BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2019100237

ORDER DENYING MOTION FOR STAY PUT

On October 8, 2019, Student filed a motion for stay put. On October 11, 2019, San Francisco filed an opposition, and on October 16, 2019, Student filed a reply to the opposition.

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 last agreed upon and implemented individualized educational program, called IEP, placement 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).)

Courts have recognized, however, that 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 Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-1135, superseded by statute on other grounds, 20 U.S.C. § 1414(d)(1)(B).) When a student advances from grade to grade, the stay-put provision entitles the student to receive a placement that, as closely as possible, replicates the placement that existed at the time the dispute arose, taking into account the changed circumstances. (*N.E. v. Seattle Sch. Dist*. (9th Cir. 2016) 842 F.3d 1093, 1098; *Beth B. v. Van Clay* (N.D. Ill. 2000) 126 F.Supp.2d 532,534-535; *Van Scoy v. San Luis Coastal Unified Sch. Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086.)

DISCUSSION

From the extensive moving and opposing papers, the parties appear generally to agree on the following facts:

Student is 11 years old and eligible for special education in the categories of autism, intellectual disability and other health impaired. Student's last agreed-upon and implemented IEP was proposed on February 12, 2018 signed by Student's Mother on May 22, 2018, and amended four times since. In the 2018-2019 school year, under that IEP, Student was in the fifth grade and attended a mild-moderate third-to-fifth grade special day class, with general education mainstreaming, at San Francisco's Francis Scott Key Elementary School.

Starting in January 2019, Mother asked San Francisco not to advance Student to sixth grade and to middle school for the 2019-2020 school year, but instead to retain him in fifth grade for another year. She believed that he had made some recent progress and worked well with the teacher, but had not yet mastered 5th grade material.

At the time, the school board's Policy No. 5120 gave the principal the discretion to decide whether a general education student should be advanced or retained. It did not mention students with IEP's. Student's IEP team met on February 26 and April 4, 2019, to discuss Mother's request that Student be retained in fifth grade but the District members of the team did not agree with it. San Francisco then gave Mother prior written notice that Student would be promoted to sixth grade under Policy No. 5120.

On May 14, 2019, the school board adopted a new retention policy, No. 5123, which gave the teacher authority to retain a special education student, subject to appeal to the Superintendent, although it also provided that the IEP team should determine the standards for retention. Pursuant to that new policy, San Francisco again denied Mother's request to retain Student in the fifth grade. Since the beginning of the school year Mother has declined to send Student to school in sixth grade.

Student's essential argument is that whether he should have advanced to sixth grade was a decision that the Individuals with Disabilities in Education Act, called the IDEA, required his IEP team to make, and therefore required Mother's agreement. Since there is no agreed-upon and implemented IEP placing him in sixth grade, Student maintains, his stay put placement is in his fifth grade special day class at Key Elementary School, and San Francisco's attempt to promote him to sixth grade constitutes an attempted unilateral change of placement.

However, Student fails to establish that advancement from grade to grade constitutes a change of placement for the purpose of the stay put rule, and several decisions hold that it does not. For example, in *Beth B. v. Van Clay, supra,* 126 F.Supp.2d 532, a case quite like this one, a student who had completed fifth grade and was scheduled to proceed to junior high school became involved in a due process dispute. The court held that advancement to junior high was part of the student's stay put placement:

> We do not believe that the change to junior high school means that there is no longer a current educational placement, or that junior high is unquestionably an inappropriate placement. Junior high school is the normal matriculation progression [and] progression adheres to the educational status quo . . .

(*Id.* at pp. 534-535.)

In *Van Scoy v. San Luis Coastal Unified Sch. Dist.*, *supra*, 353 F.Supp.2d 1083, the court declined to apply the stay put rule to the promotion of a student from kindergarten to first grade. It reasoned:

> Certainly the purpose of the stay-put provision is not that students will be kept in the same grade during the pendency of the dispute. The stay-put provision entitles the student to receive a placement that, as closely as possible, replicates the placement that existed at the time the dispute arose, taking into account the changed circumstances.

(*Id.* at p. 1086.)

In *N.E. v. Seattle Sch. Dist.*, *supra,* 842 F.3d 1093, a student finishing third grade in Bellevue was given a two-part IEP which placed him in an "individual class" for the rest of his third grade year and in a self-contained class with other disabled students for the beginning of the next school year. (*Id.* at pp. 1094-1095.) Over the summer the family

moved to Seattle, filed a request for due process, and disputed student's stay put placement with the new district. A majority of the Ninth Circuit panel held that the student's stay put placement at the beginning of the new school year was the self-contained class described in the second part of the IEP, and observed:

> [W]e commonly think of education as forward-looking; we refer to a child who has completed fourth grade and is about to enter fifth grade as a "rising fifth grader." The status quo at the time of the hearing request was the anticipated entry into the self-contained program.

(*Id.* at p. 1098.) By that reasoning, Student's stay put placement here is his anticipated entry into sixth grade.

A particular school or building is not an educational placement. (*D.K. v. District of Columbi*a (D.D.C. 2013) 962 F.Supp.2d 227, 232-234.) The Ninth Circuit has held that an educational placement is "the general educational program of the student," a description that is consistent with California's definition of placement. (*N.D. v. Hawaii Dept. of Educ.* (9th Cir. 2010) 600 F.3d 1104, 1116; see Cal. Code Regs. tit. 5, § 3042, subd. (a).) Here advancement does not change Student's program because San Francisco proposes to educate Student in the sixth grade according to the same IEP now in effect.

Student cites a single judicial decision in support of his argument: *School Comm. of Town of Burlington, Mass. v. Department of Educ. of Mass* (1985) 471 U.S. 359 [105 S.Ct. 199; 685 L.Ed.2d 385], in which the high court addressed whether parents were entitled to reimbursement for a unilateral placement in a private school. Student points to the following passage:

> We think at least one purpose of [the stay put provision] was to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings.

(Id. at p. 3783.) Student underscores the word "classroom" and argues that its use meant the Supreme Court interpreted the stay put provision as requiring that a student remain in his previous classroom pending resolution of a due process dispute.

This places far too much meaning in a single word. The *Burlington* court did not interpret the IDEA's stay put provision; in fact it expressly stated it would not decide what the student's stay put placement was. (*Burlington, supra,* 471 U.S. at p. 371.) Instead, in the passage stressed by Student, the court was only addressing and rejecting the school district's contention that parents had waived any right to reimbursement by violating the terms of a written agreement with the district about the student's interim placement, which the stay put provision authorizes. (*Id.* at p. 371-372; see 20 U.S.C. § 1415(j).) It is axiomatic that a decision is not authority for a proposition not considered by the court. (See, e.g., *Dickey v. Davis* (E.D. Cal. 2017) 231 F.Supp.3d 634, 716.) No court has read the word "classroom" in *Burlington* to have the sweeping effect Student attributes to it. Moreover, the court did not analyze or consider California's definition of "specific educational placement," which is far broader, and therefore more protective generally of students' rights, than the narrow concept of a specific classroom. (Cal. Code Regs. tit. 5, § 3042, subd. (a).)

In his moving papers, Student raises several issues not appropriate for decision on this motion. He asserts that the April 4, 2019 IEP team meeting did not include all required members; that advancement to sixth grade would deny him a free appropriate public education; and that both the board policies under which San Francisco acted are inconsistent with state and federal law and invalid. San Francisco, for its part, argues that

OAH has no jurisdiction over decisions to retain or promote because those are not IEP team decisions; they are governed instead by Education Code sections 48070 and 48070.5, which vest the retention or promotion decision in school boards and require them to adopt poicies.

None of those arguments needs to be addressed here. Student is still in his "then-current educational placement." (20 U.S.C. § 1415(j).) Student's advancement to sixth grade was not a change of placement and therefore did not implicate the stay put rule.

ORDER

Student's motion for a stay put order is denied.

DATED: October 18, 2019

Charles Marson
Administrative Law Judge
Office of Administrative Hearings