

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN MARCOS UNIFIED SCHOOL
DISTRICT AND BANYAN TREE
FOUNDATIONS ACADEMY.

OAH CASE NO. 2013010566

ORDER DENYING MOTION FOR
STAY PUT

On January 18, 2013, Student filed a motion for stay put with the Office of Administrative Hearings (OAH) against the San Marcos Unified School District (District) and Banyan Tree Foundations Academy (Banyan) that requested that Student continue to receive one-to-one academic teaching at Banyan. The District and Banyan did not file a response.

On January 28, 2013, OAH issued an order that requested additional information as to whether the District or Banyan is presently seeking not to implement Student's last agreed upon and implemented educational program. The parties were to submit the additional information by 5:00 p.m., on February 1, 2013. Student submitted her additional information on January 30, 2013, the District on January 31, 2013, and Banyan on February 1, 2013.¹ On February 4, 2013, Student filed a reply brief. On February 5, 2012, Banyan submitted a response.

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)²; Ed. Code, § 56505 subd. (d).) This is referred to as "stay put." For purposes of stay put, the current educational

¹ Banyan has not filed a motion to dismiss itself as a party as not being a responsible public agency. (Ed. Code, §§ 56500 and 56028.5.)

² All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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.)

The “current educational placement” for the purpose of stay put may also include services administered by the same non-public agency (NPA) if the most recently implemented IEP required the District to provide the services with a specific NPA. (*Joshua A. v. Rocklin Unified Sch. Dist.* (E.D. Cal. August 20, 2007, No. CV 07-01057 LEW(KJMx)) 2007 WL 2389868, ** 2-4, affd. *Joshua A. v. Rocklin Unified Sch. Dist.* (9th Cir. 2009) 559 F.3d 1036 (*Joshua A.*).

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.) A student is not entitled to the identical services pursuant to his or her IEP when those services are no longer possible or practicable. (*Ibid.*, at pp. 1133-1134.) When a student’s “current educational placement” becomes unavailable, the local educational agency must provide the student with a similar placement in the interim. (*See Knight v. District of Columbia* (D.C. Cir. 1989) 877 F.2d 1025, 1028; *McKenzie v. Smith* (D.C. Cir. 1985) 771 F.2d 1527, 1533.)

DISCUSSION

Student’s motion for stay put includes her last agreed upon and implemented IEP, May 23, 2012, as modified on July 24, 2012, and contends that the parties had not agreed upon an appropriate resolution of Student’s educational program after the recent IEP team meeting to discuss Student’s most recent assessments. The parties do not dispute that this is Student’s last agreed upon and implemented educational program. The parties dispute whether this IEP mandates that Student remain at Banyan, a certified non-public school (NPS), despite Banyan informing Parent and the District that she can no longer remain at Banyan past January 30, 2013.

The May 23, 2012 IEP, as modified on July 24, 2012, provides that Student requires a placement at an NPS. Student had attended another NPS and Mother specifically requested Banyan as the NPS that could best meet Student’s need. The District, after the IEP team discussion, offered Student Banyan to provide her with a free appropriate public education. However, in this case, the District is not seeking to change Student’s placement. Instead, Banyan, as a private service provider, has made the decision that it can no longer meet Student’s needs, and the District has found another certified NPS, Excelsior Academy, for Student to attend.

Student attempts to rely on *Joshua A.* for the proposition that Banyan remains Student's stay put placement even though Banyan terminated its contract to serve Student. However, *Joshua A.* is distinguishable as in *Joshua A.* the school district terminated its master agreement with the NPA serving Joshua A. In this case, Banyan terminated its agreement with the District to serve Student, with 20 days notice, as provided in Education Code, section 56366, subdivision (a)(4). Further, nothing in Education Code, section 56366, or the applicable stay put statutes and regulations provide that a certified NPS or NPA must retain a student if it terminates a contract to serve a student with the proper notice if the parent does not consent to the private service provider's contract termination.

Because Student's placement at Banyan is no longer available due to Banyan's unilateral action, the District has the legal obligation to find a comparable educational program for Student to attend. The District contends that the Excelsior Academy is a comparable educational program and Student disagrees. However, no decision is made in this order whether the Excelsior Academy constitutes such a program as Student has not presented that issue before OAH, except to argue that she should remain at Banyan because the Excelsior Academy cannot implement her current IEP. Therefore, Student's motion for stay put for her to remain at Banyan during the pendency of this dispute is denied because Banyan is no longer available as a placement due to Banyan's decision that Student can no longer attend Banyan.

ORDER

Student's motion for stay put is denied.

Dated: February 5, 2013

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings