BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. BUCKEYE SCHOOL DISTRICT.	OAH CASE NO. 2013051083 ORDER DENYING MOTION FOR STAY PUT

Student filed a request for due process (complaint) with the Office of Administrative Hearings on May 24, 2013 naming the Buckeye School District (District) as respondent. Student's complaint raises five issues: whether the District failed in its child find obligations to Student in the 2010-2011, 2011-2012, and 2012-2013 school years (issues one, two, and three); whether Student's parent is entitled to reimbursement for expenses she accrued in privately placing Student at a residential treatment center; and, lastly, whether Student should be retained in the eighth grade rather than promoted to high school. In her complaint, Student indicates that she has never been found eligible for special education and related services. Student therefore has never been provided with an individualized education plan (IEP) by the Buckeye School District, or any other educational agency.

On May 29, 2013, Student filed a Motion for Expedited Order Denying [Student] Promotion to 9th (sic) Grade or Alternatively Staying Placement in the 8th (sic) Grade Pending Resolution of the Issues Raised in Petitioner's Request for Due Process. Student essentially contends that the District is socially promoting Student from eighth grade to ninth grade because ninth grade is at high school and in another school district. Student contends that the District is promoting Student solely for the purpose of avoiding the obligation of providing her with a free appropriate public education because, once Student promotes to high school that responsibility would no longer pertain to the District. Student's motion is basically a motion for stay put.

The District filed an opposition to Student's motion on June 3, 2013. On June 4, 2013, Student filed a reply to the District's opposition.

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) (2006); 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 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.

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 (*Van Scoy*), the Court explained as follows:

> 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.)

Stay put may apply, however, when a child with a disability files for a due process hearing on the issue of whether graduation from high school (which ends IDEA eligibility) is appropriate. (*Cronin v. Bd. of Educ. of East Ramapo Cent. Sch. Dist.* (S.D.N.Y. 1988) 689 F.Supp. 197, 202 fn. 4; see also *R.Y. v. Hawaii* (D. Hawaii February 17, 2010, Civ. No. 09-00242) 2010WL558552.) Stay put applies because if it did not, schools would be able to end special education eligibility for students by unilaterally graduating them from high school. (*Ibid.*) Such is not the situation in the instant case because Student has never had eligibility for special education and because here, Student is not graduating from high school.

DISCUSSION

Student is a fourteen year old girl who has never been found eligible for special education services by any school district. In February of 2013, Student's parent withdrew her from a District middle school, where Student was attending eighth grade and privately placed Student a Copper Canyon, a certified residential treatment center. The District promoted Student from eighth to ninth grade on or about May 31, 2013, at the end of the District's school year and about a week after Student filed this request for due process.

Student urges OAH to order the District to either retain Student in eighth grade or to stay her promotion to ninth grade. Student is essentially asking for an order of stay put. Student has provided no persuasive statutory or case law support for her contention that she is entitled to stay put.

As stated above, for purposes of stay put, the current educational placement is typically the placement called for in the student's IEP, which has been implemented prior to the dispute arising. Student has never had a special education placement because she has never been found eligible as a child with special needs. No IEP has been developed for her and there is thus no "signed and implemented IEP" that would serve as the basis for a stay put order.

Student attempts to analogize the facts of her case to those in *Forest Grove School District* v. *T.A.* (2009) 557 U.S. 230 (*Forest Grove*). In that case, the United States Supreme Court found that the parents of a child who had never been found eligible for special education were potentially entitled to reimbursement for private school tuition costs they incurred if their school district was found to have denied their child a free appropriate public education. The Court also found that the failure to propose an IEP at all was as serious a violation of proposing an inadequate IEP.

Forest Grove is inapposite to Student's case because it addresses the availability of certain remedies, not whether a student who has never had an IEP is entitled to stay put. Student has offered no other statutory or case authority to support her proposition that a child who has never been found eligible for special education and thus has never had an IEP is entitled to stay put. Student's motion is denied on that basis.

However, even assuming that a student who has never had an IEP is somehow entitled to stay put during the pendency of a due process proceeding, stay put is generally not available as a means to avoid either retention in a particular grade or to avoid promotion to the next grade.

Under the Individuals with Disabilities Education Act, 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. 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 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 request for stay-put solely concerns whether she should be promoted to ninth grade, as urged by the District, or retained in eighth grade, as urged by Student. Student has not provided any evidence that she would suffer any harm by being promoted to the ninth grade. There are no declarations from her present school as to what her grade level is or what it should be. The court's ruling in *Van Scoy, supra,* is persuasive and generally applicable here. If Student prevails at hearing on some or all of her issues, she may be entitled to remedies to address any violations found as to the District. Those remedies would be sufficient to address the issues Student raises in her motion for stay put if Student prevails on all or part of her case at hearing. Therefore, even assuming that a child who has never had an IEP can somehow argue that she is entitled to a stay put placement, Student in this case has failed to persuasively argue that retention in eighth grade is an appropriate basis for a stay put order.

ORDER

Student's motion for an order that the District either be required to retain her in eighth grade or for an order staying her promotion to ninth grade is denied.

Dated: June 6, 2013

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