

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

ELK GROVE UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2014070092

ORDER GRANTING MOTION FOR
STAY PUT

On June 25, 2014, Student filed a motion for stay put supported by a declaration under penalty of perjury from his mother and authenticated exhibits. On June 30, 2014, District filed an opposition supported by a declaration under penalty of perjury by Attorney Jack B. Clarke, Jr. Student filed a response to District's opposition on July 1, 2014, supported by a declaration under penalty of perjury from his mother. For the reasons discussed below, the motion for stay put is granted.

APPLICABLE LAW

Under federal and state special education law, a special education student is entitled to remain in his or her current educational placement pending the completion of due process hearing procedures unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. 300.518 (2006); Ed. Code, §§ 48915.5, 56505, subd. (d).) This is referred to as "stay put." The purpose of stay put is to maintain the status quo of the student's educational program pending resolution of the due process hearing. (*Stacey G. v. Pasadena Independent School Dist.* (5th Cir. 1983) 695 F.2d 949, 953; *Zvi D. v. Gordon Ambach* (2d Cir. 1982) 694 F.2d 904.)

For purposes of stay put, the current educational placement is typically the placement called for in the student's individualized education program (IEP) which was implemented prior to the dispute arising. (*Johnson v. Special Education Hearing Office* (9th Cir. 2002) 287 F.3d 1176, 1180; *Thomas v. Cincinnati Board of Education* (6th Cir. 1990) 918 F.2d 618, 625.) In California, "special educational placement means 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.)

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, 1133-1135.) Progression to the next grade maintains the status quo for purposes of stay put. (*Van Scoy v. San Luis Coastal Unified*

Sch. Dist. (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086 .) “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.” (*Ibid.*) When a student’s “current educational placement” becomes unavailable, the local agency must provide the student with a similar placement in the interim. (See *Knight v. District of Columbia* (D.C. Cir. 1989) 877 F.2d 1025, 1028; *McKenzie v. Smith* (D.C. Cir. 1985) 771 F.2d 1527, 1533.)

Generally, if an IEP calls for non-public agency (NPA) services but no particular NPA is named, a district has unilateral authority to replace an NPA provider. (*Z.F. v. Ripon Unified School Dist.* (E.D.Cal., Jan. 9, 2013, No. 2:11–CV–02741) 2013 WL 127662, p. 6; *Student v. Ripon Unified School Dist.*, Cal. Offc.Admin.Hrngs. Case No. 2011030842, Order Denying Motion for Stay Put (April 12, 2011).) If, however, an NPA is identified in the IEP as the provider of services, that particular NPA is part of Student’s stay put placement. (See *Joshua A. v. Rocklin Unified School Dist.* (E.D. Cal., Aug. 20, 2007, No. CV 07-01057) 2007 WL 238968, pp. 2-4, *affd.* (9th Cir. 2009) 559 F.3d 1036 (*Joshua A.*); see also *Student v. San Francisco Unified School Dist.*, Cal.Offc.Admin.Hrngs. Case No. 2011071058, Order Granting Motion for Stay Put, (Aug. 26, 2011) [non-public school identified in IEP]; *Student v. San Francisco Unified School Dist.*, Cal.Offc.Admin.Hrngs. Case No. 2011060361, Order Granting Motion for Stay Put (Aug. 5, 2011) [same].)

DISCUSSION

Student is a thirteen year old boy with autism. He became eligible for special education at the age of three. Student’s October 28, 2011, IEP provided a full-time 1:1 Applied Behavior Analysis trained aide by a non-public agency under contract with District or the SELPA to be provided by Center for Autism and Related Disorders (CARD). The IEP also provided support services, including 9 hours monthly supervision and 12 hours clinic meetings monthly, all specifically provided by CARD, and the services extended through the extended school year. The October 28, 2011 was agreed upon and implemented.

Student’s October/ November 2012 IEP included the full-time 1:1 NPA aide support, monthly NPA supervision and NPA monthly clinic meetings, all to be provided by a non-public agency under contract with District or the SELPA. Although the IEP did not specify CARD as the provider, the IEP was implemented using CARD to provide the services.

Student’s October 17, 2013 IEP continued to provide full-time 1:1 NPA aide support, monthly NPA supervision and NPA monthly clinic meetings and notes that the team agreed “to continue services and supports as they are stated on the last signed IEP [October 28, 2011] until the team can reconvene to discuss remaining assessments...” At that time, the behavior supports and services were provided by CARD.

District’s contract with CARD was terminated on April 25, 2014, effective June 30, 2014. In May 2014, District informed Parents that District was terminating District’s

contract with CARD and CARD would no longer be the NPA providing services to Student. At an IEP team meeting on May 12, 2014, District informed Parents that services would be provided by Learning Solutions. Parents did not consent to the change in providers.

Student seeks an order compelling District to continue providing behavior support services for Student through CARD during the pendency of this matter.

District contends CARD is no longer under contract with District and that District can meet Student's needs and implement Student's IEP using a different contracted NPA. Mr. Clark's declaration states District has terminated its contract with CARD and is working with CARD to finish a 90 day interim agreement which would provide services to District students until September 28, 2014. District avers that an interim agreement with CARD could be used to assist Student's transition to a new provider.

The merits of the services provided by CARD are not at issue in this stay put motion. There is no dispute District provided Student NPA behavioral support services through CARD as specified in the last signed and implemented IEP in October 2011 and as subsequent IEP's were implemented through May 2014.

District offered no credible evidence that established a change in Student's circumstance or specific reasons why CARD cannot provide behavior intervention services during the pendency of this matter. To the contrary, District is planning to enter into a 90 day interim agreement with CARD for behavior intervention services, thus District is able to continue to provide behavior services through CARD as Student's stay put.

This reasoning is consistent with *Joshua A.*, cited by both parties. In *Joshua A.*, the student sought a stay put order after the district proposed to change the service provider from whom the student had been receiving services for more than two years. As in this case, the student's IEP specifically identified the service provider by name, and the service provider participated in the IEP meeting. The court noted that the student had no change in circumstance such that a change in service providers would be warranted, and that the district had not provided any evidence justifying a change in service providers. Therefore, the court concluded that the IEP supported the conclusion that the student's stay put should be with the current provider. (*Joshua A.*, *supra*, 2007 WL 238968 at p. 3.)

Furthermore, as in *Joshua A.*, Student's October 17, 2013 IEP clearly states District's intention to continue CARD services during pending assessments, thus giving direction as to what Student's status quo should be. Accordingly, Student's stay put during the pendency of this due process complaint is the October 28, 2011 IEP as implemented by District, including behavior support services provided by Center for Autism Related Disorders as the non-public agency service provider.

ORDER

1. Student's motion for stay put is granted.
2. Student's stay put shall be the placement and related services in the October 28, 2011 IEP as it was implemented by District through and after the October 17, 2013 IEP.
3. Consistent with this Order, District shall promptly employ or contract with Center for Autism Related Disorders to provide behavior services while this dispute is pending.

DATE: July 08, 2014

/s/

MARIAN H. TULLY
Administrative Law Judge
Office of Administrative Hearings