

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:
PARENTS ON BEHALF OF STUDENT,

v.

OAKLEY UNION ELEMENTARY SCHOOL DISTRICT.

OAH CASE NUMBER 2021100610

ORDER DENYING MOTION FOR STAY PUT

NOVEMBER 3, 2021

On October 28, 2021, Student filed a motion for stay put. On November 2, 2021, Oakley Union Elementary School District filed an opposition on the ground that stay put is the last agreed upon and implemented individualized education program, called IEP, not Student's distance learning plan. On November 2, 2021, 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 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.)

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 G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35, superseded by statute on other grounds, 20 U.S.C. § 1414(d)(1)(B).)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

DISCUSSION

Student contends that Student's distance learning plan was the last agreed-upon and implemented educational placement. Student alleges that she has been receiving her IEP services at home through her distance learning plan since the beginning of the COVID-19 global pandemic. Student asserts that Parents consented to the services offered in the November 17, 2020 annual IEP as amended on February 11, 2021; but Parents did not consent to placement at O'Hara Park Middle School. Student explains that Parents did not consent to the in person placement because Student's physician stated that Student was at high risk for complications related to COVID-19 based upon her disabilities. Student argues that the distance learning plan is the educational placement that was implemented during the 2020-2021 school year and is her current educational placement for the purposes of stay put.

Oakley Union argues that the last consented to and implemented placement was Student's 5th grade year at Laurel Elementary School in an IEP dated November 22, 2019. This IEP was implemented until Oakley Union closed its schools due to COVID-19 pandemic on March 30, 2020. Oakley Union contends it implemented Student's IEP through distance learning for the remainder of the 2019-2020 school year. On May 15, 2020, the IEP team convened to discuss Student's transition to 6th grade. Oakley Union offered placement at O'Hara Park Middle School rather than Student's home school, because it offered a life skills class for Student and changed Student's SAI minutes to reflect the middle school program; Parents did not consent.

Due to continued COVID-19 school closures, Student's IEP was implemented via the distance learning model for the 2020-2021 school year. Student's IEP team developed an IEP on November 17, 2020, which included a distance learning plan. Oakley Union explains that the distance learning plan was required to describe IEP implementation in emergency situations. On January 5, 2021, Parents consented to all parts of the November 17, 2020 IEP except placement.

Oakley Union reopened schools to in person instruction for the 2021-2022 school year. The IEP team convened a meeting on August 12, 2021 to discuss independent study and Parent's concerns. Oakley Union contends the IEP team determined independent study placement was not appropriate for Student and no changes were made to Student's IEP. Oakley Union argues that Student's agreed upon and implemented IEP for placement is the November 22, 2019 IEP and the operative IEP for goals and services is the November 17, 2020 IEP as amended on February 11, 2021. Oakley Union contends for the purposes of stay put, the placement is in person at O'Hara Park Middle School because Student has aged out of her previous placement at Laurel Elementary School.

On November 2, 2021, Student filed a response to Oakley Union's opposition. Student contends that her current placement for over one year was in the home setting. Student asserts that at home was the operative placement under which she was receiving instruction at the time the dispute arose and should remain her current stay put placement. Student argues that Oakley Union failed to offer any facts or argument as to why it is not possible or practicable for Student to receive services in the home setting, given that Parent's and Student's physician deemed that in person instruction is unsafe for Student.

On June 29, 2020, Governor Newsom signed Senate Bill 98, which supersedes prior guidance issued by CDE regarding distance learning. SB 98 updated the Education Code to include new distance learning requirements applicable to both general and special education students. One new requirement was for students' IEP's to contain a description of the means by which the IEP will be provided under emergency conditions, in which instruction or services, or both, cannot be provided to the pupil at the school or in person for more than 10 school days. (Ed. Code, § 56345, subd.(a)(9).)

Here, the document that Student refers to as the "distance learning plan" is titled "Contra Costa SELPA Emergency Circumstances Consideration IEP form (Ed. Code § 56345(a)(9)". This document describes the IEP services that will be implemented if there is an emergency condition that prevents the provision of instruction or services, or both, to the pupil either at the school or in person for more than 10 school days. The distance learning plan was not a separate IEP, but rather part of the November 17, 2020 IEP, and was a required component pursuant to SB98. Student did not consent to the educational placement that was offered in the November 17, 2020 IEP. Student consented to the services offered in the November 17, 2020 IEP as amended February 11, 2021. Oakley Union implemented the November 17, 2020 IEP services. Accordingly,

the services listed in the November 17, 2020 IEP as amended February 11, 2021 are stay put.

The last agreed upon and implemented placement was in person at Laurel Elementary School according to the November 22, 2019 IEP. However, Student is not eligible to attend Laurel Elementary School based upon her age. The comparable in person placement is O'Hara Park Middle School. Student cites *Thomas v. Cincinnati Bd. of Education* (6th Cir. 1990) 918 F.2d 618, to support her argument that the distance learning plan is the stay put placement because Student was receiving this model of instruction at the time the dispute arose; *Thomas* is distinguishable from the instant matter. In *Thomas*, the dispute arose before an IEP had been implemented. The court in *Thomas*, determined that when no IEP had been implemented, the current educational placement will be the operative placement under which the child is actually receiving instruction at the time the dispute arises. In this matter, the November 22, 2019 IEP placement in person was consented to and implemented. Accordingly, the stay put placement is in person at O'Hara Park Middle School.

ORDER

1. Student's request for stay put placement at home pursuant to the distance learning plan is denied.

IT IS SO ORDERED.

Marlo Nisperos

Marlo Nisperos

Administrative Law Judge

Office of Administrative Hearings