

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:
PARENTS ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2021090121

ORDER GRANTING MOTION FOR STAY PUT

SEPTEMBER 13, 2021

On September 3, 2021, Student filed a motion for stay put. On September 13, 2021, Los Angeles filed an opposition. On September 13, 2021, Student filed a reply. For the reasons stated below, the motion is granted.

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).)

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 G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35, superseded by statute on other grounds, 20 U.S.C. § 1414(d)(1)(B).)

DISCUSSION

Student’s last agreed upon IEP was dated June 3, 2021. It offered Student placement in a special day class with various related services, accommodations and transportation. Mother consented to that IEP.

Student had significant medical needs, including as pertinent to this motion the need for nursing support, gastrostomy tube feed during school hours, and a tracheostomy tube that might require suctioning. Services and accommodations to meet his needs were included in his IEP.

Los Angeles Unified School District, called LAUSD, re-opened for in-person instruction, after COVID-19 school closures, on August 16, 2021. Student was not permitted on the bus despite his IEP’s provision of transportation services. At an August 16, 2021 meeting delineated as a “reentry meeting,” LAUSD filled out a form for students that require Aerosol Generating Procedures including tracheostomy suctioning.

The form reflected that Student would have to be placed in a separate classroom and not educated with peers. He would only be educated in a 1:1 setting. Additionally, transportation would be not be supplied by LAUSD, but Parent would be reimbursed for mileage or private transportation. LAUSD restated these provisions in a prior written notice letter dated August 18 2021.

LAUSD cites no persuasive authority that stay put does not apply here, or that the IEP as written should not constitute Student's stay put placement and services. Therefore, Student's stay put placement is that stated in his IEP, specifically a special day class with group instruction, and the enumerated related services, accommodations and transportation.

Neither the Legislature nor the Los Angeles County Department of Public Health have specifically addressed students who may require Aerosol Generating Procedures in a classroom setting. On August 27, 2021, however, LAUSD issued an Interoffice Correspondence from the Director of District Nursing Services entitled "Guidance for Students with Aerosol Generating Procedures." Contained within the attachments to that document was a subsection entitled "Aerosol Generating Procedures Recommendation Guidance" which stated: "due to safety concerns, Aerosol Generating Procedures that include oral/nasopharyngeal suctioning, tracheostomy suctioning and care, oral/nasal suctioning, [and] other forms of respiratory suctioning, will only be accommodated in a 1:1 classroom setting and are not permitted to be transported in a group." LAUSD argues that because of possible life-threatening emergencies for Student that may require immediate suctioning procedures, and the fact that Student's mask would need to be removed in the possible presence of staff and other students who could not immediately be distanced, that its guidance is factually reasonable and justified. LAUSD cites to numerous Department of Public Health directives that are

pertinent to the requirement of masks generally, and possible exceptions or accommodations to that requirement, although none are specifically instructive here.

On the other hand, Mother's declaration states that Student "was able to wear a face mask as necessary" and that "there is an extremely low likelihood [Student] would require emergency suctioning in a classroom where he or his peers could not be evacuated."

The parties' factual contentions concerning the risks, or not, of Student's attending school with peers, cannot be determined here. The only relevant inquiry for purposes of this Motion, is what was Student's stay put placement.

LAUSD's Nursing Department guidance does not fall within the type of "system wide administrative decisions" that the Ninth Circuit has found can overcome stay put. (*N.D. v. Hawaii Dep't of Educ.* (9th Cir. 2010) 600 F.3d 1104, 1116-1117 (hereafter *N.D.*) *N.D.* upheld a district court's denial of a motion by special education students to enjoin the state's shutdown of all schools on Fridays during a fiscal emergency. The students argued that ceasing services owed them under their IEPs was a change of placement and therefore violated IDEA's stay-put rule. However, the court disagreed, explaining that "Congress did not intend for the IDEA to apply to system wide administrative decisions" and that [a]n across the board reduction of school days such as the one here does not conflict with Congress's intent of protecting disabled children from being singled out." (*Id.* at p. 1116.)

Nor is the Nursing Guidance equivalent to the statewide public health restrictions that the court upheld over a stay put objection in the case of *E.M.C. v. Ventura Unified School Dist.* (C.D. Cal. October 14, 2020 No. 2:20-CV-09024-SVW-PD) 2020 WL 7094071 (*E.M.C.*). In *E.M.C.*, a student argued she was entitled to a stay-put order, ordering in-

person services notwithstanding the COVID-19-related statewide public health restrictions. The court found her argument was unlikely to succeed on its merits, thus defeating an application for a temporary restraining order. The unlikeliness-of-success analysis was based on the reasoning of *N.D.* In *E.M.C.*, the court reasoned that even if the student's IEP did provide for in-person services, her educational program had been modified by the statewide public health restrictions prohibiting in-person education pursuant to the statewide COVID-19 monitoring list. Under *N.D.*, the court reasoned, the IDEA does not "give the parents of disabled children veto power over a state's decisions regarding the management of its schools." (*E.M.C.*, *supra* at *6 [quoting *N.D.*]). Where an entire county's schools were limited to distance learning under the state-wide Framework, the student was "unlikely to be entitled to modify this system-wide decision." (*E.M.C.*, *supra* at *6.)

Here, the Nursing Guidance did not constitute either a system-wide administrative decision nor a county- or state-wide public health restriction. The Nursing Guidance overall merely contained requirements for documentation and meetings to determine accommodations. The particular prohibition on group learning, for students with tracheostomy tubes that might require suctioning, was a single subsection on the second page of attachment B to the guidance. This policy does not

rise to the level of the types of administrative decisions that courts have found overcome the entitlement to stay put, pending the due process hearing. The Motion is therefore granted.

IT IS SO ORDERED.

June Lehrman

June Lehrman

Administrative Law Judge

Office of Administrative Hearings