

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN MATEO UNION HIGH SCHOOL
DISTRICT.

OAH CASE NO. 2011031447

ORDER GRANTING MOTION FOR
STAY PUT

On March 24, 2011, Student filed a motion for stay put. On March 30, 2011, District filed an opposition. As discussed below, the Motion is granted.

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); 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 (IEP), which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

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.)

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 Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35.)

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 v. District of Columbia* (D.C. Cir. 1989) 877 F.2d 1025, 1028; *Weil v. Board of Elementary & Secondary Education* (5th Cir. 1991) 931 F.2d 1069, 1072-1073; see also *Concerned Parents & Citizens for Continuing Education at Malcolm X (PS 79) v. New York City Board of Education* (2d Cir. 1980) 629 F.2d 751, 754, cert. den. (1981) 449 U.S. 1078 [101 S.Ct. 858, 66 L.Ed.2d 801]; *Tilton v. Jefferson County Bd. of*

Education (6th Cir. 1983) 705 F.2d 800, 805, cert. den. (1984) 465 U.S. 1006 [104 S.Ct. 998, 79 L.Ed.2d 231].)

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.) If a contract is ambiguous, i.e., susceptible to more than one interpretation, then extrinsic evidence may be used to interpret it. (*Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 37-40.) Even if a contract appears to be unambiguous on its face, a party may offer relevant extrinsic evidence to demonstrate that the contract contains a latent ambiguity; however, to demonstrate an ambiguity, the contract must be "reasonably susceptible" to the interpretation offered by the party introducing extrinsic evidence. (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391, 393.)

Nonpublic, nonsectarian school means a private, nonsectarian school that enrolls individuals with exceptional needs pursuant to an IEP and is certified by the California Department of Education. (Ed. Code, § 56034; Cal. Code Regs., tit. 2, § 60010.)

Government Code section 7572.5 describes the process by which an IEP team determines whether a residential placement is required for a student. When an assessment determines, and a member of the pupil's IEP team recommends, a residential placement for a pupil with a serious emotional disturbance, the IEP team shall be expanded to include a representative of the county mental health department. (Gov. Code, § 7272.5, subd. (a).) If the resulting IEP calls for residential placement, the IEP must designate the county mental health department as lead case manager. (Gov. Code, § 7572.5, subd. (c)(1).) The county mental health case manager shall coordinate the residential placement plan as soon as possible after the decision has been made to place the pupil in a residential placement. (Cal. Code Regs., tit. 2, § 60110, subd. (b).) If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child. (34 C.F.R. § 300.104 (2006).)

DISCUSSION

Pursuant to a settlement agreement (Settlement) dated July 23, 2009, District agreed to fund Student's placement in Bachman Academy (Bachman), a residential placement in Tennessee that was not certified by the California Department of Education, for the 2008-2009 and 2009-2010 school years, including extended school year (ESY) for summer 2008 and 2009. District also agreed to a detailed schedule of transportation for home visits, and for parents to escort Student to and from school at the beginning and end of each school year. The Settlement provided for related services in the areas of speech and language therapy, counseling and tutoring.

The Settlement stated: “For the purposes of stay put, Student’s stay put placement shall be a non-public school [NPS] or Bachman.”

The Settlement incorporated by reference an IEP dated February 2, 2009, as follows: “Except as set forth herein or in the Bachman contracts to be provided to the District, District shall not be responsible for any other services or placement for Student except for those set forth in this Agreement, incorporating by reference the IEP dated February 2, 2009. . . .” The parties agreed that “the services and transportation costs included in this agreement shall be incorporated in the IEP dated February 2, 2009. Parent agrees to sign the IEP dated February 2, 2009.” The February 2, 2009, IEP was attached to the Settlement as Exhibit A.

The February 2, 2009, IEP made the following offer of FAPE, Educational Setting, School Type: “Private residential school (not certified by Special Education Division), School of Attendance Bachman Academy.” It made the following offer of FAPE, Services: “specialized academic instruction; provider: Other private program; location: Nonpublic residential school – outside California; Comments: [Student] is attending Bachman academy.” It also offered language and speech, other special education/related services, and counseling and guidance, all with a “provider: Other private program; location: private residential school (not certified by Special Education).”

Both parties were represented by counsel who approved the Settlement as to form. The Settlement contained a representation and warranty that the parties had “relied upon legal advice from the attorney of their choice; that the terms of this Agreement have been read and its consequences (including risks, complications and costs) have been completely explained to them by that attorney; and that they fully understand the terms of this Agreement. They further acknowledge and represent that, in executing this Agreement, they have not relied on any inducements, promises or representations other than those stated in this Agreement.” The Settlement also contained an integration clause: “This Agreement contains the entire Agreement between the parties.”

On February 24, 2010, Student was discharged from Bachman. The reasons are not relevant here. Bachman will no longer accept Student, and it is not available as a placement for him.

Thereafter, at IEP meetings on March 25, 2010, May 27, 2010, June 29, 2010, and November 30, 2010, District offered home instruction and a placement at Oak Hill, a certified nonresidential nonpublic school in Marin County, with transportation.

The parties dispute whether stay-put requires residential placement, and also dispute whether Student’s current needs require residential placement. District contends that the plain language of the Settlement does not require that the nonpublic school alternative to Bachman must be a residential placement. Student contends that residential placement at a certified nonpublic school was clearly what was contemplated. Student therefore seeks, as his stay-put placement, one of two residential placements, Heartspring, located in Kansas,

and Boston Higashi School in Randolph Massachusetts, that will accept Student and are certified as nonpublic schools by the California Department of Education.

The Settlement is ambiguous in that it does not specify whether the stay-put NPS was intended to be a residential placement or not. The law's definition of "nonpublic school" neither specifically includes nor excludes residential placements. Although extrinsic evidence is admissible to resolve this ambiguity, the parties' declarations simply attest to their own interpretations and are unhelpful in resolving the ambiguity. The most probative evidence is the language of the IEP that was specifically incorporated into the Settlement. It stated that the school type was to be a "Private residential school;" and offered services to be provided by a "nonpublic residential school –outside California" and by an "Other private program; location: private residential school." The most reasonable interpretation of the parties' intent is that they agreed to Bachman, a residential placement that was not certified and therefore was not within the legal definition of "nonpublic school," and that stay-put was to be either Bachman or another residential placement that was certified and therefore was within the legal definition of "nonpublic school." It appears that District's interpretation, a nonresidential nonpublic school, was not contemplated. Therefore the Motion is granted.

ORDER

Student's stay-put placement will be a residential placement that is also a "nonpublic, nonsectarian school" within the meaning of California Education Code, section 56034. Stay-put shall include the transportation and related services that are provided for in both the Settlement and the February 2, 2009, IEP.

IT IS SO ORDERED.

Dated: April 1, 2011

/s/

JUNE R LEHRMAN
Administrative Law Judge
Office of Administrative Hearings