BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

DINUBA UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2023010036

ORDER DENYING SECOND MOTION FOR STAY PUT

MARCH 20, 2023

On November 9, 2022, Dinuba Unified School District filed with the Office of Administrative Hearings, called OAH, a request for due process hearing, called a complaint, naming Student.

On January 3, 2023, Father, on behalf of Student, filed a complaint with OAH, naming Dinuba. On January 13, 2023, the OAH granted the parties' motion to consolidate the two matters. On February 8, 2023, Dinuba withdrew their complaint. On February 10, 2023, OAH granted Student's request to file an amended complaint, deemed filed on that date.

In the interim, On January 6, 2023, Student filed a motion for stay put, contending that Dinuba should continue to implement Student's May 19, 2020

individualized education program, called an IEP. On January 13, 2023, Dinuba filed an opposition on the ground that Student became a general education child when Mother consented to exit Student from special education.

On January 26, 2023, OAH denied Student's motion for stay put. Student produced evidence insufficient to support his contention that the May 19, 2020 IEP constituted his stay put placement.

On February 6, 2023, OAH granted Student's request for reconsideration of the order denying stay put, analyzed additional information provided by Student, and denied the motion for stay put. Evidence presented demonstrated that Mother signed consent to exit Student from special education at the June 1, 2022 IEP amendment meeting and the law requires consent from only one Parent unless a court order provides otherwise.

On February 28, 2023, Student filed a second motion for stay put, attempting to circumvent Mother's consent to exit Student from special education. Student bases his motion on a custody order signed by Parents' respective counsel on September 28, 2022. Student's motion misrepresents the underlying facts, misreads the Parents' custody order, and cites no law supporting his erroneous theories. Counsel for Student is cautioned that a lawyer shall not bring an action, conduct a defense, or assert a position without probable cause, or present a claim that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law. (Cal. Rules of Prof. Conduct, Rule 3.1.) Student's misrepresentations shall be addressed, below.

On March 3, 2023, Dinuba filed an opposition arguing that Mother consented to exit Student from special education when she signed the June 1, 2022 exit IEP. Dinuba also argued that it could exit a student from special education without consent. Though the argument does not affect the finding of stay put, Dinuba has misstated the law regarding its ability to exit a student from special education in several opposing documents and that will be addressed here.

A school district must conduct appropriate assessments before terminating eligibility. (Ed. Code, § 56881, subd. (h).) Assessments require review at an IEP team meeting. (Ed. Code, § 56341.1, subds. (a)(3) and (d)(2).) An IEP team reviews assessment results to determine eligibility and make program recommendations. (Ed. Code, § 56342.) School districts shall ensure that the parent of a child with special needs is a member of any group making decisions on the educational placement of that child. (Ed. Code, § 56342.5.) No IEP will result from an assessment without consent from a parent. (Ed. Code, § 56321, subd. (b)(4).) Counsel for Dinuba is also cautioned that a lawyer shall not bring an action, conduct a defense, or assert a position without probable cause, or present a claim that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law. (Cal. Rules of Prof. Conduct, Rule 3.1.)

Student's motion for stay put is denied on the basis that, as a general education child at the time the dispute arose, Student was not entitled to stay put in a special education placement.

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 IEP placement prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625-626.) Where child attends general education, not under an IEP, the child continues in their general education placement while the dispute is pending. (*Ibid.*)

The IDEA, California Education law and their respective regulations do not entitle a general education child to stay put, including Student here. In his second motion, Student describes a series of IEPs and a 504 Plan, none of which effect the determination of stay put. The Parties agree that the May 19, 2020 IEP, as modified by the September 19, 2020 IEP, constitutes the last IEP agreed upon by both Parents. The Parties also agree that Mother signed consent to the June 1, 2022 amendment IEP, which exited Student from special education. Student did not continue to receive a special education placement or related services since Mother signed the June 1, 2022 IEP. More specifically, Student was not receiving special education or related services at the time Dinuba filed their complaint on November 9, 2022 or when Student filed his complaint on January 3, 2023.

Student fails to cite a single statute or regulation requiring both Parents to consent to an exit IEP before a school district may terminate special education placement and services. The law requires consent to implement an IEP, including an exit IEP, from only one parent with educational rights. (34 C.F.R. § 300.30(a)(1) and (b); (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46566-46568 (August 14, 2006).) Special education law refers to parents as individuals, requiring consent from a parent or the parent, not both parents. (*Ibid.*)

The Parents' custody order does not change the analysis of stay put. Student argues that the custody order accompanying his motion requires mutual agreement of

the Parents to make decisions pertaining to Student's special education. The custody order, signed by Parents' respective attorneys on September 28, 2022, did not exist and could not have applied to Mother's exit of Student from special education on June 1, 2022.

Notwithstanding the date of execution, the custody order does not require mutual consent regarding special education matters. The custody order provides that Parents share joint legal custody. The order describes joint legal custody as follows: "both parents shall share in the right and responsibility to make decisions and must confer in making decisions," in matters including enrollment in or leaving a particular private or public school, participation in extracurricular activities, beginning or ending psychiatric, psychological, or other mental health counseling or therapy, and selection of doctors or other health professionals in non-emergency situations. In cases of disagreement, the child shall remain with a "current health care provider, childcare provider, and counselor and/or in their present school pending further order of the court." In all other circumstances, one Parent, acting alone, may exercise legal control of the child.

The court's custody order is aligned with California law. In California, joint legal custody means that both parents share the right and the responsibility to make decisions relating the health, education, and welfare of a child. (Fam. Code, § 3003.) When a family court makes an order of joint legal custody, the court must specify the circumstances under which the consent of both parents is required to be obtained to exercise legal control of the child and the consequences of the failure to obtain mutual consent. If the court does not state that the consent of both parents is required on an issue, either parent acting alone may exercise legal control of the child. (Fam. Code, § 3083.)

Here, the custody order specifies the circumstances under which the consent of both Parents is required. The custody order does not require the consent of both Parents regarding the provision of special education or IEPs. The custody order does not address the provision of special education, exit from special education, or a change of special education placement. The custody order does not use the terms special education, IEP, school psychologist, school counseling, designated instruction services, or related services. Simply put, the custody order does not apply to Student's receipt of or exit from a special education placement or related services.

Rather, the custody order addressed the provision of private counseling services for Student. The custody order required Parents to enroll Student in individual counseling at a specific agency within five business days and required releases of information allowing the agency to communicate with the Court. From the plain meaning of the order, any reference to counseling pertains to private counseling, not special education counseling.

Student attempts to conflate special education behavior services and speech and language therapy with the private counseling services required under the custody order. The argument is specious at best. Under the May and September 2020 IEPs, Dinuba offered a general education placement with 600 minutes of yearly speech and language services as push in, pull out, or consultation. Dinuba also offered 120 minutes of yearly behavior intervention services to monitor progress toward a behavior goal, and for collaboration and consultation among service providers. According to the opposition, Dinuba provided behavior intervention services by either a school psychologist or board-certified behavior analyst. The IEPs did not offer counseling goals or related services in counseling by a school psychologist. Speech and language therapy and behavior intervention services can hardly be equated with the private psychiatric,

psychological, or other mental health counseling or therapy defined in the custody order as requiring mutual agreement.

Counsel for both Parents signed the custody agreement, which does not require mutual agreement in matters involving special education and did not apply to events occurring in June 2022. The custody order provides a mechanism to supplement or revise the terms of the custody agreement. Student's motion for stay put is denied as Student remained a general education child without entitlement to stay put in special education at the time the Parties filed their respective complaints.

Student's motion for stay put is denied.

IT IS SO ORDERED.

Cole Dalton

Cole Dalton
Administrative Law Judge
Office of Administrative Hearings