

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

ELK GROVE UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2014070099

ORDER GRANTING MOTION FOR
STAY PUT

Parents on Student's behalf filed a request for due process hearing and mediation on June 24, 2014 naming Elk Grove Unified School District (District). Parents concurrently filed a motion for stay put. Student's stay put motion was supported by a declaration under penalty of perjury from his mother and authenticated exhibits. On June 27, 2014, District filed an opposition to the stay put motion, which was supported by declarations under penalty of perjury and authenticated exhibits. Student filed a reply to District's opposition with a supplemental declaration under penalty of perjury and additional exhibits. For the reasons discussed below, the motion is granted.

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.)

Where controversy arises regarding the physical component of an order to stay put, the Ninth Circuit looks to the IEP to determine the "then current educational placement." (*Joshua A. v. Rocklin Unified School Dist.* (E.D. Cal., Aug. 20, 2007, No. CV 07-01057))

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

2007 WL 238968, pp. 2-4, affd. (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, 1133-1135.) 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 (2006)[discussing grade advancement for a child with a disability.]) And 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, 1072-1073. The application of this principle to the replacement of NPA providers is addressed below.

Generally, if an IEP calls for non-public agency (NPA) services but no particular NPA is named, a district has unilateral authority to replace an NPA provider. (*Z.F. v. Ripon Unified School Dist.* (E.D.Cal., Jan. 9, 2013, No. 2:11-CV-02741) 2013 WL 127662, p. 6; *Student v. Ripon Unified School Dist.*, Cal. Offc.Admin.Hrngs. Case No. 2011030842, Order Denying Motion for Stay Put (April 12, 2011).)

If, however, an NPA is identified in the IEP as the provider of services, that particular NPA is part of Student’s stay put placement. (See *Joshua A. supra*, 2007 WL 238968 at pp. 2-4; see also *Student v. San Francisco Unified School Dist.*, Cal.Offc.Admin.Hrngs. Case No. 2011071058, Order Granting Motion for Stay Put, (Aug. 26, 2011) [non-public school identified in IEP]; *Student v. San Francisco Unified School Dist.*, Cal.Offc.Admin.Hrngs. Case No. 2011060361, Order Granting Motion for Stay Put (Aug. 5, 2011) [same].)

DISCUSSION

As a threshold matter, District’s opposition challenges Parents’ standing to bring this motion on his behalf because he is over 18 years of age. In her reply brief and accompanying declaration, Mother asserts that Student granted her authority to act on his behalf, and supports her assertion with a copy of Student’s authorization executed on May 14, 2014. That is sufficient to establish her standing to act on his behalf in this matter.

Student’s complaint asserts that in early May 2014, District denied Student a free appropriate public education (FAPE) when it unilaterally decided to change Student’s long-time behavior intervention service provider from Center for Autism and Related Disorders (CARD) to another contracted non-public agency (NPA) for the 2014-2015 school year. Although District held an IEP meeting in late May 2014, District did not make a FAPE offer for the 2014-2015 school year. District informed Parents that it decided not to renew its contract with CARD for all students after June 30, 2014. Parents objected to the change of service providers on the ground that based on Student’s history with CARD, no other service provider is qualified to serve Student’s needs.

Student's motion for stay put seeks an order compelling District to continue providing behavior support services for Student through CARD during the pendency of this matter. Both parties offered a copy of Student's May 3, 2013 IEP, which they contend is the last agreed upon and implemented IEP.

District contends that it has decided not to contract with CARD for the 2014-2015 school year, it has identified a replacement NPA, Advanced Kids, and it has also opened negotiations with CARD to provide up to 90 days of transition services to Student to help make the transition to the Advanced Kids. However, as of the date of the filing of its opposition, District has not yet entered into such a contract.

The Operative IEP

The two May 3, 2013 IEPs offered by the parties are not identical. Parents provided a form IEP consisting of 59 pages, with the added words "Draft #2" on the first page and numerous handwritten notations throughout the document including reference to "Parent Addendum" (the Addendum). The Addendum is a multi-paged typed narrative document that responds to the IEP and purports to modify several pages of the form IEP document, including the offer of FAPE on pages 17 and 18 of 59, which identified as a related service behavior intervention services by a "[n]onpublic agency (NPA) under contract with SELPA or district" with a frequency of 270 minutes daily for the regular school year. The FAPE offer on pages 17 and 18 does not identify CARD as the service provider for Student's behavior intervention services, including in the Comments section. The Notes pages for the May 3, 2013 identify a CARD supervisor as attending and participating in the meeting. No reference was made in the notes that CARD would continue as the non-public agency providing behavior intervention services to Student. Notes dated May 28, 2013 make no reference to CARD.

District offered a copy of the May 3, 2013 IEP, which had no interlineations or references to "draft". The Addendum was not attached. District's representative stated in her declaration that the District's version of the IEP is the version that she believed was the operative and implemented IEP, claiming that the District did not consider the Addendum to be part of the IEP.

This order does not decide the merits of Student's case as it applies to the validity of the Addendum. However, for purposes of stay put only, the Addendum is not part of the IEP because the evidence from both parties has demonstrated that it was not agreed upon.

Change in Circumstances

No dispute exists that, in the 2013-2014 regular school year, District provided Student non-public agency behavioral support services through CARD as the District-contracted service provider or that it had done so for several years previous. However, District argues that it has voluntarily decided to terminate its contractual relationship with CARD, entitling

it to decide what service provider it will use for Student's behavior support services. District also argues that its decision to terminate CARD was based on unspecified performance issues by the non-public agency. District distinguishes *Joshua A, supra*, cited by Parents, claiming that the district in that case did not provide a reason why it made the change in service providers. District asserts that it has the right to determine with whom it contracts and that it has explained to Parents its reasons for changing providers. District also contends that, going forward it will provide Student all of the behavior services called for in the May 3, 2013, but through a different state certified non-public agency.

District offered no credible evidence that establishes a change in Student's circumstance or specific reasons why CARD cannot provide behavior intervention services during the pendency of this matter. Relying on *Student v. Paso Robles Joint Unified School District*, Cal.Offc.Admin.Hrngs, Case No. 2012090342, Order Granting Motion for Stay Put, (Feb. 8, 2013), District asserts that it has the right to replace contracted service providers and that it has explained to Parents its reasons for changing providers. District also contends that, as stay put, it will provide Student all of the behavior services called for in the May 3, 2013, but through a different NPA.

On the other hand, Parents strongly object to a change of providers, based on Mother's declaration in support of their position that a change in Student's long-time behavior intervention service provider would deprive Student of the ability to meaningfully access his education. In contrast to *Paso Robles, supra*, although District has identified a state certified NPA as the new NPA service provider, it has not offered any credible evidence establishing a basis for changing providers based upon performance such that it would justify disrupting Student's educational program, which has historically included CARD, during the pendency of this action.

Additionally, District has admitted that it can and is planning to contract with CARD for interim behavior intervention services for up to 90 days in the 2014-2015 school year, thus establishing that it is able to continue to provide the behavior services identified in the May 3, 2013 IEP through CARD as Student's stay put. Choosing to terminate its contractual relationship with CARD does not obviate District's obligation to provide Student with stay put when, as District has shown, District can still enter a contract with CARD, even temporarily.

The same result can be supported by applying the reasoning in *Joshua A.*, cited by both parties. In *Joshua A.*, the student sought a stay put order after the district proposed to change the service provider from whom the student had been receiving services for more than two years. The court noted that the student had no changed in circumstance such that a change in service providers would be warranted, and that the district had not provided any evidence justifying a change in service providers. Therefore, the court concluded that the IEP supported the conclusion that the student's stay put should be with the current provider. (*Joshua A., supra*, at p. 3.)

Conclusion

Accordingly, Student's stay put during the pendency of this due process complaint is the May 3, 2013 IEP as implemented by District, including the behavior support services specified on page 17 and 18 of 59, provided by Center for Autism Related Disorders as the non-public agency service provider.

ORDER

1. Student's stay put motion is granted.
2. Student's stay put shall be the placement and related services in the May 3, 2013 IEP as it was implemented by District during the 2013-2014 school year, without the changes and modifications made by Parents on the IEP document entitled "draft #2" or in the Parent Addendum.
3. Consistent with this Order, the District shall promptly employ or contract with Center for Autism Related Disorders to implement the behavior services required by Student's May 3, 2013 IEP while this dispute is pending.

DATE: July 7, 2014

/s/

ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings