties do not dispute that Student’s last agreed-upon and implemented educational program is his November 10, 2010 individualized education program (IEP). The parties disputed whether the educational placement in the November 2010 IEP was specifically the Erikson School, Student’s position, or merely an NPS that has a contract with either the District or the Special Education Local Plan Area (SELPA), District’s contention. The July 22, 2011 order held, based on an analysis of the November 2010 IEP, that while the District attempted to limit the offered NPS to just an NPS with a contract with either District

or SELPA, the minutes of the IEP team meeting indicate that the Erikson School was a component of the District's offer designed to specifically meet his unique needs to provide a free appropriate public education. Therefore, the District's attempt to change Student's NPS constituted a change in Student's program. (*Joshua A. v. Rocklin Unified Sch. Dist.* (E.D. Cal. August 20, 2007) 2007 WL 2389868, \*\* 2-4, affd. *Joshua A. v. Rocklin Unified Sch. Dist.* (9th Cir. 2009) 559 F.3d 1036; *Student v. Fullerton Elementary School District* (2011) Cal.Ofc.Admin.Hrngs. Case No. 2011010214; *Student v. Jefferson Elementary School District* (2007) Cal.Ofc.Admin.Hrngs. Case No. 2007020606.)

While the Erikson School was Student's last agreed-upon and implemented educational placement, the Erikson School was not automatically Student's stay put placement if his attendance at the Erikson School was no longer possible or practicable. A review of the parties' briefs and attached declarations and documents in the motion for reconsideration and motion for stay put establish that the Erikson School is presently certified by CDE. Therefore, because Student's attendance at the Erikson School is possible and practicable, the Erikson School is his stay put placement. Accordingly, Student's motion for stay put that he attend the Erikson School pursuant to his November 20, 2010 IEP is granted.

#### ORDER

1. Student's request for reconsideration is granted.
2. Student's motion for stay put is granted as his last agreed-upon and implemented educational program is the November 10, 2010 IEP at the Erikson School.

Dated: August 22, 2011

/s/

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PETER PAUL CASTILLO  
Administrative Law Judge  
Office of Administrative Hearings