

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

GUARDIAN ON BEHALF OF STUDENT,

v.

SAN FRANCISCO UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2011070973

ORDER DENYING MOTION FOR
STAY PUT

On July 26, 2011, Student filed a motion for stay put against the San Francisco Unified School District (District), requesting an order that Student attend the Erikson School, a non-public school (NPS), as his last agreed-upon and implemented educational program. On July 29, 2011, the District filed an opposition contending that the Erikson School is not Student's stay put placement because it does not have a contract with either the District or Special Education Local Planning Area (SELPA) for the 2011-2012 school year (SY) and also because the Erikson School is not presently certified by the California Department of Education (CDE) to accept students at its new location.

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); 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].)

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.)

DISCUSSION

The parties do not dispute that Student's last agreed-upon and implemented educational program is his December 1, 2010 IEP. The parties dispute whether the educational placement in the November 2010 IEP is specifically the Erikson School, Student's position, or merely an NPS that has a contract with either the District or SELPA, District's contention. The parties' disagreement regarding Student's educational placement for SY 2011-2012 began when the District terminated the Erikson School's lease to operate at a District school site and the District's and SELPA's later decision not to enter into a contract with the Erikson School for SY 2011-2012 for it to provide services to District students. For SY 2011-2012, the District offered Student placement at the San Paths Academy, an NPS that has a contract with the District.

The issue whether Student's last agreed-upon and implemented educational placement is the Erikson School or merely an NPS with a contract with either District or SELPA requires an analysis of the December 1, 2010 IEP. A review of the December 1, 2010 IEP establishes that while the District attempted to limit the offered NPS to just an NPS with a contract with either District or SELPA, that the minutes of the IEP meeting indicate that the Erikson School was a component of the District's offer designed to specifically meet his unique needs to provide a free appropriate public education. Therefore, the District's attempt to change Student's NPS constitutes a change in Student's program. (*Joshua A. v. Rocklin Unified Sch. Dist.* (E.D. Cal. August 20, 2007) 2007 WL 2389868, ** 2-4, affd. *Joshua A. v. Rocklin Unified Sch. Dist.* (9th Cir. 2009) 559 F.3d 1036; *Student v. Fullerton Elementary School District* (2011) Cal.Ofc.Admin.Hrngs. Case No. 2011010214; *Student v. Jefferson Elementary School District* (2007) Cal.Ofc.Admin.Hrngs. Case No. 2007020606.)

Even with the Erikson School being Student's last agreed-upon and implemented educational placement, the Erikson School is not automatically Student's stay put placement if his attendance at the Erikson School is no longer possible or practicable. A review of the parties' briefs and attached declarations and documents does not establish that the Erikson School is presently certified by CDE. Student did not present any evidence that the Erikson

School will be available to accept students at the start of SY 2011-2012. In contrast, the District submitted documentation that established that the Erikson School is not presently certified by CDE at its present location. Therefore, Student is not entitled to a stay put order for the Erikson school. Additionally, Student presented no evidence to counter the District's contention that the San Paths Academy is a comparable program.¹ Accordingly, while the Erikson School is Student's last agreed-upon and implemented educational program, it cannot presently be Student's stay put placement because it is not currently certified by CDE to operate at its new location.

ORDER

Student's motion for stay put is denied.

Dated: August 2, 2011

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings

¹ Nothing in this order prevents Student from challenging at hearing the District's offer of the San Paths Academy as not being appropriate to meet Student's unique needs or whether the District violated Student's procedural rights in the manner in which the District offered the San Paths Academy.