BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. ELK GROVE UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2013070148 ORDER GRANTING MOTION FOR STAY PUT

On June 28, 2013, Student's parent on behalf of Student (Student) filed a motion for stay put. On July 3, 2013, the Elk Grove Unified School District (District) filed an opposition. On July 5, 2013, Student filed a reply.

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 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.)

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; *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.)

DISCUSSION

This stay put motion involves Student's extended school year (ESY) services. The parties disagree over which IEP was the last agreed upon and implemented IEP for purposes of determining the stay put ESY services.

Student contends the last agreed upon and implemented IEP was the October 6, 2011 IEP, as amended on April 18, 2012. Under the October 6, 2011 IEP, Student attended a year-round school program at a District school. The IEP called for Student to receive ESY services through his "BECA" program in an amount not to exceed 50 days/400 hours during off-track periods. Later, Student was placed in a "home/hospital" setting, but the BECA ESY hours remained the same.

The services page of the October 6, 2011 IEP described the ESY services as individual behavior intervention services provided by the SELPA for 480 minutes per day. The comments to that section stated, in part: "ESY service provided during off-track periods. Total number of ESY days NOT TO EXCEED 50 days/400 hours."

The April 18, 2012 IEP stated, in part: "BECA hours will be provided per IEP dated October 6, 2011."

On December 20, 2012, the parties held another IEP meeting in which they agreed to begin transitioning Student gradually from home/hospital back to a public school setting. Unlike Student's prior school placement, the new placement was on a traditional school year. Under the heading "ESY Services," the IEP stated that behavior intervention services would be provided by the SELPA from December 24, 2012, through January 7, 2013, in the amount of 30 hours per week for 60 hours total. The non-ESY services ran from October 6, 2012, to February 3, 2013. No mention was made of any summer ESY services or any other ESY services besides the winter break hours. The December 2012 IEP document did not contain any present levels of performance or goals for Student, and was only four pages long. (By contrast, the October 6, 2011 IEP had been approximately 15 pages long.)

The District contends that the December 20, 2012 IEP was the last agreed upon and implemented IEP for Student. The District believes this IEP superseded the prior IEP's, and that Student is not entitled to any stay put for the ESY services called for in the earlier IEP's.

Although the parties held a subsequent IEP meeting, they did not agree to any subsequent IEP's after the December 20, 2012 IEP. On June 13, 2013, the District sent a "prior written notice" to Student's parent offering to provide Student with 80 hours of ESY over the summer (four hours a day for 20 days). In the District's opposition papers, the District states that no summer ESY services were offered in the December 2012 IEP, but the District sent the prior written notice with the offer of 80 hours of summer ESY "informally...as a sign of good faith."

For purposes of this stay put motion, Student's position is more persuasive both factually and legally. There is a genuine dispute as to whether the December 2012 IEP was intended to be an addendum to the prior IEP's or an entirely new IEP which superseded the others. The December 2012 IEP contained no new goals and present levels of performance. There was no mention made of *any* summer ESY services, although it appears that the parties

believed Student needed at least some ESY. The IEP, by its terms, seems to address only the winter break, not the ESY necessary for the remainder of the school year. [1]

The legal policies underlying the stay put doctrine also support Student's position. The purpose of stay put is to prevent a school district from unilaterally changing a child's placement and services while litigation is pending. The issues for hearing in Student's due process proceeding involve Student's ESY services. At this point, it is too early to determine which side will prevail at hearing, but Student should not be deprived of ESY services in the meantime.

ORDER

Student's motion for stay put is granted. Pending the final resolution of this due process case, the District shall provide Student with the ESY services called for in the October 6, 2011/April 18, 2012 IEP's.

Dated: July 15, 2013

/s/
SUSAN RUFF
Administrative Law Judge
Office of Administrative Hearings

[1] Nothing in this Stay Put Order is intended to resolve the merits of this case. No Factual Findings or Legal Conclusions are made herein; any discussion of the facts and law is solely for the purpose of determining stay put.