

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

FRESNO UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2008100696

DECISION ON BIFURCATED ISSUE OF RESIDENCY

Administrative Law Judge (ALJ) Trevor Skarda, Office of Administrative Hearings (OAH), State of California, heard this matter on January 29, 2009, in Fresno, California.

Sarah Daniel, Attorney at Law, and Nancy Miser, District Manager of Special Education, appeared on behalf of Fresno Unified School District (FUSD).

Rebecca Northcutt, Attorney at Law, and Student's Mother appeared on behalf of Student. Student's Father was also present.

The request for due process hearing was filed on October 24, 2008. A continuance was granted on December 3, 2008. At a prehearing conference on January 12, 2009, the due process hearing was bifurcated so that the threshold issue of residency, i.e., whether FUSD was responsible for Student's education, could be heard prior to a hearing on the merits of Student's substantive claims related to FUSD's alleged denial of a free appropriate public education (FAPE) during the current school year. The hearing on the bifurcated issue of residency was convened and completed on January 29, 2009. The parties' oral and written closing arguments were submitted on that same day. Thereafter the record was closed, and the matter on the bifurcated issue of residency was submitted for decision.

ISSUE

Is FUSD the local educational agency (LEA) responsible for Student's education?

FACTUAL FINDINGS

Background and Jurisdiction

1. Student is 17 years old and is in the 11th grade. She is eligible for special education and related services under the category of autistic-like behaviors (autism) and secondarily, under the category of speech and language impairment (SLI). Student's responsible local educational agency (LEA) through the end of the 2007-2008 school year was Clovis Unified School District (Clovis).

Student's Residency

2. The parties stipulated that at all relevant times, Student resided with her parents at an address in Fresno,¹ California, which is in the boundaries of Clovis and not within the boundaries of FUSD.

Student's Application for an Interdistrict Transfer and Appeal

3. In July 2008, Student's parents applied for an interdistrict transfer from Clovis to FUSD on the basis that Student's Mother was employed within the boundaries of the FUSD. Student's mother is a teacher in the District. Student's parents requested that Student attend Bullard High School in FUSD.

4. On August 8, 2008, FUSD notified Student by letter that the request was denied because the Bullard High School program was "impacted," meaning the program had met and/or exceeded the allowable number of students. The letter also states that the denial "may be appealed to the Fresno County Board of Education." On December 22, 2008, Student appealed the denial of the request for an interdistrict transfer and on January 9, 2009, FUSD denied Student's appeal.

5. Although the parties stipulated that Student was a resident of a different district, the facts also established that shortly after the transfer request was denied, Student's parents rented an apartment located within the geographical boundaries of FUSD in order to enroll Student in that school district. Although Student has received some tutoring services from a private tutor a couple of times at the partially-furnished apartment, neither Student nor her parents have stayed at the apartment overnight.

6. The facts also established that after procuring the apartment, Student's parents enrolled her in FUSD, using the address to establish residency. Student's Mother testified that she falsified the address because she wanted Student to receive services from FUSD because she was unhappy with the services provided by Clovis, and Clovis' stance regarding inclusion services for Student. Mother acknowledged that family has not lived at the apartment.

¹ Clovis' geographical boundaries extend into the neighboring city of Fresno.

7. On October 9, 2008, FUSD placed Student at Bullard High School on a 30-day interim placement.

8. Because of the circumstances surrounding the transfer denial and subsequent enrollment using a new address, FUSD initiated an investigation to establish Student's true residency. FUSD hired a private investigator (PI) who surveiled Student and her parents for several days in early December 2008. The PI concluded that the apartment was vacant and that Student resided with both parents at their home inside the boundaries of Clovis.

Due Process Hearing Request

9. Student's parents filed a due process hearing request on October 24, 2008, naming FUSD. In the due process request, Student's parents falsely stated that both Student and her parents resided at the apartment located within FUSD.

LEGAL CONCLUSIONS

1. In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) Student requested the hearing and, therefore, Student has the burden of proof related to the issues of FAPE. However, with regard to the instant bifurcated issue, which arose from an affirmative defense raised by FUSD, FUSD bears the burden of proof.

2. A child with a disability has the right to a FAPE under the IDEA. (Ed. Code, §§ 56000, 56026; 20 U.S.C. § 1412(a)(1)(A).) FAPE is defined as special education, and related services, that are available to the student at no cost to the parent or guardian, that meet the state educational standards, and that conform to the student's IEP. (Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o); 20 U.S.C. § 1401(9).) The term "related services," called designated instruction and services (DIS) in California, includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (Ed. Code, § 56363; 20 U.S.C. § 1401(26).)

Residency and responsibility for providing a FAPE

3. The primary responsibility for providing a FAPE to a disabled student rests on an LEA. (20 U.S.C. § 1414(d)(2)(A); Ed. Code, § 48200.) As a general rule, a student's school attendance is determined by the residency of his parent or guardian. (*Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 57.) Section 48200 Of the Education Code, California's compulsory attendance law, requires that a student between six and 18 years of age attend school in "the school district in which the residency of either the parent or legal guardian is located." That district usually becomes the

LEA responsible for providing a FAPE to an eligible student. (20 U.S.C. § 1401(19); 34 C.F.R. § 300.28(a) (2006); Ed. Code, § 56026.3.)

4. Determination of a parent or guardian's residence is determined as follows: (1) it is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose, (2) there can only be one residence, (3) a residence cannot be lost until another is gained, and (4) the residence can be changed only by the union of act and intent. (Gov. Code, § 244.)

5. As determined in Factual Findings 2, 5 and 6, at all relevant times Student resided outside the boundaries of FUSD and within the boundaries of Clovis Unified School District. Pursuant to Legal Conclusions 3 and 4, Student never lost her residency within Clovis and never gained residency in Fresno. Absent some exception to the general rules regarding residency, FUSD was never Student's LEA.

Interdistrict Transfer Request

6. There are exceptions to the general compulsory education requirement that children attend school in the school district in which one of their parents or their legal guardian resides. Education Code section 48204, subd. (a), provides that a pupil is deemed to have complied with the residency requirements for school attendance "notwithstanding [Education Code] Section 48200" if an agreement for interdistrict attendance has been made between the transferee and transferor districts.

7. As determined in Factual Finding 4, Student's transfer request was denied. Accordingly, pursuant to Legal Conclusion 6, FUSD established that Student has not met this exception.

8. Student argued at hearing that the ALJ in the instant due process hearing should overturn FUSD's denial of an interdistrict transfer because it was discriminatory. Jurisdiction to hear an appeal of a denial of an interdistrict transfer request lies with the county board of education or its designee. (Ed. Code, § 46001, subd. (b)(1).) No statute (State or federal), regulation or other authority provides a special education due process hearing officer in an IDEA hearing with concurrent jurisdiction to hear or decide an appeal of a denial of an interdistrict transfer.

9. Another exception to the general compulsory education rule applies in the case of a parent of a pupil who works within the boundaries of another school district. In that case a school district "may" deem a pupil to have complied with the residency requirements. (Ed. Code, § 48204, subd. (b).)

10. As determined in Factual Finding 3, Student's mother not only works within the boundaries of FUSD, she is actually employed by FUSD. Nonetheless, as found in Legal Conclusion 9, the statute is permissive. FUSD was not legally obligated to accept Student

because her mother worked within the district's boundaries. Accordingly, this exception does not apply.

11. In summary, Student is not and has never been a resident of FUSD. Because Student has not resided within FUSD's boundaries and no exception applies, FUSD is not Student's responsible LEA.

12. Because Student is not FUSD's responsibility, Student's FAPE claims against FUSD are hereby dismissed.

ORDER

1. Fresno Unified School District is not the LEA responsible for Student's education.
2. Student's complaint is dismissed in its entirety.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing Decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute: FUSD prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: February 25, 2009

/s/
TREVOR SKARDA
Administrative Law Judge
Office of Administrative Hearings