FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

E. E., a minor, by and through his guardian ad litem LAURA HUTCHISON-ESCOBEDO; CHRISTOPHER ESCOBEDO; LAURA ESCOBEDO, *Plaintiffs-Counter-Defendants-Appellees*, v. NORRIS SCHOOL DISTRICT, *Defendant-Counter-Claimant-Appellant.*	No. 20-17270 D.C. No. 1:20-cv-01291-AWI-JLT OPINION

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted June 17, 2021
San Francisco, California

Filed July 14, 2021

Before: Mary M. Schroeder, Milan D. Smith, Jr., and Lawrence VanDyke, Circuit Judges.

Opinion by Judge VanDyke

SUMMARY*

Individuals with Disabilities Education Act

The panel affirmed the district court's preliminary injunction order designating student E.E.'s current educational placement as his "stay put" placement during the pendency of judicial proceedings in a suit brought under the Individuals with Disabilities Education Act.

The IDEA's stay put provision provides that "the child shall remain in the then-current educational placement" pending any proceedings. The panel held that this means the educational setting in which the student is actually enrolled at the time the parents request a due process hearing, and it is typically the placement set forth in the student's most recently implemented individualized education plan ("IEP"). The panel held that the district court properly deemed void and without legal authority an administrative law judge's designation of a never-implemented 2020 IEP, rather than a 2018 IEP, as E.E.'s stay put placement. Accordingly, the parents' stay put motion in the district court functioned as an automatic preliminary injunction, and they were not required to meet the traditional preliminary injunction factors.

The panel declined to adopt an exception to the stay put requirement when a student challenges the then-current placement as a failure to offer a free appropriate public education.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Stephanie Virrey Gutcher (argued) and Melissa D. Allen (argued), Schools Legal Service, Bakersfield, California, for Defendant-Counter-Claimant-Appellant.

Goriune Dudukgian (argued), California Justice Project, Pasadena, California, for Plaintiffs-Counter-Defendants-Appellees.

OPINION

VANDYKE, Circuit Judge:

This appeal focuses on a preliminary injunction order entered during the pendency of a suit brought under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–91 (IDEA).

Norris School District (Norris) challenges the district court's preliminary injunction order designating student E.E.'s current educational placement as his "stay put" placement during the pendency of judicial proceedings. Norris's primary arguments on appeal are that (1) the district court applied the incorrect legal standard in entering the injunction because the federal injunction was preceded by an administrative stay put determination placing E.E. elsewhere, and (2) even if the correct legal standard was applied, this court should adopt a concededly novel exception to IDEA's stay put provision. For the reasons explained below, we disagree and therefore affirm the district court.

BACKGROUND

E.E. is a young boy who has been diagnosed with autism spectrum disorder.[1] He lives in Bakersfield, California with his parents (Parents), and resides within the Norris School District. E.E. attended kindergarten in a general education classroom at Norris Elementary beginning in August 2018, and his original Individualized Education Plan (IEP) was implemented on November 27, 2018 (2018 IEP).

Under IDEA, a child *must* receive a "'free appropriate public education[, or FAPE,] that emphasizes special education and related services designed to meet [the child's] unique needs and prepare them for employment and independent living.' IDEA accomplishes this goal by funding state and local agencies that comply with its goals and procedures." *Johnson ex rel. Johnson v. Special Educ. Hearing Off.*, 287 F.3d 1176, 1178 (9th Cir. 2002) (per curiam) (quoting 20 U.S.C. § 1400(d)(1)(A)). Each child covered by IDEA receives an IEP that "addresses: (1) the child's goals and objectives, (2) the educational services to be provided, and (3) an objective method of evaluating the child's progress." *Id.*

The 2018 IEP placed E.E. at Norris Elementary School in a general education classroom for most of his school day. Norris and Parents met multiple times throughout 2019, but the parties did not modify the 2018 IEP, nor did they adopt a new IEP.

[1] E.E. was seven years old when the district court entered its preliminary injunction order on October 5, 2020.

A. Administrative Proceedings

On January 14, 2020, Parents filed a due process hearing request with the California Office of Administrative Hearings (OAH) seeking to modify certain aspects of E.E.'s IEP. On January 22, 2020, Norris offered Parents a new IEP that would move E.E. from Norris Elementary to Bimat Elementary and place him in a special day class with a trained behavior aide, but Parents did not agree to Norris's proposed IEP (2020 IEP).

Norris thus filed its own due process hearing request on June 4, 2020, and OAH consolidated the two cases. In July 2020, an Administrative Law Judge (ALJ) heard the matter over seven days, and on September 2, 2020, she issued a ruling (OAH Decision). The ALJ found in favor of Parents in part and Norris in part. Relevant to the parties' arguments here, the OAH Decision stated that "Norris denied [E.E.] a FAPE by materially failing to implement [the] . . . 2018 IEP," and "[t]he January 22, 2020 IEP, as it may be amended, shall constitute [E.E.'s] 'stay put' under title 20 United States Code section 1415(j) . . . until Parents consent to a new amendment or annual IEP, or as otherwise ordered by OAH or other tribunal."

B. District Court Proceedings

When the new school year started in August 2020, Norris made plans to move E.E. from Norris Elementary to Bimat Elementary, consistent with the OAH Decision. On September 10, 2020, Parents filed a federal lawsuit challenging parts of the OAH Decision that they disagreed with. Parents also moved for a temporary restraining order (TRO) to keep E.E. at Norris Elementary under the 2018 IEP pending litigation.

The district court granted Parents' TRO and entered a preliminary injunction enjoining Norris from implementing the 2020 IEP. The district court explained that, even though the ALJ had "acknowledged that the [2018] IEP was the last one that was implemented for E.E.," "without any analysis or explanation" the OAH decision nonetheless stated that the 2020 IEP was E.E.'s new stay put placement. The district court concluded this ruling was wrong as a matter of law, and that "the stay put placement will default to the [2018] IEP, not the [2020] IEP."

Because Parents sought "to impose the stay put provision in the first instance," the district court also determined under governing precedent that their "motion for stay put functions as an automatic preliminary injunction, meaning that the moving party need not show the traditionally required factors (e.g., irreparable harm) in order to obtain preliminary relief." Rather, the party seeking to *change* that stay put—here, Norris—bore the burden to show the traditional preliminary injunction factors favored its attempt to impose a placement other than the 2018 IEP. The court concluded that Norris failed to meet that burden.

Lastly, in a final attempt to persuade the district court that E.E.'s 2018 IEP should not be his stay put placement, Norris asserted that public policy supports a new exception to the normal stay put rule. Norris argued that where, as here, "an IEP . . . has been found by an ALJ to deny a student a FAPE," it "should never be given stay put status." The district court rejected Norris's proposed exception, concluding that it is not supported by any legal authority.

The district court entered a preliminary injunction order that directed Norris to implement the 2018 IEP "as best as possible," subject to Norris and Parents reaching a mutual agreement on modifications to that IEP or a new placement

for E.E. Absent such agreement, the district court's preliminary injunction effectively keeps E.E. in the 2018 IEP at Norris Elementary during the pendency of legal proceedings. Norris appeals that preliminary injunction order.

STANDARD OF REVIEW

Because our review is limited to the district court's preliminary injunction order, we do not address the merits of the parties' dispute. We review a district court's grant of a preliminary injunction for abuse of discretion. *Prudential Real Est. Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 874 (9th Cir. 2000). "The district court's interpretation of the underlying legal principles, however, is subject to de novo review and a district court abuses its discretion when it makes an error of law." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (per curiam).

DISCUSSION

The current appeal focuses on IDEA's stay put provision. That provision reads:

> [D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, ***the child shall remain in the then-current educational placement*** of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in

> the public school program until all such proceedings have been completed.

20 U.S.C. § 1415(j) (emphasis added).[2]

We have recognized that "[t]he reading most consistent with the ordinary meaning of the phrase suggests that the 'then-current educational placement' refers to the educational setting in which the student is actually enrolled at the time the parents request a due process hearing to challenge a proposed change in the child's educational placement." *N.E. ex rel. C.E. v. Seattle Sch. Dist.*, 842 F.3d 1093, 1096 (9th Cir. 2016). Educational placement is defined as "the general educational program of the student." *N.D. v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1116 (9th Cir. 2010). Specifically, this court has "interpreted 'current educational placement' to mean 'the placement set forth in the child's last implemented IEP.'" *K.D. ex rel. C.L. v. Dep't of Educ.*, 665 F.3d 1110, 1118 (9th Cir. 2011) (quotation omitted); *accord L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 911 (9th Cir. 2009); *Johnson ex rel. Johnson*, 287 F.3d at 1180. While the statute uses the term "educational placement" instead of IEP, "the purpose of an

[2] IDEA's implementing regulations also reaffirm that a child should remain in his or her current educational placement during judicial proceedings:

> Except as provided in § 300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under § 300.507, unless the State or local agency and the parents of the child agree otherwise, ***the child involved in the complaint must remain in his or her current educational placement***.

34 C.F.R. § 300.518(a) (emphasis added).

IEP is to embody the services and educational placement or placements that are planned for the child." *N.E. ex rel. C.E.*, 842 F.3d at 1096.

I.

The ALJ determined—without parental consent—that "[t]he January 22, 2020 IEP . . . shall constitute [E.E.'s] 'stay put' under title 20 United States Code section 1415(j)." But IDEA states that "during the pendency of any proceedings . . . the child shall remain in the then-current educational placement." 20 U.S.C. § 1415(j). This court has recognized that "'then-current educational placement' refers to the educational setting in which the student is actually enrolled at the time the parents request a due process hearing," *N.E. ex rel. C.E.*, 842 F.3d at 1096, and it "is typically the placement described in the child's most recently implemented IEP." *Johnson ex rel. Johnson*, 287 F.3d at 1180; *see also Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1037 (9th Cir. 2009).

The parties agree that the 2018 IEP was the "operative IEP until May 7, 2020." The ALJ also "acknowledged that the [2018] IEP was the last one that was implemented for E.E." The record shows that Parents requested a due process hearing on January 14, 2020. Therefore, because E.E. was enrolled in the 2018 IEP at the time Parents requested a due process hearing and because the 2018 IEP was the last implemented IEP, it constitutes E.E.'s "then-current educational placement" under the plain language of the statute. Absent parental agreement for a modification, E.E.'s 2018 IEP at Norris Elementary remains his current educational placement and the default stay put placement. *See* 34 C.F.R. § 300.518(a) (requiring parental consent to change the current educational placement during the pendency of judicial proceedings).

The ALJ lacked the legal authority to effectively reinterpret the word "current" in the statute to "future." "An agency that exceeds the scope of its statutory authority acts ultra vires and the act is void." *Water Replenishment Dist. of S. Cal. v. City of Cerritos*, 135 Cal. Rptr. 3d 895, 903 (Ct. App. 2012), *as modified on denial of reh'g* (Feb. 8, 2012); *cf. City of Arlington v. FCC*, 569 U.S. 290, 297–98 (2013) (recognizing that federal agencies act ultra vires when they act beyond their statutory authority). Because the ALJ's stay put determination "contravene[s] 'clear and mandatory' statutory language" by designating E.E.'s potential future placement in the 2020 IEP as his current placement, the district court properly deemed the ALJ's stay put determination as void. *Pac. Mar. Assoc. v. NLRB*, 827 F.3d 1203, 1208 (9th Cir. 2016) (citation omitted); *see Water Replenishment Dist. of S. Cal.*, 135 Cal. Rptr. 3d at 903.

II.

The district court correctly applied the law and did not abuse its discretion in granting Parents' motion for a preliminary injunction. If the ALJ's stay put ruling had been valid, then Parents' motion for a preliminary injunction would have been the equivalent of a motion to modify or enjoin a preexisting stay put order. *See Johnson ex rel. Johnson*, 287 F.3d at 1180. Under that scenario, Norris would be correct in asserting that Parents must meet the traditional preliminary injunction factors. *See id.* ("We hold that a request to enjoin a preexisting 'stay put' order is handled appropriately by the district court's application of traditional preliminary injunction analysis.").

But because the ALJ acted ultra vires in stating that E.E.'s potential future educational placement was his current educational placement, Parents' request to the district court for a preliminary injunction ordering Norris to continue

implementing the 2018 IEP at Norris Elementary was not a request to enjoin a valid preexisting stay put order. Rather, their "motion for stay put function[ed] as an 'automatic' preliminary injunction," and they did not have to "show the traditionally required factors (e.g., irreparable harm) in order to obtain preliminary relief." *Joshua A.*, 559 F.3d at 1037. "Stay put routinely functions" in this way when "a school district attempts to change a student's placement, the student objects to the change by filing an administrative complaint, and stay put maintains the placement until the dispute ends." *A.D. v. Haw. Dep't of Educ.*, 727 F.3d 911, 914 (9th Cir. 2013).

Because Norris (and not Parents) sought to modify the current stay put order, Norris bore the burden to show "[1] that [it] is likely to succeed on the merits, [2] that [it] is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in [its] favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see Johnson ex rel. Johnson*, 287 F.3d at 1180. On appeal, Norris does not argue that it satisfies these factors. Therefore, the district court did not abuse its discretion or err by entering the preliminary injunction order designating the 2018 IEP as E.E.'s stay put placement.

III.

Anticipating that we might agree with the district court that the 2018 IEP is E.E.'s statutorily required stay put placement, Norris offers an alternative argument: judicially create an exception to the statute. Specifically, Norris asks us to adopt a novel exception to IDEA's stay put statutory requirement that, "[w]hen a student challenges the then current placement as a failure to offer FAPE, ... [the student] is not entitled to invoke stay put."

Norris admits that there are no cases directly supporting this newly proposed exception. But more problematic for Norris, the text of the statute cuts against the proposed exception. The statute does not make the stay put provision contingent on any challenges to a current placement. It simply states that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, ***the child shall remain in the then-current educational placement*** of the child." 20 U.S.C. § 1415(j) (emphasis added). We decline Norris's invitation to create this new exception because it would add a contingency on the stay put provision that Congress did not include in the statute.

In addition to contravening the statutory text, the proposed exception ignores Parents' legitimate concern that Norris could place E.E. in a *worse* placement than his 2018 IEP in the general classroom. Norris argues that because Parents sought to change the 2018 IEP, it "would obviously be at odds with IDEA's purpose" for them to be allowed to keep E.E. in an IEP they agreed "is not the appropriate placement." But Norris's argument is based on the false notion that just because parents want to change a current placement, they necessarily agree that a placement chosen by the school or ALJ would be better. The latter does not follow from the former. Parents might think that their child should be provided different educational services while also thinking that the different services the school or ALJ is offering to provide would be worse than the current placement. Indeed, that is presumably what Parents think in this case. And under IDEA's stay put provision, during the dispute process it is Parents who get to pick which less-than-ideal (from their perspective) placement their child will be in—the current "stay put" placement, or the placement proposed by the school district or ALJ. IDEA essentially

gives Parents a veto against moving their child until the courts finally resolve the dispute. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53–54 (2005).

Thus, "the stay put provision acts as a powerful protective measure to prevent disruption of the child's education throughout the dispute process." *Joshua A.*, 559 F.3d at 1040. Under Norris's proposed exception, parents desiring to challenge a current placement as denying a FAPE could do so only by assuming the risk that a school district could remove their child from his current placement and place him in a worse placement (from the parents' perspective). While one might make various policy arguments for or against such a possibility, it is not one Congress left unaddressed. Under IDEA, if the parents and the school district do not agree on a child's placement, then the parents can keep their child in his current placement until the dispute is finally resolved. *See id.*; 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a).

CONCLUSION

The ALJ acted without legal authority in determining that E.E.'s potential future placement in the 2020 IEP constituted his current placement for purposes of E.E.'s stay put placement. Because the ALJ acted ultra vires, her stay put determination was void. As a result, Parents' stay put motion did not seek to modify an existing stay put order, so the district court correctly entered an automatic preliminary injunction pursuant to *Joshua A.*, 559 F.3d at 1037. And Norris's proposed exception to the stay put provision is not supported by either the text of IDEA or any other legal authority, and we decline to adopt it.

AFFIRMED.