

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

v.

PASO ROBLES JOINT UNIFIED
SCHOOL DISTRICT.

OAH CASE NO. 2012090342

ORDER GRANTING MOTION FOR
STAY PUT

On January 22, 2013, Student filed a motion for stay put. On January 25, 2013, the Paso Robles Joint Unified School District (District) filed an opposition to the motion. On January 29, 2013, Student filed a reply.

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); 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 (IEP), 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.)

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, 1133-35.) 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 [“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 (2006)[discussing grade advancement for a child with a disability.]) And 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 v. District of*

Columbia (D.C. Cir. 1989) 877 F.2d 1025, 1028; *Weil v. Board of Elementary & Secondary Education* (5th Cir. 1991) 931 F.2d 1069, 1072-1073. The application of this principle to the replacement of NPA providers is addressed below.

DISCUSSION

Factual Background

This stay put dispute concerns the District's termination of Student's provider of behavioral and specialized academic services, Hayden Consultation Services, Inc. (Hayden), a non-public agency (NPA). From the moving and opposing papers and the extensive supporting declarations these facts appear:

Student is 19 years old and receives special education and related services due to autistic-like behaviors. He is large, sometimes aggressive, and sometimes engages in self-injurious behaviors. He has been receiving behavioral services from Hayden since 2008, and recently has been educated at home. His last agreed-upon and implemented individualized education program (IEP) was signed by Parents on January 26, 2012, and amended by agreement on June 8, August 17, September 18, and November 13, 2012. That IEP now requires that the District provide Student 1200 minutes a week of behavioral intervention services at home, and 300 minutes a week of specialized academic instruction at home, from a "nonpublic agency (NPA) under contract with the SELPA or District." Both services have in fact been delivered by Hayden through its employee Guy Hatchell, a behaviorist, and through academic instructors it also employs.

During the fall of 2012 the District became dissatisfied with Hayden's services and, on December 20, 2012, notified Hayden that it was terminating its Master Contract with Hayden, under which Student and others were receiving services. That same day, without invoking the IEP development process, the District notified Student's Parents that Hayden's services to Student would no longer be provided after January 15, 2012. The District invited Parents to an IEP team meeting on January 24, 2013, to discuss a transition to another provider, but did not identify any such provider. At present the District has not employed or contracted with another NPA to implement Student's IEP, and it is not being implemented.

The District's Authority to Replace an NPA

Generally, if an IEP calls for NPA 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.*, Cal. Offc.Admin.Hrngs. Case No. 2011030842, Order Denying Motion for Stay Put (April 12, 2011).)

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.*, Cal.Offc.Admin.Hrngs. Case No. 2011071058, Order Granting Motion for Stay Put, (Aug. 26, 2011) [non-public school identified in IEP]; *Student v. San Francisco Unified School Dist.*, Cal.Offc.Admin.Hrngs. Case No. 2011060361, Order Granting Motion for Stay Put (Aug. 5, 2011) [same].)

The facts of this case fall somewhere between those two general principles. The most closely applicable precedent is the District Court's order in *Joshua A.*, *supra*. In *Joshua A.* a school district sought to replace Therapeutic Pathways, Inc., an NPA provider that had been delivering services to an autistic student pursuant to an IEP, with a public agency. (*Id.* at p. 1.)

The District Court held that Therapeutic Pathways was part of the student's stay put placement. It first observed that "The purpose of the stay put provision is to maintain the status quo and to prevent school districts from unilaterally denying placement to a student while a dispute over the placement is being resolved. [Citations.]" (*Joshua A.*, *supra*, at p. 2.) It then held that "[p]laintiff's current educational placement is clearly ascertainable. He is, and has been, receiving special education services from the same provider for more than two years." In this matter Student has been receiving services from Hayden since 2008.

The District Court in *Joshua A.* then rejected the district's contention that Therapeutic Pathways was not part of the student's stay put placement because it was not identified as the provider on the services page of the IEP:

[T]he Court is satisfied that IEP does make reference to the services provided by Therapeutic Pathways [T]he IEP lists Therapeutic Pathways under "IEP Agency Linkages". . . . Further, given the intent of the entire statutory scheme, this Court cannot simply ignore the entirety of the evidence before it, as Defendant requests. For example, Therapeutic Pathways participated in the October 15, 2005 IEP meeting and handwritten notes taken at that meeting indicate that Therapeutic Pathways will be providing Plaintiff with special education services "

(*Id.* at p. 3.) "Therefore," the Court concluded, "examination of the IEP supports the conclusion that Plaintiff's Stay Put Order includes the services of Therapeutic Pathways." (*Ibid.*)

Examination of Student's IEP here compels a similar conclusion. The services page requires services to be delivered only by an NPA under contract to the SELPA or District, and Student's goals are to be pursued by "NPA staff." However, Guy Hatchell, Hayden's behaviorist, attended every one of the IEP team meetings that resulted in Student's amended IEP, and is referred to in the IEP documents in various contexts 17 times. Jeffrey Hayden, the owner of the Hayden organization, the organization itself, and its academic teachers are also referenced numerous times. It is plain from the entire IEP that it contemplates the delivery of services by Hayden; it mentions no other possible provider. The IEP documents,

taken as a whole, demonstrate that Hayden’s involvement with Student’s program is pervasive and unique, and the views of its staff are essential to the IEP team’s decision-making process.

The other factor leading the *Joshua A.* court to its conclusion was that the district had only vague plans for substituting another provider for Therapeutic Pathways:

. . . there has been no review into whether the yet unidentified non-public agency proposed by Defendant would comply with the IEP or would provide adequate services. Defendant has yet to present any evidence regarding the proposed NPA or any justification for changing service providers.

(*Id.* at p. 4.)

In this matter the District’s efforts to identify and retain another NPA to serve Student are far less advanced than those in *Joshua A.* The District’s December 20, 2012 letter to Parents states that it is “working with qualified Non Public Agencies to assess [Student’s] current program” and invites Parents to an IEP team meeting “to discuss the transition to the new NPA,” but it is apparent that the District still has no particular NPA in mind. In its opposition filed January 25, 2013, the District states only that it “plans to propose assessments to facilitate ... a transition,” and the declaration of its Special Education Director Marcia Murphy refers vaguely to a transition to “an alternative NPA.” Declarations by Mother establish without contradiction that Student is not now receiving the services to which his IEP entitles him, and that the District has not identified any NPA that might substitute for Hayden, has not employed or contracted with any such NPA, recognizes a transition plan is needed but does not have one,¹ and has no particular time schedule by which it intends to resume delivering services to Student.

In *Joshua A.* the Court did note that the district there had not advanced any justification for terminating Therapeutic Pathways. (*Joshua A.*, *supra*, at p. 4.) The District here seeks to distinguish *Joshua A.* on that ground, and to establish that it had good cause to terminate Hayden. Ms. Murphy’s declaration contains a lengthy list of grievances against Hayden including allegations of failure to provide required data; to maintain data on training and credentialing of its personnel; to document crisis interventions; to provide proper training to its personnel; to provide evidence of insurance; to allow the District to monitor its performance; and to notify the District of the departure of one of its teachers. It also alleges possible misrepresentation of data and inaccurate billing.

¹ The record contains a declaration by Dr. Robert Patterson, a highly qualified educational psychologist who has recently completed an assessment of Student at the District’s request. In it Dr. Patterson opines that if another NPA is to serve Student, there must be an adequate transition plan or Student will regress and be harmed.

Nothing in *Joshua A.* requires that cause for an NPA's termination must or should be litigated and decided in a due process proceeding, on a stay put motion or otherwise. To do so would be inappropriate here. Student has provided declarations from Jeffrey Hayden and Guy Hatchell, as well as two declarations from Student's Mother, vigorously contesting the allegations made by the District. The issues raised by these declarations are many and complex, and the factual claims involve questions of competing credibility. The truth of the allegations could not be properly resolved without an evidentiary hearing in an appropriate forum. The District professes a fear of substandard service and a desire not to jeopardize its students by continuing Hayden's services. But its allegations against Hayden largely involve record-keeping, reporting, billing, and other business disputes between contracting parties, not the sort of malfeasance that would directly threaten Student. And even if true, Hayden's alleged conduct poses far less a threat to Student's education and well-being than the District's outright termination of his IEP services.

Moreover, assuming without deciding that the District has good cause to terminate Hayden, that does not justify its failure to replace Hayden with another provider. The District makes no attempt to explain how it can be in compliance with the IDEA's stay put rule, having terminated Student's program. And even if the District eventually obtains another provider and devises an adequate transition plan, the *Joshua A.* court's conclusion still applies here:

Altering the NPA would require Plaintiff to change from one program to another, with different staffing, facilities and knowledge of Plaintiff's specific disability. This disruption appears to be exactly what Congress intended to avoid through [20 U.S.C.] § 1415(j).

(*Id.* at p. 3.)

In the unusual circumstances of this case, the delivery of services by Hayden is an integral part of Student's program for which the District has no substitute. The District's apparent inability to replace Hayden illustrates the importance of its services to Student's program. The record establishes that Hayden's services are an essential part of "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services" to Student (Cal. Code Regs., tit. 5, § 3042), and are therefore part of Student's stay put placement. Since Student is entitled to remain in his current educational placement while this dispute is pending (20 U.S.C. § 1415(j)), his motion for stay put is granted.

ORDER

1. Student's motion for stay put is granted.
2. The District shall promptly employ or contract with Hayden Consultation Services, Inc., for the resumption of Hayden's services to Student as required by Student's IEP, and shall do so until this proceeding is resolved.

3. The District shall compensate Hayden for its services under this Order at the rates previously paid Hayden under its Master Contract, and shall pay Hayden's invoices for services under this Order within 45 days of receipt of adequate documentation of those services.

4. In the event that Hayden cannot or will not resume its services to Student, the District shall with all deliberate speed seek out and employ or contract with another NPA in order to provide Student with special education and services equivalent to those delivered by Hayden, and shall create and implement an adequate plan for transition of Student's services to the new NPA.

5. Nothing in this order precludes the parties from entering into a written agreement altering the terms of Student's stay put placement.

Dated: February 11, 2013

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings