BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENTS ON BEHALF OF STUDENT, v. WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT,	OAH CASE NO. 2013031004
WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT.	OAH CASE NO. 2013040364 ORDER DENYING STUDENT'S FOURTH MOTION FOR STAY PUT

On June 14, 2013, Student filed a fourth motion for stay put in this matter. On June 18, 2013, the District filed an opposition to the motion.

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 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.)

DISCUSSION

Student's fourth motion for stay put is based upon the same facts as the first three.

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

First Motion for Stay Put

On March 11, 2013, the District filed a request for due process hearing (complaint) against Student in OAH Case No. 2013030286.[2] On March 18, 2013, Parents filed in that matter a request for a stay put order "according to the terms of the settlement agreement signed on May 26, 2010." This was a reference to a settlement agreement between the parties (Settlement Agreement) that governs Student's placement until the beginning of the school year (SY) 2013-2014 and provides for several contingencies in case the parties continue to disagree on his placement. Parents provided no further information or argument.

On April 2, 2013, the undersigned denied the first motion for stay put on several grounds, one of which was that Parents failed to discharge their burden of persuasion on the motion because they failed to provide sufficient facts on which the motion could be decided. The motion was also denied on the ground that the motion was premature, as Student was at the time in the home placement desired by Parents and provided for in the Settlement Agreement, and would remain there until the beginning of SY 2013-2014.

Second Motion for Stay Put

On March 26, 2013, Student filed a complaint against the District, which was assigned OAH Case No. 2013031004. Student titled that complaint as both a request for due process hearing and a request for stay put, but there was no mention in the body of the document of any request for stay put, nor was any argument for stay put made. On April 3, 2013, ALJ Margaret Broussard denied the second motion for stay put on the ground that Student's stay put placement was governed by the earlier order denying stay put entered on April 2, 2013.

Third Motion for Stay Put

On May 7, 2013, Student moved to amend his complaint in Case No. 2013031004 and again moved for stay put. This time Parents argued that, although Student's stay put placement is defined by the Settlement Agreement, the District had breached the Agreement and that because of "[t]he existing District climate," which violated federal and state law, the District could not in the recent past or the near future offer Student an appropriate placement. On May 20, 2013, the undersigned denied the third stay put motion on the grounds that Parents' new allegations could not be resolved without a hearing, and that the stay put motion was still premature, as Student still remained in the home placement Parents desire until the beginning of SY 2013-2014.

[2] OAH Case No. 2013030286 was dismissed on April 5, 2013 for reasons not relevant here.

Fourth Motion for Stay Put

On June 14, 2013, Student again moved to amend his complaint in Case No. 2013031004. (OAH has granted that motion in a separate order) The newly amended complaint contains the fourth stay put motion addressed here. It is made in language identical to that of the third stay put motion.

Student's fourth stay put motion is repetitive and must be denied on that ground alone. It also could be regarded as a motion to reconsider the previous ruling on May 20, 2013, and if so regarded would be denied for failure to present any new facts or law not available at the time the previous motion was made. However it is characterized, the motion is still premature, as Student continues to remain in the home placement desired by Parents and agreed to in the Settlement Agreement until the beginning of SY 2013-2014.

It is conceivable, while unlikely, that Parents believe that for some legal reason they must renew their stay put motion every time they file an amended complaint, or perhaps every time they file a response to a District complaint or pleading. If so, Parents are advised that such a belief is incorrect. Parents are cautioned that the repeated filing of stay put motions based on the same facts is greatly wasteful of the resources of both parties and of OAH, and that any additional filing of essentially the same stay put motion may be regarded as frivolous and may be subject to sanctions.[3]

The District's New Stay Put Argument

In its opposition to Student's fourth stay put motion, the District argues that recent factual developments require a ruling that Student's stay put placement must be in accord with a new IEP offer made by the District. The District asserts that on April 24 and May 21, 2013, the parties attended a triennial IEP team meeting for Student, and as a result of that meeting the District made an offer to Student of a program for SY 2013-2014. The offer included placement at the Anova Center for Education, a non-public school, with various supports and services. Parents have not yet agreed to the offer.

The District argues that its recent triennial offer is nonetheless Student's new stay put placement by virtue of section 14.c of the 2010 Settlement Agreement. That section provides generally that the District shall complete a triennial re-evaluation of Student in the Spring of 2013; that Parents consent to the re-evaluation and will make Student available for it; and that an IEP meeting will be held on or before May 1, 2013, for the purposes of reviewing the triennial re-evaluation and deciding on a program for Student for SY 2013-2014. Section 14.c. of the Agreement then provides:

[3] Nothing in this Order is intended to prevent Parents from filing a stay put motion based upon new factual developments that may actually alter Student's stay put placement under the terms of the Settlement Agreement.

> The parties agree that should a dispute arise at this [triennial] IEP team meeting regarding Student's placement and/or services, and should either party file a due process hearing complaint, Student's stay put placement shall be in accordance with the IEP developed at this IEP team meeting.

Accordingly, the District argues that Student's stay put placement is now the program it offered at the triennial IEP team meeting, not the home placement sought by Parents.

A definitive ruling on the District's new stay put argument would be premature. The District does not affirmatively seek a ruling that its triennial offer is now Student's stay put placement; it only raises the argument as a reason to deny Student's fourth stay put motion. The District makes its factual assertions and argument in its opposition to Student's motion, and Parents have not responded to that opposition. OAH's motion practice does not contemplate the filing of a reply to an opposition, so Parents may not have had an adequate opportunity to dispute the District's theory.

Moreover, the District's filing does not address at least two issues that may be important in determining Student's current stay put placement. First, the District's stay put argument is premised, among other things, on the completion of its triennial re-evaluation. From the numerous pleadings on file in these matters, the parties appear to agree that the District has not entirely completed the psychoeducational and behavioral portion of that re-evaluation. This is because Parents have refused to produce Student for that part of the re-evaluation unless provided an opportunity to view and hear it in real time through a one-way vision arrangement (such as a one-way mirror or window) and an audio feed. The District has been unwilling to comply with that condition.

This dispute has spawned competing claims of breach of contract. Parents claims that the District has not completed the triennial re-evaluation because it has not completed the contested psychoeducational and behavioral portion of the re-evaluation. The District's stay put theory thus might be flawed because one condition precedent required by section 14.c. of the Settlement Agreement -- the completion of the triennial re-evaluation -- has not been entirely fulfilled. The District claims that the triennial re-evaluation has not been completed only because Parents have revoked their consent and breached their obligation to present Student for the re-evaluation, and that Parents have no right to condition the psychoeducational portion of the re-evaluation upon the real-time observation they seek. OAH has previously held that these contentions cannot be fully resolved without a hearing.

On this motion, the parties have not fully briefed whether the District's failure to complete the triennial re-evaluation under these circumstances defeats its stay put theory. Neither party has addressed, for example, whether section 14.c. of the Agreement should be enforced notwithstanding the lack of a completed psychoeducational assessment because Parents plainly have no right to condition their promised production of Student for assessment upon the observation they seek. Neither party has addressed whether the alleged breaches of contract must relate to a plausible legal theory in order to matter to the determination of stay put. Judicial decisions generally hold that parents have no right to

attach conditions to a district assessment that are unacceptable to the district, and that their insistence on such conditions constitutes a refusal of consent to the assessment. (See, e.g., *G.J. v. Muscogee County School Dist.* (M.D.Ga. 2010) 704 F.Supp.2d 1299, 1309, affd. (11th Cir. 2012) 668 F.3d 1258, 1264-1265; *Dubois v. Connecticut State Bd. of Educ.* (2d Cir. 1984) 727 F.2d 44, 49, fn. 5.) In light of these decisions, Parents should have an opportunity to argue that their insistence on real-time observation of the psychoeducational assessment is an even arguably legitimate demand rather than the mere obstructionism the District claims it is.

Second, the stay put portion of section 14.c. of the Settlement Agreement is conditioned upon a dispute between the parties over the triennial offer (which appears to exist) and then the filing by either party of a request for due process concerning that dispute. The District has not addressed whether any of the pending due process requests in these consolidated matters satisfies that requirement, or whether the requirement can only be satisfied by the filing of another due process request directly attacking or supporting the triennial offer.

No opinion is expressed here concerning these issues. As set forth above, there are other valid reasons for denying Student's fourth stay put motion. There is sufficient time between now and the beginning of SY 2013-2014 to resolve Student's stay put situation upon an appropriate motion that has been fully briefed and has been supported by declarations under oath concerning contested facts rather than unsworn allegations in pleadings.

For the reasons above, Student's fourth motion for stay put is DENIED.

Dated: June 21, 2013

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings