

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BAKERSFIELD CITY SCHOOL
DISTRICT.

OAH CASE NO. 2015010661

ORDER GRANTING STUDENT'S
MOTION FOR STAY PUT IN PART,
AND DENYING IN PART

On January 14, 2015, Student filed a due process hearing request (Complaint) and request for stay put in this matter. This initial request for stay put included no supporting declarations or exhibits. On January 27, 2015, District filed an opposition to Student's request for stay put. On January 28, 2015, Student filed a stand-alone request for stay put supported by Parent's declaration and exhibits, superseding Student's initial request for stay put and addressed in this Order as Student's operative motion for stay put. On February 3, 2015, District filed an opposition to Student's motion for stay put, and on February 4, 2015 District filed a letter regarding allegedly inaccurate contentions in the motion for stay put regarding acts of District counsel.

Student's motion for stay put alleged that Student has exhibited aggressive behaviors in his general education placement at Cesar Chavez Magnet Elementary School, and that District successfully contained these behaviors in the fall of 2014 by placing Student in a special day class at Chavez. Student did not allege that the special day class placement was a permanent placement or that it was made pursuant to an IEP. Student alleged that Student was moved to the Chavez special day class prior to Student's initial IEP meeting held in December 2014. At the IEP meeting, District found Student eligible for special education under the category emotional disturbance, and the IEP offered Student placement in a special day class at a different school. Parent refused to sign Student's IEP on grounds that the eligibility category of emotional disturbance was inappropriate, and that the least restrictive environment for Student would be placement in a general education class with a one-on-one behavioral aide. The IEP form did not state that Parent could agree to Student's eligibility for special education without agreeing to District's offer of placement and services. Student alleged that in January 2015, District refused to allow Student to return to Chavez to either a general education classroom or the special day class that he attended in fall 2014, and that Student therefore has not been attending school in the District. Student requested stay put placement at Chavez, either in the special day class, or in a general education class supported by a one-on-one aide.

District opposed Student's motion for stay put on grounds that Student was not entitled to stay put protections of the IDEA and Education Code because parent did not

consent to Student's initial IEP and Student therefore had never had an agreed-upon, implemented IEP. District also opposed the motion on grounds that Student's placement in a special day class at Chavez was not made pursuant to an IEP, and was in any event temporary only for diagnostic purposes, and therefore not subject to stay put. District also contended in a sworn declaration by the principal of Chavez that District had repeatedly asked Parent to return to a general education class at Chavez, that placement in a general education class at Chavez remained available to Student, and that there was therefore no dispute as to placement that required a stay put order. Finally, District opposed Student's request for a one-on-one aide on grounds that Student has never previously had a one-on-one aide, was not offered one in his initial IEP, and therefore would not be entitled to a one-on-one aide as stay put even if Parent had signed the IEP.

APPLICABLE LAW

Jurisdiction over this matter arises under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (a)¹; et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000, et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

A parent or a public agency may file a due process complaint with respect to any matter relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. §§ 300.507 and 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) A child does not have to have been found eligible for special education in order to be entitled to relief under the IDEA. (See, e.g., *Forest Grove Sch. Dist. v. T.A.* (2009), 557 U.S. 230, 129 S. Ct. 2484. (Parents of a child who was found ineligible for special education filed a due process claim, proved eligibility, and were awarded reimbursement of private placement costs; the Supreme Court rejected the district's claim that the IDEA barred reimbursement of private placement costs unless the child had previously received special education or related services from the district.)

During the pendency of a due process proceeding, the child involved in the complaint must remain in his or her current educational placement, unless the parties agree otherwise, or the current placement of the child is substantially likely to result in injury to the child or others. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a); Ed. Code, § 56505 subd. (d).) This is referred to as "stay put." For purposes of stay put, the current educational placement of a child with an existing IEP is typically the placement called for in the student's most recent

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

IEP 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, that 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.)

Where a student is applying for initial admission to public school, the parents may consent to the student being placed in public school during the pendency of administrative proceedings. In that case, even if the parents disagree with the school's initial proposed special education placement, the public school becomes the child's "current educational placement" for purposes of "stay put." (*L.M. v. Capistrano Unified Sch. Dist.* (9th Cir. 2009) 556 F.3d 900, 911, citing 20 U.S.C. § 1415(j); Ed. Code § 56505 subd. (d).)

DISCUSSION

District and Student agree that Student is eligible for special education. Student has not agreed-upon and implemented IEP because Parent disagreed with the terms of Student's initial IEP and refused to sign it.

Education Code section 56505, subdivision (d) provides that, during the pendency of a due process hearing, "the pupil shall remain in his or her present placement," unless the parties agree otherwise, or the current placement of the child is substantially likely to result in injury to the child or others. District is not persuasive in its arguments that Student is not entitled to stay put because: (i) Student cannot be considered a "child with a disability" because Parent did not sign the disputed IEP to consent to Student's special education eligibility; and (ii) only a child defined as a "child with a disability" is entitled to stay put.

Education Code section 56346, subdivision (a) does not make a child's status as a child with a disability contingent on the parent's consent to special education and related services. It requires that a district responsible for providing a FAPE to a child with a disability shall seek to obtain a parent's consent before providing special education and related services to the child, and that the district does not deny a student a FAPE if it fails to provide special education and related services that it offered but that were not consented-to. Also, section 56505, subdivision (d) does not refer to "child with a disability" at all. It states that "the *pupil* shall remain in his or her present placement." Further, it would not make sense to deny existing students stay put protections that are afforded under Education Code section 56505, subdivision (d) to students new to a district.

In the absence of a specific exclusion of stay put protection for students disputing matters related to their initial IEP, Education Code section 56505, subdivision (d) must be interpreted broadly in light of the stated purpose of the IDEA to ensure that the rights of children with disabilities and their parents are protected. Student is entitled to stay put during the pendency of this due process proceeding.

As stay put, Student seeks placement at Chavez, either in a general education classroom with a one-on-one aide, or in the special day class for students with mild to moderate disabilities that he attended in fall, 2014. Student does not dispute the declaration of Chavez's principal that Student's placement in the special day class was temporary and not made pursuant to any IEP. As a temporary placement that was not implemented as part of an IEP, the special day class cannot be stay put placement for Student.

Student also alleges and admits that District has never offered or provided Student a one-on-one aide. Student does not state any legal basis for incorporating a related service that was never offered or implemented into Student's stay put placement, and that request must also be denied.

Student and district agree that Student's permanent placement at the time of the Complaint was in general education at Chavez. District contends and declares that it has not only offered, but has affirmatively sought, Student's attendance in a Chavez general education class. Both parties agree that this placement is appropriate, and disagree only as to whether District has or has not offered it to Student. Student contends that District has refused to allow Student to attend a general education class at Chavez.

Student is granted stay put placement in a general education classroom at Chavez, with no one-on-one aide or other special education services. It is not necessary to determine the merits of each party's contentions with respect to the dispute over whether District has made this placement available to Student after Student's December 2014 IEP.

ORDER

1. Student's motion for stay put is granted in part.
2. Student's stay put placement is a general education classroom in Cesar Chavez Magnet Elementary School without a one-to-one aide or any other special education and related services.
3. Student's motion for stay put is denied in all other respects.

DATE: February 13, 2015

/s/

ROBERT MARTIN
Administrative Law Judge
Office of Administrative Hearings