BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: SAN LEANDRO UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2017100642 ORDER DENYING MOTION FOR STAY PUT

On October 13, 2017, San Leandro Unified School District filed with the Office of Administrative Hearings a request for due process naming Student. San Leandro seeks an order that its June 2017 individualized education program offering a special day class placement with mainstreaming constitutes an offer of a free appropriate public education in the least restrictive setting. On December 6, 2017, Student filed a motion for stay put, generally asserting that his stay put placement is a general education placement with adult support "as needed" which he interprets to be a full-time one-to-one behavior aide. Student's motion for stay put is supported by sworn declarations from Parent and Student's counsel. Attached to the motion are authenticated copies of Student's April 25, 2016 individualized education program with notes from the follow-up meetings on May 3, 12, and 31, 2016; amendments to the April 2016 IEP dated June 9, 2016, October 16, 2016, and December 15 2016; a September 13, 2017 Amendment to the June 5, 2017 IEP; and a July 27, 2017 prior written notice.

On December 11, 2017, San Leandro filed an opposition on the ground that Student's last agreed-upon IEP from December 2016 does not include aide support. San Leandro's opposition references and relies upon Student's attachments. Attached to the opposition is a September 14, 2017 Investigation Report prepared by the California Department of Education in response to Student's August 16, 2017 compliance complaint.

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

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

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 (*Thomas*).)

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).)

DISCUSSION

Student alleges that San Leandro unilaterally removed his adult support services, deprived him of the support he requires, and changed his placement because he is spending much of his day outside the classroom and in the principal's office. Student maintains that he is entitled to receive the services of a full-time, one-to-one behavior aide trained to implement his behavior intervention plan. Student appears to argue that both the December 2016 and September 2017 amendment IEP's require that he receive one-to-one support in the general education setting. San Leandro asserts that Student's last agreed-upon and implemented IEP for the purposes of stay put is the December 2016 IEP amendment which required it to provide time-limited adult support in the class, as needed, through the 2016-2017 school year ending in June 2017. The parties do not dispute that Student's stay put placement is in a general education classroom nor is there a dispute as to the related services. This order addresses the sole dispute as to the provision of adult support or a one-to-one aide.

IEP Offers for the 2016-2017 School Year

REJECTION OF SPECIAL DAY CLASS OFFER, MAY 2016

Based on the pleadings filed in this matter, specifically San Leandro's request for due process, Student's motion for stay put, and San Leandro's opposition, the following facts are undisputed. Student qualifies for special education pursuant to the primary eligibility category of autism and attended a special day class for preschool during the 2015-2016 school year. San Leandro convened Student's annual IEP team meeting on April 25, 2016, and May 3, 12, and 31, 2016. San Leandro initially offered a mild to moderate special day class placement for Student's kindergarten year (2016-2017 school year) at Roosevelt Elementary School for 80 percent of the time with specialized academic instruction, speech and language services, occupational therapy, accommodations, nine annual goals, and non-

academic mainstreaming opportunities. On May 31, 2016, Parents agreed to the IEP offer with the exception of placement and services (hours/minutes).

ACCEPTANCE OF JUNE 2016 IEP OFFER OF GENERAL EDUCATION

San Leandro held a further IEP team meeting on June 9, 2016, and drafted and presented an amended IEP offering placement in the general education setting with resource support, related services, and accommodations. San Leandro offered three, 30-minute sessions of specialized academic instruction, 1350 yearly minutes of group speech services; 60 minutes per week of occupational therapy services; and extended school year services. The IEP team meeting notes explain that school-based and district-based resources will be used to help kindergarteners transition to a full school day; that a San Leandro behavior specialist will consult with the teacher at the beginning of the year; and that a behaviorally trained paraprofessional will be available to assist teachers at Roosevelt where needed. Parents provided written consent to this IEP on June 10, 2016.

ADDITIONAL SERVICES INCLUDING ADULT SUPPORT

Parents agreed to an October 18, 2016 amendment IEP which added speech consultation and support for 30 minutes per month; increased speech services to 1800 yearly minutes of group and individual sessions; and added 60 monthly minutes of individual and group behavior intervention services for observation and consultation only. San Leandro convened an IEP team meeting on December 15, 2016. According to the IEP team meeting notes, the team agreed that Student had not received consistent support from the class paraprofessional due to staffing changes. The team discussed options of continuing Student's general education placement with continued staff support for the rest of the school year until June 2017, or moving Student to a special day class. Parent consented to the December 2016 IEP amendment that required San Leandro to increase Student's behavior services to 120 minutes per month and to provide additional staff support in his general education class through the end of the school year in June 2017.

IEP Offers for the 2017-2018 School Year

REJECTION OF JUNE 2017 IEP OFFER OF SPECIAL DAY CLASS

On June 5 and 27, 2017, San Leandro convened Student's annual IEP team meeting following his triennial assessments and offered a special day class placement for first grade, during the 2017-2018 school year, with 40 percent mainstreaming. The offer included specialized academic instruction, individual and group speech services, occupational therapy, and behavior services. Parent did not consent. In a July 24, 2017 prior written notice, San Leandro explained that the paraprofessional support for the 2016-2017 school year was not intended to be permanent and did not include one-to-one support. However, San Leandro acknowledged, "due to the level of support [Student] required in the general education setting, the extra classroom para support person effectively functioned as an individual para support for [Student]."

CONSENT TO SEPTEMBER 2017 OFFER OF ADULT SUPPORT

In August 2017, Student filed a compliance complaint with the California Department of Education alleging that San Leandro failed to implement Student's last agreed upon IEP from December 2016 by not providing one-to-one aide support with the start of the 2017-2018 school year. Parents kept Student out of school. San Leandro convened a follow-up IEP team meeting on September 13, 2017, to discuss Student returning to school pending resolution of his placement dispute. San Leandro offered an IEP amendment pending a resolution of the disputes as to what Student's stay put placement is and what his placement should be moving forward. This interim offer calls for San Leandro to provide additional adult support to Student, as needed, in the general education setting to implement his behavior plan. The amendment specifies that the adult support is not a one-to-one para educator assigned to Student; that this support is not intended to be stay put; and that Student's need for adult support will be determined based on data collection under the direction of the district behaviorist, who will provide any required staff training to implement the behavior plan. On September 14, 2017, the California Department of Education found San Leandro to be in compliance as Student's December 2016 IEP did not require the provision of a one-to-one aide. Parent consented to the IEP amendment on September 15, 2017.

Analysis of Stay Put

In this case, Student and San Leandro agreed to a very specific IEP amendment in September 2017 pending resolution of Student's placement. The parties agreed that San Leandro would provide Student with adult support in his general education classroom. The parties specifically agreed that this would not be a one-to-one aide dedicated to Student and the adult support would not constitute stay put. The Individuals with Disabilities Education Act encourages the parties to work collaboratively to address Student's educational needs. The parties have the right to agree that an IEP service will not constitute stay put, and they did so in this matter. Given the express terms of the September 2017 amendment, this IEP providing for adult support is not Student's stay put placement.

Student's last agreed-upon and implemented IEP is the December 2016 amendment IEP. This IEP required San Leandro to provide adult support as needed for a limited period of time - through the 2016-2017 school year, ending in June 2017. The provision of adult support was not written into the IEP as a related service, with starting and ending dates corresponding to an annual offer, and which would generally continue on as stay put in the event of an ensuing dispute. Rather the December 2016 amendment called for adult support through the end of the year in lieu of recommending a special day class and in recognition of the fact that San Leandro had not provided consistent support and had not been able to begin the process of fading the support as discussed in many IEP team meeting notes.

Student argues that at the time the dispute arose, he was receiving one-to-one aide support, and therefore, such support must remain under stay put. The intent of the stay put provision is to maintain the status quo pending resolution of a dispute. In *Thomas*, the Sixth

Circuit held that in the situation where there was no prior IEP, then the current educational placement was the operative placement actually functioning at the time the dispute arose. (*Thomas, supra*, 918 F.2d 618, 625.) The student in *Thomas* was in a home program prior to the IEP dispute and this was deemed his stay put placement; however, there was no evidence the home program was time-limited, unlike the matter at hand. Here, Student did have an operative IEP and the parties agreed to a specific IEP amendment requiring San Leandro to provide adult support for a temporary period.

Similarly, if a district provides services in excess of those specified in the operative IEP, under stay put, the district may be required to continue those services for the duration of any FAPE dispute. In *R.R. v. Oakland Unified School Dist.* (N.D. Cal., February 25, 2014, No. CV 13-05069-KAW) 2014 WL 726680, the federal district court found that a three-day per week program at a special day class was the stay put placement because that was the frequency with which the student was attending despite the IEP calling for a two-day per week program. However, in *R.R.*, the special day class was not meant to be a temporary placement. Rather, the district in that case was proposing a full-time special day class placement. Even if San Leandro had been providing Student with a one-to-one aide following the December 2016 IEP amendment, because the IEP specified that the adult support was a temporary service, Student's argument that he is entitled to a one-to-one aide is not persuasive. Because the adult support was included in the IEP amendment as a service for a limited period of time, ordering San Leandro to continue to provide adult support is "not the type of maintenance of the status quo the [IDEA] envisions." (*Verhoeven, supra*, 207 F.3d at p. 9.) Further, Student's position that he is entitled to a full-time, dedicated, one-to-one trained behavior aide is an extension of a temporary service and not supported by the stay put provision. Accordingly, Student's request that his stay put placement include the provision of adult support or a one-to-one aide in his general education classroom is denied.

ORDER

Student's request for stay put is denied.

IT IS SO ORDERED.

DATE: December 12, 2017

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Theresa Ravandi
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THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings