

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

NEWPORT-MESA UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2013080735

ORDER DENYING MOTION FOR
STAY PUT

INTRODUCTION

On October 2, 2013, Student filed a motion for stay put. Student contends that his current placement, the Child Development Center (CDC) at the University of California, Irvine, is his stay put placement. On October 7, 2013, the Newport-Mesa Unified School District (District) filed an opposition to Student's motion. The District contends that Student's parents have privately placed him at the CDC, at District expense, during the entire time frame covered by Student's due process complaint. The District contends that Student's placement at the CDC has never been pursuant to an individualized education program (IEP) but rather, has been pursuant to a 2010 settlement agreement between the parties that was extended through a series of modifications. In each of these agreements, the parties have specifically delineated that Student's stay put placement would be at a District school site if the parties were unable to agree on placement at Student's IEP meetings. The latest agreement between the parties was for the 2012-2013 extended school year. In this agreement, Student's parents agreed that Student would transition from CDC to the District over the course of summer 2013. In exchange, the District agreed to fund the 2013 extended school year session at CDC. The District funded the program, but Student's parents did not permit Student to transition to the District program. The District attached all pertinent agreements in support of its 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)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

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

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.)

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 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.)

DISCUSSION

In February, 2010, Student, through his parents, filed a due process complaint against the District. The parties entered into a settlement agreement with regard to that complaint in early June, 2010. The agreement covered all of the District's educational obligations to Student through June 24, 2011. In the agreement, the District agreed to fund Student's placement at the CDC for extended school year (ESY) 2010 and for the 2010-2011 academic school year. The parties agreed that they would convene an IEP meeting for Student no later than June 1, 2011 in order to determine Student's placement for the 2011-2012 school year. In the event that Student's parents and the District could not agree on a subsequent placement for Student, their settlement agreement stated the following:

"The Parties expressly agree that in the event of a dispute regarding placement and services for Student for the period following June 24, 2011, Student shall be entitled, as "stay put" during the pendency of such dispute to (1) placement in a District applied behavior analysis special day class, (2) District speech and language group services twice per week for thirty minutes per session, (3) District individual clinic occupational therapy forty-five minutes per week, and (4) District group occupational therapy forty-five minutes per week ."

Student's parents and the District then Executive Director of Special Education signed the agreement. The agreement was approved as to form by Student's attorney and the District's attorney.

The parties first modified this settlement on July 10, 2010, because the CDC ESY was not available. The modification placed Student in a District ESY program. No attorney approved the modification as to form.

In late June, 2011, Student's parents and the District's Executive Director for Special Education entered into another modification of the parties' settlement agreement. The District agreed to fund Student's private placement at CDC for ESY 2011 and for school year 2011-2012, which would be Student's first grade year. The parties agreed to hold an

IEP meeting for Student no later than May 1, 2012. In the event of a disagreement between the parties at that time as to Student's placement, the parties agreed that Student's stay put placement would again be the District program and related services detailed in the parties' June 2010 settlement agreement, as described above. No attorney for either party approved this settlement modification as to form.²

In late May, 2012, the parties entered into another modification of their settlement agreement. In this modification, the District agreed to fund Student's placement at CDC for ESY 2012 and for the 2012-2013 school year, when Student would be in second grade. The parties agreed to convene an IEP meeting for Student no later than April 19, 2013, to determine Student's placement for ESY 2013 and school year 2013-2014. In the event of a disagreement between the parties as to Student's placement, the parties again agreed that Student's stay put would be the District program and services described in the parties' original settlement agreement. Student's parents and the District's Executive Director for Special Education signed the agreement. No attorney for either party signed as to form.

In his motion for stay put, Student contends that his stay put is CDC. Student states that there are no instruments written and signed by the parties to alter the parties' original settlement agreement of June 2010. Student seems to state that since the District has maintained his placement at CDC since the 2010-2011 school year, he is entitled to remain there until the present due process dispute is resolved.

The evidence does not support Student's contentions. The June 2010 settlement agreement between the parties specified that Student's stay put would be a District applied behavioral analysis classroom, with related services in the areas of speech and language and occupational therapy. Although it appears no attorneys were involved in subsequent modifications to the settlement agreement, Student's parents and the District signed modifications in 2010, 2011, and 2012. In each case, the parties agreed that Student's stay put placement would be the same District program described in the 2010 settlement agreement. Student has presented no evidence that contradicts the settlement modifications signed by the parties. Student's stay put placement is the District program and related services described in the original June 2010 settlement agreement between the parties, as reiterated in their 2011 and 2012 modifications.

ORDER

1. Student's motion for stay put is denied.
2. Student's stay put placement is a District applied behavioral analysis special day class, with District speech and language services twice per week for 30 minutes a

² The modifications to the settlement agreement appear to have inadvertently referred to the agreement as the "June 20, 2011" agreement, rather than the June 2010 agreement.

session, District individual clinic occupational therapy for 45 minutes a week, and District group occupational therapy for 45 minutes per week.

Dated: October 14, 2013

/s/

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings