BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. RIVERSIDE UNIFIED SCHOOL DISTRICT AND CALIFORNIA SCHOOL FOR THE DEAF, RIVERSIDE.	OAH CASE NO. 2013080398 ORDER GRANTING IN PART AND DENYING IN PART STUDENT'S MOTION FOR STAY PUT

FACTUAL BACKGROUND

Student filed her due process complaint on August 13, 2013, naming the Riverside Unified School District (RUSD) and the California School for the Deaf, Riverside (CSDR) (collectively referred to below as the Districts), as respondents. Student simultaneously filed a motion for stay put. RUSD filed an opposition to Student's motion on August 15, 2013.

Student's complaint alleges that the individualized education programs (IEP's) developed for her over the last two years by RUSD and CSDR, where Student attends school, were inadequate. Student alleges that the IEP's did not include goals, modifications, and accommodations that Student needed to address her unique needs and that had been previously recommended for her in assessments. Student also alleged that she has not progressed sufficiently in school. As a result, her parents have requested since Student was in first grade that RUSD and CSDR permit Student to repeat a grade so that she could catch up to grade level. Student states that the Districts have consistently denied the request to permit her to repeat a grade. Student states that her latest annual IEP meeting convened beginning on March 13, 2013, during the second half of Student's third grade year. At that time, the IEP team members from CSDR concurred that Student should be retained in third grade for the following school year rather than promoting to fourth grade. The IEP team member from RUSD believed that Student did not require retention.

Student's IEP meeting did not conclude on March 13 and was continued to April 10, 2013. At that time, more school-based assessment results for Student were available for review by her IEP team. Apparently, because of Student's showing on these assessments, the IEP team members from CSDR reconsidered their earlier recommendation that Student be retained in third grade. As of the April 10 IEP meeting, neither CSDR nor RUSD staff recommended that Student be retained. Student's parents continued to believe that she should repeat third grade in order to catch up to grade level.

Subsequent to the Districts' denial of the request to retain Student in third grade, Student, through her parents, filed the instant complaint. Student requests several remedies in her complaint, including independent assessments funded by the Districts, compensatory education, the provision of one-on-one reading specialist support, and private tutoring. Student also requests as a remedy that she be retained in third grade.

Student's motion for stay put only requests that Student be retained in third grade. Student contends that since her retention in third grade is at issue in her complaint, and that since she is entitled to remain in her current educational placement during the pendency of her due process procedures, she is entitled to an order that the Districts retain her in third grade. Student did not provide any declaration in support of her motion for stay put and did not provide a copy of her last agreed-upon and implemented IEP. However, RUSD has provided a copy of the pertinent IEP in its opposition to Student's motion. Based upon Student's complaint and her motion for stay put, as well as the evidence provided by RUSD in support of its opposition, the evidence indicates that Student's last agreed-upon and implemented IEP is dated May 16, 2012.

APPLICABLE LAW

Under federal and California special education law, a special education student is entitled to remain in his or her current educational placement pending the completion of due process hearing procedures unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a); Ed. Code, §§ 48915.5, 56505, subd. (d).) The purpose of stay put is to maintain the status quo of the student's educational program pending resolution of the due process hearing. (*Stacey G. v. Pasadena Independent School Dist.* (5th Cir. 1983) 695 F.2d 949, 953; *D. v. Ambach* (2d Cir. 1982) 694 F.2d 904, 906.) 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.)

California Code of Regulations, title 5, section 3042, defines "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.

However, under stay put, "it is not intended that a child with disabilities remain in a specific grade or class pending appeal if he or she would be eligible to proceed to the next grade and the corresponding classroom within that grade." (Fed.Reg., Vol. 64, No. 48, p. 12616, Comment on § 300.514.) In most instances, progression to the next grade adheres to the status quo for purposes of stay put. (See *Beth B. v. Van Clay* (N.D. Ill. 2000) 126 F. Supp.2d 532, 534.) Notably, in *Van Scoy v. San Luis Coastal Unified Sch. Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, (herein, *Van Scoy*) which RUSD cites in its opposition, the court explained:

> Courts have recognized, however, that because of changing circumstances the status quo cannot always be exactly replicated for the purposes of stay put. *Ms. S. ex rel. G. v. Vashon Island School District*, 337 F.3d 1115, 1133-35 (9th Cir. 2003). In the present case, the circumstances have changed because [the student] has moved from kindergarten into first grade, which includes additional time in the classroom. Certainly the purpose of the stay-put provision is not that students will be kept in the same grade during the pendency of the dispute. The stay-put provision entitles the student to receive a placement that, as closely as possible, replicates the placement that existed at the time the dispute arose, taking into account the changed circumstances.

(*Id.*, 353 F.Supp.2d at p. 1086.)

DISCUSSION

As of the time she filed her complaint, Student had just finished third grade. Her March 16, 2012 IEP, in pertinent part, states that her placement is at CSDR, with instruction in American Sign Language, in a small group setting. Student's complaint contends that the Districts should retain her in the third grade because her academic levels are too low for her to complete work at the fourth grade level. In its opposition to Student's motion for stay put, RUSD states that there is no reason to retain Student in third grade.

Under the Individuals with Disabilities Education Act (IDEA), a stay put order is not a final adjudication of the merits of the issue of retention but serves as injunctive relief during the pendency of the due process action, to maintain the status quo. In *Van Scoy*, *supra*, the court acknowledged that the stay-put provision of IDEA entitles a student to receive a placement that, as closely as possible, replicates the placement that existed at the time the dispute arose, taking into account changed circumstances. In that case, the student was transitioning from kindergarten to first grade. The student spent fewer hours in kindergarten in the classroom and more hours outside of the classroom with related services, than he would have in the first grade. Those additional out of class hours were the issue in the stay-put context. The court determined that the student's stay-put required inclusion of the additional services outside the classroom in conjunction with advancement to the first grade in order to avoid a significant change in the stay-put placement.

Here, Student's only request for stay-put is retention in the third grade is based upon her parents' determination that she is not progressing sufficiently to be able to access a fourth grade curriculum. However, Student offered no evidence that she would suffer detriment or harm, or that the status quo cannot be achieved, by a stay put order that allows her to transition to fourth grade with the supports provided for in her May 16, 2012 IEP. RUSD relies on the holding in *Van Scoy, supra,* which is persuasive and generally applicable here. The status quo can be preserved, even if Student matriculates to fourth grade with the same supports as provided for the last agreed-upon IEP.

Student's argument that she should be retained because failing to do so will negate her ability to obtain a requested remedy should she prevail on her due process complaint is not persuasive. First, granting Student's request for retention provides her with a requested remedy even before she has prevailed on her complaint. Second, should Student prevail in whole or in part on her complaint, there are sufficient remedies available to her, such as her request for tutoring and compensatory education, that would address any deficiencies that might be found in her IEP's. Finally, finding that a student's stay put is his or her present grade has the potential for leading to the absurd result that a student might remain at one grade level for several years while his or her due process case is litigated administratively and through appeals. Such a result is not the purpose of stay put and directly contradicts the language of the court in *Van Scoy* that a child should advance from grade to grade during the pendency of any due process disputes. Student is entitled to stay-put, but with the modification that the Districts may advance her from grade to grade, pending resolution of this matter.

ORDER

Student's motion for stay-put is partially granted. Student's stay-put shall be as provided in the May 16, 2012 IEP, with the exception that the Districts may advance Student from grade to grade pending resolution of this matter.[1]

Dated: August 20, 2013

/s/
DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings

[1] Nothing in this Order prevents the Districts from applying to Student their normal school policies with regard to retention of students should Student warrant retention under those policies. Nor does this Order prevent the parties from otherwise mutually agreeing, either through the IEP process or through general policies of the Districts, that Student should be retained.