

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. 2014070176

ORDER GRANTING MOTION FOR
STAY PUT

On June 27, 2014, Student filed a motion for stay put supported by declarations under penalty of perjury from counsel and Student's mother with authenticated exhibits. On July 2, 2014, District filed an opposition supported by a declaration by attorney Michelle Jorden. Student filed a response to District's opposition on July 7, 2014, supported by a declaration under penalty of perjury from her 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 twelve year old girl with autism. She became eligible for special education at the age of three. Student’s last agreed upon and implemented IEP was dated May 13, 2013. The May 13, 2013 IEP provided a full-time 1:1 Applied Behavior Analysis trained aide by a non-public agency. The IEP also provided support services, including eight hours of consultation and four hours of clinic meetings per month provided by Center for Autism and Related Disorders (CARD). The IEP further identified CARD as the entity responsible for certain goals and the only NPA service provider under “Other Agency Services.” The aide, consultation and clinic services were also provided during the extended school year.

District’s contract with CARD was terminated on April 25, 2014, effective June 30, 2014. On May 5, 2014, Mother was informed District was not renewing its contract with CARD and Student’s services would be provided by another NPA. Student’s triennial IEP meeting was held on May 20, 2014. The May 20, 2014 IEP offered a full-time NPA aide and behavior support services but did not specify CARD as the NPA. Mother did not consent to the May 20, 2014 IEP.

Student’s 1:1 aide and other services were provided by CARD from May 2012 through June 30, 2014. Student seeks an order compelling District to continue providing behavior support services for Student with CARD during the pendency of this matter.

District contends it did not renew its contract with CARD and that District may implement Student's IEP using a different contracted NPA. District further argues that it is only supplementary services in which CARD is specifically identified in the IEP, and CARD is not specifically identified as to the Applied Behavior Analysis trained NPA aide. Therefore, according to District, a change in the CARD contracted aide actually provided is "no more than a change in District personnel at the end of a school year." Ms. Jorden's declaration states District 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 behavioral support services through CARD, including a 1:1 Applied Behavior Analysis trained aide and additional services as specified in the last signed and implemented IEP dated May 13, 2013, through June 30, 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.)

District's argument that stay put does not apply to aide support because the 1:1 aide was not specifically to be provided by CARD in the May 13, 2013 IEP is not persuasive. The fact that District did not specify CARD as the service provider for the 1:1 services during the school day does not logically lead to the conclusion that, for purposes of stay put, District would be entitled to contract with a different NPA for 1:1 behavior services, while having CARD provide supervision, clinic meetings, and be responsible for particular goals as specified in the IEP. Student's IEP specifically provides for CARD as the behavior service provider and the only provider under "Other Agency Services." The IEP language read as a whole indicates that CARD was to provide the behavior services, and District's own conduct in seeking to extend CARD's contract is consistent with an understanding that CARD was the agency implementing Student's behavior services. Accordingly, Student's stay put during the pendency of this due process complaint is the May 13, 2013 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 May 13, 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