

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LAFAYETTE SCHOOL DISTRICT.

OAH CASE NO. 2011090193

ORDER DENYING MOTION FOR
STAY PUT

On September 6, 2011, Student filed a request for due process hearing (complaint) and requested as part of the complaint that OAH issue an Order for stay put. Student's request will be considered a motion for stay put. The complaint/motion was supported by a declaration under penalty of perjury from Student's mother and authenticated evidence, including a copy of the last agreed upon and implemented individual education plan (IEP) and amendments. On September 12, 2011, District filed an opposition, which was not supported by a declaration under penalty of perjury or authenticated exhibits. Student filed a reply on September 14, 2011, which was supported by two declarations under penalty of perjury.

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), 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.)

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.)

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

DISCUSSION

Student's last agreed upon and implemented IEP is the January 5, 2011 IEP (Student's Exhibit F), as amended on March 1, 2011 and May 4, 2011 (Exhibits G and I). Student's May 31, 2011 IEP, as amended on June 16, 2011 and July 6, 2011 was expressly intended to be a temporary IEP for the 2011 extended school year (ESY), and for the limited time period of June 16, 2011 through August 22, 2011. In addition, the May 31, 2011 IEP, as amended, expressly states that it shall not be considered stay put, and that the January 5, 2011 IEP, shall be stay put. (Student's Exhibits J, K and K(a)).

Student seeks stay put placement at Springhill Elementary School (Springhill) instead of Burton Valley Elementary School (Burton Valley), which is the school of placement in the January 5, 2011 IEP. Student argues that District temporarily placed Student at Springhill during 2011 ESY and that Burton Valley is not appropriate for Student. (Mother's declaration, Pars. 3, 4 and 32.).

Although Student asks that OAH rely on a previous OAH order as precedent on this issue, that order is not binding authority. (Cal. Code of Regs., tit. 5, § 3085.) Instead, this motion must be decided on the facts presented. As discussed above, the May 31, 2011 IEP as amended was temporary as shown by the limited time and application to ESY, and facially stated it was not stay put. Thus, Student's last agreed upon and implemented IEP dated January 5, 2011 provided for placement at Burton Valley and is Student's stay put. Therefore, Student's request for stay put placement at Springhill must be denied.

Student also requests that the supports and services provided for in his May 31, 2011 ESY IEP, as amended, be ordered as stay put. As discussed above, the May 31, 2011 IEP was expressly intended to have a limited term, and the IEP team agreed that the IEP was not stay put. Therefore, Student's request for stay put as to supports and services as provided for in the May 31, 2011 IEP, as amended, is denied. Student's stay put for supports and services are those contained in his January 5, 2011 IEP.

Finally, Student seeks as stay put three hours and twenty minutes per day, five days a week, of instructional support, with behavioral support and supervision by Lauren Tolk, Psy.D. Student also seeks an additional four to eight hours per week aide time outside of school. However, those services were not provided for in Student's January 5, 2011 IEP, or any amendment to that IEP. Instead, they were provided pursuant to a January 3, 2011 non-IEP memorandum of understanding (MOU) between District and Parents. (District's Exh. D.) The MOU was expressly intended by District and parents to be effective through February 18, 2011. Thus, even if part of an IEP, the temporary nature of the MOU would not result in stay put. However, Student failed to show that the MOU was even an IEP for purposes of stay put. The parties did not expressly agree in the MOU that the services listed there would be part of an IEP, and there is no mention of the MOU reflecting a modification of Student's stay put rights. Accordingly, Student's request for behavioral support as stay put must be denied.

ORDER

1. Student's request for stay put is denied in its entirety.
2. Student's Stay Put while this due process hearing request is pending is the placement and services listed in the January 5, 2011 IEP.

IT IS SO ORDERED.

Dated: September 15, 2011

/s/

ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings