BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

DRY CREEK JOINT ELEMENTARY SCHOOL DISTRICT.

OAH CASE NUMBER 2024080423

ORDER GRANTING STUDENT'S MOTION FOR STAY PUT

AUGUST 22, 2024

On August 12, 2024, Student filed a request for due process hearing with the Office of Administrative Hearings naming Dry Creek Joint Elementary School District, called Dry Creek. The Office of Administrative Hearings is called OAH. On August 12, 2024, Student filed a motion for stay put. Student's stay put motion was supported by sworn declarations by Student's attorney and Parent. Student's last agreed upon and implemented October 3, 2023 individualized education program, called IEP, was included with Student's stay put motion.

On August 15, 2024, Dry Creek filed an opposition to Student's stay put motion. Dry Creek's opposition was supported by sworn declarations by Dry Creek's Executive Director of Special Education Sonia Moscatelli and Director of Student Services and Community Engagement Jennifer Mccoy. Dry Creek's opposition motion also was

supported by a sworn declaration by Dr. Richard Pan, one of the joint authors of Senate Bill 277, which was signed into law on June 30, 2015, and codified as Health and Safety Code section 120335.

On August 21, 2024, Student filed a reply to Dry Creek's opposition. Student's reply brief was supported by a sworn supplemental declaration by Student's attorney. On August 21, 2024, Dry Creek filed a sur reply to Student's relief brief.

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.)

California Health and Safety Code section 120335 requires children to receive immunizations against certain infectious diseases prior to being admitted to any public or private elementary or secondary school, childcare center, nursery, nursery school, family day care home, or development center. (Cal. Health & Saf. Code §§ 120325, subd. (a), 120335, subd. (b).) Effective July 1, 2016, school districts cannot unconditionally admit for the first time any child to preschool through sixth grade, or admit any child to seventh grade, unless the child either has been properly immunized, or qualifies for other exemptions recognized by statute. (Cal. Health & Saf. Code § 120335, subd. (g)(3).)

The statute contains three express exceptions to California's immunization requirements. First, immunizations are not required for any child in a home-based private school or a child who is enrolled in an independent study program and does not

receive classroom-based instruction. (Cal. Health & Saf. Code, § 120335, subd. (f).) Second, children who qualify for an IEP pursuant to federal law and section 56026 of the California Education Code may not be prohibited from accessing any special education and related services required by his or her IEP based on vaccination status. (Cal. Health & Saf. Code, § 120335, subd. (h).) Third, children may be medically exempt from the immunization requirements if a licensed physician states in writing that "the physical condition of the child is such or medical circumstances relating to the child are such, that immunization is not considered safe." (Cal. Health & Saf. Code, § 120370, subd. (a)(1)-(2).)

School districts are required to provide disabled students with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.)

Student contends Dry Creek prevented Student from attending school and accessing his special education and related services pursuant to his October 3, 2023 IEP beginning August 8, 2024, because he did not receive immunization against certain infectious diseases as required by California Health and Safety Code section 120335. Student argues he is exempt from mandatory immunization pursuant to Health and Safety Code section 120335, subdivision (h). Student further argues he is entitled to the procedural safeguard of stay put under the Individuals with Disabilities Education Act, called IDEA, during the pendency of the due process proceeding. Student seeks an order of stay put implementing his October 3, 2023 IEP. The October 3, 2023 IEP offered Student the following:

- 474 minutes weekly specialized academic instruction in co-taught English language arts and math classes;
- 45 minutes monthly consultation between Student's special education and general education teachers;
- 60 minutes yearly occupational therapy consultation services provided at the school site or by phone/email;
- 30 minutes monthly behavior intervention services.

Parent consented to the October 3, 2023 IEP on November 15, 2023.

Dry Creek agrees Health and Safety Code section 120335, subdivision (h) does not prohibit a pupil who qualifies for an IEP and is not vaccinated from accessing any special education and related services. Dry Creek argues, however, that a student who is not vaccinated cannot participate in general education because that is neither special education nor related services. Relying primarily on guidance from the California Department of Public Health and Dr. Pan's declaration, Dry Creek argues students with IEPs who do not receive mandatory immunizations should continue to receive all necessary services in their IEPs, but not access the general education environment unless the student has complied with state vaccination requirements or received a valid medical exemption. Dry Creek argues it will provide Student's special education and related services, but Student will be required to access general education through an independent study program. Specifically, Moscatelli's declaration states Student can attend sixth and seventh periods of the school day to receive specialized academic instruction in a co-taught class and that Dry Creek will enroll Student in an independent study program for Student to access the general education curriculum.

There is no dispute that Student did not receive the required immunizations required or a medical exemption as required by Health and Safety Code section 120335.

There also is no dispute that Student is entitled to the special education and related services in his IEP. The dispute centers on the meaning of the special education and related services Student may access notwithstanding his immunization status. Dry Creek argues the California legislature did not intend for the exemption to apply to Student's placement and suggests it can implement the general education component of Student's educational program through an independent study model. Dry Creek relies on Dr. Pan's declaration which attests the California Legislature intended for students with IEPs to access special education services, but not access the general education environment unless the student complied with the vaccination requirement or received a valid medical exemption. However, this distinction between special education and related services and placement is not stated in Health and Safety Code section 120335, subdivision (h). Further, a June 9, 2015 transcription from the California Assembly Health Committee meeting does not demonstrate the same intention as stated by Dr. Pan. Several committee members expressed their understanding that the bill should not impact the "ability of a [disabled child] to get a full program afforded to them in their IEP" and that nothing in the bill should prohibit a child with an IEP to access the "mainstreaming component" or prevent them from being "allowed to take part in normal classroom activities with other kids in a general setting if they had the exemption."

OAH recently rejected a similar argument a by school district who sought to implement only special education and related services and carve out an exception for general education. While orders and decisions in special education due process proceedings may be cited as persuasive, they are not binding authority. (Cal. Code Regs., tit. 5, § 3085.) Here, OAH's order granting stay put in OAH case number 2024020607 is persuasive. (*Parents on behalf of Student v. Corona-Norco Unified School District* (February 27, 2024) OAH case number 2024020607 [stay put granted

based on statutory exception to Health and Safety Code section 120335, subdivision (h)].) Similarly, Dry Creek's argument that the Health and Safety Code only requires a school district to provide special education and related services undercuts a central principal under the IDEA: the right of children with special needs to be educated in the least restrictive environment appropriate to meet their needs and the clear policy preference for inclusion to the maximum extent appropriate. (20 U.S.C § 1412(a)(5)(A); 34 C.F.R. §§ 300.114 & 300.116; Ed. Code, § 56031.)

Dry Creek's argument that recent decisions from the United States District Court for the Southern District of California should be disregarded as dicta also is not persuasive. The court has recognized federal law requires implementation of students' IEPs notwithstanding California's vaccination requirements. (*Royce v. Bonta* (S.D.Cal. March 25, 2024) 2024 WL 1269485, *8 (recognizing obligation to implement IEPs under federal law notwithstanding non-compliance with California's vaccination laws); *Whitlow v. State of California* (S.D.Cal. 2016) 203 F.Supp.3d 1079, 1083 (students with IEPs are exempted from the vaccination requirement as a condition of school attendance).)

Dry Creek's argument OAH should consider policy guidance from the California Department of Health also is not persuasive. The California Department of Health's guidance merely reiterates the exemptions contained in Health and Safety Code section 120355, subdivision (h), but states students who have an IEP should continue to receive "all necessary services" identified in their IEP regardless of their vaccination status. This contradicts the express language of the statute, which states students with IEPs may not be prohibited from accessing any special education and related services required by his or her IEP based on vaccination status. (Cal. Health & Saf. Code § 120335, subd. (h).)

Dry Creek's reliance on *V.D., et al. v. State of New York, et al.* (E.D.N.Y. 2019) 403 F.Supp.3d 76 is misplaced. In *V.D.*, the plaintiffs were parents of children with

disabilities. They challenged enforcement of the repeal of a religious exemption that previously allowed their children to attend schools without immunization certificates. Notably, unlike Health and Safety Code section 120335, New York's legislation did not contain a provision allowing an exemption for students with IEPs. The court determined the plaintiff did not demonstrate they were entitled to a preliminary injunction or a stay put order. (*Id.* at p. 86). The court determined that under New York law, the school district action of removing IEP services from students' IEPs was not a change in placement because it was the plaintiffs' decision not to comply with the requirement of obtaining vaccinations. (*Id.* at p. 92.) Under the New York statute in dispute, the law did not alter the disabled students' IEPs. For example, the school did not intend to move the plaintiffs to a different school with a different educational program. (*Id.* at pp. 93-94.)

In California, placement is 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).) Here, Dry Creek seeks to change Student's placement by requiring him to participate in general education through independent study without parental approval. This action constitutes a unilateral change in placement and violates the stay put provision under the IDEA. (*Honig v. Doe* (1988)) 484 U.S. 305, 320, 324-325, 108 S.Ct. 592, 98 L.Ed.2d 686 (holding that Congress's goal was to attack "exclusionary practices" that resulted in a "unilateral change in placement").)

Student has the right to remain in his current educational placement while this dispute is pending before OAH. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a); Ed. Code, § 56505, subd. (d).) Student's motion for stay put is granted.

ORDER

1. Student's motion for stay put is granted.
2. Student's stay put placement during the pendency of this matter shall consist of the last agreed upon and implemented placement and services in Student's October 3, 2023 IEP.

Jennifer Kelly

Jennifer Kelly

Administrative Law Judge

Office of Administrative Hearings