BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2021030159

ORDER DENYING MOTION

FOR CLARIFICATION OF STAY PUT ORDER

MAY 11, 2021

On March 1, 2021, Parent, on behalf of Student, filed a request for due process hearing with the Office of Administrative Hearings, often called OAH, naming San Diego Unified School District as respondent. Also on March 1, 2021, Student filed a Motion for Stay Put, seeking an order from OAH that directed San Diego to provide a variety of services as replacements for the services provided by Student's residential treatment center, due to the imminent termination of those services. These services mirrored those sought as remedies in Student's request for due process. On March 8, 2021, District filed an opposition to the motion. Student filed a reply to San Diego's opposition on March 9, 2021.

On May 3, 2021, Student filed a "Motion for ALJ Penelope Pahl to Clarify Her Stay Put Order Dated March 10, 2021." In the motion, Student asserted that he was unable to enforce the order in federal district court because the judge found the order unclear. On May 6, 2021, San Diego opposed the motion, asserting that the motion did not seek clarification, but rather sought reconsideration, which was not timely, or an order from OAH enforcing its own order which was outside of OAH jurisdiction. On May 10, 2021, Student filed a reply brief.

UNDERLYING DUE PROCESS HEARING REQUEST CLAIMS

Student filed a due process hearing request in this case, in part, to resolve the question of San Diego's alleged failure to implement Student's most recent Individualized Educational Program or IEP, by failing to identify specific programs for Student to replace the residential treatment center or RTC, where Student was placed. Student had received notice in December of 2020 that he would no long qualify for services from the Wisconsin facility where he was placed, because that facility followed federal law, which ends access to special education and related services when a student turns 22 years of age. (20 U.S.C. §1412 (a)(1).) Student turned 22 on March 10, 2021. California law allows a student with a March birthday to continue to receive services through the end of the educational agency's fiscal year. (Ed. Code § 56026(c)(4)(A)).

Student's request for due process, in part, seeks adjudication of whether San Diego will be responsible for payment for the substitute services Parents have put in place to care for Student pending San Diego's search for a residential treatment center or comparable educational placement.

STAY PUT MOTION

Student's motion is a request for reconsideration of the originally filed motion for stay put that sought payment for replacement services secured by Parents. The Office of Administrative Hearings will generally reconsider a ruling upon a showing of new or different facts, circumstances, or law justifying reconsideration, when the party seeks reconsideration within a reasonable period of time, generally within ten days. (See, e.g., Gov. Code, § 11521; Code Civ. Proc., § 1008.) The party seeking reconsideration may also be required to provide an explanation for its failure to previously provide the different facts, circumstances or law. (See *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1199-1200.) San Diego challenges the timeliness of student's filing.

A nearly two-month gap between the issuance of an order and a request for reconsideration would not generally be considered reasonable. However, in this case, the motion will be granted due to the unusual circumstances. Student returns to OAH with a request for reconsideration based on his understanding of the federal district court's difficulty in understanding the original stay put order and his understanding of the district court's suggestion that he return to OAH for clarification. The motion for reconsideration is granted.

MOTION FOR CLARIFICATION OF STAY PUT

Student asserts that he was unable to enforce the stay put order in federal district court, because the judge hearing the motion found the OAH Stay Put Order unclear. Student offered no written order following the federal district court hearing substantiating this assertion, although San Diego attached a copy of the transcript of

the hearing to their opposition motion, which provided helpful context regarding the judge's comments offered by Student.

Judge Bencivengo summarized the situation well in her closing comments during the preliminary injunction hearing. After identifying two fundamental evidentiary issues requiring resolution, specifically, whether comparable services had been offered and whether Student had refused services, the judge stated:

> "I think there's a lot of extraneous outward forces that are making this really hard. I'm not issuing any injunction today. It's too vague. The request -- the relief you're seeking, it would be an order for the Court in the first instance, and I do not believe that's my role here. Your relief, I think, is to do the administrative process, have the ALJ issue something more definitive as to what can and should be done in the interim and what could have been done since March so that you can make your damages claim as to what you provided, and the effect of what you provided, whether that was reasonable and The School District should pay for it. But this Court is not going on intervene at this point." (*Court Stenographer's Transcript of Proceedings- Motion for Preliminary Injunction*, May 3, 2021, U.S. District Court Case No. 21CV0503-CAB, p. 15.)

While the judge's comments somewhat conflate the due process hearing and stay put processes, she accurately describes the ruling Student sought in federal district court, and has been seeking via Stay Put, as a "ruling in the first instance." Student seeks a Stay Put order directing San Diego to pay for any services Parents secure in the

interim period while San Diego assembles the ordered comparable services to Student's last consented to and implemented IEP. These reimbursements are also the subject of the Request for Due Process hearing. Issuing such an order would necessitate findings that the services were comparable, complied with the requirements for services being provided under the IDEA and California special education law, and met Student's needs.

Student offered no legal authority allowing OAH to summarily determine how Student's IEP services should be changed, without presentation of evidence and outside the IEP process, as part of a motion for Stay Put. A due process hearing must be conducted in order for an Administrative Law Judge to issue an order addressing these claims in the first instance. A stay put motion is not equivalent to a motion for summary judgment and, furthermore, there is no summary judgment process in special education cases.

Stay put has been granted in this case and the elements of the IEP that San Diego is required to provide as stay put have been identified. If San Diego is unable to offer the services provided for in the last consented-to and implemented IEP, it must offer comparable services. (*Ms. S. ex rel. G. v. Vashon Island School Dist.,* (9th Cir. 2003) 337 F.3d 1115, 11133-1134, *superceded by statute on other grounds*.) If San Diego is unable to or fails to provide comparable services, Parents may have claims for failure to implement Stay Put or additional claims for denial of FAPE. Without a review of the

evidence, it is impossible to make those determinations as part of a stay put order.

ORDER

Student's Motion to Clarify the March 10, 2021 Order Granting Stay Put is denied.

IT IS SO ORDERED.

Penelope S. Pahl

Penelope S. Pahl
Administrative Law Judge
Office of Administrative Hearings