BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

V.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2022090181

ORDER DENYING MOTION FOR STAY PUT

SEPTEMBER 14, 2022

On September 2, 2022, Student filed a motion for stay put. Student contends that he was entitled to remain in Giannini Middle School's eighth grade mild/moderate special day class placement with the special education related services in the last agreed upon and implemented individualized education program, called an IEP, instead of graduating to the ninth grade. Student also contends Parent did not consent to San Francisco Unified School District's May 18, 2022 IEP because it inappropriately offered a moderate/severe special day class placement. San Francisco Unified School District is called San Francisco. Student further contends that he was not ready for high school because of academic regression during the COVID-19 pandemic and San Francisco had not offered enough special education related services.

On September 8, 2022, San Francisco filed an opposition. San Francisco contends that advancing from the eighth to the ninth grade was recommended by San Francisco's IEP team and not a placement change under stay put principles. Further, San Francisco contends that Student's arguments of inadequate special education related services and free appropriate public education denials, called a FAPE, required determination under due process hearing procedures, and should not be determined by a stay put motion. San Francisco did not dispute that Student's stay put placement was a mild/moderate special day class.

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, 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).)

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).) For example, 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.) However, Hawaii's teacher furloughs and concurrent shut down of public schools was not considered 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.)

DISCUSSION

The parties offered conflicting evidence as to the last agreed upon and implemented IEP. Student's attorney argued in the stay put motion that last agreed upon and implemented IEP was February 11, 2021. Parent's declaration under the penalty of perjury represented that the last agreed upon and implemented IEP was March 11, 2020, to which she consented on February 10, 2021. San Francisco's Special Education Supervisor Benjamin Neumann's declaration under the penalty of perjury represented that the operative IEP was March 11, 2020, as amended on February 4, 2021, to which Parent consented except to the: placement offer of two moderate/severe special day classes in English language arts and in math; and two mild/moderate special day classes for science and social studies. Therefore, Neumann

represented that San Francisco continued to implement the mild/moderate special day class placement for 1,000 weekly minutes offered in the March 11, 2019 IEP, as amended and consented on October 24, 2019.

San Francisco's contention that the last agreed upon and implemented IEP was March 11, 2020, as amended on February 4, 2021 as to special education related services; and the last agreed upon and implemented IEP was March 11, 2019, as amended on October 24, 2019 as to mild/moderate special day class placement was persuasive as they were supported by exhibits filed by the parties and consistent with facts which the parties did not dispute. The parties did not dispute the mild/moderate special day class was the last agreed to and implemented placement.

Contrary to Student's argument, stay put placement was not retention in the eighth grade, but a natural advancement to the ninth grade, as the ninth grade reflected Student's advancement from grade to grade pursuant to stay put principles. Further, because the last agreed upon and implemented placement was a mild/moderate special day class, a mild/moderate special day class in ninth grade would be Student's placement until completion of the due process hearing procedures.

Although Student disagreed with the amount of special education related services San Francisco offered in various IEPs, Student did not address, or dispute, which IEP embodied the last agreed upon and implemented special education related services. Student's arguments regarding San Francisco's failure to offer enough special education related services were irrelevant to the stay put motion, and were not considered. Lastly, San Francisco represented that it was prepared to implement all components in Student's last agreed upon and implemented IEPs in a ninth-grade high school setting. Therefore, Student's motion for stay put is denied.

ORDER

Student's motion for stay put is denied.

IT IS SO ORDERED.

Sabrina Kong

Sabrina Kong

Administrative Law Judge

Office of Administrative Hearings