

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA^s

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN DIEGO UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2012060587

ORDER DENYING MOTION FOR
STAY PUT

On June 14, 2012, Student filed a request for a due process hearing (complaint). A Motion for Stay Put was filed simultaneously, along with a request by Student to delay ruling on the Motion for Stay Put until June 20, 2012. The request to delay ruling was based on the assertion of Student's advocate that a negotiated stay put placement was possible. On June 19, 2012, the San Diego Unified School District (District) filed an opposition to Student's motion. On June 19, 2012, Student filed a reply to District's opposition. OAH has not been informed that the stay put issue has been resolved, such that the Motion for Stay Put is ready for ruling.

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.)

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.)

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,

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

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].)

DISCUSSION

Student, who is now in Fifth Grade, has been diagnosed with Bipolar Mood Disorder, Attention Deficit Hyperactivity Disorder, Anxiety Disorder NOS and Reactive Attachment Disorder, and is eligible for special education as a student with emotional disturbance. Her last agreed upon and implemented IEP, dated April 30, 2012, provided Student with 315 minutes daily of specialized academic instruction at a non-public school (NPS), with 20 hours per week (or 4 hours per day) of mental health day treatment services, with 30 minutes per week of school counseling. Since May 2011, Student has been placed at the San Diego Center for Children Academy (Academy), where San Diego County's Department of Mental Health (DMH) also ran the San Diego Center for Children Intensive Day Treatment Program (IDTP). DMH is discontinuing the IDTP as of June 30, 2012.

Student moves for stay put placement at (a) the Academy for specialized academic instruction in the morning, and (b) a new program entitled the San Diego Center for Children's Extended Therapeutic Services (ETS), on Academy grounds, in the afternoon.² Student concedes that ETS is not a certified day treatment facility, but argues that ETS has an unspecified certification under the "auspices" of the Academy. Student submits a letter from the Academy's principal, Nancy Macnamara, describing the ETS program, but it makes no reference to licensure as a day treatment program, or the provision of day treatment services other than references to various types of therapy that could be provided by "clinicians supervised by licensed personnel" and that Student's "Mental Health goals" could be followed. Student also submits a letter from the Academy's Interim Program Manager, Cassie Powers, describing Student's current day treatment services. Neither statement is under penalty of perjury, and neither rises to the level of evidence that Student will receive day treatment services in ETS, or that ETS will have the same service providers as DMH's IDTP. In her Motion for Stay Put, Student argues that due to her Reactive Attachment Disorder and fragile emotional state, it is more important to retain her in a program with familiar staff than to provide the full four hours per day of intensive day treatment as called for in her IEP. Student submits voluminous documents testifying to her fragile emotional state.

District argues that Student's motion be denied "as to the SDCC ETS program" after June 30, 2012, as Student's IEP requires that she be placed in a certified day treatment

² Student also requests temporary stay put in the San Diego Center for Children's Interim Day Treatment Program through June 30, 2012, which District has indicated in its opposition that it will provide without dispute.

program once that program ends, and not in an after school counseling program such as ETS. District concedes that Student could receive up to 90 minutes per day of a “therapeutic milieu” at ETS, but contends that this falls far short of the four hours per day, or 50% of Student’s educational program, required by Student’s IEP. District submits an unauthenticated copy of DMH’s 2003-2004 contract requirements for day treatment facilities which purports to require that a day treatment program consist of no less four hours per day of a therapeutic milieu, although no citation to a specific section of the contract requiring such a four-hour program is given. District contends that Student has been offered placement for four hours per day in District’s certified day treatment program, Unified Day Treatment Program.

Student replies that during the 2011-2012 extended school year (ESY), ETS is open 2.5 hours per day, without clarification as to how this ESY program would meet the requirements of Student’s IEP. Student also submits a DMH directory from November 2010 showing that the Unified Day Treatment Program was, at the time of printing, a school for adolescents, and argues that placement there would be inappropriate for an 11-year old. Student adds that the Unified Day Treatment program had been on a site that was historically a day “rehabilitation” program alternate school.

Analysis

Per *McKenzie*, where a Student’s current program is closed, the school district must provide a comparable program. Here, District limits its opposition to the ETS program for the day treatment portion of Student’s school day, and stay put placement of Student for specialized academic instruction at the Academy is not in dispute. District has offered Student placement for four hours per day in a day treatment program, United Day Treatment Program, in lieu of Student’s current placement for that time in a day treatment program being closed by DMH.

The ETS program sought by Student has little resemblance to the placement provided for in her last agreed upon and implemented IEP. The April 30, 2012 IEP expressly provides for mental health day treatment services for 20 hours per week, or four hours per day. Student has not submitted admissible, let alone persuasive, evidence that she can obtain the comprehensive mental health services required by her IEP at a 1.5 to 2.5 hour non-credentialed, after school counseling program. Comprehensive mental health services comprise one-half of Student’s school day, and are not lightly replaced with an hour or two of after school counseling, regardless of the credentials and skills of the providers or their intent to focus on Student’s IEP goals.

Student’s assertion that the United Day Treatment Program may still be limited to adolescents two years after the DMH directory was published is speculative, and it is not relevant whether the United Day Treatment Program school site was previously a rehabilitation site.

Student's contentions that her mental state is fragile, and that a change in providers can be destabilizing, are well taken, although not determinative. Student's IEP calls for an intensive day treatment program to address her unique educational needs and the impact her disability has on access to the general education curriculum. The upcoming change in providers may well cause Student anxiety, but her IEP provides for comprehensive mental health services to support Student in dealing with the stresses inherent in her educational program, and resultant anxiety can be addressed in the United Day Treatment Program. If the 20 hours per week of day treatment services are insufficient to provide Student with the support she requires to progress in her educational program, the IEP team can revisit Student's IEP to provide the necessary services and placement.

The ETS program is not sufficiently comparable to the specific educational placement of Student's last agreed upon and implemented IEP to constitute a stay put placement, and Student's motion is denied.

ORDER

Student's motion for stay put placement in the San Diego Center for Children's Extended Therapeutic Program for the day treatment portion of her IEP is denied.

Dated: June 27, 2012

/s/

ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings