BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2024070618

ORDER GRANTING MOTION FOR STAY PUT

AUGUST 7, 2024

On July 18, 2024, Student filed with the Office of Administrative Hearings, or OAH, a request for due process hearing, or complaint, naming San Diego Unified School District. On July 23, 2024, Student filed a motion for stay put. On July 29, 2024, San Diego filed an opposition.

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 individualized educational program, called IEP, placement 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).)

Courts have recognized, however, that the status quo cannot always be replicated exactly for purposes of stay put. (*Ms. S. ex rel. G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-1135 (*Vashon Island*), superseded by statute on other grounds, 20 U.S.C. § 1414(d)(1)(B).) 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.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086.)

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.)

When a special education student transfers to 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 *Vashon Island*, supra, 337 F.3d 1115, 1134, 20 U.S.C. § 1414(d)(1)(B).)

During the 2023-2024 school year, Student attended NewBridge School, The Koonings Center, referred to as Koonings Center, a certified nonpublic school, as a privately placed child, pursuant to a settlement agreement. San Diego conducted a multidisciplinary evaluation, reviewed at IEP team meetings held on April 30, 2024, May 15, 2024, and June 4, 2024. In Student's June 4, 2024 IEP, San Diego offered Student continued placement at Koonings Center for the 2024 extended school year and 2024-2025 regular school year. Parents consented to implementation of the IEP.

On June 25, 2024, San Diego sent correspondence to the director of NewBridge School and Koonings Center, notifying him that San Diego's Board of Education would terminate its contract with the nonpublic schools for cause, with an effective date of June 30, 2024. San Diego cited several portions of the master contract, by section number, which it believed NewBridge and Koonings violated. San Diego did not explain the alleged violations, except for the allegation that NewBridge and Koonings simultaneously operated a for-profit private school on the same school site as the nonpublic school. San Diego further alleged that NewBridge and Koonings had privately and publicly placed students co-mingled in classrooms taught by special education teachers and other special education related service providers.

On June 26, 2024, San Diego sent prior written notice to Student stating that, as of July 1, 2024, it would no longer have a contract with Koonings Center but would continue implementing Student's extended school year program at Koonings Center, pursuant to his IEP. San Diego offered to meet with Parents to discuss alternative

nonpublic school placements or another type of agreement on placement. Parents attended a meeting on July 2, 2024, open to all Parents of children attending NewBridge or Koonings Center.

On July 11, 2024, San Diego held an IEP team meeting, offering two nonpublic school placements, which Student contends did not have programs comparable to Koonings Center. On July 15, 2024, Parents toured the two programs. On July 18, 2024, Student filed his request for due process hearing with OAH contending the placements proposed by San Diego differed substantially from Koonings Center in numerous ways. Among the differences, Student identified larger student-to-teacher ratios, larger class sizes, non-comparable peer groups, meaning children with disruptive behaviors, staff without experience or expertise in working with children with dyslexia, and no embedded reading program.

Student's complaint challenges San Diego's July 11, 2024 IEP offer changing Student's placement on the grounds that San Diego failed to offer an appropriate placement, predetermined the placement offered, failed to make a clear written offer of FAPE, failed to have an offer of FAPE in place at the beginning of the 2024-2025 school year, failed to include Parents in the decision-making process, and failed to make a placement decision by a group of people knowledgeable about Student, taking into account recent evaluation data. In summary, Student challenges the very issue of placement central to his motion for stay put.

San Diego argues that it merely seeks to change the location of Student's education from one nonpublic school to another, based on Koonings's breach of contract. San Diego argues that it cannot implement placement at Koonings as it no longer has an individual services contract for Student's attendance and that OAH has no authority to force a continued contract with Koonings. San Diego concludes that it is

entitled to change Student's placement for purposes of stay put because of the change in circumstances rendering Koonings no longer available.

San Diego correctly argues that OAH does not have authority over contract disputes between nonpublic schools and school districts. However, OAH is required to determine what constitutes a special education student's stay put placement. No current statute, regulation, or legal precedent supports a finding that a school district's termination of a contract with a certified nonpublic school supersedes a child's right to stay put during the pendency of due process proceedings.

State and federal special education law recognize that the status quo cannot always be replicated exactly for purposes of stay put. In such circumstances, 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. Changed circumstances may include a student matriculating from grade to grade, a school closure for budgetary reasons, or transfer into a new school district, as outlined above. Changed circumstances do not include a certified nonpublic school being unavailable because a school district terminated its contract.

Here, the very reason Koonings is "not available" under contract with San Diego is because San Diego terminated the contract. San Diego did so without first holding an IEP team meeting to secure Parents' agreement to a change in placement. Koonings remains a certified nonpublic school and has not closed. Neither party argues that matriculation changed Student's placement needs or that Student has transferred into another school district. Case law does not support the position that a change in circumstances can be created by a school district which then allows it to unilaterally change a child's stay put placement.

The status quo can be replicated at Koonings because Koonings remains open as a certified nonpublic school, despite San Diego's concerns, however legitimate. Potential future educational placements do not constitute stay put placements unless Parents consent to the change in placement. (*E.E. by and through Hutchinson-Escobedo v Norris School District* (9th Cir. 2021) 4 F.4th 866, 872.)

Accordingly, Student's motion for stay put at Koonings pursuant to the June 4, 2024 IEP is granted.

IT IS SO ORDERED.

Cole Dalton

Cole Dalton
Administrative Law Judge
Office of Administrative Hearings