

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LONG BEACH UNIFIED SCHOOL
DISTRICT and MARSHALL ACADEMY
OF THE ARTS.

OAH Case No. 2017090407

ORDER GRANTING/DENYING
MOTION FOR STAY PUT

On September 27, 2017, Student filed a motion for stay put. On September 29, 2017, Long Beach Unified School District filed an opposition.

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 IEP. (Cal. Code Regs. tit. 5, § 3042, subd. (a).)

Health and Safety Code section 120335, contains a list of required vaccinations for California schoolchildren. It also contains a list that describes conditions that may exempt a child from the requirement. Subdivision (h) requires a school district to provide a child with special education and services pursuant to his IEP, even if he has not been vaccinated.

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

DISCUSSION

Student is eligible for special education as a pupil on the autism spectrum. He has been eligible for special education since 2008. Parents consented to his last IEP in May 2017, and provided a copy of that IEP to the Office of Administrative Hearings when they filed their motion for stay put. Pursuant to this IEP, Student is placed in a general education classroom; receives specialized academic instruction for 48 minutes, five times each week; is provided with 370 minutes daily of behavioral intervention services in the general education classroom; and is provided with 480 minutes per month of consultation, supervision and direct behavioral intervention services. Student attends a Long Beach school named Marshall Academy of the Arts.

Student filed his request for due process on September 13, 2017, when Long Beach threatened to remove him from Marshall because he has not been vaccinated. In his stay put motion, Student claims that he was removed from school effective September 14, 2017. Long Beach has offered him home instruction. In its opposition, Long Beach argues that subdivision (h) does not create an exception to the vaccination requirement.

The California Legislature passed Senate Bill 277 in 2015, and it was signed into law thereafter. This legislation eliminated an exemption from vaccination when parents signed a statement that their personal beliefs did not support vaccination of their children (personal belief exemption). (*Whitlow v. California* (C.D. California 2016) 203 F.Supp. 3d 1079 (*Whitlow*)). In *Whitlow* parents who did not want to have their children vaccinated due to personal beliefs filed suit attacking the removal of the personal belief exemption, but the court upheld the provisions of SB 277. The plaintiffs attacked the removal of the personal belief exception, but did not make claims that children with IEP's should be exempted from vaccination due to subdivision (h). However, the court stated, "if [] children are covered by the IDEA [Individuals with Disabilities Education Act], they are exempt from vaccination."

SB 277 was originally introduced on February 9, 2015, and it contained no language concerning children with IEP's. This language was added when the bill moved from the Senate to the Assembly in May 2015. The Legislative Counsel, in an analysis of SB 277 dated June 11, 2015, on page 14 stated "Special education students must have access to services," as the rationale for subdivision (h). The IDEA is federal law that obligates states to educate all students, including those with a disability. Children who qualify for special education pursuant to the IDEA are given IEP's. A plain reading of subdivision (h) reveals that a school district is obligated to provide any student with an IEP, placement and services as specified in the IEP, and this, in effect creates an exemption from vaccination for these children.

Student's IEP requires placement in a general education environment, with specified behavior intervention services. Home instruction cannot replace this placement and services, and thus is not stay put. Long Beach must return Student to Marshall with the placement and services specified in his IEP.

ORDER

1. Student's stay put placement is in a general education classroom with designated behavior intervention services, as called for in the IEP Parents consented to in May 2017, and which was implemented thereafter.

2. Long Beach must return Student to his previous placement at Marshall, with all the services called for in his IEP.

IT IS SO ORDERED.

DATE: October 9, 2017

DocuSigned by:
Rebecca Freie
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REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings