BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

ORCUTT UNION SCHOOL DISTRICT.

OAH CASE NUMBER 2020100618

ORDER DENYING MOTION FOR STAY PUT

JANUARY 27, 2021

On January 14, 2021, Student filed a motion for stay put. On January 20, 2021, Orcutt Union School District filed an opposition on the ground that Orcutt is implementing Student's last agreed upon individualized education program. Student filed a reply to Orcutt's opposition on January 21, 2021.

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 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).)

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 G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35, superseded by statute on other grounds, 20 U.S.C. § 1414(d)(1)(B).)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.)

The parties agree that Student's last agreed upon and implemented IEP is the April 9, 2020 IEP. Student's April 9, 2020 IEP calls for 300 minutes daily of specialized academic instruction in a separate class, 120 minutes weekly of speech and language services in a separate class, and 720 minutes of behavior intervention services in a separate class. All of the services note that they will be provided when schools reopen.

The educational settings page of the April 9, 2020 IEP specifies that the offer of a free appropriate public education, referred to as FAPE, is predicated on regular school attendance and schools open according to the published calendar. The notes of the April 9, 2020 IEP state that distance learning will begin on April 20, 2020, and Orcutt will implement a distance learning plan until it reopens. Parent consented to the April 9, 2020 IEP on May 11, 2020. Parented initialed the option that she understood and consented to the contents of the April 9, 2020 IEP with the exception of blank, however, there was nothing written in that Parent did not consent to. Parent emailed the consent page to Orcutt on May 11, 2020, included in the email Parent noted she could not consent that the IEP is FAPE because she had not yet received the IEP.

As of January 11, 2021, Orcutt was providing Student with two and a half hours of in-person specialized academic instruction with behavioral support on campus four days a week, 30 minutes daily physical education, 120 minutes weekly individual speech and language services, and 60 minutes monthly occupational therapy consult. Orcutt included a declaration that it would continue to provide these services. Student argues Orcutt should be ordered to provide Student with 300 minutes daily of in-person specialized academic instruction, 120 minutes per week of speech and language service, and 720 minutes per week of behavior intervention services. Orcutt argues it has been implementing Student's April 9, 2020 IEP through distance learning and Student's motion should be denied.

On March 4, 2020, California Governor Gavin Newsom declared a state of emergency in California due to the threat of novel COVID-19. On March 13, 2020, Governor Newsome issued Executive Order N-26-20 which directed the California Department of Education, referred to as CDE, and the Health and Human Services Agency to jointly develop guidance ensuring that students with disabilities receive a free

appropriate public education consistent with their IEPs under the Individuals with Disabilities Education Act, referred to as IDEA during public health related school closures.

On September 30, 2020, CDE updated its Special Education Guidance for COVID-19. (Cal. Dept. of Educ., Special Education Guidance for COVID 19 Providing In-Person Supports and Services to Students with Disabilities (Sept. 30, 2020).) CDE addressed whether school districts may provide in-person special education services while schools are closed due to COVID-19. CDE noted the California Department of Public Health guidance from August 25, 2020, permitting the provision of in-person targeted, specialized support and services in stable cohorts. However, local education agencies still need to limit cohort size, prevent cohort mixing, practice distancing, and use face coverings. CDE clarified that despite the fact pursuant to Education Code, section 43502, subdivision (d)(1), the annual instructional minute requirements are waived for the 2020-2021 school year, local education agencies are still required to implement IEPs. The amount of specialized academic instruction a student receives is an IEP team decision based on a student's need.

The governmental guidelines issued during the COVID-19 school closures provide a means for school districts to substantially comply with the IDEA, using alternative delivery models of educational services to materially implement a student's IEP. Orcutt acknowledges Student's April 9, 2020 IEP is the last consented to and implemented IEP and argues that it has implemented that IEP through a distance learning plan. Orcutt further argues the services listed in Student's April 9, 2020 IEP

specify that they will be provided when schools reopen. Orcutt is still legally obligated to implement Student's IEP. However, Orcutt has been attempting to implement Student's IEP, using specialized and targeted support services, under Governor Newsom's executive orders and the guidelines issued by the CDE and orders by local health agencies.

Student argues that because he is already attending school in-person through a small cohort for two and a half hours a day, nothing prevents Orcutt from providing him the full 300 minutes of specialized academic instruction called for in his April 9, 2020 IEP. This argument misinterprets Governor Newsom's executive orders and the guidance provided by CDE. While Orcutt may provide in-person instruction to students in cohorts, it still must abide by health and safety guidelines. Parents cannot veto decisions made by the State of California regarding the management of its school during the pandemic under the IDEA stay put provision. (*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.) Orcutt may implement Student's IEP through a combination of distance learning and in-person instruction.

Student argues in the alternative that Orcutt provide in-home supports for virtual learning. Student's IEP does not call for in-home support, therefore, the alternative argument seeks a modification of the April 9, 2020 IEP, and is denied.

Student's stay put during the pendency of this action is his April 9, 2020 IEP, unless or until an IEP team changes the IEP and Parents consent. This includes 300 minutes of daily specialized academic instruction, as well as the speech and

language, and behavior intervention services specified in the IEP. Orcutt provided a signed declaration that it has been implementing Student's April 9, 2020 IEP through a combination of virtual and in-person learning. Student did not present any evidence that Orcutt is not providing all Student's services through a combination of virtual and in-person learning.

Therefore, Student's motion for stay put is denied without prejudice. If Orcutt is not providing Student with all the services listed in his April 9, 2020 IEP through a combination of virtual and in-person learning, Student may refile his motion for stay put.

IT IS SO ORDERED.

Linda Johnson

Linda Johnson
Administrative Law Judge
Office of Administrative Hearings