BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT(S) ON BEHALF OF STUDENT, v. NEWPORT-MESA UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2013050180 ORDER DENYING MOTION FOR STAY PUT

On May 2, 2013, Student filed a motion for stay put. On May 7, 2013, the Newport-Mesa Unified School District (District) filed an opposition. On May 9, Student filed a reply.

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 (*Thomas*) .)

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 *Ms. S. ex rel G v. Vashon Island Sch. Dist*. (9th Cir. 2003) 337 F.3d 1115, 1134 (*Vashon*), the Ninth Circuit Court of Appeals addressed the question of a school district's obligation to provide stay put when a student transfers from another school district and the parent files a due process complaint challenging the services offered by the receiving school district. The court in *Vashon* held that when a dispute arises under the IDEA involving a transfer student, and a disagreement exists between the parent and student's new school district about the most appropriate educational placement, "if it is not possible for the new district to implement in full the student's last agreed-upon IEP, the new district must adopt a

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

plan that approximates the student's old IEP as closely as possible." The plan thus adopted would serve the student until the dispute between parent and school district was resolved by agreement or at an administrative hearing with due process. (*Id.* at 1134.)

Subsequently, the Individuals with Disabilities Education Act (20 U.S.C. § 1400, et seq. (IDEA)) was amended, effective July 1, 2005, and revised the law concerning stay put placement for students who transfer to a new school district within the same state. Title 20 United States Code 1414(d)(2)(C)(i)(1) now provides for an interim placement for those students, as follows:

> In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

The new IDEA federal regulations, which became effective on October 13, 2006, mirror the above provision.[2] (34 C.F.R. § 300.323(e).)

California Education Code section 56325, subdivision (a)(1), effective June 30, 2011, 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 educational agency shall provide the interim program "for a period not to exceed 30 days, by which time the local educational agency shall adopt the previously approved IEP or shall develop, adopt, and implement a new IEP that is consistent with federal and state law."

The interim IEP becomes the stay put placement pending a disagreement concerning whether the interim IEP offers a FAPE. (*Vashon, supra,* 337 F.3d at p. 1134; *Termine ex. rel. Termine v. William Hart Union High Sch. Dist.* (C.D. Cal. 2002) 219 F.Supp. 1049, 1061.)

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[2] The U.S. Department of Education's comments to this regulation state that "the Department interprets 'comparable' to have the plain meaning of the word, which is 'similar' or 'equivalent.'" (71 Fed.Reg. 46681 (Aug. 14, 2006).) Additionally, the comments to a similar regulation, which applies to IEPs for students who transfer from another state, note that if there is a dispute between the parent and the public agency regarding what constitutes comparable services, the dispute could be resolved through mediation or due process. (*Id.* at p. 46682.)

DISCUSSION

Student's due process hearing request (complaint) was filed concurrently with this motion. Student's complaint alleges that he had a multi-year settlement agreement with another school district to place Student in a nonpublic school (NPS) through the 2013-2014 extended school year (ESY). However, after his move into District in February 2013, District offered a 30-day interim placement based upon Student's last agreed upon and implemented IEP of July 13, 2011, in a District special day class (SDC) program rather than an NPS as provided in Student's settlement agreement. According to the complaint, District has not made any further IEP offer. Student claims that he was denied a FAPE because (1) the interim program was not comparable to the NPS program, (2) the District failed to offer a FAPE within 30 days of Student entering the District, and (3) the District continued to fail to offer Student a FAPE.

By this stay put motion, Student seeks placement in an NPS. Student argues that the NPS he attended under the settlement agreement was his "then-current" program at the time of his move for stay put purposes, and that only an NPS can provide a comparable program because it offers an educational program unavailable in the public setting. (See Ed. Code, § 56365.) Student contends that a literal application of Education Code, section 56325, which requires school districts to offer an interim placement comparable to the "previously approved individualized education program [IEP]" would be hypertechnical, and lead to the absurd result of stay put placement under an IEP that is over a year old. The motion is supported by the sworn declaration of Student's counsel, attaching copies of the settlement agreement, the previous NPS program and the District's interim IEP offer.

District opposes the stay put motion, arguing that it correctly developed an interim placement from the July 2011 IEP, that the interim placement was comparable to the July 2011 IEP, that a stay put program comparable to the July 2011 IEP was expressly contemplated by Student in the settlement agreement so is neither stale nor absurd, and that the District cannot be held to the terms of a settlement agreement to which it was not a party. District's opposition is not supported by a sworn statement, but attaches a copy of Student's July 13, 2011 IEP. Student's reply contends that District's positions are incorrect, criticizes the authorities cited, and reiterates the arguments in his moving papers.

Each of the authorities cited by Student pre-dates the current federal and state law expressly requiring interim placements to be comparable to previously held or approved IEPs, and have little or no applicability to the facts presented in this motion. Neither *Johnson v. Special Education Hearing Office* (9th Cir. 2002) 287 F.3d 1176 (*Johnson*) nor *Vashon* address the issue of whether the last agreed upon and implemented IEP can be disregarded in determining stay put, or whether a temporary placement pursuant to a settlement agreement can supersede the last IEP for stay put purposes. For the reasons discussed below, Student fails to meet his burden as moving party of showing that his stay put placement should be other than the interim placement derived from Student's July 13, 2011 IEP, or that the interim placement offered is not comparable to the July 13, 2011 IEP.

Both the IDEA and California special education law expressly mandate that the stay put for Student be the interim educational program developed by District to be comparable to Student's last agreed upon IEP. Student's argument that, instead, the placement provided for in the settlement agreement should be stay put fails for several reasons. First, the current educational placement for stay put purposes is typically that called for in the student's last agreed upon and implemented IEP, and Student expressly waived the NPS placement as stay put in the settlement agreement. (Decl. of Massey, Ex. A, par. 2(a)(III).) Second, Student's contention a stay put placement tied to the July 13, 2011 IEP would be "stale" or "defunct" is undermined by the settlement agreement itself, which states in part that, at any time through the end of the 2014 ESY, if the agreed upon NPS were to become unavailable and no other NPS was agreed upon, the Student would be placed in a district program and "the Parties agree the [other district] will implement [Student's] individualized education program ("IEP") dated July 13, 2011." (Decl. of Massey, Ex. A, par. 2(a)(II).) Clearly, Student contemplated and agreed to implementation of his July 13, 2011 IEP through July or August 2014, and cannot be heard now to complain that the July 2011 IEP is too remote in time to implement as stay put in May 2013. Third, the placement in the settlement agreement was expressly intended to be temporary and "subject to Student and Parents continuously residing within the [other district's] jurisdictional boundaries" (Decl. of Massey, Ex. A, par. 9), and so will not support a stay put placement after Student's move out of the other district. Lastly, the District was not a party to the settlement agreement, and Student cannot use stay put to bind District to temporary and conditional placement terms to which it did not agree.

Even if the District was required to offer Student an interim placement comparable to the settlement agreement, and District was not, Student makes no showing that the special education and related services offered in the interim placement were not comparable to those provided by Student's NPS. The authorities cited in Student's motion do not support Student's argument his NPS placement must be exactly duplicated. The Ninth Circuit, in *Johnson*, agreed with the lower court that the school district into which a disabled child transferred was not required to provide the exact same educational program previously in effect. (*Johnson*, *supra*, 287 F.3d at p. 1181.) The *Vashon* court summarized *Johnson* as holding that "the new agency need not provide a placement identical to that provided by the old agency," and explained that "[a]lthough the "stay-put" provision is meant to preserve the status quo, we recognize that when a student transfers educational jurisdictions, the status quo no longer exists." (*Vashon, supra*, 337 F.3d at p. 1133). The prior district's offer of an NPS placement because it did not have a program sufficient to implement Student's IEP does not establish that the District does not have such a program. Student has the burden of persuasion as moving party, and failed to address, let alone establish, that the interim placement offered by District was not comparable to the placement provided for in the settlement agreement Student seeks as the basis for stay put.

Student has failed to establish that he is entitled to an NPS placement, or that the District failed to comply with the provisions of the IDEA when it offered an interim placement comparable to Student's July 13, 2011 IEP. Accordingly, Student's motion for stay put is denied.

IT IS SO ORDERED.

Dated: May 09, 2013

/s/

ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings