BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

PLEASANTON UNIFIED SCHOOL DISTRICT AND

CONTRA COSTA COUNTY OFFICE OF EDUCATION.

OAH CASE NUMBER 2020070970

ORDER GRANTING MOTION FOR STAY PUT

OCTOBER 30, 2020

On July 30, 2020, Student filed a Request for Due Process hearing with the Office of Administrative hearings, called OAH, naming Pleasanton Unified School District and Contra Costa County Office of Education as respondents. On August 17, 2020, Student filed her first motion for stay put regarding essential in-person related services in Student's Individualized Education Program, commonly called an IEP. OAH issued an order granting Student's motion for stay put for the related services on August 24, 2020.

On October 23, 2020, Student filed a second motion for stay put requesting a determination that Student's stay put placement is at Mauzy School. Pleasanton filed a response and Contra Costa filed an opposition to Student's second motion for stay put.

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, 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).)

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.) "Hawaii's teacher furloughs and concurrent shut down of public schools is not 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 dispute which program should be considered stay put for Student during the pendency of this due process matter. Student asserts it should be Mauzy School, the placement Student attended and is listed in the last agreed upon and implemented IEP dated August 27, 2019. Contra Costa contends that the placement at Mauzy School has been made impossible by the ongoing COVID-19 pandemic because the school is closed to in-person instruction. Contra Costa argues the stay put placement is the offer made by Pleasanton, Student's district of residence, after Contra Costa provided notice it would terminate services to Student on September 17, 2020. Pleasanton takes no position regarding Student's stay put placement.

Pleasanton is a member of the Tri-County Special Education Local Plan Area, called SELPA. Contra Costa operates Mauzy School and is a member of the Contra Costa County SELPA. The two SELPAs entered into a memorandum of understanding for the benefit of their members and this agreement allowed the parties to implement placement at Mauzy School. The Mauzy program provides special day classes and services to primarily medically fragile students.

On August 24, 2020 OAH granted Student's first stay put motion and ordered Pleasanton and Contra Costa to provide in-person services to Student as described in her IEP of August 27, 2019 in the areas of 1:1 licensed vocational nurse, speech therapy, physical therapy, and vision services. Contra Costa notified Student and Pleasanton that it was experiencing difficulty locating in-home providers as required by the first stay put order. On September 17, 2020, Contra Costa served a notice of discontinuation of services for Student. Contra Costa stated that it was unable to provide the individualized education and related services to Student based on the unprecedented COVID-19 pandemic and the ongoing need to provide education services through

distance learning. Contra Costa submitted a declaration from the director of special education that details the efforts it made to comply with OAH's first stay put order to secure providers for in-person services. The declaration indicates that despite its good faith efforts, Contra Costa determined that it would not be possible to comply with the stay put order and therefore decided to terminate the services to Student as of October 8, 2020.

Contra Costa cites *J.M. v. Chino Valley Unified School District* 2018 WL 6075349 in support of its argument that the placement offered by Pleasanton, after Contra Costa notified them of termination of services to Student, satisfies stay put. The instant case is distinguishable from *J.M.* In *J.M.*, student's placement program and district were members of the same SELPA. However, subsequent to student's placement, the program withdrew from the SLEPA. As a result of being in different SELPAs, the program did not provide service to the district unless an agreement was reached with the district on a case-by-case basis. In *J.M.*, the court found that when the program withdrew from the SEPLA, that was similar to a school closure and resulted in the placement being unavailable. Based on the unavailability, the *J.M.* court required the district to provide a new comparable educational placement. Here, the agreement between the SELPAs remains intact; the only change was discontinuation of services to Student. Contra Costa cannot terminate the agreement with Pleasanton, only as it applies to Student, based on the its inability to comply with OAH's orders to provide in-person services. Contra Costa's unilateral termination of the contract in contravention to OAH's first stay put order does not shift the stay put placement to Pleasanton.

Student's last agreed upon and implemented IEP of August 27, 2019 indicated placement at Mauzy School. Pleasanton made an offer for a different placement in response to Contra Costa's notice that it would no longer provide services. The new

offer of placement made by Pleasanton is not stay put because it was not consented to by Student and was never implemented. A determination of whether the placement at Mauzy School is impossible must be resolved after findings of fact have been made by a hearing officer. Likewise, the contractual issues regarding services Contra Costa and Pleasanton were to provide to Student also require an evidentiary hearing. Based on the forgoing, Student's request for Mauzy School be the stay put placement is granted.

Nothing in this order changes the previous orders made on August 24, 2020 granting Student's first stay put motion.

ORDER

1. Student's motion for stay put is granted.

2. Orders regarding stay put made on August 24, 2020 are not modified by this order.

IT IS SO ORDERED.

Marlo Nisperos

Marlo Nisperos
Administrative Law Judge
Office of Administrative Hearings