

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN RAFAEL CITY SCHOOLS  
ELEMENTARY SCHOOL DISTRICT.

OAH CASE NO. 2012100555

ORDER GRANTING STUDENT'S  
MOTION FOR STAY PUT

On October 15, 2012, Student filed a motion for stay put. On October 18, 2012, the San Rafael City Schools Elementary School District (District) filed opposition. On October 22, 2012, Student filed a reply, and District filed a "surreply."

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.)

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

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

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 AND ORDER

Student’s complaint alleges that he is three and a half years old, with profound hearing loss. Since he was five months old, he has attended a preschool program at Magnolia Park School for students with low incidence disabilities from 0 to 3 years, operated by the Marin County Office of Education (MCOE) (MCOE 0-3 Program), where Student was taught in English via Total Communication using Sign Exact English (SEE). SEE is Student’s only means of communication. At IEP team meetings on May 9 and 31, 2012, District developed ten goals for Student, six of which required SEE skills. District offered Student placement in the MCOE 0-3 Program through the end of the 2011-2012 school year and extended school year (ESY) while Student’s parents viewed programs for older preschoolers, including the District’s early intervention (EI) program at Short Elementary School (Short) and MCOE’s low incidence disabilities program for children three to five years of age (MCOE 3-5 Program). The May IEPs also offered group speech services for 30 minutes two times per week by MCOE, and 600 minutes per year (60 minutes per month) of individual instruction by an itinerant deaf and hard of hearing (D/HH) teacher from MCOE. At an IEP team meeting on August 21, 2012, District offered Student placement in the EI program at Short, with group speech services for 30 minutes twice a week by MCOE and 600 minutes per year of D/HH instruction by MCOE, to which Student’s parents (Parents) did not consent.<sup>2</sup>

Student moves for a stay-put placement in the MCOE 3-5 program, with related services. Student contends that placing him in an IE class, where the teacher and students do not use SEE, would leave Student isolated and without a means to communicate or progress on his communication goals. Parents’ declaration states that the Short staff is not proficient in SEE, half of the students at the MCOE 0-3 Program were D/HH, and Student’s same-age peers from the MCOE 0-3 class have advanced to the MCOE 3-5 Program.

District submits the declaration of its early intervention program manager, which provides essentially the same facts, but explains that the IE program at Short was offered over the MCOE 3-5 Program because the IE program is less restrictive. It also attaches the IEPs from May 9, May 31 and August 21, 2012. District contends that (i) the MCOE 0-3 Program is nothing more than a generic Early Start program, (ii) the May 9, 2012 IEP offered the MCOE 0-3 Program as a “temporary” program because the IEP contained an “end date”

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<sup>2</sup> There is disagreement between the parties as to whether the August 21, 2012 IEP offered Student the MCOE 3-5 Program for the 2012-2013 academic school year, and whether Parents consented thereto. However, as the parties agree that such placement was never implemented, it is unnecessary for stay put purposes to determine if such an offer was made.

for that program of July 13, 2012, and (iii) as the District never offered Student the MCOE 3-5 program, it cannot be stay put.

Student's last agreed upon and implemented placement was in the MCOE 0-3 Program class for 180 minutes per week, three times per week. The May 9 and 31, 2012 IEPs do not indicate that the placement was "temporary" as asserted by District, only that the IEPs were intended to cover the 2011-2012 school year and 2012 ESY that ended on July 13, 2012. An IEP must include a projected start date for services, as well as the anticipated frequency, location, and duration of those services. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code § 56345, subd. (a)(7).) Compliance with the description requirements of federal and state law does not make all services in an IEP "temporary," or the status quo protections of the stay put statute would be rendered meaningless.

Student's placement at the MCOE 0-3 Program with related services constitutes his last agreed upon and implemented placement for purposes of determining stay put. However, a child with a disability need not remain in a specific class or grade if he would be eligible to proceed to the next grade and corresponding classroom with same-age peers. Here, Student's same-age peers from the MCOE 0-3 Program have advanced on the basis of age to the MCOE 3-5 Program, and Student may advance to the MCOE 3-5 Program with those peers to maintain the status quo.

Whether or not the MCOE 3-5 Program is more restrictive, or cannot meet Student's needs, as asserted by District, is not at issue for stay put purposes.

Student's stay put placement is as follows: placement in MCOE's low incidence disabilities program for three to five year olds at Magnolia Park School for 180 minutes per day three times per week (for a total of 540 minutes per week); group language and speech services for 30 minutes twice a week by an MCOE provider; and 600 minutes per year, to be provided no less than 60 minutes per month, of individual specialized deaf and hard of hearing services by an MCOE provider. District shall make all necessary arrangements with MCOE to implement Student's stay put placement and services.

IT IS SO ORDERED.

Dated: October 22, 2012

/s/

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ALEXA J. HOHENSEE  
Administrative Law Judge  
Office of Administrative Hearings