

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LINCOLN UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2011090998

ORDER GRANTING IN PART AND  
DENYING IN PART DISTRICT'S  
MOTION TO DISMISS

On September 27, 2011, Student, through his Father acting in pro per, filed a request for due process hearing (complaint). The complaint alleged that Student is entitled to special education and related services from the Lincoln Unified School District (LUSD) but has wrongly been expelled from its Lincoln High School after an erroneous manifestation determination made on May 31, 2011. The complaint set forth issues appropriate for both an expedited and a nonexpedited due process hearing, and requested that Student be restored to Lincoln High School. On September 28, 2011, OAH filed a scheduling order bifurcating the hearing, setting October 24, 2011, at 1:30 p.m. as the date and time for the expedited hearing, and November 11, 2011 for the nonexpedited hearing.

*Motion to Dismiss All Expedited Issues*

On October 5, 2011, the District moved to dismiss all the expedited issues from the complaint, and therefore to vacate the expedited hearing, on the ground that a Superior Court has issued a restraining order preventing Student's entry into any District School, and on the ground that Student was no longer a resident of the District. In the alternative, the District moved to dismiss specific issues relating to the expedited hearing from the complaint. On October 7, 2011, Dr. Robert Clossen filed a notice that he was acting as the advocate for Parent and Student, and on October 10, 2011, Dr. Clossen filed a declaration in opposition to the District's motion to dismiss. The motion to dismiss was orally argued on October 10, 2011, at a prehearing conference held for the expedited hearing, and at the request of the Administrative Law Judge (ALJ), the parties filed supplemental briefs on the motion on October 11, 2011.

*The Temporary Restraining Order (TRO)*

The District claims that the TRO issued by the San Joaquin County Superior Court makes any expedited hearing moot because OAH could not order Student reinstated at Lincoln High School without violating it. But the copy of the TRO furnished by the District does not support that argument.

On October 6, 2011, at the ex parte application of the District, the San Joaquin County Superior Court filed a TRO preventing Student from appearing at any District campus or event. (Civil Action No. 39-2011-00270483.) The TRO provides that “[t]his Order expires at the date and time of the hearing below: 10/24/2011 [at]10:30 a.m.” That is the date and time of the hearing in the Superior Court on the District’s motion for a preliminary injunction. By the time OAH’s expedited hearing convenes at 1:30 p.m. that day, the TRO will have expired. The TRO itself does not impair OAH’s ability to hold an expedited hearing or order Student reinstated.

However, the District’s argument will have merit if the Superior Court extends the TRO or issues a preliminary injunction affording the same relief. After his expulsion from Lincoln High School, Student was placed in an Interim Alternative Educational Setting (IAES) at the San Joaquin County Office of Education. On October 10, 2011, ALJ Adrienne Krikorian ruled that the IAES, not Lincoln High School, was Student’s stay put placement. The only additional relief an ALJ could grant Student at an expedited hearing would be to return him to Lincoln High School, and if an extant court order prohibits that, the expedited issue in Student’s complaint would be moot and the expedited hearing would be vacated.

#### *Student’s Residency*

##### *California Law*

With minor exceptions not pertinent here, a school district is obliged to educate all children between ages 6 and 18 “in which the residency of either the parent or legal guardian is located.” (Ed. Code, § 48200.) Father has custody of Student and apparently resided with Student within the District’s boundaries when Student was expelled. Student’s residency therefore turns on Father’s residency. On July 17, 2011, Father notified the District that he had become homeless and furnished a mailing address but no further information relevant to his residency.

The District first claims that Student’s complaint on its face conclusively establishes he is no longer a resident of the District. On close reading, however, the complaint is contradictory. It states that Father’s address is “9120 Thornton Rd #367” in Stockton, and Student’s address is “Antoine Court” in Stockton. The District has filed a declaration by Dr. Louise King-Bassett, its Director of Special Education, which asserts that the Antoine Court address given for Student is outside the District, and the Thornton Road address listed for Father is a “a mail drop and not a residence.” Father’s note announcing his homeless status to the District asks it to “send all mail” to the Thornton Road address, but does not state he resides there.

The District’s argument has some support in the Individuals with Disabilities in Education Act (IDEA), which requires that “the address of the residence of the child” appear in the complaint. (20 U.S.C. § 1415(b)(7)(A)(ii)(III).) An address given for Student in the complaint that is outside the District therefore implies that Student no longer resides in the District.

However, the complaint then undermines that conclusion because a few lines below Student's address, in a box that asks for "District of Residence (Required)," Father wrote "Lincoln School District." So the complaint is contradictory in its statement of Student's residency, and does not by itself furnish an adequate factual basis for deciding the question.

The District points out that residency is defined as "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." (Gov. Code, § 244, subd. (a).) But the District does not explain how that definition can be applied to a homeless person. Nor does the District address other possibly applicable subsections of the same statute. Subsection (f) of Government Code section 244 provides that a new residency cannot be established without the "union of act and intent." It is likely that Father's homelessness is unintentional. Section 244 also provides in subsection (b) that "[t]here can only be one residence," and in subsection (c) that "[a] residence cannot be lost until another is gained." The District does not claim or prove that Father has gained another residence, so he may not have lost his residency in the District.

It is therefore not possible to determine Student's residency on this record. The issue will have to be resolved at hearing. As moving party, the District has not discharged its burden of proving that Student no longer resides in the District. Its motion to dismiss all the expedited issues on that ground will be denied.

#### *The McKinney-Vento Act*

In response to the District's residency argument, Father claims that Student is entitled to education from the District 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. 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].)

#### *Motion to Dismiss Individual Expedited Issues*

The complaint alleges six issues for expedited hearing. In Issue No. 1, Student alleges "Disagreement with LUSD/IEP team's assessment that my son's behavior was or was not a manifestation of his disability." In Issue No. 2 he asserts the identical argument in different words. The District seeks dismissal of one of the two issues. Issue No. 1 can fairly be read as a claim that the District erred in determining that Student's behavior leading to his

expulsion was not a manifestation of his disability. So interpreted, it is adequately pleaded and appropriate for expedited hearing. Issue No. 2 is redundant and will be dismissed.

Issue No. 3 is alleged as follows:

Conflict of disciplinary procedures conducted by the LUSD/IEP team manifestation hearing who has been referred for special education evaluation and is removed for disciplinary infraction prior to determining eligibility. [¶] Our findings without prejudice indicate LUSD/IEP teams's had prior knowledge of my son's disabilities and other undetermined concerns due to the referral for the 26.5 that were made by LUSD.

The District characterizes this allegation as “nonsensical” and inadequate to inform it of the nature of the claim. However, when he made the allegation Father was acting in pro per. Given a generous reading, the allegation means that although Student was not deemed eligible for special education at the time of the manifestation determination on May 31, 2011, the District had a basis of knowledge at that time that Student was in fact disabled.

The District's moving papers concede that at all relevant times, including May 31, 2011, Student was already eligible for special education, and that “there is no dispute that Student is and was eligible for special education at the time of the manifestation determination on May 31, 2011.” That concession is accepted, making Issue No. 3 moot.

Student has withdrawn his Issue No. 4.

In Issue No. 5 Student alleges that the District has not given him an audio recording of the manifestation determination meeting. That issue is not appropriate for resolution at an expedited hearing and is deferred for resolution at the nonexpedited hearing.

In Issue No. 6, Student essentially alleges that he is entitled to reinstatement at Lincoln High School because it is his stay put placement. OAH has already resolved that issue by ruling that Student's stay put placement is his IAES. The issue is therefore moot.

#### ORDER

1. The District's motion to dismiss all the expedited issues in Student's complaint is denied.
2. The District's motion to dismiss expedited issues 2 through 6 is granted.
3. The expedited hearing will address only Student's first issue.

Dated: October 14, 2011

/s/

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CHARLES MARSON  
Administrative Law Judge  
Office of Administrative Hearings