

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

CAMPBELL UNION HIGH SCHOOL
DISTRICT.

OAH Case No. 2015100950

ORDER GRANTING STAY PUT AND
DETERMINING STAY PUT
PLACEMENT

On October 28, 2015, Student filed a motion for stay put.¹ Student's supporting documentation was filed on November 2, 2015. Campbell filed an opposition to Student's motion on October 29, 2015, and a supplemental opposition on November 2, 2015.

In an Order for Supplemental Briefing and Documentation dated November 6, 2015, the parties were ordered to submit additional documentation regarding the similarities and/or differences between Campbell's offer of placement and services and the April 28, 2015 IEP. On November 13, 2015, Student filed additional documentation consisting of declarations from both parents with attachments, and Campbell filed a supplemental brief supported by a declaration and attachments.

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)²; Ed. Code, § 56505 subd. (d).) This is referred to as "stay put."

The IDEA does not define the phrase "current educational placement," and courts have interpreted it to mean "the placement set forth in the child's last implemented IEP." (*L.M. v. Capistrano Unified School Dist.* (9th Cir. 2008) 556 F.3d 900, 902.) More recently,

¹ Student's Request for Due Process Hearing filed on October 23, 2015, also included a motion for stay put.

² All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

the Ninth Circuit held that “‘educational placement’ means the general educational program of the student.” (*N.D. ex rel. parents acting as guardians ad litem v. Hawaii Dept. of Educ.* (9th Cir. 2010) 600 F.3d 1104, 1116; see also Cal. Code Regs., tit. 5, § 3042, subd. (a) [defining “specific educational placement” 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”].)

The Ninth Circuit Court of Appeals has recognized 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 School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35, superseded by statute on other grounds; 20 U.S.C. § 1414(d)(1)(B).) In *Ms. S. ex rel G v. Vashon Island School Dist.*, *supra*, at pp. 1133-1134, the Ninth Circuit addressed the question of a school district’s obligation to provide stay put when a student transfers from another school district and the parent files a due process complaint challenging the services offered by the receiving school district. The Court held as follows:

[W]hen a dispute arises under the IDEA involving a transfer student, and there is disagreement between the parent and student's new school district about the most appropriate educational placement, the new district will satisfy the IDEA if it implements the student's last agreed-upon IEP; but if it is not possible for the new district to implement in full the student's last agreed-upon IEP, the new district must adopt a plan that approximates the student's old IEP as closely as possible. The plan thus adopted will serve the student until the dispute between parent and school district is resolved by agreement or by administrative hearing with due process.

(*Id.* at p. 1134.) Similarly, when a student transferred in to a school district upon aging out of preschool, the Ninth Circuit held that the IDEA did not require the exact same vendors to provide services to the student, and the new educational agency could “meet the requirements of the ‘stay put’ provision by providing comparable educational placement.” (*Johnson ex rel. Johnson v. Special Educ. Hearing Office* (9th Cir. 2002) 287 F.3d 1176, 1181.) In a more recent examination of stay put requirements, the Ninth Circuit held that “under the IDEA a change in educational placement relates to whether the student is moved from one type of program—i.e., regular class—to another type—i.e., home instruction. A change in the educational placement can also result when there is a significant change in the student's program even if the student remains in the same setting.” (*N.D. v. Hawaii Dept. of Educ.*, *supra*, 600 F.3d at p. 1116.)

There are special provisions for Students who transfer within the same school year to new school districts within the same state. Title 20 United States Code 1414(d)(2)(C)(i)(1) states:

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable

to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

(20 U.S.C. § 1414(d)(2)(C)(i)(1); see 34 C.F.R. § 300.323(e).)

DISCUSSION

Student is thirteen years old and eligible for special education under the category of autism. For the 2014-2015 school year, Student attended school in the Moreland Elementary School District as an eighth grader in a special day class at Easterbrook Discovery School. On April 28, 2015, Student's annual IEP team meeting was held. Goals and services were updated, and the IEP was signed.

In anticipation of Student's transition to high school in the Campbell Union High School District for the 2015-2016 school year, an IEP team meeting was held on March 5, 2015. Representatives from both Moreland and Campbell attended. Campbell offered Student placement in a Santa Clara County Office of Education (County) special day class (SDC) on the campus of Campbell's Westmont High School. At a June 10, 2015 IEP team meeting, Campbell reiterated its placement offer, and Parents did not consent.

In this matter, Student has challenged whether Campbell's offer constitutes a free appropriate public education and seeks stay put in a moderate to severe SDC at Campbell's Prospect High School. Student supports this request by asserting that his last educational placement is a district SDC and not a county SDC. Student similarly asserts that his last placement was a non-categorical SDC whereas the County program is an autism specific SDC. Student also asserts that the County program is more restrictive than a Campbell SDC, removes him from the general education population, and does not meet his unique needs.

Campbell asserts that Student is not entitled to the protections of the stay put provision because he transferred in to the district in between school years. Campbell alternatively asserts that its placement offer is an equivalent program to Student's prior placement in Moreland and therefore satisfies the requirements of stay put.

As an initial issue, Campbell's argument that stay put does not apply to Student because he transferred in to Campbell in between school years is not persuasive. Contrary to Campbell's position, this proposition is not well settled law, and Campbell has presented no binding legal authority explicitly denying stay put to students who transfer in to a new school district in between school years.³ Indeed, Student did not move but happens to live in a residential area where there are two districts separating the high schools from the elementary and middle schools. Nowhere in the law is there an exception to the procedural protections

³ Administrative decisions are not binding precedent.

of stay put for students who live in such an area, nor would Campbell be able to attempt to deny Student a stay put placement if Campbell's district was unified with its grade schools.

Campbell references 20 U.S.C. § 1414(d)(2)(C)(i)(1) and 34 C.F.R. § 300.323(e) in support of its argument that stay put does not apply to Student. The code and regulation refer to districts' obligations to provide FAPE to students who transfer mid-year. They are part of laws setting forth when IEP's must be in effect and subsections addressing the specific instance of mid-year transfer students. The stay put code and regulation, in contrast, are separate laws describing procedural safeguards and in particular with regard to the filing and pendency of appeals. There is no reason that the additional, special requirements districts must follow to provide FAPE when receiving a student mid-year should impact the procedural safeguards provided to all students, including other incoming transfer students.

Turning to the application of stay put to the instant case, the parties do not dispute that the April 28, 2015 IEP (IEP), last implemented by Moreland, is Student's last agreed upon and implemented educational program. This IEP provides for specialized academic instruction in a group in a special day class. The provider is listed as "District of Service," which is identified as Moreland on a subsequent page. Ninety percent of Student's time is outside the general education environment. Related services include speech and language therapy, a one-to-one aide, adapted physical education, occupational therapy consultation, and transportation.

Campbell's June 10, 2015 written offer, contained on a two-page IEP Amendment/Addendum, closely reflects the IEP. Both the IEP and Campbell's offer provide Student specialized academic instruction in a special day class on a comprehensive campus. Both the IEP and Campbell's offer provide for: push in group speech and language therapy for thirty minutes twice per week; pull out group adapted physical education for thirty minutes once per week; and transportation.⁴ Campbell's offer adopts the same goals, provides the same accommodations, and confirms that ninety percent of Student's time will continue to be outside the general education environment. Although an occupational therapy consultation is not specifically mentioned, the offer states that "[a]ll aspects of [Student's] current IEP will remain in place. ...Team will reconvene at the 30-day IEP."

Student's position that stay put should be in an SDC operated by Campbell, as opposed to the County, is unpersuasive where, as here, the overall educational placement and program offered to Student closely approximate the last implemented IEP. Further, there is no evidence that a Campbell SDC would provide Student with a significantly different educational program or one that more closely approximates the IEP. Which provider operates the class is, with nothing more, less significant to the stay put analysis than the type of placement itself. Student's argument that stay put should be in a non-categorical SDC as opposed to an autism specific SDC is also unavailing because the IEP does not specify

⁴ Although Campbell's offer does not include a one-to-one aide, the IEP indicated that this service would end July 17, 2015, and Student does not raise any claim related to the aide in his stay put motion.

placement in a “non-categorical” SDC. The IEP does not specify any particular type of SDC, so the County SDC is not inconsistent with the IEP.

Student also opposes the County SDC on the basis that it does not meet his unique needs and is more restrictive than the IEP and his last placement in Moreland. Student suggests that the County program will provide individual academic instruction, rather than the group instruction called for in the IEP, because Student’s parents did not observe any group academic instruction in the County SDC. However, there is not sufficient evidence to establish that group academic instruction is not going to be provided to Student. Student mentions the location of the lunch tables and that transportation would no longer be with general education students as examples, yet Campbell’s offer confirms that Student will continue to spend ten percent of his time in the general education setting, which is consistent with the IEP. Furthermore, the County SDC is located on a comprehensive campus, as was Student’s previous SDC in Moreland. Student’s concerns about the program’s curriculum, electives, and use of non-verbal communication and communication devices are of the type that are more appropriately addressed in the underlying FAPE claim. The stay put analysis is limited here to how closely Campbell’s offer approximates the IEP, and many of Student’s concerns about the County program are related to program components that are simply not addressed in the IEP placement and services.

Student has not met his burden of establishing that Campbell has not provided an appropriate stay put placement. The educational program and placement offered by Campbell closely approximates the provisions of the last implemented IEP placement. In addition, the evidence does not establish that Student’s requested stay put placement aligns more closely with the IEP.

ORDER

Student is entitled to a stay put placement. However, Student’s stay put placement is the one identified in the April 28, 2015 IEP, and Student has not established that the County SDC program offered by Campbell represents a change in educational placement in contravention of the stay-put provision. Therefore, Student’s stay put placement is that described in Campbell’s June 10, 2015 offer.

IT IS SO ORDERED.

DATE: November 18, 2015

/s/

LISA LUNSFORD
Administrative Law Judge
Office of Administrative Hearings