BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SAN MATEO FOSTER CITY SCHOOL DISTRICT.	OAH Case No. 2016061143 ORDER DENYING MOTION FOR STAY PUT

On September 6, 2016, Student filed a motion for stay put to maintain Student's current attendance in a general education kindergarten classroom at Meadow Heights Elementary School. On September 12, 2016, 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, which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

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 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 G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35, superseded by statute on other grounds, 20 U.S.C. § 1414(d)(1)(B).) Progression to the next grade maintains the status quo for purposes of stay put. (*Van Scoy ex rel. Van Scoy v. San Luis Coastal Unified School Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086 ["stay put" placement was advancement to next grade]; see also *Beth B. v. Van Clay* (N.D. Ill. 2000) 126 F.Supp.2d 532, 534; Fed.Reg., Vol.

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

64, No. 48, p. 12616, Comment on § 300.514 [discussing grade advancement for a child with a disability.].)

DISCUSSION

On June 12, 2015, Parent consented to District's offer of placement and services in an integrated preschool setting called Helping Hands, with specialized academic instruction for 240 minutes per day (1,200 minutes weekly), speech and language in a consultative model for 30 minutes per month, and occupational therapy with direct and consultative services for 120 minutes per month. The placement was identified as a "diagnostic placement."

On September 14, 2015, District's annual IEP offered continued placement in Helping Hands with occupational therapy services, but reduced speech and language consultative services to 15 minutes per month. Parent consented to the IEP, with the exception of the reduction in speech and language services. Throughout the 2015 – 2016 school year Student received specialized academic instruction for 240 minutes per day, occupational therapy for 120 minutes per month and speech and language for 30 minutes per month. This constituted Student's stay put, or, last agreed upon and implemented placement and services.

Helping Hands was a blended inclusion preschool classroom with one special education teacher, one preschool teacher with a child development certificate, one special education aide, and one general education aide. There were 16 students or less in the class throughout the relevant time period with an equal number of special education and regular education students. Student received direct academic instruction, along with the other students with IEP's, from a credentialed special education teacher. Student engaged in large group activities with general education peers for such activities as circle time and recess.

On June 9, 2016, District held an IEP meeting for Student's transition into kindergarten. District offered specialized academic instruction for 900 minutes per week (180 minutes per day) and general education inclusion for 425 minutes per week (85 minutes per day) for a total of 1,325 minutes weekly. Parent did not consent to the IEP. A complaint was filed on June 17, 2016, seeking placement in a general education classroom with a one-on-one behavior trained aide, and other supports and services.

Revocation of Consent for Special Education Services

In its Opposition, District argues, in part, that Student is not entitled to stay put as Parent revoked consent for special education services on August 12, 2016, and subsequently placed Student in a general education classroom.

On August 12, 2016, Student's counsel, Jessica Cochran-Kelly, wrote to District's counsel, Lenore Silverman, to notify District of Parent's rejection of both the June 9, 2016

IEP, and further implementation of the September 14, 2015 IEP. District took this as a rejection of special education services.

On August 19, 2016, Ms. Cochran-Kelly wrote Ms. Silverman again to amend the rejection of services and sought implementation of various portions of the IEP's of March 19, 2015, September 14, 2015, and June 9, 2016.

On August 22, 2016, District's Director of Special Education, John Bartfield, sent a prior written notice letter to Parent regarding District's position on revocation of consent for services and reinstituting special education services.

Parents may revoke consent for the continued provision of special education at any time. However, such revocation is prospective only and does not negate an action that occurred after the parent gives consent and before the parent revokes consent. (34 C.F.R. 300.9(c); 34 300.300(b)(4).) Further, before a local educational agency can cease providing special education services, it must provide prior written notice that explains the change in the education program that will result from parent's revocation. (34 C.F.R. 300.300(b)(4)(i).) The provision of this notice gives parents information and time to fully consider the ramifications of the revocation of consent. (73 Fed.Reg. 73008 (December 1, 2008).)

Here, Parent reversed the revocation of consent for special education before District sent its prior written notice. Thus, there was no discontinuation of special education and Student would be entitled to a stay put placement. However, the general education kindergarten at Meadow Heights is not materially and substantially similar to the placement and services provided by Student's last agreed upon and implemented IEP.

Maintaining the Status Quo

Where a dispute arises prior to implementing placement and services under a new IEP, maintaining the status quo means to continue the former placement. (*Drinker v. Colonial Sch. Dist.* (3d. Cir. 1996) 78 F.3d 859.) Where a student's previously implemented placement is no longer available, stay put is satisfied through placement in a program that is materially and substantially similar to the former program. (*Ibid.*)

Here, Student matriculated from preschool to kindergarten for the 2016 – 2017 school year. Student does not seek retention in preschool. The motion argues for various placements but, at the outset, agrees that stay put is his September 14, 2015 IEP, with speech and language services from his June 12, 2015 IEP.

Although stay put is generally automatic when a due process case is filed, stay put cannot always be exactly replicated due to changing circumstances. As the court stated in *Van Scoy*:

> The purpose of the stay-put provision is to maintain the status quo and to prevent the school district from unilaterally denying placement to a student

> while a dispute over the placement is being resolved. Courts have recognized, however, that because of changing circumstances the status quo cannot always be exactly replicated for the purposes of stay put. (*Ms. S. ex rel. G. v. Vashon Island School Dist.* (9th cir. 2003) 337 F.3d 1115, 1133-35. In the present case, the circumstances have changed because [the student] has moved from kindergarten into first grade, which includes additional time in the classroom.
>
> Certainly the purpose of the stay-put provision is not that students will be kept in the same grade during the pendency of the dispute. 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.
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> (*Van Scoy, supra*, 353 F.Supp.2d at p. 1086.)
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> The comments to the federal regulations also address this issue.
>
> The term "current placement" is not readily defined. While it includes the IEP and the setting in which the IEP is implemented, such as a regular classroom or a self-contained classroom, the term is generally not considered to be location-specific. In addition, it is not intended that a child with disabilities remain in a specific grade and class pending an appeal if he or she would be eligible to proceed to the next grade and the corresponding classroom within that grade.
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> (64 Fed.Reg. 12616 (March 12, 1999).)

Here, Student contends the stay put setting should be a regular classroom, since the IEP itself specified that Student's placement was "100% in regular classroom" and identified the class as "a general education integrated preschool setting." At the same time, the parties agree the class was comprised of special education students and general education students, in equal numbers.[2] Further, the September 14, 2015 IEP states that Student "benefits from frequent adult facilitation in a highly structured classroom setting with a low student teacher ratio in order to make progress towards his IEP goals." It is undisputed that Student received direct instruction through a special education teacher for the bulk of his school day, while in preschool.

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[2] Student contends that any class, which is comprised of at least 50% general education students, is a general education class. Student cites to *Letter to Colleague* (OSEP 2012) 58 IDELR 290, which refers to calculating the number of enrolled students in various class settings for purposes of fulfilling State reporting requirements under 20 U.S.C. § 1418. That provision does not purport to define what a general education class is for purposes of the provision of a FAPE or for application of the least restrictive environment analysis and is inapposite, here.

District's opposition to the stay-put motion provided several declarations describing the preschool class and kindergarten classes. It is undisputed that District does not have integrated kindergarten classes. According to District, the class that most closely replicates Student's stay put placement is the kindergarten special education class at George Hall Elementary School.

District's program specialist Megan Caughey, Student's prior special education teacher Cristina Blanco, and District's Assistant Superintendent for Student Services Molly Barton, executed declarations in support of District's opposition to the motion for stay put.

Cristina Blanco, who taught Student in the Helping Hands program, opined that the special day class at George Hall and the integrated class at Helping Hands class are similar in that both programs are taught by special education credentialed teachers; have modified pacing for curriculum; offer programming for global delays in multiple areas of development; offer small group instruction with multiple teachers; consist of a highly structured environment; offer direct instruction in social skill development; and provide opportunities for supported or facilitated access to general education curriculum and peers.

Based upon the evidence presented, the George Hall placement more closely replicates the placement that existed before the underlying dispute arose, taking into account the changed circumstances. Consistent with Student's prior placement, the George Hall placement offers Student small group direct instruction through a special education credentialed teacher while also offering mainstreaming through whole group instruction in circle time, recess, and physical education or play time. Student's occupational therapy and speech and language services can be implemented in the George Hall placement, consistent with Student's prior program. Full time placement in a general education classroom with full day whole group instruction by a general education teacher is not similar to Student's prior program.

Nothing in this Order is intended to decide the ultimate dispute in this case, regarding whether the District's offer of the special day class placement at George Hall constituted a free appropriate public education. This Order is intended to decide only what constitutes the "status quo" for Student while this case is pending.

ORDER

Student's motion for stay put as to the general education kindergarten classroom at Meadow Heights Elementary School is denied. Student's stay put placement during the pendency of this matter on the evidence presented, would be the kindergarten special day class at George Hall Elementary School, with 180 minutes of daily specialized academic instruction, 85 minutes of general education inclusion (including circle time, play time, story time, group instruction, recess, and physical education) along with related services of occupational therapy for 120 minutes per month and speech and language consultative services for 30 minutes per month.

IT IS SO ORDERED.

DATE: September 23, 2016

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Cole Dalton
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COLE DALTON
Administrative Law Judge
Office of Administrative Hearings