

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. 2011071058

ORDER GRANTING MOTION FOR
STAY PUT

On August 11, 2011, Student filed a motion for stay put. On August 16, 2011, the District filed an opposition to the motion.¹ Student filed a response to that opposition on August 18, 2011.

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)²; 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.) If a student receives services from a nonpublic agency (NPA), or a NPS that placement may be a stay put placement, even if a school district has terminated its contract with the NPA or NPS. (*Joshua A. v. Rocklin Unified Sch. Dist.* (E.D. Cal. August 20, 2007)

¹ On August 3, 2011, the District, believing that Student’s request for due process filed on July 27, 2011, contained a motion for stay put, filed another document entitled “Opposition to Motion for Stay Put.” The opposition filed on August 3, 2011, was incorporated by reference into the District’s response, and has been considered by the ALJ.

² All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

2007 WL 238968, ** 2-4, affd. *Joshua A. v. Rocklin Unified Sch. Dist.* (9th Cir. 2009) 559 F.3d 1036 (hereafter referred to as *Joshua A.*.) However, if a school district terminates its contract with an NPA or NPS and can establish that it had good cause to do so, such as malfeasance by the NPA or NPS, stay put may not apply. (*Student v. Newport Mesa School District* (2009) Cal.Ofc.Admin.Hrngs. Case No. 2009020296; *Newport Mesa School District* (2007) Cal.Ofc.Admin.Hrngs. Case No. 2007070057).

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].)

Education Code section 56366.4, subdivision (a)(5)(B), states that a NPA or NPS can lose state certification from the California Department of Education (CDE) if it fails to notify CDE within 45 days of a "major modification or relocation of facilities." In other words, there is no provision in the Education Code for the decertification of an NPA or NPS on the ground that it moves from one location to another, unless the entity fails to notify the CDE of the move.

DISCUSSION

Student is 13 years of age and is eligible for special education under the categories of specific learning disability, and emotional disturbance. He is ready to begin seventh grade, and attended Erikson School (Erikson) for the 2010-2011 school year. He also attended Erikson during the 2009-2010 school year. Erikson is an NPS located in San Francisco. His last annual IEP team meeting was held in February 2011.³ The Notes this IEP team meeting demonstrate that Student was specifically placed at Erikson because it met his unique needs, and afforded him educational benefit.⁴ At Erikson he received individualized instruction and counseling. Student had a behavior support plan.

³ The District attempted to convene an IEP team meeting In August 2011, but Student's Parent did not appear.

⁴ Student attached the IEP from February 2011 to its motion for stay put, and the District attached the same IEP to its response filed August 3, 2011. The District attached the IEP from February 2010 to its August 16, 2011 opposition, and this IEP has been considered because it has no relevance.

On May 9, 2011, the District sent Student's grandmother (Parent) a letter informing her that the District would not be renewing its contract with Erikson School.⁵ However, there is evidence that the District and Erikson continued contract negotiations after that date. The District formally notified Erikson on June 30, 2011, that it was terminating its contract. On July 1, 2011, the District notified Parent that Student would be placed at another NPS for the upcoming school year. Student filed his request for due process (complaint), on July 27, 2011. Student is now asking that Erikson be found to be his stay put placement.

The District had previously provided Erikson with free facilities on a closed middle school campus, but it negotiated with a charter school to take over those facilities at the end of the 2010-2011 school year. As a result Erikson relocated its facility following the 2010-2011 school year.

The District's opposition to Student's stay put motion filed on August 3, 2011, is multi-faceted. First, the District argues that Student cannot be placed at Erikson due to "changed circumstances" because its contract with the NPS has been terminated, and further, that Erikson has not been certified by CDE at its new location. However, Student has provided evidence that the CDE certified Erikson at its new location on August 9, 2011.

The District then argues that it decided not to renew its contract with Erikson "for cause." On July 11, 2011, a District administrator filed a complaint with the CDE. The administrator filed her complaint with the CDE only after the District had formally terminated its contract with Erikson. Apparently this administrator had visited the middle school site many times from January through June 2011, because she was locating facilities for charter schools. There is a declaration from this administrator describing numerous observations she had which led her to believe students were not being properly supervised or instructed at Erikson. Further she reports that she was told by a charter school employee that he had observed a student on the Erikson campus appearing to roll a marijuana joint and smoke it.

The District's administrator claims that she complained to the District's special education director on numerous occasions between January and June 2011 about her observations and concerns about Erikson. However, in the letter the District's special education director sent to Erikson terminating the contract, dated June 30, 2011, the special education director states that the contract is being terminated "[d]ue to the current budget crisis and the District's growing need for facility space. . . ." The letter concludes by saying "SFUSD appreciates your hard work and service to SFUSD students; we wish you great success and appreciate your cooperation during this challenging time." The District did not provide sufficient information to establish that it had "good cause" to terminate the contract with Erikson, and it did not establish that Erikson has been decertified or otherwise disciplined by the CDE.

⁵ Student resides with his grandmother.

The District contends in its opposition filed on August 3, 2011, that it also terminated its contract with Erikson due to “budgetary concerns.” It claims that Erikson was not less expensive than other NPS’s under contract with the District. This situation does not replicate the closing of a public school for budgetary concerns, which might justify a change of placement notwithstanding stay put. Rather, the termination of the District’s contract with Erikson at the end of June is similar to the situation in *Joshua A.*, in which the school district decided to replace the NPA that had previously been providing aide services to a child with a disability with another unnamed NPA. The Court held that stay put applied, and the district was required to continue using the first NPA.

In his August 3, 2011 opposition the District claims that because Erikson’s physical location has changed, Erikson cannot be considered as his stay put placement, citing section 3042 of title five of the California Code of regulations, which defines an educational placement as “that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs.” However, location is merely one of many components to be considered in defining “educational placement.”

Student has now provided evidence that Erikson’s relocation was approved by CDE on August 9, 2011. There is evidence that CDE personnel visited the new site. Although the District contends that it had additional cause to terminate its contract with Erikson, and provides purported evidence of record-keeping irregularities at Erikson to support these allegations, this is not sufficient reason to deny Student’s request for stay put. The evidence establishes that CDE certified Erikson at its new location on August 9, 2011. This occurred four weeks after the District filed its July 11, 2011 complaint, with CDE against Erikson. Accordingly, Student’s motion for stay put is granted, and there is no need to consider whether the District’s proposed alternative placement is a comparable placement.

ORDER

Student’s stay put placement is Erikson School and Student shall be placed there pending the outcome of this case. Should Erikson subsequently be decertified during the pendency of this proceeding, stay put shall no longer apply.

IT IS SO ORDERED.

Dated: August 26, 2011

/s/

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings