

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

MURRIETA VALLEY UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2008080110

ORDER GRANTING MOTION FOR
STAY PUT

On July 30, 2008, attorney Adam J. Newman, on behalf of the Murrieta Valley Unified School District (District), filed a motion for stay put. On August 14, 2008, educational advocate Tim Jon Runner, on behalf of Student, filed an opposition to the District's stay put motion and a request to dismiss the District's motion. The District filed a response on August 15, 2008. On August 25, 2008, OAH issued an order that required both sides to submit further evidence regarding the District's motion. On September 2, 2008, OAH granted the District's request for an extension of time to file its response by September 4, 2008. OAH received Student's responses on September 1 and 8, 2008, and the District's on September 4, 2008.

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); 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 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.)

Neither federal nor State law indicates that a public education agency may invoke the stay put provision. No court has construed stay put to be a remedy available to school districts. In *School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 373 [105 S.Ct. 1996], the Supreme Court stated that the stay put provision is located in a section of the Education of the Handicapped Act (the predecessor statute to the Individuals with Disabilities Education Act (IDEA)) delineating procedural safeguards largely for the benefit

of parents and their children and that the Court doubted that this provision “would authorize a court to order parents to leave their child in a particular placement.” The Supreme Court held that parental violation of the stay put provision does not operate to preclude reimbursement for a unilateral placement by the parents if the school district’s proffered placement is ultimately found to be inappropriate. (*Id.*, 471 U.S. at 370, 372.) The Court stated that parents are not required to leave their child in what may turn out to be an inappropriate placement or risk waiving reimbursement. (*Id.*, 471 U.S. at 372.) In sum, there is no authority for an order requiring a student’s parents to keep their child at a particular placement.

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.

Under stay put, “it is not intended that a child with disabilities remain in a specific grade or class pending appeal if he or she would be eligible to proceed to the next grade and the corresponding classroom within that grade.” (Fed.Reg., Vol. 64, No. 48, p. 12616, Comment on § 300.514.) In most instances, progression to the next grade adheres to the status quo for purposes of stay put. (See *Beth B. v. Van Clay* (N.D. Ill. 2000) 126 F. Supp.2d 532, 534.) Notably, in *Van Scoy v. San Luis Coastal Unified Sch. Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, the Court explained as follows:

Courts have recognized, however, that because of changing circumstances the status quo cannot always be exactly replicated for the purposes of stay put. *Ms. S. ex rel. G. v. Vashon Island School District*, 337 F.3d 1115, 1133-35 (9th Cir. 2003). In the present case, the circumstances have changed because [the student] has moved from kindergarten into first grade, which includes additional time in the classroom. Certainly the purpose of the stay-put provision is not that students will be kept in the same grade during the pendency of the dispute. 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.

(*Van Scoy, supra*, 353 F.Supp.2d at p. 1086.)

DISCUSSION

Student is five years old who is eligible for special education services under the categories of mental retardation and other health impaired. The parties do not dispute that the May 2, 2007 IEP is Student’s last agreed upon and implemented educational program. Pursuant to the May 2, 2007 IEP, Student attended a District preschool at E. Hale Curran Elementary for the 2007-2008 school year (SY), where he was in a special day class (SDC) for special education students, with typical developing peers present in the SDC preschool

for a portion of the school day. The District also provided Student with speech and language, occupational therapy and adaptive physical education services. Because of the dispute, Student is not presently attending an educational program.

Student requests that OAH deny the District's stay put motion because only Student, not the District, may file a stay put motion. Student's position is only partially correct. The District may not force Student to attend a particular program through a stay put motion during the pendency of the due process hearing process. However, IDEA does not prohibit the District from filing a stay put motion to obtain a determination from OAH regarding Student's stay put placement because of the parties' dispute. Otherwise, the District is placed in an untenable position of not knowing what constitutes Student's stay put placement because the Student did not file a stay put motion. However, as stated previously, even if OAH grants the District's stay put motion, OAH cannot order that Student attend the stay put placement.

In this case, Parents and the District met on May 22 and June 9, 2008, to develop Student's IEP for the next school year. While the parties reached an agreement on Student's goals and related services, Parents did not agree to the District's proposed placement at a District kindergarten-first grade SDC at Antelope Hills Elementary. Instead, Parents wanted Student to attend the District kindergarten through second grade SDC at Tovashal Elementary. At the IEP meeting, Parents and the District did not dispute that Student should be in a kindergarten classroom. Rather, the parties disputed which program and school Student would attend.¹

Because Student is progressing from preschool to kindergarten, the stay put placement must provide Student a program that as closely as possible replicates his last agreed upon and implemented placement at his SDC preschool program.

The District's motion for stay put and response for more information includes declarations from District personnel regarding Student's SDC preschool program at Curran and the SDC kindergarten programs at Antelope Hills and Tovashal. During SY 2007-2008, the Curran SDC preschool program was a highly structured program in a self-contained classroom with 12 to 15 students, eight to 12 who were special needs children. The staff to student ratio was one staff member to three students. The Curran program focused on teaching students skills needed to progress to attend an educational program that more closely replicated a regular education classroom.

The primary distinction between the District's SDC kindergarten program at Antelope Hills and Tovashal is the level of services for and expectations of the students. The Antelope

¹ Student contends for the first time in his response for further information that Parents did not agree at the IEP meeting that Student should progress to kindergarten and that Student should remain in preschool. Student's position is contradicted by the IEP notes attached to the District's original stay put motion. Additionally, Student's response does not include any evidence to support this contention, such as a declaration from Parents that they did not wish that Student attend kindergarten.

Hills program is also a highly structured program, designed for students with moderate-to-severe special education needs who still need extensive interventions to learn skills to participate in a regular education classroom. The Tovashal program focuses more on academics and does not offer the same level of support and structured learning as Antelope Hills. The Antelope Hills classroom has 12 special needs children, with a ratio of no less than three staff persons to one student. In contrast, the Tovashal classroom has two staff members for 12 students, and is designed for children with mild-to-moderate special education needs. Therefore, the District established that its SDC program at Antelope Hills as closely as possible, replicates the last agreed-upon and implemented placement that existed at the time the dispute arose, the Curran SDC preschool program, taking into account the changed circumstances.

ORDER

The District's motion for stay put is granted in so far that its SDC program at Antelope Hills is Student's stay put placement. If Parents want Student to attend a District placement during the pendency of this dispute, that placement is the Antelope Hills SDC. However, nothing in this Order requires Student to attend this program.

Dated: September 9, 2008



PETER PAUL CASTILLO

Administrative Law Judge

Office of Administrative Hearings