

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

OCEANSIDE UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015120386

ORDER GRANTING MOTION FOR
STAY PUT

On December 10, 2015, Student filed a motion for stay put with a supporting declaration and documents, seeking an order finding that Oceanside must continue providing Student with transportation to Student's after-school program, which moved to a location outside of District boundaries. On December 15, 2015, Oceanside filed an opposition with supporting declarations 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:

"educational 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 Court found that Hawaii's system-wide teacher furloughs and concurrent shut down of public schools on certain Fridays throughout the school year was not a "change in the educational placement" of disabled students that triggers the IDEA's stay-put provision. (*N.D. v. Hawaii Dept. of Educ.*, *supra*, 600 F.3d at p. 1116.)

When there is disagreement as to what the IEP requires, the court must evaluate the IEP as a whole and determine whether the services in question are required under the terms of the IEP. (*John M. v. Board of Education of Evanston Township High School Dist.* 202 (7th Cir. 2007) 502 F.3d 708, 715) "Under usual circumstances, the court should find it unnecessary to go beyond the four corners of the document in order to make that determination. However, vagueness in the instrument with respect to how its goals are to be achieved may require that the court turn to extrinsic evidence to determine the intent of those who formulated the plan. See *Doe v. Defendant I*, 898 F.2d 1186, 1190 (6th Cir. 1990) (noting that it would 'exalt form over substance' to ignore information known to parents and administrators simply because it was not contained in the four corners of the IEP)." (*Id.* at pp. 715-716)

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.)

DISCUSSION

Student resides and attends middle school within Oceanside's boundaries. He is eligible for special education and related services under the categories of orthopedic

impairment and intellectual disability. He receives transportation services through his IEP. The parties agree that Student's last agreed upon and implemented IEP is dated October 9, 2014. The IEP contains a checkmark in the box for "Yes" next to "Special Education Transportation." Beyond affirming that Student will be provided with transportation, the IEP does not offer any further information about the transportation services.

Student states that Oceanside has required parents to annually complete a separate form, entitled "Oceanside Unified School District – Transportation Application," which is not part of the IEP document. Student submitted copies of three completed transportation applications in support of his motion. The first application, signed by Parent on May 25, 2014, and approved by Oceanside on July 2, 2014, shows Student's drop off point is at Together We Grow in Oceanside. Together We Grow is Student's private after-school program and is a pediatric day health care program. During the 2014-2015 school year, Oceanside transported Student after school to Together We Grow. On April 20, 2015, Parent signed another transportation application with a request for continued drop off at Together We Grow's Oceanside location, and Oceanside approved the request on May 12, 2015.

During summer 2015, Together We Grow relocated its facility from Oceanside to Vista, California, outside of Oceanside's district boundaries. An August 12, 2015 letter from Oceanside to Parents indicates that although it provided transportation to Together We Grow in the past, it would no longer do so due to Together We Grow's new location outside of attendance boundaries and because transportation to after-school programs is not required as part of Student's FAPE. On September 11, 2015, Parent signed a transportation application requesting Student be dropped off at Together We Grow's Vista location. However, the Together We Grow name and Vista address have been crossed out and replaced with notations indicating the drop off location is home. The form was approved on October 23, 2015.

Student moves for stay put, arguing that transportation to Together We Grow is part of Student's last agreed upon and implemented IEP. Student further argues that, because Together We Grow's new location in Vista is only 5.6 miles outside of the district boundary, it is not impracticable or impossible for Oceanside to continue providing transportation there.

In its opposition, Oceanside asserts that Student's IEP does not include transportation to Together We Grow, regardless of its location. Oceanside argues that it is not required to transport Student to a daycare program that is not a part of his FAPE and is solely based on Parents' convenience and a request made outside of the IEP process. Oceanside alternatively argues that even if it was obligated to transport Student to Together We Grow's original location, it is not now obligated to transport him to the new Vista location or any other site outside of district boundaries. The Vista location, Oceanside claims, is twelve miles from the original Oceanside location and would add twenty-five miles and one hour and fifteen minutes of driving time to the bus route. This burden was not contemplated and would not have been agreed to by Oceanside.

Student's IEP provides for transportation but does not indicate any details of the transportation. The IEP does not specify the purpose, type or location of the transportation services. Although a review of the IEP document itself is often adequate to determine a Student's educational placement for purposes of stay put, in this case the IEP's vagueness with regard to transportation services necessitates a review of extrinsic evidence. Here, the transportation services as implemented meant that Student was dropped off at Together We Grow. This service had been provided to Student since at least the beginning of the 2014-2015 school year and was in place when the last agreed upon and implemented IEP was executed. Under these circumstances, the transportation services provided to Student as part of his last implemented IEP include transportation to Together We Grow. Therefore, the stay put provision requires Oceanside to continue transportation to Together We Grow.

Oceanside attempts to rely on the vagueness of the IEP to shield itself from the stay put obligation. However, Oceanside could have included a statement in the IEP describing the nature of, or limits to, the transportation services it was providing as part of Student's FAPE offer and did not do so. Oceanside also asserts that transportation to Together We Grow is a request parents made outside of the IEP process, yet Oceanside apparently required they do so and now attempts to rely on that separate process as the reason it is not part of Student's stay put. Oceanside's categorization of past transportation to Together We Grow as a "courtesy" is unpersuasive where transportation is part of Student's IEP and there is no evidence the Together We Grow drop off had been a "courtesy" prior to the facility's relocation.

Oceanside claims that the IDEA does not require it to transport Student to an after-school program that is not part of his FAPE. However, the issue of whether transportation to Together We Grow is necessary to Student's FAPE contemplates a legal analysis that is distinct from the stay put analysis and beyond the scope of this order.

Finally, Oceanside argues that Together We Grow's relocation outside of district boundaries is a material change in circumstances rendering continued transportation to the program overly burdensome. There is no question that Together We Grow's relocation is a change in circumstances. Nonetheless, for the purposes of stay put, continued transportation to Together We Grow, while more burdensome, remains possible. Oceanside does not dispute that the new location is 5.6 miles outside of its boundary. Although Oceanside would not have agreed to provide transportation to Together We Grow's Vista location, this order remains in effect only during the pendency of the proceeding and does not leave Oceanside without a means for redress, as Oceanside may raise its defenses in the underlying FAPE claim.

ORDER

Student's motion for stay put is granted. Oceanside shall transport Student after school to Together We Grow's facility in Vista, California, until the proceedings arising out of this due process complaint have concluded.

IT IS SO ORDERED.

DATE: December 23, 2015

/s/

LISA LUNSFORD
Administrative Law Judge
Office of Administrative Hearings