BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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| In the Matter of:<br><br>PARENT ON BEHALF OF STUDENT,<br><br>v.<br><br>ANTIOCH UNIFIED SCHOOL DISTRICT AND ACALANES UNION HIGH SCHOOL DISTRICT. | OAH Case No. 2017010326<br><br>ORDER GRANTING MOTION FOR STAY PUT |

On January 11, 2017, Student filed a motion for stay put against Antioch Unified School District. On January 17, 2017, Antioch filed an opposition. On January 19, 2017, Student filed a reply to Antioch's opposition. For the reasons discussed below, Student's motion is granted. Student's stay put is Oak Hill non-public school with services and supports as outlined in his last agreed upon and implemented IEP.

## 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.)

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 School Committee* (1st Cir. 1999) 207 F.3d 1, 7-8; *Leonard by 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, subd. (a).)

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

When a special education student transfers to a new school district in the same academic year, the new district must adopt an interim program that approximates the student's old IEP as closely as possible for 30 days until the old IEP is adopted or a new IEP is developed. (20 U.S.C. § 1414(d)(2)(C)(i)(1); 34 C.F.R. § 300.323(e); Ed. Code, § 56325, subd. (a)(1); see *Ms. S. ex rel. G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1134, 20 U.S.C. § 1414(d)(1)(B).)

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 Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-1135.) Progression to the next grade maintains the status quo for purposes of stay put. (*Van Scoy v. San Luis Coastal Unified Sch. Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086.) "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." (*Ibid*.)

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 (*Ripon*); *Student v. Ripon Unified School Dist*., Cal.Offc.Admin.Hrngs. Case No. 2011030842, Order Denying Motion for Stay Put (April 12, 2011).[2]) 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) Cal.Offc.Admin.Hrngs. Case No. 2011071058, Order Granting Motion for Stay Put [non-public school identified in IEP]; *Student v. San Francisco Unified School Dist*., Cal.Offc.Admin.Hrngs. Case No. 2011060361 (Aug. 5, 2011) Order Granting Motion for Stay Put [same].)

## DISCUSSION AND ORDER

Student, who is eligible for special education with a diagnosis of autism, attended Acalanes Union High School District until August 2016.[3] He attended Oak Hill non-public school as his IEP placement. He had behavioral issues at school that frequently resulted in his absence from school. His daily round trip commute distance to school was

[2] California Code of Regulations, title 5, section 3085 provides that decisions rendered in a special education matter shall be considered persuasive authority in subsequent proceedings.

[3] Both parties submitted declarations under penalty of perjury establishing the facts upon which this Order is based. The facts stated in this Order are not factual findings that are binding on the hearing administrative law judge.

approximately 95 miles, to which he was acclimated. In August 2016, the Regional Center of East Bay changed his residence to a group home within Antioch. Student continued attending Oak Hill. On November 3, 2016, Acalanes held an IEP meeting at which it discussed a recent assessment. The IEP from that meeting identified Student's placement as "Oak Hill non-public school." Neither party disputes that the November 3, 2016 IEP is the last agreed upon and implemented IEP.

On or about November 29, 2016, Acalanes referred Student to Antioch. Student enrolled in Antioch on December 9, 2016. On December 22, 2016, Antioch held an administrative interim IEP meeting for placement. The Antioch IEP team members agreed to communicate an interim IEP offer to Parent in writing. The parties agreed to reconvene Student's IEP in late January 2017. On January 6, 2017, Antioch wrote to Parent, including a three-page IEP offer in which Antioch identified its offer of placement as Spectrum Center-Antioch, a non-public school. Parent filed for due process on January 9, 2017, challenging Antioch's interim IEP offer.

Student claims he is entitled to stay put at Oak Hill because it was the specifically named placement in his last agreed upon and implemented IEP, analogous to *Student v. Elk Grove Unified School Dist.* (July 8, 2014) Cal.Offc.Admin.Hrngs. Case No. 2014070177, Order Granting Motion for Stay Put (*Elk Grove)*. On the other hand, Antioch claims it is not obligated to maintain Student's placement at Oak Hill because Spectrum Center is the equivalent. By analogy to *Elk Grove*, the balance of equities tip the scales in favor of Student on this point. The IEP specifically named Oak Hill as the school of placement.

The parties also disagree over whether implementation of continued placement at Oak Hill as stay put is feasible. Student asserts that, because Antioch and Acalanes are within the same special education local plan area, Oak Hill remains an appropriate placement and the distance traveled each day is not significantly different. Antioch claims the travel time and distance are not practical or feasible, and would require Antioch to provide transportation by private vehicle, which is not persuasive. Antioch offered no evidence that the educational setting or programs at Oak Hill and Spectrum were not closely approximated to each other, again tipping the scales in favor of stay put at Oak Hill.

Finally, the purpose of stay put is to prevent a school district from unilaterally changing the status quo during the legal process, without a requirement to establish harm to the student caused by a change in the educational program. (*Joshua A. v. Rocklin Unified Sch. Dist.* (9th Cir.2009) 559 F.3d 1036, 1037.) Antioch is obligated to offer Student an interim IEP that approximated his IEP from Acalanes as closely as possible for 30 days or until Parent consents to a new IEP. However, the parties dispute whether Antioch's interim offer constituted a FAPE. As a result, allowing Antioch to place Student at the offered placement as his stay put would be contrary to Congress's intent to maintain the status quo when it enacted the stay put provisions of the IDEA.

Student has credibly established, in part based on Parent's declaration, that his disability and behavioral challenges would be impacted by forcing him to change schools

during the pendency of this case. The change would cause greater harm to him than having to travel a few additional miles each day. Student's complaint asserts that the appropriate placement should be a residential treatment center. Until that is resolved, requiring Student to change schools during the interim would likely be harmful and disruptive given his history.

Student's motion is granted. Student's stay put is Oak Hill non-public school with the supports and services identified in Student's last agreed upon and implemented IEP from Acalanes, as it may have been amended.

IT IS SO ORDERED.

DATE: January 19, 2017

DocuSigned by:
Adrienne L. Krikorian
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ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings