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 NO. 2013030710 ORDER DENYING STUDENT'S MOTION FOR STAY PUT

On March 26, 2013, Student filed a motion for stay put. On March 27, 2013, the San Diego Unified School District (District) District filed an opposition.

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)[1]; Ed. Code, § 56505 subd. (d).) This is referred to as "stay put." For purposes of stay put, the current educational placement is typically the placement called for in the student's individualized education program (IEP), which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

Courts have recognized, however, 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.) It does not violate stay put if a school becomes unavailable and the child is provided a comparable program in another location. (See *McKenzie v. Smith* (D.C. Cir. 1985) 771 F.2d 1527, 1533; *Knight v. District of Columbia* (D.C. Cir. 1989) 877 F.2d 1025, 1028; *Weil v. Board of Elementary & Secondary Education* (5th Cir. 1991) 931 F.2d 1069, 1072-1073.)

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 IEP 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 *Ms. S. ex rel G v. Vashon Island Sch. Dist*. (9th Cir. 2003) 337 F.3d 1115, 1134.)

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

DISCUSSION

Student's due process hearing request (complaint) alleges that she is eligible for special education and related services under the eligibility category of emotional disturbance (ED). It appears from the complaint that Student attended a public school in the Temecula Valley Unified School District (TVUSD) from August 2011 through April 2012. In an IEP of April 2012, TVUSD offered Student a nonpublic school (NPS) placement, to which her mother consented. TVUSD convened as annual IEP team meeting on August 24, 2012, four days prior to Student's 18th birthday. According to the IEP notes, someone identified as Dr. Perlman told the team that Student's emotional needs were becoming more severe and that Student required an NPS with a "therapy component," which opinion was echoed by the "mental health coordinator" who stated that Student required a program with a "therapeutic component." Student's special education teacher recommended a "small therapeutic setting." For the 2012-2013 school year, TVUSD offered Student placement in an NPS with an "inclusive therapy component," 90 minutes per day of services focusing on Student's academic, social/behavioral and vocational needs, transition services for career and college awareness for 30 minutes two times per month, family therapy for 40 minutes one time per week, and transportation (including transportation of parent to family therapy).[2] Student's complaint alleges that Mother consented to the August 24, 2012 IEP as Student's "attorney in fact" on September 5, 2012, after Student had turned 18 years of age. Student allegedly refused to, and did not, attend the NPS offered.[3] Student seeks placement at an NPS pursuant to the August 24, 2012 IEP as her stay put placement.

According to the complaint, Student no longer lives with Mother, but as Mother now resides within District boundaries, Student enrolled in District on March 6, 2013. District held an IEP team meeting on March 9, 2013,[4] and offered Student a 30 day interim placement from March 9 through April 8, 2013 at New Dawn, identified as a "separate school" in the IEP, with 20 hours per week of specialized academic instruction and 10 hours per week of intensive mental health services (MHRS). District allegedly did not offer Student transportation, although Student lives 23 miles from New Dawn. Student contends that the interim IEP offer is not comparable to the August 24, 2012 IEP, because New Dawn

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[2] An authenticated copy of the August 24, 2012 IEP is attached as Exhibit 2 to the sworn declaration of Student's counsel, who attended the IEP team meeting by telephone.

[3] Student's moving papers note that there was a due process hearing on whether TVUSD's August 24, 2012 IEP offered Student a free appropriate public education (FAPE), and by a decision dated January 14, 2013, OAH found that the August 24, 2012 IEP did offer Student a FAPE.

[4] A partial copy of the interim IEP was attached as Exhibit 3 to the sworn declaration of Student's counsel, who inaccurately refers to the interim IEP as dated March 14, 2013 because that was the date it was faxed to counsel's office. The partial document itself is not dated, but Student's Exhibit 4 is a letter to Student's counsel from the District referring to the IEP as dated March 9, 2013. District did not dispute the accuracy of Student's exhibits, and the attached IEP will be deemed, for purposes of this motion, to be dated March 9, 2013 and to accurately represent the terms of District's interim IEP offer.

is not an NPS but rather, based upon hearsay statements made to Student's counsel and counsel's unsupported speculation, a day treatment center.[5]

District opposes Student's stay put motion, contending that, for a period not to exceed 30 days after a student's inter-district transfer, District need only provide an interim placement with comparable services to those in the student's last IEP in effect, and is not required to implement the student's last IEP.

Student has failed to establish that the August 24, 2012 IEP was agreed upon or implemented for purposes of enforcing the placement in that IEP as the status quo. Mother was no longer the holder of Student's educational rights when Student turned 18 years of age on August 28, 2012, and could not consent to the August 24, 2012 IEP on behalf of her adult daughter on September 5, 2012. Student's own complaint states on the first page that "Student holds ED RIGHTS," not Mother. No evidence was submitted that Student, as holder of her own educational rights from August 28, 2012, consented to the August 24, 2012 IEP at any time. Student's own allegation that she refused to attend the offered NPS suggests that Student did not consent to such placement, either herself or through Mother as "attorney in fact." Student's moving papers concede that Student never attended the NPS offered, so the August 24, 2012 IEP was never implemented. The August 24, 2012 IEP was neither: (i) agreed upon, nor (ii) implemented, and is therefore not Student's current educational placement for stay put purposes. Accordingly, Student's stay put motion is denied.

Even had Student established that the August 24, 2012 IEP constituted her last agreed upon and implemented educational placement, District's obligation for the first 30 days of Student's inter-district transfer is to provide Student an interim placement comparable to the last IEP in effect. (20 U.S.C. § 1414(d)(2)(C)(i)(1).) Student transferred between school districts mid-academic year on March 8, 2013, and has attended District for less than 30 days. Therefore, Student's motion to implement a placement other than an interim placement is premature.

Student submitted no admissible evidence that the placement and services offered in the interim IEP of March 9, 2013, which included specialized academic instruction and intensive mental health services at New Dawn, were not comparable to the NPS program with a "therapeutic component" offered in the August 24, 2012 IEP, even had the August 24, 2012 IEP been Student's agreed upon and implemented educational program, which it was not. As only two pages of the March 8, 2013 interim IEP were submitted, Student has not established that District failed to offer transportation anywhere in that interim IEP. Student alleges that she is now an adult living apart from her mother, so family counseling need not be retained for District to approximate the services offered in the previous IEP. Student no longer lives near, nor attends, the specific NPS offered by TVUSD and that school is therefore unavailable: even under the stay put provisions of the IDEA, Student would be

[5] Judicial notice is taken that District's website, at www.sandi.net, lists New Dawn as one of its public, alternative schools.

entitled to no more than a comparable program. Student has not established that the program offered by District is not comparable to the educational placement she seeks to enforce, and her motion also fails on this ground.

ORDER

Student's stay put motion is denied.

Dated: March 29, 2013

/s/
ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings