BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. GROSSMONT UNION HIGH SCHOOL DISTRICT.	OAH Case No. 2017061027 ORDER GRANTING MOTION FOR STAY PUT AND DENYING MOTION TO STRIKE DECLARATION

Student is a 14 year old boy who qualifies for special education under the categories of other health impairment and speech or language impairment. According to a March 18, 2015 IEP document, Student has attended Excelsior Academy, a non-public school in San Diego, since at least the sixth grade. Placement at Excelsior was continued pursuant to this IEP by La Mesa Spring Valley School District, an elementary school district which feeds into Grossmont Union High School District for the 15-16 school year. There is no dispute that the March 18, 2015 IEP was the last agreed upon implemented IEP for Student.

Student is now ready to start high school and has been working on a transition plan with Grossmont. Student filed a request for due process hearing (complaint) on June 22, 2017 challenging Grossmont's placement offer and also filed a motion for stay put. On June 28, 2017, Grossmont filed an opposition on the grounds that the motion is unnecessary and premature as the school year has not yet begun and discussions regarding Student's placement continue. Grossmont also argues that the motion is based entirely on conjecture and assumption as no evidence that Grossmont refused to implement the last agreed upon IEP has been provided and, as such, motion at this point is frivolous. Grossmont asserts that the Office of Administrative Hearings has no basis for ordering relief as Grossmont has not yet refused to continue the placement.

On July 5, 2017, Grossmont moved to strike Mother's June 30, 2017 declaration on the grounds that it was untimely, constitutes hearsay and was improperly authenticated. None of the statements in Mother's declaration of June 30, 2017 were considered in reaching the decision detailed in this order.

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 most recent individualized education program, 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).)

"A motion for stay put functions as an "automatic" preliminary injunction, meaning that the moving party need not show the traditional required factors (e.g. irreparable harm) in order to obtain preliminary relief." *Joshua A. v. Rocklin Unified School District* (9th Cir. 2009) 559 F. 3d, 1036, 1037.) "The stay put provision requires no specific showing on the part of the moving party and no balancing of the equities by the court due to the heightened risk of irreparable harm inherent in the premature removal of a disabled child to a potentially inappropriate educational setting." *Id* at p.1040.

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.) "[I]t is not intended that a child with disabilities remain in a specific grade or class pending appeal if he or she would be eligible to proceed to the next grade and the corresponding classroom within that grade." (Fed.Reg., Vol. 64, No. 48, p. 12616, Comment on § 300.514.) In most instances, progression to the next grade adheres to the status quo for purposes of stay put. (See *Beth B. v. Van Clay* (N.D. Ill. 2000) 126 F. Supp.2d 532, 534.)

The law addresses the question of stay put differently when a child transfers between districts as opposed to simply advancing through grade levels within the same district. Moreover, different outcomes are possible if the child transfers between districts in the middle of a school year as opposed to transferring over the summer break. When a transfer occurs mid-year, the new district must adopt an interim program that approximates the student's old IEP as closely as possible until the old IEP is adopted or a new IEP is developed. (20 U.S.C. § 1414(d)(2)(C)(i)(1); 34 C.F.R. § 300.323(e).) California Education Code section 56325, subdivision (a)(1), mirrors title 20 United States Code section 1414(d)(2)(C)(i)(1), with the additional provision that, for a student who transfers into a district not operating under the same special education local plan area (SELPA), the local

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

educational agency (LEA) shall provide the interim program "for a period not to exceed 30 days," by which time the LEA shall adopt the previously approved IEP or shall develop, adopt, and implement a new IEP that is consistent with federal and state law.

These rights of a transferring student only apply in the case of a transfer within the same academic year that he was in the previous district. There are no federal or state statutory provisions addressing the situation where a student transfers between school years, such as during summer vacation. This issue was recently addressed the case of *R.F. by Frankel v. Delano Union School District* (E.D. Cal., 2016) 224 F. Supp. 3d 979.

In that case, a father sought stay put protections for his son on the basis of what Father thought was an unacceptable offer of special education services from the boy's new school district. Stay put had been denied at the administrative level. Therefore, the father sought services for his son via request for a temporary restraining order. In analyzing the likelihood of success aspect of the TRO, the court addressed the fact that the last implemented IEP was implemented in the prior school year and that Student was asking that the placement of that IEP be considered stay-put. Acknowledging that the federal Department of Education was silent in the regulations issued in 2006 as to a student's stay put rights in those instances where intra-state transfers occurred in the summer, the court concluded:

> "[T]he silence as to the effects of a student changing districts between school years in the federal Department of Education's regulations does not demand the inference that the Department intended to exempt such students from the protections of stay-put. Also, the Department's explanation that stay-put does not apply for students who moved from state to state does not suggest that the same rule applies to intra-state transfers. The Department may have valid reasons for distinguishing an inter-state transfer from an intra-state transfer, including the differences between educational standards and systems among the states. The Court declines to read into the Department's silence an intention to limit the essential protections of stay-put."

R.F. v. Delano Union School District , supra, 224 F. Supp. 3d at p. 988-989.

DISCUSSION

In this case, Student has filed for due process to challenge whether the offer of placement by Grossmont constitutes a free appropriate public education. Pending a determination, Student has asked that his most recent placement at Excelsior be maintained. Student has submitted an authenticated copy of the last implemented IEP which was the IEP dated March 18, 2015. That IEP clearly states that Student was attending Excelsior at the time of the IEP and that the offer of Excelsior for the 2015-2016 school year was accepted by Parent. There is no dispute that this was the last implemented IEP.

Grossmont has filed an opposition to the motion, but has acknowledged that the filing of Student's petition "creat[ed] a stay put obligation that is clear in this case ..." Grossmont

then goes on to argue that Student's request for stay-put is premature as the obligation has not yet been refused by the district.

It is unclear that Grossmont is acknowledging that Excelsior, specifically, is stay-put for purposes of this student's last implemented IEP. Their pleadings are non-committal. While Grossmont may be indicating that they understand Excelsior is stay-put, one could just as easily interpret their documents to indicate they intend to oppose Excelsior later and assert a different NPS constitutes stay-put. That is not at issue with these pleadings however, Here Grossmont simply argues that the debate should be delayed until they specifically reject Student's stay-put placement. This, however, merely leads to uncertainty for Student. "The stay-put provision … was designed to strip schools of the unilateral authority they had traditionally employed to exclude disabled students ... from school and to protect children from any retaliatory action by the agency." (*Anchorage School District v. M.P.* (9th Cir. 2012) 689 F. 3d 1047, 1056.)

Grossmont has offered no authority for the assertion that Parents must wait until their request to a district to continue the placement of the last implemented IEP is rejected before filing for stay-put for their child. There is no such provision in the law and to interpret it that way would be to defeat the automatic entitlement to continue in Student's last placement pending resolution of the request for due process.

ORDER

1. Student's motion for stay put is GRANTED. Grossmont shall maintain Student's placement at Excelsior pursuant to the last implemented IEP of March 18, 2015.

2. Grossmont's motion to Strike the declaration of Mother is DENIED as moot.

IT IS SO ORDERED.

DATE: July 21, 2017

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Penelope S. Pahl
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PENELOPE S. PAHL
Administrative Law Judge
Office of Administrative Hearings