

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

ALHAMBRA SCHOOL DISTRICT.

OAH CASE NO. 2012080207

ORDER DENYING STUDENT'S
MOTION FOR STAY PUT

Student moves for a stay put order that District fund her placement at an NPS pending the hearing or appeal in this matter, either (i) pursuant to an existing settlement agreement between the parties or (ii) as Student's "district of origin" because Student is a foster child. District opposes on the grounds that the settlement agreement was rendered impossible to perform when Student was asked not to return to the NPS identified in the agreement, and that a non-party school district, Hacienda La Puente Unified School District (HLPUSD), is financially responsible for funding Student's education as Student's "district of residence." Student filed a response to District's opposition. However, as District has nonetheless agreed to fund NPS placement in compliance with the settlement agreement, the motion for stay put is denied.

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.)

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, and the court will look to an earlier IEP. (*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.) 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.) It does not violate stay put if a school becomes unavailable, 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].)

DISCUSSION

Student is a 16-year old foster child eligible for special education as a student with other health impairment (OHI). She has attended Logsdon, a nonpublic school (NPS) within the boundaries of District, since November 2010. During the 2011-2012 school year, a dispute arose between District and HLPUSD over which school district was responsible for Student's educational placement when Student moved from a group home in District to her foster parent's (Parent) residence within the boundaries of HLPUSD. Student claimed that District was required to maintain her educational placement at Logsdon as her "school of origin" under California statutes providing for stable school placement of pupils in foster care. (Ed. Code, secs. 48850, et seq.) On January 6, 2012, Student filed a due process hearing request on this issue,¹ and on April 24, 2012, Student, District and HLPUSD entered into a fully executed settlement agreement (Settlement Agreement) that provided in pertinent part:

9.2. [T]he Parties agree that [District] will continue to fund Student's placement at Logsdon through December 13, 2012, and that commencing with December 14, 2012, HLPUSD will fund Student's placement at Logsdon through March 30, 2013.

9.3. Commencing on December 14, 2012, HLPUSD will take over implementation and funding of Student's services pursuant to the IEP process....[and] agrees to assume responsibility for Student commencing on December 14, 2012 and agrees to fund Student's placement at Logsdon through March 30, 2013....Following March 30, 2013, HLPUSD will be responsible for Student pursuant to the IEP process as Student's district of residence provided Student still resides within HLPUSD's jurisdictional boundaries.

Student attended Logsdon until she was suspended at the end of the 2011-2012 school year for physically assaulting another student, and told not to return to Logsdon. At an

¹ *Student v. Alhambra Unified School District and Hacienda La Puente Unified School District*, OAH Case No. 2012010165.

emergency IEP team meeting held on May 31, 2012, District offered home instruction for the remainder of the school year, to which Parent consented as an interim placement. Student met with the home instructor four times, however, at an IEP team meeting on July 12, 2012, District contended that home school instruction for Student constituted the District's continuing offer of FAPE.

Student filed this due process claim against District on August 7, 2012, contending that District made "take it or leave it" offers of home instruction at the May and July IEP team meetings, failed to assess Student to address her social-emotional needs, and failed to offer Student a FAPE in the May or June IEP's.

On August 13, 2012, Student filed a motion for a stay put order that District fund Student's educational placement at Quest Academy (Quest), an NPS located outside of District's boundaries, pending the hearing in this matter, or at least through December 13, 2012 pursuant to the Settlement Agreement. Student's motion is supported by the declaration of Student's attorney, Susan McClure, who negotiated and executed the Settlement Agreement on Student's behalf, attended the May and July 2012 meetings, states that Student "is appropriate" for Quest, and provides copies of the relevant IEPs, the Settlement Agreement, and transcriptions of portions of the July meeting at which District's director of secondary special education stated that the May offer was for interim placement. Student contends that if the Settlement Agreement is not enforced, Student's stay put placement is at an NPS comparable to Logsdon, where Student was placed pursuant to her December 2011 IEP, as the agreed upon and implemented May IEP was a temporary placement.

On August 17, 2012, District filed opposition contending it had no responsibility for Student's placement under special education or California foster youth statutes, and that the Settlement Agreement was "impossible" to implement because Student cannot be returned to Logsdon. However, among the exhibits attached to the supporting declaration of District's counsel, Cole Dalton, is an August 16, 2012 letter and IEP amendment from District to Parent offering to fund Student's placement at Quest, with transportation, through December 13, 2012, in accordance with the Settlement Agreement.

On August 21, 2012, Student filed a 61-page response to District's opposition. That response informed OAH that Parent had consented to the August 16, 2012 IEP amendment, and that District was funding, and Student was attending, Quest. However, Student continued to seek an order to "ensure [Student's] educational placement at Quest during pendency of this administrative proceeding and any subsequent appeal, which may exceed the December 13 date in the IEP."

This motion was the result of District's initial refusal to comply with the terms of the Settlement Agreement between Student, District and HLPUSD. Pursuant to the Settlement Agreement, District will fund Student's NPS placement through December 13, 2012, after which HLPUSD will become responsible for implementing and funding Student's educational placement and services. District has complied with the terms of the Settlement

Agreement by implementing the August 16, 2012 IEP amendment with Parent's consent, funding Student's placement at a school the parties apparently agree is comparable to Logsdon (Quest) through December 13, 2012, thereby rendering Student's motion as to stay put through December 13, 2012 moot.

The Settlement Agreement between Student, District and HLPUSD provides that HLPUSD will be responsible for Student's educational placement and services after December 13, 2012. Student has presented no evidence that HLPUSD disputes this responsibility, or refuses to fund Student's placement at Quest or to provide another program comparable to Logsdon from December 14, 2012. Student has also chosen not to name HLPUSD in this proceeding, depriving OAH of jurisdiction over all parties involved in the stay put dispute after December 13, 2012.

Student is entitled to remain in her last agreed upon and implemented placement while a dispute is pending and an order for stay put is generally not required unless a dispute over placement exists. Here, District has agreed to fund Student's placement at an NPS comparable to Logsdon through December 13, 2012, consistent with the Settlement Agreement, at which time non-party HLPUSD has contractually agreed to become the educational agency responsible for Student's placement and services. Because District is providing Student with the last agreed upon placement and services, and any future placement is covered by an agreement with a different school district, the motion for stay put is denied.

IT IS SO ORDERED.

Dated: August 21, 2012

/s/

ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings