BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

SAN DIEGUITO UNION HIGH SCHOOL DISTRICT.

OAH CASE NUMBER 2024020675

AMENDED ORDER DENYING MOTION FOR STAY PUT

APRIL 16, 2024

On February 20, 2024, Parents on behalf of Student, filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming San Dieguito Union High School District, called San Dieguito. On March 21, 2024, Student filed a motion for stay put and four declarations asserting The Winston School, called Winston, is the appropriate placement in this matter. On March 26, 2024, San Dieguito filed opposition to Student's motion for stay put. On March 27, 2024, Student filed a reply. On April 9, 2024, the undersigned prematurely issued an Order Denying Motion for Stay Put. This amended order contains the same holding but supersedes that order.

THE PARTIES' CONTENTIONS

Student's motion seeks an order determining Winston, Student's unilateral private placement, is Student's stay put placement.

Student argues that OAH should find Winston Student's stay put placement because:

1. Student's stay put placement must be a nonpublic school;
2. Winston should be deemed Student's current educational placement;
3. Administrative Law Judge Arden found that Winston conferred an educational benefit to Student; and
4. Moving Student from Winston would be detrimental.

San Dieguito argues that Student's motion must be denied because:

1. Student's preferred unilateral placement is not stay put and is contrary to law;
2. The motion is precluded by res judicata and collateral estoppel, and
3. Student's enrollment in a private school by Parents does not become stay put.

Additionally, San Dieguito objects to the four declarations in support of Student's motion on the grounds of relevance, calls for legal conclusions, improper opinion, and speculative assertions. Further, it argues there is no opportunity to cross examine the four declarants to challenge their credibility, reliability, and basis of evidence presented and are prejudicial.

San Dieguito also requests official notice of six OAH orders:

1. OAH case number 2022020209 Student's Motion for Clarification and/or Reconsideration for the Decision dated August 4, 2022;
2. OAH case number 2022020209 Notice of No Action on Student's Motion for Clarification and/or Reconsideration of the Decision, dated August 4, 2022;
3. OAH case number 2022110515 Student's Motion for Stay Put, dated November 21, 2022;
4. OAH case number 2022110515, Order Denying Motion for Stay Put, including the Proof of Services dated December 5, 2022
5. OAH case number 2022020209, Student's Notice of Representation and Complaint for Due Process, dated February 7, 2022; and
6. OAH case number 2022110515, Student's Notice of Representation and Complaint for Due Process, filed on November 17, 2022.

In Student's reply, Student argues that San Dieguito misinterpreted Student's arguments and believes Student is entitled to stay put, which it contends San Dieguito conceded to in its opposition, and that the stay put placement should be at Winston because it is a comparable placement to Excelsior.

RES JUDICATA AND COLLATERAL ESTOPPEL DO NOT APPLY

San Dieguito argues this motion is precluded by res judicata and collateral estoppel. Federal and state courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. (*Allen v. McCurry* (1980) 449 U.S. 90, 94 (*Allen*); *Levy v. Cohen* (1977) 19 Cal.3d 165, 171 [collateral estoppel requires that the issue presented for adjudication be the same one that was decided in the prior action, that there be a final judgment on the merits in the prior action, and that the party against whom the plea is asserted was a party to the prior action]; see 7 Witkin, California Procedure (4th

Ed.), Judgment § 280 et seq.) Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their agents from relitigating issues that were or could have been raised in that action. (*Allen*, *supra*, 449 U.S. at p. 94.)

Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. (*Ibid.*; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341; see also *Migra v. Warren City School Dist. Bd. of Ed.* (1984) 465 U.S. 75, 77, n. 1 [104 S.Ct. 892, 79 L.Ed.2d 56]; federal courts use the term "issue preclusion" to describe the doctrine of collateral estoppel.) Collateral estoppel applies to final administrative decisions of OAH in special education matters, including final administrative decisions that are pending on appeal. (*Loof v. Upland Unified School Dist.* (C.D. Cal., Sept. 10, 2021, Case No. EDCV 21-556 JGB (SPx)) 2021 WL 4974797, **4-5.)

Here, the parties have a previous stay put order and decision from previous OAH cases between the parties. However, since that time, San Dieguito has made a different placement offer as described below. Thus, while similar and some overlap in the issues, some facts have changed in this matter. Thus, res judicata and collateral estoppel do not apply, and the undersigned is not bound by those determinations.

Government Code section 11515 provides that "official notice can be taken, either before or after submission of the case for decision …of any fact which may be judicially noticed by the courts of the state." Courts have traditionally taken judicial notice of public records public records issued by public agencies. (*Board of Education of City of Los Angeles v. Watson* (1966) 63 Cal. 2d 829, 836, fn.3; *McPheeters v. Board of Medical Examiners of State* (1946) 74 Cal. App. 2d 46, 48.)

However, there may be documents that have some relevance to this motion in order rule on this motion and for relevant background information. Accordingly, OAH will take official notice of the decision in OAH case number 2022020209, issued on August 4, 2022. (*Student v. San Dieguito Unified Sch. Dist.* (2022) OAH Case No. 2022020209.) The decision is public record. OAH will also take official notice of the Order Denying Motion for Stay Put, OAH case number 2022110515, issued December 5, 2022. (*Student v. San Dieguito Unified Sch. Dist.* (2022) OAH Case No. 2022110515)

BACKGROUND AND PROCEDURAL HISTORY

According to Student's complaint and motion for stay put, which were either confirmed or undisputed in San Dieguito's opposition, and the two documents officially noticed, the facts are as follows:

Student had been placed by a prior school district through an agreed upon IEP at the Excelsior Academy, a nonpublic school. When Student entered San Dieguito on July 1, 2021, it continued Student's placement at Excelsior. On January 24, 2022, San Dieguito offered Student placement at San Diego Center for Children, a nonpublic school. Parents disagreed with the placement offer and Student remained at Excelsior.

On February 7, 2022, Student filed for due process hearing, OAH case number 2022020209. Excelsior then closed on February 28, 2022, and Parents unilaterally placed Student at the Winston School, a private school, on March 1, 2022.

On August 4, 2022, OAH issued a written decision in OAH case number 2022020209. OAH's decision determined San Dieguito denied Student a FAPE by predetermining Student's placement, thereby denying Parents meaningful participation in the IEP process. As a compensatory remedy, OAH awarded Parents reimbursement for costs and tuition for Student's attendance at Winston. The decision determined

Winston was an appropriate placement for purposes of a reimbursement award but did not analyze whether Winston offered Student a FAPE. Further, the decision did not name Winston as Student's stay put placement. Student appealed OAH's decision to the United States District Court for the Southern District of California, in Case Number 22CV1703H. According to the parties, the appeal is pending.

On November 17, 2022, Student filed a due process complaint naming San Dieguito. In that case, Student made a motion for stay put but it was denied on December 5, 2022. The case was later withdrawn.

At the October 19, 2023 IEP team meeting, San Dieguito offered Student placement at the Seaside Program, a social emotional program on a district comprehensive site. Parents declined the offer and continued Student at Winston. Student filed the instant due process hearing complaint on February 20, 2024.

Student's complaint seeks determinations, among other things, that San Dieguito denied Student a FAPE for failing to offer appropriate IEPs to Student for the previous two years before the complaint was filed, and predetermining eligibility and placement. Student seeks as remedies placement at Winston and reimbursement for Student's private placement.

DISCUSSION

Student seeks to have Winston deemed Student's stay put placement. Student makes several arguments in support of this proposition. None, however, are persuasive. Student misses the primary point that a Student is not entitled to stay put at their unilaterally chosen private school. An exception exists if a decision holds that is deemed appropriate, then the placement becomes the current educational placement for purposes of stay put. That has not happened in this case. Moreover, Student cites no

authority for the position that when the last agreed upon an implemented placement becomes unavailable, that OAH is to analyze whether parent's unilaterally selected private placement is comparable to the last agreed upon and implemented placement. Rather, the analysis is whether the district's offered placement is comparable for the purposes of stay put. Student does not seek that determination herein.

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." The Individuals with Disabilities Education Act, called IDEA, does not define current educational placement, but courts have interpreted it to mean the placement set forth in the student's last agreed upon and implemented IEP prior to the dispute arising. (*K.D. ex rel. C.L. v. Hawaii Dept. of Educ.* (9th Cir. 2011) 665 F.3d 1110, 1117-1118 (*K.D.*); see also *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 902-903 (*L.M.*); and see *Thomas v. Cincinnati Board of Educ.* (6th Cir. 1990) F.2d 618, 625 (*Thomas*).) 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, 1133-35, 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.)

Where a parent unilaterally changes the placement of a child, but a subsequent administrative or judicial decision confirms the parental placement is appropriate, the placement must be treated as an agreement between the State and the parents to a change in placement, and the placement becomes the current educational placement for purposes of stay put. (See 34 C.F.R. § 300.518(d); see also *K.D. ex rel., supra*, 665 F.3d at p. 1118 (citing *Clovis Unified School Dist. v. California Office of Admin. Hearings* (9th Cir. 1990) 903 F.2d 635, 641).) However, such a favorable decision for a parent must expressly find that the private placement was appropriate. (*K.D. ex rel., supra*, 665 F.3d at 1118 citing *L.M., supra*, 556 F.3d at p. 903-904 [finding there was no implied "current educational placement" because the district court's ruling in favor of the parents was on procedural grounds and the court never adjudicated the appropriateness of the private placement].)

Parents who unilaterally move their child to a private placement, without the consent of the school district, do so at their own financial risk. (*Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 16 (quoting *School Comm. of Burlington v. Dept. of Educ. Of Mass.* (1985) 471 U.S. 359, 373-374 (*Burlington*); see *W.G. v. Bd. of Trustees of*

Target Range School Dist. No. 23 (9th Cir. 1992) 960 F.2d 1479, 1487; see also *Ventura de Paulino v. New York City Department of Education* (2nd Cir. 2020) 959 F.3d 519, 534, *cert. denied*, (2021) 141 S.Ct. 1075 [the IDEA does not permit parents to determine their child's placement, "would be better provided somewhere else, enroll the child in a new school, and then invoke the stay-put provision to force the school district to pay for the new school's services on a pendency basis"].) Parents are entitled to reimbursement only if a court concludes both that the public placement violated the IDEA and the private school placement was proper under the IDEA. (*Florence County*, *supra*, 510 U.S. at p. 15.) A unilaterally placed student in a private school IS NOT ENTITLED TO STAY PUT because the placement is not an agreed to placement by the parties.

NO STAY PUT AGREEMENT WAS MADE BETWEEN THE PARTIES AND NO COURT ORDER DETERMINED WINSTON WAS STAY PUT

Here, Student is a unilaterally placed student in a private school and is not entitled to stay put at her private placement unless the parties agreed that Winston was stay put or OAH or other court determined Winston was stay put. No evidence was presented by Student that either of these conditions occurred.

Student's argument that an administrative law judge found, in the August 4, 2022, decision, OAH case number 2022020209, an educational benefit in Winston and awarded reimbursement means it is the appropriate stay put placement is flawed. There, Winston was an appropriate educational placement for purposes of awarding tuition reimbursement as an equitable remedy, it did not find it was Student's stay put placement. Tuition reimbursement may be awarded for a private placement considered appropriate, also referred to as proper, under the IDEA. (*Florence County, supra*, 510 U.S. at pp. 12-16; *Burlington, supra*, 471 U.S. at p. 369.)

Student cites no legal authority that supports a stay put placement for a unilaterally placed student at a private school without an agreement between the parties or order of the court. Neither has happened here.

STUDENT'S CURRENT EDUCATIONAL PLACEMENT ARGUMENTS FAIL

Since March 2022, Student has been unilaterally placed by Parents at Winston, a private school. Since that time, Student filed a due process complaint and OAH rendered a decision in that case. After the August 4, 2022, decision, in 2023, San Dieguito offered Student placement at the Seaside social emotional program.

Student argues that Student's current placement at Winston is his current educational placement for purposes of stay put. This argument fails. Since the August 2022 OAH decision, Student has been offered an educational placement by San Dieguito when it offered the Seaside social emotional program in 2023. Parents refused this placement and chose to continue Student's placement at Winston. Student cannot convert a unilateral placement into Student's current educational placement through Student's attendance at a private placement after a new IEP placement was offered to Student. The law is clear that a Parent that unilaterally places a Student in a private placement over a disputed IEP offer, to their preferred chosen placement, does so at their own financial risk. (*Florence County, supra*, 510 U.S. at pp. 12-16; *Burlington, supra*, 471 U.S. at p. 369.)

STUDENT'S COMPARABLE EDUCATIONAL PLACEMENT ARGUMENTS FAIL

Student further argues Winston, a private school, is the only comparable placement to Excelsior, a nonpublic school, Student's last agreed upon IEP placement from 2021. However, Student cites no law supporting its argument that OAH must analyze whether Student's unilateral placement is comparable to the last agreed upon

an implemented placement when that placement becomes unavailable. Rather, any argument regarding a comparable placement must analyze whether San Dieguito's offered placement is comparable to the last agreed upon and implemented IEP. The inquiry of whether SDCC was comparable to Excelsior when the school closed in February 2022 is now stale. It is two years later, Student has been unilaterally placed at Winston, and San Dieguito has now offered Seaside, an entirely different placement. While Student briefly mentions that the current placement offer is not appropriate or similar to Excelsior, Student's arguments were not supported by any reliable information, only from declarations of people that have no personal knowledge of the district program and focused their analysis exclusively on Winston as the appropriate placement. Therefore, Student failed to meet his burden of persuasion that Seaside is not a comparable program for the purposes of stay put.

Thus, Student's argument of her private placement now constituting her current educational placement for purposes of stay put is not legally supported. Accordingly, Student's motion for stay put is denied.

IT IS SO ORDERED.

Cynthia Fritz

Cynthia Fritz
Administrative Law Judge
Office of Administrative Hearings