

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

EDUCATIONAL RIGHTS HOLDER ON
BEHALF OF STUDENT,

v.

YUCAIPA-CALIMESA JOINT UNIFIED
SCHOOL DISTRICT.

OAH CASE NO. 2012090262

ORDER DENYING MOTION TO
DISMISS

On September 11, 2012, Educational Rights Holder (ERH), on behalf of Student, filed a request for due process hearing (complaint) naming the Yucaipa-Calimesa Unified School District (District).

On September 18, 2012, the District, proceeding without counsel, moved to dismiss Student's complaint on the ground that Student was no longer a resident of the District, and the District therefore no longer had any obligation to provide her special education and related services, if it ever did.

On September 20, 2012, Student filed an opposition to the motion. On September 26, 2012, through counsel, the District filed a notice of intent to file a reply, and filed a reply on October 4, 2012.

APPLICABLE LAW AND DISCUSSION

It appears from the moving papers that ERH holds Student's educational rights by court order. On March 1, 2012, while Student was a resident of the District, ERH signed an assessment plan. On March 21, 2012, a court ordered Student placed in a foster home in North Hollywood, to which she was immediately moved. The assessment was completed. The District held an IEP team meeting on May 7, 2012, at which the assessment was discussed, and took the position that Student was not eligible for special education. ERH argued that she was eligible.

Beyond those facts the parties disagree. Student's complaint alleges that Student should have been ruled eligible for special education, and that the District committed numerous specified violations of the Individuals with Disabilities Education Act (IDEA) and related laws in the conduct of the assessments. Student's complaint also alleges that ERH

was denied her right to participate in the IEP team meeting of May 7, 2012, because the District predetermined the outcome and because of other procedural violations.

The District argues that even if it had an obligation to provide special education and related services to Student (which it denies), that obligation ceased when she moved out of the District's educational boundaries. The District claims that it conducted or completed the assessment and held the IEP meeting only as a courtesy to ERH, so that the information produced by the assessment could be helpful to Student in her new situation.

Student responds that the District's obligation to Student did not cease upon her move to North Hollywood. ERH contends that Student resides with her under Education Code section 48204, subdivision (a)(4),¹ which provides that a pupil complies with the residency requirements for school attendance in a school district if she is:

A pupil who lives in the home of a caregiving adult that is located within the boundaries of that school district. Execution of an affidavit under penalty of perjury pursuant to Part 1.5 (commencing with Section 6550) of Division 11 of the Family Code by the caregiving adult is a sufficient basis for a determination that the pupil lives in the home of the caregiver, unless the school district determines from actual facts that the pupil is not living in the home of the caregiver.

But Student admits that she does not live in ERH's home, and that ERH has not executed the affidavit for which the statute provides. She argues only that ERH "satisfies the purpose" of the subsection. However, the subsection specifically requires that the student live in the caregiver's home, and the parties agree she does not, so the subsection does not establish Student's residency.

Student also argues that she is homeless and therefore protected under the McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11301 et seq.), a part of the No Child Left Behind Act. However, the McKinney-Vento Act sets forth its own dispute resolution process, and the California Department of Education also maintains a process for resolving McKinney-Vento disputes. OAH has no jurisdiction to resolve Student's McKinney-Vento claim. (*Parent v. Lincoln Unified School Dist.* (2011) Cal.Offc.Admin.Hrgs. Case No. 2011090998 (Order Granting in Part and Denying in Part District's Motion to Dismiss); *Parent v. Panama-Buena Vista Union School Dist.* (2011) Cal.Offc.Admin.Hrgs. Case No. 2011040320 (Order Granting Motion to Limit Issues and to Quash Subpoena Duces Tecums); see also *Parent v. Lincoln Unified School Dist.* (2011) Cal.Offc.Admin.Hrgs. Case No. 2011061010 (Order Partially Granting Motion to Dismiss Issues 4 and 5 of Student's Complaint) [OAH has no jurisdiction to resolve No Child Left Behind claims].

ERH, in her declaration, states that Student's presence in the North Hollywood foster home is "temporary, pending determination of a permanent placement." Student offers no

¹ All further statutory references are to the Education Code unless otherwise indicated.

facts showing that Student's placement is temporary beyond this conclusory statement. The court order allegedly placing Student in North Hollywood is not part of the record. And it appears that Student has been in this "temporary" situation since March, which raises substantial factual questions about the actual nature of the arrangement that cannot be resolved on this record.

After the above documents were filed, the District retained an attorney, who filed a reply to Student's opposition to the motion to dismiss. That filing reveals additional factual conflicts that cannot be resolved on this record. For example, Student alleges that ERH consented to the assessment on March 1, 2012, and that they were already underway by March 21, 2012, when Student was moved to North Hollywood. The District's original motion to dismiss appears to agree with that chronology; it states that EHR consented to an assessment plan on March 1, 2012, although she noted "conditions or dissent"; that the District "began an initial assessment"; but that "[d]uring the assessments ... Student was moved" to North Hollywood. The Declaration of Claudia Martinez, the school psychologist, states that she received consent for the assessment on March 1, 2012.

But the District's new Reply alleges, in an unsworn memo, that because conditions were attached to the March 1 consent, it was ineffective and the only effective consent was given after March 21, 2012. It further alleges that "[t]he District began conducting a multi-disciplinary assessment and a Prior Written notice was drafted on April 5, 2012 ..." If this is an allegation that the assessment did not begin until April 5, 2012, well after Student left the District, then it conflicts not only with Student's allegation but also with the school psychologist's declaration and the District's original motion to dismiss.

Moreover, the reply shows that the District has served a subpoena duces tecum on ERH for production of documents relevant to Student's residency, including the court order, and that the parties are disputing the validity of the subpoena.

In addition, the pleadings fail to address some obvious legal issues. The District simply assumes that when Student moved to North Hollywood, she immediately became a resident of the district in which the foster home is located, and that the District's obligation to her, if any, ceased at that time. This assumption appears to be based on the general rule of residency in section 48200.

However, other more specific statutes not mentioned by the parties address the residency of a recently-moved foster child. Subdivision (a)(1) of section 48204, for example, provides that a student complies with the residency requirements for school attendance in a school district if she is:

A pupil placed within the boundaries of that school district in ... a licensed foster home ... pursuant to a commitment or placement under Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code.

The moving papers do not establish whether Student is in North Hollywood pursuant to a commitment or placement within that statutory description.

Neither party addresses the possible applicability of Chapter 5.5 of Part 27 of Division 4 of title 2 of the Education Code (§§ 48850 et seq.), which is entitled “Educational Placement of Pupils Residing in Licensed Children's Institutions.” That chapter seeks to establish “stable school placements” for recently moved foster children. (§ 48850, subd. (a)(1).) It provides, inter alia:

A foster child who changes residences pursuant to a court order ... shall be immediately deemed to meet all residency requirements for participation in interscholastic sports or other extracurricular activities.

(§ 48850, subd. (a)(2).) Notably, that provision does not address whether such a foster child is also deemed to meet residency requirements for any other purpose, such as academic instruction. And the rest of Chapter 5.5 sets forth an elaborate division of responsibility for newly moved foster children among several agencies. (§ 48850, subd. (b); see also 56156.4.) Without knowing when special education responsibility shifted from the District to another agency, if it did, the allegations of the complaint addressing matters after that shift occurred cannot be separately identified and dismissed.

Neither party addresses the legal significance, if any, of the alleged fact that Student’s placement is temporary. Neither addresses whether the District’s obligation to complete an assessment and hold a procedurally correct IEP team meeting to discuss the results still applies after a change of residency, or applies to a district that elects after a change of residency to complete an assessment and hold an IEP team meeting to discuss it.

It is not possible to address these legal questions on the current record. Since the District, as moving party, has the burden of persuasion that its motion is well taken, and has not discharged that burden, the motion to dismiss cannot be granted. Factual and legal issues this complex will most likely require a hearing to resolve.

The District’s motion to dismiss is denied.

IT IS SO ORDERED.

Dated: October 8, 2012

/s/
CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings