BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

GILROY UNIFIED SCHOOL DISTRICT,

CALIFORNIA DEPARTMENT OF EDUCATION, AND

CALIFORNIA SCHOOL FOR THE DEAF.

OAH CASE NUMBER 2020020346

ORDER DENYING MOTION FOR STAY PUT

APRIL 2, 2020

On March 19, 2020, Student filed a motion for stay put. On March 23, 2020, Student filed an amended motion for stay put. On March 26, 2020, Gilroy Unified School District filed what it called a joinder in Student's motion and supported Student's motion to attend California School for the Deaf Fremont during the pendency of the due process case. Also on March 26, 2020, California Department of Education and California School for the Deaf filed an opposition on the ground that California School for the Deaf was not Student's placement and was only temporarily attending as part of

a placement suitability assessment. On March 30, 2020, Student filed a reply to California Department of Education and California School for the Deaf'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 stated in the last agreed upon and implemented individualized education program, called an IEP, prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625, as informed by later federal definition of term "placement" in 34 C.F.R. § 300.116 (2006); see *N.W. ex rel. J.W. v. Boone County Bd. of Educ*. (6th Cir. 2014) 763 F.3d 611, 617.)

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).)

However, 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 (*Verhoeven*); *Leonard by Leonard v. McKenzie* (D.C. Cir. 1989) 869 F.2d 1558, 1563-64.)

School districts are required to provide each special education student with a program in the least restrictive environment. To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that children with disabilities are educated with non-disabled peers; and that special classes

or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a); Ed. Code, § 56031.)

The continuum of program options includes, but is "not necessarily" limited to, in increasing order of restrictiveness:

- regular education;
- resource specialist programs;
- designated instruction and services;
- special classes;
- nonpublic, nonsectarian schools;
- state special schools;
- specially designed instruction in settings other than classrooms;
- itinerant instruction in settings other than classrooms; and
- instruction using telecommunication, and instruction in the home, in hospitals, or other institutions.

(Ed. Code, § 56361.)

One such state special school is California School for the Deaf. (Ed. Code, § 59000 et seq.) The legislature and California Department of Education have enacted specific statutes and implementing regulations, respectively, unique to the more restrictive environment of state special schools like California School for the Deaf. A student's attendance at California School for the Deaf during an assessment period is specifically defined as not being a "placement." (Ed. Code, § 56367, subd. (b).)

California Code of Regulations, title 5, sections 17660 et seq. set forth application procedures specific to California School for the Deaf. Once California School for the

Deaf receives a student application, it evaluates the student to determine whether it is the appropriate placement for the student. This period, not to exceed 60 days, is called an "assessment of suitability for placement." (Cal. Code Regs., tit. 5, § 17660, subd. (a); Ed. Code, § 56344, subd. (a).) The student's presence at California School for the Deaf for purposes of the assessment is called a "temporary assignment." (Cal. Code Regs., tit. 5, § 17660, subd. (e).) A student who attends California School for the Deaf during this time and for this purpose is not attending the school as his or her "placement."

While much case law exists on when temporary placements may be considered placements for purposes of stay put, California School for the Deaf has its own regulation, enacted for this purpose. For California School for the Deaf, a temporary assignment shall not constitute the last agreed upon placement for stay put. (Cal. Code Regs., tit. 5, § 17660, subd. (e).)

DISCUSSION

In the October 8, 2018 IEP, Student's district of residence, Gilroy Unified School District, offered Student placement at Santa Clara County Office of Education's Hester School. Student and his two parents participated in this meeting. An unsigned copy of the IEP was submitted by Student. The IEP confirms that Student was attending Hester School at that time; however, no agreed upon IEP offering Hester School was submitted.

The parties held additional IEP team meetings on December 14, 2018, February 2, 2019, and on May 14, 2019. Throughout those meetings, Gilroy's placement offer remained the Hester School.

The notes from the May 2019 meeting specify that Parent requested Student be placed at the California School for the Deaf. Although the placement offer did not

change, Student's IEP team agreed to refer Student to California School for the Deaf. The meeting notes state, "GUSD and SCCOE both are in agreement that [Student's] current setting in the post secondary deaf and hard of hearing program is FAPE. GUSD is offering continued placement in the SCCOE program however, in the spirit of cooperation, the district is offering to submit a referral to CSDF for consideration for residential placement." This did not constitute an offer of placement at California School for the Deaf.

A referral was made and Parent completed the application. The application specifies on the first page, "The enrollment process includes a 60-day assessment by the Pupil Personnel Services staff. A meeting will be held with you, a representative from your school district, and representatives from our school to determine the most appropriate placement for your child. If your child is to be enrolled, you will receive official notification and information about enrollment."

An IEP team meeting was held on October 24, 2019, following the assessment period. Representatives from the California School for the Deaf informed Student that he was not accepted for enrollment into the program. The meeting notes specific an additional IEP team meeting would be held with Gilroy to discuss placement.

California School for the Deaf was not an agreed upon and implemented placement for stay put purpose. The May IEP, in conjunction with California School for the Deaf's enrollment application makes clear, as in *Verhoeven*, it was a temporary placement for the limited purpose of assessing its appropriateness.

The agreement to allow Student to undergo an assessment at California School for the Deaf was not a placement in an agreed upon, implemented IEP. Student's attendance at California School for the Deaf was only intended to be temporary.

Student did not establish that a right to stay put at California School for the Deaf results from any IEP.

California School for the Deaf argued that even if Student established a right to stay put, it is governed by regulations, specifically California Code of Regulations, title 5, sections 17660 et seq. that deem the first 60 days diagnostic and not a "placement." Student argued that these regulations are unconstitutional as they potentially limit rights conferred by the IDEA. Student did not establish a right to stay put. Accordingly, no decision regarding the regulatory scheme's constitutionality is reached here.

Student did not file a motion seeking to enforce his stay put rights generally. Rather, he filed a motion specifically seeking stay put at California School for the Deaf. Neither party submitted a copy of Student's last agreed upon and implemented IEP. No determination is made here as to what constitutes Student's stay put placement.

ORDER

The motion for stay put at California School for the Deaf is denied.

IT IS SO ORDERED.

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Claire.Yazigi
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Claire Yazigi
Administrative Law Judge
Office of Administrative Hearings