

In the Consolidated Matters of:  
ORANGE COUNTY DEPARTMENT OF EDUCATION,  
v.  
STUDENT.

OAH CASE NO.  
2009010078  
OAH CASE NO.  
2009010529

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STUDENT,  
v.  
ORANGE COUNTY DEPARTMENT OF EDUCATION;  
CALIFORNIA DEPARTMENT OF EDUCATION &  
NEWPORT-MESA UNIFIED SCHOOL DISTRICT.

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BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

**DECISION**

Administrative Law Judge Richard T. Breen, Office of Administrative Hearings (OAH), State of California, heard this matter in Costa Mesa, California, on May 11, 2009. Danielle Augustin, Attorney at Law, appeared for Student. Karen Van Dijk, Attorney at Law, appeared for Orange County Department of Education (OCDE). OCDE representatives Lysa Saltzman, Mel Peters, and Todd Martin attended the hearing. Michael Hersher, Deputy Counsel, appeared for the California Department of Education (CDE).

S. Daniel Harbottle, Attorney at Law, appeared for Newport-Mesa Unified School District (Newport-Mesa).

OCDE filed its Request for Due Process Hearing (complaint) in OAH case number 2009010078 (Case One) on January 6, 2009. Student filed her complaint in OAH case number 2009010529 (Case Two) on February 3, 2009. The matters were consolidated. All hearing timelines were reset on March 13, 2009 after Student amended her complaint to add Newport-Mesa. At the hearing, OCDE was granted permission to file additional argument by May 15, 2009, regarding the impact, if any, of a settlement agreement between Student and OCDE. Newport-Mesa was also given until May 15, 2009, to file any additional argument in response to CDE's arguments at the hearing. Newport-Mesa's deadline to file additional argument was extended to May 29, 2009. Upon receipt of Newport-Mesa's written closing arguments on May 29, 2009, the matter was submitted and the record was closed.

## ISSUE<sup>1</sup>

Whether OCDE, CDE, or Newport-Mesa was responsible to provide a free appropriate public education (FAPE) to Student from March 9, 2007 through December 31, 2008?

## FACTUAL FINDINGS

1. Student is a female who was 16 years old at the time of hearing. At all relevant times through the date of hearing, Student was a dependent of the Orange County Juvenile Court (Juvenile Court) pursuant to Welfare and Institutions Code section 300 et seq. At all relevant times, Student was eligible for special education as a child with emotional disturbance.
2. In December of 2006, the Juvenile Court appointed Laura Van de Merghel, who lived within the boundaries of Newport-Mesa, to be Student's "responsible adult," i.e., the person responsible to make educational decisions for Student. The parental rights of Student's parents had been terminated in 2004.
3. During December of 2006 and January of 2007, Student lived at Orangewood Children's Home (Orangewood). OCDE had responsibility to provide education to children at Orangewood.
4. An individualized education plan (IEP) team meeting was held on January 16, 2007, at which time the team agreed to place Student in an out-of-state residential treatment center (RTC). The Juvenile Court approved the change in placement. Student was placed in the RTC at all times from March 9, 2007 through December 31, 2008.
5. Student and OCDE entered a confidential settlement agreement that was fully executed on March 7, 2007.<sup>2</sup> OCDE commendably agreed to continue providing a special education placement to Student without admitting liability until the issue of which agency was responsible to provide FAPE to Student was resolved. OCDE held addendum IEP meetings for Student in 2007, subsequently held an annual IEP team meeting in 2008, and paid for educational portion of Student's RTC placement through December 31, 2008.

<sup>1</sup> All issues arise under the Individuals with Disabilities Education Act (IDEA), title 20, United States Code, section 1400 et seq. and related state statutes. The ALJ has combined and rephrased the issues from Case One and Case Two for clarity.

<sup>2</sup> The terms of the settlement agreement were submitted to the ALJ under seal at hearing and were not provided to CDE or Newport-Mesa. Other than to explain why Student continued to receive RTC services, the terms of the agreement are not relevant to resolution of the issue presented.

## CONCLUSIONS OF LAW

### *Burden of Proof*

1. As the petitioning parties, OCDE has the burden of persuasion as to Case One, and Student has the burden of persuasion as to Case Two. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

### *Jurisdiction and Mootness*

2. As an initial matter, the due process hearing requests are within OAH jurisdiction. Interagency due process hearing requests in which one agency names another as a respondent are outside of the jurisdiction of IDEA hearings. (Gov. Code, § 7586, subd. (d) [no state or local public agency may request a due process hearing against another public agency].) However, IDEA hearings properly include declaratory relief actions regarding residency. (See *Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1525; *J.S. v. Shoreline School Dist.* (W.D. Wash. 2002) 220 F.Supp.2d 1175, 1191.) Thus, in an IDEA hearing, OAH has jurisdiction to entertain declaratory relief actions by Student against OCDE, CDE, and Newport-Mesa, and by OCDE against Student, regarding which agency is responsible for providing special education to a particular student.

3. Further, the ALJ declines to dismiss these matters as moot. Mootness describes the doctrine under which courts decline to hear a case because it does not present an existing controversy by the time for decision. (See *Wilson v. Los Angeles County Civil Service Com.* (1952) 112 Cal.App.2d 450, 453.) However, mootness is not a jurisdictional defect. (*Plymouth v. Superior Court* (1970) 8 Cal.App.3d 454, 460.) An exception to the mootness doctrine is made if a case presents a potentially recurring issue of public importance. (*DiGiorgio Fruit Corp. v. Dept. of Employment* (1961) 56 Cal.2d 54, 58.) Here, although Student received services from OCDE during the period in dispute, the issue of which educational agency was responsible for providing Student a FAPE during the relevant time period may recur. Because the statute of limitations has not run on the entire time period at issue, and it is possible Student may assert FAPE denials for this time period in the future, the instant case will not be dismissed for mootness.

### *Determination of Responsible Agency*

4. Student contends that at the time she left Orangewood and transferred to the out-of-state RTC, California law was silent on the question of who her “parent” was for purposes of determining the school district that was responsible to provide her with FAPE. Accordingly, Student contends that either OCDE, as the last agency to serve her, or CDE, as the state education agency responsible to oversee the provision of FAPE would be the responsible entities to provide her with FAPE. OCDE contends that it had no duty to provide Student with the RTC placement between March 9, 2007 through December 31, 2008. Specifically, OCDE contends that it was only

responsible to provide FAPE to Student while she was living in a licensed children's institution served by OCDE prior to March 9, 2007. After that time, OCDE contends that it did not fit within the definition of "parent" in Education Code<sup>3</sup> section 56028, nor did any of the residency exceptions in 46204 apply. OCDE's position, like Student's, is that CDE, as the state education agency responsible for overseeing the delivery of FAPE to students in California would be responsible to provide FAPE if the statutory definitions of "parent" failed to specifically identify a responsible agency. CDE contends that at all times, the definition of "parent" in Education Code section 56028, subdivision (a) included "responsible adult," such that the school district of residence of Student's "responsible adult" determined which agency had responsibility to provide FAPE. In particular, CDE contends that the statutory language of section 56028, as well as subsequent amendments to it, demonstrate a legislative intent that the residency of the "responsible adult" determines the responsible local district. Finally, Newport-Mesa contends that section 56028 at no time prior to January 1, 2009 included a "responsible adult" under the definition of "parent" for purposes of determining residency. In particular, Newport-Mesa contends that an interpretation of section 56028 prior to January 1, 2009 is only possible by resorting to the words of the Legislative Counsel's Digest regarding the proposed changes that became effective on January 1, 2009. As discussed below, at all relevant times section 56028 on its face included "responsible adult" within the definition of "parent," such that Newport-Mesa, as the district of residence of the "responsible adult" had a duty to provide Student with FAPE.

5. The IDEA is intended to ensure that a free and appropriated public education is available to all children with disabilities, ensure that the rights of children and their parents are protected, and assist states and localities to provide for the education of all children with disabilities. (20 U.S.C. § 1400(d)(1).)

6. Under the IDEA, state education agencies are responsible for "general supervision," i.e., ensuring that: 1) IDEA requirements are met; 2) special education programs are supervised and meet the educational standards of the state education agency; and 3) the requirements of the McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431, et seq.) are met as to homeless children. (20 U.S.C. § 1400(d)(11)(A).) A state education agency may be responsible for the provision of special education if it fails to meet its duty of ensuring that the requirements of the IDEA are met. (See *Gadsby v. Grasmick* (4th Cir. 1997) 109 F.3d 940, 953; *Kruelle v. New Castle County Sch. Dist.* (3d Cir. 1981) 642 F.2d 687, 696.) However, the "general supervision" responsibilities of a state agency do not limit the responsibility of other agencies in a state "to provide, or pay for some or all of the costs of a free appropriate public education for any child with a disability in the State." (20 U.S.C. § 1400(d)(11)(B).)

<sup>3</sup>

All subsequent statutory references are to the Education Code, unless otherwise indicated.

7. The IDEA leaves it to the individual states to establish mechanisms for determining which agency within a state is financially responsible for the provision of special education services, as well as procedures for reimbursement between agencies, and procedures for the resolution of interagency disputes. (20 U.S.C. § 1400(d)(12)(A); *Manchester School District v. Crisman* (1st Cir. 2002) 306 F.3d 1, 10-11.) The requirement of establishing mechanisms for determining which agency within a state is financially responsible for the provision of special education services may be met through statutes, regulations, or interagency agreements. (20 U.S.C. § 1400(d)(12)(C).) Thus, residency questions are determined under state law. (See *Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1525; *J.S. v. Shoreline School Dist.* (W.D. Wash. 2002) 220 F.Supp.2d 1175, 1191.)

8. Determination of the issue in this case requires interpretation of California statutes and regulations. The goal of statutory interpretation is to ascertain and effectuate the legislative intent. (*Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 54, citing *Mejia v. Reed* (2003) 31 Cal.4th 657, 663.) The plain meaning of a statute controls and courts will not resort to extrinsic sources to determine the Legislature's intent unless the application of the plain meaning leads to unreasonable or impracticable results. (*Nuclear Info. & Res. Serv. v. DOT Research* (9th Cir. 2006) 457 F.3d 956, 960; *In re Jennings* (2004) 34 Cal.4th 254, 263.)

9. Words of a statute should be construed in light of the statutory purpose and should also, to the extent possible, be interpreted in a way that is consistent with other statutes relating to the same subject. (*Katz v. Los Gatos-Saratoga Joint Union High School Dist.*, *supra*, 117 Cal.App.4th at p. 54, citing *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) The Education Code and California Code of Regulations expressly state the principles of statutory construction that “the definitions prescribed by this article apply unless the context otherwise requires,” and, “words shall have their usual meaning unless the context or a definition of a word or phrase indicates a different meaning.” (§ 56020; Cal. Code Regs., tit. 2, § 60010, subd. (a).)

10. When statutory language is interpreted in the proper context, yet still contains an ambiguity, secondary sources of interpretation may be applied, such as maxims of statutory construction or legislative history. (*Katz v. Los Gatos-Saratoga Joint Union High School Dist.*, *supra*, 117 Cal.App.4th at p. 55.) Subsequent amendments to a statute that are made to correct a court’s interpretation can be evidence of the Legislature’s original intent. (See *People v. Kelly* (2007) 154 Cal.App.4th 961, 966-967 [Legislature’s action in response to a court’s statutory interpretation undermined contention that original statute should be read as court interpreted it].)

11. In California, the determination of which agency is responsible to provide education to a particular child is controlled by residency as set forth in sections 48200 and 48204. (*Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 57 (interpreting §§ 48200 and 48204 as allowing enrollment of

children in school district where only part of a residence was located).) Under section 48200, children between the ages of 6 and 18 must attend school in the district “in which the residency of either the parent or legal guardian is located.” (Ed. Code, § 48200.)

12. As part of California’s general statutory scheme of determining which school district is responsible for education based on parental residency, section 48204 includes exceptions for situations other than a child living with a “parent or legal guardian.” (See *Katz v. Los Gatos-Saratoga Joint Union High School Dist.*, *supra*, 117 Cal.App.4th at pp. 57-58.) At all relevant times, section 48204, provided that agencies other than the school district where the “parent or legal guardian” resided were responsible to provide education under the following circumstances: 1) A pupil placed within the boundaries of that school district in a regularly established licensed children's institution, or a licensed foster home, or a family home; 2) A pupil for whom interdistrict attendance has been approved; 3) A pupil whose residence is located within the boundaries of that school district and whose parent or legal guardian is relieved of responsibility, control, and authority through emancipation; 4) A pupil who lives in the home of a caregiving adult that is located within the boundaries of that school district; and 5) A pupil residing in a state hospital located within the boundaries of that school district. (§ 48204.)

13. 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.

14. From October 7, 2005, to October 9, 2007, section 56028 provided:

(a) “Parent,” includes any of the following:

(1) A person having legal custody of a child.

(2) Any adult pupil for whom no guardian or conservator has been appointed.

(3) A person acting in the place of a natural or adoptive parent, including a grandparent, stepparent, or other relative with whom the child lives. “Parent” also includes a parent surrogate.

(4) A foster parent if the authority of a parent to make educational decisions on the child's behalf has been specifically limited by court order in accordance with subsection (b) of Section 300.20 of Title 34 of the Code of Federal Regulations.

(b) “Parent” does not include the state or any political subdivision of government.

15. From October 10, 2007, through December 31, 2008, section 56028, provided:

(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.

(4) An individual acting in the place of a biological or adoptive parent, including a grandparent, stepparent, or other relative, with whom the child lives, or an individual who is legally responsible for the child's welfare.

(5) A surrogate parent who has been appointed pursuant to Section 7579.5 or 7579.6 of the Government Code, and in accordance with Section 300.519 of Title 34 of the Code of Federal Regulations and Section 1439(a)(5) of Title 20 of the United States Code.

(b)(1) Except as provided in paragraph (2), 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.

(2) 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 section.

(c) "Parent" does not include the state or any political subdivision of government.

(d) "Parent" does not include a nonpublic, nonsectarian school or agency under contract with a local educational agency for the provision of special education or designated instruction and services for a child.

16. Effective January 1, 2009, section 56028 was amended to 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.

(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.

(b)(1) Except as provided in paragraph (2), 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.

(2) 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.

(c) "Parent" does not include the state or any political subdivision of government.

(d) "Parent" does not include a nonpublic, nonsectarian school or agency under contract with a local educational agency for the provision of special education or designated instruction and services for a child.

17. From October 7, 2005 through December 31, 2007, the definition of "surrogate parent" in Education Code section 56050 incorporated by reference Code of Federal Regulations, title 34, part 300.515, which provided:

(a) General. Each public agency must ensure that the rights of a child are protected if--

(1) No parent (as defined in § 300.20) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent;

(3) The child is a ward of the State under the laws of that State.

(b) Duty of public agency. The duty of a public agency under paragraph

(a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method--

(1) For determining whether a child needs a surrogate parent; and

(2) For assigning a surrogate parent to the child.

(c) Criteria for selection of surrogate parents.

(1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies must ensure that a person selected as a surrogate parent--

(i) Is not an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the child;

(ii) Has no interest that conflicts with the interest of the child he or she represents; and

(iii) Has knowledge and skills that ensure adequate representation of the child.

(3) A public agency may select as a surrogate a person who is an employee of a nonpublic agency that only provides non-educational care for the the child and who meets the standards in paragraphs (c)(2)(ii) and (iii) of this section.

(d) Non-employee requirement; compensation. A person who otherwise qualifies to be a surrogate parent under paragraph (c) of this section is not an employees 6of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

18. Effective January 1, 2008, the definition of “surrogate parent” in Education Code section 56050 incorporated by reference Code of Federal Regulations, title 34, part 300.519, which provides:

(a) General. Each public agency must ensure that the rights of a child are protected when--

(1) No parent (as defined in § 300.30) can be identified;

(2) The public agency, after reasonable efforts, cannot locate a parent;

(3) The child is a ward of the State under the laws of that State; or

(4) The child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434(a)(6)).

(b) Duties of public agency. The duties of a public agency under paragraph (a) of this section include the assignment of an individual to act as a surrogate for the parents. This must include a method--

(1) For determining whether a child needs a surrogate parent; and

(2) For assigning a surrogate parent to the child.

(c) Wards of the State. In the case of a child who is a ward of the State, the surrogate parent alternatively may be appointed by the judge overseeing the child's case, provided that the surrogate meets the requirements in paragraphs (d)(2)(i) and (e) of this section.

(d) Criteria for selection of surrogate parents.

(1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies must ensure that a person selected as a surrogate parent--

(i) Is not an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the child;

(ii) Has no personal or professional interest that conflicts with the interest of the child the surrogate parent represents; and  
(iii) Has knowledge and skills that ensure adequate representation of the child.

(e) Non-employee requirement; compensation. A person otherwise qualified to be a surrogate parent under paragraph (d) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(f) Unaccompanied homeless youth. In the case of a child who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogate parents without regard to paragraph (d)(2)(i) of this section, until a surrogate parent can be appointed that meets all of the requirements of paragraph (d) of this section.

(g) Surrogate parent responsibilities. The surrogate parent may represent the child in all matters relating to--

(1) The identification, evaluation, and educational placement of the child; and

(2) The provision of FAPE to the child.

(h) SEA responsibility. The SEA must make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a public agency determines that the child needs a surrogate parent.

19. At all relevant times, Welfare and Institutions Code section 361, provided that a “responsible adult” was required to be appointed by the juvenile court when a child was adjudicated a ward of the court and parental rights regarding educational decisions were limited. (Welf. & Inst. Code, § 361, subd. (a).) Notably, if no “responsible adult” could be appointed by the juvenile court, then, if the child had an IEP, the juvenile court was required to refer the child to the local education agency for the appointment of a “surrogate parent” pursuant to Government Code section 7579.5. (*Ibid.*) At all relevant times, Government Code section 7579.5 (contained in sections relating to interagency coordination of the provision of mental health services), provided that a local education agency was obligated to appoint a “surrogate parent,” as defined under the IDEA, for a dependent child only if no “responsible adult” had been appointed pursuant to Welfare and Institutions Code section 361 (setting for the definition of “responsible adult”) or Education Code section 56055 (setting forth the definition and responsibilities of a “foster parent.” (Gov. Code, § 7579.5, subd. (a)(1)(C).) These statutes, when read together, demonstrate that the only difference between a “responsible adult” and a “surrogate parent” is that a “responsible adult” under state law is appointed by a judge of the juvenile dependency court whereas a “surrogate parent” could be appointed by a local education agency under the IDEA. The above statutes, although using different terminology, are consistent with title 34, Code of Federal Regulations, part

300.519(c), which provides that a juvenile dependency court may appoint a “surrogate parent” to represent the child’s educational interests under the IDEA.

20. The published ruling in *Orange County Department of Education v. A.S.* (C.D. Cal. 2008) 567 F.Supp.2d 1165 is not persuasive authority. There, two of the same parties in the instant matter, OCDE and the CDE, were involved in a dispute over which agency was responsible for funding the 2006, out-of-state, RTC placement of a child whose parents no longer held parental rights. The published ruling in *A.S.* is not a final decision on the merits, but instead is a denial of CDE’s motion to dismiss OCDE’s action for failure to state a claim on which relief can be granted. More importantly, the *A.S.* ruling on CDE’s motion to dismiss is distinguishable, and not persuasive authority on the question of whether California law designates the agency responsible to provide FAPE to children who are placed out-of-state when biological parents no longer have rights, because the ruling does not analyze, or even address, the relationship between Education Code section 56028, which defines “parent” in the special education context, and Education Code section 48200, which uses residency of a “parent” for purposes of determining the district of attendance. (See *Id.* at pp. 1167-1169.) Thus, *A.S.* is not persuasive and will not be applied in the instant matter.

21. Here, neither OCDE, nor CDE was responsible for the provision of special education services to Student after Student moved from Orangewood, a licensed children’s institution served by OCDE, to an out-of-state RTC. Instead, the educational agency responsible to provide Student with services under the IDEA after March 9, 2007 was Newport-Mesa, the school district in which the “responsible adult” resided. When read together, sections 48200, 48204, and 56028 demonstrate a legislative intent that with only a few exceptions, the residency of a person, either a parent, the child upon emancipation or achieving the age of 18, or a person acting in the place of a parent, determines which local education agency is required to provide services to the child. The express language of section 56028 unambiguously excludes the state and any political subdivision from the definition of “parent” for purposes of special education, indicating a legislative intent that the statute should be construed in a way that avoids placing any governmental body in the place of a “parent.” In contrast, section 56028 includes various possible individuals who may be considered the child’s “parent” for all purposes.

22. Because the language of section 56028 changed during the relevant time period, all relevant versions of this section will be interpreted for purposes of this decision. Until October 10, 2007, section 56028, subdivision (a)(3) defined “parent” broadly to include a “person acting in the place of a natural or adoptive parent.” Subdivision (a)(3) contains the explanatory phrase “including a grandparent, stepparent, or other relative with whom the child lives,” which, when given its plain meaning does not restrict the class of persons described only to persons living with the child. (See *Garcetti v. Superior Court* (2001) 85 Cal.App.4th 1113, 1120-1121 [applying the last antecedent rule of statutory construction, when a statute contains a list of descriptive phrases separated by commas, any modifiers included within a particular phrase do

not apply to all items in the list].) None of the parties contend that sections 48200 or 48204 are ambiguous. Pursuant to section 48204, OCDE was responsible for Student's education prior to March 9, 2007, while Student was living at Orangewood. After March 9, 2007, Student did not fall into any of the exceptions in section 48204. Instead, the general rule in section 48200, that the school district where a "parent" resided was responsible for Student's education applied. Because "parent" was defined at the time in section 56028, subdivision (a)(3) in a way that included the "responsible adult" who was "acting in the place of a natural or adoptive parent," the residency of the "responsible adult" determined which local agency was responsible for Student's special education. It would be an absurd result to find that section 56028 included a "surrogate parent" but not a "responsible adult" when a prerequisite to the appointment of a "surrogate parent" for a child who is a ward of the Juvenile Court is the inability of the Juvenile Court to appoint a "responsible adult." (See Welf. & Inst. Code, § 361, subd. (a); Gov. Code, § 7579.5.) In sum, when the language of sections 48200, 48204, and 56028, as it existed prior to October 7, 2007, are read together, and harmonized with Welfare and Institutions Code section 361 and Government Code section 7579.5, it is clear that the Legislature expressed an unambiguous intent that neither the CDE, nor OCDE, would be considered a child's "parent" for purposes of the residency requirement. Instead, the school district where the "responsible adult" resided had a duty to provide Student with FAPE.

23. After October 10, 2007 through December 31, 2008, the language of section 56028 changed. Specifically, what was once subdivision (a)(3) became subdivision (a)(4), and was rephrased to state that a "parent" could be defined as, "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." In light of the prior language of section 56028 that restricted "with whom the child lives" to relatives, this new version of section 56028 cannot be read to mean that the "individual acting in the place of a biological or adoptive parent" had to live with the child. (See Legal Conclusion 22, above.)

24. As of October 10, 2007, the Legislature also added to the list of persons who could be considered a parent under section 56028 a separate subsection referencing a "surrogate parent" as defined under the IDEA. The language of section 56028, subdivision (b)(2) as of October 2007 and after January 1, 2009 excluded "surrogate parent" from the list of persons who could be considered a "parent" but did not exclude "responsible adult." The January 1, 2009 revision of section 56028 expressly clarified that the residence of a "responsible adult" would be used to determine residency, whereas the residence of a "surrogate parent" would not. This is a logical distinction given that a "surrogate parent" may be appointed under a variety of circumstances where there is still a "parent" residing somewhere, whereas, in contrast, if a child has a "responsible adult" appointed, the child is by definition a parentless ward of the court.

25. At all times between March 9, 2007 and December 31, 2008, the Legislature expressly contemplated that the residency of a “responsible adult” would result in financial responsibility to the school district where the “responsible adult” resided. Moreover, at all relevant times section 56028 contemplated that persons residing in other school districts could become a student’s “parent” for purposes of section 48200. Applying the above interpretations of section 56028 to the instant facts, Newport-Mesa, as the local education agency where the “responsible adult” lived, was responsible for providing Student with FAPE from March 9, 2007 through December 31, 2008. (Factual Findings 1-5; Legal Conclusions 1, 5-25.)

#### ORDER

Newport-Mesa was responsible to provide FAPE to Student from March 9, 2007 through December 31, 2008.

#### 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, OCDE prevailed on the issues presented in Case One. Student prevailed as to Newport-Mesa only in Case Two.

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

DATED: June 2, 2009

/s/

RICHARD T. BREEN

Administrative Law Judge

Office of Administrative Hearings