BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SIMI VALLEY UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018030159 ORDER DENYING MOTION FOR STAY PUT

On March 1, 2018, Student filed a Request for Due Process Hearing (complaint) against Simi Valley Unified School District. On March 26, 2018, Student filed a motion requesting stay put under the terms of a 2017 settlement agreement (agreement) between Student and District. The District opposed Student's motion.

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 IEP, which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

However, if a student's placement in a program was intended only to be a temporary placement, such placement does not provide the basis for a student's "stay put" placement. (*Verhoeven v. Brunswick School Committee* (1st Cir. 1999) 207 F.3d 1, 7-8; *Leonard v. McKenzie* (D.C. Cir. 1989) 869 F.2d 1558, 1563-64.) The court in *Verhoeven* interpreted a settlement agreement that specified a placement only through the end of a certain school year as not setting forth the last implemented placement for purposes of stay put. In particular, *Verhoeven* relied on the express language of the settlement agreement to conclude that the placement was not intended to be stay put, and on the policy behind stay put to preserve the status quo of educational programs developed through the IEP process. (See *Id*. at p. 10.)

In California, "specific educational placement" is defined as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to

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

an individual with exceptional needs," as specified in the IEP. (Cal. Code Regs. tit. 5, § 3042, subd. (a).)

A student's special education placement in a settlement agreement reached by the parties may constitute the student's current educational placement, and may be found to be the student's stay put placement in a subsequent dispute. (*Casey K. v. St. Anne Comty. High Sch. Dist. No. 302* (7th Cir. 2005) 400 F.3d 508, 513; *Doe by Doe v. Independent Sch. Dist. No. 9* (N.D.Okla. 1996) 938 F.Supp. 758, 761; see also, *Jacobsen v. District of Columbia Bd. of Education* (D.D.C. 1983) 564 F.Supp. 166, 171-173.)

Courts in other cases have determined, based on the facts in those cases, that a student's placement, as described in a settlement agreement, is not the student's current educational placement and is not the student's stay put placement. (*Zvi D. v. Ambach* (2d Cir. 1982) 694 F.2d 904, at p. 908; *Leonard v. McKenzie* (D.C. Cir. 1989) 869 F.2d 1558, 1564 [hearing officer's prior decision does not constitute current educational placement for stay put purposes].)

Settlement agreements are interpreted using the same rules that apply to interpretation of contracts. (*Vaillette v. Fireman's Fund Ins. Co*. (1993) 18 Cal.App.4th 680, 686, citing *Adams v. Johns-Manville Corp*. (9th Cir. 1989) 876 F.2d 702, 704.) "Ordinarily, the words of the document are to be given their plain meaning and understood in their common sense; the parties' expressed objective intent, not their unexpressed subjective intent, governs." (*Id*. at p. 686.) If a contract is ambiguous, i.e., susceptible to more than one interpretation, then extrinsic evidence may be used to interpret it. (*Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co*. (1968) 69 Cal.2d 33, 37-40.) Even if a contract appears to be unambiguous on its face, a party may offer relevant extrinsic evidence to demonstrate that the contract contains a latent ambiguity; however, to demonstrate an ambiguity, the contract must be "reasonably susceptible" to the interpretation offered by the party introducing extrinsic evidence. (*Dore v. Arnold Worldwide, Inc*. (2006) 39 Cal.4th 384, 391, 393.)

DISCUSSION

The stay put dispute between the parties involves speech and language services District funded in the August 2017 agreement, OAH Case No. 2017021214, and if those services are Student's stay put placement under the Individuals with Disabilities Education Act. Student argues that Student's stay put placement is the continuance of the speech and language services for 60 minutes per week with a nonpublic agency under the agreement. District claims the agreement has a finite time period, from the execution of the agreement through the January 2018 Individualized Education Plan (IEP) team meeting, and not stay put. Further, District argues the agreement did not provide for any placement, only services, and the January 16, 2018 IEP is Student's stay put.

Here, a review of the agreement shows Parents consented to the Student's IEP developed on January 20, 2017, as supplemented by the agreement as follows: "From the date of full execution of this agreement through the date of Student's next annual review IEP team meeting to be convened on or around January 20, 2018, the District agrees to fund speech and language services for 60 minutes per week provided by a mutually agreeable nonpublic agency in a clinic setting." According to the evidence submitted in support of the motion, the IEP team meeting convened on January 16, 2018. Thus, the agreement's explicit terms defined the applicable time period the speech and language services would be available and did not contemplate the services continuing beyond the next annual January 2018 IEP team meeting.

Additionally, the agreement contained recitations that it is not an admission of liability by either party and is a result of a compromise to settle Student's past claims. The agreement lacks any language that the speech and language services contained in the agreement constitute stay put if a dispute arose following the January 20, 2018, IEP team meeting. Thus, the agreement's plain meaning suggests a finite period for the services and not stay put placement.

The primary purposes of the stay put provision are to maintain the stability of the student's educational program during a due process dispute, and to prevent unilateral changes in that program by a school district. (*K.D. v. Department of Educ.* (9th Cir. 2011) 665 F.3d 1110, 1120 (*K.D.*); see 34 C.F.R § 300.518(a).) The stay put dispute here is similar to the one considered by the Ninth Circuit in *K.D.* In that case, the dispute between the Department of Education (DOE) and K.D. centered upon the effect of a March 2007 settlement regarding K.D.'s educational placement. K.D. argued that he was placed at Loveland by the settlement agreement, and that Loveland remained his then current educational placement because he continued to attend school and he never accepted any of the subsequent IEPs offered by the DOE. In response, the DOE contended that the settlement agreement only required the DOE to pay K.D.'s Loveland tuition for the 2006-07 school year and did not make Loveland K.D.'s placement for purposes of the stay put provision. The Court agreed with the DOE stating that the settlement agreement never called for placement but rather for tuition reimbursement, limited the time period for reimbursement to the end of the school year and never determined if the placement was the proper placement under the IDEA. (*Id.*)

In reaching its decision in K.D., the Ninth Circuit also examined the case of *Zvi D. v. Ambach,* (2d Cir. 1982) 694 F.2d 904, 906. In that case, the Second Circuit concluded that even though the Board of Education agreed to fund Student's placement at a private school for the 1978-79 school year through an agreement, the private school was not the "current educational placement" for Student, because the agreement did not constitute "public agency placement" of the student at the private school. Thus, as in K.D., the Second Circuit also found that "[p]ayment and placement are two different matters," and not the same. (*K.D. v. Dept. of Educ., State of Hawaii* (9th Cir. 2011) 665 F.3d 1110, 1122.)

As in K.D., a reading of the settlement merely provided that District would "fund" speech and language services in a nonpublic agency. Rather than placing Student, the agreement provided to fund the services until District convened the next IEP team meeting in January 2018, subsequent to the execution of the agreement, in order to determine various issues including Student's eligibility for special education, present levels of performance, goals and objectives, among others. Further, the agreement fails to state whether parties believe that the speech and language services at the nonpublic agency is the appropriate placement for Student.

Since the burden of persuasion is in the party making the motion and Student's motion does not set forth the evidence necessary to show that the agreement is continuing and contemplated stay put placement by the parties, Student's motion for stay put as specified in the settlement agreement must be denied[2].

IT IS SO ORDERED.

DATE: April 1, 2018

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Cynthia Fritz
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CYNTHIA FRITZ
Administrative Law Judge
Office of Administrative Hearings

[2] Neither party sought a determination regarding what constitutes Student's stay put placement for speech and language services should the settlement agreement be found not to constitute stay put. Accordingly, no finding is made herein regarding what alternate speech and language services Student may be entitled to for stay put purposes.