

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

FREMONT UNION HIGH SCHOOL  
DISTRICT.

OAH CASE NO. 2011080870

ORDER DENYING MOTION FOR  
STAY PUT

On August 22, 2011, Student filed a motion for stay put. On August 25, 2011, District filed an opposition to the motion. On August 28, 2011, Student filed a reply to the opposition.

APPLICABLE LAW

Each school district must have an IEP in place for a child at the beginning of the school year. (20 U.S.C. § 1414(d)(2)(a); 34 C.F.R. § 300.323(a).)<sup>1</sup> Districts must convene a meeting to develop an IEP within 30 days of the initial determination that the student needs special education and related services. (34 C.F.R. § 300.323(c).)

When due process hearing procedures have been initiated, 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); Ed. Code, § 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.) “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.)

In *Ms. S. ex rel G v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1134, the Ninth Circuit Court of Appeals addressed the question of a school district's obligation to provide stay put when a student transfers from another school district and the parent files a due process complaint challenging the services offered by the receiving school district. The *Vashon* opinion ruled that when a dispute arises under the IDEA involving a transfer student, the new district must implement the last agreed-upon IEP to the extent possible. If it is not

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<sup>1</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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.)

Subsequently, the law was revised, effective July 1, 2005, concerning placement for students who transfer to a new school district, as follows: When a special education student transfers to a new school district in the same academic year, the new district must adopt an interim program that approximates the student's old IEP as closely as possible until the old IEP is adopted or a new IEP is developed. (20 U.S.C. § 1414(d)(2)(C)(i)(1); 34 C.F.R. § 300.323(e).) Education Code section 56325, subdivision (a)(1), mirrors title 20 United States Code section 1414(d)(2)(C)(i)(1), with the additional provision that, for a student who transfers into a district operating under the same special education local plan area (SELPA), the local educational agency (LEA) shall provide services comparable to those existing in the approved IEP, unless the parent and the LEA agree to develop, adopt, and implement a new IEP that is consistent with federal and state law.

These rights of a transferring student only apply in the case of a transfer within the same academic year that the student was in the previous district. There are no federal or state statutory provisions addressing the situation where a student transfers between school years, such as during summer vacation. In the official comments to the 2006 Federal Regulations, the United States Department of Education addressed whether it needed to clarify the Regulations regarding the responsibilities of a new school district for a child with a disability who transferred during summer. The Department of Education stated that the IDEA, (20 U.S.C. § 1414(d)(2)(a)), is clear that each school district must have an IEP in place for a child at the beginning of the school year. Therefore, the new district must have a means for ensuring that an IEP is in effect at the beginning of the school year. (71 Fed. Reg. 46682 (August 14, 2006).)

## DISCUSSION

Student is a 15 year old boy who transitioned from Miller Middle School (Miller) within the Cupertino School District (Cupertino), a non-unified district, to Fremont Union High School District for high school (Fremont). Fremont and Cupertino are within the same SELPA. Student's annual IEP was held by Cupertino at Miller on April 8, 2011 and May 6, 2011 (April/May 2011 IEP). Student's parents consented to the April/May 2011 IEP on May 23, 2011. The April/May IEP provided, among other things, that Student would be placed in a special day class (SDC) with mainstreaming in a wood shop class, a full-time one to one applied behavioral analysis (ABA) assistant for 6 hours per day staffed by an independent provider, Allison Zevallos, M.A. (hereafter Zevallos), home ABA instruction 13.5 hours per week staffed by Zevallos, Dyad group/social skills programming for 4 hours per week staffed by Zevallos, supervision for the behavior intervention services of 16 hours per month staffed by Zevallos; speech and language services by the school district specialist for three minutes per week, and occupational therapy of 60 minutes per month consultation by District.

Student's parents participated in three transition IEP meetings on May 25, 2011, June 30, 2011 and August 11, 2011 (August 2011 IEP) wherein Fremont proposed an IEP for Student for the 2011-2012 school year. Fremont proposed placement at the Lynbrook High School ACT program, a paraeducator as additional staff to the program and to support Student as needed, three sessions of speech and language therapy per week for 30 minutes per session, 60 minutes of occupational therapy consultation per month, and 10 hours per month of behavioral support transition and consultation time between the private provider and the Fremont behavior specialist. District declined to provide any in home behavioral support, asserting that Student's needs could be met in the school program.

Parents did not consent to Fremont's offer as of the August 2011 IEP because they felt that the Lynbrook High School class contained pupils functioning at a much lower level than Student. Parents preferred a particular class at Cupertino High School which would have permitted Student to continue mainstreaming into a woodshop class as he had at Miller. Parents also objected to the provision of behavior support by Fremont staff and the elimination of the home behavior program.

Under the applicable authorities discussed above, neither stay-put, nor intra-year transfer obligations, apply to this inter-year, inter-district transfer. Cupertino developed the IEP Student seeks as a stay put placement, not Fremont. The Cupertino IEP contemplated that Student would transfer to Fremont for high school, and upon his transfer to Fremont between school years, Fremont was not required to exactly implement Student's middle school IEP. Instead, consistent with the IDEA, Fremont developed a new offer prior to the beginning of the school year, which parents have rejected, and which is now the subject of the due process hearing. Under these facts, the motion for stay put must therefore denied

#### ORDER

Student's motion for Stay Put is denied.

Dated: September 6, 2011

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GLYNDA B. GOMEZ  
Administrative Law Judge  
Office of Administrative Hearings