

115 LRP 55023

**SAN DIEGO UNIFIED SCHOOL
DISTRICT**

California State Educational Agency

2015080848

2015060967

November 16, 2015

Judge / Administrative Officer

Darrell Lepkowsky, Administrative Law Judge

Full Text

**DECISION ON BIFURCATED ISSUE
OF RESIDENCY**

On June 19, 2015, Student filed a request for a due process hearing with the Office of Administrative Hearings, naming the San Diego Unified School District. OAH granted Student's motion to amend his complaint on August 17, 2015. On August 20, 2015, District filed a request for due process naming Student. OAH granted District's motion to consolidate the two cases on August 27, 2015.

At the prehearing conference in the consolidated cases held on October 2, 2015, OAH granted District's motion to amend its case. OAH also, on its own motion, bifurcated the issue of if and when Student had established residency within District's boundaries. District had raised the issue of Student's residency in its response to Student's request for due process and as a separate issue in its amended complaint. OAH designated District's case as the primary case for purposes of establishing the timelines in the consolidated matter, and continued the hearing on all other issues in both complaints.

Administrative Law Judge Darrell Lepkowsky heard this bifurcated matter in San Diego, California, on October 13 and 14, 2015.

2

Kirsten Zittlau, Attorney at Law, represented District. Jennifer Parks-Orozco, District Special

Education Program Manager, was present for the entire hearing.

Meagan Nuriez and Jennifer Varga, Attorneys at Law, represented Student. They were accompanied by paralegal Karen Williams. Student's mother attended each day of the hearing. Student's father testified at the hearing, but did not otherwise attend the hearing. Student did not attend.

At the conclusion of the hearing, the record was left open at the parties' request to file written closing briefs. The parties timely filed their briefs on October 19, 2015.

ISSUE

For the bifurcated hearing, the sole issue is whether and/or when Student established residency within District's boundaries?

SUMMARY OF DECISION

District failed to establish by a preponderance of the evidence that Student and his mother did not begin to reside within District's boundaries first, on June 5, 2015, when Mother and Student moved into a room she had rented in a house located within District's boundaries, and then later, on or about October 1, 2015, when Student's father facilitated the purchase of a residence for Student and his mother in a different area within District's boundaries. District had significant reason to doubt Student's motives for moving within its boundaries, and whether he and his mother were actually living where they said they were. However, the preponderance of the evidence weighs in favor of Student's contentions that he has resided within District's boundaries since June 5, 2015, and never had the intention of returning to reside in the family home, located in the boundaries of another school district. District was therefore the local educational agency responsible for Student's education beginning June 5, 2015.

FACTUAL FINDINGS

Background Information

1. Student is a 12-year-old boy who is eligible for special education and related services under the

eligibility category of Autism.

2. There is no dispute that up until June 4, 2015, Student lived with Mother and Father within the boundaries of the Del Mar Union School District. The family lived in a large home in Del Mar. Student shared the master bedroom with Mother. This arrangement

3

happened because of Student's needs associated with his disability, and because his parents were having marital difficulties. Mother, who was born and raised in the Middle East, and who did not move to the United States until she was an adult, did not find this arrangement to be improper or inappropriate, particularly given the fact that Student was cognitively younger than his chronological age.

3. Del Mar Union had placed Student at a non-public school called The Institute for Effective Education through a settlement agreement with Student's parents. The placement was then formalized in Student's individualized education program. Mother transported Student to and from The Institute, which was located some 25 miles from Del Mar, within District's boundaries. Del Mar Union reimbursed Mother for the cost of transporting Student.

Student's Change of Residence

4. In late 2014, Mother began discussing with Father the possibility of her moving out of the family home in Del Mar with Student because of the marital difficulties they were having. Mother began searching for places to move to by viewing internet realty websites. Mother focused her search on homes located near The Institute. She did so because she wanted to be closer to that school and because it was much less expensive than the area in which the family lived in Del Mar. Mother did not work outside the home, and therefore was primarily dependent on Father for meeting her expenses and those of Student. Father agreed to finance the purchase of another residence for Mother and Student.

However, the amount that he committed to would not be enough for anything located near the family home in Del Mar.

5. Mother began to consider renting a room while she continued to look for a place to buy so that she could move out of the house in Del Mar. She was aware that several families who attended her church rented out rooms in their homes. During the spring of 2015, she began asking church members if any had a room available that she and Student could rent.

6. Among other people, Mother spoke with fellow church members Rhonda Smith and Mark and Lida Hill. Mother attended church with Ms. Smith and the Hills, but did not socialize with them. Ms. Smith and the Hills confirmed that they had rooms available for rent. Ms. Smith had an extra room in her home that she was willing to rent out. The tenant who had occupied a rental room in the Hills' home had recently left, and they had not yet rented the room to another tenant.

7. Del Mar Union held an individualized educational program team meeting for Student on May 13, 2015. It was a joint meeting to develop Student's annual and triennial IEP's. Student was in his second semester of sixth grade at the time. His IEP team at this meeting included his parents, representatives from The Institute, and representatives from Del Mar Union.

8.

4

At the May 13, 2015 IEP team meeting, Student's IEP team determined that his academic placement would continue to be at a non-public school, specifically at The Institute.

However, because Del Mar Union is an elementary school district that only enrolls pupils through sixth grade, Student's May 13, 2015 IEP only included placement and services through June 30, 2015. The school district which Student was supposed to transition to for seventh grade was the San Dieguito Union High School District. Del Mar Union

and San Dieguito had an agreement that the IEP's for Del Mar Union pupils would end as of June 30 during the year the pupil would transition to San Dieguito, before the start of San Dieguito's extended school year classes. Therefore, the responsibility for providing extended school year placement and services, if needed, would fall to San Dieguito.

Rachel Page, a program specialist for San Dieguito, also attended Student's May 13, 2015 IEP team meeting. However, her only role was as an observer at the meeting and to acknowledge that San Dieguito would convene a transition IEP team meeting for Student prior to the end of the 2014-2015 school year to develop an IEP for him for the 2015 extended school year and for seventh grade.

Neither Mother nor Father informed the other IEP team members that Mother intended to move. Mother testified that she did not do so because, in her culture, personal issues such as a failing marriage are not discussed outside the family. This may indeed be the case; however, it is also clear that as of the May 13, 2015 IEP team meeting Mother had not made any concrete decisions about moving. As of that meeting, Mother's efforts to find alternative housing amounted to vague inquiries rather than a purposeful search for a place to live.

San Dieguito convened a transition IEP team meeting for Student on June 3, 2015. The purpose of the meeting was to develop a program for Student for the extended school year 2015 and for the 2015-2016 school year when he would attend seventh grade. Student's IEP team included Parents and representatives from The Institute, Del Mar Union, and San Dieguito.

Prior to the June 3, 2015 IEP team meeting, staff from San Dieguito sent an email to Parents letting them know that they had to formally enroll Student at San Dieguito before he would be considered to be a San Dieguito pupil. San Dieguito staff reiterated that requirement during the June 3, 2015 IEP team meeting.

San Dieguito IEP team members believed that San Dieguito had programs at its schools that could provide Student with a free appropriate public education in the least restrictive environment. Therefore, San Dieguito offered Student placement for extended school year 2015 and for the 2015-2016 school year in a specialized program at one of its comprehensive middle school campuses rather than offering Student continued placement at The Institute.

15.

5

Parents declined San Dieguito's offer of placement. Mother, in particular, believed that Student required continued placement at The Institute.

16.

Neither Mother nor Father informed the other members of Student's IEP team at the June 3, 2015 meeting that Mother was looking for another place to live outside of San Dieguito's boundaries. The reason they did not discuss the issue was that Mother had not made concrete efforts to move prior to the IEP team meeting.

The fact that she would have to register Student at San Dieguito for him to attend the extended school year, which was scheduled to begin on July 1, 2015, and the fact that San Dieguito did not offer to continue Student's placement at The Institute galvanized Mother's efforts to find another place to live. It is clear that she realized that remaining a resident within San Dieguito's boundaries meant that Student might not be able to continue at The Institute, which is where she wanted him to continue to attend school.

Faced with having to enroll Student at San Dieguito or find somewhere else to live, Mother decided to contact the church members who had earlier said they had rooms available to rent. On June 4, 2015, she called Ms. Smith to ask if Ms. Smith would still rent her a room. After determining that the room was available, Mother and Ms. Smith agreed on a monthly rental price. Mother found a copy of an old

lease that Father had used to rent out properties he owned. Mother whited out the information on it, filled in the information for herself and Ms. Smith's address, and brought the lease agreement and a check to Ms. Smith that same day.

However, after meeting with Ms. Smith, Mother found out that Ms. Smith's mother was also going to also live in the home, which was somewhat small. Mother determined that it would be too difficult for Student and her to share a small house with two other people, particularly given some of Student's behavioral issues related to his disability. Ms. Smith agreed to void the lease. She tore it up and later returned the deposit Mother had given her for the room.

After concluding that the room in Ms. Smith's home would not be suitable, Mother immediately contacted the Hills on June 4, 2015, to determine if the room in their home was still available. Sometime on June 4, 2015, Mother took a lease to the Hills for everyone to sign. She met with Lida Hill, looked at the room, and determined that it was an adequate place for her and Student to live while she looked for a home to purchase.

Mother again used a copy of one of Father's old leases, whiting out information and substituting her name, the name of the Hills, and the address of their home. However, through oversight, Mother neglected to white out all of the old information. Information from Father's old lease that was not erased included his name as the person who would receive move-in funds, and the name of the real estate agent he used for leasing his property. However, Father was not involved at all in arranging the lease with the Hills or with any part of the agreement between them and Mother.

22.

6

The Hills' home was located in the Mira Mesa neighborhood in the city of San Diego, within District's boundaries. It was a fairly large

four-bedroom home. The room the Hills rented to Mother and Student was on the first floor. It had direct access to a full bathroom. It only had one bed.

23.

The Hills regularly rented out rooms in their home. They sometimes allowed people in need to stay without paying rent. Mother explained to the Hills that she did not have much money. The Hills therefore agreed that the rent for Mother and Student for the room would be only \$300 a month. Mother told them she would pay more when and if she could. During the four months she lived with the Hills, Mother paid rent for each of the months, and paid additional money when she could.

Mother rented the room because it was within District's boundaries. She believed that District would be able to provide Student with a FAPE. She expected that District would continue Student's placement at The Institute. She informed Mr. Hill that District would be able to properly address Student's disability. Mother also sought to live within District's boundaries because many neighborhoods within its boundaries were much more affordable than the neighborhood in Del Mar where she lived with Father.

Mother began to move things into the Hills' home in Mira Mesa on June 4, 2015, the day she signed the lease. She and Student also began to sleep there regularly as of June 5, 2015. Mother's neighbors from Del Mar noticed that she was no longer in the area. One neighbor, Patricia Adams, saw Mother moving things out of the Del Mar home in early to mid-June 2015.

On June 5, 2015, while Student was at school at The Institute, Mother went to Wangenheim Middle School, the neighborhood middle school nearest to the Hills' home, to register Student. She provided school staff with a copy of her lease. Mother was not able to complete the enrollment process because she did not have Student's birth certificate or passport with her, one of which was needed to enroll a pupil in District. Wangenheim staff provisionally enrolled Student pending receipt of a copy of his birth certificate or

passport.

After filling out the paperwork at Wangenheim, Mother sent an email to its Principal stating that she had just moved to the area and had enrolled Student that day. She informed the Principal that Student had an IEP. Mother requested that the Principal convene an IEP meeting for Student.

Mother continued moving things into the Hills' home over the course of summer 2015. Since she was only moving into one room that was already furnished, she did not move furniture out of the family's home in Del Mar. She moved clothing, make-up, and other such personal items, and many of Student's belongings, such as his clothing and backpacks.

29.

7

Mother, Father, Lida Hill, and the Hills' young adult daughter, Krista, all credibly testified that Mother and Student moved into the Hills' home as of June 5, 2015, and that they lived there until approximately October 1, 2015. Ms. Hill and Krista Hill were at the home during the day time. They heard Student and Mother in their room and in the kitchen and interacted with them during the day. Krista Hill saw Mother and Student at the home almost every day. Mother's car was parked in front of the home at night.

30.

Mr. Hill was not certain if Mother moved her things into his home before the family left for a vacation on June 10, 2015. However, Mr. Hill worked a swing shift from three in the afternoon until 11 p.m. By the time he returned at night, Mother and Student would have gone to sleep. He was certain Mother was at his home when he and his daughters returned from vacation on or about June 16, 2015.

There is no credible evidence that Mother and Student did not live at the Hills' home beginning on June 5, 2015, and while the Hills were on vacation.

Lida and Krista Hill credibly testified that Mother and Student were at the home when the Hills returned from their vacation, and that they lived there continuously since June 5, 2015.

All three members of the Hill family were direct and forthright during their testimony, and readily answered questions about Mother's stay at their home. There is no convincing evidence that the Hill family lied about Mother's and Student's tenancy with them. The weight of the evidence supports Mother's testimony that she moved into the Hills' home on June 5, 2015.

Student slept at the Hills' home for the majority of each week he was in San Diego from June 5, 2015, to October 1, 2015. Mother did take Student to stay with Father for visitation purposes a couple of times a month. Student would stay for a day or two. Father traveled some two weeks a month for work, so Student could not be there on a regular basis. On a few occasions, when Mother had gone to the home in Del Mar to retrieve things, Student fell asleep, and Mother stayed at the Del Mar home on those few occasions rather than waking Student up.

Mother did not file a change of address notification with the United States Post Office while she lived with the Hills. She did not change the address on her driver's license either. However, she did change her address with her bank and credit card companies, as well as with her doctors and Student's doctors. Mail from her bank and credit card companies therefore was sent to the Hills' address. Some of Mother's mail continued to be sent to the Del Mar address.

Mother provided a copy of Student's passport to District around June 9, 2015. District staff met with Mother on June 12, 2015, to offer Student an interim placement. District offered him placement at Wangenheim Middle School rather than at The Institute. Mother did not accept District's interim offer and chose to retain Student at The Institute. District did not contest whether Mother and Student were living within its boundaries during this meeting or

during any subsequent IEP team meetings.

36.

8

Mother and Student went to the Middle East for approximately a month beginning June 29, 2015, to visit Mother's family. During that time, Mother parked her car at the home in Del Mar. However, she did not move her belongings or those of Student out of the Hills' home, and she continued to pay rent to the Hills while she was out of the country.

37.

When Mother and Student returned to San Diego at approximately the beginning of August, 2015, they continued living at the Hills' residence in Mira Mesa. However, it was quickly apparent that the living arrangement was not functioning well. The Hills maintained a structured and disciplined living environment. Student's disability caused him to engage in behaviors that disrupted the Hills' lifestyle. Student did not respond to discipline or structure. He was constantly turning on appliances in the kitchen, would throw food away without eating it, constantly turned lights on and off, and constantly emptied soap dispensers in the bathrooms. Student would also push Mother and Ms. Hill and often made loud noises, disturbing the Hills and their guests. Mr. Hill had an especially difficult time understanding that Student's behavior was related to his disability. Ultimately, the Hills and Mother determined that she and Student could not continue living with them.

It had been Mother's intent to find a small home or condominium that Father would purchase for her and Student. She readily acknowledged at hearing that she considered her stay with the Hills to be temporary until she found a place to purchase within District's boundaries.

Mother confined her search to neighborhoods fairly close to The Institute. Her intent was to find something affordable within District's boundaries. In September 2015, she found a one-bedroom condominium' in the Rolando neighborhood in the

city of San Diego. Mother's attorney had recommended the neighborhood. The condominium was approximately 700 square feet. Mother ascertained that the building it was in was safe. The amount of money Father was able to pay for a residence for Mother and Student was not enough for a two-bedroom residence in a neighborhood that Mother and Father considered safe. Rolando was within District's boundaries, albeit in a different area than the Hills' home in Mira Mesa.

The purchase of the home in Rolando was finalized approximately October 1, 2015. Father provided the majority of the purchase price. Mother and Student moved into the home on October 1. Mother contracted with the cable company and other utility

1

Various parties during the hearing referred to this residence as "an apartment." However, it is clear that Father and Mother purchased this home and that it was not a rental unit.

9

companies to start service at the Rolando home right after closing escrow. She moved her belongings from the Hills' home as soon as escrow closed. While a few of her belongings and those of Student remained at Father's home in Del Mar, the majority of their belongings were moved to the home in Rolando as of October 1, 2015.

District's Efforts to Confirm Student's and Mother's Place of Residence

Darius Ashton was the Vice Principal at Wangenheim Middle School at the time at issue. She was in charge of the special education program at the school as well. Staff notified her that a pupil with an IEP was enrolling after Mother dropped off the enrollment packet for Student on June 5, 2015.

42. There were several issues that sparked Ms. Ashton's concern about Student's enrollment in District and whether he and Mother were truly living

within District's boundaries. First, District's school year was due to end on June 15, 2015, merely 10 days before Mother attempted to enroll Student on June 5, and only a few days after Mother completed the enrollment process around June 9. Ms. Ashton did not recall a pupil enrolling so late in the school year in her many years as an educator. Further, Mother did not have Student with her when she went to Wangenheim on June 5, 2015. In Ms. Ashton's experience, it was also unusual for a parent to enroll a child and not bring the child to the new school during the enrollment process.

43. There was also some confusion as to whether Mother really wanted to enroll Student at Wangenheim. Ms. Ashton communicated with Mother to ascertain whether Mother meant to enroll him. Mother informed her that Student had difficulty with transitions and that she was concerned about the placement District was going to offer him. However, Mother finally did enroll Student around June 9, 2015.

44. Ms. Ashton also had concerns about whether Mother and Student were living in the District's boundaries based upon questionable items in the lease Mother provided as proof of residence. It was clear that portions of the lease had been whited out and new information added in handwriting rather than being typed in. Mother provided a lease rather than a utility bill, which was the usual method of proving residency, although District policy did permit a lease to be used as proof. The rent of \$300 a month was very low, particularly for the Mira Mesa neighborhood where the Hills' home was located. Father's name was on the lease although Mother's enrollment papers did not provide his address. There was a real estate agent listed on the lease that Ms. Ashton was unable to locate even after doing an internet search for the name. Finally, Mother had put Lida Hill down as the person to contact in case of an emergency. Ms. Ashton thought it somewhat strange that Mother would put down her landlord as the emergency contact.

45.

10

Ms. Ashton called the Hills around June 9, 2015, to confirm if Mother was indeed living there. She spoke with Lida Hill. Ms. Hill confirmed that Mother and Student were renting a room in her home, and that the room had been a previous rental. Ms. Hill also confirmed that Mother and Student had already moved some of their belongings into the home, and were continuing to move more in.

Although she continued to have doubts about whether Mother and Student were truly living in Mira Mesa with the Hills, Ms. Ashton did not bring up the issue of residency at any of the meetings she had with Mother to discuss Student's IEP, or at any of the formal IEP team meetings convened by District for Student. Ms. Ashton did not ask Mother for additional proof of residency to supplement the lease.

Brian Spry is a special education administrator for District. One of District's attorneys decided to visit the Hills' home on June 24, 2015, to verify if Student and Mother were living there. Mr. Spry accompanied the attorney on this visit. They arrived at the home about noon. Mr. Hill answered the door. He confirmed that Mother and Student were living there, but was not certain if they had been there full time.

Mr. Hill agreed to show the attorney and Mr. Spry the room Mother had rented. The room was very clean. There were no toys or clothing in the bedroom itself that would indicate whether anyone was living in the room. The room had a door leading to a closet and a door leading to a bathroom. Both doors were closed and, therefore, Mr. Spry could not see the contents of either the bathroom or the closet.

The door to the bedroom was completely open when Mr. Hill showed the room to District's attorney and Mr. Spry. Mr. Spry was not able to see behind the door when he stood in the doorway to the bedroom. Neither he nor the attorney looked behind the door. He therefore could not determine if anything belonging to Mother or Student was hanging on the

door or was behind it. Mr. Spry and District's attorney continued to have significant doubts as to whether Mother had truly moved into District's boundaries because of the irregularities with the lease and the fact that the room at the Hills' home did not appear to be occupied.

Edward Baisley is the Non-Public School Coordinator for District. He has a master's degree in special education, and has been an educator for over 20 years. His responsibilities in his present position include handling the logistics of placing District special education students in non-public schools.

Mr. Baisley initially became involved with Student since Student's IEP from Del Mar Union indicated a non-public school placement. Sometime after June 8 or 9, 2015, Mr. Baisley contacted Del Mar Union's special education department to request Student's records. The staff member with whom he spoke at Del Mar Union was surprised to hear that Student had moved and was enrolling in a different school district because neither Mother nor Father had ever informed Del Mar Union of the move.

52.

11

Mr. Baisley then contacted The Institute. Staff there was also unaware that Student had supposedly moved. The fact that neither Del Mar Union nor The Institute was aware of Student's move raised deep concerns with Mr. Baisley. In his 20 years as an educator, he had never had a situation where a parent of a special education student had not been forthcoming about a pending move. Because many special needs children do not transition well, parents and educators addressed significant transitions, such as moving to another home, before they occurred to help prepare the child for the transition.

53.

Mr. Baisley decided to try to confirm if Mother and Student were going to Del Mar after the school day ended at The Institute rather than going to Mira Mesa. In the afternoon of June 23, 2015, Mr. Baisley

went to the home in Del Mar. He parked his car and waited. Mother arrived in her car with Student. She pulled into the driveway and opened the garage. Student took some things from the back of the car and then he and Mother went into the house. Mr. Baisley waited about 15 minutes. During that time, Mother and Student remained in the home. After 15 minutes, Mr. Baisley left. He did not stay to see if Mother and Student spent the night in Del Mar.

Neither Mr. Baisley nor any other District representative attempted to do an overnight residency check in Del Mar or at the Hills' home in Mira Mesa to determine where Student and Mother were spending their nights. Neither Mr. Baisley nor any other District representative did a check to see from which address Mother and Student departed in the mornings when Mother took Student to school.

Mr. Baisley attended an IEP team meeting for Student convened by District on September 2, 2015. Neither he nor any other District staff person brought up the issue of residency at this meeting.

Mother sent an email to Mr. Baisley about two weeks after the September 2, 2015 IEP team meeting to inform him that she and Student were moving to the new address in the Rolando neighborhood of the city of San Diego. Although Mother later provided her escrow papers and utility contracts for the home Father purchased for her in Rolando, Mr. Baisley had doubts that Mother was really going to live there. He believed that Mother would not move to the area because it was economically depressed and her home in Del Mar had been in an affluent area. Mr. Baisley also did a search of the crime statistics for Rolando and determined that it had a much higher crime rate with a higher percentage of parolees living in the area than did Mother's address in Del Mar. However, as of the hearing in this matter, neither Mr. Baisley nor any other District staff member had done any surveillance at the home in Rolando to determine if Mother and Student were sleeping there. Other than his suspicions, Mr. Baisley had no concrete reason to believe that Mother and Student were not living at the

home in Rolando after October 1, 2015.

LEGAL CONCLUSIONS

Introduction: Legal Framework under the IDEA²

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 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 FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, which meet state educational standards, and conform to the child's individualized education program. (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); Ed. Code, § 56032.)

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. Rowley expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (Id. at p. 200.) Instead, Rowley interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (Id. at pp. 200, 203-204.) The Ninth

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 version.

12

13

Circuit Court of Appeals has held that despite legislative changes to special education laws since Rowley, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the Rowley standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the Rowley standard, which should be applied to determine

whether an individual child was provided a FAPE. (Id. at p. 951, fn. 10.)

Burden of Proof

4. In a special education administrative due process proceeding, the party seeking relief has the burden of proving the essential elements of his claim. (Schaffer v. Weast (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].) The standard of a preponderance of evidence, also known as a balance of probabilities, is met if the proposition is more likely to be true than not true. Effectively, the standard is satisfied if there is greater than a 50 percent chance that the proposition is true.

5. District confirmed at the beginning of the hearing in this case that it had the responsibility of going forward in this case and was presenting its case-in-chief first. However, in its closing brief, District asserted that Student had the burden of proof in this case, and that he failed to meet his burden.

6. District raised the issue of Student's residency within its boundaries in two pleadings. First, it raised the issue as an affirmative defense in its response to Student's complaint filed at August 28, 2015. Second, District raised the issue of whether Student was a resident of District as a separate issue in its amended complaint filed with OAH on September 30, 2015. The issue stated: "Have [Mother] and [Student] established residency within the District's boundaries and, if so, when and where did this occur?"

7. It was District's issue contesting Student's residency within District's boundaries which the All bifurcated and which was the subject of the instant hearing. Therefore, District had the burden of proving by a preponderance of the evidence that Student did not establish residency within its boundaries between June 5, 2015, and the date of the hearing. As discussed below, District has not met its burden of proof.

Student Established Residency within District's Boundaries on or about June 5, 2015 RESIDENCY DEFINED

5. Under the IDEA, the State Educational

Agency has the responsibility for the general supervision and implementation of the Act. (20 U.S.C. § 1412(a)(11)(A); 34 C.F.R. § 300.149(a).) This responsibility includes ensuring that a FAPE is available to all children with disabilities in the mandated age ranges within the state. (20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101(a).) Generally, a FAPE is made available through a local educational

14

agency within the state. (20 U.S.C. § 1412(a)(12)(A); Letter to Covall, 48 IDELR 106 (OSEP Dec. 2006).) In this case, District and Del Mar Union are local educational agencies within the meaning of these provisions. The local educational agency where Student resided was responsible for providing him with a FAPE.

9. In California, for the most part, identification of the local educational agency that has the responsibility for providing a disabled child with a FAPE is determined through residency. Under the state's compulsory education law, a pupil who is between the ages of 6 and 18 must attend the school district where his or her parent or legal guardian resides. (Ed. Code, § 48200; Katz v. Los Gatos-Saratoga Joint Union High School District (2004) 117 Cal.App.4th 47, 54.)

10. The IDEA speaks in terms of a local educational agency "providing for the education of children with disabilities within its jurisdiction." (20 U.S.C. § 1413(a)(1).) California law generally requires students to attend the public school "in which the residency of either the parent or legal guardian is located." (Ed. Code, § 48200.)

11. Residency under the IDEA (20 U.S.C. § 1400 et seq.) is measured by "normal standards." (Union School District v. Smith (1994) 15 F.3d 1519, 1525 (Union).) In California, Government Code section 244 lists "the basic rules generally regarded as applicable to domicile [legal residency]." (Fenton v. Board of Directors (1984) 156 Cal.App.3d 1107, 1114.) In Smith v. Smith (1955) 45 Cal.2d 235, 239, the California Supreme Court explained:

Courts and legal writers usually distinguish "domicile" and "residence," [b]ut statutes do not always make this distinction in the employment of those words. They frequently use "residence" and "resident" in the legal meaning of "domicile" and "domiciliary," and at the times in the meaning of factual residence or in still other shades of meaning. . . . [I]n our codes "residence" is used as synonymous with domicile in the following statutes: sections 243 and 244 of the Government Code

10. Government Code, section 244, states in relevant part:

In determining the place of residence [domicile] the following rules shall be observed:

(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.

15

(d) The residence of the parent with whom an unmarried minor child maintains his or her place of abode is the residence of such unmarried minor child.

(f) The residence can be changed only by the union of act and intent. CASE LAW CONCERNING RESIDENCY

13. Case law, developed over many years, emphasizes intent as a crucial factor in the legal definition of residency. *Union School Dist. v. Smith*, supra, 15 F.3d at p. 1525, is instructive on the issue of intent. There, the parents, who were residents of the city of San Jose, placed their child at a non-public school in Los Angeles and resided in

Los Angeles while he attended school. The school district argued that the child "resided" in Los Angeles during the week while attending a school there and, therefore, the Union School District was not responsible for the child's education. The Ninth Circuit found otherwise. The parents were only

temporarily in Los Angeles during the school week and did not intend to move there permanently as evidenced by the father's maintenance of his medical practice in San Jose and the maintenance of parents' permanent home there. The parents' intent, therefore, was to remain residents of San Jose and their actions supported that intent.

14. The intent of a person with respect to their residence is a key factor in California cases on residency. In *Eriksen v. Eriksen* (1943) 57 Cal.App.2d 532, 534-535, the court stated:

In order to affect a change of residence, there must be a concurrence in the act of abandonment of one residence with the intent to establish a new residence elsewhere. It is mainly a question of intent, which may be shown by the testimony of the parties, considered in connection with the surrounding circumstances, plus corroboration when essential.

15. Similarly, in the case of *Michelman v. Frye* (1965) 238 Cal.App.2d 698, 704, the court stated that "Absence from one's permanent residence, if all the while he intends the absence only for a special temporary purpose and to be followed by resumption of the former residence, constitutes neither abandonment thereof nor a change of residence."

16. Finally, in the case of *Demiglio v. Mashore* (1992) 4 Cal.App.4th 1260, 1269-1270, the court held:

We pointed out in our first opinion that the concept of a temporary versus permanent move has to do with the territorial jurisdiction, not the actual dwelling place: "[T]he notions of permanency and an intention to remain which attach to the domicile concept have nothing to do with the actual dwelling, and everything to do with the actual place or location.'

16

DISCUSSION AND DETERMINATION OF ISSUE

17. In the instant case, there were several factors that validly caused District to be suspicious that Mother's and Student's residency within District's

boundaries was a subterfuge. Mother moved mere days prior to the end of a school year. She did not bring Student with her when she first attempted to enroll him in District on June 5, 2015. She provided a lease in support of her move that was whited out and indicated that Father was involved in the lease. The rent the Hills agreed to charge Mother was low for the area of the city where they lived. The room only contained one bed although Mother and Student would both be living in it. Mother never informed Del Mar Union of her intent to move, and did not inform The Institute, where Student attended school, of the move. Significantly, Mother signed a lease only one day after being informed by San Dieguito that it was not offering to continue Student's attendance at The Institute.

18. These factors all support District's contention that Mother's motive for moving was to "shop" for a school district that might have to continue funding Student's attendance at The Institute. However, Mother's motives, even if "impure," are not determinative of whether she actually effectuated a move from Del Mar to a neighborhood within District's boundaries, or whether she had the intent to move.

19. District's contention that Mother did not move to the Hills' home on or about June 5, 2015, is based on inference. District contends that Mother would not move from an affluent neighborhood to live in one bedroom in someone else's home. This contention does not take into account Mother's failing marriage, her lack of personal funds, and the fact that she was dependent on Father for purchasing a home for her.

20. District contends that Mother's move to the Hills' home in Mira Mesa was temporary, and therefore does not support that she intended to move. District points to the fact that Mother did not change her address with the post office or on her driver's license when she allegedly moved in with the Hills. District also contends that Mother never had the intent to permanently leave her home in Del Mar, and that her rental agreement with the Hills was a subterfuge.

21. Had District presented evidence that Mother intended to return to the home in Del Mar occupied by Father, this argument would be more persuasive. Mother admitted that the move to Mira Mesa was not intended to be permanent. She only informed her bank, credit card companies, and doctors that she was living at the address in Mira Mesa. She did not change the address with the post office or change the address on her driver's license. However, Mother testified, and the evidence supports a finding, that Mother intended to permanently leave Del Mar and move permanently into District's boundaries, especially to live closer to The Institute. District presented no convincing evidence that Mother and Student returned to live at the home in Del Mar for other than the few days a month Student spent there while visiting Father, or that they had any intention of returning to Del Mar to live at any time after June 5, 2015. Father's purchase of the home in the Rolando

17

neighborhood for Mother and Student on October 1, 2015, confirmed the fact that Mother had no intention of returning to Del Mar, and had every intention of continuing to live within District's boundaries.

22. District contends that the fact Mother and Student went directly from The Institute to the home in Del Mar on June 23, 2015, is persuasive evidence that they continued to live there. However, Mr. Baisley only remained in front of the house for 15 minutes. He did not know if Mother and Student spent the night there. Neither he nor any other District representative did any nighttime surveillance of either the Del Mar home or the Mira Mesa home to determine where Mother and Student were sleeping at night. The fact that Mother drove to the home in Del Mar several times to retrieve belongings is not persuasive evidence that she continued to live in Del Mar.

23. District contends that there is persuasive evidence that Mother and Student did not live in the Hills' home because there was little evidence of them

living there when Mr. Spry made his home visit to the Hills' residence on June 24, 2015. The fact that the room itself did not have personal items scattered about is not persuasive evidence that Mother and Student had not moved into the Hills' home. What is more persuasive is the testimony of the Hills as they were forthright and had no motive to lie to state that Mother and Student lived with them.

24. Although Mr. Hill was uncertain of whether Mother moved her belongings into his home before or after his one-week vacation starting June 10, 2015, Mother, Father, Lida Hill, and Krista Hill all credibly testified that Mother and Student began living with the Hills around June 5, 2015. Lida Hill explained that she saw and heard Mother and Student in the home. Krista Hill also stated that Mother and Student were living there, and that she saw them almost every day. The fact that Student and Mother were actually living in the Hills' home is supported by the fact that Mr. Hill eventually asked them to leave. Student engaged in behaviors that were triggered by his disability. The behaviors included his constantly turning lights on and off, emptying soap dispensers, throwing away food, making loud noises, and failing to respond to discipline. These behaviors did not comport with the way Mr. Hill wanted to run his household.

25. The discord in the Hills' home prompted Mother to intensify her search for a permanent residence. She located a home in the Rolando neighborhood of the city of San Diego. Father supplied the majority of the funds for the purchase. The purchase of the home was finalized on October 1, 2015. Student and Mother moved in that same day.

26. The only evidence that District presented to demonstrate that Mother and Student did not move into the Rolando home on October 1, 2015, is that the home is much smaller than the home in which Mother and Student lived in Del Mar, and that the neighborhood has a higher crime rate. However, neither factor is persuasive evidence that Mother and Student did not actually move into the home. Mother was dependent on Father

18

for the purchase of another residence. Father had a specific sum of money that he committed to spending for the purchase. Mother had to locate a home that fell within that amount. Under the circumstances, the home in Rolando was all Mother could afford.

27. Mother and Father credibly testified that Mother and Student moved into the home in Rolando on October 1, 2015. Mother presented escrow papers supporting the purchase, and utility contracts for the Rolando home that went into effect on or about October 1, 2015. The weight of the evidence therefore supports a finding that Mother and Student moved into the Rolando home on that date.

28. As stated above, preponderance of the evidence means that just over 50 percent of the evidence supports the prevailing party. In this case, there certainly are many factors that arouse suspicion concerning Mother's move from her home in Del Mar to the rented room in the Hills' home in Mira Mesa. However, District has failed to demonstrate that the preponderance of the evidence supports a finding that Mother either did not move from Del Mar or did not intend to permanently move from Del Mar. To the contrary, the preponderance of the evidence supports the finding that Mother and Student moved to Mira Mesa, which is within District's boundaries, on June 5, 2015. The evidence further supports the conclusion that Mother and Student moved to a home in the Rolando neighborhood of San Diego, also within District's boundaries, which Father purchased for them, on or about October 1, 2015. There is no evidence that Mother intended to return at any time to Del Mar.

29. Student and Mother have therefore resided within District's boundaries since June 5, 2015.

ORDER

Mother and Student have been residents of District since June 5, 2015. District has been the local educational agency responsible for providing Student with an education since that date. 4

4 As District has been found to be the local educational agency for the period alleged in both Student's and District's complaints, the matter will proceed as scheduled, with the prehearing conference on November 20, 2015, and hearing on December 8 through 10, 2015.