BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

LODI UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2023090240

ORDER GRANTING MOTION FOR STAY PUT

SEPTEMBER 29, 2023

On September 11, 2023, Student filed a request for due process hearing naming Lodi Unified School District as respondent. That same day, Student filed a motion for stay put. On September 18, 2023, District filed an opposition to the motion.

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 G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35, superseded by statute on other grounds, 20 U.S.C. § 1414(d)(1)(B).)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

In this case, Student is moving from preschool to kindergarten in the 2023-2024 school year. During her preschool years, Student attended an inclusion classroom that was jointly taught by a special education teacher and a general education teacher. The classroom was a blended class of special education students and general education students. Both sides agree that Student's last, agreed to and implemented IEP is the IEP dated June 1, 2022 as amended on August 22, 2022. That IEP provided:

- Specialized academic instruction of 180 minutes per day, five days per week for a total of 900 minutes per week in a general education program with 8 special education students and 12 general education students. Specialized academic instruction to be provided by an "itinerant special education teacher."
- Speech therapy of 300 minutes per month;
- Adaptive physical education of 15 minutes per week;
- Feeding therapy 45 minutes per month; and

- Occupational therapy 60 minutes per month.

Student asserts that she is entitled to stay put for her kindergarten placement that aligns with the last agreed to and implemented IEP. Student contends that Lodi's proposed stay put kindergarten placement, in a special day class for Students with mild to moderate disabilities, does not meet the requirement that her kindergarten placement replicate the last agreed to and implemented IEP placement as closely as possible. Student argues that such a placement provides inclusion with general education peers for only 10% of Student's school day, as opposed to being with typically developing peers during the entire school day as provided for in her IEP.

Lodi argues that placement in a "mild-moderate" special day class that provides inclusion with general education peers during recess and lunch is a placement that "resembles Student's last, agreed-upon IEP *as closely as possible*." (emphasis in the original.) To further explain its position, Lodi relies on a declaration offered by Student's preschool teacher detailing the teacher's interactions with Student, and observations regarding Student's abilities during preschool.

Lodi's arguments are unpersuasive and, in one instance, unintelligible. Lodi offers no legal authority supporting the consideration of unsupported hearsay evidence in determining a Stay Put motion. California law places limitations on the use of hearsay evidence in special education hearings. "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. (Cal. Code Regs., tit. 5, § 3082 subd. (b).) Given the limitations imposed in the hearing context, without legal authority supporting its use, hearsay cannot be used as the basis for a finding in a motion determination.

Nor is Lodi's argument that stay put placement in a special day class "maintains the status quo" convincing. Lodi admits in its opposition papers that the special day class placement would result in Student interacting with general education students only during lunch and recess. Lodi further asserts Student does not state, "what stay put should be, given that the District does not have a co-taught preschool program." This statement is confusing on the one hand, as Lodi provided such a program to this student. It is also irrelevant to this consideration of what Student's kindergarten stay put placement should be.

Lodi asserts "at least five circuit courts have ruled that stay put protections do not apply when a student's placement changes due to circumstances outside of the district's control." However, there is no information offered here that circumstances are outside of Lodi's control. Lodi has not established that it is incapable of placing Student in a general education class with specialized academic instruction supports for a full day for the duration of the stay put placement.

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).) The question in this case, is what constitutes a placement, with its separate attributes, that replicates the last agreed to IEP as closely as possible. The case of *Van Scoy ex rel. Van Scoy v. San Luis Coastal Unified School Dist.* (C.D. Cal. 2005) 353 F. Supp. 2d 1083, is illustrative.

In *Van Scoy*, the part-time kindergarten student moved to full time first grade. San Luis Coastal Unified School District argued that it should not have to provide 120 minutes of additional behavior training services during the pendency of the due process dispute because those services were offered based on the fact Student attended a part-

time program. The Court noted that resolution of whether Student should continue to receive the additional minutes was one of the subjects of the due process dispute, and not before it. However, acknowledging that maintaining the status quo was the purpose of the Stay Put statute, the Court determined inclusion of the 120 minutes of behavior training, pending resolution of the dispute, was part of his Stay Put placement, despite the fact that Student had advanced from kindergarten to first grade. (*Van Scoy, supra,* at p. 1086.)

In this case, Lodi is asserting a more significantly changed placement replicates Student's last agreed-to and implemented IEP. Rather than providing a kindergarten stay put placement that puts Student in a class that provides general education interaction for most of Student's school day, Lodi argues that a special day class, removing Student from interaction with her general education peers for most of the school day, replicates her prior IEP "as closely as possible." Lodi offers no authority supporting that this maintains the status quo, as required. On its face, it appears that it does not.

Whether Student should ultimately be placed in a special day class or in a general education classroom with supports is not the issue being determined by this motion. Under these facts, however, Student is entitled to stay put in a classroom that provides interaction with general education peers for most of her school day.

ORDER

1. Student's Motion for Stay Put is Granted.
2. Stay Put is:

a. Specialized academic instruction for Student's full school day, five days per week in a classroom where Student is included with general education students;
b. Speech therapy of 300 minutes per month;
c. Adaptive physical education of 15 minutes per week;
d. Feeding therapy 45 minutes per month; and
e. Occupational therapy 60 minutes per month.

IT IS SO ORDERED.

Penelope Pahl

Penelope S. Pahl
Administrative Law Judge
Office of Administrative Hearings