

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

NEWPORT-MESA UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007070057

**ORDER REGARDING STUDENT'S
MOTION FOR STAY PUT**

On September 21, 2007, Robyn Ginney, attorney for Student, filed a motion for “stay put.” The motion seeks an order that the District continue to contract with Autism Spectrum Consultants, Inc. (ASC), a non-public agency (NPA), for her Applied Behavior Analysis (ABA), and that the District provide an ASC in-school shadow aide for the entirety of Student’s school day. Student relies upon a recent stay put order issued by the U.S. District Court, Eastern District of California, in the case of *Joshua A. v. Rocklin Unified School District* (E.D. Cal. August 17, 2007, CV 07-01057 LEW(KJMx)) 2007 U.S. Dist. Lexis 63978), requiring the Rocklin Unified School District (Rocklin) to provide the NPA who had been providing services to Joshua A. even though Rocklin sought to terminate the NPA.

On October 1, 2007, S. Daniel Harbottle, attorney for the District, filed an opposition to the motion. The District contends that it has cause to terminate its contract with ASC and that Student’s Individualized Education Program (IEP) requires that Student receive ABA from an NPA, but not specifically from ASC. The District also contends that Student’s IEP only requires a shadow aide for part of Student’s school day, not for the entirety of the day.

On October 2, 2007, Ms. Ginney filed a reply to the opposition. On October 3, 2007, Mr. Harbottle filed a request for oral argument and leave to file a written response.¹

¹ The formal rules of evidence do not apply in special education due process matters. (Cal. Code Regs., tit. 5, § 3082, subd. (a).) Accordingly, the declarations filed by both parties were reviewed and accepted for the information contained therein. In addition, any request for supplemental briefing or oral argument is denied.

BACKGROUND

Student is in the first grade and is eligible for special education services under the category of autistic like behaviors. Student's June 13, 2006 IEP requires ABA services from an NPA but does not list ASC as the NPA. However, Student has been receiving ABA services from ASC for nearly four years and ASC participated in the June 13 IEP meeting. While Student was in kindergarten, she had a shadow aide provided by ASC for the entirety of her school day, which was 3.75 hours. Student has a twin sister and at some point her parents agreed to use one shadow aide for both students.² On July 13, 2006, Student's attorney sent a letter to the District stating that her parents agreed to a shadow aide for the entirety of her school day and listed ASC as the service provider. On April 16, 2007, another IEP was held where the District made an offer for services, but Student's parents did not consent to the IEP.

On July 2, 2007, the District sent Student a letter stating that if the matter were not resolved prior to the start of the 2007-2008 school year, it would continue to provide ABA behavioral tutoring at school by an NPA for Student's full school day as agreed to in a letter from Student's former attorney dated July 13, 2006. Student was to be in the first grade during the 2007-2008 school year. When she went to first grade, she initially had a shadow aide for her entire school day, which was 6 hours and 45 minutes, but was later reduced to 3.75 hours by the District.

On August 31, 2007, the District notified ASC that it would be terminating its master contract with ASC. On September 12, 2007, the District notified Student's parents in writing that the District would no longer contract with ASC for any reason. On September 18, 2007, the District sent Student's parents an email stating that the ASC aide would no longer be a full day aide, but would be limited to 3.75 hours per day.

The District is transitioning students serviced by ASC to Autism Spectrum Therapists (AST), who the District asserts is a highly qualified and experienced NPA. While the transition is occurring, the District is funding supervision hours for a short-term basis to allow both NPAs to meet so that the students can be transitioned as smoothly as possible.

The District filed for due process on July 2, 2007, and subsequently amended its complaint on September 12, 2007. The District contends that Student is no longer eligible for special education services and seeks to exit Student from special education services.

² Student's sister has a companion case N2007070061 that also has a motion for stay put pending that is essentially identical to the issues raised in this matter.

APPLICABLE LAW

Under federal and state 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 (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 Sch. Dist.* (5th Cir. 1983) 695 F.2d 949, 953; *Zvi D. v. Gordon Ambach* (2d Cir. 1982) 694 F.2d 904.)

For purposes of stay put, the current educational placement is typically the placement called for in the student's IEP, which has been implemented prior to the dispute arising. (*Johnson v Special Education Hearing Office* (9th Cir. 2002) 287 F.3d 1176, 1180; *Thomas v. Cincinnati Board of Education* (6th Cir. 1990) 918 F.2d 618, 625.) In California, "special educational placement means 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 student's "current educational placement" becomes unavailable, the local 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.) As a general rule, courts must refrain from enforcing contracts that violate a defined public policy as ascertained from well established laws and legal precedents and not from general considerations of public interest. (*California Union Ins. Co. v. American Diversified Sav. Bank* (9th Cir. 1991) 948 F.2d 556, 562.)

In *Van Scoy v. San Luis Coastal Unif. Sch. Dist.*, (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086) the California District Court, discussing stay put in the context of changing grade levels, recognized that because of changing circumstances the status quo cannot always be exactly replicated for the purposes of stay put. "The stay-put provision entitles the student to receive a placement that, as closely as possible, replicates the placement that existed at the time the dispute arose, taking into account the changed circumstances." (*Ibid.*)

Joshua A., *supra*, 2007 U.S. Dist. Lexis 63978, involves an appeal from a due process decision in favor of Rocklin. While the appeal was pending, the District notified the parents of Joshua A. that it would be changing from one NPA to another, but would not alter the amount or quality of services to him. In *Joshua A.*, the court concluded that the NPA was part of the then current educational program of student since the NPA participated in an IEP and was referenced in the IEP document, even though the IEP called for the services to be delivered by an NPA without specifically stating which NPA. The Court granted the request for stay put noting that Rocklin had not identified a new NPA or provided information that the new NPA would comply with the IEP or provide adequate services. The Court further found that identical services were available and that Joshua A. had not changed circumstances.

DISCUSSION

In this matter, Student seeks an Order that the District continue to contract with ASC, the NPA that has been providing services to Student for the past four years. Student also seeks an order that the District provide a shadow aide for the entirety of Student's school day.

First, citing the case of *Joshua A.*, *supra*, 2007 U.S. Dist. Lexis 63978, Student contends that the District must continue to provide ASC as Student's NPA. The District contends that it has cause to terminate the contract for all services with ASC, and in fact has terminated the contract. *Joshua A.* is distinguishable from the facts in this matter. In *Joshua A.*, Rocklin did not provide any reason or justification for the change of NPA providers and did not provide any information that the new NPA would provide the nature and quality of service that Joshua A. had been receiving. Here, the District has provided sufficient documentation that it has cause to terminate the contract with ASC. The District is not only terminating the contract for Student's service, but it is also terminating the contract for all students receiving services from ASC. The District has agreed to provide transition services between AST, the new NPA, and ASC. Further, the District has averred that AST is a reputable and duly qualified NPA that can provide the services required under Student's IEP.

Furthermore, the court in *Joshua A.* noted that there are circumstances that warrant a change in placement for purposes of stay put and cited *Van Scoy*, *supra*, 353 F.Supp.2d 1083, and *Johnson*, *supra*, 287 F.3d. 1176. Here, the NPA is no longer available to provide services to Student, not because the District has unilaterally decided to change service providers, but because the District has decided that it cannot jeopardize the education of its students by using an NPA that does not fulfill its obligations under the contract to provide a free appropriate public education (FAPE) to students in the District. To order that the District provide the services from an NPA that it has determined to be substandard seems nonsensical and would violate public policy requiring that the District ensure the highest quality education for its students. Therefore, the District has provided sufficient justification to change NPA providers.³ Accordingly, Student's request that the District continue to contract with ASC for services is denied.

Second, Student contends that the District is required to provide a full day shadow aide for Student as agreed upon in two letters dated July 13, 2006, and July 2, 2007. In the July 13, 2006 letter, Student's former attorney indicated that Student was accepting a full day shadow aide. At that time, Student was in kindergarten and had a full time school day of 3.75 hours. Student's IEP at the time called for a shadow aide for 3.75 hours per day. During the 2007-2008 school year, Student was in first grade and had increased her day to 6 hours and 45 minutes in length. The District sent Student a letter agreeing to the full time shadow aide for the entirety of Student's day knowing that her IEP called only for 3.75 hours

³ ASC and the District are currently in a contract dispute. The Office of Administrative Hearings (OAH) does not have jurisdiction to hear contract disputes. For purposes of stay put, the District has alleged sufficient information warranting a finding that ASC is no longer qualified to provide services in the District.

and that she was now going to be in the first grade for a longer day. Thus, the District agreed otherwise to provide Student with a shadow aide for the entirety of her day. Student's motion for stay put is granted as it relates to the District providing a shadow aide from an NPA for Student's full school day.

The other provisions of stay put do not appear to be in dispute. Student alleges that her program requires 10 hours per week of individual home ABA by an NPA, 8 hours per month of ABA supervision, and 12 hours per month of ABA clinic. The District has not disputed those services. Thus, stay put is ordered as listed.

ORDER

1. Student's motion for stay put requiring the District to contract with ASC is denied.
2. Student's motion for stay put requiring a full time shadow aide by an NPA is granted.
3. The District is ordered to provide Student the following services by a qualified NPA: 10 hours per week of individual home ABA, 8 hours per month of ABA supervision, and 12 hours per month of ABA clinic.

Dated: October 15, 2007

RICHARD M. CLARK
Administrative Law Judge
Special Education Division
Office of Administrative Hearings