BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

IRVINE UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2019081114

ORDER GRANTING MOTION FOR STAY PUT

In early 2019, Student and Irvine Unified School District took consolidated cases to due process hearing. The consolidated decision in OAH case number 2018080638, Irvine Unified School District v. Student; and OAH case number, 2018080938, Student v. Irvine Unified School District was issued on February 19, 2019. The Administrative Law Judge, often referred to as an ALJ, determined that the IEP offered by Irvine did not offer a free, appropriate public education, often called a FAPE, to Student; and that the school Parents had placed Student in pending the outcome of the case, the Prentice School, constituted "an appropriate educational placement that provided Student educational benefit." (See, Decision, OAH Case No. 2019080938, p. 72.)

Irvine was ordered to maintain Student's placement at The Prentice School through the 2018-2019 school year; fund speech and language therapy provided by The Prentice School at the rate of $70 per session; and fund mileage reimbursement for Student's transportation for one round trip to school each day attended in the amount

of 6.3 miles for Father and 12 miles for Mother, both of which were round trip mileage calculations, at the IRS mileage rate of $.58 per mile in 2019.

On August 28, 2019, Parent on behalf of Student filed a request for due process hearing with the Office of Administrative Hearings, often called OAH, accompanied by a motion for stay put. In the motion, Student asserted that on July 2, 2019, Parents notified Irvine of their intent to maintain Student's placement at The Prentice School for the 2019-2020 school year invoking "stay put" as the basis for their request. On July 16, 2019, Irvine issued a prior written notice informing Parents that they would not fund Student's placement at the Prentice School for the 2019-2020 school year because they believed their June 3, 2019 Individualized Education Program offer constituted a free, appropriate public education.

On September 3, 2019, Irvine Unified School District filed an opposition to the motion. On September 3, 2019, Student filed a reply to Irvine's opposition. On September 4, 2019 Irvine objected to Student's reply brief as introducing new arguments and evidence but filed a "surreply" in conjunction with its objection, responding to Student's arguments.

APPLICABLE LAW

MOTION PROCEDURE

Generally, OAH law and motion does not provide for the filing of reply and "surreply" briefs. However, in this instance both were read and considered. The attached declaration and attachment, however, were not considered as the evidence should have been submitted with the original moving papers.

STAY PUT

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.)

"Where a parent unilaterally changes the placement of a child, but a subsequent administrative or judicial decision confirms that the parental placement is appropriate, the decision 'constitute[s] an agreement by the State to the change of placement' and the placement becomes the 'current educational placement' for the purposes of the stay put provision." *K.D. ex rel. C.L. v. Dept. of Educ., Hawaii,* (9th Cir. 2011) 665 F.3d 1110, 1118 (quoting *Clovis Unified School District v. California Office of Administrative Hearings,*(9th Cir. 1990) 903 F.2d at 641). "However, such a favorable decision for a parent must expressly find that the private placement was appropriate." (*Id.*,*citing L.M. v. Capistrano Unified Sch. Dist.,* (9th Cir.2009) 556 F.3d 900, 903–04).

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).)

DISCUSSION

THE FAPE STANDARD

On several occasions in both of its briefs, Irvine refers to the "*Burlington*-FAPE" standard implying that the case of *School Committee of Town of Burlington, Massachusetts et al. v. Department of Education of the Commonwealth of Massachusetts et al.* (1985) 471 U.S. 359, established a secondary standard for determining a free, appropriate public education; separate from the standard established by the Individuals with Disabilities in Education Act or IDEA. Irvine cites no authority for this proposition. The standards by which a student's IEP are determined to be FAPE are set forth in the IDEA.

Burlington established that a unilateral private school placement may be reimbursed under a court's inherent authority pursuant to 20 U.S.C. 1415(e)(2) to, "grant such relief as it deems appropriate." (*Sch. Comm. of Burlington v. Dept. of Ed. of Mass.*, *supra,* 471 U.S. at p. 369.) Thus, in cases in which the proposed IEP is determined not to provide FAPE, a parent is entitled to reimbursement if the court determines the placement to be "proper." The case of *Florence County School District 4 v. Carter* (1993) 510 U.S. 7, then established the premise that a unilateral private school placement did not have to meet the state educational standards in order to qualify for reimbursement. (*Id, at p. 14.)*. Neither case established a two-tiered standard of FAPE. There is no "*Burlington-FAPE"* standard.

The primary question in this motion is whether the prior OAH decision constitutes Student's "then current educational placement" for purposes of determining stay put. In the prior decision, the Administrative Law Judge made a specific finding that Parent's unilateral placement constituted "an appropriate educational placement

that provided Student educational benefit." The ALJ also determined that Irvine's IEP offer did not offer Student a FAPE and ordered Irvine to reimburse parents for the cost of tuition, transportation and speech and language services.

"The stay put provision may only be invoked during the pendency of any proceeding." *K.D. v. Dept. of Ed. Hawaii, supra* 1117.) A post-placement administrative determination can operate to define the current educational placement of a child and that is what has occurred in this instance. OAH's prior decision established The Prentice School as the most recent educational placement of the child by specifically finding it was appropriate and provided Student with educational benefit. There has been no subsequent IEP to which Parents have consented. Student has continued her placement at The Prentice School without another intervening placement since the prior OAH decision in the cases filed by these parties. As such, The Prentice School is Student's current educational placement and stay put in that placement is dictated by the IDEA pending resolution of this dispute. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006); Ed.Code, § 56505 subd. (d).)

Placement includes related services required by the child. The ALJ ordered mileage reimbursement for Student's transportation to and from school, of one round-trip per day and one speech and language therapy session per week. These related services also comprise parts of Student's stay put entitlement. (Cal. Code Regs. tit. 5, § 3042, subd. (a).)

ORDER

1. Student's request for Stay Put is granted.
2. Pending resolution of this case, from August 28, 2019 forward, Student's stay put includes tuition for The Prentice School; Speech and Language

therapy provided by The Prentice School at the rate of $70 per session; and mileage reimbursement for Student's transportation for one round trip to school each day attended in the amount of 6.3 miles for Father and 12 miles for Mother, both of which were round trip mileage calculations, at the current applicable IRS mileage rate..

IT IS SO ORDERED.

DocuSigned by:
Penelope S. Pahl
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DATED: September 9, 2019

Penelope S. Pahl
Administrative Law Judge
Office of Administrative Hearings