

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

MENLO PARK CITY ELEMENTARY
SCHOOL DISTRICT.

OAH CASE NO. 2009101420

ORDER RE RECONSIDERATION OF
STAY PUT ORDER

On October 26, 2009, Parent on behalf of Student (Student) filed a due process hearing request with a motion for stay put. On October 30, 2009, District filed an opposition to District's stay put motion. By Order dated November 4, 2009, ALJ Eileen M. Cohn denied in part and granted in part Student's motion for stay put. On November 16, 2009, District filed a motion for reconsideration of the ALJ's Order of November 4, 2009. District supplemented its motion on November 17, 2009. Student did not file a response to District's motion.

APPLICABLE LAW

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. (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.)

For purposes of stay put, the current educational placement includes the placement called for in the pupil's most recently implemented IEP. (*L.M. ex rel. Sam M. v. Capistrano Unified School Dist.* (9th Cir. 2008) 538 F.3d 1261, 1270.) Student is entitled 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. (*Van Scoy, supra*, 353 F.Supp.2d at p. 1086.)

DISCUSSION

District maintains that the ALJ's stay put order should be modified for two reasons. First, the District should not be required to retain NPAs to provide the services agreed to in the last agreed upon IEP as the NPAs were provided to service Student's unique kindergarten needs and it is appropriate and within District's authority to assign its own staff to provide

the services. Second, District maintains that it is not required to provide any assistive technology supports and services technology services at this time as the last agreed upon IEP did not specify what those services would be.

Student's last agreed upon educational placement as set forth in the May 30, 2007 IEP, included the following services provided by an unspecified NPA: LAS, 2 X 30 minutes per week of individual and 1 X 60 minutes push-in; OT, 1 X 60 minutes per week individual provided by an NPA, and assistive technology devices and service support, provided by an NPA. As set forth in the Order of November 4, 2009, District is required to provide the agreed upon LAS and OT services by an NPA.

District did not provide any additional evidence that would justify modification of the ALJ's November 4, 2009 Order as to LAS and OT services. District's statement -- outside of the IEP document-- that it provided an NPA at the time of the IEP because it did not have experienced District staff to provide preschool services as it does for kindergarten, is not supported by admissible and uncontradicted evidence. The IEP document which provides the basis for the stay put does not limit the NPA to preschool or record any discussion of District's rationale for providing NPA services exclusively at the preschool level.

District's argument that it does not have to provide assistive technology services because the last IEP only provided for an assessment is not supported by the IEP. As District noted, the last agreed upon IEP expressly required District to conduct an assistive technology assessment. Contrary to District's contention, the IEP also expressly indicated that Student required assistive technology devices and/or services including voice output, picture symbols (photographs), signing, gestures and adapted scissors. As evidenced by the unconsented to May 2009 IEP, Student has been utilizing an assistive technology device not expressly specified in the last agreed upon IEP of May 30, 2007, a voice output communication aid referred to as VOCA. However, as a voice output device VOCA is included in the last agreed upon IEP and accordingly, is part of stay put.

District is also required to provide the services of the NPA speech therapist to assist with the utilization of the certain devices as specified in the last agreed upon IEP. Under communication goal number eight (page 10 of 21) the IEP specified that Student would use a visual communication system (with or without voice output) to convey novel messages at least three times per day. The IEP identified the speech therapist and special education teacher as the individuals responsible for the goal. As the agreed upon IEP specifies that speech services shall be provided by an NPA, to the extent the last agreed upon services of the speech therapist include assistance with visual communication devices that include voice output devices the NPA speech therapist shall continue with these services. In contrast, District is not required to subsidize a special education teacher that is part of an NPS that is not a previously-agreed upon placement merely because goals are designed to be implemented by a special education teacher. Further, unlike the unconsented to April 29, 2009, IEP, the last agreed upon IEP of May 30, 2007, does not specifically provide for training of personnel and other support for any assistive technology device or services, including the VOCA. Student has provided no evidence of an agreement with District to

support the provision of assistive technology training and personnel support as part of stay put. Accordingly, although the last agreed upon IEP does require District to provide Student with assistive technology devices and/or services, to clarify the ALJ's order, as part of stay put, District is required to provide the VOCA, the voice output device, as part of the assistive technology devices required in the last-agreed upon IEP, and an NPA speech therapist that can implement goal number 8 as part of stay put NPA LAS services.

Accordingly, District's motion for reconsideration is denied and the ALJ's Order dated November 4, 2009 is clarified by the following Order.

ORDER

1. District's Motion for Reconsideration is denied.

2. Student's stay put request as to the last agreed-upon services in the May 30, 2007, IEP is granted. District is required to fund LAS and OT services by an NPA, at the same level, frequency, and manner as specified in the May 30, 2007, IEP, and described in the ALJ's November 4, 2009 Order.

3. District is required to provide assistive technology devices as set forth in the May 30, 2007, IEP, and described above, including the VOCA. As specified in the May 20, 2007, IEP, and described above, District is required to provide an NPA speech therapist as part of stay put LAS services that can implement goal number eight; otherwise, District is not responsible for provide NPA or District personnel to provide assistive technology services, support or training as part of stay put.

IT IS SO ORDERED.

Dated: November 30, 2009

/s/

EILEEN M. COHN
Administrative Law Judge
Office of Administrative Hearings