BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. BEVERLY HILLS UNIFIED SCHOOL DISTRICT.	OAH Case No. 2019020071 ORDER GRANTING MOTION FOR STAY PUT

On February 4, 2019, Student filed a motion for stay put. On February 7, 2019, Beverly Hills Unified School District filed an opposition to Student's motion. On February 8, 2019, Student filed a reply to Beverly Hills' opposition.

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

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, subd. (a).)

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 G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35, superseded by statute on other grounds, 20 U.S.C. § 1414(d)(1)(B).) Progression to the next grade maintains the status quo for purposes of stay put. (*Van Scoy ex rel. Van Scoy v. San Luis Coastal Unified School 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.

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

64, No. 48, p. 12616, Comment on § 300.514 [discussing grade advancement for a child with a disability.].)

It does not violate stay put if a school is closed for budget reasons and the child is provided a comparable program in another location. (See *McKenzie v. Smith* (D.C. Cir. 1985) 771 F.2d 1527, 1533; *Knight by Knight v. District of Columbia* (D.C. Cir. 1989) 877 F.2d 1025, 1028; *Weil v. Board of Elementary & Secondary Educ.* (5th Cir. 1991) 931 F.2d 1069, 1072-1073; see also *Concerned Parents & Citizens for the Continuing Ed. at Malcolm X (PS 79) v. New York City Bd. of Ed.* (2d Cir. 1980) 629 F.2d 751, 756; *Tilton by Richards v. Jefferson County Bd. of Educ.* (6th Cir. 1983) 705 F.2d 800, 805.) "Hawaii's teacher furloughs and concurrent shut down of public schools is not a change in the educational placement of disabled children." *N.D. ex rel. parents acting as guardians ad litem v. Hawaii Dept. of Educ.* (9th Cir. 2010) 600 F.3d 1104, 1116

Generally, if an IEP calls for non-public agency services but no particular NPA is named, a district has unilateral authority to replace an NPA provider. (*Z.F. v. Ripon Unified School Dist.* (E.D.Cal., Jan. 9, 2013, No. 2:11–CV–02741) 2013 WL 127662, p. 6; *Student v. Ripon Unified School Dist*. (April 12, 2011) OAH Case No. 2011030842 (Order Denying Motion for Stay Put).)

If, however, an NPA is identified in the IEP as the provider of services, that particular NPA is part of Student's stay put placement. (See *Joshua A. v. Rocklin Unified School Dist.* (E.D. Cal., Aug. 20, 2007, No. CV 07-01057) 2007 WL 238968, pp. 2-4, affd. (9th Cir. 2009) 559 F.3d 1036 (*Joshua A.*); see also *Student v. San Francisco Unified School Dist*. (Aug. 26, 2011) OAH Case No. 2011071058 (Order Granting Motion for Stay Put); *Student v. San Francisco Unified School Dist*. (Aug. 5, 2011) OAH Case No. 2011060361 (Order Granting Motion for Stay Put).)

DISCUSSION

Student alleges in his complaint that Beverly Hills denied him a free appropriate public education for multiple violations related to removing his nonpublic agency behavior aide. Student has had a nonpublic agency behavior aide through the Shabani Institute since fall 2015. Student's IEP team met on February 20, 2018, for Student's annual review; Beverly Hills continued to offer behavior intervention services from a nonpublic agency under contract with the special education local plan area or Beverly Hills. Student's Parents consented to that IEP on March 14, 2018. Student's IEP team met again on October 8, 2018, to discuss a transition from the nonpublic agency behavior intervention services to services provided by Beverly Hills. Parents were not in agreement with transitioning Student from his nonpublic agency behavior aide and the only changes made to the February 20, 2018 IEP were regarding speech and a communication log. Parents consented to the speech and communication log changes in the October 8, 2018 amendment IEP.

There is no dispute that Student's February 20, 2018 IEP that was amended on October 8, 2018, is his operative IEP. There is also no dispute as to the level or duration of any of the services offered. The only dispute regarding stay put is what nonpublic agency is to provide the behavior intervention services. Student's motion for stay put seeks an order compelling Beverly Hills to continue providing behavior support services for Student through the Shabani Institute during the pendency of this matter. Both parties offered a copy of Student's February 20, 2018 IEP, that was amended on October 8, 2018, and contend it is the last agreed upon and implemented IEP.

Beverly Hills argues that the Shabani Institute is not stay put for Student because the specific nonpublic agency is not written into Student's IEP nor is it referenced anywhere within the IEP document. Student argues that changing the nonpublic agency responsible for providing his behavior intervention services would require him to change from one program to another with different staffing, facilities, and knowledge of Student's disability. Beverly Hills disagrees with Student and contends that changing the nonpublic agency that provides the behavior intervention services would only require a change in staffing as the new nonpublic agency would provide the same behavior interventions services at the same location. Beverly Hills further argues that it gave Student notice of the change by way of a letter sent to Parents on January 11, 2019. Beverly Hills informed Parents that it was hiring a new nonpublic agency, STAR, to provide behavior intervention services to Student effective February 12, 2019, and that it terminated its contract with the Shabani Institute effective January 31, 2019. However, Beverly Hills worked out an agreement with the Shabani Institute to continue providing behavior intervention services until February 20, 2019, to provide a week long transition for Student. Beverly Hills argues it gave proper notice to Student regarding the change in nonpublic agency services and it has the sole discretion to choose the nonpublic agency provider.

Beverly Hills distinguished the facts here with those of *Student v. Elk Grove Unified School Dist*. (July 7, 2014) OAH Case No. 2014070177 (Order Granting Motion for Stay Put) which relied on *Joshua A., supra,* in that nowhere in Student's IEP does it mention the Shabani Institute where in *Elk Grove* the specific behavior service provider was named several times in the IEP and attached to specific goals. Although Student's IEP does not specifically name the Shabani Institute, Student's aides from the Shabani Institute attended both the February 20, 2018, and October 8, 2018, IEP team meetings. Additionally, the Shabani Institute had been working with Beverly Hills since the October 8, 2018 IEP team meeting to develop a plan to transition Student from working with the Shabani Institute to Beverly Hills behavior intervention services. Although not written into the IEP document, the Shabani Institute has been a part of Student's IEP since fall 2015 providing behavior intervention services. Changing the nonpublic agency responsible for providing the behavior services changes the staff working with Student on his behavior.

Beverly Hills offered no credible evidence that establishes a change in Student's circumstance or specific reasons why the Shabani Institute cannot provide behavior intervention services during the pendency of this matter. Beverly Hills alleged Student is the only Beverly Hills student who receives services from the Shabani Institute and it has used

different nonpublic agencies in recent years because it believes other agencies provide higher quality services. However, Beverly Hills did not offer any evidence to this assertion, and if true that would bolster Student's contention that the Shabani Institute is Student's last agreed upon and implemented provider as Beverly Hills would have used the generic NPA it uses for other students requiring behavior intervention services. After communications back and forth with the Shabani Institute Beverly Hills notified the Shabani Institute that it was terminating its contract effective January 31, 2019. This is not a situation where the nonpublic agency closed, lost accreditation, or terminated its services with the district. This is a situation where Beverly Hills decided to terminate its contract with the nonpublic agency. However, despite the termination date Beverly Hills gave the Shabani Institute it still contracted with it after the given date.

Parents strongly object to a change of providers, based on Father's declaration in support of their position that a change in Student's long-time behavior intervention service provider would add an additional and unnecessary transition for Student. In contrast to *Paso Robles*, *supra*, although Beverly Hills has identified a new nonpublic agency service provider, it has not offered any credible evidence establishing a basis for changing providers based upon performance such that it would justify disrupting Student's educational program, which has historically been the Shabani Institute as the nonpublic agency service provider, during the pendency of this action.

Additionally, District has admitted that it can, and is planning, to contract with the Shabani Institute past January 31, 2019, thus establishing that it is able to continue to provide behavior services identified through the Shabani Institute as Student's stay put. Choosing to terminate its contractual relationship with the Shabani Institute does not obviate Beverly Hills' obligation to provide Student with stay put when, as Beverly Hills has shown, it can still enter a contract with the Shabani Institute, even temporarily.

The same result can be supported by applying the reasoning in *Joshua A*. In *Joshua A.*, the student sought a stay put order after the district proposed to change the service provider from whom the student had been receiving services for more than two years. The court noted that the student had no change in circumstance such that a change in service providers would be warranted, and that the district had not provided any evidence justifying a change in service providers. Therefore, the court concluded that the IEP supported the conclusion that the student's stay put should be with the current provider. (*Joshua A., supra,* at p. 3.)

Although the facts here are not identical to *Joshua A.,* in that the Shabani Institute is not specifically mentioned anywhere in the IEP document, similarly to *Joshua A.,* the Shabani Institute has been providing Student with behavior intervention services for over three years. Additionally, the Shabani Institute participated in IEP team meetings and worked with Beverly Hills to create a plan to transition Student to behavior intervention services provided by Beverly Hills. Changing nonpublic agency service providers would mean a change in staffing without the same knowledge of Student's specific disability.

Accordingly, Student's stay put during the pendency of this due process hearing is the February 20, 2018 IEP as amended on October 8, 2018, including the behavior intervention services through the Shabani Institute as the nonpublic agency service provider.

ORDER

1. Student's stay put motion is granted.

2. Student's stay put shall be the placement and related services in the February 20, 2018 IEP as amended on October 8, 2018, including the behavior intervention services through the Shabani Institute as the nonpublic agency service provider.

DATE: February 13, 2019

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Linda Johnson
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LINDA JOHNSON
Administrative Law Judge
Office of Administrative Hearings