

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

NEW HAVEN UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015070576

ORDER PARTIALLY GRANTING
MOTION FOR STAY PUT

On August 3, 2015, Student filed with the Office of Administrative Hearings a motion for stay put. His motion is supported by a declaration under penalty of perjury from his counsel authenticating two attached documents – a settlement agreement signed July 31, 2014, and a copy of a proposed individualized education program dated May 12, 2015, for the 2015-2016 school year for which Parent has not consented. Student served this motion on New Haven Unified School District on July 28, 2015. Student seeks an order that his stay put placement should be his current home applied behavior analysis program and services pursuant to the July 31, 2014 settlement agreement.

On July 30, 2015, New Haven filed an opposition to Student's motion, supported by a declaration under penalty of perjury from its director of special education, which authenticates an attached copy of Student's January 11, 2013 IEP. New Haven contends that the settlement agreement called for a time-limited program which the parties specifically agreed would not constitute stay put, and therefore, Student's stay put placement is a nonpublic school placement pursuant to his last implemented and agreed-upon IEP dated January 11, 2013.

In an Order for Supplemental Briefing dated August 10, 2015, the undersigned administrative law judge advised the parties that if it were determined that the July 31, 2014 settlement agreement did not constitute Student's stay put placement, it would be necessary to hear from Student as to his position of what constitutes his last agreed-upon and implemented IEP. The parties were ordered to submit supplemental briefing on this issue and to address the effect, if any, of any grade-level advancement on Student's stay put placement. At Student's request, time for submitting supplemental briefs was extended to August 21, 2015. On August 21, 2015, Student submitted his supplemental brief supported by a declaration from Parent. OAH has not received a supplemental brief from New Haven.

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

However, if a student's placement in a program was intended only to be a temporary placement, such 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 (*Verhoeven*); *Leonard v. McKenzie* (D.C. Cir. 1989) 869 F.2d 1558, 1563-64.)

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]; 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].)

Settlement agreements are interpreted using the same rules that apply to interpretation of contracts. (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 686, citing *Adams v. Johns-Manville Corp.* (9th Cir. 1989) 876 F.2d 702, 704.) “Ordinarily, the words of the document are to be given their plain meaning and understood in their common sense; the parties' expressed objective intent, not their unexpressed subjective intent, governs.” (*Id.* at p. 686.)

DISCUSSION

On July 31, 2014, the parties entered into a settlement agreement which provided Student with a home ABA program with a nonpublic agency including 120 minutes per week

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

of speech therapy, 90 weekly minutes of occupational therapy, and two hours per month of team meetings through the 2014-2015 extended school year.

Student concedes the settlement agreement specifically states that the services set forth in the agreement shall not constitute stay put. Further, the settlement agreement states that the home program is time limited and will be provided only through the 2014-2015 extended school year; and that New Haven will convene an IEP team meeting by May 15, 2015, to plan Student's placement for the 2015-2016 school year. Through its plain language, the settlement agreement set forth a temporary placement and services which terminated at the conclusion of the 2014-2015 extended school year.

Under *Verhoeven*, since Student's program delineated in the settlement agreement was intended to be a temporary placement, then that placement does not constitute stay put. (*Verhoeven, supra*, 207 F.3d 1, 7-8.) The First Circuit in *Verhoeven*, in determining that the student's current educational placement was not the recently concluded temporary placement at a private school provided for by a settlement agreement, held, "Ordering [district] to fund a private placement ... during the challenge to the IEP is not the type of maintenance of the status quo [the IDEA] envisions. To the contrary it would be an extension of this temporary placement to a degree well beyond the parties' intent at the time of the ... settlement agreement." (*Id.* at p. 9.) Here, the parties stated their intent to not only limit Student's program but further explicitly stated in the settlement agreement that his home program and services specified therein, would not constitute stay put in the event of a future IEP dispute.

Student contends that because the agreement fails to designate a stay put placement, the services in the settlement agreement must constitute stay put as they are the last implemented program. Student provides no persuasive legal authority for this contention. Student's reliance on *Thomas* is misplaced as that case is factually distinct. In *Thomas*, the Sixth Circuit held that in the situation where there was no prior IEP, then the current educational placement was the operative placement actually functioning at the time the dispute arose. The student in *Thomas* was in a home program prior to the IEP dispute and this was deemed his stay put placement; however, there was no evidence the home program was time-limited, unlike the matter at hand. (See *K.D. v. Department of Education* (9th Cir. 2011) 665 F.3d 1110, 1120-1121 (*K.D.*) [the Ninth Circuit held that a district's offer to reimburse tuition for a private placement for a time limited period, did not render the private placement to be the student's stay put placement].) Indeed, none of the cases Student cites supports his legal contention. In both *Clovis Unified School Dist. v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635, 641, and *K.D., supra*, 665 F.3d 1110, the Ninth Circuit held that a subsequent administrative or judicial decision confirming the appropriateness of a private placement constitutes an agreement by the state to change the student's placement and that change in placement constitutes stay put; these cases are factually distinct from Student's situation.

Further, Student is not correct in his claim that the failure of the settlement agreement to specify his stay put placement creates an ambiguity. There is no ambiguity; Student's stay put placement is his last agreed-upon and implemented IEP. Whether that IEP offers Student

a FAPE is not at issue in Student's motion for stay put. Student's argument that he will be without an educational program if the settlement agreement is not found to be his stay put placement is equally without merit; his program is that identified in his last implemented IEP.

The parties' pleadings and attachments establish that Student's last implemented IEP was the January 11, 2013 IEP. Student does not contend otherwise and was afforded the opportunity to specifically address this issue. Student's supplemental briefing is supported by Parent's declaration under penalty of perjury, in which Parent declares that Student attended "CEID" (Center for Early Intervention on Deafness) from January 2013 through November 2013, pursuant to an IEP. The January 2013 IEP affords Student a nonpublic school placement with 180 minutes per day of specialized academic instruction with daily support from a paraprofessional trained in applied behavior analysis, an FM system and visual aids; transportation; 30 minutes twice per week of occupational therapy and 30 monthly minutes of consult; 30 minutes per week of individual speech and language services; and 120 minutes per day of one-to-one ABA instruction in a class setting. The January 2013 IEP constitutes Student's stay put placement.

ORDER

Student's motion for stay put is partially granted. Student's stay put placement is that specified in the January 11, 2013 IEP.

DATE: August 24, 2015

/s/

THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings