

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

LUCIA MAR UNIFIED SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2011070196

ORDER DENYING STUDENT'S
SECOND STAY PUT MOTION

On July 7, 2011, the Lucia Mar Unified School District (District) filed its complaint in Office of Administrative Hearings (OAH) Case No. 2011070196, naming Student. On September 16, 2010, Student filed her complaint in OAH Case No. 2011090698, naming the District and the San Luis Obispo County Office of Education (SLOCOE). The cases were consolidated on September 22, 2012.

On February 1, 2012, Student filed a First Amended Complaint. After a Notice of Insufficiency was sustained in part, Student filed a Second Amended Complaint on March 8, 2012.

Student then filed a Motion for Stay Put on March 14, 2012, which was denied on March 21, 2012.

On April 26, 2012, on Student's motion, the Second Amended Complaint was dismissed.

On May 2, 3, 8, 9, 10, 15 and 22, 2012, the due process hearing was held. Final briefing is due on June 22, 2012.

On May 29, 2012, Student filed a second motion for stay put. The District filed an opposition on June 1, 2012, and Student filed a reply on June 7, 2012.

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)¹; 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) that 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 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; *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 AND ORDER

Student is 14 years and nine months old and has not attended school since approximately the end of the 2010-2011 extended school year (ESY) because of the parties’ dispute. Her last agreed-upon and implemented IEP is dated May 2009 and placed her in elementary school, apparently in sixth grade. The parties have been disputing her proper placement ever since.

Both Parents and the District wish to place Student in middle school, and an appropriate placement there is the subject matter of the hearing. The District argues that until the matter is decided, Student’s stay put placement is still in elementary school. Parents argue that because the stay put rule contemplates advancement from grade to grade, and because Student is now of middle or high school age, she has “matriculated” at least to middle school, and her stay put placement should be a placement that replicates, as nearly as possible, her elementary school placement but at the middle school level.

It is true that a stay put placement may recognize advancement to a higher grade, although the decisions supporting that rule typically involve situations in which

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

no party disputes that advancement of a single grade is appropriate. (See, e.g. *Van Scoy v. San Luis Coastal Unified School Dist.*, *supra*, 353 F.Supp.2d at p. 1086 [advancement from kindergarten to first grade]; *Beth B. v. Van Clay*, *supra*, 126 F.Supp.2d at p. 533 [advancement from fifth to sixth grade].) Whether that rule includes “matriculation” to a different school and school level is a harder question. (See *Millay v. Surry School Dept.* (D.Me. 2008) 584 F.Supp.2d 219[discussed below].) The District argues that matriculation is more than a matter of age and grade level and that Student has not yet matriculated to middle school. Those issues need not be decided here.

Parents argued in their first stay put motion that Student should be skipped entirely over middle school and placed in high school. In their second motion for stay put, Parents now claim the stay put placement is in Ms. Julie Albano’s special day class, a class operated by SLOCOE on the District’s Mesa Middle School (Mesa) campus. They realize that such a placement by OAH would last only to the upcoming decision, but argue that in the meantime Student should be able to attend the ESY, which starts on June 18, 2012.

The Order denying Parents’ first stay put motion made several observations that are equally relevant here:

The placement that Parents propose that OAH should fashion and declare to be the stay put placement bears little resemblance to the last agreed-upon elementary school placement except in its most basic outlines, including placement in a restricted class in a public school and the provision of a variety of services

The placement Parents seek for Student ... resolves in her favor most of the factual propositions at issue between the parties

The stay put rule seeks to preserve the educational status quo, not to license judges to create an essentially new placement while a dispute is pending. The purposes of the stay put provision are to provide educational continuity, to strip schools of unilateral authority to exclude disabled students from schools, to protect students from retaliatory action, and to prevent schools from removing a child from a regular public school classroom over parents’ objections. (*N.D. v. Hawaii Dept. of Educ.* (9th Cir. 2010) 600 F.3d 1104, 1114.) None of those purposes is served by the relief Student seeks here. This matter began when the District sought a judge’s approval of a prospective change of placement, not when it unilaterally implemented one. Neither the District nor SLOCOE is removing Student from her elementary school placement, which is nearly three years old and obsolete in the views of all parties.

In addition, the placement Student seeks to have declared the stay put placement is far too removed from Student's elementary school placement to provide any continuity in her education. [It is] "a significant change in the student's program," and thus is itself a change of placement rather than the continuation of a current placement. (*N.D. v Hawaii Dept of Educ.*, *supra*, 600 F.3d at p. 1116.) In a similar situation in *Millay v. Surry School Dept.* (D.Me. 2008) 584 F.Supp.2d 219, the district court held that the stay put rule did not entitle a fourteen-year-old girl, unilaterally withdrawn from school, to placement in a new program in a "similar" high school she had never attended. (*Id.* at pp. 228-235; see also *Wagner v. Board of Educ.* (4th Cir. 2003) 335 F.3d 297, 300-302 [stay put rule does not require provision of alternative to current placement].)

(Order Denying Motion for Stay Put, March 21, 2012.)

In this second stay put motion, Parents seek an order placing Student in middle school rather than high school, but the precise placement they seek is still far removed from Student's placement when this dispute began. The program Parents propose is a patchwork of hours, services, and supports from the May 2009 IEP, but with new goals agreed upon and first implemented in January 2012, to be pursued in a classroom that was offered to Student in an IEP meeting in April 2012.² Parents elaborate on the proposed placement in great detail in their 293-page motion. Such a placement would itself be a change of placement, rather than the continuation of one.

It is striking that the new proposed stay put placement is in the same classroom in which the disputed IEP would place Student. In June 2011 the District offered to place Student in Ms. Albano's SLOCOE-operated classroom at Mesa; Parents declined; and the District brought this action to seek approval of that offer. Through seven days of due process hearing, Parents vigorously attacked the District's proposal to place Student in the classroom they now claim is the stay put placement. They argued that such a placement would deny Student a free appropriate public education (FAPE) because, for example, the staff of that classroom is inadequately trained to care for their daughter and will leave her unattended during their lunch breaks, whereupon she will injure herself. They argued that the four-week-long plan proposed by the District for transitioning Student back into public school in the disputed IEP is inadequate. And they argued that Student, at least as of June 2011, was not ready to move to a public school classroom because, in the noise and distraction caused by the other students, she would be unable to learn. Since Student

² Parents claim this placement is appropriate because they have "partially" agreed to the April 2012 proposal. The District disputes that contention and claims that Parents' purported partial agreement is so vague and hedged and leaves so many disputed matters unresolved that it is no agreement at all.

has been at home during the last school year and not learning to live among her peers, there is nothing in the record to suggest any of those concerns have lessened.

It is unimportant whether the fundamental contradiction between Parents' position at hearing and the relief they now seek is analyzed under the equitable doctrines of waiver, estoppel, or unclean hands, all of which potentially apply. What matters is that Parents are in no position to assert that the placement they have resisted and condemned for a year has been Student's stay put placement all along. They are essentially asking that Student be put in a placement that, according to them, denies her a FAPE. Stay put is basically an equitable doctrine, and does not contemplate such an order.

Parents' new motion is sufficiently different from their first stay put motion that, contrary to the District's contention, the doctrine of law of the case does not apply. However, the District is correct in asserting that the new motion is untimely. Almost any stay put motion filed nearly a year after the underlying due process complaint is vulnerable to that claim, at least when the District has not suddenly changed a placement. And Parents could have made this motion during the hearing, when it could have been argued and analyzed much more effectively. The ESY is now only days away. The only reason Parents assert for not making the motion at hearing is that they did not know they could. Since they believe the motion is timely made even after hearing, that contention is unpersuasive.

Finally, the placement Parents propose requires implementation not just by the District, but by SLOCOE as well. Ms. Albano is employed by SLOCOE, which operates and is responsible for her class. SLOCOE has arrangements with the District that it will implement an IEP calling for Student's placement in Ms. Albano's class, if Parents and the District can agree on such an IEP, but those arrangements do not extend to implementing a disputed stay put order. SLOCOE is not a party to this matter. It was named in Parents' Second Amended Complaint, but that was dismissed on their own motion and OAH lost jurisdiction over SLOCOE at that time. SLOCOE has had no opportunity to appear on this motion to assert its interests, or even to address such basic matters as whether there is still room in Ms. Albano's ESY class for Student at this late date. OAH has no jurisdiction to order SLOCOE to implement the placement Parents seek, and could not enforce such an order if made.

Student's second motion for stay put is denied.

Dated: June 12, 2012

/s/

CHARLES MARSON
Administrative Law Judge

