BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT

v.

SANTA CLARA COUNTY OFFICE OF EDUCATION AND SCOTTS VALLEY UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2019101173

ORDER GRANTING MOTION FOR STAY PUT

On October 29, 2019, Student filed a Request for Due Process hearing with the Office of Administrative Hearings. The Request for Due Process is referred to as a complaint. The Office of Administrative Hearings is referred to as OAH.

On October 29, 2019, Student filed a motion for stay put. On November 4, 2019, Santa Clara County Office of Education filed an opposition on the ground that under an existing memorandum of understanding entered into between Scotts Valley and Santa Clara, referred to as an MOU, Student was only permitted to attend its program for 60 days. Student filed a reply brief on November 5, 2019. Student provided the declaration and reply declaration of Mother and Student's counsel, together with supporting documentation in both the motion and reply. Santa Clara provided the declaration of its Assistant Director of Special Education, including supporting

documentation. OAH did not receive a response to the motion from Scotts Valley Unified School District.

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 individualized educational program, referred to as an 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).) However, if a student's placement in a program was intended only to be a temporary placement, such placement does not become a student's "stay put" placement. (*Verhoeven v. Brunswick School Committee* (1st Cir. 1999) 207 F.3d 1, 7-8; *Leonard by Leonard v. McKenzie* (D.C. Cir. 1989) 869 F.2d 1558, 1563-64.)

Courts have recognized 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).) Notwithstanding a change in campus, the "stay-put provision entitles the student to receive a placement that, as closely as possible, replicates the placement that exited at the time the dispute arose, taking into account the changed circumstances." (*Id.*) When the child's last IEP cannot be implemented due to a change in circumstances, stay-put requires that the student

receive a placement that, as closely as possible, replicates the last placement." (*R.F. by Frankel v. Delano Union School Dist.*, 224 F.Supp.3d 979, 985 (E.D. Cal. 2016), citing *Van Scoy ex rel. Van Scoy v. San Luis Coastal Unified School Dist.,* 353 F.Supp.2d 1083, 1086 (C.D. Cal. 2005); See *J.M. v. Chino Valley Unified School Dist.*, 2018 WL 6075349 (C.D. California, 2018) [holding that an expired general MOU is analogous to a school closure or transfer to another district].)

DISCUSSION

Student is a seven-year-old girl, who is deaf and blind, and suffers from Charge Syndrome. Student has developmental delays, vestibular/proprioception, and sensory deficits. She has an "intervener" who assists with behavior and communication and receives food through a G-tube during the school day. Scotts Valley Unified is Student's district of residence.

On March 19, 2019, Scotts Valley Unified and Parents held an IEP meeting. At the IEP meeting, Scotts Valley Unified offered Student 15 goals for math, writing, social/behavior, English Language Arts, expressive language, gross motor, oral speech, expressive communication, visual motor, orientation/mobility, and vision. Parents consented to the March 19, 2019 IEP, which included placement at Brook Knoll Elementary School within Scotts Valley Unified's boundaries.

On May 15, 2019, Scotts Valley Unified and Parents attended a second IEP meeting. The IEP team concluded Student had outgrown her placement in a special day class at Brook Knoll and recommended that Scotts Valley place Student in another special day class at Oster Elementary School for the 2019 to 2020 school year. Santa Clara oversees Oster Elementary. The March 2019 IEP was amended to reflect the change of placement, and Parents consented in writing to the amendment. Mother

believed this was a permanent placement for the 2019 to 2020 school year based upon the May 2019 IEP and other documents she received from both Scotts Valley Unified and Santa Clara.

Following the May 15, 2019 IEP, Scotts Valley Unified and Santa Clara County entered into an MOU on June 25, 2019, which provided that Student's placement at Oster Elementary was temporary, for 60 days only. The MOU also specifically provided that the placement was subject to reevaluation after 60 days and that it did not constitute a "stay put" placement as between Scotts Valley Unified and Santa Clara. Parents were not a party to the MOU. Parents were not aware of the MOU arrangement until late October 2019.

On August 14, 2019, Student entered into the program at Oster Elementary. On October 16, 2019, an IEP meeting was held to review Student's progress at Oster Elementary. Representatives of Oster Elementary, Parents, and the Director of Student Services of Scotts Valley attended the meeting. While the Oster Elementary members noted that Student was slowly progressing, they felt that the program at Oster Elementary was not an appropriate placement for Student, and was too costly for Santa Clara. Over the objections of Parents and the Scotts Valley Unified Director, the Santa Clara team indicated that as of November 1, 2019, Student would no longer be able to attend the school. Mother first saw the MOU on October 26, 2019.

Santa Clara contends that the stay put motion is inappropriate because the motion was filed without Student filing a complaint with OAH. This argument is without merit since OAH received Student's complaint within minutes of Student's filing of the Stay Put motion, and the proof of service indicates the complaint was served on Santa Clara by facsimile on October 29, 2019.

Santa Clara's next argues that the MOU takes precedence over the May 15, 2019 IEP and that it cannot be compelled to place Student once the MOU expired. In response, Student argues that the May 15, 2019 IEP is the controlling document and the last implemented IEP. Student further asserts that Parents were unaware of the MOU and were not a party to that document. Finally, Student argues that Santa Clara and Scotts Valley Unified cannot unilaterally waive Student's statutory rights. Accordingly, Student contends that the last agreed placement is in the special day class at Oster Elementary.

The last agreed upon and implemented IEP is the May 15, 2019 IEP. The question as to whether both Santa Clara and Scotts Valley Unified, as a matter of law or public policy, could unilaterally waive Student's statutory stay put rights in agreement that they independently executed after the May 15, 2019 IEP, must be resolved after findings of fact have been made by the hearing officer.

Student's last agreed upon and implemented placement is as stated in the May 15, 2019 IEP between Scotts Valley and Student, which specifically designates a special day class at Oster Elementary. Unlike a school closure or elimination of a program, the facts here establish that the placement still exists for purposes of stay put. The MOU was created solely for Student's placement and was not a broad MOU for placement that was terminated, which might have otherwise rendered the IEP placement impossible (see, for example, *J.M. v. Chino Valley Unified School District*, *supra,* 2018 WL 6075349 at p. 6). Whether or not the May 15, 2019 IEP placement is a free appropriate public education or whether the MOU is a valid and enforceable agreement as to Student is an issue of fact to be determined at a hearing.

As such, Student's motion is granted. Student's stay put placement is at the Oster Elementary program pending the outcome of this due process matter, unless the parties agree otherwise.

IT IS SO ORDERED.

DATED: November 08, 2019

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Brian H. Krikorian
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Administrative Law Judge
Office of Administrative Hearings