

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

ORANGE UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2012060544

ORDER DENYING MOTION FOR
STAY PUT

On June 11, 2012, Student filed a Motion for stay put (Motion). On June 14, District filed an opposition to the Motion. Student filed a response to District's opposition on June 15, 2012.

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, § 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.) However, if a student's placement in a program was intended only to be a temporary placement, such placement does not provide the basis for a student's "stay put" placement. (*Verhoeven v. Brunswick Sch. Comm.* (1st Cir. 1999) 207 F.3d 1, 7-8; *Leonard v. McKenzie* (D.C. Cir. 1989) 869 F.2d 1558, 1563-64.)

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.)

A student's special education placement set forth in a settlement agreement reached by the parties may constitute the student's current educational placement, and may be found to be the student's stay put placement in a subsequent dispute. (*Casey K. v. St. Anne Comty.*

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

High Sch. Dist. No. 302 (7th Cir. 2005) 400 F.3d 508, 513; *Doe by Doe v. Independent Sch. Dist. No. 9* (N.D.Okla. 1996) 938 F.Supp. 758, 761; see also, *Jacobsen v. District of Columbia Bd. of Education* (D.D.C. 1983) 564 F.Supp. 166, 171-173.)

Courts in other cases have determined, based on the facts in those cases, that a student's placement, as described in a settlement agreement, is not the student's current educational placement and is not the student's stay put placement. (*Zvi D. v. Ambach, supra*, 694 F.2d at p. 908; see also, *Verhoeven v. Brunswick Sch. Comm.* (1st Cir. 1999) 207 F.3d 1, 9-10 [dicta]; *Leonard v. McKenzie* (D.C. Cir. 1989) 869 F.2d 1558, 1564 [hearing officer's prior decision does not constitute current educational placement for stay put purposes].)

Settlement agreements are interpreted using the same rules that apply to interpretation of contracts. (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 686, citing *Adams v. Johns-Manville Corp.* (9th Cir. 1989) 876 F.2d 702, 704.) "Ordinarily, the words of the document are to be given their plain meaning and understood in their common sense; the parties' expressed objective intent, not their unexpressed subjective intent, governs." (*Id.* at p. 686.) If a contract is ambiguous, i.e., susceptible to more than one interpretation, then extrinsic evidence may be used to interpret it. (*Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 37-40.) Even if a contract appears to be unambiguous on its face, a party may offer relevant extrinsic evidence to demonstrate that the contract contains a latent ambiguity; however, to demonstrate an ambiguity, the contract must be "reasonably susceptible" to the interpretation offered by the party introducing extrinsic evidence. (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391, 393.)

DISCUSSION

The stay put dispute in this matter centers on the question of whether the settlement agreement (agreement) executed between the parties on August 23, 2011, including the services and "placement" called for in the agreement, is stay put for Student under the Individuals with Disabilities Education Act (IDEA). Student argues in the affirmative. District on the other hand contends otherwise. District argues that the agreement is not stay put for Student because the agreement did not provide for any placement, but rather for the reimbursement of a variety of the costs of services and Student's placement (by parents) at Tutor-Time Pre-school in Anaheim. Further, District argues that because the agreement was only effective through May 23, 2012, its obligations under the agreement ended on May 23, 2012, and thus was nonexistent on June 11, 2012 when Student filed this instant complaint.

The primary purposes of the stay put provision are to maintain the stability of the student's educational program during a due process dispute, and to prevent unilateral changes in that program by a school district. (*K.D. v. Department of Educ.* (9th Cir. 2011) 665 F.3d 1110, 1120 (*K.D.*); see 34 C.F.R § 300.518(a).) The stay put dispute in the instant case is similar, and quite analogous to the one considered by the Ninth Circuit in *K.D.* In that case, the dispute between the Department of Education (DOE) and *K.D.* centered upon the effect, if any, of a March 2007 settlement regarding *K.D.*'s educational placement. *K.D.*

argued that he was placed at Loveland by the settlement agreement, and that Loveland remained his then current educational placement because he continued to attend school and he never accepted any of the subsequent IEPs offered by the DOE. In response, the DOE contended that the settlement agreement only required the DOE to pay K.D.'s Loveland tuition for the 2006-07 school year and did not make Loveland K.D.'s placement for purposes of the stay put provision. The Court agreed with the DOE.

In *K.D.*, the Ninth Circuit noted as follows:

“...K.D.’s settlement agreement never called for “placement,” *and only required tuition reimbursement*. This is not an insignificant semantic difference. Rather, it was logical for the DOE to settle the case by agreeing to pay tuition for a limited amount of time in order to avoid the costs associated with a full due process hearing. However, it does not follow that, by doing so, the DOE had conducted the detailed evaluation required to determine whether Loveland was the proper educational institution for K.D. under the IDEA.
[*Italic added*]

In reaching its decision in *K.D.*, the Ninth Circuit also examined the case of *Zvi D. v. Ambach*, (2d Cir. 1982) 694 F.2d 904, 906, a case cited by Student in support of this Motion. In that case, the Second Circuit concluded that even though the Board of Education agreed to fund Student’s placement at a private school for the 1978-79 school year through an agreement, the private school was not the “current educational placement” for Student, because the agreement did not constitute “public agency placement” of the student at the private school. Thus, as in *K.D.*, the Second Circuit also found that “[p]ayment and placement are two different matters,” and not the same.

Based on the facts presented herein, and the authorities discussed above, a support cannot be found for Student’s argument that the August 23, 2011 agreement is stay put for him under the IDEA. Therefore, Student’s Motion for stay put must be denied.

ORDER

Student’s Motion for stay put is denied

Dated: June 19, 2012

/s/

ADENIYI AYOADE
Administrative Law Judge
Office of Administrative Hearings