

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

FRESNO UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2012020842

ORDER GRANTING MOTION FOR
STAY PUT

On April 20, 2012, Student filed with the Office of Administrative Hearings (OAH) a motion for stay put against the Fresno Unified School District (District) that sought for him to remain at the District's Phoenix Secondary School pending the outcome of this matter. On April 24, 2012, the District filed an opposition on the ground that the April 16, 2012 Expedited Decision ordered Student "to be reinstated at a District general education high school that he would have matriculated to and attended after AMS [Ahwahnee Middle School] as of the date of this Order." The hearing on Student's nonexpedited complaint is scheduled for May 15 – 17, 2012.

On April 27, 2012, OAH issued an order that requested the parties to submit additional information by May 2, 2012, that document the results of the manifestation determination review team meeting and any additional briefing as to Student's stay put placement based on the results of the manifestation determination review team meeting. On April 30, 2012 and May 2, 2012, Student submitted additional information, and the District submitted its additional information on May 1, 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), which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

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

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.)

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].)

When a child violates a code of student conduct and school personnel seek to order a change in placement that would exceed ten school days, the local educational agency (LEA), the parent, and the relevant members of the IEP team shall determine whether the conduct was a manifestation of the child's disability. A child's parent may appeal the manifestation determination by requesting an expedited due process hearing.² (20 U.S.C. § 1415(k); 34 C.F.R. § 300.532.) While the appeal is pending, the child shall remain in the interim alternative educational setting (IAES) pending the decision of the hearing officer or until the expiration of the 45 school-day IAES placement, whichever occurs first, unless the parent and the LEA agree otherwise. (Ed. Code, § 56505, subd. (d); see 20 U.S.C. § 1415(k)(4)(A) & 34 C.F.R. §§ 300.532, 300.533.)

A parent who disagrees with any decision regarding the manifestation determination may request a hearing. (20 U.S.C. § 1415(k)(3)(A).) In appropriate circumstances the ALJ hearing the dispute may order a change in placement of the student, and may return the student to the placement from which he was removed. (20 U.S.C. § 1415(k)(3)(B)(ii).)

² In such cases, "the State or local education agency shall arrange for an expedited hearing." (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c).) The expedited hearing shall occur within 20 school days of the date the hearing is requested. (*Id.*)

DISCUSSION

Student's motion for stay put requests that he remain at the Phoenix Secondary School as his last agreed upon and implemented educational program. The District contends that pursuant to the April 16, 2012 expedited decision that Student's stay put placement is Hoover High School.³ The parties' dispute is whether Student's last agreed upon and implemented educational program is the Phoenix Secondary School or Hoover High School, the general education high school Student would have attended after his matriculation from AMS.

Student filed a request for a due process hearing (complaint) on February 22, 2012, that listed several problems, some of which involved an expedited appeal of a school disciplinary manifestation determination, and others which alleged a denial of a free appropriate public education on a nonexpedited basis. Student's expedited complaint challenged the District's May 13, 2011 manifestation determination review decision, that found that Student's disciplinary conduct was not a manifestation of his disability. At this time, Student was in eighth grade and attended AMS. On September 15, 2011, the District's governing board upheld the expulsion, but suspended its enforcement to permit Student to attend the Phoenix Secondary School.⁴ The September 15, 2011 District expulsion decision stated that Student could attend the Phoenix Secondary School and that Parents could petition the District in December 2011 for Student to attend a regular District school. Student subsequently attended the Phoenix Secondary School until the District disenrolled him on April 27, 2012.

In the Expedited Decision, Student prevailed on issues that the District violated the procedural rights of Parents that significantly impeded their right to meaningfully participate in Student's educational decision making process. The Expedited Decision returned Student to a general education high school that he would have attended after graduating from AMS, which is Hoover High School. The Expedited Decision gave the District 10 school days to hold a subsequent manifestation determination review team meeting if the District still wished to expel Student for the May 9, 2011 disciplinary incident, which the District conducted on April 27, 2012. At the April 27, 2012 manifestation determination review team meeting, the District again found that Student's disciplinary conduct was not a

³ The parties do not dispute that if Student had graduated from AMS that he would have attended Hoover High School for ninth grade in the 2011-2012 school year.

⁴ On November 17, 2011, the Fresno County Board of Education granted Student's appeal of the District's expulsion, and ordered the District to expunge the expulsion records. On February 14, 2012, the District filed a writ of mandate in the Superior Court of Fresno County that seeks to overturn the decision of the Fresno County Board of Education. The civil court's hearing on the District's writ is scheduled for May 2012. Parents did not seek to remove Student from the Phoenix Secondary School after the November 17, 2011 Fresno County Board of Education decision.

manifestation of his disability. Because the time period for the suspended expulsion had lapsed, the District did not recommend placement in an IAES, such as the Phoenix Secondary School. The District's April 27, 2012 IEP places Student at Hoover High School. However, the District did not present any evidence that Student had sought readmission into a regular District high school, as provided by the September 15, 2011 District expulsion decision.

Before the May 9, 2011 disciplinary incident, Student's last agreed upon and implemented educational program was his January 19, 2011 IEP. This IEP placed Student in a general education middle school, with special education services constituting 33 per cent of his school day. While the April 16, 2012 Expedited Decision order called for Student to return to his last agreed upon and implemented educational program, which would be Hoover High School because Student is now in ninth grade, the Expedited Decision did permit the District to convene a new manifestation determination review team meeting to correct the procedural flaws noted in the Expedited Decision. The District timely held the manifestation determination team meeting, and again determined that Student's disciplinary conduct was not a manifestation of his disability.⁵ The April 27, 2012 manifestation determination decision reimposes the District's expulsion, which by the terms of the September 15, 2011 District decision has expired. However, the terms of the September 15, 2011 District decision state that for Student to return to regular District high school that he must petition the District's board for readmission. Because Student has not petitioned the District's board for readmission, nor has the District board readmitted Student, his last agreed upon and implemented educational program is the Phoenix Secondary School pursuant to the terms of the September 15, 2011 District decision.

ORDER

Student's motion for stay put is granted, and his placement is the Phoenix Secondary School pending a decision of the District's writ of mandate action, any possible challenge to the District's April 27, 2012 manifestation determination decision or subsequent mutually agreed upon and implemented educational program.

Dated: May 3, 2012

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings

⁵ Nothing in this Order prevents Student from filing a new complaint to challenge the April 27, 2012 manifestation determination decision.