

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

MT. DIABLO UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2014070539

ORDER PARTIALLY DENYING
STUDENT’S MOTION FOR STAY PUT
AND DEFINING STAY PUT

On July 22, 2014, Student filed a motion for stay put. On July 25, 2014, Mt. Diablo Unified School District (District) filed an opposition. On July 31, 2014, Student filed a rebuttal declaration.

APPLICABLE LAW

Until due process hearing procedures under the Individuals with Disabilities Education Act (20 U.S.C. § 1400, et seq. (IDEA)) 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.)

Courts have recognized that because of changing circumstances, the status quo cannot always be replicated exactly for purposes of stay put. (*Ms. Sex rel. G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35.) 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 (*Van Scoy*) [“stay put” placement was advancement to next grade]; see also *Beth B. v. Van Clay* (N.D. Ill. 2000) 126 F. Supp.2d 532, 534 (*Beth B.*); Fed.Reg., Vol. 64, No. 48, p. 12616, Comment on § 300.514 [discussing grade advancement for a child with a disability.].) As the court stated in *Van Scoy*:

The purpose of the stay-put provision is to maintain the status quo and to prevent the school district from unilaterally denying placement to a student while a dispute over the placement is being resolved. Courts have recognized,

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

however, that because of changing circumstances the status quo cannot always be exactly replicated for the purposes of stay put. *Ms. S. ex rel. G. v. Vashon Island School District*, 337 F.3d 1115, 1133-35 (9th Cir. 2003). In the present case, the circumstances have changed because [the student] has moved from kindergarten into first grade, which includes additional time in the classroom. 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.

(*Van Scoy, supra*, 353 F.Supp.2d at p. 1086.)

The comments to the federal regulations also address this issue:

The term “current placement” is not readily defined. While it includes the IEP and the setting in which the IEP is implemented, such as a regular classroom or a self-contained classroom, the term is generally not considered to be location-specific. In addition, it is not intended that a child with disabilities remain in a specific grade and class pending an appeal if he or she would be eligible to proceed to the next grade and the corresponding classroom within that grade.

(64 Fed.Reg. 12616 (March 12, 1999).)

DISCUSSION

Student seeks a stay put order that he not be promoted from fifth grade to sixth grade, which requires that the location of his classroom be changed to Pine Hollow Middle School, and that his door-to-door transportation services continue to be provided by a private driver. Student’s last agreed upon and implemented IEP, dated April 18, 2013 and attached to the declaration of Student’s mother (Mother), provides in pertinent part for placement in a “strategic autism” special day classroom (SDC), door-to-door transportation and a full day one-on-one aide.

Student argues that the program offered by District for sixth grade is not a free appropriate public education that meets Student’s needs. Mother’s declaration explains that: (i) when Student was in fourth grade in Fall 2012, he eloped from school, and as a result District and Student entered into a settlement agreement in January 2013 that moved Student to a “strategic autism” SDC at a new elementary school and provided door-to-door transportation; (ii) District provided door-to-door transportation with a private driver from January 2013 through the end of the 2013-2014 school year, but beginning June 30, 2014, provided Student door-to-door transportation by bus with other students; (iii) Student was the only fifth grader in a third-through-fifth grade class room in 2013-2014, and advancing him to middle school would deprive him of his peer group; and (iv) the strategic autism SDC at

the proposed middle school is located near a non-gated fire road, which Student's parents (Parents) contend is unsafe. Parents also worry that Student has changed schools too frequently. Student urges OAH to disregard the holdings in *Van Scoy* and *Beth B.* as dicta and distinguishable on their facts, because matriculation was not an issue in either.

District argues that *Van Scoy* and *Beth B.* are well-established legal authority, and that OAH has consistently determined that stay put does not prevent normal advancement from grade to grade. The opposition is supported by the sworn declaration of District's special education administrator, who opines that the strategic autism SDC at the proposed middle school is comparable to Student's elementary school SDC, and a natural progression from the elementary school program. However, District does not state whether the proposed middle school is Student's school of residence. In rebuttal, Student filed another declaration of Mother stating that Student's current elementary school is not a feeder school for Pine Hollow, and matriculation there would not be a "natural progression."

Addressing Student's legal authority argument first, the holdings of *Van Scoy* and *Beth B.* are relevant and persuasive. The issue in *Van Scoy* was whether the school district could advance a student from kindergarten to first grade, which had a longer school day, without also continuing the student's daily two hours of after-school behavior intervention services. Student's statement that the impact of advancement from grade to grade was not an issue in *Van Scoy* cannot be squared with the plain language of the *Van Scoy* excerpt cited above, where the court expressly addressed the "changed circumstances" presented by grade advancement in that case, and concluded that changed circumstances resulting from grade advancement may be taken into account when replicating a placement for stay put purposes. (*Van Scoy, supra*, 353 F.Supp.2d at p. 1086.) Similarly, in *Beth B.*, as here, the student was matriculating from elementary school to junior high school, and one of the issues expressly addressed by the court [in addition to whether stay put continued to apply during an appeal] was whether Student's elementary school program could be duplicated in the junior high school environment. Again, the court expressly addressed changed circumstances brought on by grade advancement, and opined that "Junior high school is the normal matriculation progression.... We recognize that a change to a multi-classroom setting adds complexities, but that is not enough to lead to a denial of a statutory right [to stay put]." (*Beth B., supra*, 126 F.Supp.2d 532 at p. 534.) In summary, the cases interpreting the IDEA's stay put provisions are clear in holding that a child's matriculation into the next grade is a changed circumstances that should be taken into account in replicating the child's "current educational program" where a due process challenge extends into a new school year. Accordingly, Student's matriculation to sixth grade and middle school is a "natural progression" pending this dispute.

Student's other arguments for remaining in a third-to-fifth grade classroom are also unpersuasive. It is illogical to posit that the correct course to remedy Student having been isolated as the only student of his age and grade during fifth grade is to hold him back with children a year younger and a grade behind him in academics for another year. In a sixth grade classroom at middle school, Student will learn with students his own age and a similar academic level. Parents worry that Student has changed schools too frequently, but it is

Parents who requested that Student be moved from his original elementary school, and there is no showing that Student was unable to transition to a new school in 2012, or that he will be unable to transition to middle school for the 2014-2015 school year. Most sixth grade students are new to middle school, and Student will be learning the new campus, which will presumably be his school for three years, along with his classmates and grade level peers. Similarly, Parents should have been aware when they asked for a change in elementary schools in 2012 that Student might attend an elementary school that was not a feeder school for his neighborhood middle school or the local strategic autism program, and without a showing that Student is unable to make friends, the lack of familiar peers is not grounds for overriding his stay put placement at his middle school of residence. And, as just discussed, Student has no same grade peers, and will need to meet unfamiliar grade level peers regardless of which middle school he attends. Parents' concern that a proposed middle school placement is unsafe has little support: there is no evidence that Student has eloped from school grounds in almost two years; Student now has a full day one-on-one aide who can ensure Student's campus safety and implement Student's behavior intervention plan to reduce or eliminate Student's off-campus elopement behavior [and has apparently successfully done so since January 2013]; and, assuming Pine Hollow Middle School is the school of residence, there is no showing for purposes of stay put that it is unfenced or that there is a possibility, let alone a probability, that Student will be able to access the nearby fire road. Accordingly, Student makes an insufficient showing that matriculation to middle school, change in peers, or the school's location bar his progression to the strategic autism SDC as a stay put placement.

As to Student's request that a private driver be provided for transport, Student's last agreed upon and implemented IEP provides only for door-to-door transportation and does not specify the mode of transportation. The manner in which District contracts to meet its transportation obligations is not a matter for due process, and Student's April 18, 2013 IEP does not require a private driver. Student has not made a showing that he needs a private driver, either, as he has taken the school bus to school since June 20, 2014. Accordingly Student's stay put request for a private driver is denied.

However, Student's last agreed upon and implemented IEP dated April 18, 2013, does form the basis for stay put, with matriculation to the sixth grade.

ORDER

1. Student's request for stay put in the fifth grade in the elementary school he attended during the 2013-2014 school year and transportation with a private driver is denied.
2. The District may matriculate Student to the sixth grade.

3. Student's stay put educational program shall be placement at his middle school of residence in a strategic autism SDC class for the number of minutes provided for in the April 18, 2013 IEP, and the supports and services, or their equivalent, including a one-to-one aide and door-to-door transportation, as provided for in the April 18, 2013 IEP.

DATE: August 4, 2014

/s/

ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings