BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
SAN MARCOS UNIFIED SCHOOL DISTRICT,	OAH Case No. 2017120623
v.	ORDER GRANTING MOTION FOR STAY PUT
PARENT ON BEHALF OF STUDENT.	

On March 7, 2018 Student filed a motion for stay put. Student requested San Marcos be ordered to place Student at a non-public school pursuant to her last agreed upon and implemented IEP dated May 10, 2016 pending the outcome of litigation. Student's May 10, 2016 IEP placement offer was at a non-public day school, specifically, New Bridge School. Her last agreed upon and implemented IEP included the following: 340 minutes per day of group specialized academic instruction; 30 minutes twice per week of group speech and language services; 30 minutes weekly of group occupational therapy services and all services were to be provided by a non-public school under contract with the special education local plan area or San Marcos, and, transportation to and from the non-public school.

On March 9, 2018, San Marcos filed an opposition on the grounds the Student's May 10, 2016 IEP was not Student's last agreed upon and implemented IEP. San Marcos further asserted that insufficient evidence established what constitutes stay put as changing circumstances made her previous placement unavailable, and it would be an error to order stay put in a school Student had never attended.

Student was placed through her IEP at a non-public school from second grade through eighth grade. The non-public school she attended, New Bridge School, only served students through the eighth grade. Upon completion of eighth grade, and in anticipation of transferring to high school, San Marcos convened an IEP team meeting on April 27, 2017. At the conclusion of the April 27, 2017 IEP team meeting, parents were presented with an offer that included placement at San Marcos High School, a public day school, in general education classes. Also included was the following: 855 minutes per week of specialized academic instruction in a co-taught academic classroom in the subjects of Algebra, English language arts, and Biology; 285 minutes weekly of group literacy academy, 930 minutes yearly of speech and language services, 30 minutes weekly of group occupational therapy, 30 minutes weekly of individual counseling, and 1567 minutes weekly of intensive individual services. Implementation of all special education services was offered at San Marcos High School. Parents had not consented to Student's IEP, but enrolled her at San Marcos High School on the first day of the 2017-2018 school year. Student attended San Marcos High School for two days. Student was unilaterally withdrawn by Mother on August 24, 2017 and

placed at California Coast Academy, a private school not certified as a non-public school. To date, parents have not consented in writing to the April 27, 2017 IEP.

On March 12, 2018 Student replied to San Marcos' opposition. Student's reply reiterated the same argument stated in its first motion, but for the first time asserted the Winston School of Del Mar is the non-public school that most closely resembles Student's previous placement, and argued Student should be placed there for the purposes of stay put.

On March 14, 2018, San Marcos filed a supplemental response to Student's reply. San Marcos, again, argued Student's most recent implemented IEP was dated April 27, 2017. San Marcos asserts that identifying Student's stay put placement at a non-public school after Student has been enrolled in a private school for the duration of the 2017-2018 school year would frustrate the purposes of stay put. Finally, San Marcos asserts that placing Student at non-public school would contravene a Superior Court of California Family Court order dated February 26, 2018 that orders Student attend California Coastal Academy for the 2017-2018 school year.

Currently pending before OAH in this matter is the issue of whether Student's April 27, 2017 individualized education program, as modified on November 3, 2017, offers her a free appropriate public education in the least restrictive environment. San Marcos concedes that Parents never provided written consent to that IEP. The undersigned ALJ is presently hearing this matter and no decision has been issued.

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)[1]; 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.)

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).)

When a Student's current school is no longer available, stay put is satisfied through a placement in a program that is materially and substantively similar to the former program. *Letter to Fischer* (OESP 1994). Should "'rigid adherence' to the exact educational program

[1] All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

become an 'an impossibility,"… the school district must "provide educational services that approximate the student's old [Individualized Education Program] as closely as possible'" *Tindell v. Evansville-Vanderburgh School Corp.*, No. 2010 WL 557058, (S.D. Ind. 2011) The law does not require the placement be exact; however, the educational placement must be a "comparable placement." *Johnson ex rel. Johnson v. Special Educ. Hearing Office* (9th Cir. 2002) 287 F.3d 1176, 1182.

DISCUSSION

Student argues for stay put purposes, Student's placement should be in a non-public school pending the outcome of the current litigation. Student's assertion is predicated on the last agreed upon and implemented IEP dated May 10, 2016, which specifically provides for a non-public school placement.

San Marcos argues Student's enrollment and subsequent attendance at San Marcos High School constituted implementation for stay put purposes. San Marcos concedes the last IEP parents consented in writing to was Student's May 10, 2016 IEP. Thus, while San Marcos argues that enrollment and two-day attendance constitutes implied consent to the IEP, San Marcos cites no legal authority where enrollment and attendance satisfy consent under special education law. Student's prior school of attendance, New Bridge School, is no longer available as it only went through eighth grade. Student is entitled, pending the outcome of litigation, to a placement that is "materially and substantively" similar to her placement in the May 10, 2016 IEP. That extends beyond placement and to her enumerated related services, including speech and language, occupational therapy, and transportation. Moreover, the court order authorizing placement in a private school does not contravene student's right to stay put.

Now, in Student's reply motion, Student asserts placement at the Winston School of Del Mar maintains the status quo for Student. Student provided insufficient evidence the Winston School is a "comparable placement," to student's previously agreed upon and implemented IEP placement. This order makes no finding whether Winston is the school "materially and substantively" resembles Student's non-public school placement in her May 10, 2016 IEP.

ORDER

1. Student's Motion for Stay Put is granted.

2. Student's stay put placement pending the outcome of litigation will be a non-public school that will include the following:

a. 340 minutes per day of group specialized academic instruction;

b. 30 minutes twice per week, totaling 60 minutes of group speech and language services;

c. 30 minutes served weekly of group occupational therapy services,

d. transportation to and from the non-public school.

3. All services are to be provided by a nonpublic school under contract with the special education local plan area or San Marcos.

IT IS SO ORDERED.

DATE: March 23, 2018

DocuSigned by:
Tiffany Gilmartin
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TIFFANY GILMARTIN
Administrative Law Judge
Office of Administrative Hearings