

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

HAYWARD UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2007040294

DECISION

Charles Marson, Administrative Law Judge (ALJ), Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter on September 17-19, 2007, in Hayward, California.

Student's Mother (Mother) represented Student. On September 18 and 19, 2007, Kasie Cheung, a certified Fukienese translator, was present to assist Mother, who was generally proficient in English but occasionally sought translation assistance.¹

Shawn Olson Brown, Attorney at Law, represented the Hayward Unified School District (District). Valerie Baugh, the District's Director of Special Education, was present throughout the hearing.

¹ At the beginning of the hearing, on September 17, 2007, the translator who had been scheduled to assist Mother did not appear. Mother was given the option of waiting until Ms. Cheung became available or proceeding in English, and chose to proceed in English until Ms. Cheung arrived at approximately 1 p.m. on September 18.

The request for due process hearing was filed on April 9, 2007. On May 30, 2007, the hearing was continued at Mother's request. At the hearing, oral and documentary evidence were received. At the conclusion of the hearing, the matter was continued and, at the parties' request, the record was held open until October 22, 2007, for the filing of closing briefs and declarations. On October 22, 2007, closing briefs and declarations were filed, and the matter was submitted.

ISSUES

1. Whether Student resided within the District between February 23, 2004, and the end of the school year (SY) 2004-2005.
2. Whether the statute of limitations bars relief for anything occurring earlier than April 9, 2005, including reimbursement of expenses for in-home Applied Behavior Analysis (ABA) therapy and for private school registration and tuition.

REQUESTED RESOLUTIONS

Student requests that his Mother be reimbursed for in-home Applied Behavior Analysis (ABA) therapy from February 23, 2004, to February 2005; and for tuition and registration at Redwood Christian School for SY 2004-2005.

CONTENTIONS OF THE PARTIES

Student contends that the District failed to reimburse his Mother for the costs of agreed-upon in-home ABA therapy from February 23, 2004, to February 2005. He contends that he was a resident of the District during that time, and that the District was therefore responsible for his special education and related services. He also contends that, since the District ignored repeated requests for Individualized Education Program (IEP) meetings, he was enrolled in Redwood Christian Schools for SY 2004-2005, while still residing in the District, and that the District is responsible for the cost of his tuition and registration for that school year.

The District contends that it was not responsible for Student's special education and services after February 23, 2004, because he was removed from the District on February 6, 2004, and did not reside within District boundaries after that day. The District contends it made a reasonable effort to determine Student's residence after his removal, but was unable to do so. It argues that the two-year statute of limitations precludes recovery for anything occurring before April 9, 2005. Finally, it argues that it is not liable for Mother's expenditures for Student's tuition at Redwood Christian Schools because there was no proof at hearing that Mother paid for his tuition and registration or notified the District of his enrollment there, and because there was no proof that the placement was appropriate.

FACTUAL FINDINGS

BACKGROUND

1. Student is an eight-year-old male who resided with his parents (Parents) within the District from age three until at least February 6, 2004. He began receiving special education and services from the District in October 2002 because he was eligible as a child who exhibited autistic-like behaviors. He was removed from the District's preschool program at its Laurel School (Laurel) by Child Protective Services (CPS) on February 6, 2004, and his residence since that day is in dispute.

2. Before he was removed from Laurel by CPS on February 6, 2004, Student was receiving special education and services under an IEP developed on November 20, 2003, and signed by Mother. It placed him in the Special Day Class (SDC) at Laurel for five hours a day, five days a week, with speech and language therapy, occupational therapy, a one-to-one aide, transportation to and from home, and 20 hours a week of in-home ABA therapy supplemented by three hours a week of ABA supervision. These terms evolved from a mediation agreement executed by the parties on October 28, 2003.

3. Under the terms of the November 20, 2003 IEP and the October 28, 2003

mediation agreement, Student's at-home ABA therapy was to be provided by therapist Ellen Cheng until the District found and contracted with a suitable nonpublic agency. The District agreed to reimburse Mother for payments to Cheng. The District eventually reimbursed Mother for Cheng's services through February 23, 2004.

4. At hearing Dr. Renee C. Wachtel, M.D., the Director of Developmental Behavioral Pediatrics at Children's Hospital and Research Center of Oakland, and Student's treating physician, testified that at all relevant times Student has required an intensive program of treatment for autism of which an essential part is ABA therapy. The District does not dispute her opinion. It concedes that, at all times relevant here, Student needed an in-home ABA program to receive a free appropriate public education (FAPE).

STUDENT'S RESIDENCE FROM FEBRUARY 6, 2004 TO JUNE 2005

5. A school district is generally responsible for providing a FAPE to a child with a disability residing within its jurisdictional boundaries. The residence of an unmarried minor child is determined by the residence of the parent with whom the child maintains his or her place of abode, or the individual who has been given the care or custody of the child by a court of competent jurisdiction.

6. The parties agree that, at all relevant times before February 6, 2004, Student resided with his brother and Parents at a house on Orchard Park Place in Hayward (the Hayward home), within the boundaries of the District.

7. On February 6, 2004, when Student and his brother appeared at Laurel, a staff member noticed injuries on Student's brother's feet and called CPS, which came to the school, investigated briefly, and removed both children to a place unknown to Parents or the District. Between February 6 and February 23, 2004, Student was probably placed in a foster home, the location of which was unknown to the parties. During that time someone who was probably involved in Student's foster care brought him a few times to Laurel, where he received speech and language services. On and after February 23, 2004, he did not appear at Laurel, and the District did not know where he resided.

8. On or about February 6, 2004, Student and his brother were adjudicated dependents of the Alameda County Juvenile Court. On or about February 23, 2004, the Juvenile Court effected an "in-home placement" of Student and his brother, an arrangement in which a dependent child is returned home to live with one or more parents, although the child remains a dependent of the court and is served and protected by social workers under the direction of the court. Student's in-home placement entrusted him to his father's care and custody at the Hayward home. Student's father (Father) had sole custody of him for the next six months, after which time Mother was given joint custody. Student remained a dependent of the Juvenile Court until June 6, 2005, when he was discharged into his parents' custody and full parental rights were restored to them. The District was unaware of these events.

9. Student introduced substantial evidence that he remained with Father at the Hayward home from February 23, 2004, to the end of SY 2004-2005. Mother testified that the children stayed with Father and slept at the Hayward home throughout that time. For the first six months Mother was not permitted to sleep over at the Hayward home, although she spent her days there with the children, apparently while Father was at work. After six months she was permitted to stay in the Hayward home at night as well, and did so. Mother produced a utility bill sent to her at the Hayward home in June 2004.

10. Mounq Saetern, a Child Welfare Worker for the Alameda County Social Services Agency, testified that she was Student's social worker from September 2004 to June 6, 2005, while he was a dependent of the Juvenile Court. During this time, Saetern testified, Student resided with his parents at the Hayward home. She visited Student once a month at the Hayward home, and concluded from the presence of the children, and books and toys appropriate for the children, that they lived there. Father had custody of the children during this time.

11. Brian K. Ross, an attorney, testified that he represented Mother in the Juvenile Court dependency proceeding from its inception to its conclusion on June 6,

2005, and that his partner, attorney Kjell C. Bomark-Noel, represented Father in that proceeding. Ross testified that Student lived at the Hayward home during the dependency proceedings. Ross visited Mother in the Hayward home approximately six months after the dependency proceedings began and noted that the children were present. He also represented Mother in unrelated civil matters involving the Hayward home. Bomark-Noel testified, by declaration, that Student lived at the Hayward home during those proceedings.

12. The District is critical of two declarations Ross signed that Mother introduced in prehearing proceedings. The first, executed in March 2007, stated *inter alia* that Father was given custody of the children shortly after February 6, 2004, and that the children resided at the Hayward home until the dependency proceedings were dismissed. The second, executed in September 2007, omitted that sentence; it addressed educational decision-making authority rather than residency. This difference in content does not make the declarations inconsistent. Ross testified that Mother requested the second declaration because the first one was not broad enough, since it did not address the issue of educational decision-making rights. There was no evidence that Mother requested that Ross omit the sentence concerning Student's residence. At hearing Ross was consistent and credible in asserting that Father had been given custody during the in-home placement and that Student lived in the Hayward home during the time in question. The declaration of Father's attorney, Bomark-Noel, unequivocally states that the children resided at the Hayward home. The difference between the declarations does not substantially detract from Ross's straightforward testimony at hearing.

13. The District offered no credible evidence that Student lived anywhere other than in the Hayward home during the time in question, or that anyone other than Father had custody of him. Special Education Director Valerie Baugh testified that, "In my mind, I was thinking or hearing that [Student] was in Oakland," but could not identify a source for that information.

14. The District argues that three letters written by Student's physician suggest that he did not reside within the District during the time in question. On February 12, 2004, at Mother's request, Dr. Wachtel wrote a letter "To Whom It May Concern," reviewing Student's diagnoses, problems, and therapies. She sent copies to CPS and the Hayward Police Department, but not to the District. In that letter she stated that Student was then currently enrolled in a special education program in Oakland. Dr. Wachtel stated that Mother was the source of all her information. On February 12, 2004, Student may have been in foster care in Oakland, although there was no direct evidence that he was. Dr. Wachtel had stated the same thing in similar letters on April 22, 2003, and August 5, 2003, times when the record shows and the parties agree that Student was in fact in Hayward. She testified that it was possible the statements were in error. In any event, none of the three letters addresses Student's location during the time in question, and none is based upon personal knowledge. It appears from the texts of the letters that Dr. Wachtel simply carried forward a mistake into later letters by cutting and pasting. The letters do not constitute significant evidence that Student was in Oakland between February 23, 2004, and the end of SY 2004-2005.

15. The weight of the evidence thus established that from February 23, 2004 through the end of SY 2004-2005, Student lived, slept, maintained his abode, and resided with Father at the Hayward home, in the custody of Father for the entire time and possibly in the joint custody of Parents for all but the first six months. Father, at least, was both the parent with whom Student maintained his place of abode, and the individual who was given the care and custody of Student by a court of competent jurisdiction. The District was therefore responsible during that time for providing Student a FAPE.

THE DISTRICT'S EFFORTS TO LOCATE STUDENT

16. The District argues that it should not be required to reimburse Mother for Student's in-home ABA services from February 23, 2004 through the end of SY 2004-2005 because Parents did not directly inform the District of Student's return, and because the

District made its "best effort" to find him and could not.

17. Penny Harris, an early intervention teacher in the Walnut Creek School District, was the Vice Principal of Laurel during SY 2004-2005 and a Program Specialist for the District during SY 2005-2006. She witnessed Student's removal from school by CPS on February 6, 2004. Soon after that event she tried to determine if Student would return to Laurel, and made provisions to accommodate him if he did. Student was still enrolled at Laurel, and a place was held for him there for the remainder of SY 2003-2004.

18. In February and March, 2004, Harris twice called Malvina Cooper, her contact at CPS, to inquire into Student's status. Cooper stated that a hearing was coming up in the Juvenile Court dependency proceeding, but was unwilling to tell Harris where Student was residing. Harris called Student's social worker to see who had custody of Student and where he was residing, but the social worker was unwilling to give her specific information. When a detective from the Hayward Police Department came to Laurel to interview her, Harris asked about Student's custody and residence, but the detective would not tell her. Later in the spring a representative of Redwood Christian Schools called Harris to ask questions about Student, but would not reveal Student's location.

19. However, during the time in question, there is no evidence that the District made any attempt to ask either parent where Student was. Special Education Director Baugh stated that she did not know of any such attempt, and did not know why no one at the District made such an attempt. She conceded that it would have been a logical first step in finding him. Harris, whose duty it apparently was to locate Student, testified that she did not attempt to contact either parent. She did not think it was "appropriate" to do so because she had been told when Student and his brother were removed from Laurel that Parents no longer had custody of them. She testified that she did not attempt to contact Parents because she believed, for reasons she did not explain, that they continued not to have custody of their children. Harris's explanation was not persuasive. If Harris

assumed that a noncustodial parent would not know where his or her child was located, that assumption was illogical in general and wrong in this case. The evidence showed that from February 23, 2004 onward, both parents knew exactly where their children resided and went to school. If Harris assumed that once a parent lost custody she never could regain it, that assumption was also illogical in general and wrong in this case. As Director Baugh testified, from her experience, juvenile court placements can be temporary.

20. There was no evidence that, during the time in question, the District made any attempt to inspect the records of the Juvenile Court in order to locate Student. An exception to the confidentiality provisions of the Welfare and Institutions Code allows access to a juvenile court case file by the superintendent or designee of the school district where the minor is enrolled or attending school. Student was enrolled in Laurel at least until the end of SY 2003-2004.

21. Parents never directly informed the District that Student had returned to the District, and thus bear some responsibility for the fact that the District did not know of his presence. However, the evidence shows that Mother made two requests for IEP meetings after February 23, 2004.

22. Student introduced a copy of a letter dated April 1, 2004, from Mother to the District's then-Director of Special Education Dr. Zaida McCall-Perez, requesting an IEP meeting to consider transferring Student to another school or school district. Mother testified that she wrote the letter and personally handed it to McCall-Perez's secretary Rosemarie Parras. The District denies that it received the letter. It relies solely on the fact that the letter is not in Student's file, and on the testimony of District witnesses that they do not remember seeing such a letter. Parras was available as a witness but was not called to testify. There was no evidence that the District's file-keeping practices were reliable. Mother's first-person testimony that she prepared and delivered the letter was more persuasive than the fact that the letter is not in the District's file, particularly in the absence of available testimony by the person to whom Mother alleged she handed it. The

preponderance of the evidence therefore showed that the letter was delivered to the District. The District did not respond to it.

23. Student introduced a copy of another letter, dated August 1, 2004, that Mother testified she wrote to McCall-Perez, again asking for an IEP meeting. Mother testified that she took the letter, which was properly addressed, to the Hayward post office, put postage on it, and mailed it. That evidence was sufficient to give rise to the evidentiary presumption that a letter properly addressed and posted was received. The District denies receiving the August 1, 2004 letter on the same grounds: that it is not in Student's file, and that no District employee remembers it. The evidence showed that, in the ordinary course of business practice at the District, the letter would have been routed to and opened by Rosemarie Parras,² who was available as a witness but was not called to testify. Mother's first-person testimony that she prepared and mailed the letter, evaluated in light of the presumption of receipt, was more persuasive than the fact that the letter is not in the District's file, particularly in the absence of available testimony by Parras. The preponderance of the evidence therefore showed that the letter was mailed to and received by the District. The District did not respond to it.³

² By that time Valerie Baugh had become Acting Director of Special Education. She testified that a letter addressed to McCall-Perez would have been routed by Parras to her.

³ Teresa Criscuolo, who was Student's SDC teacher at Laurel School for part of SY 2003-2004, testified that Mother also made several oral requests for IEP meetings during January and February 2004 that were ignored by the District. However, Criscuolo's testimony was not reliable. She repeatedly contradicted herself, admittedly had a poor memory, displayed animus toward her former supervisor Penny Harris, and twisted, squirmed, and affected odd facial expressions during her testimony. No weight is given to her testimony in this decision.

24. Thus the District failed to utilize two obvious and potentially fruitful methods of locating Student: asking his parents, and examining his juvenile court case file. It received but did not respond to two requests for an IEP meeting, which indicated at minimum that Mother believed the District still had responsibility for Student's special education and should have alerted the District that further investigation was appropriate. The District's "best efforts" to locate Student were therefore inadequate, and do not justify relieving it of responsibility for providing special education and services to Student.⁴

STATUTE OF LIMITATIONS

The two-year requirement

25. As of October 9, 2006, a request for a due process hearing in California must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. The parties dispute whether Mother knew or had reason to know of those facts more than two years before the filing of the request in this matter on April 9, 2007.⁵

⁴ In his request for due process hearing Student does not allege any violation by the District of its "child find" obligations under state or federal law, nor does the Order Following Prehearing Conference mention such a possible violation, so the District's compliance with those obligations cannot be addressed here. However, the extent of the District's child find obligations supplies a useful analogy in measuring the effectiveness of the District's search for Student. A district is required to "actively and systematically seek out" a disabled student who may be within its boundaries and in need of special education and services. A search that does not include contacting the child's parents, or looking at the records of the agency known to have control of the child, is neither active nor systematic.

⁵ Student filed a previous request on March 5, 2007, making the same allegations. (Student v. Hayward Unified School District, OAH Case No. N2007030116.) On March 19,

26. Mother testified she first became aware that the District would not reimburse her for the ABA expenses in dispute in a telephone call with Kris Vasser, the District's compliance officer, at the end of April or the beginning of May 2005. She also testified, inconsistently, that she first became aware of the District's intention not to pay her in a telephone call with Mercedes Metcalf of the California Department of Education (CDE) in June 2005. However, the evidence showed that Mother became aware of the District's intention not to pay her approximately a year earlier.

27. Mother began struggling with the District over reimbursement for ABA expenses at least as early as 2003. A mediation agreement between Mother and the District dated October 28, 2003, provided that the District would reimburse Mother for in-home ABA services by a therapist until a new nonpublic agency was selected to take over provision of ABA services. A new provider was never selected, so the District's reimbursement obligation under the agreement was ongoing. In April 2004, Mother discussed her difficulties in receiving reimbursement for ABA services with John Laster, a CDE compliance officer, who advised her that the only way she would get reimbursed for ABA services was to file a compliance complaint with CDE or a request for a due process hearing with OAH. On May 20, 2004, Mother filed a compliance complaint with CDE, alleging that the District failed to reimburse her for in-home ABA services in compliance

2007, OAH sustained the District's Notice of Insufficiency of the request, and gave Student until April 2, 2007, to amend his request. Student failed to do so, and OAH dismissed the matter on April 9, 2007. Also on April 9, 2007, Student purported to file an Amended Complaint in the matter that had been dismissed. OAH treated that document as an original complaint and gave it the case number this matter bears. The statute of limitations was not tolled while the earlier request was pending. However, in light of the analysis in this decision, it makes no difference whether Student's complaint is deemed filed on March 5, 2007, or April 9, 2007.

with the October 28, 2003 mediation agreement.⁶ Since that agreement obliged the District to make continuous reimbursement for ABA services, Mother's May 20, 2004 compliance complaint constituted a demand for reimbursement for services purchased both before and after February 23, 2004, the beginning of the time at issue here, and also constituted a recognition that she would have to resort to some sort of outside legal process to obtain reimbursement for those expenditures. On May 20, 2004, therefore, Mother knew and had reason to know of the facts underlying the basis for her request, and the statute of limitations began to run.

28. In the August 1, 2004, letter Mother mailed to the District requesting an IEP meeting, she also requested "reimbursement of ABA program from October, 2003 up to the present." The District did not reply to that letter. By September 1, 2004, therefore, knowing that the District for a month had ignored her request for reimbursement for ABA services up to August 1, 2004, Mother was aware that the District would not reimburse her voluntarily for those services and that she would have to resort to legal process to collect. Therefore, in the alternative, by September 1, 2004, Mother knew and had reason to know of the facts underlying the basis for her request, and the statute of limitations began to run.

29. The last expenditure for in-home ABA services for which Mother seeks reimbursement here occurred in February 2005, outside the two-year statute of limitations. That statute therefore bars recovery for any expenditures for in-home ABA

⁶ Mother filed the compliance complaint in Father's name. She testified she was afraid to file it in her own name because she feared retaliation against her or Student from the District. Sometime in May 2004, possibly on the District's complaint, Mother had been arrested for felony child abuse. The charge was dismissed in December 2004 for lack of evidence. Mother testified she was advised by her lawyer not to do anything while the felony charge was pending to further annoy the District.

services.

Exceptions to the two-year rule

MISREPRESENTATIONS

30. The two-year statute of limitations does not apply if a parent was prevented from requesting a due process hearing by specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request. Student argues that four alleged representations exempt him from the two-year statute.

The District's claim of nonresidence

31. First, Student argues that the District's statement to CDE that Student left the District on February 23, 2004, and did not return, was a misrepresentation that prevented Mother from filing for due process within the two-year statute of limitations. In September 2004, CDE began to investigate Mother's May 20, 2004 compliance complaint. On October 25, 2004, it wrote to Father and the District announcing that its investigation was complete, and that it had concluded that the District was out of compliance in reimbursing Mother for ABA expenses from October 17, 2003, to December 20, 2003. The finding was limited to that time period only because Mother had not yet submitted to the District any proof of expenditures past that date.⁷

⁷ Mother testified that she had not submitted additional proof of expenditures because the District "always" disregarded her invoices and that she knew she would not be reimbursed for them. It was frequently her practice to decide that the District would not pay her, and to seek relief from CDE or OAH, before she had actually submitted proof of her expenditures to the District, so the history of the dispute does not correlate neatly with the presentation and rejection of invoices. As late as May 2005, the District solicited and received from Mother proof of expenditures in 2003, and reimbursed her for them.

32. The CDE's October 25, 2004 letter purporting to close the compliance investigation twice quoted a letter the District had written to CDE on September 20, 2004, stating that "[Student] was removed from the school and District on [2/23/04] and continued his absence to today." When Mother received the October 25, 2004 CDE letter, she became aware of the District's claim that Student had been removed from the school and the District on February 23, 2004, and that his absence from the District had continued since then.

33. In December 2004, Mother telephoned Mercedes Metcalf at CDE to complain that the compliance investigation should not have been closed and that the District still had not paid her for ABA services.⁸ In this or a subsequent conversation, Mother testified, Metcalf told her that the District had submitted "proof" that Student was in another school district after February 23, 2004. Mother assumed that this meant the District had submitted documentary evidence of that claim, although she admitted this was only an assumption and could not produce evidence that the District had actually sent CDE any such proof. Nothing in the record shows that the District did so.

34. Mother testified at hearing that she did not file for due process earlier than she did because she assumed and believed that the District's "proof" that Student was in a different school district would bar recovery. As shown above, the District's representation that Student had not returned to the District was largely incorrect. However, it was not a representation that the problem had been solved. Moreover, Mother knew the representation was wrong. As soon as the children returned to the Hayward home on February 23, 2004, Mother began spending her days there with them, and six months later moved back into the home. She was with Student every day and knew where he was at all

⁸ CDE reopened its investigation and closed it again in June 2005. Mother argues that the statute of limitations should start running at that time, but the statute contains no such provision.

times. She was part of a team supervised by the Juvenile Court that made educational decisions for him. She knew he was not in a different school district. Thus the District's representation, or misrepresentation, did not mislead Mother or prevent her from filing for due process. The District's erroneous claim that Student was not a resident of the District would have been no more difficult to disprove two years ago than it was this year.

CDE's representation that the District was willing to pay

35. Mother testified that in February 2005, Mercedes Metcalf of CDE informed her that the District was willing to pay for in-home ABA services until that date. Student produced no documentary support for this claim, and Metcalf did not testify.⁹ But the District may temporarily have given Metcalf that impression in a letter to her dated February 24, 2005. That letter referred to the ongoing compliance proceeding, purported to respond to a request that the District "provide a purchase order number as proof of payment for reimbursement for ABA services through February 2005," and stated that the District had not yet received invoices from the parent for January or February 2005." These dates should all have been 2004, not 2005. The District discovered its error within days. On February 28, 2005, the District's compliance officer Kris Vasser called Metcalf to tell her that the dates in the letter were erroneous, and that the year mentioned should have been 2004, not 2005. A sticky note attached to the District's copy of its February 24, 2005 letter states that the "error [was] noted" by Metcalf and that further response was not necessary. Thus, at most, the District inadvertently misled CDE for a period of four days.

⁹ Before the hearing Mother sent a subpoena duces tecum to Metcalf by facsimile alone, and received a letter from CDE stating that service by facsimile was ineffective and that Metcalf would not appear. At the beginning of the hearing, the ALJ explained to Mother how she could employ a process server to secure Metcalf's appearance. Mother did not take any further action to obtain Metcalf's testimony or documents.

36. Assuming that Metcalf, based on the error in the District's February 2005 letter, represented to Mother that the District was willing to pay through February 2005, that representation had no bearing on the statute of limitations. Mother never saw the District's letter or its retraction. Mother testified that Metcalf retracted her own statement in late April or early May 2005, and informed Mother that the District would not pay for in-home ABA services past February 23, 2004. Thus, at most, Mother delayed filing for due process for two to three months in the hope that the District would pay voluntarily. Metcalf's February 2005 statement to Mother was not a representation by the District itself; it was not a representation that the District had solved the problem, but only that it would in the future. Metcalf's statement did not prevent Mother from filing for due process; and it was recanted at least a year before the statute of limitations expired. Even if the statute were somehow tolled for those two or three months, Mother's filing of this request would still have been too late.

The District's erroneously dated purchase order and check

37. On June 17, 2005, in response to Mother's submission of proof of ABA expenditures up to February 2004, the District issued a purchase order for a check paying for "Ellen Ching [the ABA provider] from 12/19/04-2/27/05." Again the dates were wrong; the payment was actually for expenditures from December 19, 2003 to February 27, 2004. The District then sent a check to Mother for \$10,376.00, which compensated her for ABA expenditures in December, January, and February 2004. Student argues that this was a misrepresentation that the problem had been solved, and that this misrepresentation prevented Mother from filing for due process earlier.

38. Assuming that the purchase order and check constituted misrepresentations that the problem had been solved, they did not prevent Mother from filing for due process before the statute of limitations expired. Mother testified that she was aware, from the amount of the check, that it did not compensate her for expenditures through February 2005. She was also aware that she had not yet submitted proof of expenditures

through February 2005. She testified that she never saw the purchase order until March 2007, two months after she had filed the first of her two requests for due process concerning the ABA expenditures. The check and the purchase order therefore had no relationship to Mother's delay in filing for due process.

The East Bay Therapy Log

39. During February 2004, Student received pull-out speech and language (S/L) services at Laurel from East Bay Therapy, a nonpublic agency under contract to the District. East Bay Therapy's service log for Student shows that he received S/L services at Laurel on February 9, 19, and 20, 2004. Student argues that this is a misrepresentation, since he was in the custody of CPS at that time, and that it prevented Mother from filing for due process within the statute of limitations.

40. Student's argument is not persuasive. The East Bay Therapy log was not a representation that the problem has been solved. It was a representation by East Bay Therapy, not the District. Mother obtained it directly from East Bay Therapy by means of a subpoena duces tecum in March 2007, long after the statute of limitations had run. Thus, Mother's failure to timely file for due process was not due to any reliance on the log. Moreover, the log was not a misstatement. Bonnie Groth, the owner of East Bay Therapy, testified persuasively that S/L services were provided to Student at Laurel on those dates. That testimony was consistent with other testimony that, for two weeks after Student's removal from Laurel by CPS on February 6, 2004, someone who was probably involved in his foster care brought him to school for speech and language therapy. There was no evidence to the contrary.

WITHHOLDING OF RECORDS

41. The two-year statute of limitations also does not apply if a parent was prevented from requesting a due process hearing by a district's withholding of information that the law required the district to provide to the parent. Student argues

that the District withheld from Mother the letter it wrote to CDE on September 20, 2004, in response to her May 20, 2004 compliance complaint, and that, not having that letter, she was somehow prevented from filing for due process earlier than she did.

42. Mother requested Student's records in April 2004, but there was no evidence that she requested them after that date. The District therefore was not required by law to give Mother a copy of the September 20, 2004 letter. That letter contained nothing that misled Mother or delayed or prevented her from filing for due process, and its relevant contents were communicated to her in the CDE letter of October 25, 2005, closing the compliance complaint. Nothing in either letter prevented Mother from doing anything. The fact that Mother did not have the September 20, 2004 letter was unrelated to her delay in filing for due process.

OTHER REASONS FOR DELAYED FILING

43. Mother testified that she had numerous other reasons for not filing a request for due process before 2007. She feared the District would have her arrested again; that filing would complicate her felony and juvenile dependency cases; that her compliance complaint was still open; and that the District would again report Student to CPS. The validity of these reasons is not at issue. They do not constitute facts that relieved Mother from complying with the applicable statute of limitations.

TUITION AND REGISTRATION PAYMENTS TO THE REDWOOD CHRISTIAN SCHOOL

44. Sometime in the spring of 2004, Parents decided to send Student to the private Redwood Christian Schools (RCS) in Castro Valley, California, for SY 2004-2005. They did not inform the District of that choice. Student asks that Mother be reimbursed \$9,240 in tuition for his education at RCS from August 1, 2004, to May 5, 2005, and \$50 for his registration.

45. For numerous reasons Mother is not entitled to reimbursement for any expenses related to RCS. Student did not prove that Mother paid RCS the money. The

tuition and registration fee bills are addressed to Father. Father and Mother are divorced, and nothing in the record shows when they divorced. The record only shows that they used different last names as early as 2003. The bill for tuition shows that it was paid in full, but does not explicitly identify the payor. Student produced no cancelled checks or other proof of expenditures. The registration bill is for registering Student's brother, not Student. Moreover, a student seeking reimbursement for a unilateral private placement must show that the placement is appropriate, and replaced services that the district failed to provide. No such showing was made at hearing. There was no evidence about the curriculum or services at RCS, or any evidence that they could or did meet any of Student's unique needs. Finally, Parents were aware of the facts underlying their claim for RCS tuition in August 2004 at the latest, well beyond the applicable two-year statute of limitations.

CONCLUSIONS OF LAW

BURDEN OF PROOF

1. Student, as the petitioner, has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [163 L.Ed.2d 387].)

ELEMENTS OF A FAPE

2. Under the Individuals with Disabilities in Education Act (IDEA) and state law, children with disabilities have the right to free appropriate public education (FAPE). (20 U.S.C. § 1400(d); Ed. Code, § 56000.) FAPE means special education and related services that are available to the 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(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are

called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).)

3. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-07 [73 L.Ed.2d 690].) Second, the tribunal must decide whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

4. In *Rowley*, the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, 458 U.S. at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

RESIDENCY AND RESPONSIBILITY FOR SPECIAL EDUCATION

5. A "local educational agency," such as a school district, is generally responsible for providing a FAPE to those students with disabilities residing within its jurisdictional boundaries. (34 C.F.R. § 300.220(a)[in effect at all times relevant here];¹⁰ Ed. Code, § 48200.)

6. The residence of an unmarried minor child is determined by the "residence of the parent with whom the child maintains his or her place of abode," or the residence of "any individual who has been appointed legal guardian or the individual who has been given the care or custody by a court of competent jurisdiction." (Welf. & Inst. Code, § 17.1, subd. (a).)

¹⁰ See also, 34 C.F.R. § 300.201 (effective October 13, 2006).

7. Based on Factual Findings 5-15, and Legal Conclusions 6 and 7, Student was a resident of the District from February 23, 2004, to the end of SY 2004-2005. Substantial evidence showed that, during the time in question, Student resided at the Hayward home with Father, who had custody of him. There was no persuasive evidence to the contrary. The District was therefore responsible for Student's special education and services during that time.

CONFIDENTIALITY OF JUVENILE COURT RECORDS

8. Juvenile court records of dependency proceedings are generally confidential and not available for public inspection. (Welf. & Inst. Code, §§ 825 et seq.) However, some officials are permitted to inspect them, including "[t]he superintendent or designee of the school district where the minor is enrolled or attending school." (Welf. & Inst. Code, § 827, subd. (a)(1)(F).)

DISTRICT'S CHILD FIND OBLIGATIONS

9. Under IDEA and California law, a school district has an affirmative, continuing obligation to identify, locate, and evaluate all children with disabilities residing within its boundaries. (20 U.S.C. § 1412(a)(3); Ed. Code, § 56300 et seq.) The duty is not dependent on any action or inaction by parents; the district must "actively and systematically seek out all individuals with exceptional needs ... who reside in the district." (Ed. Code, § 56300.) In addition, the district must develop and implement "a practical method" to locate those individuals. (Ed. Code, § 56301.)

PRESUMPTION OF RECEIPT OF A LETTER PROPERLY MAILED

10. A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail. (Evid. Code, § 641.)

11. Based on Factual Findings 21-23, and Legal Conclusion 10, the preponderance of evidence showed that Mother delivered or mailed, and the District

received, the IEP requests dated April 1 and August 1, 2007.

12. Based on Factual Findings 16, and Legal Conclusions 8 and 9, the District's attempts between February 23, 2004, and the end of SY 2004-2005 to determine Student's residence were inadequate, and do not justify relieving it of responsibility for providing Student's special education and services.

STATUTE OF LIMITATIONS

13. The IDEA allows states to determine the time by which a request for due process hearing must be filed. (20 U.S.C. § 1415(b)(6)(B).) California law provides that a request for a due process hearing "shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request." (Ed. Code, § 56505, subd. (l); see, *Miller, etc. v. San Mateo-Foster City Unified Sch. Dist.* (N.D.Cal. 2004) 318 F.Supp.2d 851, 860-61.)¹¹

14. The pendency of a first action that is dismissed for procedural default does not toll the statute of limitations on a second action. (*Hu v. Silgan Containers Corp.* (1999) 70 Cal.App.4th 1261, 1270; see, 3 Witkin, Cal. Procedure (4th ed. 1996), Actions, §§ 665, 674.)

15. Based on Factual Findings 25-29, and Legal Conclusions 13 and 14, all of Student's claims are barred by the two-year statute of limitations. Mother knew and had reason to know of the facts underlying the basis of the request for reimbursement for ABA services on May 20, 2004, when she filed a CDE compliance complaint seeking reimbursement for some of the ABA services at issue here. In the alternative, Mother knew and had reason to know of the facts underlying the basis of the request by

¹¹In 2006, the Legislature amended the statute to reduce the existing three-year limitations period to two years. The change went into effect on October 9, 2006, and affected all requests for due process hearing filed after that date. (See, Ed. Code, § 56505, subd. (l)(text of section operative until October 9, 2006).)

September 1, 2004, when a month had passed without a response from the District to her written request of August 1, 2004, for reimbursement for some of the ABA services at issue here. She knew and had reason to know of the facts underlying the basis of the request for tuition and registration at RCS in April 2004, when Student was registered to attend RCS in SY 2004- 2005.

16. The two-year statute of limitations "does not apply to a parent if the parent was prevented from requesting the due process hearing" by either of the following:

- (1) Specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request.
- (2) The withholding of information by the local educational agency from the parent that was required ... be provided to the parent.

(Ed. Code, § 56505, subd. (l).)

17. Based on Factual Findings 30-43, and Legal Conclusion 16, Mother was not prevented from requesting a due process hearing by any of the alleged misrepresentations by the District or CDE, nor was she prevented from requesting a due process hearing by the alleged withholding of the District's September 24, 2004 letter to CDE.

REIMBURSEMENT

18. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371 [85 L.Ed.2d 385].) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. However, the parents' unilateral placement is not required to meet all requirements of the IDEA. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14 [126 L.Ed.2d 284].)

19. Based on Factual Findings 44 and 45, and Legal Conclusion 18, Mother is not entitled to reimbursement for Student's tuition and registration at RCS.

ORDER

For the foregoing reasons, all of Student's requests for relief are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d) requires that this decision indicate the extent to which each party prevailed on each issue heard and decided. Student prevailed on Issue One, his residence. The District prevailed on Issue Two, the statute of limitations.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: November 19, 2007



CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings

Special Education Division