

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

OAH Case No. 2017031065

PARENT ON BEHALF OF STUDENT,

v.

LAFAYETTE SCHOOL DISTRICT.

DECISION ON BIFURCATED ISSUE OF RESIDENCY

Student filed a request for due process hearing on March 21, 2017, naming Lafayette School District. The matter was bifurcated on May 25, 2017, so that the issue of residency could be determined prior to the determination of the other issues in this case. Administrative Law Judge Rita Defilippis heard the matter in Lafayette, California, on August 29, 30 and 31, 2017.

Laurene Bresnick, Attorney at Law, represented Student throughout the hearing. With the permission of Parents, interns from Ms. Bresnick's office observed the hearing. Emily Sprague observed the hearing on August 29 and 31, 2017, and Fawn Tang-Quan observed the hearing on August 30, 2017. Parents attended all days of the hearing. Student was not present.

Diane Willis, Attorney at Law, represented Lafayette throughout the hearing. Sarah Garcia, Attorney at Law, was present at hearing on the afternoon of August 30, 2017. Pat Gargiulo, Lafayette's Director of Student Services, attended all days of the hearing on Lafayette's behalf.

At the parties request on August 31, 2017, the matter was continued to September 19, 2017, for the filing of written closing arguments. On that day, the parties filed closing arguments, the record was closed, and the bifurcated issue was submitted for decision.

## ISSUE

Was Student a resident of Lafayette such that Lafayette is the local education agency with the jurisdictional responsibility to provide special education to Student from June 5, 2015, through May 7, 2017?

## SUMMARY OF DECISION

Student proved, by a preponderance of the evidence, that he was a resident of Lafayette such that Lafayette is the local educational agency with the jurisdictional responsibility to provide special education to Student from June 5, 2015, through May 7, 2017.

## FACTUAL FINDINGS

### JURISDICTION

1. Student is a 13-year-old boy who was diagnosed with attention deficit hyperactivity disorder, disruptive mood dysregulation disorder (with depressive symptoms), and a sensory modulation disorder. Student attended Springhill Elementary School in Lafayette School District from kindergarten through fifth grade, from 2010 until June 2015.

2. On June 21, 2013, Parents purchased a three bedroom home located within the boundaries of Lafayette (Home A). Student lived in that home with both Parents until Parents separated on June 1, 2014, and Mother moved to a three bedroom home, located within the boundaries of Lafayette, which she rented (Home B). Until

January 15, 2016, Student lived part of the time with his Father in Home A, and part of the time with his Mother in Home B. The two homes were just a half a mile apart. Student had his own bedroom at both houses. At all times relevant to this case, Parents shared legal and physical custody of Student as equally as possible.

#### SPECIAL EDUCATION DISPUTE AND UNILATERAL PLACEMENT OF STUDENT

3. On June 5, 2015, an initial IEP meeting was held to review assessments to determine whether Student qualified for special education. The IEP document listed Home A as Father's address and Home B as Mother's address. Based on the assessments, Lafayette denied Student's eligibility for special education. Parents did not sign consent. Parents sought a nonpublic school placement for Student because they felt that he would not be able to handle general education classes at the offered Lafayette middle school, due to his disability related struggles. Parents first tried to place Student in a nonpublic school in Lafayette, but he was not accepted. Student was accepted by Esther B. Clark School in Palo Alto, California, and was unilaterally placed there by Parents during the 2015-2016 extended school year. He remained there throughout the 2016-2017 school year.

4. On August 10, 2015, Susan Manzano, Instructional Support Teacher at Springhill School, emailed Father to confirm Father's intention to place Student in private school and to not enroll him in Lafayette public schools. On August 17, 2015, Father replied by email confirming that Student would not be in attendance at Lafayette Public Schools in the 2015-2016 school year as he was enrolled in a private school. Father also asked Ms. Manzano to forward his response email to whoever is appropriate.

5. On August 17, 2015, the email from Father to Ms. Manzano was forwarded to Pat Gargiulo, Interim Director of Student Services. Mr. Gargiulo forwarded the email to Lafayette's attorney on December 7, 2015.

## FATHER'S MOVE TO PORTOLA VALLEY

6. On June 11, 2015, Father completed an enrollment packet for Esther B. Clark listing his address at Home A and Mother's address at Home B, and indicating that Student lived with each of the Parents. Student began attending Esther B. Clark for the 2015-2016 extended school year. Parents had to drive Student to Esther B. Clark, which was a one and one-half to two and one-half hour drive, one way. The hours in the car were hard on Student and his family. Father developed pneumonia in the fall of 2015, making the commute even more difficult. Parents decided that one of them had to try to find housing nearer to Esther B. Clark in Palo Alto to reduce the commute and relieve the family stress. Because Mother was in the process of completing a master's degree program and attends school near Lafayette, and Father works primarily from home, Parents decided that Father would find a house closer to Palo Alto. On January 15, 2016, Father rented a home in Portola Valley (Home C) for the purpose of shortening the commute to school. Parents intended to return Student to public school in Lafayette once he was determined to no longer need the educational services of Esther B. Clark. Home C is five miles from Esther B. Clark. Home A was put on the market as part of the divorce and the sale of Home A was complete in March 2016. Mother resided in Lafayette in Home B during the entire timeframe at issue in this case.

7. Mr. Chris Harris, Director of Esther B. Clark, testified at hearing. Mr. Harris has known Student and his Parents since Student was placed at the school the summer of 2015. Mr. Harris was aware that Father had moved closer to Esther B. Clark to eliminate the long commute. Mr. Harris knows Parents well based on their involvement in the education of Student and his sibling at Esther B. Clark. He also was aware that Student lived at each Parent's home, and that Student and his sibling spent weekends with their mother.

8. On August 15, 2016, Father completed Esther B. Clark's enrollment packet for Student for the 2016-2017 school year and listed Father's address at Home C and Mother's address at Home B. The form indicated that Student lived with Father but not Mother. Father credibly testified that he did this at the time because, in an emergency, he did not want the school to be contacting Mother who was far away. Student lived with each parent during the entire timeframe at issue in this case.

#### CUSTODY AND LIVING ARRANGEMENTS FOLLOWING DISSOLUTION

9. In August 2016, Parents' final Judgment of Dissolution was filed. Parents have joint legal and physical custody of Student and his sibling. Pursuant to their dissolution agreement, which was corroborated by Parent's testimony at hearing, Parents have open and ongoing dialogue with each other regarding all issues related to Student and his sibling and are flexible and cooperative with respect to such issues. While Mother is completing her studies, Parents have also agreed to as close to a 50-50 custody arrangement as possible, given Mother's school schedule.

10. From January 15, 2016, when Father moved to Portola Valley, until May 7, 2017, Mother had shared custody of Student. Parents both participated in counseling sessions at Esther B. Clark on alternating Mondays and went there other days during the week for school meetings as needed. Student stayed at Mother's house Friday after school, Saturday, and every other Sunday during school weeks. The actual days during school weeks that Parents had the children was fluid and flexible with the goal of equally sharing physical custody to the extent that the school schedules of Mother and Student and his sibling allowed. Custody during holidays was split evenly. Student generally spent Monday through Thursday with Father in Portola Valley. Parents were each involved in all decisions regarding Student in every aspect of his life.

11. Mother testified at hearing regarding her residency in Lafayette, her legal and physical custody of Student, and her co-parenting and involvement in Student's life.

Her testimony was sincere, very emotional and credible. She clearly detailed the family history during the time at issue in this case.

12. Father testified at hearing regarding his physical and legal custody of Student, his residences throughout the timeframe in this case, and his co-parenting of Student. His testimony was forthright, detailed and credible. He gave a good picture of the timeframe at issue in this case. Father's testimony was consistent with Mother's testimony.

13. Lynn Chiarello testified at hearing. Ms. Chiarello has been friends with Parents for approximately three years since her son became friends with Student's sibling at Springhill Elementary School. Her son and Student's sibling, had play dates at Ms. Chiarello's home and at Student's home throughout the years at issue. At first the play dates were at Home A, and after Parents separated, the play dates occurred at both Home A and Home B. Ms. Chiarello has been inside both Home A and Home B and she observed that Student and his sibling each had their own bedroom in each house. Ms. Chiarello observed Student and his sibling to regularly be at their Mother's house, sometimes in pajamas, on weekends, including Fridays, Saturdays and Sundays. Since Father moved to Portola Valley, she made a real effort to continue the regular playdates on weekends because maintaining friendships are very important to her family.

#### LAFAYETTE'S RESIDENCY POLICIES

14. Marilyn Sibley testified at hearing. For the last three years, Ms. Sibley has been the primary registrar for Lafayette. She is responsible for registration, enrollment, and student transfers. She is also responsible for verification of residency. Ms. Sibley testified confidently and clearly regarding Lafayette's residency policies.

15. As registrar for Lafayette, Ms. Sibley enforces Lafayette's residency policies. One Lafayette policy, described by Ms. Sibley, requires students, who live at more than one residence, to sleep a minimum of three school nights a week at a residence within

Lafayette in order to establish educational responsibility by Lafayette. Students, who reside in Lafayette with one parent but live for part of the week with another parent in another school district, must register in the school district where they sleep at least three school nights a week. These policies are not in writing on any district form and Lafayette's school board has not considered or approved this three school night a week policy. Parents in the district have not been given any written notice of this policy. Ms. Sibley does not inquire as to where a student sleeps unless two addresses are provided on Lafayette's demographics form upon a student's enrollment. Ms. Sibley accepts a parent's word that a student spends the required amount of time in the district. The demographics form does not alert a parent of the three night a week policy or inquire further into custody if two addresses are listed.

16. Ms. Sibley and Mr. Gargiulo testified that Lafayette's unwritten three school night a week policy is based on other school district policies and the California Education Code § 48204(a)(7) which governs residency based on a nonresident parent living with a child in the home of an employer located in a school district. Mr. Gargiulo testified that the district policy requiring a student to reside in the district three school days a week has been a district policy for more than three years. No documentary evidence of other district's residency policies was introduced or admitted as evidence at hearing. No evidence was offered to indicate that Education Code 48204(7) applied to Student's family's living situation.

## LEGAL CONCLUSIONS

### LEGAL FRAMEWORK UNDER THE IDEA<sup>1</sup>

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

2. A free and appropriate public education means special education and related services that are available to an eligible child at no charge to a parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9)(A-D); 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, subd. (a).) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].)

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<sup>1</sup> Unless otherwise indicated, the legal citations in this section are incorporated by reference into the analysis of each issue decided below.



3. 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, 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).) As the petitioning party, Student has the burden of proof by a preponderance of the evidence on all issues in this case. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

#### LEGAL PROVISIONS REGARDING RESPONSIBILITY FOR A FREE AND APPROPRIATE PUBLIC EDUCATION

4. Under the IDEA, a local education agency is charged with "providing for the education of children with disabilities within its jurisdiction." (20 U.S.C. § 1413(a)(1).) California law requires students, between the ages of 6 and 18, to attend school in the school district in which either the student's parent or legal guardian resides. (Ed. Code § 48200; *Orange County Dept. of Educ. v. California Dept. of Educ.* (9th Cir. 2011) 668 F.3d 1052, 1056; *Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 57.) The IDEA's residency determination is made under state law and is no different from the residency determination in other types of cases. (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1525 (*Union*).) In *Union*, the Ninth Circuit rejected arguments that the physical location of a child during the school week determines the residency of that child, and found that California Education Code provisions addressing a school district's responsibility to a child do not relieve it from its responsibility to disabled children who reside in the district and receive their free appropriate education outside the district. (*Ibid.*) A parent's residence is determined as follows: (1) it is the place where one remains when not called elsewhere for labor or

other special or temporary purpose, and to which she returns in seasons of repose; (2) there can only be one residence; (3) a residence cannot be lost until another is gained; and (4) the residence can be changed only by the union of act and intent. (Gov. Code § 244.)

ISSUE 1: WAS STUDENT A RESIDENT OF LAFAYETTE SUCH THAT LAFAYETTE IS THE LOCAL EDUCATION AGENCY WITH THE JURISDICTIONAL RESPONSIBILITY TO PROVIDE SPECIAL EDUCATION TO STUDENT FROM JUNE 5, 2015, THROUGH MAY 7, 2017?

5. Parents contend that Lafayette is the responsible local education agency responsible for Student's education between June 5, 2015, and May 7, 2017. The basis of this contention is that one or both Parents were residents of Lafayette from June 5, 2015, through May 7, 2017. From June 5, 2015, to January 15, 2016, Student lived with his Parents, who each resided within the boundaries of Lafayette. From January 15, 2016, to May 7, 2017, Student lived with Mother, who continued to reside in Home B, within the boundaries of Lafayette until May 7, 2017, and Father, who moved outside of Lafayette boundaries to be closer to Esther B. Clark, a nonpublic school, while Student and his sibling attended the school.

6. Lafayette contends that Father attended the June 5, 2015, IEP team meeting, agreed that Student did not qualify for special education, and agreed to a 504 plan for Student. Lafayette contends that Student and Parents did not assert that Lafayette had jurisdictional responsibility for Student, thereafter, and he never returned to school.<sup>2</sup> Lafayette contends that Student resided only with his Father from June 5,

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<sup>2</sup> Lafayette's contention that it bears no financial responsibility for Student's education due to the lack of knowledge of Parent's unilateral placement or notice of expected reimbursement is not a subject of this portion of Student's bifurcated case and is not considered or determined in this decision.

2015 to May 7, 2017. Lafayette contends that from January 15, 2016 to May 7, 2017, Student's residency was not established within the boundaries of Lafayette, through Mother's residence, because Student did not reside with her for at least three school nights a week. Lafayette contends that, after January 15, 2016, Father was obligated to enroll Student in the local school district in Portola Valley, his new residence, because Student slept at Father's home at least three school nights a week.

#### Analysis and Conclusions

7. The documentary and testimonial evidence presented at hearing establish that one or both Parents were residents of Lafayette from June 5, 2015, through May 7, 2017. Therefore the residence of Student was within the boundaries of Lafayette at all times relevant to this case. (Ed. Code § 48200.)

8. Lafayette's contention that Student never lived with Mother since Parents' separation in June 2014, was not supported by the evidence presented at hearing. Lafayette's contention that residency can only be established by custodial parents living within Lafayette who have physical custody of students at least three school nights a week is not consistent with the express language of Education Code section 48200. Section 48200 requires a parent or legal guardian to send a child between the ages of six and 18 to a school in the district where the parent or legal guardian resides. Lafayette's contention that Student was the responsibility of the school district in Portola Valley, following Father's January 15, 2017, move to be closer to Esther B. Clark, is not consistent with case law determining that the physical location of a child during the week does not relieve a district of jurisdictional responsibility to students whose parent resides in the district. (*Union*, at p. 1525.)

9. Lafayette provided no persuasive authority for their argument that Lafayette is not responsible for the education of Student unless Student sleeps in Mother's home at least three school nights a week. Lafayette does not have any written

policy to support this contention; nor has Lafayette's school board considered or adopted such a policy. There was no evidence presented at hearing that Parents were ever informed of this three night a week policy. Lafayette's three school night a week policy, as applied to Student, was arbitrary, contrary to statute, and inconsistent with due process of law.

10. Lafayette cited *R.F. v. Delano Union School District* (E.D. Cal., Feb. 15, 2017) 2017 WL 613919 (Delano) to support its contention that the district where student spends most of his time determines the responsible local education agency. This argument was not reasonable or persuasive. Lafayette not only misstates the holding of *Delano*, but the facts of *Delano* are distinguishable from the facts of the instant matter. In *Delano*, the biological father's act of housing student and re-enrolling him in father's district of residence was dispositive of the issue of residency as opposed to the caregiver's enrollment of student pursuant to a caregiver affidavit in a different district where student never attended school. In the present case, the evidence established that Mother resided within Lafayette, Student regularly stayed with Mother at all times relevant and Lafayette is the only district where Student was enrolled. Father never enrolled Student in another school district and Father was only temporarily housed in Portola Valley for the purpose of shortening the commute to school. Parents intended to return Student to Lafayette public schools when the services of Esther B. Clark were no longer required to meet his educational needs.

11. Lafayette's reliance on *Student v. Cornejo Valley Unified Sch. Dist. V. Parent* (1998) SEHO Case No. SN 1511-98<sup>3</sup>, where the hearing officer held, "in the event

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<sup>3</sup> Administrative decisions are not precedential and, although such decisions can be considered for persuasive authority, the cited decision was not current persuasive authority. (Cal. Code Regs., tit 5, § 3085.)

of joint physical custody a reasonable inference can be drawn that the residency of the child is determined by the residency of the parent with whom the child lives most of the time”, is also not persuasive in light of case law holding otherwise. (*Katz v. Los Gatos-Saratoga Joint Union High School Dist.*, *supra* at p. 67[holding district responsible despite student’s house, situated in two school districts and occupying a lesser part of the property in responsible district]; *Union School District v. Smith*, *supra* at p. 1525 [holding a district responsible despite student’s attendance in a non-residential educational program outside the district boundaries where student lived with parent for sole purpose of lessening the commute].) This decision declines to follow the holding and inferential reasoning of *Cornejo* and instead relies on the express language of Education Code section 48200 establishing that it is the residency of the parent and not the residency of the student which is determinative of special education responsibility. Special Education responsibility should not be determined by child custody agreements which are personal parental decisions based on unique family circumstances which are inherently diverse, complex, and ever changing.

12. Lafayette’s contention that the unwritten three school night a week policy was based on the California Education Code is also not reasonable. Notwithstanding Education Code section 48200, there are situations when a student can establish residency within a particular school district, by means other than finding that a parent or guardian resides in that district. Education Code section 48204(a)(7) expressly allows a student to establish residency within a district if his or her parent resides outside of a district but is employed and lives with the student, at the place of parent’s employment, within the boundaries of the school district, for a minimum of three days out of the school week. Lafayette’s policy requiring Student to live with Mother at least three school days a week in order to establish Lafayette’s responsibility for his education, is erroneously based on the language of the 48204(a)(7). There was no evidence presented

at hearing that this situation is applicable to Student in the present case. Here, Mother is a resident of Lafayette and it is Mother's residency that makes Lafayette the proper school district of residence.

13. Student established by the preponderance of the evidence presented at hearing that Lafayette is the local education agency responsible for Student's educational services based on his Mother's continued residence in Home B, which is within the boundaries of Lafayette. Therefore, analysis of Father's legal residency is not necessary.

## ORDER

1. Student is a resident of Lafayette such that Lafayette is the local education agency with the jurisdictional responsibility to provide special education to Student from June 5, 2015, through May 7, 2017.

2. All remaining issues will be discussed at the continued prehearing conference for the second portion of this bifurcated case, scheduled as follows:

Prehearing Conference: October 23, 2017, at 1:00 p.m.

Due Process hearing: October 31, 2017 at 9:30 a.m., continuing November 1 and 2, 2017, at 9:00 a.m., and day to day, Monday through Thursday, as needed at the discretion of the administrative law judge.

## 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, Student prevailed on the only issue heard and decided.

## RIGHT TO APPEAL

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

DATED: October 9, 2017

\_\_\_\_\_/s/\_\_\_\_\_  
RITA DEFILIPPIS  
Administrative Law Judge  
Office of Administrative Hearings