BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: MOTHER ON BEHALF OF STUDENT, v. EL MONTE UNION HIGH SCHOOL DISTRICT, LOS ANGELES UNIFIED SCHOOL DISTRICT, AND BIRMINGHAM COMMUNITY CHARTER SCHOOL.	OAH Case No. 2017070535 ORDER DENYING IN PART STUDENT'S MOTION FOR STAY PUT AND ORDER FOR SUPPLEMENTAL BRIEFING AND EVIDENCE ON MOTION FOR STAY PUT

Mother on behalf of Student[1] filed a request for due process hearing (complaint) on July 14, 2017, naming El Monte Union High School District, Los Angeles Unified School District, and Birmingham Community Charter School.[2] Student also filed a motion for stay put on July 14, 2017. His motion is supported by a declaration from Mother and Student's counsel, attesting to the facts alleged in his motion. Student also presented copies of two settlement agreements entered into between his parents and the Rosemead School District,[3] a copy of a Superior Court decree awarding Mother sole educational rights for Student, a copy of an assessment plan signed by Mother for assessments to be completed by El Monte Union, and a copy of a waiver signed by Mother permitting El Monte Union to share Student's

[1] Although Student has included his father and his mother as petitioners in the caption of his motion for stay put, his complaint specifically states that the complaint was filed only by Mother. Additionally, in his motion for stay put, Student's opening paragraph states that the motion is brought by Mother on behalf of Student, and that counsel for Mother and Student does not represent Father. Therefore, only Mother on behalf of Student is indicated as the petitioning party in this Order.

[2] It is unclear whether Student intends to continue to name Birmingham Community Charter School as a separate party. Student does not name Birmingham Charter in the caption of his motion for stay put. Since Birmingham Charter was named as a party in Student's complaint, it is included in the caption of this Order.

[3] Rosemead is not a unified school district and does not have high schools. It only educates children through eighth grade. Student will be in ninth grade for the 2017-2018 school year and has aged out of Rosemead's schools. Student did not name Rosemead as a party to the instant case.

records with Los Angeles Unified. Student did not attach any individualized education plans to his motion.

On July 17, 2017, El Monte Union filed an opposition to Student's motion. Los Angeles Unified filed an opposition to Student's motion on July 20, 2017.[4] On that same date, Birmingham Charter filed an opposition to Student's motion, in which it also joined in Los Angeles Unified's opposition.

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 placement called for in the student's individualized education program, which has been implemented 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 provide the basis for a student's "stay put" placement. (*Verhoeven v. Brunswick School Committee* (1st Cir. 1999) 207 F.3d 1, 7-8 (*Verhoeven*); *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 because of changing circumstances, 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).) Progression to the next grade maintains the status quo for purposes of stay put. (*Van Scoy ex rel. Van Scoy v. San Luis Coastal Unified School Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086 ["stay put" placement was advancement to next grade]; see also *Beth B. v. Van Clay* (N.D. Ill. 2000) 126 F.Supp.2d 532, 534; Fed.Reg., Vol. 64, No. 48, p. 12616, Comment on § 300.514 [discussing grade advancement for a child with a disability.].)

[4] Los Angeles Unified also included a motion for it and Birmingham Charter to be dismissed as a party, or, in the alternative, a motion to bifurcate the issue of Student's residency. Los Angeles Unified's motions will be addressed in future orders. Los Angeles Unified is advised that, in the future, it should file its opposition to another party's motion as a pleading separate from its own motions rather than conflating the two.

The interpretation of settlement agreements is based on familiar and well-established principles of contract law. (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 686, citing *Adams v. Johns-Manville Corp.* (9th Cir. 1989) 876 F.2d 702, 704; (*Vaillette*); *Miller v. Fairchild Indus.* (9th Cir. 1986) 797 F.2d 727, 733; see also *Jeff D. v. Andrus* (9th Cir. 1990) 899 F.2d 753, 759.) If a written agreement is not equivocal or ambiguous, "the writing or writings will constitute the contract of the parties, and one party is not permitted to escape from its obligations by showing that he did not intend to do what his words bound him to do." (*Brant v. California Dairies, Inc*. (1935) 4 Cal.2d 128, 134; see also 1 Witkin, Summary of Cal. Law, Contracts, § 89 ["Ordinarily, one who accepts or signs an instrument, which on its fact is a contract, is deemed to assent to all its terms . . . ."]; cf. *Skrbina v. Fleming Co., Inc*. (1996) 45 Cal.App.4th 1353, 1368 [releases must be "clear, explicit and comprehensible in each of their essential details"].) "Ordinarily, the words of the document are to be given their plain meaning and understood in their common sense; the parties' expressed objective intent, not their unexpressed subjective intent, governs." (*Vaillette, supra*, 18 Cal.App. 4th at p. 686.) By entering into a settlement agreement, each party agrees to "extinguish those legal rights it sought to enforce through litigation in exchange for rights secured by the contract." (*Village of Kaktovik v. Watt* (D.C.Cir. 1982) 689 F.2d 222, 230.) In addition, parties may waive claims that, at the time of the settlement agreement, are unknown to them. (Civ. Code, § 1542.)

DISCUSSION

As an initial observation, Student's motion for stay put conflates the issue of what constitutes his stay put placement with the issue of which of the named respondents is responsible for providing his education, based on his residency. While the issue of stay put is properly determined by OAH based on motion practice, the issue of a child's residency and what local educational agency is responsible for educating him is not. Therefore, this Order only addresses what placement constitutes Student's stay put, not which local educational agency is responsible for providing him with that placement.

Student alleges in his motion that his stay put placement is at Westmark Academy, a private school located within the boundaries of Los Angeles Unified School District. The evidence Student provided in his motion for stay put does not support that contention.

Student originally attended school in the Rosemead School District. He filed a complaint naming Rosemead in OAH case number 2015100163. On December 9, 2015, Rosemead and Student's parents executed a settlement agreement in that case, which was approved by Rosemead's school board on February 4, 2016. Paragraphs 3 and 4 of the agreement address Student's placement for the 2015-2016 and 2016-2017 school years, and are the portions of the settlement pertinent to Student's motion for stay put.

In paragraph 3(C), Rosemead agreed to fund Student's placement at Westmark for the 2016-2017 school year, including funding for speech and language services and reimbursement up to an amount certain for costs of transporting Student to the school.

In paragraph 3(E), the parties agreed that Student's placement at Westmark was as a parentally placed private school student. The parties acknowledged that Student would be matriculating into El Monte Union as a high school student following the end of the 2016-2017 school year. Rosemead agreed to schedule a transition meeting for Student on or before June 1, 2017, and to invite El Monte Union to the meeting.

In paragraph 4, the parties agreed that Student's placement and services for the remainder of the 2015-2016 school year would be in accordance with Student's September 15, 2015 IEP. The parties therefore agreed to implement that IEP for the remainder of the 2015-2016 school year, after which Rosemead agreed to fund Student's private placement at Westmark. However, the settlement agreement only references the speech and language services Rosemead would provide pursuant to the IEP. It does not delineate any other placement, programming, services, or accommodations. None of the parties have attached a copy of the September 15, 2015 IEP to their respective pleadings.

Student's motion for stay put is long on irrelevant facts related to his prior dispute with Rosemead, which is not a party to the instant case, and on law concerning Student's possible residency in El Monte Union, and short on facts and law specifically related to what constitutes his stay put placement.

It is clear that the settlement between Rosemead and Student's parents for placement at Westmark for the 2016-2017 school year was not intended to be Student's stay put placement. The parties specified that Student was a parentally placed private school student, and that the placement would end with the 2016-2017 school year.[5] The parties also agreed to hold an IEP team meeting by June 2017, to transition Student to high school. There is no support for Student's contention that Westmark is his stay put placement. The plain language of the settlement is that placement at Westmark was temporary, and that the placement and services would terminate before Student began high school for the 2017-2018 school year.

Student appears to contend that because he has not been offered a specific placement by either El Monte Union or Los Angeles Unified, his placement at Westmark is his stay put because it is his last implemented program. Student offers no support for that assertion and case law is to the contrary. Under *Verhoeven*, since Student's program delineated in the settlement agreement was intended to be a temporary placement, then that placement does not constitute stay put. (*Verhoeven, supra*, 207 F.3d at pp. 7-8.) The First Circuit in *Verhoeven*, in determining that the student's current educational placement was not the recently concluded temporary placement at a private school provided for by a settlement agreement, held, "Ordering [district] to fund a private placement … during the challenge to the IEP is not the type of maintenance of the status quo [the IDEA] envisions. To the contrary it would be an extension of this temporary placement to a degree well beyond the parties' intent at the time of the … settlement agreement." (*Id.* at p. 9.) In *K.D. v.*

[5] Rosemead later agreed in a settlement of OAH case number 2017031270 to fund Student's placement at Westmark for extended school year 2017.

Department of Education (9th Cir. 2011) 665 F.3d 1110, 1120-1121 (*K.D.*) the Ninth Circuit came to much the same conclusion as had the court in *Verhoeven.* The court in *K.D.* held that a district's offer to reimburse tuition for a private placement for a limited time period did not render the private placement to be the student's stay put placement.

Here, the parties specifically agreed that an IEP team meeting would be convened with the purpose of determining Student's placement for the 2017-2018 school year, when he would transition to high school at a district not a party to the settlement agreement. That fact emphasizes the temporary nature of Student's placement at Westmark.

The Ninth Circuit's more recent decision in *Sam K. v. State of Hawaii Dept. Of Educ.* (9th Cir. 2015) 788 F.3d 1033 (*Sam K.*), does not change the analysis of this case. In *Sam K.*, the student had been placed at a private school through a settlement agreement between his parents and his school district. When the settlement period terminated, the district made an offer of placement that would return the student to a public school. The student's parents did not think the placement constituted a free appropriate public education, and retained student at the private school, paying for tuition themselves. They filed for due process and prevailed, asking as a remedy reimbursement for the cost of the placement after the settlement ended. The hearing officer denied reimbursement based on a provision of Hawaii law not applicable in California. The district court, affirmed by the Ninth Circuit, found that the parents were entitled to reimbursement. *Sam K.* is not applicable, however, because it did not address the issue of what constituted the student's stay put placement after the settlement period ended. Rather, it found that the parents were entitled to *reimbursement* of the costs of the placement because the placement the district offered after the settlement ended was not appropriate.

The fact that the settlement agreement between Student and Rosemead does not specify a stay put placement does not mean there is any ambiguity here. Since Westmark is not Student's stay put placement pursuant to the clear language of the settlement, Student's stay put is his last agreed-upon and implemented IEP. Student's contention that only placement at Westmark would offer him a FAPE is not at issue in the instant motion for stay put. His argument that he is without a placement is also not meritorious because his program is that which is identified in his last implemented IEP.

Student's motion for stay put at Westmark is therefore denied. However, because neither Student nor any of the respondents has provided a copy of the September 15, 2015 IEP, it is not possible to determine the contours of Student's stay put placement. Student is ordered to provide a copy of the September 15, 2015 IEP to OAH no later than 5:00 p.m. on Tuesday, July 25, 2017. If Student contends that another IEP constitutes his stay put placement, he shall provide a copy of that IEP, along with supplemental briefing as to why that IEP, and not the September 15, 2015 IEP, constitutes his stay put placement.

ORDER

1. Student's motion for stay put at Westmark Academy is denied.

2. Student is ordered to provide to OAH a copy of his September 15, 2015 IEP. If Student contends that another IEP is his last agreed upon and implemented IEP, he shall provide a copy of the IEP along with supplemental briefing, supported by declarations under penalty of perjury, as to why it and not the September 15, 2015 IEP is his last agreed upon and implemented IEP. Student shall submit the supplemental evidence and briefing by no later than 5:00 p.m. on July 25, 2017.

3. Any response to Student's supplement evidence and briefing must be filed no later than 5:00 p.m. on July 28, 2017.

DATE: July 21, 2017

DocuSigned by:
Darrell Lepkowsky
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DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings