

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

STUDENT,

OAH CASE NO. 2009090943

vs.

ORANGE COUNTY DEPARTMENT OF
EDUCATION, IRVINE UNIFIED SCHOOL
DISTRICT AND CALIFORNIA
DEPARTMENT OF EDUCATION,

ORANGE COUNTY DEPARTMENT OF
EDUCATION

OAH CASE NO. 2009100565

vs.

STUDENT.

DECISION

On November 12, 2009, Timothy L. Newlove, Administrative Law Judge (ALJ) from the Office of Administrative Hearings, Special Education Division (OAH) presided at the due process hearing in these consolidated cases.

At the hearing, Patricia E. Cromer, attorney at law, represented the Student. Karen Van Dijk of Best, Best & Krieger, attorneys at law, represented the Orange County Department of Education (OCDE). Also appearing on behalf of OCDE were Mel Peters, Todd Martin and Lisa Saltzman. S. Daniel Harbottle of the Harbottle Law Group, attorneys at law, represented the Irvine Unified School District (Irvine or IUSD). Also appearing for the District was Lisa Krogsdale, Director of Special Education. Michael Hersher, Deputy General Counsel appeared by telephone on behalf of the California Department of Education (CDE). Also appearing by telephone for CDE was Edmundo Aguilar, Deputy General Counsel.

On September 21, 2009, Student filed with OAH a document entitled "Petitioner's Filing for Due Process" which named as respondents OCDE, Irvine Unified School District and CDE. OAH designated this matter as Case No. 2009090943. On October 8, 2009,

OCDE filed with OAH a document entitled “OCDE’s Request for Due Process Hearing; Motion for Consolidation with OAH Case No. 2009090943,” which named Student as the respondent. OAH designated this matter as Case No. 2009100565. On October 20, 2009, OAH consolidated the two cases. In the order of consolidation, OAH designated Case No. 2009090943 as the lead case and the matter which controls the 45-day timeline for issuance of a decision.

For the hearing, the parties prepared and submitted a Joint Statement of Stipulated Facts and Evidence. For the stipulated evidence, the parties submitted a packet that consisted of Exhibits A through FF. The ALJ accepted the stipulated facts and admitted the exhibits into evidence. The ALJ also granted the Request for Judicial Notice made by OCDE. Prior to the hearing, the parties submitted trial briefs. The ALJ included such trial briefs in the record of this matter.¹

At the hearing, the parties presented oral argument. Upon the conclusion of oral argument, the parties submitted the matter for decision, and the ALJ closed the record.

ISSUE

Which educational agency is responsible for providing Student with a free appropriate public education (FAPE)?

CONTENTIONS OF THE PARTIES

In this case, Student, OCDE and IUSD contend that the state statutes which describe residency requirements and which normally determine the Local Educational Agency that is responsible for providing a disabled child with a free appropriate public education do not apply to Student who is without a biological parent and who is a ward of the Orange County Court. Student, OCDE and IUSD also contend that the definition of “parent” in the version of Education Code section 56028 which is applicable to this matter did not include a Responsible Adult who is a court appointed person assigned to make educational decisions for designated children. CDE contends that, for the period relevant in this case, the applicable statutory scheme provided for a Local Educational Agency that was responsible for Student’s special education program.

Based upon the stipulated facts and the conclusions of law set forth below, this Decision determines that the Irvine Unified School District is responsible for providing Student’s educational placement at his out-of-state residential treatment center in Texas. Former Education Code section 56028 included within the definition of “parent” a “guardian . . . authorized to make educational decisions for the child.” This Decision determines that

¹ The ALJ marked for identification Student’s trial brief as Exhibit GG, OCDE’s trial brief as Exhibit HH, IUSD’s trial brief as Exhibit II, and CDE’s trial brief as Exhibit JJ.

the term “guardian” was broad enough to include a Responsible Adult. At the time that Student entered his out-of-state placement and when he turned 18 years of age, his Responsible Adult resided within the boundaries of IUSD. Based upon applicable rules of residency, since Student’s Responsible Adult was considered his “parent” within the meaning of former Education Code section 56028, the Irvine Unified School District had the responsibility of providing Student with a FAPE.

FINDINGS OF FACT

1. Student is 19 years of age, and he has been eligible for special education services under the Individuals with Disabilities Education Act (IDEA) at all times relevant to this action.

2. Student is not currently a party to an interdistrict transfer, nor does he reside within the home of a caregiving adult or hospital within the jurisdiction of any school district within the State.

3. Student was removed from his mother’s home in 2004 due to parental neglect and abuse. Soon thereafter, Student’s mother passed away. On June 21, 2004, the Orange County Juvenile Court (Juvenile Court) declared Student a dependent of the court, as his father had never been identified. The Juvenile Court also appointed Cecily Ballou as Student’s Responsible Adult. Ms. Ballou has not resided within the boundaries of the Irvine Unified School District at any time relevant to this action.

4. Since Student’s removal from his mother’s home, he has had several social services and Juvenile Court placements, and has been educationally served by multiple school districts. Student has never physically resided within the boundaries of the Irvine Unified School District.

5. In August 2006, the Orange County Social Services Agency placed Student in foster care with his aunt, Roxie Walker Jones, who resided within the Wheatland Union High School District (Wheatland).

6. On September 21, 2006, Wheatland convened an Individualized Education Program (IEP) meeting for Student. During this IEP meeting, the team referred Student for a mental health assessment under AB 3632. The Irvine Unified School District was neither invited to, nor in any manner made aware of this IEP meeting.

7. The Sutter-Yuba Mental Health Services (SYMHS) subsequently transferred Student’s mental health referral to the Orange County Health Care Agency (OCHCA). Because Student was declared a dependent in the County of Orange and was eligible to receive MediCal services through that County, OCHCA was the county mental health agency responsible for providing Student with mental health services.

8. OCHCA subsequently notified Wheatland that it had rejected Student's mental health referral because the referral failed to document previous mental health interventions received by Student.

9. In January 2007, the Orange County Juvenile Court placed Student in the Orange County Juvenile Hall (Juvenile Hall). While there, he attended Otto Fischer, a juvenile court school administered and operated by OCDE. By that time, the Juvenile Court had changed Student's legal status from a dependent to a ward of the court.

10. On January 25, 2007, OCDE convened an IEP meeting for Student. The Irvine Unified School District was neither invited to, nor made aware of this IEP meeting. At that time, Student's counsel requested that OCDE assess Student to determine whether he satisfied the eligibility criteria for emotional disturbance. Student's counsel further requested that OCDE re-refer Student to OCHCA for a mental health assessment. The IEP team subsequently forwarded a Notification of Mental Health Services Request to Student's Responsible Adult for her signature.

11. On February 5, 2007, OCDE informed Wheatland that Student had been placed at Juvenile Hall, asked whether Wheatland staff wished to participate in any IEP team meetings for him, and explained that Wheatland may be responsible for Student's educational placement following his release from Juvenile Hall based upon the residency of Roxie Jones within the boundaries of Wheatland.

12. On March 9, 2007, OCDE received from the Responsible Adult a signed copy of Student's mental health referral reflecting her consent to the referral.

13. On April 26, 2007, OCDE convened an IEP team meeting for Student. The Irvine Unified School District was neither invited to, nor in any manner made aware of this IEP. At this meeting, the IEP team reviewed its psychoeducational assessment of Student, and changed his eligibility to emotional disturbance. OCHCA had not yet completed its assessment of Student at the time of this IEP meeting.

14. On May 24, 2007, OCDE convened an IEP team meeting for Student. Student's Responsible Adult and a representative from Wheatland were in attendance. The Irvine Unified School District was neither invited to, nor in any manner made aware of this IEP. At this meeting, OCHCA reviewed its mental health assessment, recommended placement of Student in a residential treatment center (RTC), and agreed to conduct a residential placement search for Student.

15. On June 5, 2007, the Juvenile Court limited the rights of Cecily Ballou, and appointed Ms. Jean Shiota as Student's new Responsible Adult. At that time, Ms. Shiota lived within the jurisdictional boundaries of the Irvine Unified School District, and she continues to reside there today. The Order appointing Ms. Shiota as Student's Responsible Adult indicates that she was a Court Appointed Special Advocate.

16. On June 21, 2007, Ms. Shiota signed and returned necessary paperwork to OCHCA so that a residential placement search could commence. On June 26, 2007, OCDE convened an IEP team meeting for Student. The Irvine Unified School District was neither invited to, nor in any manner made aware of this IEP. At the time of this meeting, OCHCA had not yet completed its residential placement search for Student. The June 26, 2007 IEP document indicates that Ms. Shiota attended this meeting.

17. On July 17, 2007, OCDE convened Student's IEP to discuss the results of OCHCA's residential placement search. During this meeting, OCHCA recommended placement of Student at Daystar, an out-of-state RTC located in Manville, Texas. Student's IEP team accepted OCHCA's residential placement recommendation. The July 17, 2007 IEP document indicates that Ms. Shiota attended this meeting.

18. Thereafter, a dispute arose between Student and OCDE regarding which educational agency was responsible to implement his out-of-state placement in an RTC following his release from Juvenile Hall. OCDE contended, and still contends, that it was not legally responsible to implement Student's special education program once he was released by the Court from Juvenile Hall.

19. In an effort to avoid a delay of Student's RTC placement, in September 2007, OCDE and Student entered into a confidential Settlement Agreement. Through this Settlement Agreement, OCDE agreed to temporarily and conditionally fund the educational portion of Student's placement at Daystar until such time as the Office of Administrative Hearings (OAH), a state or county agency, a court of competent jurisdiction, or a governing legislative body, among other things, enacted new legislation or otherwise issued a ruling that clarified what Local Educational Agency (LEA) or State Educational Agency (SEA) is responsible for Student's (or a similarly situated pupil's) education following his removal from Juvenile Hall by the Court, determined another LEA/SEA to be financially responsible for Student's RTC placement, or otherwise legally clarified the LEA/SEA responsible for Student's education. The Irvine Unified School District was neither made aware of this Settlement Agreement, nor asked to take over responsibility for Student's IEP nor funding of his RTC placement.

20. Through the Settlement Agreement, OCDE expressly disclaimed any legal responsibility to provide Student's education once he left Juvenile Hall, and did not assume programmatic responsibility for Student's education as his responsible LEA. OCDE further preserved its right to recoup any and all costs that OCDE expended on Student's education from the LEA/SEA held ultimately responsible.

21. On October 26, 2007, Student was placed at Daystar. On October 31, 2007, he returned to Juvenile Hall for approximately two months as the result of medical issues. On December 19, 2007, OCDE convened an IEP meeting for Student. The December 19, 2007 IEP document indicates that Ms. Shiota did not attend this meeting, but gave the IEP team permission to proceed in her absence. On December 21, 2007, Student returned to Daystar where he remains today.

22. On January 14, 2008, Student turned 18 years of age. At this time, Ms. Shiota's status as Student's Responsible Adult terminated by operation of law.

23. During 2008 and 2009, OCDE convened IEP meetings for Student on the following dates: February 21, 2008, June 30, 2008, and January 15, 2009. The IEP documents from these meetings reflect that Student represented himself, and that he had not yet graduated from high school and obtained a diploma.

24. Subsequent to his placement at Daystar, OCDE communicated with CDE on several occasions to discuss whether it was willing to accept fiscal and programmatic responsibility for Student's program. At all times relevant to this action, CDE has refused to assume any direct responsibility for Student's educational program.

25. On April 8, 2009, based upon activity in OAH Case Nos. 2008120021 and 200902130, Student's attorney notified a law firm representing the Irvine Unified School District that IUSD might be responsible for Student's educational program.

26. On May 26, 2009, after receiving a decision in OAH Case Nos. 2008120021 and 200902130, which were consolidated special education due process administrative matters, Student's counsel again contacted the Irvine Unified School District and requested that it assume responsibility for Student's educational program and convene an IEP team meeting for Student.

27. On July 23, 2009, OCDE informed Student that it would no longer be funding his education.

28. On September 1, 2009, the Irvine Unified School District convened an IEP team meeting for Student, but did not voluntarily assume legal responsibility for his education.

29. As of the date of the due process hearing in this matter, both OCDE and CDE have refused to implement and fund the educational portion of Student's current IEP, which reflects his placement at Daystar. The Irvine Unified School District has agreed to convene IEP team meetings on behalf of Student, but only to avoid the threatened discharge of Student from Daystar.

30. On September 22, 2009, in the instant case, Student filed a Motion for Stay Put. On October 6, 2009, OAH issued an Order which determined that Student's stay put placement is at Daystar. The Order declined to decide the public agency responsible for Student's placement at Daystar.

31. On October 13, 2009, the Irvine Unified School District convened an IEP team meeting on behalf of Student. At this IEP meeting, IUSD attached an addendum specifically disclaiming legal responsibility for the funding of the RTC placement, and indicating that it had been informed by counsel for Student that Daystar was preparing to discharge Student

based upon the cessation of funding by OCDE. The Irvine Unified School District stated that its only intention in provisionally agreeing to fund the Daystar placement was to avoid Student's discharge from that program, and IUSD reserved all of its rights to assert that it is not, and has never been, legally responsible for Student's educational placement.

32. CDE has never participated in any IEP meetings or decisions regarding the placement of Student, other than to decline OCDE's request for direct reimbursement.

CONCLUSIONS OF LAW

Burden of Proof

1. In a special education administrative due process proceeding, the party seeking relief has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].) In this case, Student has the burden of establishing that OCDE, Irvine Unified School District or CDE has the responsibility of providing him with a free appropriate public education (FAPE). The Orange County Department of Education has the burden of establishing that, after Student's release from the Orange County Juvenile Court, OCDE did not have the responsibility of providing Student with FAPE.

Responsible Agencies

2. Under the Individuals with Disabilities Education Act (IDEA), a "State Educational Agency" (SEA) means the State Board of Education. (20 U.S.C. § 1401(32); 34 C.F.R. § 300.41 (2006). In California, the SEA is the state Department of Education (CDE).

3. Under the IDEA and companion state law, a "Local Educational Agency" includes both a school district and a county office of education. (20 U.S.C. § 1401(19); 34 C.F.R. § 300.28 (2006); Ed. Code, § 56026.3.) In this case, OCDE and the Irvine Unified School District are Local Educational Agencies, or LEAs, within the meaning of these provisions.

4. Under the IDEA and companion state law, a "public agency" includes both the SEA and LEAs. (34 C.F.R. § 300.33 (2006); Ed. Code, § 56028.5.) "The definition of *public* agency refers to all agencies responsible for various activities under the Act." (71 Fed. Reg. 46569 (Aug. 14, 2006), original italics.) In this case, OCDE, Irvine Unified School District and CDE are public agencies within the meaning of these provisions.

OAH Jurisdiction

5. The persons who can initiate a special education administrative due process proceeding include a pupil who is a ward of the court and for whom no parent or guardian can be located and the public agencies that are involved in any decisions regarding the pupil.

(20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.507(a)(2006); Ed. Code, § 56501, subd. (a).) Such parties have the right to present a due process complaint with respect to any matter relating to the identification, evaluation, or educational placement of a child with a disability, or with regard to the provision of FAPE for the child. (20 U.S.C. § 1415(b)(6)(A); 34 C.F.R. § 300.507(a)(2006); Ed. Code, § 56501, subd. (a)(1)-(4).) In this matter, OAH has jurisdiction to hear and decide the issue presented for decision because the issue concerns what public agency has the responsibility of providing Student with a FAPE.

Purpose of the IDEA

6. The express purpose of the IDEA is to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs.” (20 U.S.C. § 1400(d)(1)(A); see *Forest Grove School District v. T.A.* (2009) 557 U.S. ___ [129 S.Ct. 2482, 2491;174 L.Ed.2d 168].)

7. FAPE means special education and related services that are available at no cost to the disabled student, that meet the state educational standards, and that conform to the pupil’s Individualized Education Program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

SEA and LEA Responsibility

8. Under the IDEA, the State Educational Agency has the responsibility for the general supervision and implementation of the Act. (20 U.S.C. § 1412(a)(11)(A); 34 C.F.R. § 300.149(a)(2006).) This responsibility includes ensuring that a FAPE is available to all children with disabilities in the mandated age ranges within the state. (20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101(a)(2006).) Generally, FAPE is made available through a Local Educational Agency within the state. (20 U.S.C. § 1412(a)(12)(A); *Letter to Covall*, 48 IDELR 106 (OSEP Dec. 2006).) However, in the rare instance when state law does not provide for a responsible LEA or public agency, then the duty to provide a FAPE falls upon the SEA. (*Gadsby v. Grasmick* (4th Cir. 1997) 109 F.3d 940, 952-953; *Orange County Dept. of Education v. A.S.* (C.D.Cal. 2008) 567 F.Supp.2d 1165, 1169-1170 [*OCDE v. A.S.*].)

Responsibility Determined by Residency

9. In California, for the most part, identification of the LEA that has the responsibility for providing a disabled child with a FAPE is determined through residency. Under the state’s compulsory education law, a pupil who is between the ages of six and 18 must attend the school district where his/her parent or legal guardian resides. (Ed. Code, § 48200; *Katz v. Los Gatos-Saratoga Joint Union High School District* (2004) 117 Cal.App.4th 47, 54.) In this case, Education Code section 48200 is applicable in determining the LEA responsible for Student’s placement at Daystar for relevant time periods before Student turned 18 years of age. These time periods are from October 26 to 31, 2007, and from December 21, 2007 to January 13, 2008.

10. There are exceptions to this basic rule of residency if the pupil is placed in a licensed children's institution, a licensed foster home or a family home; if the pupil is the subject of an interdistrict transfer; if the pupil is emancipated; if the pupil is living in the home of a caregiving adult; or if the pupil is residing in a state hospital. (Ed. Code, § 48204, subd. (a)-(e).) None of these exceptions are applicable in this case.

Juvenile Court School

11. In this matter, starting in January 2007, the Orange County Juvenile Court placed Student in a juvenile court school where he remained until his departure for the residential treatment center in Texas. (see Ed. Code, § 48645.1.) When a child with a disability attends a juvenile court school, the normal rules of residency for determination of the LEA that is responsible for providing the child with FAPE do not apply. Instead, the county office of education for the county in which the juvenile court school is located must develop and implement a special education program for the child. (Ed. Code, §§ 48645.2, 56150.) In this case, the parties agree that, while Student was under the jurisdiction of the Juvenile Court and attending Otto Fischer school, OCDE was responsible for providing him with a FAPE.

12. However, the responsibility of OCDE ceased when the Orange County Juvenile Court released Student and he left for his out-of-state placement in Texas. (Ed. Code, §§ 48645, 48645.1, 48645.2, 56150.) When this event occurred, the rules of residency became applicable in determining the public agency responsible for providing Student with a FAPE. (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1525, fn. 1 [*Union*].) Before Student turned 18 years of age, the basic residency rule in Education Code section 48200 was applicable for making this determination. After Student turned 18, the residency rule in Education Code section 56041, subdivision (a), was applicable. Education Code section 56041 is discussed below in Legal Conclusions, paragraph 22.

Responsible Adult

13. In this case, on June 5, 2007, the Orange County Juvenile Court appointed Jean Shiota as the Responsible Adult for Student. Ms. Shiota served in this role until Student turned 18 on January 14, 2008. In California, the Juvenile Court has the authority to limit the right of a parent or guardian to make educational decisions for a dependent or ward of the Court. (Welf. & Inst. Code, §§ 361, subd. (a), 726, subd. (b).)

14. When a Juvenile Court specifically limits the right of a parent or guardian to make educational decisions for a minor who is a dependent or ward, the Court must at the same time appoint a Responsible Adult to make educational decisions for the child. (Welf. & Inst. Code, §§ 361, subd. (a), 726, subd. (b); Cal. Rules of Court, rule 5.650(b)(1).) The Responsible Adult is also referenced as the educational representative of the child. (Cal. Rules of Court, rule 5.560.)

15. California Rule of Court, rule 5.560, concerns the appointment of a Responsible Adult by a Juvenile Court. The rule describes the authority and responsibility of the Responsible Adult as follows: “The educational representative is responsible for representing the child in the identification, evaluation, and educational placement of the child and with the provision of the child’s free, appropriate public education. This includes representing the child in all matters relating to the child’s education. . .” (Cal. Rules of Court, rule 5.560(f)(1).) Regarding the relationship between the Responsible Adult and the pupil, the rule also states that “(T)he educational representative acts as the parent or guardian in all educational matters regarding the child. . .” (Cal. Rules of Court, rule 5.560(f)(3), emphasis added.)

16. Ms. Shiota was a Court Appointed Special Advocate (CASA). (See Welf. & Inst. Code, § 101.) A CASA is a volunteer who assists the Juvenile Court with regard to children who are dependents and wards. (Welf. & Inst. Code, § 102; *In re Samuel G.* (2009) 174 Cal.App.4th 502, 507, fn. 2.) “A CASA volunteer is a person who has been recruited, screened, selected, and trained, who is being supervised and supported by a local CASA program, and who has been appointed by the juvenile court as a sworn officer of the court to help define the best interest of a child or children in juvenile court dependency and wardship proceedings.” (Cal. Rule of Court, rule 5.655(b)(3).)

Placement in an Out-of-State RTC

17. In this case, starting with a brief stay on October 26, 2007, and resuming on December 21, 2007 to the present, Student’s IEP placed him in an out-of-state residential treatment center. California law provides that an IEP team, expanded to include a representative from the county mental health department, can place a child with a serious emotional disturbance in an out-of-state residential placement. (Gov. Code, §§ 7572.5, 7572.55; Cal. Code Regs., tit. 2, § 60100, subd. (h).) In such case, the county mental health department must fund the pupil’s mental health services and the LEA must fund the pupil’s special education program. (Cal. Code Regs., tit. 2, § 60200.) The statutes and regulations that govern interagency responsibilities do not contain residency provisions that determine LEA responsibility when an IEP team places a pupil with an emotional disturbance in an out-of-state residential placement. (Gov. Code, § 7570 et seq.; Cal. Code Regs., tit. 2, § 60000, et seq.)

18. When an educational agency places a child with a disability in an out-of-state residential placement, the State initiating the placement is responsible for ensuring that the child’s IEP is developed and implemented. (*Letter to Covall, supra*; *Letter to State Directors of Special Education*, 44 IDELR 46 (OSEP March 2005).)

Age of Majority

19. In this case, Student turned 18 years of age on January 14, 2008. Under the IDEA and state law, a child with a disability has the right to receive a free appropriate public

education between the ages of three and 21. (20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101(a)(2006); Ed. Code, § 56040, subd. (a).)

20. Under federal and state law, a child with a disability is no longer eligible to receive a FAPE when he/she graduates from high school with a regular high school diploma. (34 C.F.R. § 300.102(a)(3)(i)(2006); Ed. Code, § 56026.1, subd. (a).) In this case, although Student is currently 19 years of age, he has not graduated from high school and he continues in his need for a special education program.

21. When Student turned 18, he became responsible for making educational decisions for himself. At this time, all the rights accorded to the parent under special education law transferred to Student. (Ed. Code, § 56041.5.) At the same time, the authority of the Responsible Adult to make educational decisions for Student ceased. (Welf. & Inst. Code, §§ 361, subd. (a)(1), 726, subd. (b)(1).)

22. When Student turned 18, the residency rule in Education Code section 56041, subdivision (a), became applicable in determining the LEA responsible for his special education program. Section 56041 sets forth a slightly different standard than the basic residency rule in Education Code section 48200, and provides as follows:

Except for those pupils meeting residency requirements for school attendance specified in subdivision (a) of Section 48204, and notwithstanding any other provision of law, if it is determined by the individualized education program team that special education services are required beyond the pupil's 18th birthday, the district of residence responsible for providing special education and related services to pupils between the ages of 18 and 22 years, inclusive, shall be assigned as follows:

(a) For nonconserved pupils, the last district of residence in effect prior to the pupil's attaining the age of majority shall become and remain as the responsible local educational agency, as long as and until the parent or parents relocate to a new district of residence. At that time, the new district of residence shall become the responsible local educational agency.
(emphasis added.)

Definition of "Parent"

23. The issue in these consolidated cases requires a determination of which public agency, CDE, OCDE or IUSD, is responsible for Student's placement at his out-of-state residential treatment center. The proper resolution of this issue requires an examination of three distinct time periods. The first period was Student's brief five day stay in Texas from October 26, 2007, when Student entered Daystar, to October 31, 2007, when Student returned for medical reasons to the authority of the Orange County Juvenile Court. The second period was the roughly three week period between December 21, 2007, when Student returned to Daystar, and January 13, 2008, the day before he became an adult. The third

period runs from January 14, 2008 to the present, representing the time that Student has been making educational decisions for himself.

24. As previously indicated, for the two periods in which Student attended Daystar before his eighteenth birthday, the basic residency rule in Education Code section 48200 applied in determining the LEA responsible for providing Student with a FAPE. Section 48200 assigns responsibility to the school district in which the pupil's parent resides. After Student turned 18, the age of majority residency rule in Education Code section 56401, subdivision (a), was applicable in making this determination. Section 56401, except for circumstances not applicable in this case, assigns responsibility to the LEA in which the pupil's parent resides at the time of the pupil's eighteenth birthday. In this case, the application of Education Code sections 48200 and 56401, subdivision (a), yields the same result, since Jean Shiota, Student's Responsible Adult, resided within the boundaries of the Irvine Unified School District during the scope of this case.

25. Also during the scope of this case, Education Code section 56028 defined the term "parent." In resolving the issue presented in this matter, the definition of "parent" in Education Code section 56028 applies in determining the meaning of the same term in the basic residency rule of Education Code section 48200 and the age of majority residence rule in Education Code section 56401, subdivision (a). While Education Code section 48200 is not within Part 30 of the Education Code relating to Special Education Programs, nevertheless, the definition of "parent" in Education Code section 56028 gives meaning to the term "parent" in section 48200 whenever a residency determination is made for a special education pupil. (*Union, supra*, 15 F.3d at p. 1525, fn. 1 [residency for special education coverage purposes is measured by normal standards].) The definition of "parent" in Education Code section 56028 more obviously applies to the same term in Education Code section 56401, subdivision (a), since the latter statute is within Part 30 of the Education Code. (Ed. Code, § 56020.)

26. In the last four years, the California Legislature has amended Education Code section 56028 three times. This changing landscape in the meaning of "parent" has caused confusion, especially as concerns the issue of what public agency has the responsibility to provide FAPE for a child, like Student, who is parentless and a ward of the court. The first version of Education Code section 56028 in this series was effective from October 7, 2005 to October 9, 2007. (Stats. 2005, c. 653 (A.B. 1662), § 3.) Of note, this version of Education Code section 56028 did not include in the definition of "parent" a guardian authorized to make educational decisions for the disabled child. (*Ibid.*) The second version of Education Code section 56028 in this series was effective from October 10, 2007 to December 31, 2008. (Stats. 2007, c. 454 (A.B. 1663), § 4.) This is the version of Education Code section 56028 that applies in these consolidated cases, and this Decision will refer to this version as "former Education Code section 56028." The current version of Education Code section 56028 became effective on January 1, 2009. (Stats. 2008, c. 223 (A.B. 2057), § 12.)

Former Education Code section 56028

27. Because former Education Code section 56028 is applicable to the events in these consolidated cases, the background of this statute is important. This background starts on June 1, 2005, when the United States Congress reauthorized the Individuals with Disabilities Education Act. (Pub.L. 108-446, § 302(a), (b).) The definition of “parent” in the reauthorized version of the Act included the following category of person: “a guardian (but not the State if the child is a ward of the State).” (20 U.S.C. § 1401(23)(B).)

28. Effective October 13, 2006, the United States Department of Education promulgated regulations that supplemented the 2004 reauthorization of IDEA. The regulation which defines “parent” included within the definition the following category of person: “A guardian generally authorized to act as the child’s parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State).” (34 C.F.R. § 300.30(a)(3) (2006), emphasis added.) In order to clarify circumstances when more than one person can be considered a “parent,” the regulation also specified that “If a judicial decree or order identifies a specific person or persons under paragraphs (a)(1) through (4) of this section to act as the ‘parent’ of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the ‘parent’ for purposes of this section.” (34 C.F.R. § 300.30(b)(2) (2006).)

29. In the Analysis of Comments and Changes that accompany the 2006 federal regulations, the U.S. Department of Education made clear that the term “guardian” in 34 Code of Federal Regulations, part 300.30(a)(3)(2006), has a broad meaning that includes persons who are assigned the authority to make educational decisions for a disabled child. In response to a commenter who raised an issue regarding guardian *ad litem*s, the Analysis informed as follows. “We agree that guardians with limited appointments that do not qualify them to act as a parent of the child generally, or do not authorize them to make educational decisions for the child, should not be considered to be a *parent* within the meaning of these regulations. What is important is the legal authority granted to individuals appointed by a court, and not the term used to identify them. Whether a person appointed as a guardian *ad litem* has the requisite authority to be considered a *parent* under this section depends on State law and the nature of the person’s appointment.” (71 Fed.Reg. 46566 (Aug. 14, 2006), original italics, emphasis added.) The Analysis further informed that “Section 300.30(b)(2) specifically states that if a judicial decree or order identifies a person or persons to act as the parent of a child or to make educational decisions on behalf of a child, then that person would be determined to be the parent.” (71 Fed.Reg. 46567 (Aug. 14, 2006).)

30. In amending the definition of “parent” for purposes of special education law, the California Legislature intended that former Education Code section 56028 follow the definition of “parent” in 34 Code of Federal Regulations, part 300.30 (2006). On this point, the digest notes of the Legislative Counsel provide, in pertinent part: “This bill would make various revisions generally conforming state law to federal requirements relating to, among others, pupil identification, assessment, and eligibility. . .” (West’s Cal. Legis. Service, Assem. Bill No. 1663 (2007-2008 Reg. Sess.) Stats. 2007, c. 454, p. 3043.)

31. In fact, former Education Code section 56028 tracks 34 Code of Federal Regulations, part 300.30 (2006), and provided in full as follows:

(a) “Parent” means any of the following:

(1) A biological or adoptive parent of a child.

(2) A foster parent if the authority of the biological or adoptive parents to make educational decisions on the child’s behalf specifically has been limited by court order in accordance with Section 300.30(b)(1) or (2) of Title 34 of the Code of Federal Regulations.

(3) A guardian generally authorized to act as the child’s parent, or authorized to make educational decisions for the child.

(4) An individual acting in the place of a biological or adoptive parent, including a grandparent, stepparent, or other relative, with whom the child lives, or an individual who is legally responsible for the child’s welfare.

(5) A surrogate parent who has been appointed pursuant to Section 7579.5 or 7579.6 of the Government Code, and in accordance with Section 300.519 of Title 34 of the Code of Federal Regulations and Section 1439(a)(5) of Title 20 of the United States Code.

(b)(1) Except as provided in paragraph (2), the biological or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified under subdivision (a) to act as a parent, shall be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.

(2) If a judicial decree or order identifies a specific person or persons under paragraphs (1) to (4), inclusive, of subdivision (a) to act as the “parent” of a child or to make educational decisions on behalf of a child, then that person or persons shall be determined to be the “parent” for purposes of this section.

(c) “Parent” does not include the state or any political subdivision of government.

(d) “Parent” does not include a nonpublic, nonsectarian school or agency under contract with a local educational agency for the provision of special education or designated instruction and services for a child.
(emphasis added.)

Current Education Code section 56028

32. Effective January 1, 2009, the Legislature amended former Education Code section 56028. (Stats. 2008, c. 223 (A.B. 2057), § 12.) The amendment made two changes in the former version of this statute. First, the Legislature amended section 56028, subdivision (a)(3) to read that a “parent” means “A guardian generally authorized to act as the child’s parent, or authorized to make educational decisions for the child, including a responsible adult appointed for the child in accordance with Sections 361 and 726 of the Welfare and Institutions Code.”

33. Second, the Legislature amended former Education Code section 56028, subdivision (b)(2) to read as follows: “If a judicial decree or order identifies a specific person or persons under paragraphs (1) to (4), inclusive, of subdivision (a) to act as the ‘parent’ of a child or to make educational decisions on behalf of a child, then that person or persons shall be determined to be the ‘parent’ for purposes of this part, Article 1 (commencing with section 48200) of Chapter 2 of Part 27 of Division 4 of Title 2, and Chapter 26.5 (commencing with Section 7570) of Division 7 of Title 1 of the Government Code, and Sections 361 and 726 of the Welfare and Institutions Code.”

The Legislative Counsel’s Digest

34. In this case, both OCDE and the Irvine Unified School District place great reliance upon the comments in the Legislative Counsel’s Digest that accompanied the amendment of former Education Code section 56028. (See West’s Cal. Legis. Service, Assem. Bill No. 2057 (2007-2008 Reg. Sess.) Stats. 2008, c. 223, pp. 846-848.) Regarding the changes in Education Code section 56028, the digest notes stated as follows:

(11) Existing law defines “parent” for purposes of provisions governing special education and specifies the purposes for which the definition of “parent” extends if a judicial decree or order identifies the person who is defined as a parent.

This bill would include in that definition a responsible adult appointed in accordance with specified provisions of the Welfare and Institutions Code and would broaden the purposes for which the definition of “parent” extends if a judicial decree or order identifies the person who is defined as a parent.

(*Ibid.* at p. 848.)

35. The foregoing Legislative Counsel’s Digest must be read with care. The following portions of the digest notes pertain to the amendment of former Education Code section 56028, subdivision (a)(3): “Existing law defines ‘parent’ for purposes of provisions governing special education. . . This bill would include in that definition a responsible adult appointed in accordance with specified provisions of the Welfare and Institutions Code. . .” The following portions of the digest notes pertain to the amendment of former Education Code section 56028, subdivision (b)(2): “Existing law. . . specifies the purposes for which the definition of ‘parent’ extends if a judicial decree or order identifies the person who is

defined as a parent. This bill. . . would broaden the purposes for which the definition of ‘parent’ extends if a judicial decree or order identifies the person who is defined as a parent.”

Statutory Construction: the Meaning of “Guardian”

36. In this case, from the time that Student’s IEP placed him at Daystar in October and December 2007 to the date of his eighteenth birthday, Jean Shiota, as Student’s Responsible Adult, satisfied several aspects of former Education Code section 56028. First, Ms. Shiota was “authorized to make educational decisions for the child” within the meaning of former Education Code section 56028, subdivision (a)(3). Second, Ms. Shiota derived her authority to make educational decisions for Student based upon a “judicial decree or order” within the meaning of former Education Code section 56028, subdivision (b)(3). Thus, in terms of deciding whether Ms. Shiota was Student’s legal parent, the sole question is whether the term “guardian” within the meaning of former Education Code section 56028, subdivision (a)(3), included a Responsible Adult. Despite the strenuous arguments of OCDE and IUSD to the contrary, this Decision finds that the term “guardian” in former Education Code section 56028 did include a Responsible Adult.

37. Because former Education Code section 56028 did not specify that a “guardian” included a Responsible Adult, this tribunal must engage in statutory construction. The first rule of statutory construction is that the tribunal must ascertain the intent of the Legislature in order to effectuate the purpose of the law under scrutiny. (*Carlton Browne & Co. v. Superior Court* (1989) 210 Cal.App.3d 35, 38.) In ascertaining legislative intent, the first step in the process of statutory construction is to examine the language of the statute. (*Ibid.*) If the language of the statute is clear and unambiguous, there is no need for construction and a tribunal should not engage in such practice. (*Ibid.*)

38. When engaging in statutory construction, a tribunal must give effect to every word and phrase in the statute under consideration. (*Donovan v. Poway Unified School District* (2008) 167 Cal.App.4th 567, 589 [*Donovan*].) Giving effect to every word and phrase requires the tribunal to construe the law under scrutiny in the context of both the statute as a whole and laws relating to the same matter. (*Id.* at pp. 589-590.)

39. In this case, the foregoing canons of statutory construction operate rather easily to resolve the issue of whether the term “guardian” included a Responsible Adult. According to common understanding, “guardian” means “one that guards or secures: one to whom a person or thing is committed for protection, security or preservation.” (Webster’s 3d New Internat. Dict. (1981) p. 1007.) A Responsible Adult, as the educational representative of a child who is a ward of the court, easily fits this definition. The Responsible Adult guards, secures and protects the educational rights of the child. It is well-established that the process of statutory construction can resolve with the plain meaning provided by a dictionary definition. (*Smith v. Novato Unified School District* (2007) 150 Cal.App.4th 1439, 1455.)

40. In addition, several laws “in pari materia” with former Education Code section 56028, support the conclusion that the term “guardian” included a Responsible Adult. (See *Donovan, supra*, 167 Cal.App.4th at p. 591.) First, the Legislature enacted former section 56028 to conform to the definition of “parent” contained in 34 Code of Federal Regulations, part 300.30 (2006). (Stats. 2007, c. 454 (A.B. 1663), § 4.) As indicated in the Analysis of Comments and Changes that accompanied the 2006 federal regulations, the term “guardian” had a broad meaning. (71 Fed.Reg. 46565-46568.) In particular, the Analysis made clear that, when a judicial decree or order identified a person to make educational decisions for a child with a disability, then that person was the legal parent of the child no matter what title the State used to identify the person. (71 Fed.Reg. 46566-46567.) Second, former Education Code section 56028 connected “guardian” with a person “authorized to make educational decisions for the child” and a judicial decree or order that specified a person to make such decisions. (Ed. Code, §§ 56028, subd. (a)(3), (b)(2), eff. Oct. 10, 2007.) In California, when a court issues a judicial decree or order authorizing a person to make educational decisions for a child, the result is a Responsible Adult. (Welf. & Inst. Code, §§ 361, subd. (a), 726, subd. (b).) Finally, the California Rule of Court that concerns educational representatives appointed by court order characterizes the Responsible Adult as a “parent or guardian in all educational matters regarding the child.” (Cal. Rules of Court, rule 5.560(f)(3).) In fact, Ms. Shiota was also a Court Appointed Special Advocate charged with protecting the best interests of Student, a further indicator of her status as a guardian. (Cal. Rules of Court, rule 5.655(b)(3).)

41. A tribunal engaged in statutory construction must also avoid an interpretation that will lead to absurd consequences. (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003.) Here, Student, OCDE and IUSD contend that, because state statutes fail to designate an LEA that is responsible for Student’s education, the responsibility falls by default to CDE as the State Educational Agency. (See *OCDE v. A.S.*, *supra*, 567 F.Supp.2d at p. 1170.) Within this contention is the argument that the term “guardian” in former Education Code section 56028, subdivision (a)(3), did not include a Responsible Adult. However, the parties aligned against CDE in this matter have failed to discuss the logical consequences of not finding that a “guardian” included a Responsible Adult. Former Education Code section 56028, subdivision (b)(2), mandated that, if a judicial decree or order designated a specific person described in subdivision (a)(1) to (4) of the statute, then that person “shall be determined to be the ‘parent.’” If a Responsible Adult was not a “guardian” within the meaning of former Education Code section 56028, subdivision (a)(3), that means that, for the period between October 10, 2007 and December 31, 2008, whenever a Superior Court in California appointed a Responsible Adult for a child who either received or deserved to receive a special education program, the child did not have a parent, and CDE was responsible for providing the child with an education. The consequence of this result is that CDE is now responsible for an undefined class of children for whom CDE must conduct child find, perform assessments, and formulate and implement IEPs. Quite clearly, the Legislature did not intend for CDE to assume such responsibilities which are part of the duties that an LEA must perform. In this vein, following federal law, the Legislature also clearly stated in former Education Code section 56028, subdivision (c), that “‘Parent’ does

not include the state or any political subdivision of government.” (See 20 U.S.C. § 1401(23)(B); 34 C.F.R. § 300.30(a)(3) (2006).)

Statutory Construction Contentions of OCDE and IUSD

42. Against the foregoing analysis, both OCDE and the Irvine Unified School District urge the application of canons of statutory construction that result in a determination that the term “guardian” in former Education Code section 56028, subdivision (a)(3), did not include a Responsible Adult.

The Legislative Counsel’s Digest

43. The principle contention raised by OCDE and IUSD is that the Legislative Counsel’s Digest regarding the current version of Education Code section 56028 shows that the former version of this statute did not include a Responsible Adult. OCDE and IUSD present alternative arguments based upon the digest notes, which are set forth above in Legal Conclusion, paragraph 34. On the one hand, the parties argue that the digest notes show that the Legislature “broadened” former Education Code section 56028 to include a Responsible Adult. On the other hand, the parties contend that the digest notes, stating that the current version of Education Code section 56028, subdivision (a)(3) “would include” a Responsible Adult, indicate that the Legislature added a category of person not included in the previous version of the statute.

44. The Legislative Counsel is an organization created to assist the Legislature in matters pertaining to the passing of laws. (Gov. Code, §§ 9762, 10200-10248.) In general, courts give great weight to comments in the Legislative Counsel’s Digest when engaged in statutory construction. (*Maben v. Superior Court* (1987) 255 Cal.App.2d 708, 712-713.) However, the digest notes are not part of the law, and, if a law is clear, then resort to the digest as an aide of interpretation is not proper. (*California Teachers’ Ass’n v. Governing Board* (1983) 141 Cal.App.3d 606, 614 [*California Teachers*].)

45. The contentions resting upon the Legislative Counsel’s Digest for the current version of Education Code section 56028 are not persuasive. The contention that the digest notes show that the Legislature “broadened” former Education Code section 56028 to include a Responsible Adult is a misreading of the digest. The Legislative Counsel’s Digest for the current version of Education Code section 56028 indicated that the Legislature intended to “broaden” the scope of former Education Code section 56028, subdivision (b)(2), which concerns circumstances when a judicial decree or order identifies a person authorized to make educational decisions for a child. The digest notes do not state that the term “guardian” in former Education Code section 56028, subdivision (a)(3), was broadened to include a Responsible Adult. (West’s Cal. Legis. Service, Assem. Bill No. 2057 (2007-2008 Reg. Sess.) Stats. 2008, c. 223, p. 848.) In addition, in terms of statutory construction, the primary purpose of the Legislative Counsel’s Digest is to assist in the interpretation of the law for which the digest relates. (*California Teachers, supra*, 141 Cal.App.3d at p. 613.) Here, the digest notes are helpful with regard to the current version of Education Code

section 56028, and less so with the former version of this statute. (*People v. Superior Court (Douglass)* (1979) 24 Cal.3d 428, 434 [subsequent legislation is entitled to little weight in construing earlier statutes, though it is not always without significance].) Finally, a tribunal must disregard the digest if the notes conflict with the unambiguous language of the statute under consideration. (*In re Marriage of Stephen* (1984) 156 Cal.App.3d 909, 916-917.) In this case, the term “guardian” in former Education Code section 56028, subdivision (a)(3), unambiguously included a Responsible Adult when one applies the common understanding of the term and the meaning added by the related federal regulation and state statutes pertaining to court appointments of persons to make educational decisions for children.

The Rule Against Retroactive Application of a Statute

46. Both OCDE and IUSD contend that the canon of construction which holds that a court must not give a statute retroactive application unless the Legislature otherwise mandates means that the current version of section 56028 cannot apply in this case. (See *Myers v Philip Morris Companies, Inc.* (2002) 28 Cal.4th 28, 840.) This rule of construction is not applicable. As discussed, within former Education Code section 56028, a “parent” for purposes of residency determinations included a guardian authorized by a judicial decree to make educational decisions for a child. (Ed. Code, § 56028, subd. (a)(3), (b)(2), eff. Oct. 10, 2007.) The term “guardian” was broad enough to cover a Responsible Adult. Thus, at the time that Student’s IEP placed him at Daystar in Texas, the law provided that Ms. Shiota, as Student’s Responsible Adult, was his parent. This result does not involve a retroactive application of the current version of Education Code section 56028.

Expressio Unius Est Exclusio Alterius

47. The Irvine Unified School District contends that the canon of statutory construction known as *expressio unius est exclusio alterius* applies in the case. This rule of construction presumes that when a statute designates certain persons, all omissions should be understood as exclusions. (See *Webb v. Smart Document Solutions, LLC* (9th Cir. 2007) 499 F.3d 1078, 1084.) More specifically, IUSD contends that, since former Education Code section 56028, subdivision (a)(3), only mentioned a “guardian,” then a tribunal engaged in statutory construction must presume that the exclusion of a Responsible Adult was intentional. This contention, likewise, is not persuasive. Former Education Code section 56028 designated that a “parent” included a guardian authorized to make educational decisions for a child, and that, if a judicial decree or order identified such a person to make educational decisions, then that person is the parent. (Ed. Code, § 56028, subd. (a)(3), (b)(2), eff. Oct. 10, 2007.) As indicated, when a court issues a decree authorizing a person to make educational decisions for a child, the result is the appointment of a Responsible Adult who is considered the parent or guardian for the child as regards educational matters. (Welf. & Inst. Code, §§ 361, subd. (a), 726, subd. (b); Cal. Rules of Court, rule 5.560(f)(3).) Thus, in interpreting the Legislative intent behind former Education Code section 56028, the proper presumption is to include, not exclude, a Responsible Adult within the meaning of “guardian.”

Prior OAH Decisions and the OCDE v. A.S. Case

48. Apart from contentions relating to statutory construction, OCDE argues that OAH administrative decisions regarding pupils in similar circumstances as Student had consistently held that a Responsible Adult was not considered a “parent” within the meaning of Education Code section 56028. The pertinent OAH decisions issued on or before the time that Student’s IEP placed him at Daystar are discussed below.

OAH Case Nos. 2006051042 & 2006070791

49. In *Student v. Escondido Union High School District, et al.*, consolidated OAH Case Nos. 2006051042 and 2006070791, at the time of the due process hearing in September 2006, the student was a 16-year-old tenth grade pupil who qualified for special education as a child with an emotional disturbance. In April 2004, the Orange County Juvenile Court declared the pupil a ward of the court. From May 2004 to October 2004, and from March 2005 to October 2005, the pupil resided at a licensed children’s institution located within the boundaries of the Escondido Union High School District. During these periods, Escondido UHSD was responsible for providing the pupil with a FAPE. (Ed. Code, §§ 48204, subd. (a), 56156.4.) From October 2005 to June 19, 2006, the Orange County Court placed the pupil in a juvenile court school. During this period, the Orange County Department of Education (OCDE) was responsible for providing the pupil with a FAPE. (Ed. Code, §§ 48645.2, 56150.) From January 18, 2006 to April 27, 2006, the Orange County Court appointed the pupil’s sister to act as his Responsible Adult. The sister resided in La Habra, California. The school district in which the sister resided was not a party in the consolidated cases. On April 27, 2006, the Orange County Court approved an IEP decision to place the pupil in an out-of-state residential treatment center. On June 19, 2006, the pupil left Juvenile Hall for the RTC which was located in Wyoming.

50. Based upon these facts, in an administrative decision issued on November 22, 2006, OAH determined that “OCDE remained responsible for Student’s FAPE after his release from juvenile hall.” (Decision, p. 10.) The ALJ reasoned that “Student is essentially a guardian-less, parentless ward of the Court. And although technically released, the Court and Probation have retained all but the most trivial decision-making authority related to Student (sic) education.” (*Ibid.*) The decision did not consider or decide whether a Responsible Adult is a “guardian” and therefore a “parent” within the meaning of former Education Code section 56028.

OAH Case No. 2006100472

51. In *Student v. Hemet Unified School District, et al.*, OAH Case No. 2006100472, at the time of the due process hearing in December 2006, the student was a 15-year-old ninth grade pupil who qualified for special education as a child with an emotional disturbance. The pupil’s parents resided within the boundaries of the Hemet Unified School District. In February 2006, the Orange County Department of Social Services placed the pupil at Orangewood Children’s Home (Orangewood) which is a temporary emergency

shelter. OCDE was responsible for providing the pupil with a FAPE while she attended the juvenile court school through Orangewood. (Ed. Code, §§ 48645.2, 56150.) In June 2006, the Orange County Court appointed a Responsible Adult to make educational decisions for the pupil. In July 2006, the Court approved an IEP team recommendation which placed the pupil in an out-of-state RTC. In August 2006, the pupil left Orangewood and went to the RTC which was located in Colorado.

52. Based upon these facts, in an administrative decision issued on January 29, 2007, OAH determined that Hemet Unified School District was the LEA responsible for providing the pupil with a FAPE upon her release from Orangewood and placement at the RTC in Colorado. The decision is based upon the version of Education Code section 56028 in effect from October 5, 2005 to October 9, 2007, and which defined a “parent” at subdivision (a)(1) to include “A person having legal custody of a child.” (Stats. 2005, c. 653 (A.B. 1662), § 3.) Regarding the pupil’s Responsible Adult, the decision made the following determination: “Hemet argues that because the RA has educational decision-making rights, Student’s parents are not her parents as that term is used in Education Code section 48200. . . (however) the Education Code defines ‘parent’ as a person having legal custody of a child. Student’s parents have legal custody. Hemet’s argument is not persuasive.” (Decision, p. 10, ¶ 18.) The decision in OAH Case No. 2006100472 did not discuss or determine that a Responsible Adult is a “guardian” for purposes of special education law.

OCDE v. A.S.

53. In *Student v. Orange County Department of Education, et. al.*, OAH Case No. 2006100050, at the time of the due process hearing in August 2007, the pupil was a 14-year-old pupil who qualified for special education as a child with an emotional disturbance. In March 1996, the Orange County Juvenile Court declared the pupil a dependent of the Court. In December 1999, the Court terminated the parental rights regarding the pupil. From February 2000 to March 2004, the pupil had a foster parent. In April 2003, the Orange County Court appointed the foster parent as the pupil’s “de facto parent.” (see Cal. Rules of Court, rule 5.534(e).) Starting in March 2004, the pupil followed a tortuous path which included stays in numerous different group homes, licensed children’s institutions and psychiatric hospitals, and which ultimately led to his placement in an out-of-state RTC. In July 2006, while the pupil was placed at Orangewood Children’s Center and attending a juvenile court school, OCDE, in conjunction with the Orange County Health Care Agency, held an IEP meeting and recommended placement of the pupil at a RTC in Utah. On July 10, 2009, the Court approved this recommendation and the pupil went to the RTC in Utah.

54. The pupil’s court appointed attorney brought a due process complaint that named the following respondents: OCDE, the Los Angeles Unified School District, the Charter Oaks Unified School District and CDE. In an administrative decision dated October 31, 2007, OAH determined that OCDE was responsible for providing the pupil with a FAPE at the out-of-state RTC. The ALJ found that Orangewood is a licensed children’s institution (LCI) and “Because Orangewood is a LCI, California law requires the OCDE and its SELPA to implement the IEP and fund placement at Cinnamon Hills.” (Decision, p. 10.)

55. OCDE appealed the decision in OAH Case No. 2006100050 to the United States District Court. In a reported opinion, the federal court, in ruling upon a motion to dismiss, determined that CDE was responsible for funding the pupil's special education program. (*OCDE v. A.S.*, *supra*, 567 F.Supp.2d at p. 1169.) Against the motion to dismiss, OCDE contended that California law failed to designate an entity responsible for parentless dependents placed in out-of-state residential treatment centers. (*Id.* at p. 1167.) CDE conceded that residency statutes in the state Education Code did not apply to students in the pupil's situation, and contended that the rules for determining the residence of a minor under the Welfare and Institutions Code was applicable. (*Id.* at p. 1168.) The federal court rejected this argument, finding that Welfare and Institutions Code section 17.1 "does not govern a determination of residency for purposes of deciding the entity responsible for overseeing and funding A.S.'s FAPE." (*Id.* at pp. 1168-1169.) The federal court also rejected the CDE contention that the statutory scheme that requires a LEA to participate in a SELPA determined residency in the case. (*Id.* at p. 1169.) Based upon the absence of a state statute delegating a county of residence for the pupil, and based upon the CDE's overarching responsibility to ensure that each child with a disability within California receives a free appropriate public education, the federal court ruled that the ultimate responsibility for providing the pupil's FAPE rested with CDE. (*Id.* at pp. 1169-1170.)

56. More recently, in the same case, on June 18, 2009, the federal court issued rulings on cross-motions for summary judgment. (Case No. SAVC 08-0077 JVS (MLGx) [*MSJ Minute Order*].) In deciding the motions in favor of OCDE and the school districts and against CDE, the federal court referenced its opinion in *OCDE v. A.S.*: ". . . the Court has already determined that California law fails to designate an entity responsible for 'parentless dependents' placed in out-of-state residential treatment centers. . . Accordingly, the only issue here is whether anything has transpired since that order to alter the Court's legal conclusion that CDE should be responsible for A.S.'s educational placement at Cinnamon Hills." (*MSJ Minute Order*, p. 4.) The federal court proceeded to reject an argument raised by CDE based upon the jurisdictional doctrine of exclusivity. (*Id.* at pp. 6-7.) The federal court also considered and rejected a statutory interpretation argument raised by CDE based upon the current version of Education Code section 56028. (*Id.* at pp. 7-8.) Apparently, in reliance upon the current version of section 56028, CDE contended that a de facto parent has always been included within the definition of "parent." (*Id.* at p. 8.)

57. In short, the OAH administrative decisions in effect at the time that Student's IEP placed him at Daystar do not support the contention that OAH had decided that a Responsible Adult was not a "parent" within the meaning of Education Code section 56028. Each OAH decision concerned facts that occurred before the effective date of former Education Code section 56028 on October 10, 2007. (Stats. 2007, c. 454 (A.B. 1663), § 4.) Neither the prior OAH decisions, nor the federal court opinion in *OCDE v. A.S.*, have decided the particular issue presented in this case: whether the term "guardian" within the meaning of former Education Code section 56028, subdivision (a)(3), included a Responsible Adult. In addition, the holding in the reported decision from *OCDE v. A.S.* does not apply to the determination of this case because Education Code sections 48200 and 56041, subdivision (a), through the definition of "parent" in former Education Code section 56028,

apply in determining the LEA responsible for Student's special education program. (See *OCDE v. A.S.*, *supra*, 567 F.Supp.2d at pp. 1169-1170.)

Determination of Issues:

58. The following determinations are based upon the stipulated Findings of Fact, paragraphs 1 through 32, and Conclusions of Law, paragraphs 1 through 57.

59. Upon Student's release from juvenile court school and placement in an out-of-state residential treatment center, the Irvine Unified School District was responsible for providing him with a FAPE. Before Student turned 18 years of age, his IEP placed him at Daystar during the periods of October 26 to 31, 2007, and December 21 to January 13, 2008. When Student left Otto Fischer for Daystar, the basic rule of residency in Education Code section 48200 determined the LEA responsible for providing Student's education. Section 48200 assigned this responsibility to the school district where the parent resides. Former Education Code section 56028 defined "parent" for purposes of the same term in Education Code section 48200. The definition included a guardian authorized by court order to make educational decisions for a child. The meaning of "guardian" within former Education Code section 56028, subdivision (a)(3), included a Responsible Adult. At the time, Student had a Responsible Adult who participated in educational decision making regarding Student and who resided within the boundaries of the Irvine Unified School District. Based upon the Responsible Adult's residence, IUSD was responsible for Student's education.

60. Upon Student turning 18, from January 14, 2008 to the present, the Irvine Unified School District continued to be the LEA responsible for providing Student with his special education program. When Student turned 18, the age of majority rule of residency in Education Code section 56041, subdivision (a), determined the LEA responsible for providing Student with his education. The rule of residency in section 56041, subdivision (a), assigned this responsibility to the school district where the pupil's parent resides upon the pupil's eighteenth birthday. Former Education Code section 56028 also defined "parent" for purposes of the same term in Education Code section 56041, subdivision (a). As Student's Responsible Adult, Ms. Shiota was Student's guardian, and therefore his parent, on the date that he turned 18 years of age. Because Ms. Shiota resided within the Irvine Unified School District, and continues to reside there, IUSD is again responsible for Student's education.

ORDER

From October 26, 2007 to October 31, 2007, and from December 21, 2007 to the present, the Irvine Unified School District was responsible for providing Student with a free appropriate public education.

PREVAILING PARTY

The decision in a special education administrative due process proceeding must indicate the extent to which each party prevailed on the issues heard and decided. (Ed. Code, § 56507, subd. (d).) Student prevailed in OAH Case No. 2009090943, by establishing that a public agency within California had the duty to provide him with a FAPE. The Orange County Department of Education prevailed in OAH Case No. 2009100565, by establishing that OCDE was not the Local Educational Agency responsible for providing Student with a FAPE as regards his out-of-state residential placement.

RIGHT TO APPEAL DECISION

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a)(2006); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of the Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b)(2006); Ed. Code, § 56505, subd. (k).)

Dated: November 30, 2009

/s/

TIMOTHY L. NEWLOVE
Presiding Administrative Law Judge
Office of Administrative Hearings