BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

SANTA CLARA COUNTY OFFICE OF EDUCATION AND

OAK GROVE SCHOOL DISTRICT.

OAH CASE NUMBER 2021030606

ORDER GRANTING MOTION FOR STAY PUT

MARCH 29, 2021

On March 19, 2021, Parents on behalf of Student filed a motion for stay put. Student filed a revised motion for stay put on March 23, 2021. Student's motion seeks a stay put order only with respect to the licensed vocational nurse services, referred to as LVN, in Student's Individualized Education Program, referred to as IEP. Student's motion is supported by a sworn declaration by Parent and various exhibits, including Student's IEP and prior written notices issued by the Santa Clara County Office of Education.

OAH received a joint opposition from Santa Clara County Office of Education and Oak Grove School District on March 24, 2021. Santa Clara County Office of Education and Oak Grove School District argue that a stay put order requiring delivery of related

services in the home setting would modify the IEP. The opposition is supported by a sworn declaration by Santa Clara County Office of Education's Principal of the Orthopedically Impaired and Medically Fragile Cluster.

Student filed a reply to Santa Clara County Office of Education and Oak Grove School District's opposition on March 25, 2021, together with a second sworn declaration by Parent One.

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); 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 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).)

On March 4, 2020, Governor Newsom declared a state of emergency in California due to COVID-19. On March 13, 2020, Governor Newsom issued Executive Order N-26-20, which directs school district operations during public health related school closures. Executive Order N-26-20 directed the California Department of Education and the Health and Human Services Agency to jointly develop guidance ensuring that students with disabilities receive a free and appropriate public education consistent with their IEP under the Individuals with Disabilities Education Act, referred to as the IDEA.

On April 9, 2020, the California Department of Education implemented Executive Order N-26-20 by issuing Special Education Guidance for COVID-19. The guidance does not address the stay put provision under the IDEA. However, the guidance does address whether school districts may provide in-person special education services while schools are closed due to COVID-19:

> "Is an LEA precluded from providing services to students with disabilities in-person or in the home for the purpose of supporting the student in accessing the alternative options for learning being offered?
>
> No. In some exceptional situations, LEAs may need to provide certain supports and services to individual students in-person in order to maintain students' mental/physical health and safety for the purpose of supporting the student in accessing the alternative options for learning being offered (e.g. distance learning). With that said, alternative service delivery options should seek to comply with federal, state, and local health official's guidance related to physical distancing, with the goal of keeping students, teachers and service providers safe and healthy as the primary consideration."

The California Department of Education also clarified that some service providers are deemed essential workers under Executive Order N-33-20, including nurses and assistants, physical and occupational therapists and assistants, social workers, and speech pathologists. The guidance states:

> "Therefore, if an individualized determination is made that a student needs services or supports in-person to maintain their mental/physical health and safety for the purpose of supporting the student in accessing the

alternative options for learning being offered (e.g. distance learning), an LEA is not necessarily precluded from providing that service by Governor Newsom's stay at home order."

DISCUSSION

Student is a 10-year old, medically fragile child. Student attends a special day class in the medically fragile program at Anne Darling Annex, a Santa Clara County Office of Education program. He suffers from multiple health and developmental challenges. He requires one to one medical care and constant monitoring. He has cerebral palsy, epilepsy and is dependent on a wheelchair for mobility. He has a tracheostomy and relies on a feeding tube for his nutrition. Student is dependent on others for all activities of daily living.

In March 2020, Santa Clara County Office of Education closed its school sites to prevent the spread of COVID-19. Santa Clara County Office of Education provided prior written notice in April 2020 stating it would provide distance learning to all students and was discontinuing in-person services during the school closure, including LVN services.

Student has had a full-time licensed vocational nurse since he started attending Anne Darling Annex in August 2018. The LVN helps manage Student's health issues and supports Student in accessing his curriculum. At the time of the school closures in March 2020, Student's IEP provided Student 2340 minutes weekly services by a licensed private agency nurse during the school day and on the bus.

Student continued to receive in-person LVN nursing services following the school closures in March 2020 through January 25, 2021. Santa Clara County Office of Education asserts it terminated the services of the LVN provider due to the school closures, but for unknown reasons this fact was not communicated to Parents by either

the Santa Clara County Office of Education or the nursing agency, and the agency continued to provide health and nursing services to Student following the school closures. Student's LVN also attended and participated in Student's September 3, 2020 IEP team meeting without objection by the IEP team.

Santa Clara County Office of Education and Oak Grove School District offer no authority supporting their argument they are excused from providing related services, including LVN services, to Student at home.

On August 12, 2020, Santa Clara County Office of Education advised Parents through a prior written notice that distance learning would continue at the start of the 2020-2021 school year schools and would continue until schools were permitted to open for in-person instruction. Parents were provided the option for Student to remain in distance learning for the entirety of the 2020-2021 school year if they had COVID-19 related concerns. No mention was made of whether Student would receive LVN services. Parent One confirms receipt of the prior written notices through her sworn declaration.

The parties agree that Student's most recent consented to and implemented IEP is dated September 9, 2020/February 8, 2021. The relevant services for purpose of Student's stay put motion is 1500 weekly minutes of Intensive Individualized Services by a licensed home health agency nurse and 300 minutes per week of specialized physical health care procedures and protocols to support school personnel. The additional 600 minutes of LVN support on the school bus is not relevant to Student's stay put motion since Student is participating in distance learning.

Effective June 29, 2020, individualized education programs in which instruction or services, or both, cannot be provided to the student at the school or in person for more

than 10 school days much contain a description of the means by which the program will be provided. (Ed. Code, § 56345(9)(A)(i)-(iv).) The description shall include, among other things, special education and related services. (*Id.*) The September 9, 2020/February 8, 2021 IEP fails to contain a description of the means by which Student's LVN services would be provided during distance learning.

Courts have recognized 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).) Stay put 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 local education authority which offers "distance learning" opportunities for its general education students has a concomitant duty to "make every effort to provide special education and related services to the child in accordance with the child's individualized education program." (*U.S. Dept. of Educ., Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (March 12, 2020) at p. 2.) School districts must "ensure that students with disabilities also have equal access to the same opportunities [as general education students], including the provision of FAPE," and, "to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP developed under IDEA." (*Ibid.)*

Student has established that the distance learning plan is not a comparable program for him given his need for intensive services to access his education. The

distance learning program without the assistance of LVN services constitutes a significant change in Student's program. Student requires the assistance of an LVN to access his educational program. These needs include, among other things, moving Student in his wheelchair, positioning and transferring Student from sitting in his wheelchair, hand over hand instruction and assisting with his multiple health care needs. Parents have the option of continuing distance learning for Student for the 2020-2021 school year as stated in Santa Clara County Office of Education's August 2020 prior written notice. Accordingly, Student's motion for stay put with respect to the LVN services in his September 9, 2020/February 8, 2021 IEP is granted.

ORDER

1. Student's motion for stay put is granted.
2. Within 15 days of this Order, Santa Clara County Office of Education and Oak Grove School District shall provide Student in-person LVN services in the duration set forth in his September 9, 2020/February 8, 2021 IEP as follows:
    a. 1500 weekly minutes of Intensive Individualized Services by a licensed home health agency nurse; and
    b. 300 weekly minutes of specialized physical health care procedures and protocols to support school personnel.

3. Santa Clara County Office of Education and Oak Grove School District shall provide these services in-person in the home setting through the date Student returns to school for in-person instruction or until the parties agree to a modification of the September 9, 2020/February 8, 2021 IEP. Upon Student's return to in-person instruction, 600 weekly minutes of LVN services to assist Student on the bus shall be implemented.

IT IS SO ORDERED.

Jennifer Kelly

Jennifer Kelly
Administrative Law Judge
Office of Administrative Hearings