BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019030484

PARENT ON BEHALF OF STUDENT, AND

MT. DIABLO UNIFIED SCHOOL DISTRICT AND CONTRA COSTA COUNTY OFFICE OF EDUCATION.

DECISION

JULY 10, 2019

Parent on behalf of Student filed a request for due process hearing with the Office of Administrative Hearings on March 12, 2019, naming the Mt. Diablo Unified School District, the Contra Costa County Office of Education, and the Contra Costa Special Education Local Plan Area. On March 28, 2019, OAH dismissed the Contra Costa SELPA, and on April 18, 2019, granted the parties' request for a continuance.

Administrative Law Judge Charles Marson heard the matter in Concord, California, on June 4 and 5, 2019.

Martha M. Watson, Attorney at Law, represented Student, who was not present. Student's Mother was present for the first day of hearing and authorized Ms. Watson to proceed on the second day without her.

Christine A. Huntoon and Kimberly B. Shulist, Attorneys at Law, represented Mt. Diablo. William Bryan Cassin, the District's Administrator for Alternative Dispute Resolution, appeared for the District.

Sally J. Dutcher, Attorney at Law, represented the County Office of Education. Tom Scruggs, Director of Student Programs and Special Education, appeared for the County Office.

On June 5, 2019, at the parties' request, OAH continued the matter to June 26, 2019, for closing briefs. On that day the parties filed closing arguments, the record was closed, and the matter was submitted for decision.

ISSUES

The issues set forth below have been redefined in accordance with *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443. No substantive changes have been made.

1. Did Mt. Diablo and the County Office deny Student a free appropriate public education, known as a FAPE, from February 22, 2019, to the beginning of hearing by disenrolling him?
2. Did Mt. Diablo and the County Office deny Student a FAPE from February 22, 2019, to April 8, 2019 by failing to implement his individualized education program, known as an IEP, of April 27, 2018, as amended on October 30, 2018?
3. Did Mt. Diablo and the County Office deny Student a FAPE and deprive Mother of meaningful participation in the IEP process, by failing to provide legally sufficient prior written notice of their intent to disenroll Student?

SUMMARY OF DECISION

This Decision finds that Student was unable to prove by a preponderance of the evidence that he resides in the Mt. Diablo Unified School District. As a result, Student was unable to prove that Mt. Diablo owed him a FAPE, that it was required to implement his IEP after February 22, 2019, or that his Mother was entitled to prior written notice of his disenrollment.

On and after February 22, 2019, neither Mt. Diablo, nor the Contra Costa County Office of Education was obliged to provide special education or related services to Student or to educate him at all, because he could not show he lived within the District. Nor was Mt. Diablo or the County Office required to accord Mother any of the procedural protections of the Individuals with Disabilities Education Act, such as prior written notice. Mother in fact had ample notice of the District's proposed action and chose to forego the District's internal appeals procedure for residency determinations in favor of litigation.

FACTUAL FINDINGS

JURISDICTION

Student is a 12-year-old boy in the seventh grade in the Counseling and Education Program at the County-operated Floyd I. Marchus School in Concord. He is eligible for and has been receiving special education and related services in the category of emotionally disturbed. Student resides with his Mother, who states that she resides in Concord within the Mt. Diablo Unified School District. The District recently came to believe that she resides in Vallejo, within the Vallejo Unified School District.

Student is intelligent and is enthusiastic, funny, helpful, and imaginative when he can control his emotions and behavior. When he cannot, he is frequently violent, defiant, and disruptive. On April 27, 2018, in an IEP amended on October 30, 2018, Mt. Diablo and Mother agreed to place Student at the County's Marchus School, and the County Office accepted him pursuant to a memorandum of understanding with Mt. Diablo. The parties agree that Marchus is an appropriate placement for Student, and the merits of that placement are not in dispute.

Starting on February 8, 2019, Mt. Diablo began to demand proof of residency from Mother, but it was not satisfied with the information she provided. On February 22, 2019, with one day's notice to Mother, Mt. Diablo disenrolled Student from the District, and therefore from Marchus, on the ground that Student was not a resident of the District. After February 22, 2019, Mt. Diablo and the County Office stopped implementing Student's IEP. On March 28, 2019, OAH issued a stay put order requiring Mt. Diablo and the County Office to re-admit Student to Marchus and implement his IEP pending the outcome of this dispute. They did so, beginning on April 8, 2019, the first school day following spring break. Student missed 23 school days in the interim.

MOTHER'S EVIDENCE THAT SHE RESIDES IN THE DISTRICT

WITNESS TESTIMONY

Mother made the following factual assertions at hearing: She resides at a certain address in Concord with her parents, Student and his younger brother, her sister and her sister's son. She has lived at that address continually since 2008. Her ex-husband, Student's father, is incarcerated, and Mother has sole custody of Student.

Mother asserted further that the Concord home is leased by her parents, who live there with her and her children and her sister and her sister's children. Most of her

belongings and most of her children's belongings are at the Concord address. When returning from a trip, she returns to Concord. She has never lived in Vallejo or considered it her home.

Mother testified further that her fiancé lives in an apartment at a certain address in Vallejo. He is the father of her younger son, a five-year-old; the couple has been together seven years. They are not married. She visits him in Vallejo, usually accompanied by her children, two or three times a week. Sometimes she stays the night; sometimes she does not. Usually, she spends three-day weekends, "Friday through Sunday or Saturday through Monday," in Vallejo. She sometimes stays in Vallejo on school nights; she estimated that she drives Student to school from Vallejo on a school day, an average of 8 times a month. In 2018, when school was out, she spent mid-June through the end of July continually in Vallejo. Nonetheless, she testified she stayed at the Concord address "most of the time."

One other witness testified for Student. Koty Meginnes has been employed by the District since 2010, as a behavioral health specialist. He provides individual therapy to students with mental health diagnoses, including Student. Pursuant to Student's IEP, Mr. Meginnes usually provided him counseling at his school site. After Student was disenrolled, but before he was returned to Marchus by the stay put order, Mr. Meginnes and Mother arranged for Student to receive weekly therapy sessions at the Concord address. Accordingly, Mr. Meginnes provided Student three sessions of therapy on March 8, 15, and 22, 2019, at the Concord address.

DOCUMENTARY EVIDENCE

At hearing Mother introduced seven documents to prove her residency in Concord, and testified about them as follows:

- A California Identification Card issued in March 2015 showing the Concord address. Mother testified that she has only had an ID card, and not had a driver's license, since 2017. When Mother was required at hearing to produce her old license, it showed an expiration date in 2014. She explained that she has not gone to the Department of Motor Vehicles since 2014 to renew the license. The reason for this was unclear, since she has been unemployed and has had ample opportunity since 2014 to have it renewed. She stated that, even without a driver's license, she has been able to maintain automobile insurance continually since 2014. She could not recall what she informed the insurer about her license.
- The first page of a multipage letter dated November 25, 2018, from the Social Security Administration to Mother, using the Concord address and announcing an increase in Student's Supplemental Security Income payments based on "the food and shelter he receives in someone else's home or apartment for November 2018." The discussion of Student's living situation ends with "[s]ee next page," but Mother did not produce the rest of the letter even after the ALJ asked her to do so. When asked about the meaning of the statement that Student was receiving food and shelter "in someone else's home or apartment," she was unsure of the answer. The Social Security Administration once told her in a telephone call, it meant she was living with several other people. Her guess was that nothing relevant was on the second page of the letter, after "[s]ee next page"; it was probably blank. Mother admitted that if she got married or was not living at the Concord address, Student's Social Security payments would probably be decreased.
- Two Forms 1095-B from the Internal Revenue Service confirming Medi-Cal health coverage for Mother and Student for 2018, using the Concord address obtained

from Medi-Cal records as the mailing address. The evidence did not show when Mother gave Medi-Cal that address.

- An unsworn Affidavit of Residence dated February 12, 2019, on a form supplied by Mt. Diablo, in which Mother stated she "ha[s] established" Student's residence at the Concord address, and Student's grandmother stated that Student "will be residing with me." On the form Mother and Grandmother authorized home visits for verification.
- A residential lease for the Concord address signed on February 15, 2019, adding Mother as a lessee; and
- A note "To Whom It May Concern," dated February 15, 2019, from Billy Rodgers, the owner of the home at the Concord address. The author stated in the note that he has been renting the home to Mother's family since 2008 and that Mother and Student had been living there. "Now that some residency issues have been brought to my attention," Mr. Rodgers wrote, he was adding Mother and Student to the lease "as they still reside in the home." The note bears the initials "BR"; Mother testified she saw Mr. Rodgers initial the document. She explained that her sole purpose in having him add her to the lease was to convince the school district of her residence in Concord.

No witnesses or documents other than those described above supported Mother's claim of residency at hearing.

THE DISTRICT'S EVIDENCE THAT MOTHER RESIDES IN VALLEJO

VALLEJO SIGHTINGS

Mt. Diablo program specialist Erin Alter is Student's case manager. Her pattern of commuting to work changed this school year, and she began to drive from the Vallejo

area east along Highway 780 toward the Benicia-Martinez bridge and south on Highway 680 into Concord. Three times during the school year, in slow morning traffic, she saw Student's family in a car or van heading in the same direction. On two of those occasions she could see Student in the back seat.

Vallejo and Concord are on opposite sides of a tributary of the San Francisco Bay, and there are only two practical ways to travel between them by car. The shortest is to take Highway 780 east and Highway 680 south over the Benicia-Martinez Bridge. The other is to take Highway 80 south, crossing the Carquinez Bridge and then Highway 4 east; both bridges collect tolls from northbound traffic. Mother testified that she shares a Fastrak account and pays her share of the tolls, but Student did not introduce any Fastrak records in evidence.

Early on Sunday morning on January 13, 2019, Ms. Alter saw the family shopping in the Vallejo Target store; the younger child was in his pajamas. She checked Student's attendance and learned that he had 27 absences and 4 tardies. She notified her supervisor, who instructed her to request a check of Student's address from Student Services. On February 8, 2019, the District requested proof of residence from Mother, which led to her producing the documents described above.

MOTHER'S FACEBOOK ACCOUNT

Ms. Alter conducted a Google search on February 9, 2019, which led her to Mother's Facebook profile page, which is roughly equivalent to a web site's home page. Ms. Alter took a screenshot of the profile page on her telephone to preserve it, and the District introduced the photograph in evidence at hearing. On February 9, 2019, Mother's Facebook profile page contained her picture against a dark rectangular background containing the cursive script "you're like, really pretty,' her identification of

herself with her own first name and her fiancé's last name, and the statement: "Lives in Vallejo, California." A later search of Mother's Facebook and Instagram accounts, produced additional pages containing pictures of the family, repeated statements that she was married and repeated uses of her fiancé's last name as her own.

In late February or early March 2019, Mother learned that the District was investigating her social media statements. The District then noticed and downloaded from her Facebook account a changed profile page that stated: "Lives in Concord, California" and had a more innocuous background of cherry blossoms

At hearing, Mother at first could not explain these Facebook pages. She denied she had written "Lives in Vallejo" on her profile, and then stated that it was possible her Facebook account had been hacked. Her account had been hacked twice before, she explained, though on those occasions the hackers stole pictures for use in other accounts. Mother could not explain what would motivate a hacker to access her Facebook account simply to change a background and insert a statement that she lived in Vallejo.

In her testimony, Mother at first denied she had ever gone by any name other than her maiden name. When confronted with her Facebook profile and documents showing she routinely uses her fiancé's last name as her own in her email address, Mother admitted she held herself out on social media as married. She explained that she wanted to discourage unwanted contacts from men, and also for "social reasons," to avoid being found by people from her past. She also volunteered that the rectangular background with the cursive script on her February 9, 2019 Facebook profile page was not hers, that it was nowhere on her Facebook account, that she always had used a background showing cherry blossoms on Facebook, and that she had not made any changes in her Facebook pages for a year.

However, the District then produced a screenshot of another of Mother's Facebook pages, from a part of her account she thought was restricted to "friends," which also displayed the cursive script background. Mother protested what she perceived as an invasion of her privacy, but did not explain the presence of the background she had denied she used. Mother's explanations at hearing of her Facebook pages were implausible and significantly damaged her credibility as a witness.

UNANNOUNCED HOME VISITS

Sue Bratton-Pardini, Mt. Diablo's child welfare and attendance liaison, made four unannounced visits to the address in Concord to determine whether Mother actually lived there. Neither Mother nor Student was present on any of those visits. Ms. Bratton-Pardini first went to the Concord address on January 16, 2019, but no one was home. She went again on January 23, 2019, and found Student's grandmother and aunt at home. They stated Mother and Student were not there, because Mother had to go to the emergency room for medical reasons and Student went with her. Mother testified the emergency room was in Vallejo.

Ms. Bratton-Pardini visited for a third time on May 23, 2019, at about 6:45 a.m. and was told by the grandmother that neither Mother nor Student was present, because Mother was at her boyfriend's house. Ms. Bratton-Pardini testified that after three unannounced home visits, she usually knew whether a student lived within the District.

Nonetheless, Ms. Bratton-Pardini conducted a fourth home visit on May 28, 2019, arriving at the Concord address at about 6:30 a.m. She watched the house until 7:00 a.m. and saw no one leave it. She went to the door and found grandmother and the aunt again. Grandmother stated that Ms. Bratton-Pardini had "just missed" Mother, who had to leave early because her boyfriend was having car trouble. Ms. Bratton-Pardini

mentioned she had been outside for a half hour and saw no one leave. The aunt then stated that Mother and Student "left about 30 minutes ago."

ARRIVALS, DEPARTURES, ABSENCES, AND RUMORS AT SCHOOL

Kehl Mandt is a special education teacher at Marchus, and Student is in his class this school year. He sometimes saw Student dropped off for school, and frequently saw him picked up. Usually, Mr. Mandt testified, Student was picked up by his family, including Mother, his younger brother, and Mother's fiancé. He saw Student being picked up about 20 times.

Twice, Mr. Mandt noticed, Student arrived at school with an extra bag and stated he was going to spend the night at his grandmother's house. On one of those occasions, he was also carrying a drone, which he was eager to show his grandmother.

Mr. Mandt was concerned about Student's poor attendance during the 2018-2019 school year. Between September 2019 and May 2019, excluding two hospitalizations, Student had 20 excused absences, 14 unexcused absences, and 7 tardies. Mr. Mandt noticed a pattern: Student almost always missed school on Wednesdays, which was a "minimum" day that ended at 12:30 p.m. He repeatedly asked Mother about the Wednesday absences but received no satisfactory explanation.

Several district and county witnesses testified that rumors were going around Marchus, that Student had told people he lived "over the bridge" in Vallejo and that Mother repeatedly was heard to express concern about bridge tolls. However, this information was hearsay and frequently multiple hearsay; no witness claimed to have personally heard Student or Mother make these statements. The rumors are thus of limited probative value; at best they supplement and explain the direct testimony of Ms. Alter, Ms. Pardini, and Mr. Mandt.

FALSE RESIDENCY INFORMATION CONCERNING YOUNGER CHILD

Student's younger brother, the child of Mother and her fiancé, is five years old and is scheduled to enter kindergarten in Mt. Diablo in the fall. Mt. Diablo accepts enrollment information on an online system called Aeries. Parents are given an account and access to the system and asked to fill out a lengthy form online. The District cannot make data entries on the form; only parents can. Parents are instructed to print the form out, take it to school, and use their accounts to make any necessary changes while at the school.

Early in 2019, Mother completed the enrollment form online to enroll Student's younger brother in the District. In the area entitled "Parent Information," she was asked whether the child's father lived with him and typed in "yes." She gave the father's correct name, but wrote that his mailing address was the address in Concord, not the one in Vallejo where he actually lived. She declined to identify his employer – though he is employed – and wrote instead that all mail to him should be sent to the Concord address.

Mother's representation that the father of Student's younger brother lived at the Concord address was false. Mother's complaint alleged, Mother admitted, and the evidence showed that the fiancé lives at the Vallejo address. And the representation that Mother's fiancé lives with his son, while probably true, contradicted Mother's testimony at hearing, that the younger child lives with her and sleeps in her bedroom in Concord. It also contradicted her other testimony, that she and her fiancé share the presence or custody of the child on a "50-50" basis.

Mother's explanations of these entries in the younger brother's enrollment form changed over time and were unpersuasive. Before her request for due process was filed

and while she was still attempting to persuade District staff that she lived in Concord, she told District Administrative Secretary Sally Quintana that the data entries about her fiancé's residence and custody of the child were "a mistake." At hearing, however, she denied she had made those data entries. She stated that she left them blank, that someone else must have filled them out, and that after Student was disenrolled she could not access the Aeries system to change them. She did not explain how she could make such a mistake about the residence of her fiancé and the father of her child, why she would leave that information blank, how someone else could have accessed her enrollment form and altered the father's residency data, or why anyone would do that. Ms. Quintana established without contradiction that the District cannot make or change entries in the Aeries enrollment forms; any changes must be made by parents through their accounts. The evidence showed that only Mother could have filled out the form with false residency information concerning the younger child's father. Her changing explanations of these false entries and her denials at hearing were not believable and further damaged her credibility.

PRIOR NOTICE OF DISENROLLMENT

On February 8, 2019, Ms. Quintana notified Mother by email that the District did not believe she resided at the Concord address, because neither she nor Student could be found there during home visits. The email gave Mother a week to provide evidence of residence. In response, Mother brought to the District the documents described above: the 2015 identification card; the first page of the Social Security Administration letter; the Internal Revenue Service confirmations of Medi-Cal coverage; and the revised lease and the note concerning the lease from Mr. Rogers, the landlord. She and grandmother also visited the District and executed the affidavit of residence described above.

In mid-February 2019, Ms. Alter searched an online telephone directory for the fiancé's address and found that he lived at the Vallejo address. Ms. Quintana called Mother and asked her to identify those who lived at the Vallejo address. Mother asked how she had obtained that address, "got quiet" and then admitted that her fiancé lived there, and that she stayed at the Vallejo address more than once a week. Ms. Quintana knew that this contradicted Mother's statement on the kindergarten admission form that the fiancé lived in Concord. She asked Mother about that contradiction; Mother responded that the information on the kindergarten form was a mistake, an error. Ms. Quintana informed Mother that the District intended to disenroll Student and gave her the contact information of the Director of Special Education and the Director of Student Services, who could explain to her the process of appealing that decision within the District.

On February 21, 2019, Ms. Quintana also notified Mother by email, that Student would be disenrolled from the District after February 22, 2019, because the District's investigation had shown that she and Student lived at the Vallejo address. Mother protested this determination in writing the same day and stated she was referring the matter to her attorney.

During this period, Mother contacted both the people Ms. Quintana had identified as sources of information about appealing the decision, presented what documentation she had to the District, spoke to other District staff, and made many calls to the principal of Marchus, pleading her case for residency in Concord. Mother retained a special education attorney. She did not pursue the District's administrative appeals process. Instead, Student filed requests for a due process hearing and a stay put order.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

In the discussion herein, unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below. Further, all references in this discussion to the Code of Federal Regulations are to the 2006 version.

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The Individuals with Disabilities Education Act is often referred to as the "IDEA." The main purposes of the IDEA are:

1. 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 and prepare them for further education, employment and independent living, and
2. To ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services"

are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel. This statement describes the child's needs, academic and functional goals related to those needs. It also provides a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690], the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.)

The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be

aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

In *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000; 197 L.Ed.2d 335] (*Endrew F.*), the Supreme Court held that a child's "educational program must be appropriately ambitious in light of his circumstances." "[E]very child should have a chance to meet challenging objectives." (*Ibid.*) *Endrew F.* explained that "[t]his standard is markedly more demanding than the 'merely more than de minimis' test …[¶]…The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (*Id.* at pp. 1000-1001.) However, the Supreme Court did not define a new FAPE standard in *Endrew F.*, as the Court was "[m]indful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since *Rowley* was decided, we decline to interpret the FAPE provision in a manner so plainly at odds with the Court's analysis in that case." (*Id.* at p. 1001.) The Court noted that "[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." (*Id.* at p. 999 [italics in original].) The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F. (E.F. v. Newport Mesa Unified Sch. Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501,

56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Student requested the hearing in this matter, and therefore Student had the burden of proof on the issues.

ISSUE NO. 1: DID MT. DIABLO AND THE COUNTY OFFICE DENY STUDENT A FAPE FROM FEBRUARY 22, 2019, TO THE BEGINNING HEARING BY DISENROLLING HIM?

Under the IDEA, a local education agency is charged with "providing for the education of children with disabilities within its jurisdiction." (20 U.S.C. § 1413(a)(1).) California law requires public school students to attend a school in the school district "in which the residency of either the parent or legal guardian is located," unless exceptions, such as approval of an interdistrict transfer, apply. (Ed. Code, § 48200; *Katz v. Los Gatos-Saratoga Joint Union High Sch. Dist.* (2004) 117 Cal.App.4th 47, 57.) That school district usually becomes the local education agency responsible for providing an eligible student a FAPE. (20 U.S.C. § 1401(19); 34 C.F.R. § 300.28(a); Ed. Code, § 56026.3.)

A residency determination for the purpose of the IDEA is made under state law and is no different from a residency determination in other types of cases. (*Union Sch. Dist. v. Smith* (1994) 15 F.3d 1519, 1525.) "The residence of the parent with whom an unmarried minor child maintains his or her place of abode" is the residence of that child. (Gov. Code, § 244, subd. (d).) Mother's residency therefore determines Student's residency.

Mother's residency is determined as follows:

1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which she returns in seasons of repose;
2. There can only be one residence;
3. A residence cannot be lost until another is gained; and
4. The residence can be changed only by the union of act and intent.

(Gov. Code, § 244.)

By these standards, Student did not prove by a preponderance of evidence that Mother is a resident of Concord. The documentary evidence introduced by Student was sparse, mostly not current, and unpersuasive.

- The state identity card produced by Student was issued in 2015. The absence of any driver's license in the record suggests the possible existence of a driver's license that does not bear the Concord address. Mother's testimony that she has been driving illegally since 2015, because she has not found the time to go to the Department of Motor Vehicles, even though she is not employed, was not plausible. This was especially so since she has been able to maintain automobile insurance.
- The November 25, 2018 letter from the Social Security Administration does use the Concord address, but there was no evidence showing when the agency obtained that address. Its discussion of Student's living situation as being "in someone else's home or apartment" is mysterious and is apparently continued on the next page of the letter, which Mother would not or could not produce.

- The IRS Forms 1095-B showed that Mother and Student have Medi-Cal coverage and used the Concord address as a mailing address, but the evidence did not show when the agency obtained that address.
- The unsworn Affidavit of Residence dated February 12, 2019, in which Mother stated she "ha[s] established" Student's residence at the Concord address, and Student's grandmother stated that Student "will be residing with me," was executed after this dispute arose. The two statements do constitute some evidence of residency in Concord. However, Mother's statement was conclusory and vague as to time, and Grandmother's statement referred to a living situation in the future. Both statements depended for their persuasive value on the credibility of the signators. Grandmother did not testify, and Mother's credibility was poor for reasons expressed throughout this Decision.
- Mother's act of having her name added to the lease for the Concord address after the dispute arose, was admittedly done for the sole purpose of supporting her claim of residence. Her landlord could not be asked how he concluded that Mother resided there, because he did not testify.

Importantly, Mother's documentary showing was remarkably weak, because it did not contain the type of documentation someone living at the same address for eight years could be expected to have. Mother produced no bank or credit card statements – although she claimed to have them – or other financial information, or any cell phone bills or location information. She introduced no voter registration information or tax returns. The record showed she and Student had relationships with numerous governmental and private entities, including Medi-Care, the County's mental health agency, and the nonprofit Therapeutic Behavior Services, but Student did not introduce any documents from them. Most striking was Student's failure to produce Mother's

Fastrak records, which would have shown the days and times when her car traveled north toward Vallejo.

Although the technical laws of evidence do not apply to these proceedings (see Cal. Code Regs., tit. 5, § 3082, subd. (b)), those laws suggest by analogy what common sense confirms: if a party having important evidence concerning the matter in dispute does not produce it, or produces weak evidence when strong evidence is available, it can fairly be inferred that the evidence not produced would not have helped the party who does not produce it. (See, e.g., Evid. Code, § 412; *Hardesty v. Sacramento Metropolitan Air Quality Management Dist*. (2011) 202 Cal.App.4th 404, 425; *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1537; *Largey v. Intrastate Radiotelephone, Inc*. (1982) 136 Cal.App.3d 660, 672.) That negative inference is appropriate here. Student assumed the burden of proof of Mother's residency by filing his request for due process hearing and can fairly be assumed to have produced all the significant evidence he was able to produce in support of his claim.

Student's proof through witnesses was also remarkably weak. Mr. Meginnes's testimony that he arranged three therapy sessions with Mother at the Concord address after Student was disenrolled proved little. At the time, Mother was disputing her residence with Mr. Meginnes's employer and preparing and filing litigation. It was highly unlikely she would invite Mr. Meginnes, a Concord-based therapist, to Vallejo, no matter where she actually lived.

Mother was Student's only other witness and her claim of residency depends primarily on her credibility. That suffered from her statement in Facebook that she lived in Vallejo and subsequent unpersuasive testimony denying the statement. It also suffered from her false statement on the younger son's kindergarten application that her fiancé lived with her and that child in Concord, and her shifting and unpersuasive

explanations of that statement. The latter statement was most damaging because it demonstrated a willingness to falsify residency information in order to obtain educational services from Mt. Diablo. In addition, though Mother was advised on the first day of hearing that she would be subject to recall, she did not appear on the second day.

Even taken at face value, Mother's testimony provided substantial support for Mt. Diablo's claim that she lives in Vallejo. She testified that she generally spends three-day weekends there and drives Student to school about twice a week from there. When coupled with Student's failure to attend school on Wednesdays, those statements show that Mother spends most of her time in Vallejo. Her weekends are periods of repose, during which she is not required to be elsewhere (Gov. Code, § 244, subd. (a)), and she spends them in Vallejo. So is the school's summer vacation, which last summer she spent almost entirely in Vallejo. These actions show that she intends to reside in Vallejo, and does so.

Student failed to produce several witnesses with direct personal knowledge of the facts surrounding Mother's residency. Mother's parents, sister, and the sister's son live at the Concord address and could have testified about the frequency of her stays there, but they did not. Student himself could have provided valuable evidence of his and Mother's residence, but he did not testify. Mother's fiancé in Vallejo also had personal knowledge of the frequency of her stays there, and Student did not produce him as a witness. The District served a subpoena for testimony on the fiancé, but he did not comply with it and did not appear. Since all those witnesses were available to Student, it is fair to assume that their testimony would have been adverse to Student if they had appeared.

For the above reasons, Student did not show by a preponderance of evidence that he resides within the Mt. Diablo Unified School District.

ISSUE NO. 2: DID MT. DIABLO AND THE COUNTY OFFICE OF EDUCATION DENY STUDENT A FAPE FROM FEBRUARY 22, 2019, TO APRIL 8, 2019, BY FAILING TO IMPLEMENT HIS IEP OF APRIL 27, 2018, AS AMENDED ON OCTOBER 30, 2018?

Mt. Diablo and the County Office did not implement Student's IEP between February 22, 2019, and April 8, 2019. After April 8 they implemented it pursuant to OAH's stay put order. Since Student could not prove that his residence was within the District, Mt. Diablo had no obligation to educate him and therefore no obligation to implement his IEP. (Ed. Code, § 48200.) Neither did the County Office, as its obligation was based on a memorandum of understanding with Mt. Diablo and was entirely dependent on Mt. Diablo's obligation. Therefore, neither agency denied Student a FAPE.

ISSUE NO. 3: DID MT. DIABLO AND THE COUNTY OFFICE DENY STUDENT A FAPE AND DEPRIVE MOTHER OF MEANINGFUL PARTICIPATION IN THE IEP PROCESS BY FAILING TO PROVIDE LEGALLY SUFFICIENT PRIOR WRITTEN NOTICE OF THEIR INTENT TO DISENROLL STUDENT?

A district must provide to parents prior written notice whenever it proposes or refuses "to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child." (34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).) The notice must include;

1. A description of the action proposed or refused by the agency;
2. An explanation of why the agency made the decision;
3. A description of each evaluation procedure, assessment, record, or report on which the decision was based;
4. A reminder of parents' procedural safeguards;
5. Sources for assistance;
6. The options considered and the reasons for rejecting the others; and
7. A description of other factors relevant to the decision.

(34 C.F.R. § 300.503(b); Ed. Code, § 56500.4, subd. (b).)

The purpose of the prior written notice requirement is to ensure that parents receive sufficient information about the proposed placement change to reach an informed conclusion about whether it will provide an appropriate education. (*Smith v. Squillacote* (D.D.C. 1992) 800 F.Supp. 993, 998.) The notice must be given "a reasonable time before" the district actually changes the student's placement or the provision of a FAPE to the student. (34 C.F.R. § 300.503(a).) This is to ensure that "parents have enough time to assess the change and voice their objections or otherwise respond before the change takes effect." (*P.N. v. Greco* (D.N.J. 2003) 282 F.Supp.2d 221, 235; *Letter to Chandler* (OSEP 2012) 59 IDELR 110.)

Student's claims of inadequate notice primarily concern Mt. Diablo's local procedure for disenrollment appeals. Student argues in his closing brief that by administratively rejecting Mother's documentation and explanations, Mt. Diablo violated Education Code section 48204.1, subdivision (a), which requires that a school district shall accept from the parent of a student "reasonable evidence that the pupil meets the residency requirements…." Since violation of Mt. Diablo's local procedures for disenrollment appeals was neither alleged in Student's complaint, nor listed as an issue

in the Order Following Prehearing Conference, that claim cannot be adjudicated here. (20 U.S.C. § 1415(f)(3)(B).)

Even if the argument were available to Student, it would fail. Subdivision (c) of Education Code section 48204.1 authorizes a district whose employee reasonably believes that a parent has provided "false or unreliable" evidence of residency may make "reasonable efforts" to determine whether the student is actually a resident. Mt. Diablo reasonably found that Mother's documents and representations were at minimum unreliable and was authorized to investigate further.

Section 48204.2, subdivision (a) of the Education Code governs investigations of residency and requires that a district must adopt a "policy regarding the investigation of a pupil…." The policy must, among other things, require the investigating district employee to be able to identify "specific, articulable facts" that support a belief that the student is not a resident, specify the basis for a determination of non-residency, and provide a process to appeal that determination. The burden of persuasion is on the appealing party. (Ed. Code, § 48204.2, subds. (b)(1), (5).)

The two statutes, read together, show an intention to allow a district to reject a parent's claim of residency, make an adverse determination, and provide an avenue of appeal. Mt. Diablo has a procedure for parents to appeal adverse residency decisions, although its details were not introduced in evidence. Ms. Quintana and other District staff members explained to Mother most of the reasons why they thought she was not a resident and referred her to two administrators who could explain the appeals process. Mother contacted them, though she did not pursue the internal procedures for contesting the determination. She cannot now be heard to complain that she did not learn the facts she would have learned in that process.

There are, apparently, no judicial decisions addressing whether the prior written notice requirement applies to a disenrollment due to nonresidency. On the one hand, the literal language of the federal regulation – that notice must be given of a proposed change of placement – would seem on its face to apply, as disenrollment is a change of placement. On the other hand, disenrollment is not a change of "educational placement" (34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a)) for which the prior written notice requirement was designed; it is a termination of any placement on the basis that the disenrolling district has no obligation to educate the student or provide him a FAPE. It applies equally to all students. Disenrollment cannot deprive a parent of participation in the IEP process because it is not a part of that process, nor is it amenable to decision by an IEP team. Residency is not even primarily an educational issue; it is a legal status that governs a wide variety of matters such as taxation, voting, the right to hold public office, and the like.

If Mt. Diablo did not owe Student a FAPE during the time period examined, it is not logical to conclude that it owed his parent prior written notice. In *Rowley, supra*, 458 U.S. at pp. 205-206, the Supreme Court held that the procedural protections of the IDEA are an integral part of a FAPE. (See also 20 U.S.C. § 1415(b)(3).) If Mt. Diablo was not obliged to provide Student a FAPE, it follows it was not obliged to provide him any element of a FAPE, including prior written notice. Thus, the more reasonable interpretation is that the prior written notice requirement does not apply to disenrollment for nonresidency.

However, this interpretation is not settled. A federal court might well conclude, in light of the broad remedial purposes of the IDEA, that the prior written notice requirement applies to disenrollment for nonresidency, as disenrollment undeniably changes a student's placement. It has been held that one purpose of the prior written

notice requirement is simply to allow a parent time to file a request for due process and seek a stay put order. (*P.N. v. Greco, supra,* 282 F.Supp.2d at p. 235.)

If federal courts were to interpret the prior written notice requirement as applicable in these circumstances, then Mt. Diablo technically violated the IDEA by failing to give Mother prior written notice of its disenrollment of Student. However, Mt. Diablo's possible failure to comply with the prior written notice requirement did not deny Student a FAPE or deprive Mother of any participatory right to which she was entitled. The violation, if there was one, was harmless for two separate reasons. First, Mt. Diablo's informal procedures gave Mother substantially the same opportunities that prior written notice would have provided. She had fourteen days' warning of the school's position, starting on February 8, 2019. In emails and telephone calls, she learned most of the reasoning behind the District's suspicions. Some of the District's reasons – for example, the Facebook page – were not mentioned in those exchanges, but Mother would likely have learned of them if she had pursued the internal appeal process that was offered to her.

Student argues that because Mother did not get prior written notice, she did not get notice of her procedural rights and therefore did not know how to challenge the disenrollment. This confuses the usual IDEA notice of special education procedural rights, with a notice of procedures for contesting a residency determination in the District. The former is standardized across districts and limited to special education rights. (See https://www2.ed.gov/policy/speced/guid/idea/modelform-safeguards.doc, as of July 3, 2019.) The latter is particular to Mt. Diablo and not related to special education. Nothing in an IDEA notice of procedural rights would have informed Mother about her rights in Mt. Diablo's process for disenrollment, which is local and not part of special education law. Mother had several times received the IDEA notice, was familiar

with it and was at the time receiving the advice of a special education attorney, so her claim not to know her IDEA rights is not persuasive.

Moreover, the due process hearing in this matter ameliorated any adverse effects the absence of formal prior written notice might have had. Student was disenrolled on February 22, 2019. The complaint in this matter was filed on March 12, a stay put motion was made on March 19, and a stay put order issued on March 28, 2019. Pursuant to the stay put order, Student was put back in the school of Mother's choice while the litigation proceeded, and she had ample opportunity to present her case at hearing, if not in Mt. Diablo's internal process.

The evidence at hearing also revealed that there was nothing additional that Mother could have said or done with prior written notice to convince Mr. Diablo that she resided in the District. She made essentially the same showing at hearing as she did before District staff, and it was unpersuasive in both forums.

A second and more fundamental reason that any procedural error was harmless, is that when a student is not eligible for special education, procedural violations of the IDEA and related laws are by definition harmless error.

In *R.B. v. Napa Valley Unified Sch. Dist*. (2007) 496 F.3d 932, 940-941, the Ninth Circuit held that the school district had violated the IDEA by not having a special education teacher or provider on the IEP team. But it declined to afford any relief for the violation because it also found that the student was not eligible for special education and services: "Because [Student] is substantively ineligible for IDEA relief, we hold that the procedural error in the composition of her IEP team was harmless." (*Id.* at p. 947.)

Similarly, in *S.B. v. San Mateo Foster City Sch. Dist*. (N.D.Cal., April 11, 2017, No. 16-cv-01789-EDL) 2017 WL 4856868, the District Court affirmed an ALJ's findings that, although the school district had violated the IDEA's child find requirements and its requirement that parents be given a copy of their rights and procedural safeguards, the violations were harmless errors because the student was not eligible for special education. (*Id.* at pp. 11, 18.) The District Court read *R.B. v. Napa, supra*, as holding: "[W]hen a student is not eligible for IDEA opportunities, she cannot lose those opportunities because of a procedural violation. [Citation.]." (*S.B. v. San Mateo Foster City Sch. Dist., supra,* at p. 18.)

This case is different in that Student was not eligible for special education in a particular district, rather than generally, but that should not require an opposite result. When it disenrolled Student, Mt. Diablo had no obligation to provide him a FAPE, or any education at all, because he did not reside in the District. If Mt. Diablo committed procedural error in failing to provide prior written notice, the error had no effect on any educational or participatory opportunities protected by the IDEA. Student lost 23 school days of instruction by Mt. Diablo and the County Office in between his disenrollment and the stay put order, but those were not instructional days to which he was legally entitled.

The County Office educated Student pursuant to a memorandum of understanding with Mr. Diablo, and its potential liability in this matter was wholly derivative of Mt. Diablo's potential liability. Mt. Diablo placed Student at Marchus and financed his education there; it was entitled to withdraw that commitment at any time. Mt. Diablo instructed the County Office to cease serving Student until the stay put order was issued, and the County Office obeyed. This Decision finds that neither Mt. Diablo nor the County Office has any liability to Student.

ORDER

1. Student's requests for relief are denied.
2. The stay put order issued March 28, 2019, is vacated.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing Decision must indicate the extent to which each party has prevailed on each issue heard and decided. Mt. Diablo and the County Office prevailed on all three issues decided.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Charles Marson
Administrative Law Judge
Office of Administrative Hearings