

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:
PARENTS ON BEHALF OF STUDENT,

v.

PLEASANTON UNIFIED SCHOOL DISTRICT
AND CONTRA COSTA COUNTY OF EDUCATION.
OAH CASE NUMBER 2021080223

ORDER DENYING MOTION FOR STAY PUT

AUGUST 12, 2021

On August 9, 2021, Student filed a due process complaint and a motion for stay put. On August 12, 2021, Pleasanton School District and Contra Costa County Office of Education filed a joint opposition on the ground that Student's requested one-to-one aide was not offered in the operative August 27, 2019 Individualized Educational Program, called an IEP, OAH's two stay-put-orders, or the March 2021 settlement agreement.

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.)

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.)

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 G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35, superseded by statute on other grounds, 20 U.S.C. § 1414(d)(1)(B).)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

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

When a special education student transfers to a new school district in the same academic year, the new district must adopt an interim program that approximates the student's old special education program, as closely as possible for 30 days until the old IEP is adopted or a new IEP is developed. (20 U.S.C. § 1414(d)(2)(C)(i)(1); 34 C.F.R. § 300.323(e); Ed. Code, § 56325, subd. (a)(1); see *Ms. S. ex rel. G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1134, 20 U.S.C. § 1414(d)(1)(B).)

DISCUSSION

Student has an intellectual disability and an orthopedic impairment due to Wolf-Hirschhorn syndrome. Student seeks a determination that an April 27, 2021 IEP offer providing a one-to-one aide at home for distance learning be stay put for in-person learning at Mauzy School.

Here, the operative IEP is the August 27, 2019 IEP. Student's requested one-to-one aide was not offered in the operative August 27, 2019 IEP. Rather, that IEP offered placement at Mauzy School, a county-run program for student's with severe disabilities, with a dedicated full-time licensed vocational nurse. That IEP did not assign Student a dedicated one-to-one aide. The August 24, 2020 stay put order from the Office of Administrative Hearings, known as OAH, in case 2020070970, affirmed Pleasanton

Unified School District's obligation to provide an in-person licensed vocational nurse during distance learning, among other necessary in-person related services. The October 30, 2021 stay put order in the same OAH case affirmed Mauzy School as Student's placement, overriding Contra Costa County's decision to terminate its contract to Student based on impossibility of performance during the COVID-19 pandemic due to its difficulty finding a licensed vocational nurse to provide the services in-person.

Finally, the March 26, 2021 settlement agreement specified that the Mauzy School was Student's educational placement through the 2022-2023 school year. Significantly, that 21-page agreement explicitly identified that the August 27, 2019 IEP was the operative IEP and delineated the stay-put provisions. Neither the August 27, 2019 IEP nor the settlement agreement provided Student with a one-to-one aide.

Student seeks to selectively borrow the provisions of the April 29, 2021 IEP which provided for temporary in-person one-to-one aide services for distance learning at home, and claim that that IEP is the operative IEP for purposes of establishing stay-put provisions. However, that is not Student's operative IEP, and is not stay put for in-person learning. The IEP documents and the detailed settlement agreement establish that the temporary offer of an aide at home for distance learning is not a permanent offer of placement when Student returns to in-person learning at Mauzy School. Student did not meet her burden to establish the one-to-one aide was a stay put provision when she returned to Mauzy School, as she never had a one-to-one aide at Mauzy School, and none of the documents provided by the parties support Student's claim. Student cannot selectively pick and choose other IEP offers made for distance learning and claim that a more recent IEP offers stay put for in-person learning, and attempt to override the March 2021 settlement agreement terms.

Rather, at the April 29, 2021 IEP team meeting, Pleasanton Unified School District and Contra Costa County Office of Education had offered a licensed vocational nurse and a one-to-one aide for educational purposes during distance learning at home. Distance learning was to be temporary due to school closures caused by the COVID-19 pandemic. When they notified Parents with a prior written notice they would be resuming in-person instruction in the Fall of 2021, they indicated they would no longer provide the one-to-one aide in the classroom, as they had done so only during distance learning.

The motion for stay put is denied.

IT IS SO ORDERED.

Deborah Myers Cregar

Deborah Myers-Cregar
Administrative Law Judge
Office of Administrative Hearings