

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

SAN DIEGO UNIFIED SCHOOL
DISTRICT AND INNOVATIONS
ACADEMY CHARTER SCHOOL.

OAH CASE NO. 2009060087

ORDER GRANTING MOTION FOR
STAY PUT

On June 3, 2009, attorney Margaret Adams, on behalf of Student, filed a motion for stay put against the San Diego City Unified School District (District) and Innovations Academy (Innovations). Neither the District nor Innovations filed a response.

APPLICABLE LAW

Under federal and California special education law, a special education student is entitled to remain in his or her current educational placement pending the completion of due process hearing procedures unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006); Ed. Code, §§ 48915.5, 56505, subd. (d).) The purpose of stay put is to maintain the status quo of the student’s educational program pending resolution of the due process hearing. (*Stacey G. v. Pasadena Independent School Dist.* (5th Cir. 1983) 695 F.2d 949, 953; *D. v. Ambach* (2d Cir. 1982) 694 F.2d 904, 906.) For purposes of stay put, the current educational placement is typically the placement called for in the student’s individualized educational 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.)

California Code of Regulations, title 5, section 3042, defines “educational placement” 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.

The Individuals with Disabilities Education Improvement Act of 2004 (IDEA) recognizes an exception to stay put concerning student disciplinary proceedings. (See 20 U.S.C. § 1415(j).) When a child violates a code of student conduct and school personnel seek to order a change in placement that would exceed ten school days, the local educational agency (LEA), the parent, and the relevant members of the IEP team shall determine whether the conduct was a manifestation of the child’s disability. A child’s parent may request a hearing if he or she disagrees with the manifestation determination or with any decision

regarding the disciplinary change of placement.¹ (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a) (2006).) When an appeal has been requested, the child shall remain in the interim alternative educational setting (IAES) pending the decision of the hearing officer or until the expiration of the 45 school-day IAES placement, whichever occurs first, unless the parent and the LEA agree otherwise. (20 U.S.C. §1415(k)(4)(A); see 34 C.F.R. §§ 300.532 and 300.533 (2006).) California law regarding stay put for IAES is consistent with federal law. (See Ed. Code, §56505, subd. (d).)

Additionally, the IDEA provides that school personnel may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting (IAES), another setting, or suspension, for not more than 10 school days, to the extent that the same alternatives are applied to children without disabilities. (20 U.S.C. § 1415(k)(1)(B).)

For a student who has not yet been determined eligible for special education, stay put protections apply only if the student engaged in behavior that violated a rule or code of conduct of the local educational agency (LEA), and the LEA is deemed to have had a basis of knowledge that the student suffered from a disability before the occurrence of the behavior that prompted the disciplinary action. (20 U.S.C. § 1415(k)(5)(B).) The LEA is deemed to have had a basis of knowledge that a student was a student with a disability if any of the following occurred before the behavior that caused the disciplinary action:

- (i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
- (ii) the parent of the child has requested an evaluation of the child pursuant to section 614(a)(1)(B) [20 U.S.C. § 1414(a)(1)(B)]; or
- (iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

(20 U.S.C. § 1415(k)(5)(B); 34 C.F.R. § 300.534(b) (2006).)

DISCUSSION

According to Student's complaint and motion for stay put, with an attached declaration from Student's parent, Student attends Innovations, which is a charter school. The District and Innovations have a basis of knowledge that Student has a disability that

¹ In such cases, "the State or local education agency shall arrange for an expedited hearing." (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c) (2006).) The expedited hearing shall occur within 20 school days of the date the hearing is requested. (*Id.*)

might qualify him for special education services due to his attention deficit-hyperactivity disorder (ADHD) because of the ongoing assessment of Student for initial eligibility for special education services. On October 28, 2008, Student's parent agreed to the District's assessment plan. The District convened an IEP meeting on February 24, 2009, to discuss the preliminary assessment findings. The District had not completed the assessment because it did not have an occupational therapist (OT) to complete the OT assessment. At the February 24, 2009 IEP meeting, the District preliminarily determined that Student was not eligible for special education services. At this IEP meeting, Student's parent requested an independent education evaluation (IEE). The District decided to wait until the IEE was completed before making a final determination regarding Student eligibility to receive special education services, and to date has not made a final decision.

On May 1, 2009, Innovations suspended Student for pinning down another student and putting his hands around the child's throat. On May 6, 2009, Innovations recommended that Student be expelled. On May 15, 2009, the District and Innovations held a manifestation determination IEP meeting. At the manifestation determination IEP meeting, the District and Innovations determined that Student's conduct was a manifestation of suspected disability, ADHD. On May 22, 2009, Innovations informed Student's parent that Student could not return to Innovations, and it would be proceeding with Student's expulsion. Neither the District nor Innovations filed a request for an expedited hearing to expel Student from Innovations.

In this case, the District and Innovations had a basis of knowledge of Student's disability and determined that Student's conduct that led to the expulsion recommendation was a manifestation of his potentially qualifying disability. Therefore, Student's motion for stay put is granted because the District and Innovations had a basis of knowledge of Student's disability and Student's conduct was determined at a manifestation determination meeting to be a manifestation of his disability.

ORDER

1. Student's motion for stay put is granted.
2. Student is to return to his educational placement at Innovations unless the parties agree otherwise to another educational placement.

Dated: June 12, 2009

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings