

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BANNING UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2011090576

ORDER DENYING MOTION FOR  
STAY PUT

On September 15, 2011, Student filed a motion for stay put in conjunction with her request for due process hearing (complaint) filed on the same date. The motion was not supported by a declaration under penalty of perjury or any exhibits. On September 20, 2011, District filed an opposition to the motion supported by a declaration under penalty of perjury and authenticated evidence, including a copy of Student's May 3, and May 27, 2010 individual education plan (IEP). Student filed a reply to District's opposition which was supported by a declaration under penalty of perjury from Student's mother, and a copy of a California Department of Education Investigation Report relating to a May 2011 IEP meeting.

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)<sup>1</sup>; 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.)

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

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

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

District and Student agree that Student's last agreed upon and implemented IEP was the May 3, and May 27, 2010 IEP, which provided for placement in the fifth grade at Big Springs School (Big Springs), a non-public school (NPS) for kindergarten through sixth grades.<sup>2</sup> Student attended Big Springs in the 2009-10, and 2010-11 school years and matriculated to the seventh grade at the end of the 2010-11 extended school year.

Student seeks stay put at Big Springs, arguing that, although she has matriculated to the seventh grade, an administrator at Big Springs has informed Student's mother that she can stay at Big Springs until she turns thirteen years old, at which time she can transfer to an unspecified Big Springs' intermediate campus. District argues that, according to the same administrator at Big Springs, Big Springs does not accommodate students after sixth grade, and that Student would only be permitted to attend if she was retained in the sixth grade. Student enrolled in the seventh grade at District's Nicolet Middle School (Nicolet), and she briefly attended from August 25 through September 1, 2011. However, Mother informed District on September 6, 2011 that Student would not return to Nicolet because her stay put should be Big Springs. As such, District argues that, based upon her transition to seventh grade and the alleged unavailability of Big Springs, appropriate placement for purposes of stay put is District's Nicolet.

Student's stay put placement is determined by her May 3, and May 27, 2010 IEP, and, as discussed above, by her current grade level. (*Van Scoy, supra*, 353 F.Supp.2d at p. 1086.) Here, her stay put is Big Springs or another NPS, not a public school as argued by District. However, the evidence offered by both parties relies on conflicting unpersuasive hearsay from a Big Springs administrator as to whether or not Big Springs will enroll Student. Student has not met her burden of establishing that Big Springs or another NPS can accommodate Student's placement as stay put in accordance with her matriculation to seventh grade and her last agreed upon IEP.

In order to establish that her stay put should be Big Springs or another NPS, the parties must submit a declaration under penalty of perjury from an appropriate administrator at Big Springs stating whether or not it will enroll Student as a seventh grade student, or a declaration from an appropriate administrator from another NPS stating that it is willing to enroll Student. If neither option is available to Student, then the undersigned will consider a public school placement as stay put based upon the changed circumstances.

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<sup>2</sup> Mother's reference to the May 2011 CDE compliance complaint is irrelevant to a determination of stay put because the last agreed upon IEP was the May, 2010 IEP.

Student's motion for stay put at Big Springs is denied without prejudice.

IT IS SO ORDERED.

Dated: September 23, 2011

/s/

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ADRIENNE L. KRIKORIAN  
Administrative Law Judge  
Office of Administrative Hearings