

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

OAH Case No. 2017060459

v.

BERKELEY UNIFIED SCHOOL DISTRICT.

DECISION

Parent on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on June 9, 2017, naming Berkeley Unified School District. A continuance of the hearing was granted on July 13, 2017, to dates stipulated by the parties.

Administrative Law Judge Alexa J. Hohensee heard this matter in Berkeley, California on September 19, 20, 21 and 26, October 26 and November 9, 2017.

Gail Hodes and Megan Harley-Dunsheath, Attorneys at Law, represented Student. Student's mother (Parent) attended and testified on behalf of Student.

Lenore Silverman, Sterling Elmore and Joanna Powell, Attorneys at Law, represented District. Lisa Graham, Special Education Director for District, attended the hearing on behalf of District.

A continuance until December 11, 2017, was granted for the parties to file written closing arguments. Upon receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES

1. Did District deny Student a free appropriate public education between November 2015 and June 2017 by failing to:
 - a. Conduct a legally sufficient psychoeducational assessment of Student;
 - b. Assess Student in mental health or social emotional needs;
 - c. Make Student eligible for special education and related services; and,
 - d. Offer an appropriate educational program designed to meet her unique individual needs?
2. Did District violate Student's and Parent's procedural rights so as to deny Student a FAPE by failing to provide a full and complete copy of Student's educational records upon request?

SUMMARY OF DECISION

Parent was not a resident within District's boundaries between November 2015 and June 2017, the time period at issue in this due process proceeding. The juvenile detention centers where Student was detained, and the residential treatment centers into which Student was placed by Parent or the Juvenile Court, were not located within District boundaries. Therefore, District did not owe Student a duty to provide a FAPE.

District promptly responded to Parent's educational records requests. Any procedural error by District in failing to include attendance records and assessment protocols in the records provided to Parent was minor and would not have risen to the level of a substantive denial of FAPE, had District owed Student a FAPE, which it did not.

Accordingly, District prevailed on all issues.

FACTUAL FINDINGS

1. Student was a 17-year-old young woman at the time of the hearing. Parent resided in the City of Richmond at all times relevant to this proceeding (the

Richmond address).

2. Student's grandparents granted Parent an interest in the property at the Richmond address in 2005. Student lived with both her parents at the Richmond house until 2006, when her parents divorced. Afterwards, Student lived at the Richmond address with Parent.

3. The Richmond address is in Contra Costa County. For each of the property tax years of 2014-2015, 2015-2016, 2016-2017 and 2017-2018, a homeowner's property tax exemption of \$7,000 per year was taken on the Richmond address. A homeowner's exemption may only be taken on property that is the primary residence of one of the property owners. The tax records in evidence did not indicate which of the property owners qualified the Richmond address for a homeowner's exemption, but Parent was the only owner who lived in the property at those times.

4. Parent was a dance instructor, and also used the Richmond address as her business address. Parent maintained a landline telephone number at the Richmond address, which was printed onto her business letters.

5. Since June 2004, Parent has been registered to vote at the Richmond address in Contra Costa County. Parent voted as a resident of Contra Costa County in general and special elections in February 2008, November 2008, June 2010, November 2010, November 2011, November 2012, May 2014, June 2014, June 2016 and November 2016.

6. At the time of the hearing, Parent's driver's license was registered at the Richmond address.

7. Student attended elementary school in West Contra Costa Unified School District, which is in Contra Costa County. Student and Parent lived at the Richmond address while Student was in elementary school.

8. Student attended middle school in Albany Unified School District, which is

in Contra Costa County. Student and Parent lived at the Richmond address while Student was in middle school.

9. Student wanted to attend high school at Berkeley High School, which is not in Contra Costa County.

10. Berkeley High was a District school. It is located in Berkeley, which is in Alameda County.

11. Student's grandmother resided in Berkeley (the Berkeley address).

12. Parent enrolled Student with District for the 2014-2015 school year using the Berkeley address. Parent arranged for Student to stay at Grandmother's house near Berkeley High during the week, and to return home to Parent on the weekends and when school was not in session. District was unaware that Parent and Student did not reside in Berkeley.

13. One evening in May 2016, near the end of Student's 10th grade year, Grandmother discovered in the middle of the night that Student had snuck out of Grandmother's house. Grandmother immediately called 911 to report Student missing. Grandmother gave the dispatcher Parent's cell phone number as the number to call with updates. Parent was not present at the Berkeley address because she did not reside there.

14. At the beginning of the 2016-2017 school year, Student's 11th grade year, Student stole money from Grandmother's purse. Grandmother no longer wanted Student in her house. On September 5, 2016, Student stopped staying at Grandmother's house during the week and attended Berkeley High from the Richmond address.

15. On October 29, 2016, Student took Parent's car without permission from the Richmond address. Parent reported the car missing to the police, and Student was subsequently stopped by Berkeley police, cited and released. On the Berkeley police department report, completed that same day, both Parent and Student are reported to

reside at the Richmond address.

16. On an undated Juvenile Responsibility Form completed by the Berkeley police department, both Parent and Student are reported to reside at the Richmond address and Parent's "residence phone" is reported as the landline at the Richmond address.

17. In October 2016, Parent requested that District assess Student for special education eligibility. Student's grades had dropped from mostly A's in ninth grade, to mostly B's with two C's in 10th grade, and Student was fighting with Parent and skipping classes.

18. On October 31, 2016, Student ran away from the Richmond address with her boyfriend. Student and her boyfriend were arrested for a crime 11 days later, and Student was placed in juvenile detention at the Alameda County Juvenile Justice Center. Parent attended, and was represented by counsel during, Student's Juvenile Court proceedings.

19. On the November 11, 2016 arrest report, the residence for both Parent and Student was reported as the Richmond address. Parent's telephone number was the landline at the Richmond address.

20. While in juvenile detention, Student was dis-enrolled from District and enrolled in the detention center school, which was not a District school. Student earned A's and B's while in detention.

21. In November 2016, the Juvenile Justice Center referred Student for a psychological evaluation by Alameda County Behavioral Health Care Services (Behavioral Health).

22. On November 14, 2016, District gave Parent an assessment plan for special education assessments, which Parent signed the same day. However, District did not begin the assessments because Student was still in juvenile detention.

23. On November 15, 2016, the Juvenile Court declared Student a ward of the Court and took physical custody of Student away from Parent. Parent retained Student's educational rights. Parent's address on the wardship petition was the Richmond address, and her telephone number was the landline at the Richmond address.

24. In November 2016, Behavioral Health conducted a psychodiagnostic evaluation of Student. During an assessment interview, Student reported that she had been staying with her Grandmother during the week, and going home to Parent on weekends.

25. The Behavioral Health report, filed with the Juvenile Justice Center on December 1, 2016, noted in one section that Student had anxiety and depression consistent with post-traumatic stress syndrome and cannabis use disorder. The report noted that Parent had consented to a District assessment for special education eligibility, although the Behavioral Health assessor did not express an opinion on whether Student would qualify for special education or not.¹

¹ Student submitted only six of 16 pages of the Behavioral Health psychodiagnostic report into evidence to prove Student's psychological functioning. Prior to the hearing, the Juvenile Court permitted District's counsel to read the entire report, with whited-out redactions by the Juvenile Court for confidentiality, at the courthouse. However, the copy submitted by Student contained further redactions by black marker. When District petitioned the Juvenile Court to release additional portions of the Behavioral Health report as evidence of Parent's residency, both Parent and Student (through separate counsel) strenuously opposed the petition. The Juvenile Court ultimately released a portion of the report previously missing or redacted which recorded Student's statement that she lived with Parent and stayed with Grandmother during the week so that she could attend Berkeley High. Student and Parent

26. Parent stayed with Grandmother temporarily during the juvenile court proceedings. A probation report dated December 5, 2016, indicated that Student lived with Parent. It also reported that Parent resided at the Berkeley address, but had lived there for less than six months.

27. Student remained in juvenile detention from November 11 through December 26, 2016. Student was released to the physical custody of a classmate's mother, who lived in Berkeley. Parent retained educational rights. Student was dis-enrolled from the juvenile detention center school, and her classmate's mother re-enrolled Student with District in January 2017.

28. In January 2017, after Student was re-enrolled in District, District conducted a psychoeducational assessment of Student.

29. District's psychoeducational assessment was conducted by Maria Garcia Sugahara-Henderson. At hearing, Ms. Sugahara-Henderson's demeanor was calm and professional, and her responses were clear, thoughtful and thorough. Ms. Sugahara-Henderson had good recall of her conversations with Parent and Grandmother, and her testimony regarding the statements of Parent and Grandmother was credible and

intentionally proffered a partial and redacted document regarding Student's psychological functioning that otherwise would have revealed party admissions highly probative of Parent's residency. If a party provides weaker evidence when it could have provided stronger evidence, the weaker evidence may be distrusted. (Judicial Council of California Civil Jury Instructions 203.) Here, Student's attempt to prove her case with a redacted partial document not only rendered the Behavioral Health report less persuasive for the purpose tendered, but suggested an attempt to suppress highly probative residency evidence, indicative of a lack of honesty or veracity on the part of Parent and Student.

consistent with her contemporaneous written report.

30. As part of the psychoeducational assessment, Ms. Sugahara-Henderson interviewed Parent and Grandmother. Parent told Ms. Sugahara-Henderson that, during high school, Student had stayed with Grandmother during the week and returned home to Parent on weekends until summer 2016, when Student stopped staying with Grandmother. Parent added that in fall 2016, Student gradually began to spend some days during the week with Grandmother again. Grandmother participated in the conversation, and did not contradict Parent.

31. Ms. Sugahara-Henderson also interviewed Student. Student confirmed that prior to being in juvenile detention and placed with her classmate's mother, Student had lived with Parent, and sometimes stayed with Grandmother during the week.

32. Parent did not give Ms. Sugahara-Henderson a copy of the Behavioral Health assessment. Ms. Sugahara-Henderson spoke to Student's Juvenile Court social worker, who reported that Student suffered from anxiety and depression.

33. In February 2017, while Student was in the custody of her classmate's mother, Parent contacted Student's academic counselor at Berkeley High School multiple times for progress updates on Student. Parent gave the landline telephone number at the Richmond address as Parent's best contact number.

34. On or about the morning of February 16, 2017, Parent saw Student near, but not on, the Berkeley High campus. She spoke to her daughter, and subsequently reported to school police that her daughter had been off school premises. Later that day, school police pulled Student out of an assessment interview with Ms. Sugahara-Henderson to question Student about being off campus. That evening, Student ran away from her classmate's home.

35. District held an IEP team meeting on March 2, 2017, to review the

psychoeducational assessment. The meeting was attended by Parent, Grandmother, Ms. Sugahara-Henderson, Student's guidance counselor, one of Student's teachers and a special education specialist. Student was still missing at the time. Ms. Sugahara-Henderson explained and discussed the psychoeducational assessment results. Parent was given an opportunity to, and did, participate in the discussion. District team members concluded that Student was not eligible for special education and related services, although they offered to create a plan of general education supports to address Student's anxiety and depression.

36. Student was located by police on March 11, 2017, and again placed in juvenile detention. While in juvenile detention, Student was dis-enrolled from District and enrolled in the detention center school.

37. Student was released from juvenile detention on March 27, 2017. The release records were not offered into evidence, so it was unclear if the Juvenile Court released Student to Parent's custody, or to a private residential treatment center arranged by Parent. Student was not re-enrolled in District. Instead, for the remainder of the 2016-2017 school year, Student attended a series of two residential treatment centers, Paradigm and TLC Child and Family Services. Grandmother helped to pay for the residential treatment programs.

38. On April 3, 2017, Parent made a written request to District for a copy of Student's educational records. The request was processed and District made the records available for pick up by Parent on April 4, 2017.

39. On April 12, 2017, Student's counsel faxed a written request for Student's educational records to District. District processed the request and mailed the records to Student's counsel on April 13, 2017.

40. On August 1, 2017, Parent and Student moved to a new residence outside of Alameda and Contra Costa counties.

TESTIMONY OF PARENT AND GRANDPARENT

41. Parent's testimony that she moved in with Grandmother in 2006 when she and Student's father divorced was not credible, and later contradicted by her admission that she lived at the Richmond address while Student was in elementary and middle school. Parent's representation that she no longer lived at the Richmond address after her divorce was also contradicted by a pre-hearing declaration of Parent under penalty of perjury that Parent "began spending more time" at the Berkeley address in 2006, "lived even more" at the Berkeley address in 2011, and lived "primarily" at the Berkeley address after 2014 so Student could attend Berkeley High. Each of these sworn statements contains an implicit admission that Parent had not abandoned her residence at the Richmond address. Parent's sworn statement that she intended the Berkeley address to be her primary residence was contradicted by her testimony that she never intended to live with Grandmother permanently, and was actively looking for a place to reside in Berkeley.

42. Parent appeared nervous during testimony, and her responses were sometimes needlessly elaborate and improbable. Her responses were frequently inconsistent with her other testimony, the testimony of others, and documentary evidence. Parent gave responses that seemed evasive and disingenuous, and she appeared to construct responses for the selective purpose of disavowing that she resided in Richmond. For example, Parent testified that she did not know to which address her car was registered or where she was registered to vote, because she "hadn't changed a lot of things" since her move in 2006. However, a delay in notifying the government of a change of address for over 10 years seems illogical and highly improbable, and documentary evidence from the Contra Costa County Registrar of Voters established that Parent consistently voted in Contra Costa County elections over the past 10 years.

43. Parent stated that she directed business and juvenile court documents be mailed to the Richmond address because Grandmother had a heart condition and was upset by the documents' contents. However, both Parent and Grandmother testified that Grandmother was intimately involved in Student's juvenile proceedings, and directing mail for pick up at a different address would not logically change Grandmother's reaction to news of the juvenile court process.

44. Parent also gave the landline at Richmond as her best contact number in multiple important situations, such as when Student was arrested and placed in juvenile detention. This strongly suggests that Parent resided at the Richmond address with ready access to that landline in the event of an emergency involving Student.

45. Parent's explanations for conflicts between her testimony and other evidence were often illogical and unlikely. Parent admitted to being somewhat familiar with the property tax exemption, and was the only property owner who lived at the Richmond address. Nonetheless, Parent speculated that some unknown person must have identified themselves as an owner-occupant to qualify for the homeowner's exemption on taxes, and that Grandmother and Grandmother's tax preparer had failed to notify Contra Costa County that the real property no longer qualified for that exemption when Parent had moved. The more logical explanation is that Parent lived continuously at the Richmond address, and as one of the property owners, qualified the property for the homeowner's exemption. This logical explanation is also consistent with what Parent and Student told Ms. Sugahara-Henderson, the Berkeley police, the Juvenile Court and the Behavioral Health assessor, as documented in multiple contemporaneous reports.

46. Parent herself considered it odd that so many people misunderstood her living arrangements, in tacit acknowledgement that the same misunderstanding by different people, at different times, and under different circumstances, is highly unlikely.

The more logical explanation is that Parent, Grandmother and Student consistently told multiple people that Student lived with Parent in Richmond, and stayed with Grandmother in Berkeley during the week, before they were aware Parent's address determined the school district responsible for special education services and had a motive to be untruthful.

47. Grandmother testified that her daughter had lived with her since Student's parents divorced in 2006, but Grandmother's demeanor during her testimony was anxious and tentative. This testimony was directly contradicted by Parent's testimony that Parent and Student had lived at the Richmond address until Student started high school in 2014. (Although it did conform with Parent's original statement, later changed on cross-examination, that she had lived with Grandmother since the divorce). Grandmother's testimony that she called 911 when Student was missing and gave the dispatcher Parent's telephone phone number because Parent was in a different room was unlikely and unconvincing. Grandmother's testimony that she did not know where Parent and Student lived when Grandmother kicked Student out of the Berkeley address in September 2016 was similarly unlikely and unconvincing, particularly as she was "another parent" to Student. That testimony was evasive, and appeared to be an attempt to avoid stating that Parent and Student stayed at the Richmond address, which Parent subsequently testified that they had. In addition, Grandmother responded emphatically that she had helped pay for Student's residential treatment, and therefore had an interest in corroborating Parent's testimony in support of a decision for Student and an award of reimbursement. All of these factors adversely affected Grandmother's credibility and her corroboration of some of Parent's statements was suspect.

48. Ms. Sugahara-Henderson testified persuasively that Parent, Grandmother and Student had all told her that Student stayed with Grandmother in Berkeley during the week, and lived with Parent in Richmond until Grandmother refused to let Student

stay in her home beginning in September 2016. These statements were documented in the assessment report prepared by Ms. Sugahara-Henderson at or around the time of the interviews, at a time when District staff were unaware that Parent's residency was a due process issue. The statements regarding residency in her assessment report were also consistent with statements in the earlier Behavioral Health assessment report, which was not shared with Ms. Sugahara-Henderson. Ms. Sugahara-Henderson's testimony was more credible than Parent's on these facts.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA²

1. 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 (2006) et seq.;³ Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) 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 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).)

2. 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

² Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

³ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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 that describes the child's needs, academic, and functional goals related to those needs, and 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).)

3. 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] (*Rowley*), 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. The Supreme Court revisited and clarified the *Rowley* standard in *Endrew F. v. Douglas County School Dist.* (March 22, 2017) 580 U.S. __ [137 S.Ct. 988] (*Endrew*). It explained that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. (*Id.*, 137 S.Ct. at pp. 1000-1001, citing *Rowley*, 458 U.S. at p. 204.) As applied to a student who was not fully integrated into a regular classroom, the student's IEP must be reasonably calculated to enable the student to make progress

appropriate in light of his or her circumstances. (*Endrew*, 137 S.Ct. at p. 1001.)

4. 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, evaluation, 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).) Subject to limited exceptions, a request for a due process hearing 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. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code 56505, subd. (l).) 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. 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].) In this matter, Student had the burden of proof on the issues decided.

ISSUE 1(A)-(D): DISTRICT RESPONSIBILITY FOR PROVIDING STUDENT A FAPE

5. Student contends that District was responsible for providing Student a FAPE, based on Parent's residency. District contends that Parent did not live within District boundaries, and therefore Student cannot prove that District owed her a FAPE.

Applicable Law

RESIDENCY OF PARENT GENERALLY DETERMINES RESPONSIBLE DISTRICT

6. The IDEA leaves it to each state to decide how it will allocate among its various state and local public agencies the responsibility for providing, and funding, special education programs. (*Los Angeles Unified School Dist. v. Garcia* (2013) 58 Cal.4th

175, 184.) Under Education Code section 48200, a school district is responsible for providing a FAPE to all eligible students whose parent or legal guardian resides within the jurisdictional boundaries of the school district, subject to several specified exceptions. (*Id.* at pp. 186-187, citing *Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1525 (*Union*).)⁴

7. If a student is detained in a juvenile detention center, the county office of education in which the juvenile detention center is located is responsible for the student's education. (Ed. Code § 48645.2.) Juvenile court schools provide educational services to all students detained in juvenile halls. (Ed. Code, § 48645.1.) If a student is placed in a residential treatment center by a juvenile court, the school district in which the residential treatment center is located is responsible for the student's education. (*Id.*, § 48204(a)(1).)

Definition of "Parent"

8. Education Code section 56028, subdivision (a) defines "parent" for special education purposes as a person holding any one of the following relationships to a child:

- (1) A biological or adoptive parent of a child.
- (2) A foster parent if the authority of the biological or adoptive parents to make educational decisions on the child's behalf specifically has been limited by court order in accordance with Section 300.30(b)(1) or (2) of Title 34 of the

⁴ School districts may also voluntarily assume responsibility for special education students whose parents do not reside within district boundaries by, for example, granting an intra-district transfer or accepting a caregiver affidavit. (*See* Ed. Code, § 48204(a)(3) and (5).) Mother did not apply for or obtain an inter-district transfer, or assert that Grandmother was Student's caregiver.

Code of Federal Regulations.

- (3) A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child, including a responsible adult appointed for the child in accordance with Sections 361 and 726 of the Welfare and Institutions Code.
- (4) An individual acting in the place of a biological or adoptive parent, including a grandparent, stepparent, or other relative, with whom the child lives, or an individual who is legally responsible for the child's welfare.
- (5) A surrogate parent who has been appointed pursuant to Section 7579.5 or 7579.6 of the Government Code, and in accordance with Section 300.519 of Title 34 of the Code of Federal Regulations and Section 1439(a)(5) of Title 20 of the United States Code.

Rules of Residency

9. The determination of residency under the IDEA or Education Code is no different from an ordinary determination of residency. (*Union, supra*, 15 F3d. at p. 1525.)

10. Residency in California is determined based on rules set forth in Government Code, section 244: (a) it is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose; (b) there can only be one residence; (c) a residence cannot be lost until another is gained; (d) the residence of an unmarried minor child is the residence of the parent with whom the child maintains his or her place of abode; (e) the residence of an unmarried minor who has a parent living cannot be changed by his or her own act; and (f) the residence can be changed only by the union of act and intent. (Gov. Code, § 244, subds. (a)-(f).)

Analysis

PARENT WAS STUDENT'S "PARENT" AT ALL TIMES

11. The weight of the evidence established that Parent was Student's parent for educational purposes at all times, even during those times when Parent did not have physical custody of Student.

12. Parent was Student's biological parent, and so a "parent" for special education purposes. (Ed. Code, § 56028, subd. (a)(1).) Parent's right to physical custody of Student was removed in November 2016, and Student was released to the custody of a classmate's mother the following month, but Parent continued to exercise Student's educational rights and to meet the definition of "parent" for special education purposes.

13. No other person acted as Student's parent during the time at issue. Parent's exercise of educational rights was not limited in any way, no guardian was authorized to act as Student's parent, and no surrogate parent was appointed. Student was not placed in foster care. Student sometimes stayed with Grandmother during the week, but Grandmother did not act in Parent's place, and was not legally responsible for Student's welfare. Parent was at all times legally responsible for Student and active in Student's education. During the time at issue, Parent requested that Student be assessed for special education, provided input for District's psychoeducational assessment of Student, contacted District staff for information on Student's progress, attended and participated in Student's March 2, 2017 IEP team meeting, and made arrangements for Student's residential treatment upon her release from juvenile detention.

14. Accordingly, during Student's weekly stays with her Grandmother, her court-ordered release to a classmate's home, and her time as a runaway, Parent continued to be Student's "parent" for special education purposes, and the school district of Parent's residence was responsible for providing Student with a FAPE.

Parent Resided in Richmond

15. The weight of the evidence established that Parent did not live within District boundaries, but at the Richmond address in Contra Costa County, during the time at issue.

16. There was abundant direct evidence that Parent resided at the Richmond address. Student reported to multiple persons, including police, juvenile authorities and assessing psychologists that she lived with Parent at the Richmond address. Both Parent and Student told Ms. Sugahara-Henderson that in ninth and 10th grades Student had stayed with Grandmother during the week, and returned home to Parent on weekends, although by early September 2016, Student was living full-time with Parent at the Richmond address. Parent and Student made their statements to Ms. Sugahara-Henderson before Parent or District were aware that Parent's residence would be an issue in this proceeding, and Parent's contradictory testimony at hearing was self-serving and unpersuasive.

17. Multiple documents created at important moments in Parent's life during the 2016-2017 school year, including the arrest of her daughter and hearings on her custody rights, indicate that Parent represented the Richmond address as her residence. A reasonable inference that Parent actually lived at the Richmond address could also be drawn from the fact that, during the years at issue, the Richmond property qualified for an annual \$7,000 homeowner's property tax exemption each year due to Parent's residence there.

18. Throughout the years at issue, Parent held herself out as a resident of Richmond to local, state and federal governments for purposes of asserting her right to vote as a citizen of Contra Costa County. She should not now be permitted by inconsistent and self-serving statements to hold herself out as the resident of a different county to impose state and federal education obligations on a school district outside of

Contra Costa County.

19. Parent's testimony that she only visited the Richmond address to do business paperwork and sleep on weekends was unconvincing and inadequate to prove that she lived, or intended to live, at the Berkeley address. Parent stayed with Grandmother as needed, such as when Grandmother's husband died or when Grandmother was ill. However, many adult children stay with their parents temporarily to assist them through difficult times or illness, and such evidence does not evince a permanent change of residence. The testimony of Parent and Grandmother that Parent did, or intended to, move to the Berkeley address was conflicting and often illogical or evasive. Ultimately their testimony was unpersuasive and insufficient to overcome the abundant evidence that Parent resided at the Richmond address at all times relevant to this proceeding.

20. Lastly, there was substantial evidence that Parent only stayed at the Berkeley address temporarily, and did not at any time intend to make a permanent home at the Berkeley address. There can only be one residence for special education purposes, and until and unless another residence was gained, Parent did not lose her residence at the Richmond address. Parent continuously maintained and always returned to her residence at the Richmond address, until such time as she moved with Student outside of both Contra Costa and Alameda Counties on August 1, 2017.

21. Accordingly, at all times that the responsibility for Student's education was that of the school district of Parent's residence, District was not responsible for providing Student with a FAPE.

Student's Juvenile Detention

22. Student was detained in a juvenile detention center from November 11 through December 26, 2016, and March 11 through March 27, 2017. The county office of education in which the detention center was located was responsible for providing

Student with a FAPE, not District, during those detentions.

23. It was unclear from the evidence whether the Juvenile Court ordered Student into a residential treatment center upon her release on March 27, 2017. Student did not offer the Juvenile Court's release orders into evidence. If the Juvenile Court ordered Student released to a residential treatment center, then the school districts in which the residential treatment centers were located were responsible for providing Student with a FAPE. Neither treatment center was located within District boundaries.

24. Had the Juvenile Court released Student without the requirement that she be placed in residential treatment, the school district responsible for providing Student with a FAPE would be the school district of Parent's residence in Richmond, not District.

25. In conclusion, at all times relevant to this proceeding, either the county office of education where Student was in juvenile detention, the school district of Parent's residence in Richmond, or the school districts in which the treatment centers were located, were responsible for providing Student with a FAPE. District was not the school district of Parent's residence, or the school district in which either of the two treatment centers were located. Therefore District did not owe Student a duty to provide a FAPE.

26. Student failed to meet her burden of proving by a preponderance of the evidence that Parent resided within District boundaries during the period at issue in Student's complaint, or that District otherwise owed an obligation to provide Student with a FAPE.

ISSUE 2: RESPONSE TO EDUCATIONAL RECORDS REQUEST

27. Student contends that District denied her a FAPE because it failed to include Student's attendance records and assessment protocols in the educational records provided upon Parent's request. District contends that it provided Parent with a complete copy of Student's educational records, and if it had missed a few documents

such as attendance records, it would have corrected the oversight if Parent had brought it to District's attention.

Applicable Law

28. Education Code, section 56504 (Section 56504), provides, in pertinent part, that "[t]he parent shall have the right and opportunity to examine all school records of his or her child and to receive copies ... five business days after the request is made by the parent, either orally or in writing."

29. "Educational records" under the IDEA are defined by the federal statute and Supreme Court decisions to mean institutional records kept by a single central custodian, such as a registrar. (See Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g(a)(4)(A); Ed. Code, § 49061, subd. (b); *Owasso Ind. School Dist. v. Falvo* (2002) 534 U.S. 426, 434-435 [122 S. Ct. 934, 151 L.Ed.2d 896]) Typical of such records would be registration forms, class schedules, grade transcripts, discipline reports, and the like." (*BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 751-755.) "[FERPA] was directed at institutional records maintained in the normal course of business by a single, central custodian of the school. (*Id.* at pp. 751-754.)

30. Educational records under Section 56504 include assessments and assessment protocols that are personally identifiable to the child, and must be disclosed to the parents. (*Newport-Mesa Unified Sch. Dist. v. State of Calif. Dept. of Educ.* (C.D. Cal. 2005) 371 F.Supp.2d 1170, 1175 (*Newport-Mesa*) .) Copies of assessment protocols include work copyrighted by the assessment test publishers, but provision of protocols to parents under Section 56504 is a fair use of copyrighted material under Title 17 United States Code section 107. (*id.* at p. 1179.) School districts may not infringe on this important disclosure protection for parents of special education students from fear of violating federal copyright law, but may minimize the risk of improper use of copies of assessment protocols by parents through reasonable measures, including a

nondisclosure or confidentiality agreement. (*ibid.*)

31. A procedural violation based on interference with parental rights does not deny a child of a FAPE unless it is shown that the violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*); Ed. Code, §56505, subd. (f)(2)(B).)

Analysis

32. As discussed at issue 1, Student failed to prove that Parent resided within District boundaries during the period at issue, or that District otherwise owed Student a FAPE. Accordingly, any procedural error by District is immaterial to Student's right to a FAPE under the IDEA or California special education law.

33. The weight of the evidence established that District promptly processed Parent's educational records requests. The absence of attendance records would have been a minor oversight, and readily corrected by a call to District giving them notice that those documents were missing.

34. Test protocols are not routinely maintained in a student's educational file and, due to the sensitive nature of the test documents and copyright obligations set forth in *Newport-Mesa*, are often kept in the files of the school psychologist. As with the attendance documents, Parent submitted no evidence that District was notified upon receipt of educational records that the test protocols were not included, and given an opportunity to promptly remedy any oversight.

35. Parent was given a copy of District's psychoeducational assessment report with Student's results on each test instrument at the March 2, 2017 IEP team meeting. A report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).) Ms. Sugahara-Henderson was also at the

IEP team meeting to explain and discuss the assessment results, and Parent participated in the discussion. Parent did not request the protocols until well after the IEP team meeting that reviewed the psychoeducational assessment. Even assuming District had a duty to provide Student with a FAPE, which it did not, the failure to provide Parent with protocols in the educational records request response was not a procedural violation that significantly impeded Parent's opportunity to participate in the IEP development process.

36. Parent's witnesses did not testify that they required the protocols from District's assessment to conduct their own assessments, or suggest that District's assessment results were discrepant with their own or suspect for any reason. There was no showing that the lack of protocols in the response to Parent's records request in any way impeded Student's right to a FAPE, significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, or caused Student a deprivation of educational benefits. Accordingly, the lack of protocols in the educational records was a minor procedural error, and per *Target Range*, would not rise to the level of a denial of FAPE had District had an obligation to provide them.

37. Student failed to meet her burden of proving by a preponderance of the evidence that District owed Student a FAPE, or that a failure to include attendance records or protocols in the educational records provided to Parent was more than a minor procedural error and denied Student a FAPE or significantly impeded Parent's opportunity to participate in the IEP decision-making process. District prevailed on Issue 2.

ORDER

All of Student's requests for remedies are denied.

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. Here, District prevailed on all issues against it.

RIGHT TO APPEAL THIS DECISION

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).)

Dated: January 11, 2018

/s/

ALEXA J. HOHENSEE

Administrative Law Judge

Office of Administrative Hearings