BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. ELK GROVE UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2013020224 ORDER FOR SUPPLEMENTAL BRIEFING CONCERNING STUDENT'S MOTION FOR STAY PUT AND DISTRICT'S MOTION TO DISMISS

On February 7, 2013, Student filed a Request for Due Process Hearing (complaint), naming Elk Grove Unified School District (EGUSD) and Berkeley Unified School District (BUSD) as the respondents.

Together with Student's complaint, Student filed a motion for stay put. On February 11, 2013, BUSD filed an opposition to Student's motion for stay put and a motion requesting dismissal of BUSD. In its motion, BUSD contended that it is not legally required to provide Student with a free appropriate public education (FAPE).

On February 19, 2013, the Office of Administrative Hearings (OAH) granted BUSD's Motion to Dismiss[1] and denied Student's motion for stay put without prejudice. On February 15, 2013, EGUSD filed an opposition to Student's motion for stay put.

[1] In granting the dismissal, OAH accepted BUSD's contention that Student has been placed in a licensed children's institution (LCI) outside the boundaries of the BUSD *by a public agency that is not an educational agency*, and therefore BUSD is not responsible for the education of the Student during the pendency of Student's placement in the LCI. This reasoning is based on the following:

> Where individuals with exceptional needs are placed in a licensed children's institution (LCI) **by a public agency, other than an educational agency**, the "special education local plan area shall be responsible for providing appropriate education to individuals with exceptional needs residing in licensed children's institutions … located in the geographical area covered by the local plan. [Emphasis Added]

(Ed. Code §§ 56155, 56156.4(a).)

On February March 21, 2013, Student filed an amended motion for stay put. Pursuant to OAH's order dated March 26, 2013, granting District request for extension of time, EGUSD timely filed its opposition to student's amended motion for stay put on April 5, 2013. In addition to the opposition, on April 8, 2013,[2] EGUSD also filed a motion to dismiss Student's case. In its request for dismissal, supported by sworn declarations by Cathy S. Holmes (Attorney for EGUSD), Lauren M. Strickroth (Attorney working with Ms. Holmes for EGUSD), and Phyllis Ramsey (Program Specialist for EGUSD), EGUSD contends that Student was privately and unilaterally placed by Student's parents at Milhous Children's Services (Milhous), an LCI located within the EGUSD's SEPLA boundaries and as such, Student has not been placed by "a public agency other than an educational agency."

APPLICABLE LAW

The Individuals with Disabilities Education Act (IDEA) is designed to "ensure that all children with disabilities have available to them a free appropriate public education" (FAPE). (20 U.S.C. § 1400 (d)(1)(A),(B), and (C); see also Educ. Code, § 56000.)

The purpose of the IDEA (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education," and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) A party has 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) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

Until due process hearing procedures are complete, a special education student is entitled to remain in his or her current educational placement, unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006) Ed. Code, § 56505 subd. (d).) This is referred to as "stay put." For purposes of stay put, the current educational placement is typically the placement called for in the student's individualized education

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[2] EGUSD's motion to dismiss was received by OAH after the close of business on April 5, 2013 and thus was deemed filed on the next business day (April 8, 2013).

program (IEP), which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

When individuals with exceptional needs are placed in a licensed children's institution (LCI) by a public agency, other than an educational agency, the "special education local plan area (SELPA) shall be responsible for providing appropriate education to individuals with exceptional needs residing in licensed children's institutions . . . located in the geographical area covered by the local plan." (Ed. Code §§ 56155, 56156.4(a).)

A "licensed children's institution" means a residential facility that is licensed by the state, or other public agency having delegated authority by contract with the state to license, to provide nonmedical care to children, including, but not limited to, individuals with exceptional needs. "Licensed children's institution" includes a group home as defined by subdivision (g) of Section 80001 of Title 22 of the California Code of Regulations. (Ed. Code § 56155.5.) "Group home" means any facility of any capacity which provides 24-hour care and supervision to children in a structured environment with such services provided at least in part by staff employed by the licensee. (Cal. Code Regs., tit. 22, § 8001(g).)

DISCUSSION

Based on the available record, Student is a 14 year old student, eligible for special education, who was adopted and eligible for the Adoption Assistance Program (AAP). Student's mother resides within the geographical boundaries of BUSD, but Student is currently placed at Milhous Children's Services (Milhous), an LCI, located within the geographical area covered by the EGUSD's SEPLA.

Student's placement at Milhouse is through an agreement between Alameda County Social Services Agency, Adoption Assistance Program (Alameda Adoption) and Student's mother. Based on the agreement, Alameda Adoption funds Student's placement at Milhous, and it appears that the funding is limited to Student's non-education costs only. Alameda Adoption pays the funds directly to Milhous. Mother contends that this arrangement is tantamount to "**placement by a public agency other than an educational agency,"** as anticipated under Education Code sections 56155 and 56156.4, subdivision (a).

EGUSD disagrees with this conclusion, and contends that Student was privately and unilaterally placed by mother at Milhous. Thus, EGUSD argues that BUSD, Student's mother's district of residence, is the educational agency responsible for the education of Student while she resides at Milhous. EGUSD seeks a dismissal of this matter. In support of its motion to dismiss, EGUSD submitted sworn declarations and several documents regarding the legal and operational framework for AAP, the Alameda Adoption program, and provided specific facts regarding the relationship between the Alameda Adoption, Milhous and Student's mother, as relevant to this case.

The totality of the information provided raises issues as to whether Student was in fact placed at Milhous by a public agency other than an educational agency as anticipated under Education Code sections 56155 and 56156.4, subdivision (a), or whether Student was privately and unilaterally placed by her mother.[3]

The issue to be resolved is a factual one. That is, whether Student was privately and unilaterally placed at Milhous, or placed by a public agency other than an educational agency pursuant to Education Code sections 56155 and 56156.4, subdivision (a). If Student is privately placed, BUSD may be the educational agency responsible for the education of Student while she resides at Milhous under the Alameda Adoption agreement, as BUSD is the district of residence of the parent of Student. Additional information is needed in order to resolve the factual disputes in this case, and determined the issue of who placed Student at Milhous. Is this a public agency other than an educational agency placement pursuant to Education Code sections 56155 and 56156.4, subdivision (a), or a private unilateral placement by mother through a funding arrangement between Alameda Adoption and Milhous? Both parties are required to address these questions, through sworn declaration(s) and supporting documentation.

ORDER

1. On or before 5:00 P.M. on April 17, 2013, Student is ordered to file with OAH a written reply to EGUSD's opposition to Student's amended motion for stay put and motion to dismiss.

2. The written reply shall be accompanied by sworn declaration(s) regarding relevant facts, legal authorities and/or documentation necessary to resolve the question of who placed Student at Milhous.

3. The reply shall address the specific issues raised in EGUSD's opposition to Student's amended motion for stay put and motion to dismiss, including the following:

a. Whether Student was privately and unilateral placed at Milhous by Student's mother pursuant to the funding agreement between Mother, Milhous and Alameda Adoption?

b. Whether the funding agreement/arrangement creates a public agency placement under Education Code sections 56155 and 56156.4, subdivision (a)?

c. Whether the Alameda County Social Services Agency/AAP considers itself the placing agency under Education Code sections 56155 and 56156.4,

[3] Based on sworn statements by the declarant, Alameda Adoption has declined to accept responsibility as the "placing agency" for Student at Milhous, and might have represented to EGUSD that Student was not placed at Milhous by them.

subdivision (a), or otherwise accepts responsibility for placing Student at Milhous as a public agency other than an educational agency pursuant to Education Code sections 56155 and 56156.4, subdivision (a)?

d. If Student was privately and unilateral placed at Milhous by Student's mother, which educational agency is responsible for the education of Student while at Milhous?

4. As necessary, EGUSD shall file its response to Student's written reply, on or before 5:00 P.M. on April 24, 2013. Thereafter, Student may request leave from OAH to file a further reply to EGUSD's response to the Student's reply. Each brief, response or reply shall be supported by sworn declaration(s) as to relevant facts, legal authorities and/or documentation.

IT IS SO ORDERED.

Dated: April 11, 2013

/s/

ADENIYI AYOADE
Administrative Law Judge
Office of Administrative Hearings