BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2020120307

ORDER DENYING MOTION FOR STAY PUT

DECEMBER 24, 2020

On December 21, 2020, Student filed a motion for stay put. On December 23, 2020, San Diego Unified School District filed an opposition on the ground that Student sought to change, rather than preserve, the current delivery model for some of Student's educational services.

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 individualized educational program, called an IEP, prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

In California, a 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).)

When a stay put placement cannot be implemented exactly as written on the IEP document, school districts must attempt to replicate the placement that existed at the time the dispute arose as closely as possible, considering the changed circumstances. The stay put placement must be a comparable program for that child. (*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.)

DISCUSSION

Student is 21 years of age. He has a severe intellectual disability, with multiple health impairments and autism. The parties agree that the last agreed upon and implemented IEP for stay put purposes is the January 15, 2020 IEP, a copy of which was attached to the sworn declaration of Parent, who stated that in person nursing services had not been provided since March 2020, when Student's program switched to distance learning during the COVID-19 pandemic.

The January 15, 2020 IEP indicates that Student's disabilities significantly impact all areas of learning, and that Student's medical problems require supervision of a licensed nurse at all times during the school day. The January 15, 2020 IEP calls for skilled nursing services in the regular classroom of a public day school.

Student argues that, during the COVID-19 pandemic school closures, San Diego must implement Student's nursing services in the home during distance learning. Otherwise, Student does not benefit from online instruction, as his behavior has regressed to the point of refusing online instruction and damaging computer and other online access equipment. Parent has made arrangements for in-home nursing throughout the school day, and contends that San Diego must pay for those services until a decision is rendered on Student's due process hearing complaint, which contends that the lack of in-home services to support distance learning deprives student of a free appropriate public education, or FAPE.

San Diego Unified asserts that it is implementing Student's last agreed upon IEP through distance learning in accordance with government directives during the COVID-19 pandemic.

On March 4, 2020, California Governor Gavin 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 mandated public health related school closures. That order also directed the California Department of Education, or CDE, and the Health and Human Services Agency to jointly develop guidance ensuring that students with disabilities receive a FAPE consistent with their IEP.

On April 9, 2020, the CDE issued guidance on in-person special education services while schools are closed due to COVID-19. It stated that in some exceptional

situations, the school district might need to provide certain in-person supports and services to maintain an individual student's mental or physical health and safety, or to support the student in accessing alternative options for distance learning. The CDE required alternative delivery options to comply with federal, state and local health official's guidance related to physical distancing, with a primary consideration of keeping all participants' safe and healthy.

The governmental guidelines issued during the COVID-19 school closures provided a means for San Diego to substantially implement Student's January 15, 2020 IEP using alternative delivery models for educational services. Since March 2020, San Diego has been implementing Student's last agreed upon IEP through alternative distance learning, in compliance with Governor Newsome's executive orders, guidelines issued by the CDE, and orders by local health agencies.

Whether Student's individual educational needs require additional supports, such as in-home nursing, is a factual inquiry for the due process hearing. (*E.M.C. v. Ventura Unified School Dist.* (C.D. Cal., Oct. 14, 2020, Case No. 2:20-cv-09024-SVW-PD) 2020 WL 7094071, * 6.) During pendency of the due process hearing, Student is not entitled to a change from the currently implemented delivery model of distance services to in-home services, even if pre-arranged by a loving parent and permitted under pandemic guidelines. If Student prevails at the administrative hearing, OAH can award reimbursement to Parent for the privately obtained nursing services, and compensatory education.

Student's motion seeks modification of the January 15, 2020 IEP through a stay put order. Accordingly, Student's motion is denied.

IT IS SO ORDERED.

Alexa Hohensee
Alexa Hohensee (Dec 24, 2020 12:32 PST)

Alexa Hohensee

Administrative Law Judge

Office of Administrative Hearings