

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

EAST SIDE UNION HIGH SCHOOL  
DISTRICT.

OAH Case No. 2015060578

ORDER DENYING MOTION TO  
DISMISS AND BIFURCATION

On June 3, 2015, Student filed a Request for Due Process Hearing (complaint), naming East Side Union High School District as respondent.

On June 23, 2015, District filed a motion to dismiss, or alternatively, to bifurcate the hearing on the issue of residency.

On July 3, 2015, Student filed her response to District's motion.

APPLICABLE LAW

Parents have the right to present a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) The Office of Administrative hearings has jurisdiction to hear due process claims arising under the Individuals with Disabilities Education Act. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9<sup>th</sup> Cir. 2000) 223 F.3d 1026, 1028-1029.) Although OAH has granted motions to dismiss allegations that are facially outside of OAH jurisdiction, e.g., regarding civil rights claims or Section 504 claims, OAH will not dismiss claims that have otherwise been properly pleaded.

The primary responsibility for providing a FAPE to a disabled student rests on a local educational agency. (20 U.S.C. § 1414(d)(2)(A); Ed. Code, § 48200.) As a general rule, a student's school of 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.) Education Code section 48200 provides that a child subject to compulsory full-time education shall attend public school in the school district in which the child's parent or legal guardian resides.

Under Government Code section 244, 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).) Subsection (f) of Government Code section 244 provides that a new residency cannot be established without the “union of act and intent.” 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 determination of residency under the IDEA may involve multiple factual inquiries and application of complex and interrelated federal and state law.

The McKinney-Vento Homeless Assistance Act is part of the No Child Left Behind Act, and it requires school districts to continue educating a homeless child in his “school of origin,” usually the school student attended before he became homeless. (42 U.S.C. § 11431, et seq.) A child who is homeless may continue to attend his “school of origin,” even if that school is not in the district where the child is temporarily housed. (42 U.S.C. § 11432, subd. (g)(3).) A child who resides with a parent in an emergency or traditional shelter may be considered homeless. (42 U.S.C. § 11434a, subds. (2)(A) and (2)(B)(i).) The school district in a child is staying and the “school of origin” must work collaboratively with the child’s parents to determine the appropriate educational setting for the homeless child. (42 U.S.C. § 11432, subds. (g)(3) and (g)(4).) There is an appeal process when a dispute arises between a school district and parents concerning a homeless student’s educational placement. (42 U.S.C. § 11432, subd. (g)(3)(E)(ii).) OAH does not have jurisdiction to adjudicate disputes arising under McKinney-Vento.

## DISCUSSION

Student’s complaint alleges that for the last year Student attended high school within District, and despite numerous absences for psychiatric hospitalization, District violated its child find obligation by failing to identify and refer Student for a special education assessment or to convene an individualized education program team meeting to determine if Student required special education and related services. The complaint also alleges that Student is now homeless. Student seeks a non-public school placement in a secure full-time psychiatric care facility and that District conduct evaluations of Student.

District argues that OAH does not have jurisdiction over the claims in the complaint because Student does not reside, and never resided, within the boundaries of District. District asserts that the McKinney-Vento Act applies because Student is homeless, and that OAH has no jurisdiction over claims arising under the McKinney-Vento Act. Student contends that District’s child-find duties under the IDEA are not dependent upon on a determination of residency under the McKinney-Vento Act.

District’s motion is the equivalent of a motion for summary judgment and District fails to point to any authority that would require OAH to hear and determine the equivalent of a summary adjudication of Student’s IDEA claims. Whether Student resided within the boundaries of District, and is or was homeless, are factual issues for determination at hearing. In order to prevail, Student will need to prove that District was her school district of

residence or that an alternative factual basis exists for finding that District was required by the IDEA to identify Student as a child with a disability. District will have an opportunity to raise factual defenses, and to argue that the McKinney-Vento Act bars imposition of liability for providing Student with an educational program. OAH has jurisdiction to decide all factual and legal issues relevant to Student's entitlement to a FAPE under the IDEA.

Accordingly, the motion to dismiss is denied. District's motion to bifurcate the issue of residency is also denied as premature. All motions regarding the order of evidence or limitations on the evidence at hearing shall be made at the prehearing conference or to the ALJ presiding over the due process hearing. All dates currently set in this matter are confirmed.

IT IS SO ORDERED.

DATE: July 16, 2015

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LAURIE GORSLINE  
Administrative Law Judge  
Office of Administrative Hearings