

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. 2011070062

ORDER GRANTING REQUEST FOR
RECONSIDERATION AND
GRANTING MOTION FOR STAY PUT

On July 27, 2011, the undersigned administrative law judge issued an order that denied Student's motion for stay put against San Francisco Unified School District (District) because Student failed to show that the last agreed-upon and implemented educational program at the Erickson School, a non-public school (NPS), was certified to operate by the California Department of Education (CDE). On August 16, 2011, Student filed a motion for reconsideration as the Erickson School had received its certificate to operate from CDE on August 9, 2011. On August 19, 2011, District filed an opposition to Student's motion. On August 23, 2011, Student filed a reply to District's opposition.

APPLICABLE LAW

The Office of Administrative Hearings (OAH) will generally reconsider a ruling upon a showing of new or different facts, circumstances, or law justifying reconsideration, when the party seeks reconsideration within a reasonable period of time. (See, e.g., Gov. Code, § 11521; Code Civ. Proc., § 1008.) The party seeking reconsideration may also be required to provide an explanation for its failure to previously provide the different facts, circumstances or law. (See *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1199-1200.)

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); 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.)

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.)

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].)

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 [“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].)

DISCUSSION

Reconsideration

Student alleges new facts, circumstances, or law in support of the request reconsideration because he establishes that the Erickson School received its certification to operate from CDE on August 9, 2011. OAH’s order on July 27, 2011, denied Student’s motion for stay put, even though the Erickson School was his last agreed-upon educational placement, because at that time the CDE had not approved Erickson’s relocation. Therefore, since the Erickson School’s certification was deficient on July 27, 2011, and Student now shows new evidence that Erickson School has obtained a valid CDE certification, Student’s motion for reconsideration is granted.

Stay Put

Student has been attending Erickson School pursuant to his IEP beginning in April 2009 and continuing through the end of the 2010-2011 school year, including the extended school year. Student’s annual IEP dated January 13, 2011, established that Student’s placement for a free appropriate public education (FAPE) is at the Erickson School. District terminated their master contract with Erickson School effective July 20, 2011, due to budget constraints, concerns over the alleged quality of Erickson School’s program, and in order to use the site for a new charter school.

Prior to terminating its contract with Erickson School, District did not hold an IEP team meeting to address Student's placement or make an alternative offer of placement and services to Student specifying any proposed placement change from his currently implemented IEP. On July 1, 2011, District notified Student by letter that his placement for the 2011-2012 school year would be at the RISE Institute (RISE), a certified NPS, that District determined to meet Student's needs, and that District would convene an IEP within 30 days of Student's placement at RISE.

It does not violate stay put if a school is closed for budgetary reasons and the child is provided a comparable program in another location. School closure for budgetary concerns is inapplicable in this case since Erickson is a NPS and not a public school run by the school district. Student has shown that the Erickson has not closed and is presently approved by CDE as a certified NPS.

Student's IEP shows that there are sufficient references to Erickson School to establish that Student's last agreed upon NPS placement is the Erickson School, and not a generic NPS. Whether the Erickson School remains an appropriate placement for Student is something to be addressed as a substantive issue at a due process hearing. For purposes of stay put, the issue is whether the status quo can be replicated by maintaining Student in his current placement at Erickson School until the dispute over his placement is resolved. The evidence established that Erickson School has complied with the CDE certification requirements for a NPS. Therefore, the status quo can be replicated at Erickson School. Accordingly, Student's motion for stay put to attend the Erickson School pursuant to his January 13, 2011 IEP is granted.

ORDER

1. Student's request for reconsideration is granted.
2. Student's motion for stay put is granted as his last agreed-upon and implemented educational program is the January 13, 2011 IEP at the Erickson School.

Dated: August 29, 2011

/s/

TROY K. TAIRA
Administrative Law Judge
Office of Administrative Hearings