

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:
PARENT ON BEHALF OF STUDENT,

v.

PLEASANTON UNIFIED SCHOOL DISTRICT AND
CONTRA COSTA COUNTY OFFICE OF EDUCATION
OAH CASE NUMBER 2020070970

ORDER GRANTING MOTION FOR STAY PUT

AUGUST 24, 2020

On August 15, 2020, Student filed a motion for stay put. Student acknowledges that school campuses are closed due to statewide public health orders related to COVID-19. Student requests a stay put order only with respect to essential related services in Student's Individualized Education Program, referred to as an IEP. Student's motion is supported by documentary exhibits and sworn declarations.

On August 19, 2020, Pleasanton Unified School District filed an opposition on the ground that school campuses are closed under statewide public health orders, and argues that Pleasanton is not permitted to provide in-person instruction. Pleasanton's

opposition is supported by documentary exhibits. Pleasanton requests that OAH find Student's distance learning plan to be Student's stay put placement.

On August 20, 2020, Contra Costa County Office of Education joined Pleasanton's opposition to Student's motion for stay put. On August 20, 2020, Student filed a reply to Pleasanton's opposition, with additional supporting exhibits and a sworn declaration. On August 21, 2020, Pleasanton filed a reply in support of its opposition. On August 24, 2020, Student filed a supplemental response to Pleasanton's reply, with additional sworn declarations and documentary exhibits.

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); 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.)

Courts have recognized, however, that 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 G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35, superseded by statute on other grounds, 20 U.S.C. § 1414(d)(1)(B).)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 example, when a student advances from grade to grade, the stay-put provision entitles the student to receive a placement that, as closely as possible, replicates the placement that existed at the time the dispute arose, taking into account the changed circumstances. (*R.F. Frankel v. Delano Union School District* (E.D. Cal 2016) 224 F. Supp. 3d, 979, *citing*, *Van Scoy ex rel. Van Scoy v. San Luis Coastal Unified School Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086.) A school closure for budgetary reasons

requires a “comparable program” in another location for stay put. (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.)

On March 4, 2020, Governor Newsom declared a state of emergency in California due to COVID-19. On March 13, 2020, Governor Newsom issued Executive Order N-26-20, which directs school district operations during public health related school closures. Executive Order N-26-20 directed the California Department of Education and the Health and Human Services Agency to jointly develop guidance ensuring that student with disabilities receive a free and appropriate public education consistent with their individualized education program under the Individuals with Disabilities Education Act, referred to as the IDEA.

On April 9, 2020, the California Department of Education implemented Executive Order N-26-20 by issuing Special Education Guidance for COVID-19. The guidance does not address the stay put provision under the IDEA. However, the guidance does address whether school districts may provide in-person special education services while schools are closed due to COVID-19:

“Is an LEA precluded from providing services to students with disabilities in-person or in the home for the purpose of supporting the student in accessing the alternative options for learning being offered?”

No. In some exceptional situations, LEAs may need to provide certain supports and services to individual students in-person in order to maintain students' mental/physical health and safety for the purpose of supporting the student in accessing the alternative options for learning being offered (e.g. distance learning). With that said, alternative service delivery options should seek to comply with federal, state, and local health official's guidance related to physical distancing, with the goal of keeping students, teachers and service providers safe and healthy as the primary consideration."

The California Department of Education also clarified that some service providers are deemed essential workers under Executive Order N-33-20, including nurses and assistants, physical and occupational therapists and assistants, social workers, and speech pathologists. The guidance states:

"Therefore, if an individualized determination is made that a student needs services or supports in-person to maintain their mental/physical health and safety for the purpose of supporting the student in accessing the alternative options for learning being offered (e.g. distance learning), an LEA is not necessarily precluded from providing that service by Governor Newsom's stay at home order."

On July 17, 2020, the California Department of Public Health issued a five-page document with a "framework to support school communities as they decide when and how to implement in-person instruction for the 2020-2021 school year." The July 17, 2020, document includes some directives for schools, including:

“Schools and school districts may reopen for in-person instruction at any time if they are located in a local health jurisdiction (LHJ) that has not been on the county monitoring list within the prior 14 days. If the LHJ has been on the monitoring list within the last 14 days, the school must conduct distance learning only, until their LHJ has been off the monitoring list for at least 14 days.”

The July 17, 2020, framework allows an exception for elementary schools to apply for waivers. The framework does not reference special education.

DISCUSSION

Student is an eleven-year old girl born with Wolf-Hirschhorn chromosomal syndrome, which significantly impacts all areas of her development. Student is orthopedically, cognitively, and visually impaired. She is nonverbal. As part of her educational program, Student requires speech therapy, occupational therapy, physical therapy, adapted physical education, and specialized vision services. Student also requires a Health Care Plan and a full time Licensed Vocational Nurse as her one-on-one aide.

Student has seizures and is fed primarily through a tube. Pursuant to her IEP, her full-time Licensed Vocational Nurse is tasked with implementing a checklist of 34 items each school day, including administering medication and tube feeding, monitoring her for seizures and providing a medical response, and repositioning and ambulating her body.

All parties agree that Student’s IEP of August 27, 2019, is her last agreed upon and implemented IEP. Additionally, on November 8, 2019, in OAH Case

No. 2019100433, OAH determined that Student's IEP of August 27, 2019 was her stay put placement. The parties have not agreed upon an IEP since August 27, 2019.

The parties also agree that the distance-learning plan for Student does not offer her a FAPE, as shown by the exhibits attached to Student's motion and related filings. Parents do consent to Student's distance learning plan. However, Pleasanton and Contra Costa contend that the distance learning plan is a reasonable and feasible plan under extraordinary circumstances. They argue that they are not permitted to deliver in-person services to Student due to the July 17, 2020, framework, and request that OAH order Student's distance learning plan to be her stay put placement.

Pleasanton and Contra Costa's arguments that they are prohibited from providing in-person services to Student is contradicted by the fact that Pleasanton has been providing in-person physical therapy to Student since July of 2020, under an order from the California Department of Education compliance unit. These compensatory education services result from the decision in OAH Case No. 2019100433. The documentary exhibits attached to Student's motions and filing show that, after being ordered to deliver in-person services, Pleasanton established a detailed protocol to deliver the compensatory physical education services in Student's home, which has been successful.

The California Department of Education guidelines, under Governor Newsom's Executive Order, establish that schools are not precluded from providing in-person educational services. Contra Costa Health Services, the public health authority in which Pleasanton is located, takes the position that they are allowing in-person educational services for any activities that cannot be done remotely and are required for students to be able to obtain their education. Finally, Pleasanton and Contra Costa have not

provided any legal authority to support a finding that the COVID-19 pandemic creates an exception to the stay put requirement.

When a stay put placement cannot be implemented exactly as written on the IEP document, school districts must attempt to replicate the placement that existed at the time the dispute arose as closely as possible, taking into account the changed circumstances. (*R.F. Frankel v. Delano Union School District*, (E.D. Cal 2016) 224 F. Supp. 3d, 979, *citing*, *Van Scoy ex rel. Van Scoy v. San Luis Coastal Unified School Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086.) The stay put placement must be a comparable program for that child.

Student has shown that the distance learning plan is not a comparable program stay put placement for her, given her need for intensive services to access her education. Accordingly, Student's motion for stay put with respect to essential services in her August 27, 2019, IEP is granted.

ORDER

1. Student's motion for stay put is granted.
2. Within 15 days of this Order, Pleasanton and Contra Costa shall provide in-person services to Student, in the duration and intensity described in her IEP of August 27, 2019, in the following areas:
 - a. 1:1 Licensed Vocational Nurse;
 - b. Speech therapy;
 - c. Physical therapy; and
 - d. Vision services.
3. Pleasanton and Contra Costa may implement Student's stay put services with qualified staff from a non-public agency if they so choose. Services

may be implemented in Student's home. Nothing in this Order requires Pleasanton and Contra Costa to provide services on school sites, or with school staff.

IT IS SO ORDERED.

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Cararea Lucier
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Cararea Lucier

Administrative Law Judge

Office of Administrative Hearings