

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

MONTECITO UNION SCHOOL
DISTRICT AND SANTA BARBARA
SCHOOL DISTRICT.

OAH CASE NO. 2010110031

ORDER DENYING IN PART MOTION
FOR STAY PUT; ORDER REQUIRING
FURTHER INFORMATION
REGARDING STUDENT'S MOTION
FOR STAY PUT

On October 29, 2010, Student filed a motion for stay put against the Montecito Union School District (MUSD) and the Santa Barbara School District (SBSD). In the motion, Student objects to the Districts' attempt to transition him to seventh grade within the SBSD and requests to be retained in sixth grade within the MUSD, and that the MUSD continue to implement Student's last agreed-upon and implemented educational program based on the previous Office of Administrative Hearings (OAH) decision between Student and MUSD.

On November 3, 2010, the Districts filed a joint opposition. The Districts contend that Student's stay put is the April 2008 IEP, and the previous OAH decision, and that he should transition to seventh grade within the SBSD. Student filed a reply on November 4, 2010.

APPLICABLE LAW

Until due process hearing procedures are complete, a special education student is entitled to remain in his or her current educational placement, unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006)¹; Ed. Code, §§ 48915.5, 56505, subd. (d).) This is referred to as "stay put." 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.)

¹ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

In California, “specific educational placement” is defined 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. (Cal. Code Regs., tit. 5, § 3042.)

The “current educational placement” for the purpose of stay put may also include services administered by the same non-public agency (NPA) if the most recently implemented IEP required the District to provide the services with a specific NPA. (*Joshua A. v. Rocklin Unified Sch. Dist.* (9th Cir. 2009) 559 F.3d 1036.)

Courts have recognized, however, that because of changing circumstances, the status quo cannot always be replicated exactly for purposes of stay put. (*Ms. S ex rel. G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35.) Progression to the next grade maintains the status quo for purposes of stay put. (*Van Scoy v. San Luis Coastal Unified Sch. Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086 (*Van Scoy*) [“stay put” placement was advancement to next grade]; see also *Beth B. v. Van Clay* (N.D. Ill. 2000) 126 F. Supp.2d 532, 534; Fed.Reg., Vol. 64, No. 48, p. 12616, Comment on § 300.514 [discussing grade advancement for a child with a disability].)

In *Ms. S. ex rel G v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1134, the Ninth Circuit Court of Appeals addressed the question of a school district’s obligation to provide stay put when a student transfers from another school district and the parent files a due process complaint challenging the services offered by the receiving school district. The *Vashon* opinion ruled that when a dispute arises under the IDEA involving a transfer student, the new district must implement the last agreed-upon IEP to the extent possible. If it is not possible for the new district to implement in full the student’s last agreed-upon IEP, the new district must adopt a plan that approximates the student’s old IEP as closely as possible. (*Id.* at 1134.)

Subsequently, the law was revised, effective July 1, 2005, concerning placement for students who transfer to a new school district, as follows: When a special education student transfers to a new school district in the same academic year, the new district must adopt an interim program that approximates the student’s old IEP as closely as possible until the old IEP is adopted or a new IEP is developed. (20 U.S.C. § 1414(d)(2)(C)(i)(1); 34 C.F.R. § 300.323(e).) California Education Code section 56325, subdivision (a)(1), mirrors Title 20 United States Code section 1414(d)(2)(C)(i)(1), with the additional provision that, for a student who transfers into a district not operating under the same SELPA, the local educational agency (LEA) shall provide the interim program “for a period not to exceed 30 days,” by which time the LEA shall adopt the previously approved IEP or shall develop, adopt, and implement a new IEP that is consistent with federal and state law.

These rights of a transferring student only apply in the case of a transfer within the same academic year that he was in the previous district. There are no federal or state statutory provisions addressing the situation where a student transfers between school years,

such as during summer vacation. In the official comments to the 2006 Federal Regulations, the United States Department of Education addressed whether it needed to clarify the Regulations regarding the responsibilities of a new school district for a child with a disability who transferred during summer. The Department of Education stated that the IDEA, (20 U.S.C. § 1414(d)(2)(a)), is clear that each school district must have an IEP in place for a child at the beginning of the school year. Therefore, the new district must have a means for ensuring that an IEP is in effect at the beginning of the school year. (71 Fed. Reg. 46682 (August 14, 2006).)

Federal and state courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. (*Allen v. McCurry* (1980) 449 U.S. 90, 94 [101 S.Ct. 411, 66 L.Ed.2d 308]; *Levy v. Cohen* (1977) 19 Cal.3d 165, 171 [collateral estoppel requires that the issue presented for adjudication be the same one that was decided in the prior action, that there be a final judgment on the merits in the prior action, and that the party against whom the plea is asserted was a party to the prior action]; see 7 Witkin, California Procedure (4th Ed.), Judgment § 280 et seq.) Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their agents from re-litigating issues that were or could have been raised in that action. (*Allen, supra*, 449 U.S. at p. 94.)

Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude re-litigation of the issue in a suit on a different cause of action involving a party to the first case. (*Ibid.*; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341; see also *Migra v. Warren City Sch. Dist. Bd. of Ed.* (1984) 465 U.S. 75, 77, n. 1 [104 S.Ct. 892, 79 L.Ed.2d 56] [federal courts use the term “issue preclusion” to describe the doctrine of collateral estoppel].) The doctrines of res judicata and collateral estoppel serve many purposes, including relieving parties of the cost and vexation of multiple lawsuits, conserving judicial resources, and, by preventing inconsistent decisions, encouraging reliance on adjudication. (*Allen, supra*, 449 U.S. at p. 94; see *University of Tennessee v. Elliott* (1986) 478 U.S. 788, 798 [106 S.Ct. 3220, 92 L.Ed.2d 635].) While collateral estoppel and res judicata are judicial doctrines, they are also applied to determinations made in administrative settings. (See *Pacific Lumber Co. v. State Resources Control Board* (2006) 37 Cal.4th 921, 944, citing *People v. Sims* (1982) 32 Cal.3d 468, 479; *Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control* (1961) 55 Cal.2d 728, 732.)

In *Nev. v. United States* (1983) 463 U.S. 110 [103 S.Ct. 2906, 77 L.Ed.2d 509], the United States Supreme Court stated that “the doctrine of res judicata [claim preclusion or issue preclusion] provides that when a final judgment has been entered on the merits of a case, ‘[it] is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.’” (*Id.* at pp. 129-130 [citation omitted].) In other words, res judicata and collateral estoppel also preclude the use of evidence that was admitted, or could have been offered, at a prior proceeding.

DISCUSSION

Student requests an order that he remain in sixth grade within the MUSD and that his last agreed-upon educational program is that as set forth in *Student v. Montecito Union Elementary Sch. Dist. and Santa Barbara County Educ. Ofc.* (2009) Cal.Offc.Admin.Hrngs. Case No. 2009050484 (*Decision*). MUSD is a kindergarten through sixth grade school district and its pupils enter SBSB for seventh through twelfth grade. Student asserts that because a dispute exists between Student and the Districts regarding whether he should transition to seventh grade and the services SBSB should provide, especially as SBSB's offer does not include services from Inclusive Education and Community Partnership (IECP), a non-public agency, and therefore he should remain in sixth grade within MUSD. The Districts contend that the *Decision* does not constitute Student's last agreed-upon educational program because the *Decision* only found procedural violations in MUSD's April 10 and 20, 2009 individualized educational program (IEP) offer, and Student's stay put request was denied by the United States District Court (District Court).

Student and MUSD participated in a due process hearing in 2009. For purposes of Student's present motion for stay put, the central issues in the prior hearing was whether MUSD's violated Student's procedural rights by predetermining its April 2009 IEP offer, and if MUSD's offer to provide instructional aide services by MUSD or Santa Barbara County Office of Education staff and not IECP staff denied Student a free appropriate public education (FAPE). The *Decision* found that the District predetermined its April 2009 IEP offer, and did not make any finding whether MUSD's April 2009 IEP failed to substantively offer Student a FAPE. The *Decision* ordered as prospective placement, if Parents enrolled in a MUSD elementary school, the goals, services and placement in the April 2009 IEP, modified with IECP providing specialized academic instruction and the supervision of this instruction. The *Decision* stated that this would constitute Student's stay put placement.

MUSD appealed the *Decision* to District Court, which has not issued a ruling whether to sustain or overturn the *Decision*. SBSB is not a party to that appeal. On appeal, Student filed a motion for stay put that sought an order from the District Court that for the 2010-2011 school year (SY) that Student should repeat sixth grade within the MUSD pursuant to the April 2009 IEP, as modified by the *Decision*, because of the dispute regarding Student's IEP for SY 2010-2011. The District Court denied Student's motion for stay put because Student failed to present adequate evidence why he should not progress to seventh grade. The District Court relied on *Van Scoy* in finding that Student's natural progression would be to advance from sixth to seventh grade. While the District Court discussed whether the April 2009 or April 2008 IEP was Student's last agreed-upon and implemented educational program pursuant to *L.M. v. Capistrano Unified Sch. Dist.* (9th Cir. 2009) 556 F.3d 900, the District Court's discussion is *dicta* because the District Court already decided that pursuant to *Van Scoy* that Student should leave MUSD and progress into seventh grade within the SBSB.

Because the District Court denied Student's motion for stay put, its ruling is binding on OAH as collateral estoppel on the issue that Student should progress to seventh grade pursuant

to *Van Scoy*. However, the District Court's decision is not binding regarding what is Student's educational program for seventh grade because SBSB was not a party to the matter before the District Court and therefore the District Court did not have jurisdiction to order a particular educational program for Student at SBSB.

In Student's motion for stay put and reply and SBSB's opposition, the parties do not discuss Student's educational program after the issuance of the *Decision* and if he attended a MUSD school. Additionally, the parties do not discuss California Education Code section 56325, and its implication regarding Student's transfer to a new school district. Accordingly, Student's motion for stay put against MUSD is denied, and Student and SBSB are ordered to provide additional information.

ORDER

1. Student's motion for stay put against MUSD is denied.
2. Student and SBSB shall provide further information to OAH regarding whether Student enrolled in a MUSD elementary school after the *Decision*, whether MUSD provided Student the educational program required by the *Decision*, and the applicability of California Education Code section 56325, regarding Student's transfer to a new school district and stay put.
3. Student and SBSB shall provide such information within five business days from the service of this Order.
4. Upon receipt of such further information, OAH shall rule upon Student's pending motion for stay put against SBSB.

Dated: November 8, 2010

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings