BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. NEWPORT-MESA UNIFIED SCHOOL DISTRICT.	OAH Case No. 2016090897 ORDER GRANTING MOTION FOR STAY PUT

On September 19, 2016, Student filed a motion for stay put with supporting declarations and documents, seeking an order that Newport-Mesa must continue to provide Student with the services set out in the last agreed to IEP. On September 22, 2016, Newport-Mesa filed an opposition with declarations and documentation. Student filed a reply on September 23, 2016 with an additional declaration and documentation.

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 subd. (d).) This is referred to as "stay put." A student who requests an administrative due process hearing is entitled to stay put "regardless of the strength of his case or the likelihood he will be harmed by a change in placement." (*A.D. ex rel. L.D. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 727 F.3d 911, 914.)

The IDEA does not define the phrase "current educational placement," and courts have interpreted it to mean "the placement set forth in the child's last implemented IEP." (*L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 902.) More recently, the Ninth Circuit Court of Appeals held that:

> "[E]ducational placement" means the general educational program of the student. More specifically we conclude that under the IDEA a change in educational placement relates to whether the student is moved from one type of program-i.e., a regular class-to another type-i.e., home instruction. A

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

> change in the educational placement can also result when there is a significant change in the student's program even if the student remains in the same setting.

(*N.D. ex rel. parents acting as guardians ad litem v. Hawaii Dept. of Educ.* (9th Cir. 2010) 600 F.3d 1104, 1116; see also Cal. Code Regs., tit. 5, § 3042, subd. (a) [defining "specific educational placement" 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"].)

The Ninth Circuit has recognized 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).) For instance, when a student transfers to a new school district, "the new district will satisfy the IDEA if it implements the student's last agreed-upon IEP; but if it is not possible for the new district to implement in full the student's last agreed-upon IEP, the new district must adopt a plan that approximates the student's old IEP as closely as possible." (*Id.* at p. 1134) Similarly, when a student transferred in to a school district upon aging out of preschool, the IDEA did not require the exact same vendors to provide services to the student, and the new educational agency could "meet the requirements of the 'stay put' provision by providing comparable educational placement." (*Johnson ex rel. Johnson v. Special Educ. Hearing Office* (9th Cir. 2002) 287 F.3d 1176, 1181.)

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. (5 Cal. Code Regs. § 3042.)

DISCUSSION

Student resides and attends high school within Newport-Mesa's boundaries. He is eligible for special education and related services under the category of autism. Student's last agreed upon and implemented IEP dated March 26, 2015 provided for 353 minutes per day of daily instruction as follows: specialized academic instruction in an autism special day class for four 59-minute sessions daily; specialized academic instruction in a mild to moderate special day class for one 59-minute session daily; and adapted physical education for one 58-minute session daily.

When Student began ninth grade for the 2016-2017 school year, his parents discovered that Newport-Mesa had reduced his instruction time to 285 minutes per day. Student's teacher told Parent that Student was to have a shortened school day. He would be leaving school at 1:20 p.m. instead of 3:00 p.m. and would only receive 285 minutes of instruction per day instead of the 353 minutes of instruction agreed to in the March 26, 2015

IEP. Newport-Mesa did not provide any evidence to dispute Parent's declaration on this point other than to point out that Student's ninth grade schedule provides for 275 minutes of instruction instead of 285 minutes as alleged by Parent.

In its opposition, Newport-Mesa conceded that Student's last agreed upon and implemented IEP provided for Student to receive 353 minutes per day of daily instruction and that this changed when Student began the ninth grade. Newport-Mesa argued that providing Student with 353 minutes of instruction was "incompatible with the high school schedule" and "impossible to implement". Newport-Mesa's rationale for this change is that the high school schedule is shorter overall and is "block scheduled," so that high school students receive "less overall instruction in longer, but more infrequent, increments" than Student received during eighth grade. Newport-Mesa further argues that this "change in circumstances", is a necessary and reasonable adaption of Student's placement due to his new schedule in high school, and that the reduction of instruction by more than one hour per day "as closely as possible replicates the previous placement."

Although legal authority does not require an exact replication of a previous placement in changed circumstances, the law does require that despite the changed circumstances, the district "must adopt a plan that approximates the student's old IEP as closely as possible." (*Vashon Island School Dist., supra,* (9th Cir. 2003) 337 F.3d 1115, 1133 - 1134.) In this case, Newport-Mesa had reduced Student's instructional hours by more than one hour per day. This is a significant change, not a few minutes of reduced instructional time. This change does not approximate Student's IEP as closely as possible.

Newport-Mesa argues in its points and authorities that if it offered Student one hour long instructional blocks, he would be the "only student in the entire school not on 90 minute block schedule periods." Newport-Mesa further argues that in order to implement Student's IEP in the ninth grade, Student would have to leave some classes early, or enter others late, or "quite possibly be offered classes exclusively for him." Newport-Mesa further argues that these solutions will isolate Student from his peers; and that Newport-Mesa would be discriminating against Student if it were to implement his IEP. However, Newport-Mesa did not support these arguments with declarations from school staff. As such, Newport-Mesa did not provide competent evidence that it was impossible for Newport-Mesa to implement Student's March 15, 2015 IEP.

The purpose of stay put is to maintain the last agreed upon placement of a student, including services the student is receiving, pursuant to his last signed and implemented IEP when a dispute arises concerning placement and services. Unless the parties agree to a different placement, the stay put placement will remain the student's placement until there has been a final adjudication of the due process complaint.

In this case, Student's last signed and implemented IEP on March 26, 2015, provided Student with specific instructional hours. Newport-Mesa did not provide any credible authority permitting district to reduce Student's instructional hours by over one hour per day.

Accordingly, Student's stay put placement shall be the services set forth in the March 26, 2015 IEP.

ORDER

1. Student's motion for stay put is granted.

2. Student's stay put placement and services are those identified in the IEP dated March 26, 2015 as follows: specialized academic instruction in an autism special day class four times per day for 59 minute sessions each; specialized academic instruction in a mild to moderate special day class one time per day for 59 minutes; and adapted physical education one time per day for 58 minutes.

DATE: September 30, 2016

DocuSigned by:
Cheryl Carlson
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CHERYL CARLSON
Administrative Law Judge
Office of Administrative Hearings