

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

SYLVAN UNION SCHOOL DISTRICT.

OAH Case No. 2014010077

ORDER DENYING MOTION FOR
STAY PUT

On January 2, 2014, Student's parents on behalf of Student (Student) filed a request for a due process hearing with the Office of Administrative Hearings, naming the Sylvan Union School District (Sylvan). Student also filed a request for stay put which was denied by OAH order dated January 9, 2014.¹

On August 6, 2014, Student filed an amended request for a due process hearing. Student also filed a new motion for stay put, seeking an order that Student be maintained in his current elementary school class pursuant to his last agreed upon and implemented individualized education program.

On August 8, 2014, Sylvan filed an opposition to the motion. Sylvan contends it is not changing Student's educational program, but is instead moving Student to the equivalent program in third grade. The third grade program is located on a different school campus.

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 placement called for in the pupil's IEP, which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

¹ That stay put motion involved a different aspect of Student's educational program, unrelated to the move to third grade at issue in the instant motion.

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.)

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, 1133-35.) 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 [“stay put” placement was advancement to next grade] (*Van Scoy*); see also *Beth B. v. Van Clay* (N.D. Ill. 2000) 126 F. Supp.2d 532, 534; Fed.Reg., Vol. 64, No. 48, p. 12616, Comment on § 300.514 [discussing grade advancement for a child with a disability].)

DISCUSSION

The dispute at issue in this stay put motion involves whether Sylvan can matriculate Student from his current kindergarten through second grade autism special day class to a third through fifth grade autism special day class located on a different school campus.

Student objects to the change because it will involve a different school campus with different personnel and different peers for Student. Student believes that Student will have difficulty with the transition. According to Student’s moving papers, Student is of small stature and is young for third grade. Student’s parents are concerned about him being in a third through fifth grade special day class with older and larger children. In addition, Student raised concerns that Student’s most recent IEP has not yet been finalized, and no transition plan has been proposed to assist Student’s move to the new school.

Sylvan contends that Student’s move is not a change of educational program or services. Student will simply be matriculating from second grade to the equivalent third grade class. That class happens to be located at a different school facility.

Student does not argue that a move to the third grade special day class would constitute a change in the type of specialized instruction and services that Student currently receives under his last agreed-upon IEP. Instead, Student objects to the change of location, personnel and peers.

However, that same argument could be made any time a child’s advancement from grade to grade causes the child to go to a different school location (such as a change from elementary school to middle school). In *Van Scoy*, the child progressed from kindergarten to first grade, which included additional classroom time. The court noted:

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.)

Student raises no persuasive facts to show that an exception to the general rule of matriculation should apply. The fact that Student will be smaller than some of the other pupils in that class does not automatically make matriculation inappropriate. A pupil will usually be smaller than some children in his class, particularly in a class containing three grade levels. Student has not shown that the school district personnel will be unable to keep Student safe in that environment.

Nor is matriculation the only issue in this due process proceeding. Indeed, as Student stated in the moving papers, “the issue of whether [Student] should be a second grade student is simply one of many issues that can be resolved in the underlying hearing.”

In Student’s moving papers, Student argues that:

While [Student’s parents] have concerns regarding [Student’s] matriculation to third grade and believe that retention, may be appropriate, [Student] is not seeking an order compelling the District to maintain [Student] as a second grade student while the hearing is pending, as part of this stay-put motion.

However, that is, in effect, what Student is requesting. The third grade autism special day class is located at a different school. By asking that Student be kept at his current school while this case is pending, Student is asking to be kept in second grade during this entire pending case. Stay put was never intended to keep a child from advancing to the next grade.

ORDER

The request for Student to remain in his kindergarten through second grade autism special day class as stay put is denied.

DATE: August 13, 2014

/s/

SUSAN RUFF
Administrative Law Judge
Office of Administrative Hearings