

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN FRANCISCO UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2011060361

ORDER GRANTING MOTION FOR
STAY PUT

On July 14, 2011, Student filed a motion for stay put with the Office of Administrative Hearings (OAH), asking that OAH order the District to continue Student's placement at a nonpublic school (NPS), Erikson School (Erikson). On July 19, 2011, San Francisco Unified School District (District) sent an opposition to the motion for stay put to Student's attorney.¹ On July 22, 2011, Student filed a reply to the District's opposition, and the District responded to this on the same date.

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)²; Ed. Code, § 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 Student's attorney represents several Erikson Students and filed stay put motions on behalf of all of them. A single law firm represents the District in each of these cases and staff there faxed similar, but not identical oppositions to these motions to OAH on behalf of their client. When OAH discovered that Student's file did not contain the District's opposition, staff telephoned the District's law firm, and a new copy of the opposition was then faxed to OAH on July 22, 2011.

² 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.) If a student receives services from a nonpublic agency (NPA), or a nonpublic school (NPS) that placement may be a stay put placement, even if a school district has terminated its contract with the NPA or NPS. (*Joshua A. v. Rocklin Unified Sch. Dist.* (E.D. Cal. August 20, 2007) 2007 WL 238968, ** 2-4, affd. *Joshua A. v. Rocklin Unified Sch. Dist.* (9th Cir. 2009) 559 F.3d 1036 (hereafter referred to as *Joshua A.*)) However, if a school district terminates its contract with an NPA or NPS and can establish that it had good cause to do so, such as malfeasance by the NPA or NPS, stay put may not apply. (*Student v. Newport Mesa School District* (2009) Cal.Ofc.Admin.Hrngs.Case No. 2009020296; *Newport Mesa School District* (2007) Cal.Ofc.Admin.Hrngs. Case No. 2007070057).

It does not violate stay put if a school is closed for budget reasons and the child is provided a comparable program in another location. (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].)

Education Code section 56366.4, subdivision (a)(5)(B), states that a NPA or NPS can lose state certification from the California Department of Education (CDE) if it fails to notify CDE within 45 days of a "Major modification or relocation of facilities." In other words, there is no provision in the Education Code for the decertification of an NPA or NPS that moves from one location to another, unless they entity fails to notify the CDE of the move.

DISCUSSION

Student is 17 years of age and is eligible for special education under the category of emotional disturbance. Student was moved to Erikson in March 2011. It is unclear where he previously attended school, or whether he previously attended another NPS or a public school. An IEP team meeting was held shortly after his move to Erickson, and his last agreed-upon and implemented IEP was developed in March 2011. Another IEP team meeting was then held on May 19, 2011, to review how Student had transitioned to Erikson.

On May 9, 2011, the District sent Student's mother (Parent) a letter informing her that the District would not be renewing its contract with Erikson School. However, the May 19, 2011 IEP addendum, states that the District is offering Student continuing placement at Erikson. The notes from the IEP team meeting on May 19 reflect lengthy discussion about Student's adjustment to placement at Erikson, and it is clear that the IEP team considered the Erikson placement to be one that met his needs, and afforded him educational benefit.

The District's opposition to Student's stay put motion is multi-faceted. First, the District argues that the placement section of the IEP calls for Student to be placed at an NPS under contract with the special education local area plan (SELPA), and Erikson is not specifically mentioned in that section of the IEP. However, in another part of the IEP, Student's "school of residence" is described as "Nps – Erikson." Further, as previously discussed, the notes section from the May 19, 2011 IEP team meeting, states that "[t]he District continues to offer placement at Erikson NPS."

The District then claims that it decided not to renew its contract with Erikson "due to space and budgetary concerns." The District had been allowing Erikson to use an unoccupied former middle school as facilities for the NPS. However, it had decided to let a charter school occupy the premises. This was when the District sent the May 2011 letter to Parent. Apparently, however, there were ongoing negotiations between the District and Erikson after that date, and it does not appear that a final decision was made to terminate the Erikson contract until the end of June 2011. This situation does not replicate the closing of a public school, which might justify a change of placement notwithstanding stay put. Rather, the termination of the District's contract with Erikson at the end of June is similar to the situation in *Joshua A.*, in which the school district decided to replace the NPA that had previously been providing aide services to a child with a disability with another unnamed NPA. The Court held that stay put applied, and the district was required to continue using the first NPA.

The District then argues that it terminated the contract with Erikson "for cause." On July 11, 2011, a District administrator filed a complaint with the CDE. The administrator filed her complaint with the CDE only after the District had formally terminated its contract with Erikson. Apparently this administrator had visited the middle school site many times from January through June 2011, because she was locating facilities for charter schools. There is a declaration from this administrator describing numerous observations she had which led her to believe students were not being properly supervised or instructed at Erikson. Further she reports that she was told by a charter school employee that he had observed a student on the Erikson campus appearing to roll a marijuana joint and smoke it.

The District's administrator claims that she complained to the District's special education director on numerous occasions between January and June 2011 about her observations and concerns about Erikson. However, in the letter the District's special education director sent to Erikson terminating the contract, dated June 30, 2011, the special education director states that the contract is being terminated "Due to the current budget crisis and the District's growing need for facility space. . . ." The letter concludes by saying "SFUSD appreciates your hard work and service to SFUSD students; we wish you great success and appreciate your cooperation during this challenging time." The District did not provide sufficient information to establish that it had "good cause" to terminate the contract with Erikson, and it did not establish that Erikson has been decertified or otherwise disciplined by the CDE.

The District contends that Erikson has “closed,” and is no longer certified because it has moved to another location. However, the Education Code does not provide for the automatic decertification of a NPA or NPS because it changes the location of its facilities. Rather, the NPS continues to be certified, although certain updated information and clearances must then be provided to the CDE concerning the new location. Erikson’s executive director has provided a declaration that these requirements are being met. Further, according to the CDE’s website, Erikson remains a certified NPS with certification through the end of December 2011.³ Accordingly, unless Erikson is unable to open at its new facilities, it shall be Student’s stay put placement, and that is where he shall attend school, pending further order of OAH, or a mutual agreement by the parties for Student to attend another NPS, or public school.

ORDER

1. Student’s stay put placement is Erikson School, unless Erikson cannot timely begin operations or loses its certification from the CDE.
2. Should Erikson cease to be available as an educational placement, the District shall convene an IEP team meeting within five days after receiving notice that Erikson is unavailable for placement of Student, and the IEP team shall find another placement.

IT IS SO ORDERED.

Dated: August 5, 2011

/s/

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings

³ The Administrative Law Judge takes official notice of this information that was obtained from the CDE’s website.