BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

SAN DIEGUITO UNION HIGH SCHOOL DISTRICT.

OAH CASE NUMBER 2022110515

ORDER DENYING MOTION FOR STAY PUT

DECEMBER 5, 2022

On November 17, 2022, Student filed a Request for Due Process Hearing, called a complaint, with the Office of Administrative Hearings, called OAH, naming San Dieguito Union High School District. On November 21, 2022, Student filed a motion for stay put. On November 22, 2022, Student filed an amended motion for stay put. Student's motion seeks an order determining the Winston School, a private school, is Student's current educational placement and requiring San Dieguito Union High School District, called San Dieguito, to fund Student's unilateral placement.

San Dieguito filed an opposition on November 29, 2022, on the grounds Parents privately placed Student at the Winston School from March 2022 to date, and therefore, was not obligated to offer Student a free appropriate public education, called FAPE, for the 2022-2023 school year. San Dieguito further asserts it made attempts to schedule

an individualized education program, called IEP, team meeting with Parents, but they declined. Student filed a reply brief on November 30, 2022.

APPLICABLE LAW

Until due process hearing procedures are complete, a special education student is entitled to remain in their current educational placement unless the school district and parents agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a); Ed. Code, § 56505, subd. (d).) This is referred to as stay put. The Individuals with Disabilities Education Act, called IDEA, does not define current educational placement, but courts have interpreted it to mean the placement set forth in the student's last agreed upon and implemented IEP prior to the dispute arising. (*K.D. ex rel. C.L. v. Hawaii Dept. of Educ.* (9th Cir. 2011) 665 F.3d 1110, 1117-1118 (*K.D.*); see also *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 902-903 (*L.M.*); and see *Thomas v. Cincinnati Board of Educ.* (6th Cir. 1990) F.2d 618, 625 (*Thomas*).) 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).) If a student's current educational placement becomes unavailable, a school district must provide them with a similar placement pending administrative and judicial approval. (*Knight by Knight v. District of Columbia* (D.D.C. 1989) 877 F.2d 1025, 1028.) Where a parent unilaterally changes the placement of a child, but a subsequent administrative or judicial decision confirms the parental placement is appropriate, the placement must be treated as an agreement between the State and the parents to a

change in placement, and the placement becomes the current educational placement for purposes of stay put. (See 34 C.F.R. § 300.518(d); see also *K.D. ex rel., supra*, 665 F.3d at p. 1118 (citing *Clovis Unified School Dist. v. California Office of Admin. Hearings* (9th Cir. 1990) 903 F.2d 635, 641).) However, such a favorable decision for a parent must expressly find that the private placement was appropriate. (*K.D. ex rel., supra*, 665 F.3d at 1118 citing *L.M., supra*, 556 F.3d at p. 903-904 [finding there was no implied "current educational placement" because the district court's ruling in favor of the parents was on procedural grounds and the court never adjudicated the appropriateness of the private placement].)

Parents who unilaterally move their child to a private placement, without the consent of the school district, do so at their own financial risk. (*Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 16 (quoting *School Comm. of Burlington v. Dept. of Educ. Of Mass.* (1985) 471 U.S. 359, 373-374 (*Burlington*); see *W.G. v. Bd. of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1487; see also *Ventura de Paulino v. New York City Department of Education* (2nd Cir. 2020) 959 F.3d 519, 534, *cert. denied*, (2021) 141 S.Ct. 1075 [the IDEA does not permit parents to determine their child's placement, "would be better provided somewhere else, enroll the child in a new school, and then invoke the stay-put provision to force the school district to pay for the new school's services on a pendency basis"].) Parents are entitled to reimbursement only if a court concludes both that the public placement violated the IDEA and the private school placement was proper under the IDEA. (*Florence County*, *supra*, 510 U.S. at p. 15.)

PROCEDURAL HISTORY

Student's complaint seeks a determination that Student's November 16, 2020 IEP did not offer a FAPE. As a remedy, the complaint seeks prospective placement at the

Winston School and reimbursement for their unilateral private placement. Parents placed Student at the Winton School beginning in March 2022 following the closure of Excelsior, a certified non-public school, where Student's November 16, 2020 IEP was implemented.

On August 4, 2022, OAH issued a written decision in OAH case number 2022020209, involving the same parties in this case. OAH's decision determined San Dieguito denied Student a FAPE in developing Student's annual IEP starting on November 15, 2021, by predetermining Student's placement, thereby denying Parents meaningful participation in the IEP process. As compensatory education, OAH awarded Parents reimbursement for costs and tuition for Student's attendance at the Winston School during the 2021-2022 school year, and the 2022 extended school year. The decision determined the Winston School was an appropriate placement for purposes of a reimbursement award but did not analyze whether the Winston School offered Student a FAPE. Further, the decision did not name the Winston School as Student's stay put placement.

Student appealed OAH's decision to the United States District Court for the Southern District of California, in Case Number 22CV1703H. According to Student, the appeal is pending.

STUDENT'S ARGUMENT'S FOR STAY PUT LACK MERIT

Student's stay put motion seeks to maintain placement at the Winston School based largely upon the remedies ordered in OAH's August 4, 2022 decision. Student conflates OAH's decision that the Winston School was an appropriate placement for purposes of reimbursement with a decision in favor of Student's choice of private

placement. Student argues the private placement now constitutes her current educational placement for purposes of stay put.

Student remains a privately placed at the Winston School for the 2022-2023 school year. Student argues the placement options previously offered by San Dieguito during the 2021-2022 school, including the San Diego Center for Children and Banyan Tree Foundations, were inappropriate for Student and the Winston School is the only appropriate placement for Student. Further, Student asserts Banyan Tree Foundations closed sometime during 2022 and was not an available placement for the 2022-2023 school year. Student offers no evidence it requested San Dieguito to implement an IEP for the 2022-2023 school year, but also asserts Student has no placement available.. San Dieguito argues it was not obligated to offer Student a FAPE for the 2022-2023 school year, because Student was parentally placed at the Winston School. However, San Dieguito maintains it remains willing to implement Student's last consented to IEP.

Student's motion for stay put lacks merit for several reasons. First, although OAH found the Winston School was an appropriate educational placement for purposes of awarding tuition reimbursement as an equitable remedy, it did not find it was Student's stay put placement. Tuition reimbursement may be awarded for parental private placements considered appropriate, also referred to as proper, under the IDEA. (*Florence County, supra,* 510 U.S. at pp. 12-16; *Burlington, supra,* 471 U.S. at p. 369.) Student cites no legal authority that turns equitable remedies in an OAH decision into a stay put placement.

Second, finding a private placement appropriate for purposes of awarding equitable remedies does not equate with a decision in favor of Student's choice of private placement. (*Florence*, *supra*, 471 U.S. at pp. 12-16 [Supreme Court distinguished between a finding that private placement offered a FAPE and an appropriate education

for purposes of reimbursement].) Here, Parents chose to continue Student's placement at the Winston school after the 2021-2022 school year concluded. Parents did so at their own financial risk and consistent with *Florence County*, are only entitled to reimbursement for the cost of that placement if a court concludes San Dieguito's proposed placement did not offer a FAPE. Thus, reimbursement for the Winston School for the 2022-2023 school year requires a determination from OAH or another court that San Dieguito failed to offer Student a FAPE.

Third, Student's complaint in OAH case number 2022020209 did not allege the issue of whether the Winston School provided Student with a FAPE. Therefore, whether the Winston School provided a FAPE was not heard or decided. Accordingly, OAH did not render a decision that Student's choice of private placement at the Winston School should become Student's stay put.

Student has not provided a factual or legal basis supporting her contention that the Winston School is the stay put placement. Student's motion for stay put is denied.

IT IS SO ORDERED.

Jennifer Kelly

Jennifer Kelly
Administrative Law Judge
Office of Administrative Hearings