BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017060384
v.	ORDER GRANTING MOTION FOR RECONSIDERATION AND GRANTING MOTION FOR STAY PUT
SAN JOSE UNIFIED SCHOOL DISTRICT.	

On July 5, 2017, OAH issued an order from Administrative Law Judge Judith Pasewark that denied Student's motion for stay put. [1] On July 17, 2017, Student filed a motion for reconsideration of the order. On July 20, 2017, San Jose Unified School District filed an opposition to the motion for reconsideration.

APPLICABLE LAW

Reconsideration

The Office of Administrative Hearings 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.)

Stay Put

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

[1] Ordinarily the ALJ who ruled on a motion with also rule on a motion for reconsideration of an order. However, ALJ Pasewark is unavailable to rule on the motion.

[2] All references to the Code of Federal Regulations are to the 2006 version.

program, 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, subd. (a).)

Stay put may apply when a child with a disability files for a due process hearing on the issue of whether graduation from high school (which ends Individuals with Disabilities Education Act eligibility) is appropriate. (*Cronin v. Bd. of Educ. of East Ramapo Cent. Sch. Dist.* (S.D.N.Y. 1988) 689 F.Supp. 197, 202, fn. 4; see also *R.Y. v. State of Hawaii Dep't. of Educ.* (D. Hawaii February 17, 2010, Civ. No. 09-00242) 2010 WL 558552, **6-7.) Stay put applies because if it did not, schools would be able to end special education eligibility for students by unilaterally graduating them from high school. (*Ibid*.) In California special education eligibility ends if a student graduates from high school with a regular high school diploma. (Ed. Code § 56026.1.)

DISCUSSION

Reconsideration

In the motion for stay put, Student asked that his graduation not be finalized. Student, in his motion to reconsideration, alleges that San Jose's opposition to his motion for stay put was misleading in that it implied that Student had already graduated prior to filing his motion for stay put. Further, Student claims that San Jose did not send prior written notice of his change of placement via high school graduation until June 6, 2017, and attaches a copy of the prior written notice sent by San Jose to Parents on that date, which was the day after he filed his motion for stay put. Lastly, Student attaches a copy of the San Jose school calendar that shows the last day of classes/school, was June 8, 2017, three days after Student filed his motion for stay put.

San Jose's opposition to the motion for stay put contained a declaration from a deputy superintendent who claimed that Student's status as a pupil who had been granted a high school diploma was finalized on June 2, 2017, after final exams were completed by seniors on June 1, 2017. San Jose's opposition to the motion for reconsideration also asks that it be denied as being untimely, claiming OAH's order denying stay put was issued on June 22, 2017. Further, San Jose objects on grounds that San Jose provided prior written notice to Student via an email exchange between the attorneys for Student and San Jose on April 13, 2017, that was attached to the original motion for stay put. Finally, San Jose states that Student has not provided OAH with a sworn declaration in support of the motion for reconsideration. However, San Jose does not dispute the validity of the school calendar that shows June 8, 2017, as the last day of school, although it has not been authenticated by Student by way of a sworn declaration.

Student's motion for reconsideration was timely since it was filed just 12 days after the OAH order denying stay put was issued.[3] Further, a review of the email exchange of April 13, 2017, attached to Student's motion for stay put, showed that although the attorneys referred to San Jose's attorney's email as prior written notice, it did not fulfill all the requirements for a prior written notice. First, it was equivocal about Student graduating, saying "Should [Student] meet the requirements for graduation by the State of California and San Jose Unified School District, he will receive a regular high school diploma and be exited from special education." However, prior written notice must also include "a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed . . . action[.]" (34 C.F.R. § 300.503(b)(3) (2006); Ed. Code § 56500.4, subd. (b)(3).) The attorney's email does not include this information.

Student has provided new facts in support of his motion for reconsideration, the information that the school year did not end until June 8, 2017, and the "official" prior written notice San Jose sent to Parents on June 6, 2017, after the stay put motion was filed. Accordingly, Student's motion for reconsideration is granted.

Stay Put

The crux of Student's complaint is that San Jose has a policy of developing a separate diploma track for special education students that will result in them getting a high school diploma following four years of high school, even if they really have not earned the credits and taken the courses necessary under California law to receive a diploma. More specific as to Student, he alleges in the complaint that his program was predetermined to keep him on a diploma track, even though he has not, in fact, completed the work necessary to earn a "regular" high school diploma. The purpose of the stay put motion is to maintain Student's status as a special education student, since graduation with a diploma terminates his eligibility for special education pursuant to the IDEA.

A special education student who disputes a school district's change of placement by way of granting him a regular high school diploma may ask for stay put if he has not, in fact, been graduated. In this case, although the deputy superintendent claimed that Student was graduated on June 2, 2017, this was not accurate. The school year did not end until June 8, and the graduation ceremony was scheduled for 6:30 p.m.on June 6, 2017, a fact that was not disclosed by either party in the pleadings they filed in this matter.[4]

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[3] Although ALJ Pasewark's order is dated June 22, 2017, it was not issued until July 5, 2017, and the parties did not receive it until it was faxed to them on that date.

[4] Official notice, pursuant to Government Code section 11515, is taken of San Jose's website where the information regarding the 2017 graduation for Willow Glen High School is located at http: //www.sjusd.org/willow-glen-high/school-information/graduation/ .

Student's motion for stay put was timely filed on June 5, 2017, before he had been granted a high school diploma at the graduation ceremony on June 6, 2017, and before the last day of school on June 8, 2017. That the District claims to have arbitrarily decided that Student had met the criteria on June 2, 2017, through a process unknown to Student, is not determinative here. Student was scheduled, with the rest of the senior class, to graduate and be granted a high school diploma on June 6, 2017. This is the date that was scheduled for Student to be granted the diploma and therefore the deadline for Student to challenge the intent of District to graduate Student and end his eligibility for special education, although it could be argued that technically he did not graduate until the last day of the school year, June 8, 2017. The District cannot claim, in retrospect, that Student met all requirements and was basically granted de-facto a diploma, without giving any notice to Student that this would result in a loss of his right to challenge the graduation.

Further, the prior written notice dated June 6, 2017, was issued after San Jose claimed Student had already graduated. However, the letter is written in a tense that makes clear that Student had not yet graduated. San Jose may not claim that Student graduated on June 2 and send a letter on June 6 giving prior written notice of their intent to graduate Student at an unspecified date in the future. The District's own prior written notice states that Student will be graduated when he receives a regular high school diploma; it does not say he will be graduated when some employee determines that he has enough credits to receive the diploma. Taken together, the evidence establishes that when Student filed his due process complaint and motion for stay put on June 5, 2017, he had not yet graduated or been granted a regular high school diploma. Therefore, Student has a right to a stay put placement, and the motion for stay put is granted.

An IEP dated September 15, 2016, is Student's last signed IEP. It calls for him to be placed at Willow Glenn High School, receiving 1060 minutes each week of specialized academic instruction, 180 minutes per month of small group speech and language therapy, and 80 minutes yearly of individual speech and language therapy instruction. In his motion for reconsideration, Student also suggests, in the alternative, that stay put be an adult special education program at Gavilan College. However, since OAH can only order stay put in accordance with the last signed IEP, unless the parties agree to another location, stay put is at Willow Glen High School.

ORDER

1. Student's motion for reconsideration is granted.

2. Based on reconsideration of Student's motion for stay put, the motion for stay put is granted.

3. San Jose shall immediately place Student at Willow Glen High School, with 1060 minutes weekly of specialized academic instruction, 180 minutes monthly of group

speech and language therapy, and 80 minutes yearly of direct speech and language instruction, pursuant to the IEP of September 15, 2016.

IT IS SO ORDERED.

DATE: September 6, 2017

DocuSigned by:
Rebecca Freie
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REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings