

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. N2007030060

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

On October 2, 2007, Stefan Hanson, attorney for Student, filed a motion for “stay put.” The motion seeks an order that the District continue to provide Student Applied Behavior Analysis (ABA) services from Autism Spectrum Consultants, Inc. (ASC), a non-public agency (NPA). On October 5, 2007, John Hayashida, attorney for the District, filed an opposition to the motion. The opposition asserts that the District no longer contracts with ASC because its services are inadequate and the District will provide Student’s ABA services from Autism Spectrum Therapies (AST), a different duly qualified NPA. On October 9, 2007, Mr. Hanson filed a reply to the opposition.

BACKGROUND

Student is eligible for special education services under the category of autistic like behaviors. Student’s May 11, 2004 Individualized Education Program (IEP) requires ABA services from an NPA but does not list ASC as the NPA, even though the comment section of the May 11 IEP shows that ASC attended and notes that the ABA services would be provided by ASC. Student had been receiving ABA services from ASC prior to the May 2004 IEP.

On February 14, 2007, another IEP was held and an offer for services was made by the District. The offer included ABA services but did not specify the name of the NPA that would be providing services. Student’s parents signed the IEP as “in attendance only” and took the IEP to review. On March 4, 2007, Student’s attorney sent the District a letter agreeing to certain services contained in the IEP and indicating that Student expected “previously consented to non-conflicting services” to continue. On March 20, 2007, Cynthia

Yount, attorney for District, sent a reply letter to Mr. Hanson acknowledging the items that were consented to but served prior written notice that the District disagreed with the characterization of the “previously consented to non-conflicting services.”

On August 23, 2007, the District notified Student’s parents in writing that it would no longer contract with ASC for any reason. The District also notified parents that it would provide supervision hours to transition Student and that there would be no change in level of services provided to Student. On September 6 and 12, the District sent a letter to Student’s parents discussing the change of NPA providers and assuring Student that the new NPA was well respected in the community.

In addition, 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. Student has not attended school since September 4, 2007.

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.)

A student is not entitled to the identical services pursuant to his or her IEP when those services are no longer possible or practicable. (*Ms. S. v. Vashon Island* (9th Cir. 2003) 337 F.3d 1115, 1133-1134.) When a student’s “current educational placement” becomes unavailable, the local educational 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 Unified School District. 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, but acknowledged there are circumstances that warrant a change in placement for stay put purposes.

DISCUSSION

In this matter, Student seeks an Order requiring the District to continue to contract with ASC, the NPA that has been providing services to Student for the past four years. 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.

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 his 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. The District is terminating ASC as a service provider for all students in the District, not just Student. The District will provide transition services between ASC and AST, the new NPA. Further, the District has averred that AST is a reputable and duly qualified NPA that can provide the services required under Student’s IEP.

As discussed above, 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 because the District has decided to use the services of a different NPA for all students. Therefore, it is not possible or practicable to provide the identical service provider under the facts of this case. (*Ms. S. v. Vashon Island, supra*, 337 F.3d at 1133-1134.) Therefore, for stay put purposes, the District has provided sufficient justification to change NPA providers.¹ Accordingly, Student's request that the District continue to contract with ASC for services is denied.

ORDER

Student's motion for stay put requiring the District to contract with ASC is denied.

Dated: October 24, 2007

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

¹ ASC and the District are currently in a contract dispute. (See Ed. Code, § 56366, subd. (a)(4).) 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 within the District.