BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of: STUDENT, Petitioner, vs. SPENCER VALLEY ELELMENTARY SCHOOL DISTRICT and CALIFORNIA VIRTUAL ACADEMIES, Respondents.	OAH CASE NO. N 2007100815 ORDER RE: MOTION FOR STAY PUT

On October 26, 2007, the Office of Administrative Hearings (OAH) received a due process complaint from Parent on behalf of Student, naming Spencer Elementary School District (District) and California Virtual Academies (CAVA) as the respondents. On November 16, 2007, OAH received Student's motion for stay put. On November 26, 2007, OAH received an opposition to the stay put motion from attorney Julie D. Robbins on behalf of CAVA. On November 27, 2007, OAH received Student's reply to CAVA's opposition.

APPLICABLE LAW

California Education Code sections 47640, et seq. provide that a charter school may serve independently as a local education agency (LEA) and must provide special education services as would any public school.

Under federal and state special education law, a special education student is entitled to remain in his or her current educational placement pending the completion of due process hearing procedures, unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.514(a) (1999); 34 C.F.R. § 300.518(a); Ed. Code §§ 48915.5, 56505, subd. (d).) The purpose of stay put is to maintain the status quo of the student's educational program pending resolution of the due process hearing. (*Stacey G. v. Pasadena Independent Sch. Dist.* (5th Cir. 1983) 695 F.2d 949, 953; *Zvi D. v. Gordon Ambach* (2d Cir. 1982) 694 F.2d 904.) 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 Board of Education* (6th Cir. 1990) 918 F.2d 618, 625.)

In *Ms. S. v. Vashon Island Sch. Dist*. (9th Cir. 2003) 337 F.3d 1115, 1134, the Ninth Circuit Court of Appeals addressed the question of the new district's obligation to provide stay put when a parent files a due process complaint challenging the services offered by the new school district. The *Vashon* opinion ruled that when a dispute arises under the IDEA involving a transfer student, "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 1134.)

The Individuals with Disabilities in Education Improvement Act of 2004 (IDEA), effective July 1, 2005, revised the law concerning stay put placement for students who transfer to a new school district within the same state. 20 U.S.C. section 1414, subdivision (d)(2)(C)(i)(1) provides for an interim placement for those students, as follows:

> In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

The new IDEA federal regulations, which became effective on October 13, 2006, mirror the above provision.[1] (34 C.F.R. § 300.323(e).)

California Education Code section 56325 similarly addresses the situation in which a child transfers from one school district to another school district. Section 56325, subdivision (a)(1), mirrors section 1414(d)(2)(C)(i)(1), with the additional provision that, for a student who transfers into a district not operating under the same special education local plan area (SELPA), the LEA shall provide the interim program "in consultation with the parents, for a period not to exceed 30 days, by which time the local educational agency shall adopt the previously approved [IEP] or shall develop, adopt, and implement a new [IEP] that is consistent with federal and state law."

[1] The U.S. Department of Education's comments to this regulation state that "the Department interprets 'comparable' to have the plain meaning of the word, which is 'similar' or 'equivalent.'" (Federal Register, Vol. 71, No. 156, p. 46681.) Additionally, the comments to a similar regulation, which applies to IEPs for students who transfer from another state, note that if there is a dispute between the parent and the public agency regarding what constitutes comparable services, the dispute could be resolved through mediation or due process. (*Id.* at 46682.)

DISCUSSION

Previously, Student attended school in Chula Vista Elementary School District (Chula Vista), where his last agreed-upon and implemented individualized education program (IEP) was dated June 13, 2007. The services page of that IEP specifically provides that Student would receive resource specialist program (RSP) four days a week for 60 minutes per day, and designated instruction and services (DIS) of 48 sessions of vision services and individual counseling twice a week for 15 minutes per session. The IEP also indicates that Student shall spend 100% of his time in the general education environment. On the "Special Factors" page, under "assistive technology devices and/or services," the IEP states that "[Student] will participate in the Fast forWord program, and an FM system will be put in [Student's] classroom." The IEP notes also discuss the Fast ForWord (FF) program, and state in part that "the team agreed that FF would be most beneficial for [Student] at this time. Mother would prefer that [Student] participate in this program during the summer. After consulting with the Fast for Forward [sic] provider, to determine schedule and location." FF is not listed among the services on the IEP's services page, and the IEP does not specify the amount, frequency, or duration of the FF services.

On or about September 30, 2007, Student's parent submitted enrollment documents to enroll Student at CAVA, a charter school. On October 5, 2007, the IEP team held a 30-day interim IEP meeting, with Student's parent participating by telephone. The IEP team reached agreement only regarding implementation of vision therapy, and did not reach agreement regarding placement or other services.

On or about October 8, 2007, Student began receiving instruction from CAVA. Also on October 8, Student's parent returned to Chula Vista for an IEP meeting with Chula Vista's Pupil Service Coordinator. Those IEP notes indicate that those IEP team members agreed that "Fast ForWord is an agreed upon service for this student."

Because the October 8, 2007 IEP was never implemented, it is not part of Student's stay put placement. Rather, the June 13, 2007 IEP identifies Student's last agreed-upon and implemented educational placement.[2] That placement is in a general education setting and includes RSP, vision services and individual counseling. The June 13, 2007 IEP also provides for FF as an assistive technology service, although the IEP does not specify the amount, frequency, or duration of the FF services. However, Student's motion asserts the following:

> The hope had been that student would participate in the Fast ForWord program during the summer but scheduling did not permit it. To date, student has not participated in the Fast ForWord program.

[2] The agreed-upon portion of the October 5, 2007 IEP also appears to constitute part of Student's stay put placement, assuming that it has been implemented. However, because the only agreed-upon portion of the October 5, 2007 IEP consists of the vision therapy services already contained in the June 13, 2007 IEP, application of the October 5, 2007 IEP is not in dispute.

CAVA does not dispute that assertion. Given that FF has never been implemented during the months that the June 13, 2007 IEP has been in effect, it is unclear how FF could be part of Student's placement for purposes of stay put.

Both section 1414(d)(2)(C)(i)(1) of the IDEA and Education Code section 56325(a)(1) provide that CAVA must provide Student a FAPE, "including services comparable to those described in the previously held IEP." Thus, CAVA must provide placement and services comparable to Student's last agreed-upon and implemented placement and services in the June 13, 2007 IEP. Those services include RSP, vision therapy, and individual counseling, but do not include FF.

The parties did not address or establish whether CAVA has offered Student services comparable to the implemented portions of the June 13, 2007 IEP. As a result, this order does not address that question.

ORDER

Unless the parties reach an agreement otherwise, CAVA must offer Student a placement and services comparable to the implemented portions of his June 13, 2007 IEP, as his stay put placement during the pendency of this dispute. The implemented portion of that IEP includes a general education placement with RSP, vision therapy, and individual counseling, but does not include Fast ForWord.

Dated: December 3, 2007

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SUZANNE B. BROWN
Administrative Law Judge
Special Education Division
Office of Administrative Hearings