BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. REDLANDS UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018100987 ORDER GRANTING MOTION FOR STAY PUT AND DENYING REQUEST FOR PERMISSION TO FILE MOTION FOR SANCTIONS

On October 23, 2018, Student filed a due process hearing request (complaint) naming Redlands Unified School District. On December 11, 2018, Student filed a motion for stay put. On December 13, 2018, Redlands filed an opposition. On December 17, 2018, Student filed a reply and a request for permission to seek monetary sanctions.

APPLICABLE LAW

Motion for Stay Put

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 G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35, superseded by statute on other

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

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

Application of the stay put provision does not ordinarily depend on whether the underlying suit is meritorious. Stay put "represents Congress' policy choice that all [children with a disability], regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved." (*Susquenita Sch. Dist. v. Raelee S*. (3d. Cir. 1996) 96 F.3d 78, 82-83.)

The decision by a school district to graduate a student with a regular high school diploma constitutes a change in educational placement that triggers all of the procedural protections under the IDEA. (*Cronin v. Board of Educ. of East Ramapo Cent. School Dist.* (S.D. N.Y. 1988) 689 F.Supp. 197, 20334; C.F.R. §300.102(a)(3)(iii); Ed. Code § 56026.1(a).)

Sanctions

In certain circumstances, an ALJ presiding over a special education proceeding is authorized to shift expenses from one party to another, or to OAH. (Gov. Code, §§ 11405.80, 11455.30; Cal. Code Regs., tit. 1, § 1040; Cal. Code. Regs., tit. 5, § 3088; see also *Law Revision Comments to § 11455.30* (1995); *Wyner ex rel. Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029.) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)[2]

The ALJ presiding over a hearing may, with approval from the General Counsel of the California Department of Education, "order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure." (Gov. Code, § 11455.30, subd. (a); Cal. Code Regs., tit. 1, § 1040; Cal. Code. Regs., tit. 5, § 3088, subd. (e).)

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[2] Section 3088 refers to "presiding hearing officers." However, the ALJ presiding over the hearing is the presiding officer. Government Code section 11405.80 states: "Presiding officer means the agency head, member of the agency head, administrative law judge, hearing officer, or other person who presides in an adjudicative proceeding." This section makes clear that an ALJ who presides in an adjudicative proceeding is the "presiding officer," a point confirmed in *Wyner v. Manhattan Beach Unified Sch. Dist., supra,* 223 F. 3d at page 1029, where the court stated, "Clearly, § 3088 allows a hearing officer to control the proceedings, similar to a trial judge."

A finding of "bad faith" under Section 128.5 does not require a determination of evil motive, and subjective bad faith may be inferred. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702 (*West Coast*).)

DISCUSSION

Motion for Stay Put

Student alleges that: she is in 12th grade, and eligible for special education and related services due to multiple disabilities including cerebral palsy, ADHD and anxiety under the eligibility categories of other health impairment and speech and language impairment; a recent out-of-state assessment diagnosed Student with functional brain damage based upon her low average intelligence and cognitive processing deficits; the assessment recommended that Student be placed in a program focused on life skills, functional academics and vocational training; Redlands instead has maintained Student on a diploma track over Mother's objections at IEP team meetings; Student failed multiple courses over the last couple of school years, and passed classes and earned credit only when grades were inflated; Redlands insists that Student has earned sufficient credits to graduate, and refused to allow Student to attend school for the second half of the 2018-2019 school year. Student's complaint contends that Redlands denied her a free appropriate public education by failing to address her unique needs in all area, including social emotional functioning, social communication, and delayed academic achievement. Student contends that she is not yet academically ready to graduate from high school. She also contends that her receipt of a high school diploma should be deferred pending the due process hearing on an appropriate educational program, and that Redlands should continue to provide special education services during the coming school year.

Student's motion is supported by the sworn declarations of Student's advocate and Parent, authenticating Student's May 11, 2018 IEP, which was agreed upon for implementation only by Parent pursuant to a letter dated May 17, 2018, and implemented during the Fall 2018 semester. Under that IEP, Student received during the 2018-2019 school year specialized academic instruction services in a mild-moderate setting 250 minutes annually, educationally-related mental health services counseling for 90 minutes per month, small group speech in 30-minute sessions for 300 minutes per year, with general education electives, and placement at Redlands East Valley High School with transportation.

Redlands opposes, arguing that stay put encompasses advancement from grade to grade, and that Student graduated from high school in December 2018 by earning sufficient credits for a high school diploma, and she is no longer eligible for special education. The declaration of Redlands' counsel states that Student's diploma is in the mail, and that as Student has taken the courses necessary to graduate, there are no more classes for her to take in Spring 2019. Redlands argues that Student and Parent took part in a mid-year graduation ceremony, and that there is no space available in the high school senior classes.

Student's reply argues that Student and Parent did not participate in a graduation ceremony, and that Redlands has been on notice for the past year that Parent disputes Student's grades and qualifications to earn a high school diploma. Student requests leave to file a motion for sanctions against Redlands for lying in its opposition papers and raising frivolous opposition to Student's motion.

A stay put motion is not the forum for deciding the case on its merits. Redlands' argument opposing the stay put motion is not persuasive, and the case law cited does not contradict the general principal that graduation constitutes a change of placement and therefore entitles a student to the procedural protections under IDEA, including stay put, during the pendency of a due process complaint. Redlands' argument goes to the merits of Student's case, which must be decided by the ALJ after a hearing and on the evidence.

Student's due process complaint was filed before she graduated from high school and while she was still eligible for special education services under the IDEA. Therefore, because Redlands is seeking to change Student's placement by issuing her a regular high school diploma and exiting her from special education services, Student is entitled to stay put based upon those elements of her May 11, 2018 IEP to which Parent consented, until this matter is resolved. The motion is therefore granted.

Sanctions

Redlands opposed Student's motion with argument and citations to special education law on the advancement of students from grade to grade under stay put. Redlands' opposition required a pre-hearing ruling on the merits and so was ultimately unsuccessful, but that did not make advocacy of that position a bad faith action or tactic without merit. As Student had already filed her stay put motion, Redlands' filing of opposition was not solely intended to cause, and did not cause, unnecessary delay.

It is disturbing that Redlands may have premised its opposition argument, in part, on the misstatement of easily investigated facts, such as whether Student and Parent had participated in a mid-year graduation celebration at a Redlands' high school. In the event Student prevails at hearing and Redlands' representations are determined to be false, Student will have an opportunity to seek recompense for the cost of defending against any bad faith tactics through recovery of attorney's fees as the prevailing party.

ORDER

1. Student's stay put shall be as follows:

    (a) Placement at Redlands East Valley High School;

    (b) General education electives for each period of a full school day except as provided at subparagraph 1(c);

(c) Special education classes in a mild-moderate setting for 250 minutes per week;

(d) Small group speech in 30-minute sessions for 300 minutes per year;

(e) Educationally-related mental health services counseling for 90 minutes per month;

(f) Transportation

2. Redlands shall use its best efforts in good faith to place Student in high school senior-level classes of her choice.

3. All scheduled dates in this matter are confirmed.

DATE: December 17, 2018

DocuSigned by:
Alexa Hohensee
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ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings