BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. OAKLEY UNION ELEMENTARY SCHOOL DISTRICT.	OAH Case No. 2017011022 ORDER DENYING MOTION FOR STAY PUT

On January 30, 2017, Student filed a motion for stay put. On January 30, 2017, Oakley Union Elementary School District filed an opposition. For the reasons listed below Student's motion is denied.

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 individualized education program. (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 G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35, superseded by statute on other grounds, 20 U.S.C. § 1414(d)(1)(B).)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.].)

Federal and State education laws and regulations distinguish between children in public and private schools. A child with a disability attending public school is entitled to a free appropriate public education at public expense. However, if District made FAPE available and a parent unilaterally chooses to send his or her child to a private school, that child is not entitled to a FAPE at public expense. (20 U.S.C. § 1412(a)(10)(C)(i); 34 C.F.R. §§ 300.137 & 300.138; Ed. Code, §§ 56174; 56174.5.) Instead, children unilaterally placed in private schools receive a proportional share of special education services under a services plan, which may provide for a different amount of service than the child would receive in public school. (See, e.g., 34 C.F.R. § 300.138.) If a child's parents chose to place the child in a private school, the student has no right to receive services beyond the proportionate share given to private school pupils. (*Board of Education of the Appoquinimink School District v. Johnson* (D.C.Del. 2008) 543 F.Supp.2d 351 (overturning an order requiring the district to pay for a sign language interpreter for a child at a private school).)

DISCUSSION

Student is a five year child who currently attends Dainty Center, a private preschool. Student's initial IEP meeting was on March 30, 2016. District's offer of free and appropriate public education in the March 30, 2016, IEP was twofold. District offered two 30 minute sessions weekly of language and speech. However, that IEP noted that from March 30, 2016, until July 1, 2016, the services would be provided at Dainty Center, and after July 1, 2016, the location would be a separate classroom in a public integrated facility.

Student contends that because at the time the disagreement arose student attended Dainty Center, then Dainty Center is the status quo for determining the stay put placement. However, Student does not offer any authority to support her position that Student is entitled to remain in a private preschool once she reached school age. Student is now old enough for kindergarten; however, Parents believe she is not ready for kindergarten because she is far behind her peers. While a dispute exists whether Student should attend a transitional kindergarten or regular kindergarten class, Student's attendance at Dainty Center was never Student's last agreed upon and implemented educational program as District never agreed to her placement there. District agreed to provide services at Student's preschool, but never agreed that it was Student's educational placement.

Although stay put is generally automatic when a due process case is filed, stay put was never intended to prevent a child from advancing from one grade to another. As the court stated in *Van Scoy*:

> The purpose of the stay-put provision is to maintain the status quo and to prevent the school district from unilaterally denying placement to a student while a dispute over the placement is

> being resolved. 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.

(*Van Scoy*, supra, 353 F.Supp.2d at p. 1086.)

However, there are situations which may warrant an exception to the rule that students advance from grade to grade. One such exception is when the dispute is over promotion to the next grade level. (*Parent on Behalf of Student v. Temecula Valley Unified School District* (August 23, 2011) Cal.Offc.Admin.Hrngs. Case No. 2011080662.) Student's case is distinguishable from *Temecula Valley* because although there is a dispute regarding Student's readiness for kindergarten, the student's preschool placement was at district preschool in *Temecula Valley*. In this case, Student is in a private placement, which is not an IEP placement.

Under these circumstances, Student has not made a sufficient factual or legal showing that she is entitled to stay put placement at Dainty Center as it was a private placement and never an agreed upon and implemented educational placement.[2]

[2] Nothing in this Order is intended to decide the ultimate dispute in this case. This Order is intended to decide only what constitutes the "status quo" for Student while this case is pending.

ORDER

1. Student's motion for stay put is denied.

DATE: February 03, 2017

DocuSigned by:
Linda Johnson
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LINDA JOHNSON
Administrative Law Judge
Office of Administrative Hearings