

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

FAIRFIELD SUISUN UNIFIED SCHOOL
DISTRICT, LIVE OAK SCHOOL
DISTRICT, AND CYPRESS CHARTER
SCHOOL

OAH CASE NO. 2010120551

DECISION RE: RESIDENCY OF
STUDENT IN FAIRFIELD-SUISUN
UNIFIED SCHOOL DISTRICT

DECISION

Administrative Law Judge (ALJ) Gary A. Geren, Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter on June 20 and 21, 2011, in Oakland, California.

Parent on Behalf of Student (Student) was represented by M. Lynn Hansen and Jonathan Quinn, Attorneys at Law. Student's mother (Mother) was present throughout the hearing.

Fairfield-Suisun Unified School District (Fairfield) was represented by Jan E. Tomsy, Attorney at Law. Present on Fairfield's behalf was Andrew Green-Owensby, Executive Director of Pupil Services.

Cypress Charter School (Cypress) and Live Oak School District (Live Oak) were represented by Laurie E. Reynolds, Attorney at Law. Also present was Les Forster, principal at Cypress and Dr. Katie Merchant, Director of Special Education for Live Oak.

PROCEDURAL HISTORY

On March 15, 2011, Student's amended complaint was deemed filed and the timeline for the adjudication of this matter was reset. On April 29, 2011, the parties' motion to continue the hearing of this matter to June 20, 2011 was granted.

Before the hearing, on June 1, 2011, a prehearing conference (PHC) was held and the subsequent order identified twenty issues and/or affirmative defenses, along with ten sub-issues, and seven requested orders for relief. The parties agreed at the PHC that Fairfield's affirmative defense challenging Student's residency status should be heard before all other issues.¹ Accordingly, on June 20 and 21, 2011, the hearing on Student's residency status convened. At the conclusion of the hearing, in lieu of oral argument, the parties were permitted to file written briefs according to the following schedule: Fairfield's opening brief filed no later than July 5, 2011, Student's opposing brief filed no later than July 26, 2011, and Fairfield's reply brief filed no later than August 12, 2011.² The parties' briefs were timely filed and served. Accordingly, the residency issue was submitted for decision on August 12, 2011.

ISSUE

Whether Student was a resident in Fairfield from October 7, 2010 to the present?

¹ At the PHC it was agreed that a ruling on the residency issue would be issued after the first day of hearing; however, due to the complexities involved in resolving the issue, after the second day of hearing the issue was taken under submission for a formal decision.

² Cypress and Live Oak did not file briefs because the residency issue does not directly concern them.

CONTENTIONS OF THE PARTIES

The parties do not dispute that Student's parents (Parents) are divorced and reside outside Fairfield's jurisdictional boundaries. Student's residency in Fairfield was established by a Caregiver's Authorization Affidavit (Affidavit) on August 7, 2009. In the Affidavit, Mother's long-time friend attested to the fact that she would be acting as Student's caregiver (caregiver residency).³

Fairfield contends that because Mother "acted like a parent" and proceeded to "make educational decisions," under the governing law, she operated to terminate Student's caregiver residency. Fairfield contends Student's caregiver residency ended on October 7, 2010, because on the previous day, Mother followed through on arrangements to have her daughter transported to a residential treatment facility in Kanab, Utah.

Student disputes Fairfield's contentions, in part, because the caregiver agreed with Mother's placing Student at a residential facility, and also because Student intends to return to caregiver's home upon her return to the state.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student has been identified as a child with a disability entitled to receive special education services under the category of Specific Learning Disability (SLD) since early elementary school. She is now sixteen years old. Her parents have been divorced for approximately five years, and neither of them resides within the boundaries of Fairfield. Student's parent share legal custody of Student, but Mother has sole physical

³ Family Code sections 6550 and 6552 set forth the requirements for caregivers to enroll a Student by completing an Affidavit.

custody. During the 2008-2009 school year, Student attended her freshman year of high school in the Pajaro Valley Unified School District (Pajaro), the district where her mother resides. Because of interpersonal struggles between Mother and Student, as well as Student's inappropriate behaviors at school and elsewhere, Mother decided that it would be best for Student to live with T.S.⁴ Student began living with T.S. on approximately July 1, 2009. Initially, Student was to only spend summer recess with T.S.; however, Mother and T.S. later decided to have Student remain at T.S.'s home for the 2009-2010 school year.

2. On August 7, 2009, T.S. completed an Affidavit and enrollment forms for Student to attend Fairfield's Armijo High School (Armijo). Student began attending that fall, her sophomore year. On December 7, 2009 and August 26, 2010, Fairfield convened Student's individualized education program (IEP) team meetings, as Student entered Fairfield as a special needs child. Student was represented at IEP team meetings by R.C., T.S.'s mother.

3. At the conclusion of the 2009-2010 school year, Student continued to live with T.S. while she attended summer school. Student returned to Armijo on August 16, 2010, to begin her junior year of high school. Student's last day of attendance was September 20, 2010, and she has not attended any school in Fairfield since then.

4. Student has suffered a long history of behavioral problems that predated her attendance in Fairfield, including her addictions to drugs and alcohol. While Student resided with T.S., R.C. made arrangements for Student to receive counseling from a psychiatrist through R.C.'s health plan. On September 14, 2010, the psychiatrist told R.C. that Student was not responding appropriately to therapy and that she needed "a wake-

⁴ The parents of Mother and T.S.'s were childhood friends and the two families continue to share a close relationship.

up call." To this end, the psychiatrist recommended Student be enrolled in a residential treatment facility. The psychiatrist's opinion was relayed to Mother, who in concert with her own mother (Grandmother), Student's father (Father), T.S., and R.C., initiated an effort to locate an out-of-state residential treatment facility.

5. In September 2010, Mother retained the Bodin Group (an educational consulting firm) to assist in locating a facility. Mother paid for Bodin's services. Bodin provided a list of potential facilities, including WinGate Wilderness Therapy (WinGate), located in Kanab, Utah. Subsequently, Parents, Grandmother, T.S. and R.C. collectively concluded Student should be placed there.

6. On October 3, 2010, Mother completed the application to enroll Student in WinGate and she identified herself on the enrollment form as Student's "primary parent/guardian." Mother also indicated on the form that she intended to place Student in a residential placement center after she completed WinGate. WinGate accepted Student's enrollment in their program.

7. To attend WinGate, Student had to be transported from Fairfield, California to Kanab, Utah. To accomplish this, Mother hired independent contractors to take Student to WinGate.⁵ On October 6, 2010, while Mother was present, two "transporters," as they were referred to during hearing, arrived at T.S.'s home, placed Student in an automobile, and drove her to the WinGate facility. Twelve days later, on October 18, 2010, R.C. advised Fairfield that Student was attending WinGate.

8. On November 2, 2010, Mother telephoned Armijo to request Student's school records, and later that same day, Grandmother, speaking on Mother's behalf,

⁵ See California Health and Safety Code, section 1596.653, which governs requirements for a Transport Escort Service and is set forth more particularly at Legal Conclusion 9.

informed Fairfield that Student's family was seeking a program for Student outside of Fairfield.

9. In early December 2010, Mother and Grandmother visited and assessed Alpine Academy (Alpine) in Erda, Utah, as a possible placement for Student upon her completion at WinGate. Following their visit, Grandmother, acting on Mother's behalf, advised Alpine that she and Mother intended to place Student there, starting December 20, 2010. On December 9, 2010, the Bodin Group sent a facsimile to Alpine stating, "my clients, [Parents and Grandmother], have chosen to place Student at Alpine Academy." On December 10, 2010, at Mother's request, WinGate forwarded confidential treatment information to Alpine.

10. On December 11, 2010, Alpine sent Mother a packet of "release of information" forms seeking Mother's consent to allow Alpine to obtain and share confidential information about Student. On December 14, 2010, Mother provided Alpine with her consent by returning the signed forms to them. On December 20, 2010, Mother contracted with Alpine Academy for Student's placement at the facility

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Student has the burden of proving the essential elements of her claim; the burden is a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].) While the burden of proving the essential elements of her claim remains throughout the hearing, the burden of *producing evidence* may shift from petitioner to respondent during the hearing once the petitioner presents sufficient evidence to establish a prima facie case. (Evid. Code, §§ 500, 550; *Sargent Fletcher v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1668.) As set forth in Factual Finding 2, Student

presented sufficient evidence establishing her caregiver residency. The burden to produce evidence that the caregiver residency ended then shifted to Fairfield.

APPLICABLE LAW

2. Education Code section 48200 mandates all children between the ages of six and eighteen years "shall attend the public full-time day school or continuation school or classes and for the full time designated as the length of the school day by the governing board of the school district in which the residency of either the **parent** or legal guardian is located" (emphasis added) (*see also Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 57 ("Section 48200 'generally requires that children attend school in the district where the residence of either the **parent** or legal guardian is located" citing 67 Ops.Cal.Atty.Gen. 452, 453 (1984) (emphasis added).) Thus, residency for the purpose of school attendance generally is established, not by where the student resides, but by the residence of the student's parents.

3. There may be only one residence. (Gov. Code, § 244, subd. (b).)

4. Education Code section 56028 defines "parent" for special education purposes. Section 56028 was amended in 2007 to mirror the definition of "parent" provided in Code of Federal Regulations, title 34, part 300.30 (2006), and was further amended in 2009, to now read:

(a) "Parent" means any of the following:

(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 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. (Emphasis added).
- (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.

5. OAH has ruled that the definition of "parent" for special education purposes as set forth in Section 56028 must be applied to the general education provision found at Section 48200 when determining which agency is responsible for providing a special education to a child. (*Student v. Orange County Dept. of Ed., Irvine Unified School Dist. and California Dept. of Ed.; Orange County Dept. of Ed. v. Student* (2009) Cal.Ofc.Admin.Hrngs. Case Nos. 2009090943 and 2009100565⁶).

"While Education Code section 48200 is not within Part 30 of the Education Code relating to Special Education Programs, nevertheless, the definition of 'parent' in section 56028 gives meaning to the term 'parent' in section 48200 whenever a residency determination is made for a special education pupil."); *Orange County Dept. of Ed. v. Student, Student v. Orange County Dept. of Ed., California Dept. of Ed. and Newport-Mesa Unified School Dist.* (2009) Cal.Ofc.Admin.Hrngs. Case Nos. 2009010078 and

⁶ The consolidated case is presently on appeal before U.S. District Court as to residency for a foster child.

2009010529 ("Section 56028, which is found in the section of the code regarding special education, sets forth definitions of 'parent' that must be read in conjunction with section 48200 when there is a question regarding which agency is responsible for providing special education to a particular child.").

6. Pursuant to Education Code section 48204, there are five exceptions to the general rule that the residency of a student follows the residency of his or her parents. Section 48204(a)(4) sets forth the caregiver exception as follows:

(a) Notwithstanding Section 48200 [the general rule that the residency of the biological parent is determinative], a pupil complies with the residency requirements for school attendance in a school district, if he or she is any of the following:

[¶...¶]

(4) A pupil who lives in the home of a caregiving adult that is located within the boundaries of that school district. Execution of an affidavit under penalty of perjury pursuant to Part 1.5 (commencing with Section 6550) of Division 11 of the Family Code by the caregiving adult is a sufficient basis for a determination that the pupil lives in the home of the caregiver, unless the school district determines from actual facts that the pupil is not living in the home of the caregiver.

7. Section 56028 was amended in 2007 to clarify the rights between a "biological parent" and statutorily created "parents" when rights are simultaneously held. Section 56208(b)(1), as amended, states:

Except as provided in paragraph (2),⁷ the biological or adoptive parent, *when attempting to act as the parent* under this part and when more than one party is qualified under subdivision (a) to act as a parent, *shall be presumed to be the parent for purposes of this section* unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.⁸ (emphasis added)

Education Code section 56028(b)(1) mirrors 34 C.F.R. §300.30(b)(1). The Analysis of the Comments and Changes to this regulation state:

Section 300.30(b) was added to assist schools and public agencies in determining the appropriate person to serve as the parent under Part B of the Act in those difficult situations in which more than one individual is "attempting to act as a

⁷ "Paragraph (2)" refers to the following: "If a judicial decree or order identifies a specific person or persons under paragraphs (1) to (4), inclusive, of subdivision (a) to act as the 'parent' of a child or to make educational decisions on behalf of a child, then that person or persons shall be determined to be the 'parent' for purposes of this part, Article 1 (commencing with Section 48200) of Chapter 2 of Part 27 of Division 4 of Title 2, and Chapter 26.5 (commencing with Section 7570) of Division 7 of Title 1 of the Government Code, and Sections 361 and 726 of the Welfare and Institutions Code." (Ed. Code, §56028(b)(2).) This subsection is inapplicable in the present matter as there has been no such judicial decree or order.

⁸ Education Code section 56028(b)(1) remained unchanged following the 2009 amendments.

parent" and make educational decisions for a child. *It recognizes the priority of the biological or adoptive parent and the authority of the courts to make decisions, and does not leave these decisions to school administrators.*

The phrase "attempting to act as a parent" is generally meant to refer to situations in which an individual attempts to assume the responsibilities of a parent under the Act. An individual may "attempt to act as a parent" under the Act in many situations; for example, if an individual provides *consent for an evaluation or reevaluation, or attends an IEP Team* meeting as the child's parent. We do not believe it is necessary or possible to include in these regulations the numerous situations in which an individual may "attempt to act as a parent." (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46567 (August 14, 2006) (*emphasis added*)).

8. The relevant portion of section Family Code section 6550(a) states:

A caregiver's authorization affidavit that meets the requirements of this part authorizes a caregiver 18 years of age or older who completes items 1 to 4, inclusive, of the affidavit provided in Section 6552 and signs the affidavit to enroll a minor in school and consent to school-related medical care on behalf of the minor. A caregiver who is a relative and who completes items 1 to 8, inclusive, of the affidavit provided in Section 6552 and signs the affidavit

shall have the same rights to authorize medical care and dental care for the minor that are given to guardians under Section 2353 of the Probate Code.

9. The Family Code section 6552 provides that a caregiver's authorization affidavit shall include information such as the student's name and birth date, as well as the caregiver's name and address. The affidavit is executed under the penalty of perjury.

10. The relevant portion of Health and Safety Code section 1596.653 states:

(a) It is the intent of the Legislature to protect the well-being of California children by regulating private individuals and companies that transport or accompany minors to out-of-state residential facilities or institutions.

(b) As used in this section:

(1) "Transport escort service" means any person, partnership, association, or corporation that accepts financial compensation or other consideration to accompany or transport minors who are residents of California to any residential facility or institution located outside the state.

(2) "Minor" means any person under the age of 18 years.

(3) "Department" means the State Department of Social Services.

(c) Every transport escort service that accompanies or transports a minor who is a resident of California to any residential facility or institution located outside the state, shall first provide the minor's parents, custodial parent, or legal guardian with all of the following:

(1) A description of the child care provider trustline registry established pursuant to this chapter that provides criminal history checks on child care providers.

(2) An explanation of how a *parent* may obtain more information about the child care provider trustline registry.

- (3) A statement that a transport escort service is prohibited by law from transporting or accompanying a minor unless the person or persons transporting the minor are trustline registered child care providers.
 - (4) An explanation of how the *parent* may verify the trustline registration of the transport escort service.
 - (5) An explanation of the minor's right to make a complaint to a child protective agency concerning abusive treatment by the transport escort service.
- (d) A transport escort service shall not transport or accompany a minor without obtaining the written permission of the minor's parents, custodial parent, or legal guardian. (emphasis added).*

STATUTORY CONSTRUCTION

11. "Statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Katz v. Los Gatos-Saratoga Joint Union High School District*, supra at p.54, citing *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) "[E]very statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect." (*Id.*, citing *Moore v. Panish* (1982) 32 Cal.3d 535, 541.)

DISCUSSION

Whether Student was a resident in Fairfield from October 7, 2010 to the present?

12. The obvious intent of the "caregiver" exception is to ensure that adults who provide care for school-age children hold the authority needed to enroll the child

in the district where the caregiver resides, without the caregiver incurring the expense and suffering the delay in obtaining formal legal guardianship over a student.⁹

Here, at the time the Affidavit was executed, Mother believed her longtime friends, T.S. and R.C., were better able to tend to Student's needs than was she (Factual Findings 1 through 3). However, once Mother began "acting like a parent" and made "educational decisions" within the meaning described in Legal Conclusions 7 and 10, and set forth in Factual Findings 4 through 10, then Student's residency in Fairfield under the Affidavit ended.

As set forth in Legal Conclusions 7 and 8, the limited rights of a "caregiver" do not exist indefinitely, and one manner of their termination is when biological parents begin making decisions about a student's education. As is the circumstances in this matter. (Factual Findings 4 through 10).

DETERMINATION

13. Harmonizing the statutes referenced in Legal Conclusions 1 through 10 , compels a finding that Student's residency under the "caregiver" exception existed only until such time that Mother "acted like a parent" by exercising an educational right

⁹ According to the Committee Report to Senate Bill 592 that preceded the amendments to Family Code, Division 11 (Minors) Part 1.5, was to create a "new type of procedure for care, custody and control of minor children that is an alternative to guardianship. [This bill] creates a category of persons called 'caregivers' who have certain limited rights to authorize medical care for and enroll in school minor children currently residing in their home."

equal to or in excess of providing "consent for an evaluation or reevaluation" or by her "attending an IEP team meeting."¹⁰

As set forth in Factual Findings 4 through 10, Mother "acted like a parent" when she made the difficult decision to place her daughter in an out-of-state residential treatment facility, and by her directly undertaking the precedent steps necessary for Student's placement in Utah to come to fruition. More particularly, as set forth in Factual Finding 7, Mother's arranging for and consenting to Student's transfer to Utah by a transport escort service was an exercise of educational rights beyond merely providing "consent for an evaluation" or "attending an IEP team meeting."

The transportation of a Student to an out-of-state residential facility by use of a transport escort service is an act that caregivers lack the authority to authorize. As a matter of law, transporting students out of state in this way requires the consent "parents, custodial parents, or legal guardians." Accordingly, Student's travel to Utah could not have lawfully occurred without Mother's consent, and the provision of her consent is consistent with an "act of parent" as that phrase is defined. (Factual Finding 7 and Legal Conclusions 7 through 10). It follows that Student's removal from the state on October 6, 2010, also marks the clearest point in time at which Mother's "acting like a parent" cannot be seriously disputed. Thus, Fairfield was not Student's district of residence after October 6, 2010.

¹⁰ Whatever acts the outer contours of that phrase may include is unclear; however, Mother's exercising of educational rights over Student here, as discussed in Factual Findings 4 through 10, falls within the boundaries of conduct equating to "acts of a parent."

ORDER

1. Fairfield has not been Student's district of residence since October 7, 2010;
2. This matter is set for a telephonic trial setting conference on September 7, 2011 at 2:30 p.m. Counsel are ordered to meet and confer prior to the conference in attempt to secure mutually agreeable hearing dates.

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.

Fairfield prevailed on the issue of Student not being a resident of the district at after October 7, 2010.

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 ninety (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).

Dated: August 30, 2011



GARY GEREN

Administrative Law Judge

Office of Administrative Hearings