

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 2021100624

ORDER DENYING MOTION FOR STAY PUT

NOVEMBER 03, 2021

Student filed a request for due process with the Office of Administrative Hearings on October 21, 2021 naming Oakley Union Elementary School District, referred to as Oakley. The Office of Administrative Hearings is referred to as OAH. Student concurrently filed a motion for stay put. Oakley filed an opposition to the stay put motion on October 26, 2021. OAH issued an order denying Student's stay put motion on October 27, 2021 on the basis Student failed to establish the last agreed upon and implemented IEP.

Student filed a second stay put motion on October 27, 2021. Oakley filed an opposition brief on November 2, 2021, on the grounds that stay put is Student's last agreed upon and implemented IEP and not Student's distance learning plan. Student filed a reply brief on that same date.

APPLICABLE LAW

Stay put requires that students remain in their current educational placement pending the resolution of an educational dispute, unless the parties agree otherwise. ((20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006); Ed. Code, § 56505 subd. (d).) 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).) 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.) 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.)

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 G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35, superseded by statute on other grounds, 20 U.S.C. § 1414(d)(1)(B).)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

On June 29, 2020, Governor Newsom signed the 2020 Budget Act and accompanying budget implementing legislation, including Senate Bill (SB) 98 (Chapter 24, Statutes of 2020). SB 98 included important changes related to special education and distance learning. SB 98 amended Education Code section 56345 to require IEP teams to make an individualized determination about how an IEP will be implemented under emergency conditions, in which instruction or services, or both, cannot be provided to the student either at the school or in person for more than 10 school days. (Ed. Code, § 56345(a)(9)(A). This description must be included in the development of each initial IEP or addressed during the regularly scheduled revision of an IEP and must take public health orders into account. (Ed. Code, § 56345(a)(9)(B).)

Education Code section 43503 was enacted for the 2020-2021 school year. (Ed. Code, § 43503(b)(4).) Section 43503 confirmed delivery of special education and related services in a student's IEP could be executed in a distance learning environment with accommodations necessary to ensure that a student's IEP could be executed in that environment.. (Ed. Code, § 43503(b)(4).) "Distance learning" was described as instruction in which the student and instructor are in different locations, including by computer, video, audio and written instruction. Under section 43503, distance learning should include computer access, grade-level content and academic supports, as well as daily live interaction with certified employees and peers for instructional purposes through the internet or telephonic communication. (Ed. Code, § 43503(a)(1)-(3).)

DISCUSSION

Student's complaint alleges that Student accessed her educational program during the COVID-19 pandemic starting in March 2020 and continuing through the 2019-2020 and 2020-2021 school years through distance learning. Student's motion for stay put is supported by a declaration by Student's Parent, Student's December 3, 2020

IEP, and Student's Distance Learning Plan, which delineates how instruction and services will be provided to Student due to emergency conditions as defined in Education Code section 56345, subdivision (a)(9). Student also included a declaration by Student's physician declaring that Student is at high risk of COVID-19 complications.

Student's December 3, 2020 IEP offered Student special education services and placement at O'Hara Park Middle School with a start date of December 3, 2020 and an end date of December 2, 2021. The December 3, 2020 IEP described the program setting for Student's specialized academic instruction and services as, a "regular classroom/public day school." Parent consented to the December 3, 2020 IEP, with the exception of placement, on January 5, 2021. Student's motion also includes a February 11, 2021 amendment to the December 3, 2020 IEP correcting Student's speech services. Parents consented to the February 11, 2021 IEP amendment on March 10, 2021, with the exception of placement. Parents assert that they did not consent to Oakley's offer of placement because of their concerns about Student's health and safety during the COVID-19 pandemic.

Oakley's opposition to Student's stay put motion is supported by a declaration by its Director of Student Services, and copies of Student's December 11, 2019 IEP, to which Parents consented to in its entirety on December 11, 2019; a May 22, 2020 IEP amendment, to which Parents did not consent; the December 3, 2020 IEP consented to by Parents on January 5, 2021, with the exception of placement; and the February 11, 2021 IEP amendment consented to by Parents on March 10, 2021, with the exception of placement.

The evidence submitted by the parties establishes Student's last agreed upon and implemented IEP was placement in a regular classroom/public day school, as set forth in the December 11, 2019 IEP, and the goals and services set forth in the December 3, 2020

IEP, as amended in the February 11, 2021 IEP amendment. Oakley established that Student had aged out of Laurel Elementary School by the 2020-2021 school year and has been enrolled in a comparable placement at O'Hara Park Middle School since the 2020-2021 school year.

Student's stay put motion offers no authority for the proposition that distance learning constitutes placement for purposes of stay put. The parties do not dispute that during the 2020-2021 school year Student received her IEP instruction and services through a distance learning model in conformance with Education Code section 43503. Education Code section 43503 confirmed delivery of special education and related services in a student's IEP could be executed in a distance learning environment with accommodations necessary to ensure that a student's IEP could be executed in that environment for the 2020-2021 school year. (Ed. Code, § 43503(b)(4).) This statute was enacted as a temporary measure to authorize distance learning during the COVID-19 pandemic and expired by its terms on June 30, 2021. The temporary use of distance learning during the COVID-19 pandemic does not make this Student's placement for purposes of stay put. (*E.M.C. v. Ventura Unified School District* (C.D. Cal. October 14, 2020), No. 2:20-CV-09024-SVW-PD) 2020 WL 7094071 (court rejected parents' request attempt to use stay put to obtain in-person behavioral support to assist student with distance learning while due process complaint was pending.)

Further, Student offers no authority for her argument that the distance learning plan included with the December 3, 2020 IEP constitutes stay put placement. Education Code section 56345 requires IEP teams to make an individualized determination about how an IEP will be implemented under emergency conditions, in which instruction or services, or both, cannot be provided to the student either at the school or in person for more than 10 school days. (Ed. Code, § 56345(a)(9)(A).) Consistent with Education Code

section 56345, Student's distance learning plan is meant to explain how Student's IEP services will be provided by alternative means during emergency conditions or public health orders. The evidence is undisputed that Oakley re-opened for in-person instruction for the 2021-2022 school year on July 28, 2021. As a result, emergency conditions do not exist that require implementation of the distance learning plan, nor does it constitute stay put.

Student also argues that Oakley failed to offer Student the option of independent study pursuant to Assembly Bill 130, and that this failure denied Student a FAPE. This issue is not relevant to the issue of stay put but may be relevant to issues raised in the due process hearing.

Based upon the foregoing, Student did not meet her burden of proving that in-home instruction through a distance learning plan is stay put pending the outcome of the due process hearing. As a result, Student's motion is denied.

ORDER

Student's motion for stay put is denied.

IT IS SO ORDERED.

Jennifer Kelly

Jennifer Kelly

Administrative Law Judge

Office of Administrative Hearings