BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2016090345
v.	ORDER GRANTING MOTION FOR STAY PUT
MENIFEE UNION SCHOOL DISTRICT.	

On September 7, 2016, Student filed a motion for stay put. Student contends that his stay put placement is The Institute for Effective Education at Children's Workshop in San Diego pursuant to his last implemented and consented to individualized education program dated January 13, 2016. Attached to the motion are an unauthenticated copy of Student's January 13, 2016 IEP and a one page document entitled "IEP Record" on letterhead of The Institute for Effective Education.

On September 13, 2016, Menifee Union School District filed an opposition supported by a declaration under penalty of perjury from its director of special education, Jodi Curtis. Menifee attached a copy of Student's January 13, 2016 IEP, substantively identical to Student's attachment, and a copy of an August 30, 2016 amendment IEP with the Notice of Meeting.[1] On September 15, 2016, Student filed a response along with a declaration under penalty of perjury from Mother in support of Student's stay put request.

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)[2]; 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.) However, if a student's placement in a

[1] The only discernable difference between the two IEP copies is that Menifee's version includes footers on the bottom right corner with numeric page numbering.

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

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; *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).)

Where controversy arises regarding the physical component of an order to stay put, the Ninth Circuit looks to the IEP to determine the "then current educational placement." (*Joshua A. v. Rocklin Unified School Dist.* (E.D. Cal., Aug. 20, 2007, No. CV 07-01057) 2007 WL 238968, pp. 2-4, affd. (9th Cir. 2009) 559 F.3d 1036 (*Joshua A.*).) Courts have recognized, however, that because of changing circumstances, the status quo cannot always be replicated exactly for purposes of stay put. (*Ms. S. ex rel. G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35, superseded by statute on other grounds, 20 U.S.C. § 1414(d)(1)(B).) A student is not entitled to the identical services pursuant to his or her IEP when those services are no longer possible or practicable. (*Ibid.*, at pp. 1133-1134.) When a student's "current educational placement" becomes unavailable, the local educational agency must provide the student with a similar placement in the interim. (*See Knight v. District of Columbia* (D.C. Cir. 1989) 877 F.2d 1025, 1028; *McKenzie v. Smith* (D.C. Cir. 1985) 771 F.2d 1527, 1533.)

It does not violate stay put if a school is closed for budget reasons and the child is provided a comparable program in another location. (See *McKenzie v. Smith* (D.C. Cir. 1985) 771 F.2d 1527, 1533; *Knight by Knight v. District of Columbia* (D.C. Cir. 1989) 877 F.2d 1025, 1028; *Weil v. Board of Elementary & Secondary Educ.* (5th Cir. 1991) 931 F.2d 1069, 1072-1073; see also *Concerned Parents & Citizens for the Continuing Ed. at Malcolm X (PS 79) v. New York City Bd. of Ed.* (2d Cir. 1980) 629 F.2d 751, 756; *Tilton by Richards v. Jefferson County Bd. of Educ.* (6th Cir. 1983) 705 F.2d 800, 805.) "Hawaii's teacher furloughs and concurrent shut down of public schools is not a change in the educational placement of disabled children." (*N.D. ex rel. parents acting as guardians ad litem v. Hawaii Dept. of Educ.* (9th Cir. 2010) 600 F.3d 1104, 1116.)

Generally, if an IEP calls for non-public agency services but no particular agency is named, a district has unilateral authority to replace the non-public agency provider. (*Z.F. v. Ripon Unified School Dist.* (E.D.Cal., Jan. 9, 2013, No. 2:11–CV–02741) 2013 WL 127662, p. 6). If, however, a non-public agency is identified in the IEP as the provider of services, that particular agency is part of Student's stay put placement. (See *Joshua A. supra,* 2007 WL 238968 at pp. 2-4.)

Settlement agreements are interpreted using the same rules that apply to interpretation of contracts. (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 686, citing *Adams v. Johns-Manville Corp.* (9th Cir. 1989) 876 F.2d 702, 704.) "Ordinarily, the words

of the document are to be given their plain meaning and understood in their common sense; the parties' expressed objective intent, not their unexpressed subjective intent, governs." (Id. at p. 686.)

DISCUSSION

The June 2015 Settlement Agreement

The pleadings, declarations, and attachments establish that in June 2015, the parties entered into a settlement agreement in which Menifee agreed to fund Student's placement at Children's Workshop, a non-public school, from October 1, 2015, or as soon thereafter as space became available for Student, through the end of the 2016 extended school year.[3] Student began attending Children's Workshop in late October 2015. He continued attending through the 2015-2016 school year including extended school year from June 17, 2016, through July 29, 2016. The settlement agreement further provided that in the event a dispute arises regarding Student's placement after the agreement expires, the placement and services delineated in the agreement would not constitute stay put. The parties agreed that stay put would be placement in a Menifee special day class at Student's home school and the related services from his April 25, 2014 IEP.

The January 2016 IEP

On January 13, 2016, Menifee convened Student's IEP team to conduct a 45-day placement review and hold Student's annual IEP meeting. The IEP identifies Student's residence school as Menifee - Oak Meadows Elementary. On the page entitled "Educational Setting - Offer of a Free Appropriate Public Education," at page 24, the IEP identifies Student's school of attendance as "NPS-Children's Workshop -The Institute for Effective [sic]". The IEP identifies Student's current attendance at a non-public school as the rationale for Student not receiving special education services at his school of residence. Staff from Children's Workshop attended and Student's progress at his current placement was discussed. The January 2016 IEP identifies Student's present levels of performance and offered several annual goals to be completed by January 2017.

On the "Special Factors" page located at page 20, the IEP states that Student receives specially designed physical education. The IEP specifically notes that Student's occupational therapist at his current non-public school designs the program. Also on this page, the IEP states that Student receives special transportation because he is enrolled at Children's Workshop in San Diego. The IEP further clarifies that the special education transportation consists of an agreed-upon mileage.

[3] Although neither party submitted a copy of the settlement agreement, they do not dispute its terms.

The IEP offers Student specialized academic instruction, occupational therapy, and speech and language services from January 13, 2016, through January 13, 2017, to be provided by a nonpublic school under contract with the special education local plan area or district. It further offers extended school year instruction and transportation from June 17, 2016, through July 29, 2016, with the provider again identified as a nonpublic school under contract with SELPA or district. Student attended extended school year 2016 at Children's Workshop. Therefore, either Children's Workshop was under contract with SELPA or Menifee during extended school year 2016, or Menifee considered Children's Workshop to otherwise fall within this definition.

The notes section of the IEP reflects that the team discussed the negative aspects of a non-public school placement including no access to typical peers or a core curriculum. The team agreed that these harmful effects do not outweigh the benefits of Student's current placement. The IEP team discussed Student's elopement being a concern but the notes indicate that Student does not have the opportunity to elope in his current setting. The notes further state that because of the high level of service integration at *the* non-public school is so high, occupational therapy and speech and language services were reduced. There is no mention in the January 2016 IEP that Student's IEP team would meet prior to the start of the 2016-2017 school year to discuss a new placement offer for the new academic year. Indeed the January 2016 IEP, by its own terms, was an annual offer, not set to expire until January 2017. Parent believed the January 2016 IEP offered Student continued placement at Children's Workshop. Parent signed consent to all parts of the January 13, 2016 IEP on that same date.

The 2016-2017 School Year and New Offer of Placement

On August 15, 2016, Menifee students began the 2016-2017 school year.[4] August 29, 2016, was the first day of school for Children's Workshop. When Student arrived for school on August 29, 2016, Children's Workshop informed him that Menifee had terminated its contract and was no longer funding Student's placement. Menifee convened an IEP team meeting the very next day on August 30, 2016. The Notice of Meeting, dated August 25, 2016, states that the purpose of this IEP team meeting was to review his non-public school placement.[5] At this meeting, Menifee offered, for the first time, another non-public school by name. Specifically, Menifee offered Student placement at Oak Grove, a non-public school under contract with Riverside County SELPA. The meeting adjourned for a private discussion between Parent's advocate and district administrators. Following this discussion, the IEP team reconvened and the IEP notes reflect that the special education administrators will seek legal counsel "on current IEP FAPE offer of NPS placement after District

[4] The ALJ takes judicial notice of Menifee's 2016-2017 academic school calendar as found on its website.

[5] There was no evidence as to when Parent received this Notice of Meeting. Although the Notice is pre-printed with the date of August 25, 2016, Parent signed the Notice on August 30, 2016, the date of the meeting.

settlement time frame." Further, the August 30, 2016 IEP notes state that Menifee will contact Parent for placement clarification by September 2, 2016.

Legal Analysis

Ms. Curtis' declaration establishes that pursuant to the June 2015settlement agreement, Menifee was only required to fund Student's placement at Children's Workshop through the 2016 extended school year; that Children's Workshop would not be Student's stay put placement; and that a District special day class at his home school with the April 25, 2014 IEP services would constitute stay put in the event of a dispute. However, the January 2016 IEP which offered services through January 2017, to which Parent consented, supersedes this settlement agreement. It is determined that the January 2016 IEP supersedes the settlement agreement for several reasons: the term of the placement offer extends further than the settlement agreement; the IEP has no indication that it is simply memorializing a settlement agreement; and it changes the related services offered to Student from a previous level. Therefore, the analysis focuses on the terms and implementation of the January 2016 IEP and whether there are sufficient references to Children's Workshop as the offered placement.

THE JANUARY 2016 IEP OFFERS STUDENT PLACEMENT AT CHILDREN'S WORKSHOP

Menifee is correct that the January 2016 IEP document calls for instruction and services to be provided by a non-public school under contract with the district or SELPA and that the written offer of FAPE in the notes generically states "placement at NPS." However, the IEP must be considered as a whole, including all of the many references to Children's Workshop, the fact that it offered extended school year at what it called a nonpublic school under contract (which in fact was Children's Workshop) and that it constituted an annual offer with no mention of any alternate placement other than the current non-public school.

Children's workshop staff attended the January 2016 IEP team meeting; no other non-public school staff or administrators were in attendance. There are multiple references to Children's Workshop as Student's specific placement including listing it by name as Student's school of attendance without any time limitation, and specifying his need for transportation based on the location of Children's Workshop. Additionally, the January 2016 IEP states that Student's current physical education program is not only required but is specifically designed by this occupational therapist at Children's Workshop; that the negative aspects of placement at a non-public school are outweighed by the benefits of his current placement at Children's Workshop; that Student's elopement is manageable given his current educational setting; and that Children's Workshop, his current placement, has such a high level of service integration that Student required fewer related services so Menifee reduced the offer of services. Further, there was absolutely no mention of a need to transition Student to a different setting come the start of the 2016-2017 school year. Indeed, Menifee did not even convene Student's IEP team until August 30, 2016, twelve school days after the start of its academic year, and the day after Children's Workshop started and informed Student that Menifee was no longer funding his placement.

NO EVIDENCE THAT MENIFEE CANNOT CONTRACT WITH CHILDREN'S WORKSHOP

Although Ms. Curtis' declaration establishes that neither Menifee nor the Riverside County SELPA have a current contract with Children's Workshop, that is not determinative in this case. Ms. Curtis avers that Riverside SELPA will not contract with Children's Workshop because Children's Workshop requires use of the San Diego County contract. Ms. Curtis declares that, *in general*, Riverside County SELPA contracts with non-public schools for Menifee students requiring such placement. Menifee has not established that it is unable to contract with Children's Workshop to continue to provide placement and services for Student. As recently as July 2016, Menifee was able to make arrangements for Student to attend Children's Workshop. Further, Menifee does not refute Student's assertion that Children's Workshop is currently operating as a California state-certified non-public school.

Cases in which the courts have found a changed circumstance such that an exception to stay put applies, generally involve situations where maintaining the status quo is illogical such as when a student matriculates to the next grade, unreasonable as with a school closure, or outside of the local education agency's control such as when a non-public school refuses to keep a student. Menifee presented no evidence that such is the case here. The purpose underlying stay put is to provide students with consistency during the hearing process and to prevent school districts from exerting their superior position when they control the purse strings.

No evidence was submitted that the Children's Workshop has closed or that it is unwilling to serve Student specifically. Menifee has not established that it cannot enter into an agreement with Children's Workshop to serve Student. Menifee provided no legal exceptions to stay put, such as school closure, justifying an order denying Student's motion.

ORDER

1. Student's motion for stay put is granted. Student's stay put placement is The Institute for Effective Education - Children's Workshop in San Diego, along with all the services and supports offered by the January 2016 IEP.

2. Menifee shall make arrangements with Children's Workshop for the return of Student to that placement within five business days of this order.

IT IS SO ORDERED.

DATE: September 23, 2016

DocuSigned by:
Theresa Ravandi
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THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings