BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

DEL MAR UNION SCHOOL DISTRICT.

OAH CASE NUMBER 2020090236

ORDER DENYING MOTION FOR STAY PUT

SEPTEMBER 21, 2020

On September 8, 2020, Student filed a request for due process hearing. On September 14, 2020, Student filed a motion for stay put. On September 16, 2020, District filed an opposition. Student filed a response on September 17, 2020.

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 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.)

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).)

DISCUSSION

The September 27, 2018 IEP was the last consented to and implemented IEP. This IEP offered specialized academic group instruction for 905 minutes weekly delivered in a separate classroom and specialized academic group instruction for 1,360 minutes served monthly as push-in services in a regular classroom to support Student with morning routine, science and social studies. The September 2018 IEP offered the following services outside of the regular classroom: occupational therapy consult for 300 minutes served yearly in a group setting, group and individual occupational therapy for 1,800 minutes served yearly, and language and speech services in a group setting for 1,800 minutes served yearly. The operative IEP offered Student to be outside of a general education setting for 59% and in a general education setting 41% of the time.

An additional IEP team meeting and amendments were held throughout the 2019-2020 school year. The offer of specialized academic instruction was reduced and time in a general education setting increased.

On June 16, 2020 Parent consented to the September 23, 2019 IEP with exceptions. Parent conditioned acceptance of the increased time in a general education setting on having an individual aide. As that was not offered at the time, the change was not consented to. Accordingly, as it relates to the amount of specialized academic

instruction and time in a general education setting, the last agreed upon and implemented IEP was the September 2018 IEP.

To reopen school to in-person learning, Del Mar created a Safe Reopening Plan. The Safe Reopening Plan was approved by and incompliance with the guidance provided by the California Department of Public Health and the County of San Diego Public Health Services. Based on the state requirements, Del Mar's plan separated students into cohorts to reduce the potential spread of COVID-19. The requirement for cohorts was a statewide change that permitted Del Mar to open schools for in-person instruction.

Del Mar parents were given the option for their student to participate in distance learning or in-person instruction. Here, Parent chose for Student to participate in in-person learning. Each student returning to in-person learning was assigned to a single cohort. As noted, Student's last agreed upon and implemented IEP called for Student to spend time in both a general education and special education setting. The single cohort system, however, required Student be designated to spend his in-person learning time to either a general education or special education setting, but not both. Del Mar assigned Student to the cohort which was made up of students with IEPs. Parent argued that Student should be placed in the in-person general education classroom for 5th grade students.

This case is similar to the facts in *N.D. ex rel. parents acting as guardians ad litem v. Hawaii Dept. of Educ*. (9th Cir. 2010) 600 F.3d 1104. In *N.D.*, parents sought an injunction to prevent the statewide closure of public schools that was caused by statewide budget issues and resulted in furloughing teachers. Petitioners argued the closure of public schools was a violation of the IDEA because it resulted in a change in educational placement. The Court held that the stay-put provision of the IDEA was not

intended to cover system-wide changes in public schools that affected disabled and non-disabled children alike, and that such system-wide changes are not changes in educational placement. *Id.* at 1108.

In this matter, the system-wide change was the statewide requirement that cohorts be implemented for in-person learning. Del Mar had to decide between assigning Student to the general education 5th grade cohort or the cohort consisting of students with IEPs. Here, because the breakdown of time for Student's IEP was 59% outside and 41% in the regular classroom, placement in the class with students that had IEPs was reasonable. The system-wide change affected all similarly situated students who chose in-person learning, namely each student was assigned to a cohort. Therefore, Student was treated similar to other students pursuant to his IEP which required him to be in the special education classroom a majority of the time.

Student's motion for stay put to be placed in the in-person 5th grade general education cohort is denied. Based on guidance from the California Department of Public Health that sets forth requirements for in-person instruction at schools and requires students to be assigned to cohorts, Student did not meet his burden to establish a right to stay put in in the general education cohort and receive special education services virtually.

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ORDER

Student's motion to be placed in the 5th grade in-person general education cohort is denied.

IT IS SO ORDERED.



Marlo Nisperos

Administrative Law Judge

Office of Administrative Hearings