BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

DEL MAR UNION SCHOOL DISTRICT.

OAH CASE NUMBER 2020080390

ORDER GRANTING MOTION FOR STAY PUT

AUGUST 26, 2020

On August 14, 2020, Student filed a request for due process, referred to as a complaint, and a motion for stay put. The complaint alleges, among other things, that Del Mar Union School District denied Student a FAPE when it unilaterally enrolled Student at a school other than Sage Canyon School, the school named in his individualized education program as his school of attendance. Student's motion for stay put seeks an order requiring Del Mar to continue to implement Student's special education program at the Sage Canyon campus. On August 19, 2020, Del Mar Union filed an opposition on the ground that it no longer operates a mild to moderate special day class at Sage Canyon. Del Mar Union contends it will implement Student's individualized education program, referred to as an IEP, at a different campus called Sycamore Ridge. On August 24, 2020, Student filed a reply.

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 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 G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35, superseded by statute on other grounds, 20 U.S.C. § 1414(d)(1)(B).)

"Educational placement" means the general educational program of the student. Under the Individuals with Disabilities Education Act, a change in educational placement relates to whether the student is moved from one type of program—i.e., regular class—to another type—i.e., home instruction. A change in the educational placement can also result when there is a significant change in the student's program even if the student remains in the same setting. This determination is made in light of Congress's intent to prevent the singling out of disabled children and to "mainstream" them with non-disabled children. (*N.D. v. Hawaii Dept. of Educ.* (9th Cir. 2010) 600 F.3d 1104, 1116.) The stay put provision requires only a comparable educational placement, not the provision of services by the same providers or at the same location. (*J.M. v. Chino Valley Unified School District*, 2018 WL 6075349 (C.D. California, 2018).)

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., supra,* 600 F.3d 1104, 1115-6.)

DISCUSSION

Student is eleven-year-olds and entering the sixth grade. Student qualifies for special education and related services under the primary eligibility category of autism and the secondary eligibility category of speech or language impairment.

On September 26, 2019, Student's IEP team convened for his annual review. The IEP team offered Student accommodations and modifications, including modified assignments and tests. The IEP team offered Student the following special education and related services:

- Group specialized academic instruction for 860 minutes per week in English language arts, math, science, social studies in a separate classroom;
- Group specialized academic instruction for 820 minutes per week in a regular classroom;
- Group language and speech services for 1,800 minutes per year in a separate classroom;

- Group adapted physical education services for 1,800 minutes per year at the service provider location;
- Group occupational therapy services for 900 minutes per year at the service provider location; and,
- Behavior intervention services for 300 minutes per year in the regular classroom.

The educational setting page notes Student's school of attendance as Sage Canyon and that his school of residence "[Carmel Del Mar] does not have a SDC that would fit [Student]'s needs." The IEP does not state that Student's placement is a mild/moderate special day class or that the location of Student's specialized academic instruction or related services are to be provided in a mild/moderate special day class.

Del Mar Union submitted a declaration by the Director of Special Education stating: The group specialized academic instruction in a separate setting "was designed" for the mild/moderate special day class program at Sage. The director further states the separate setting at Sage, where Student received specialized academic instruction was the mild/moderate special day class. According to the director, Sage Canyon does not have a mild/moderate special day class at Sage Canyon for the 2020-21 school year.

On August 11, 2020, Del Mar Union sent Parents a letter informing them that it would implement Student's IEP at Sycamore Ridge. Del Mar Union argues it can implement Student's September 26, 2019 IEP, in its entirety, at Sycamore Ridge in a mild/moderate special day class.

Student objected to the implementation of the IEP at Sycamore Ridge and moved for stay put at Sage Canyon. Student argues, essentially, that the IEP's placement calls for instruction in a "separate classroom" at Sage Canyon, not a mild/moderate special

day class at Sycamore Ridge and that Del Mar Union continues to offer special education programs at Sage Canyon.

According to the director, there are two special education programs at Sage Canyon, a Social and Emotional Learning Foundation program, and a Learning Lab for the 2020 to 2021 school year. The director declares Student's IEP cannot be implemented in either of these programs. The director declares Student's group specialized academic instruction for English language arts, math, science, social studies, and language and speech services in a separate room "was designed" to be implemented in the Sage Canyon mild/moderate classroom. However, the IEP does not specify that placement. Del Mar Union also points out that schools are currently in virtual instruction mode due to the Covid-19 pandemic, and that all of Student's instructions would be remote at this time in any event.

Addressing the latter argument, this is not a sufficient ground to deny "stay put." The situation with Covid-19 changes rapidly, and some school districts may go back to in-person instruction within the first weeks of the school year.

Concerning the location of instruction, the September 16, 2019 IEP provides, as part of its "Offer of FAPE," that Del Mar Union will provide Student specialized academic instruction in a "[s]eparate classroom in [sic] public integrated facility." While the IEP references in notes and the location page that Student will be receiving services in a special day classroom, the "Offer of FAPE" itself does not limit placement to only a special day class. The entire crux of Student's complaint is that Del Mar Union denied Student a free appropriate public education by unilaterally changing the nature of Student's instruction at Sage Canyon. This dispute is an issue of fact that must be resolved at a hearing.

Del Mar Union must implement the program and services contained in the 2019 IEP as closely as possible. If the "Offer of FAPE" specified that Del Mar Union was to provide Student's services in a mild/moderate special day class, then Del Mar Union's argument might carry more weight. Since the IEP offered specialized instruction and language and speech services in a "separate classroom," at his school of attendance, Student's motion for stay put is granted.

IT IS SO ORDERED.

DocuSigned by:

Brian H. Krikorian
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Administrative Law Judge
Office of Administrative Hearings