BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

MT. DIABLO UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2023100983

ORDER GRANTING MOTION FOR STAY PUT

NOVEMBER 16, 2023

On November 3, 2023, Student filed a motion for stay put, seeking an order requiring Mt. Diablo Unified School District to provide Student's educational program at El Monte Elementary School. On November 8, 2023, Mt. Diablo filed an opposition on the ground that Student's last agreed-upon and implemented individualized education program, called IEP, does not specify a school, and therefore Mt. Diablo may assign Student to attend any school that can implement the special education and related services required by his IEP. On November 13, 2023, Student filed a reply.

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 last agreed upon and implemented IEP placement prior to the dispute arising. (*Thomas v. Cincinnati Board of Educ.* (6th Cir. 1990) 918 F.2d 618, 625, as informed by later federal definition of term "placement" in 34 C.F.R. § 300.116 (2006); see *N.W. ex rel. J.W. v. Boone County Board of Educ*. (6th Cir. 2014) 763 F.3d 611, 617.)

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 generally interpreted the phrase "then-current educational placement" to mean the placement set forth in the child's last implemented IEP. (*L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 902. "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." (*Van Seay ex rel. Van Scoy v. San Luis Coastal Unified School Dist.* (C.D.Cal. 2005), 353 F.Supp.2d 1083, 1086. "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." (*Ibid.*)

Student and Mt. Diablo agree Student's last agreed-upon and implemented IEP is dated September 8, 2022. At the time it was created, Student attended El Monte Elementary School, and that school is documented in the September 8, 2022, IEP as Student's school of attendance. Student's September 8, 2022, IEP offered a program setting of a "regular classroom/public day school" and indicated based on the special education and related services offered, Student would be in the regular class environment 86 percent of the time, and outside the regular class environment 14 percent of the time. El Monte is the location at which Student's last agreed-upon IEP

was implemented. Student asserts and Mt. Diablo does not dispute that during the 2023-2024 school year, Mt. Diablo assigned Student to a different public day school, Wren Avenue Elementary School.

A special education student's right to stay put is not absolute, and special education law recognizes several situations in which a district may relocate a student even while that relocation is being disputed. For example, a school closure for budgetary reasons requires a "comparable program" in another location for stay put. (See *McKenzie v. Smith* (D.C. Cir. 1985) 771 F.2d 1527, 1533; *Knight by Knight v. District of Columbia* (D.C. Cir. 1989) 877 F.2d 1025, 1028; *Weil v. Board of Elementary & Secondary Educ.* (5th Cir. 1991) 931 F.2d 1069, 1072-1073; see also *Concerned Parents & Citizens for the Continuing Ed. at Malcolm X (PS 79) v. New York City Bd. of Ed.* (2d Cir. 1980) 629 F.2d 751, 756; *Tilton by Richards v. Jefferson County Bd. of Educ.* (6th Cir. 1983) 705 F.2d 800, 805.) "Hawaii's teacher furloughs and concurrent shut down of public schools is not a change in the educational placement of disabled children." (*N.D. ex rel. Parents Acting as Guardians Ad Litem v. Hawaii Dept. of Educ.* (9th Cir. 2010) 600 F.3d 1104, 1116.)

Also, when a student advances from grade to grade, 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. (*R.F. Frankel v. Delano Union School District* (E.D.Cal 2016) 224 F.Supp.3d, 979, citing *Van Scoy ex rel. Van Scoy v. San Luis Coastal Unified School Dist.*, *supra*, 353 F.Supp.2d at p. 1086.)

Additionally, when a student who last attended school in a different school district transfers into a new school district in the same academic year, the new district must adopt an interim program that approximates the student's old special education

program, as closely as possible for 30 days until the old IEP is adopted or a new IEP is developed. (20 U.S.C. § 1414(d)(2)(C)(i)(1); 34 C.F.R. § 300.323(e); Ed. Code, § 56325, subd. (a)(1); see *Ms. S. ex rel. G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1134, and 20 U.S.C. § 1414(d)(1)(B).)

None of these exceptions to stay put apply in this case. Mt. Diablo has offered no argument or evidence that the El Monte campus closed for all students, either temporarily or permanently. Similarly, Mt. Diablo has offered no argument or evidence that a special program in which Student was enrolled relocated to a different campus and Student's reassignment to a different campus maintains him in the same program. And while not necessarily a condition that would justify changing the location of a special education student's general education classroom assignment during the pendency of a dispute, Mt. Diablo did not argue or provide evidence that the third-grade classrooms at El Monte were at some statutorily restricted capacity such that no additional students could be accommodated. Student advanced from second to third grade, which does not involve promotion to middle school at a different campus. And Student attended Mt. Diablo in the 2022-2023 school year, during which Mt. Diablo developed Student's last agreed-upon and implemented IEP.

Mt. Diablo only argues the ultimate matter to be determined at the due process hearing based on what is identified in Student's complaint as Issue 2, that it did not violate the Individuals with Disabilities Education Act or California law by reassigning Student to another public school campus without Parents' consent. This Order does not determine the legal right of Mt. Diablo to change the location of Student's educational program, and that question remains for the due process hearing. But during the pendency of Student's challenge to Mt. Diablo's change of the location of Student's educational program, Student has the right to continue receiving his special education

and related services at the location at which his last agreed-upon IEP was implemented before the start of the 2023-2024 school year.

ORDER

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

2. Student's stay-put special education and related services is defined by the September 8, 2022, IEP, to be implemented during the pendency of this case at El Monte Elementary School.

Kara Hatfield

Kara Hatfield
Administrative Law Judge
Office of Administrative Hearings