

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN MATEO UNION HIGH SCHOOL
DISTRICT.

OAH CASE NO. 2014070408

ORDER DENYING MOTION FOR
STAY PUT

On October 9, 2014, Student filed a motion for stay put. On October 10, 2014, San Mateo Union High School District filed an opposition. On October 13, 2014, Student filed a reply.

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); 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.)

When a special education student transfers to a new school district within the same academic year, the new district must adopt an interim program that approximates the student's old IEP as closely as possible for 30 days until the old IEP is adopted or a new IEP is developed. (20 U.S.C. § 1414(d)(2)(C)(i)(1); Ed. Code, § 56325, subd. (a)(1); see *Ms. S. ex rel G v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1134.) Title 34 Code of Federal Regulations, part 300.323(e) (2006), consistent with Title 20 United States Code section 1414(d)(2)(C), expressly provides that the duty to implement a “comparable” IEP for a student who changes districts of residence is *only triggered when the student transfers during the school year*. In the comments to the Code of Federal Regulations, the United States Department of Education noted that some commentators requested that the regulations clarify the responsibilities of the new public education agency to implement the IEP of a child who moves during the summer. The United States Department of Education declined

to change the regulations, reasoning that the applicable rule is that all school districts are required to have an IEP in place for each eligible child at the beginning of the school year, such that the new district could either adopt the prior IEP or develop a new one. (71 Fed. Reg. 46682 (August 14, 2006).)

DISCUSSION AND ORDER

Student alleges in his due process hearing request (complaint) that his prior school district, the Hillsborough City Elementary School District, placed him in a private school (Stanbridge) through the end of the 2010-2011 school year, when he progressed to high school. Student alleges that District refused to implement that IEP, dated November 1, 2010 and consented to by Parents on April 18, 2011, and offered Student a public school placement. In settlement of an earlier due process hearing request initiated by Student, District agreed to reimburse Parents for providing a private program to Student during for the 2011-2012 school year, but Student reserved his right seek stay put under the November 1, 2010 IEP. District again offered Student a public school placement for the 2012-2013 school year in an IEP dated June 7, 2012, and for the 2013-2014 school year in an IEP dated September 19, 2013. In his stay put motion, Student seeks an order that District (i) reimburse parents for Stanbridge tuition and transportation for the 2012-2013, 2013-2014 and 2014-2015 school years to date, and (ii) contract directly with Stanbridge to fund Student's program for the 2014-2015 school year pending a decision in this proceeding.

Student's stay put motion is supported by the sworn declaration of Student's counsel, authenticating an attached copy of the November 1, 2010 IEP and the prior settlement agreement, and stating that Student's elementary school IEP is the last agreed upon and implemented IEP.

District opposes Student's motion, contending that Education Code, section 56505.2, bars OAH from ordering a school district to place a student in a private program that has not been certified pursuant to Education Code, section 56366.1. The declaration of District's counsel attaches and authenticates the same documents attached to Student's motion.

In reply, Student argues that Student is not seeking a pre-hearing "placement," but maintenance of the status quo. Student cites to *In Re John K.* (1985) 170 Cal.App.3d 783 as holding that a Student's right to stay put arises as soon as placement is "in dispute," regardless of whether a due process complaint is pending

The principles of stay put do not apply to District under these facts. A summer transfer student is treated under the IDEA as a student applying for initial admission to public school, who is entitled to attend a public program with a new IEP, but is not entitled to "stay put" because at the time of the transfer, the receiving school district was not implementing an IEP as the student's local educational agency. (See 20 U.S.C. § 1415(j).) Instead, the remedy for a placement dispute for a summer transfer student is to seek a due process hearing to establish what a FAPE is in the transferee district.

The prior settlement agreement between the parties does not confer “stay put” status on the elementary school IEP for several reasons. First, as discussed above, Student’s elementary school IEP had no stay put effect when he transferred to high school during Summer 2011. Second, Student cites no authority that the reservation of a non-existent stay put right in a settlement agreement imposed on District an obligation to implement the November 1, 2010 IEP, particularly in light of current federal and State regulations providing otherwise. Third, the ruling in *In Re John K.*, which was decided in 1985 under now superseded regulations, defined only when a dispute existed for stay put purposes, and does not support circumvention of current regulations making stay put inapplicable to an IEP from a prior school district in the event of a summer transfer. Fourth, the settlement agreement between the parties for the 2011-2012 school year did not place Student in any program, let alone Stanbridge, and merely provided for payment of a fixed dollar amount to Parents “for providing an educational program” to Student in exchange for a release of claims. Stanbridge is not identified, and no reference is made to tuition or transportation, and the terms of the settlement agreement do not support Student’s argument that District should pay Parents or Stanbridge for Student’s tuition and transportation costs. Lastly, Student submits no evidence that Stanbridge is a certified nonpublic school with whom District can contract, as a final placement or pending hearing, and the request that District directly fund Student’s tuition at Stanbridge independently fails for this reason.

In summary, Student has not established that he is entitled to stay put or that his November 1, 2010 IEP should form the basis for stay put. Accordingly, the motion for stay put is denied.

IT IS SO ORDERED.

DATE: October 20, 2014

/s/

ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings