

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

DRY CREEK JOINT ELEMENTARY
SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2011090491

ORDER GRANTING MOTION FOR
STAY PUT

On September 12, 2011, the Dry Creek Joint Elementary School District (District) filed a Request for Due Process Hearing (complaint) against Student. On September 19, 2011, Student filed a motion for stay put. On September 21, 2011, District filed a response to Student's motion. On September 23, 2011, the Office of Administrative Hearings ordered the parties to file supplemental documents with respect to what constituted Student's then-current educational placement prior to District's complaint in this matter.

On September 28, 2011, District filed a supplemental brief and declarations of Lynn Barbaria, Director of Special Education, and Andy Giannini, Principal of Dry Creek Elementary School. On September 28, 2011, Student filed a supplemental brief, including declarations from both Parents.

APPLICABLE LAW

Until due process hearing procedures are complete, a special education student is entitled to remain in his or her then-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 then-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

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

an individual with exceptional needs,” as specified in the IEP. (Cal. Code Regs., tit. 5, § 3042.)

Courts have recognized, however, 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 [“stay put” placement was advancement to next grade]; see also *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

The stay put dispute here concerns whether the placement and services set out in the September 9, 2009 IEP constitute Student’s “then-current educational placement.” The parties agree that the September 9, 2009 IEP is Student’s last signed IEP. The IEP detailed the location of placement as 70% in a general education classroom and 30% in a special day class (SDC), all to take place at Olive Grove Elementary School (Olive Grove). The IEP was implemented for approximately 8 months. At the May 28, 2010 IEP team meeting a dispute arose as to the amount of time Student should be removed from the general education environment. District did not agree with Parents’ request to have Student participate in general education for 100% of his educational day. However, District placed Student in general education for 100% of his educational day from May 28, 2010 onwards. While District did not offer such a placement to Student on the IEP, the parties, by mutual agreement, changed Student’s placement from the September 9, 2009 IEP. Furthermore, prior to the start of the 2010-2011 school year (SY), Parents refused District’s request to move Student to Dry Creek Elementary School and Student has remained at Olive Grove.

At an IEP team meeting on September 1, 2010, Parents asked that Student be placed in general education for 100% of his educational day. District informed Parents that it had been implementing such a placement for Student since May 2010. District continued to offer Student speech and language and occupational therapies, but discontinued the specialized academic instruction that Student had previously received in the SDC. Parents did not sign the IEP of September 1, 2010. Student spent his entire first grade year during SY 2010-2011 fully included in the first grade general education classroom. He received speech and language therapy at the rate of 75, 30-minute sessions per year and occupational therapy at the rate of 25, 30-minute sessions per year. Student was also provided a specialized reading instruction program called SIPPS. Student was also entitled to extended school year services and various accommodations and consultation services, which do not appear to be disputed with respect to stay put.

For the SY 2011-2012, Student has now entered second grade at Olive Grove and continues to be placed full time in the general education environment. The parties dispute as to stay put turns on Student's placement with respect to general education and SDC. District contends that Student's stay put is the 70% regular education, 30% SDC placement set out in the September 9, 2009 IEP. Student contends that his stay put placement is 100% in regular education at Olive Grove.

District cites legal authority stating that a pupil's stay put placement is the last agreed upon and implemented IEP. While this is typically the case, the last agreed upon and implemented IEP may not constitute the "then-current educational placement" in all cases. Here the parties had a signed and implemented IEP dated September 9, 2009. However, as of May 2010 the parties have through mutual agreement altered the placement set out in the September 9, 2009 IEP.

The parties have participated in several IEP team meeting since May 2010, however, the Parents have not consented to a new IEP. District has continued to provide Student the placement the parties agreed upon in May 2010, but has failed to document the changed placement in the subsequent IEPs. There is no evidence to suggest that the placement implemented in May 2010 was a temporary placement. Accordingly, in this case, with respect to Student's time in general education and in an SDC, the September 9, 2009 IEP does not constitute the "then-current educational placement" at the time of the filing of District's complaint. Student's motion for stay put is granted and his stay put placement is the September 9, 2009 IEP, as modified by the parties' actions since May 2010.

ORDER

1. The provisions of the September 9, 2009 IEP shall be maintained as follows:
 - a. Student shall attend a second grade general education classroom at Olive Grove Elementary School 100% of his educational day, except for the related services set for below.
 - b. District shall provide Student with 75 speech and language sessions, at 30 minutes per session per year. These sessions will be scheduled so that they are regularly held each week during the school year.
 - c. District shall provide Student with 25 occupational therapy sessions, at 30 minutes per session per year. These sessions will be scheduled so that they are regularly held each week during the school year.
 - d. District shall provide Student with SIPPS reading instruction one hour per day, four days per week as a general education intervention.

- e. District shall provide Student with extended school year services, which include 19 days of specialized academic instruction, 8 speech and language sessions for 30 minutes per session and 4 occupational therapy sessions at 30 minutes per session.
- f. District shall continue with all accommodations currently in place for Student to assist him in the regular classroom setting.
- g. District shall provide consultation with the general education teacher from special education staff, speech and language pathologist and occupational therapist as needed to assure Student obtains educational benefit from his program.

Dated: October 3, 2011

/s/

MICHAEL G. BARTH
Administrative Law Judge
Office of Administrative Hearings