

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

NEWPORT-MESA UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2009020296

ORDER DENYING MOTION FOR
STAY PUT

On February 10, 2009, Student filed a motion for stay put. On February 13, 2009, District filed an opposition to Student's stay put motion, and Student filed a reply. On February 17, 2009, District filed a response to Student's reply. District filed a supplemental brief on March 9, 2009.

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, referred to as stay put. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006); Ed. Code, §§ 48915.5, 56505, subd. (d).) (or as a separate sentence: This is referred to as stay put.) 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 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.

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.)

Case law recognizes an exception to stay put under circumstances when a program is closed due to purely budgetary reasons. If the student's current educational placement becomes unavailable due to this type of school closure, the LEA is not required to maintain the student in the closed school, but instead must provide the student with a similar placement which closely replicates the last agreed-upon and implemented placement. Courts created the school closure exception to enable school districts to manage their costs and to allow districts flexibility in administering their programs. (See *McKenzie v. Smith* (D.C. Cir. 1985) 771 F.2d 1527, 1533; *Knight v. District of Columbia* (D.C. Cir. 1989) 877 F.2d 1025, 1028; *Weil v. Board of Elementary & Secondary Education* (5th Cir. 1991) 931 F.2d 1069, 1072-1073; see also *Concerned Parents & Citizens for Continuing Education at Malcolm X (PS 79) v. New York City Board of Education* (2d Cir. 1980) 629 F.2d 751, 754, cert. den. (1981) 449 U.S. 1078 [101 S.Ct. 858, 66 L.Ed.2d 801]; *Tilton v. Jefferson County Bd. of Education* (6th Cir. 1983) 705 F.2d 800, 805, cert. den. (1984) 465 U.S. 1006 [104 S.Ct. 998, 79 L.Ed.2d 231].)

Notably, in one California case regarding a student's advancement from kindergarten to first grade, 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)...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 v. San Luis Coastal Unified Sch. Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086.)

DISCUSSION

The parties dispute whether District must use the same nonpublic agency (NPA) provider that it previously used to provide applied behavioral analysis (ABA) services to Student during the pendency of the due process hearing.¹ In January 2009, District cancelled the individual services agreement (ISA) with the current NPA providing ABA to Student, Autism Intervention Resources (AIR). District discontinued the ISA because AIR failed to properly implement the relevant portions of Student's IEP beginning as early as October 2008. District transitioned Student to another State-certified NPA provider called Autism Spectrum Therapies (AST). District developed and implemented a transition plan to minimize the transition's impact on Student. District is in the process of canceling its contract with AIR for all students who have been receiving services from the company.

As discussed above, the general rule is that a student must remain in his or her then-present educational placement during the pendency of a due process hearing. However, exceptions do apply, e.g., when a school closes or when a child advances from one grade to the next during a due process hearing. The present case is similar to a school closure because the District is canceling its contract with AIR for all students, not just Student. Moreover, District has implemented a transition plan to minimize the impact on Student. Accordingly, under the unique facts and circumstances of this case, District is entitled to change Student's NPA ABA provider from AIR to another NPA ABA provider such as AST.

ORDER

Student's request for a stay put order requiring the District to utilize AIR is denied.

Dated: March 9, 2009

/s/

TREVOR SKARDA
Administrative Law Judge
Office of Administrative Hearings

¹ There is no dispute about the level of services or whether District must provide services from an NPA. The only dispute is whether the District must contract with the previous NPA provider.