BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. CHINO VALLEY UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2013050218 ORDER DENYING MOTION FOR STAY PUT

Student filed a request for due process (complaint) on May 6, 2013, and a first amended complaint on July 8, 2013. At issue is whether Chino Valley Unified School District (District) offered Student a free appropriate public education (FAPE) in the least restrictive environment (LRE) in individualized education programs (IEP's) dated January 11, 2013, May 2, 2013 and June 10, 2013.

On July 8, 2013, Student filed a motion for stay put. On July 12, 2013, OAH granted District's request for an extension of time to file opposition and opposition was timely filed on July18, 2013. On July 22, 2013, Student filed a notice of intent to file a reply to District's opposition. Student filed a reply and a notice of errata regarding the reply on July 25, 2013. District filed a sur-reply on July 29, 2013. For the reasons set forth below, Student's motion for stay put is denied.

APPLICABLE LAW

Under federal and state 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 (2006)[1]; 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 Sch. Dist*. (5th Cir. 1983) 695 F.2d 949, 953; *Zvi D. v. Gordon Ambach* (2d Cir. 1982) 694 F.2d 904.)

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. (*Johnson v Special Education Hearing Office* (9th Cir. 2002) 287 F.3d. 1176, 1180; *Thomas v. Cincinnati Board of Education* (6th Cir. 1990) 918 F.2d 618, 625.) In California, "special

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

educational placement means 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.) However, there is no requirement in the IDEA that requires a school District to employ or contract with a specific provider, so long as qualified personnel are providing services to a student with special needs. (*Slama v. Independent Sch. Dist. No. 2580* (D.C.Minn. 2003) 259 F.Supp. 2d 880, 884, 888.)

Courts have recognized 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.) A student is not entitled to identical services when those services are no longer possible or practicable. (*Id.*) When a student's "current educational placement" becomes unavailable, the local agency must provide the student with a similar placement in the interim. (*See Knight v. Dist. of Columbia* (D.C. Cir. 1989) 877 F.2d 1025, 1028; *McKenzie v. Smith* (D.C. Cir. 1985) 771 F.2d 1527, 1533.) In *Van Scoy v. San Luis Coastal Unified School District*, (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086, the California District Court, discussing stay put in the context of changing grade levels, recognized that because of changing circumstances the status quo cannot always be exactly replicated for the purposes of stay put. "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*.)

DISCUSSION

Factual Background

The parties submitted extensive supporting documentation in support of and in opposition to this motion.[2] From the relevant evidence submitted the facts pertaining to Student's motion for stay put are as follows:

Student was found eligible for special education on March 4, 2011, at the age of three. Student's eligibility category was deaf/hard of hearing (DHH). Student's last agreed upon IEP was dated June 5, 2012. The June 5, 2012 IEP provided placement and services for the 2012-13 school year and included the extended school year. The IEP provided specialized academic instruction five days a week for 314 minutes per day in a special day class (SDC) in a non-public school (NPS) under contract with the SELPA or District. Student was to

[2] Much of the arguments made and the evidence submitted concerned the merits of the current offer of FAPE and other issues in the complaint, comparisons of the philosophies and methodologies of various schools and programs, and the quality of the programs and services offered by Oralingua, County DHH and Echo Center. Much of this evidence was irrelevant to this stay put motion. This Order addresses only whether Echo Center is Student's stay put placement. Accordingly, this Order is based solely upon the operative IEP and the relevant portions of the declarations and exhibits submitted.

receive two 30 minute sessions of group language and speech services (LAS) also provided by the NPS.

At the time of the June 5, 2012 IEP, Student attended Oralingua School for the Deaf, an NPS certified by the California Department of Education (CDE). In December 2012, District and Parent learned that Oralingua staff members were terminating their employment with Oralingua. In January 2013, Parent unilaterally placed Student in a general education program at a private preschool. An IEP team meeting was held on January 11, 2013. District offered placement in an auditory-oral program in the San Bernardino County DHH program (County DHH). The program consisted of specialized academic instruction five days a week for 240 minutes per day in a SDC at Hawthorne Elementary School in Ontario-Montclair School District, and two 30 minute sessions of group LAS per week. Parent did not consent to this offer. Oralingua closed on March 1, 2013.

Contentions of the Parties

Student contends his stay put placement during the due process proceedings should be the Echo Center because Echo Center replicates the Oralingua placement provided in the June 5, 2012 IEP. The Echo Center is an NPS certified by CDE that serves DHH children whose mode of communication is spoken English.

District contends that the Echo Center is not an appropriate stay put placement because it is not comparable to the program provided by Oralingua and it is located in a different region of Southern California which will require transportation of at least 90 minutes each way. District argues the County DHH program is a similar placement and more closely replicates the Oralingua program than the Echo Center program preferred by Parent.

Analysis

Student's placement provided by the June 5, 2012 IEP became impossible when Oralingua went out of business. There was no NPS within District or within the SELPA that offered a program that replicated the Oralingua program. There was no evidence District had a contract with or had ever contracted with Echo Center. Under the circumstances, District was required to provide, as closely as possible, a similar placement pending resolution of the due process proceedings.

Stay put does not require District to fund a new placement that is impossible or impracticable. Student resides in Chino Hills. Echo Center is located in Culver City. The Echo Center school day is from 8:30 am to 2:00 pm on Mondays and from 8:30 am until 3:00 pm Tuesdays through Fridays. The parties dispute how long it would take to transport Student from Chino Hills to Culver City during the hours the transportation would be necessary. Suffice to say the journey could take anywhere from 49 minutes to over two hours each direction. Under the circumstances, since Oralingua was no longer available and it was impossible or impracticable to replicate the Oralingua program, District was required

to provide Student a similar placement. The facilities, personnel, and location of the County DHH program, while not identical, were similar to the Oralingua program and the Echo Center program was not.

The Principal for San Bernardino County Superintendent of Schools was familiar with the County DHH program and Oralingua. The County DHH program was an auditory-oral (listening-speaking) special education DHH program taught by a DHH credentialed teacher. All of the students in the program were DHH with IEP's on an academic core-curriculum track. The program at Oralingua was an auditory-oral special education program taught by DHH credentialed teachers in special education classrooms. All of the children in Student's class were DHH students. On site daily staff at both the County DHH program and at Oralingua were knowledgeable and able to provide support for students' personal amplification and FM systems and to trouble shoot equipment immediately with no lost time. The County DHH program had approximately ten students per class in 2012-13. Oralingua had approximately five students per class in 2012-13. Both programs included children with hearing loss that were the same age, older and younger than Student that used spoken language to communicate.

A program specialist for District visited Echo Center on June 4, 2013. She observed the facilities and personnel. DHH students were not placed in special education classrooms. DHH students at Echo Center attended general education classrooms in which the majority of the students did not have IEP's. The teachers in the general education classrooms were not DHH credentialed, although DHH credentialed teachers did provide support and services to students and teachers.

Parent visited the County DHH SDC class after the January 11, 2013 IEP team meeting and before Oralingua closed in March. Parent felt that the children in the County DHH program functioned at a lower level than Student and would not serve as proper language models. The school day at the County DHH program was 4 hours long. Parent had Student assessed at Echo Center in March 2013. She believed the children at Echo Center would be better spoken language models for Student and functioned at Student's level. Parent believed the program at Echo Center replicated the program at Oralingua because the school day at Echo Center was 6 hours on Mondays and 6.5 hours Tuesdays through Fridays and the school day at Oralingua was 6.5 hours.

Student relies upon *Joshua A. v. Rocklin Unified School District* (9th Cir. 2009) 559 F.3d 1036 (*Joshua A.*), and three OAH orders; *Student v. Paso Robles Joint Unified School District* OAH Case No. 2012090342, *Student v. San Francisco Unified School District* OAH Case No. 2011071058, and *Student v. Paso Robles Joint Unified School District* OAH Case No. 2011060361. Each of these cases involved stay put placement where the IEP provided services from a specific non-public agency (NPA) and the district terminated, or sought to terminate, a contract with the NPA. In these cases services were in place under an IEP, the students had been receiving the services from those providers, the districts controlled whether to contract with the providers and the providers continued to be available to provide services during the pendency of the due process proceedings. In *Joshua A.*, terminating the

contract with the NPA would have required student to change from one program to another with different staff, facilities and knowledge of the student's disability, a disruption Congress intended to avoid. According to the Ninth Circuit:

> The fact that the stay put provision requires no specific showing on the part of the moving party, and no balancing of equities by the court, evidences Congress's sense that there is a heightened risk of irreparable harm inherent in the premature removal of a disabled child to a potentially inappropriate educational setting. In light of this risk, the stay put provision acts as a powerful protective measure to prevent disruption of the child's education throughout the dispute process. (*Joshua A.* at p. 1040.)

In this case, Echo Center was not specified in the IEP, and there was no evidence Student ever attended or received services from Echo Center in the past. Echo Center would change Student's placement to a new and different program with a change in staff, location and facilities, to a placement that was not familiar with Student, and which required additional hours of transportation, a disruptive situation that could be detrimental to Student. Stay put legislation is intended to avoid disruption, not to cause it.

In sum, following the closure of Oralingua, District has offered to provide a comparable program to implement Student's IEP while this dispute is pending. Student's requested stay put placement of Echo Center is not comparable, both in program and impractical distance from Student's home. Accordingly, Student's motion for stay put is denied.

IT IS SO ORDERED.

Dated: July 29, 2013

/s/
MARIAN H. TULLY
Administrative Law Judge
Office of Administrative Hearings