BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

BERKELEY UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2019091113

ORDER DENYING MOTION FOR STAY PUT

On November 6, 2019, Student filed a motion for stay put requesting an order that Berkeley Unified School District fund a non-public school program comparable to Student's prior placement. Student argues that he is entitled to stay put, based upon the last consented-to individualized education program, known as an IEP, dated January 23, 2018, and a prior 2016 settlement agreement between the parties.

On November 12, 2019, Berkeley Unified School District opposed Student's stay-put motion, contending that it is not responsible for Student's stay put placement because he is now a permanent resident of Oakland, and the settlement agreement does not confer and indefinite continued educational responsibility to Student. On November 13, 2019, Student replied to Berkeley's opposition to his Motion for Stay Put disputing Berkeley's contentions.

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 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).)

Courts have recognized, however, that 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 G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35, superseded by statute on other grounds, 20 U.S.C. § 1414(d)(1)(B).) When a student advances from grade to grade, 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. (*R.F. Frankel v. Delano Union School District,* (E.D. Cal 2016) 224 F. Supp. 3d, 979, *citing, Van Scoy ex rel. Van Scoy v. San Luis Coastal Unified School Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086.)

The Individuals with Disabilities Education Act (20 U.S.C. § 1400, et seq. (IDEA)) was amended, effective July 1, 2005, and revised the law concerning stay put placement for students who transfer to a new school district within the same state. Title 20 United

States Code 1414(d)(2)(C)(i)(1) now provides for an interim placement for those students, as follows:

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

The new IDEA federal regulations, which became effective on October 13, 2006, mirror the above provision. (34 C.F.R. § 300.323(e).)

California Education Code section 56325, subdivision (a)(1), effective June 30, 2011, mirrors Title 20 United States Code section 1414(d)(2)(C)(i)(1), with the additional provision that, for a student who transfers into a district not operating under the same special education local plan area (SELPA), the local educational agency shall provide the interim program "for a period not to exceed 30 days, by which time the local educational agency shall adopt the previously approved IEP or shall develop, adopt, and implement a new IEP that is consistent with federal and state law."

The interim IEP becomes the stay put placement pending a disagreement concerning whether the interim IEP offers a FAPE. (*Vashon, supra,* 337 F.3d at p. 1134; *Termine ex. rel. Termine v. William Hart Union High Sch. Dist.* (C.D. Cal. 2002) 219 F.Supp. 1049, 1061.)

The primary responsibility for providing a free appropriate public education, known as FAPE, to a disabled student rests on a local education agency, known as LEA.

(20 U.S.C. § 1414(d)(2)(A); Ed. Code, § 48200.) As a general rule, a student's school attendance is determined by the residency of his parent or guardian. (*Katz v. Los Gatos-Saratoga Joint Union High School Dist*. (2004) 117 Cal.App.4th 47, 57.) Section 48200 Of the Education Code, California's compulsory attendance law, requires that a student between six and 18 years of age attend school in "the school district in which the residency of either the parent or legal guardian is located." That district usually becomes the LEA responsible for providing a FAPE to an eligible student, subject to several specified exceptions. (20 U.S.C. § 1401(19); 34 C.F.R. § 300.28(a) (2006).)

Parents have the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) OAH has jurisdiction to hear due process claims arising under the Individuals with Disabilities Education Act. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029 [hereafter *Wyner*].)

This limited jurisdiction does not include jurisdiction over claims alleging a school district's failure to comply with a settlement agreement. (*Id.* at p. 1030.) In *Wyner*, during the course of a due process hearing the parties reached a settlement agreement in which the district agreed to provide certain services. The hearing officer ordered the parties to abide by the terms of the agreement. Two years later, the student initiated another due process hearing, and raised, inter alia, six issues as to the school district's alleged failure to comply with the earlier settlement agreement. The California Special Education Hearing Office (SEHO), OAH's predecessor in hearing IDEA due process cases, found that the issues pertaining to compliance with the earlier order were beyond its jurisdiction. This ruling was upheld on appeal. The *Wyner* court held that the proper avenue to enforce SEHO orders was the California Department of Education's

compliance complaint procedure (Cal. Code Regs., tit. 5, § 4600, et. seq.), and that "a subsequent due process hearing was not available to address . . . alleged noncompliance with the settlement agreement and SEHO order in a prior due process hearing." (*Wyner, supra*, 223 F.3d at p. 1030.)

In *Pedraza v. Alameda Unified Sch. Dist.* (N.D.Cal., Mar. 27, 2007, No. C 05-04977 VRW) 2007 WL 949603, the United States District Court for the Northern District of California held that when the Student is alleging a denial of FAPE, as a result of a violation of a settlement agreement, and not merely a breach of the settlement agreement, OAH has jurisdiction to adjudicate claims alleging denial of FAPE. According to the court in *Pedraza*, issues involving merely a breach of the settlement agreement should be addressed by the California Department of Education's compliance complaint procedure. In that case, the settlement agreement intended that the placement set forth in the terms of the agreement would provide Student with a FAPE. (Id. at p. 4.)

Settlement agreements are interpreted using the same rules that apply to interpretation of contracts. (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 686, citing *Adams v. Johns-Manville Corp.* (9th Cir. 1989) 876 F.2d 702, 704.) "Ordinarily, the words of the document are to be given their plain meaning and understood in their common sense; the parties' expressed objective intent, not their unexpressed subjective intent, governs." (Id. at p. 686.) If a contract is ambiguous, i.e., susceptible to more than one interpretation, then extrinsic evidence may be used to interpret it. (*Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 37-40.) Even if a contract appears to be unambiguous on its face, a party may offer relevant extrinsic evidence to demonstrate that the contract contains a latent ambiguity; however, to demonstrate an ambiguity, the contract must be "reasonably

susceptible" to the interpretation offered by the party introducing extrinsic evidence. (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391, 393.)

DISCUSSION

Student requests OAH order Berkeley to fund a non-public school as stay put, comparable to his prior placement at Maya Angelou Academy, because he aged out of the program at the end of the 2018-2019 school year. Student's request is based on the last consented-to IEP dated January 23, 2018, placing Student at Maya Angelou Academy. Additionally, Student contends that Berkeley continues to hold responsibility for Student's FAPE, due to an August 18, 2016 settlement agreement between the parties, although he now is a permanent resident of Oakland and lives within the Oakland Unified School District's boundaries.

Berkeley argues that is it is undisputed Student is now a permanent resident of Oakland, and therefore it no longer bears stay put responsibility. Further, OAH does not have jurisdiction to interpret and enforce the August 18, 2016 settlement agreement. However, even if OAH does have jurisdiction, the settlement agreement does not confer residency, obligate Berkeley indefinitely for continued responsibility for Student's education, and expressly stated that the settlement terms did not provide FAPE. Additionally, Berkeley contends that Oakland's responsibility was previously determined in OAH case number 2019090525, Order Denying Student's Request for Consolidation. Thus, the stay put motion should be denied.

Here, both parties agree that the last agreed-to IEP is dated January 23, 2018, placing Student at Maya Angelou Academy, a non-public school. Thus, there is no controversy over what constitutes Student's last stay put placement. Student, however,

aged out of that placement, and now seeks a comparable placement for sixth grade from Berkeley.

Additionally, both parties agree that Student permanently resides in Oakland Unified School District boundaries, not Berkeley. Student resided in Berkeley in elementary school and later relocated to transitional housing in Oakland. Under the McKinney-Vento Act, Berkeley continued its educational responsibility to Student. At some time prior to Student's complaint filing, he became a permanent resident in Oakland.

According to Student's complaint filed September 30, 2019, "Student resides in Oakland, where he was placed in what is now permanent housing through a transitional housing program…" Further, Student concedes in the complaint that "the family no longer qualifies for Mckinney-Vento." Student reiterates his residency in his Motion for Stay Put and Reply to Berkeley's Opposition to the Motion for Stay Put, conceding that Student is a resident of Oakland. Berkeley agrees that Student is now a permanent resident of Oakland. Thus, there is no dispute over Student's residency in Oakland. The issue here is who has responsibility for funding his stay put placement.

According to the parties, Student attended Maya Angelou Academy during the 2018-2019 school year pursuant to the last consented-to IEP dated January 23, 2018. In April 2019, Berkeley exited Student when it believed that his housing became permanent in Oakland. On September 11, 2019, Mother and counsel attended an IEP team meeting with Berkeley and Oakland in attendance. Oakland offered Student placement and funding at Phillips Academy, a non-public school. Student's complaint asserts that Mother wanted Student to attend Phillips Academy but did not consent to the offer. On September 13, 2019, Student's counsel informed Oakland that Mother agreed to the Phillips Academy placement, but argued that Berkeley is responsible for

the funding because Student has never enrolled in Oakland or consented to an Oakland IEP. On October 22, 2019, Phillips Academy withdrew its offer of placement. In the meantime, Student is not attending any school.

For the reasons discussed below, Student fails to meet his burden as the moving party. First, there is no dispute that the Student permanently resides with Mother within the jurisdictional boundaries of Oakland under Educational Code section 48200. Yet, nothing in Education Code section 48200 regarding residency requires enrollment in the particular district or the signing of an IEP. Here, Oakland was on notice of Student's transfer and attended the September 11, 2019 IEP team meeting, and offered Student placement and services.

Next, there are exceptions to the requirement that the residence of the parent determines what local educational agency is responsible for a child's FAPE. None of the exceptions apply to this situation and Student does not contend any apply. Instead, Student claims that a settlement agreement with Berkeley discharges Oakland's stay put responsibility, despite the fact that Student and Mother reside within Oakland boundaries. This argument is misguided, at least for the purpose of stay put. State educational agencies are ultimately responsible for ensuring that every child with a disability has access to FAPE. (Ed. Code § 48200.) Here, Student has provided no authority supporting its contention that a settlement agreement between two parties is able to delegate stay put responsibility to one school district and obviate it from the resident school district.

Last, assuming arguendo that authority exists allowing parties to determine stay put responsibility via a contract, in this case, OAH does not have jurisdiction over enforcing the settlement agreement, for stay put purposes. The settlement agreement is silent as to stay put responsibility, as it is not mentioned. Further, the language in the

settlement agreement specifically states that "the services and/or reimbursements that the District agrees to provide through this Agreement do not constitute, and shall not be construed as, an admission of what is a free appropriate public education ("FAPE") for Student." Thus, the limited *Pedraza* exception, conferring jurisdiction when there is a denial of FAPE, does not apply here. Although Student alleges denials of FAPE in his complaint, the terms in the settlement agreement specifically state that is it not a FAPE for Student. Further, the settlement agreement does not offer a FAPE to Student prospectively. Unlike in *Pedraza*, where the parties acknowledge in the settlement agreement that the services the district agreed to provide constituted a FAPE, Student and Berkeley expressly stated in its settlement agreement that the services and reimbursement do not constitute an admission of what a FAPE is for Student, a needed factor under *Pedraza* to confer jurisdiction. Additionally, Student did not waive FAPE prospectively, only through the date of the agreement, showing that Berkeley did not agree that the settlement terms could represent a FAPE for a future time period. Thus, OAH does not have jurisdiction to interpret the August 16, 2018 settlement agreement, for purposes of this stay put motion.

Student has the burden of persuasion as the moving party, and failed to establish that a settlement agreement requires Berkeley to fund Student's stay put placement.

ORDER

Student's Motion for Stay Put as to Berkeley is denied.

IT IS SO ORDERED.

DATED: November 18, 2019

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Cynthia Fritz
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Cynthia Fritz
Administrative Law Judge
Office of Administrative Hearings