BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. CAMBRIAN ELEMENTARY SCHOOL DISTRICT.	OAH CASE NO. 2013030517 ORDER PARTIALLY GRANTING STUDENT'S MOTION FOR STAY PUT

On March 13, 2013, Student filed a due process hearing request (complaint) against Cambrian Elementary School District (District), seeking both relief for denial of a free appropriate public education (FAPE) and an expedited hearing on Student's indefinite suspension without a manifestation determination meeting.

Student's complaint included a request for a stay put placement order returning her to the third through fifth grade (3-5) special day class (SDC) at Bagby Elementary School (Bagby) for the duration of this proceeding. On March 20, 2013, District filed opposition to Student's motion for stay put. On March 21, 20113, Student filed a reply. As discussed below, Student's motion is granted in part, with placement in the 3-5 SDC through the end of a 90 day temporary placement, followed by return to the Pre-K-2 SDC, unless the parties agree otherwise.

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.)

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, unless the

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

school district and parents agree otherwise. (*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.)

Specific stay put provisions apply to Students who are removed from their current educational placement to an interim alternative educational setting (IAES) for discipline purposes. (See 20 U.S.C. § 1415(k)(4).) School district personnel may remove a child with a disability who violates a code of student conduct from the child's current placement to an appropriate IAES, another setting, or suspension, for not more than 10 school days, to the extent such alternatives are applied to children without disabilities. (20 U.S.C. §1415(k)(1)(B).) A removal or suspension for more than 10 days constitutes a change of placement, and requires that a meeting of the school district, parents and relevant IEP team members be held to determine if the behavior that gave rise to the violation of the school code is a manifestation of the child's disability. (20 U.S.C. § 1415(k)(1)(E).) If the behavior was a manifestation of the student's disability, the student must be returned to the placement from which he or she was removed, unless special circumstances, not relevant here, exist.[2] (20 U.S.C. § 1415(k)(1)(F)(iii).) If the behavior is determined not to have been a manifestation of the student's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, including removal and placement in an IAES, so long as the disabled child continues to receive a FAPE in the new placement. (20 U.S.C. § 1415(k)(1)(C).)

DISCUSSION

Student, a young girl with autism, alleges in her complaint that she was placed in a pre-kindergarten through second grade (pre-K-2) SDC for second grade at the beginning of the 2012-2013 school year pursuant to her May 2, 2012 IEP. However, when she began engaging in maladaptive behaviors in the pre-K-2 SDC, District convened IEP team meetings on October 14 and December 5, 2012, which resulted in an offer of a "90 day

[2] The manifestation determination review team may place a student in an IAES for not more than 45 school days, regardless of whether the student's behavior is determined to be a manifestation of the student's disability, under any of three "special circumstances.," including conduct involving drugs, weapons, or infliction of serious bodily injury upon another person while at school, on school premises, or at a school function under the supervision of District. (20 U.S.C. § 1415(k)(1)(G); 20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.530 (g); 34 C.F.R.§ 300.531.) The term "serious bodily injury" for these purposes is defined as bodily injury that involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. (18 U.S.C. § 1365(h)(3). "Serious bodily injury" is not simply a cut, abrasion, bruise, burn, or disfigurement; physical pain, illness, or impairment of the function of a bodily member, organ, or mental faculty. (18 U.S.C. § 1365 (h)(4).) Student's complaint alleges that nobody was injured during her tantrum, and District's opposition does not indicate otherwise.

temporary diagnostic placement" in the 3-5 SDC.[3] Parents consented to the October 14, 2012 addendum on January 8, 2013, and Student was placed in the 3-5 SDC on January 23, 2013. On February 5, 2013, allegedly due to an extended tantrum in the classroom, District suspended Student indefinitely without convening a manifestation determination meeting. District offered Student one hour per day of home instruction during suspension, which Parents declined. Student claims that (1) District failed to implement the October 14, 2012 IEP amendment when it suspended her indefinitely, and that (2) District denied Student a FAPE by suspending her indefinitely and refusing to convene a manifestation determination meeting. As remedies, Student seeks compensatory education and services, and placement in the 3-5 SDC at Bagby.

Student's stay put motion seeks an order that she be returned to the 3-5 SDC at Bagby.[4] The October 14, 2012 amendment contains typewritten notes referencing an IEP meeting on December 5, 2012 at which Student was offered a "temporary diagnostic placement" in the 3-5 SDC. Further typewritten notes memorialize an email exchange on December 21, 2012 in which District offered Student a "90 day temporary diagnostic placement" in the 3-5 SDC. District concedes that the 3-5 SDC placement was the last agreed upon and implemented placement, but requests that any stay put order limit Student's return to the 3-5 SDC to the remaining days of the 90 day diagnostic placement. Student argues that the notes on the addendum reference Parents' desire to have an IEP convened within 90 days of placement in the 3-5 SDC to discuss their concerns with the classroom, and not a limit on the duration of the placement.

The notes of the December 5, 2012 IEP team meeting and the December 12, 2012 email exchange on the October 14, 2012 amendment expressly and repeatedly state that the 3-5 SDC at Bagby was a 90 day "temporary diagnostic placement." Parents did not sign the IEP until January 8, 2013, after those notes were added to the October 14, 2012 amendment. Therefore, the offered placement was for a 90 day period, and Parents were aware of the limited duration when they consented to the IEP amendment.

It is clear that the Student's placement in the 3-5 SDC at Bagby was temporary and limited to 90 days. What is not clear is the basis for District's indefinite suspension of student from that placement. District placed Student on suspension for more than 10 days, resulting in a change of placement, without convening a manifestation determination

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[3] The results of the October 14 and December 5, 2012 IEP team meeting, and notes of an email exchange between Parents and District on December 21, 2012, are documented in, and referred to by the parties as part of, Student's October 14, 2012 IEP addendum.

[4] Student attached a document purporting to be the last two pages of the October 14, 2012 IEP amendment to the motion. Student failed to submit a sworn declaration authenticating the amendment, and the document itself is incomplete. However, District submitted a complete authenticated copy of the October 14, 2012 IEP amendment in its opposition, thus proving the October 14, 2012 IEP addendum is the operative IEP for purposes of stay put.

meeting. However, neither a determination that Student's tantrum was a manifestation of her autism, nor a determination that it was not, would warrant a unilateral and indefinite change in Student's placement, particularly without provision of the special education and related services required by Student's IEP. District appears to have bypassed the procedural protections for the discipline of disabled children set forth in the IDEA, and as the indefinite suspension of Student is not an IAES placement resulting from a manifestation determination meeting, the stay put provisions for a disciplinary setting will not be applied here.

Instead, general stay put provisions will be applied, and District's concession in its opposition that Student's last agreed upon and implemented placement was in the 3-5 SDC, coupled with its express request that a stay put order returning Student to the 3-5 SDC classroom "not exceed the agreed upon 90 day placement," will be deemed an agreement between District and Student that, for the duration of the remaining 90 day diagnostic period, Student's stay put placement will be the 3-5 SDC at Bagley. As Student was not in the 3-5 SDC classroom for diagnostic purposes during her suspension, the days of suspension from February 5, 2013 through the date of Student's return pursuant to this order, shall not be counted in the 90 days of the temporary diagnostic period that began on January 23, 2013.

At the end of the 90 day diagnostic period, unless the parties agree otherwise, Student shall be returned to the Pre-K-2 SDC in accordance with her May 2, 2012 IEP, which was the last agreed upon and implemented IEP prior to the temporary placement contained in the October 14, 2012 amendment.

IT IS SO ORDERED.

Dated: March 27, 2013

/s/
ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings