

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

WEST CONTRA COSTA UNIFIED
SCHOOL DISTRICT.

OAH CASE NO. 2012080793

ORDER DENYING MOTION TO
MODIFY STAY PUT ORDER

On September 17, 2012, Student filed a motion with the Office of Administrative Hearings (OAH) to modify its August 29, 2012 Order partially granting stay put (Order). District filed an opposition on September 19, 2012. For the reasons discussed below, the motion is denied.

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.)

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

¹ 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.]

The law permits a child's parents to accept some IEP services, but not others. Education Code section 56346, subdivision (e), provides: "If the parent of the child consents in writing to the receipt of special education and related services for the child but does not consent to all of the components of the individualized education program, those components of the program to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child."

Federal and State education laws and regulations distinguish between children in public and private schools. A child with a disability attending public school is entitled to a free appropriate public education (FAPE) at public expense. However, if District made FAPE available and a parent unilaterally chooses to send his or her child to a private school, that child is not entitled to a FAPE at public expense. (20 U.S.C. § 1412(a)(10)(C)(i); 34 C.F.R. §§ 300.137 & 300.138; Ed. Code, §§ 56174; 56174.5;.) Instead, children unilaterally placed in private schools receive a proportional share of special education services under a services plan, which may provide for a different amount of service than the child would receive in public school. (See, e.g., 34 C.F.R. § 300.138.) If a child's parents chose to place the child in a private school, the student has no right to receive services beyond the proportionate share given to private school pupils. (*Board of Education of the Appoquinimink School District v. Johnson (Appoquinimink)* (D.C.Del. 2008) 543 F.Supp.2d 351 (overturning an order requiring the district to pay for a sign language interpreter for a child at a private school).)

ANALYSIS

In this case, at the time Student filed his due process complaint, he was eligible for enrollment in kindergarten in a District placement. District offered Student placement in a special day class in a K-2 classroom, and supports and services including speech and language therapy and occupational therapy. Student's parents (Parents) sought to retain him in preschool and sought an order from OAH for stay put in pre-school. In OAH's August 29, 2012 Stay Put Order, the administrative law judge (ALJ) ordered that "District may matriculate Student to kindergarten, but must continue to provide supports and services which are the same or equivalent to those contained in the last agreed-upon IEP."

Parents declined to enroll Student for the 2012-2013 school year in the District K-2 program and instead gave District notice that they were privately placing Student in a private pre-school program. They now seek an order modifying the August 29, 2012 Stay Put Order by asking that District provide the supports and services called for in the last agreed upon IEP, notwithstanding that Student is not attending a District school and has been privately enrolled by Parents in another placement.

District persuasively argues in its opposition that the IDEA and its associated regulations do not permit a parent to pick and choose between private placement and

District-provided services for purposes of stay put. The ability of a parent to agree only to portions of an IEP, as discussed above, does not apply to stay put. In other words, for purposes of stay put, a parent cannot refuse implementation of a District placement offer, but accept particular services that were offered, and obtain them as Student's stay put placement while privately placing the student.

If Student's position were correct, parents would be able to place their child at a private school and then obtain all IEP services from the district at the private school, by agreeing to everything in the IEP except the public placement. Under these facts, that position cannot have been the intent of the law permitting a parent to accept only part of an IEP, because it would result in the district being obligated to provide supports and services in a private setting of parents' choosing.

The supports and services offered in an IEP are intended under the IDEA to be part of the entire educational program developed by an IEP team to enable the child to receive a FAPE from his educational program. Thus, the more logical interpretation of the provisions allowing a parent to consent to only some portions of an IEP offer covers a situation in which the parents of a public school child who is eligible for special education choose to accept some IEP services, but not others, while the child attends a district school or district contracted non-public school. Student has not demonstrated any credible legal basis for finding otherwise.

For these reasons, Student's motion to modify OAH's August 29, 2012 stay put order is denied.

IT IS SO ORDERED.

Dated: September 20, 2012

/s/

ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings