

**THE STATE DEPARTMENT OF EDUCATION
STATE OF OKLAHOMA**

**DUE PROCESSING HEARING
REDACTED DECISION
CASE NO 1959**

SERC

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BY: SE

PETITIONER : [Parent]

REPRESENTATIVE: Pro se

RESPONDENT: [School District]

**REPRESENTATIVE: [School District
Attorney]**

HEARING DATE: September 22, 2009

DECISION: October 5th 2009

HEARING OFFICER: David R. Blades, Esq.

WITNESSES:

[Special Education Teacher]

[Elementary Secretary]

[Elementary Teacher]

[Elementary Principal]

[Superintendent]

[Parent]

ADMITTED EXHIBITS

Petitioner: A, B1 B2 B3 B4, C2, E 1, E2, E3 F.

Respondents 1 thru 11 Admitted

STIPULATIONS

The parties stipulate that a Physiological evaluation was done on the student with consent of the parent/petitioner in November 2008.

**STATE DEPARTMENT OF EDUCATION
STATE OF OKLAHOMA**

**[PARENT] on
behalf of [child]**

Petitioner

DPH no. 1959

v.

[PUBLIC SCHOOL]

Respondent

HEARING DECISION

In January 2006 the family of the student purchased and moved into a home located in [a housing edition] in [an Oklahoma] County. Based on assurances by the developer their housing addition was located in the [respondent] Public School District (district). The student's mother went to enroll the student in the respondent district in March 2006. The mother of the student sought to place the student in the respondent's pre-kindergarten program. When the parent arrived at the school, she along with employees of the school examined a map, completed the enrollment papers and the paperwork was then forwarded to the school's transportation director. The student was enrolled in the district; was later identified as a student requiring special services and was placed on an Individual Education Plan (IEP)

The student completed the '05-'06 school year and was later enrolled for the 2006-2007 school year with the respondent district. Since he only participated in the last part of the pre-k program, in the fall of '06 he was again enrolled in the pre-k program. He was enrolled in first grade with the district for the 2007-2008 school year.

In the fall of 2008 it was discovered by school officials that the student and his family were not residents of the school district. Relying on the advice of school officials, the parent filed the necessary paperwork for an emergency transfer. Initially, the transfer was denied, however, the Superintendent changed his mind and allowed the student to complete the 08-09 school year. The parent was then instructed to apply for transfer for the 09-10 school year and was denied.

Findings of fact & Conclusion of Law

1. On November 20th 2008 a psychological evaluation was done on the student with parental consent. (Tr. 171n 1-19)
2. When the parent came into to enroll the student enrollment papers are completed and sent to [the director of transportation]. (Tr. Pg 38 In 18-22)
3. [The named person] was the director of transportation (Tr.pg. 38 In [25-Tr. pg 39 1n1](#))
4. Student first enrolled on March 1st 2006 (Tr pg 40 In 5-14)
5. Initially enrolled in a pre-k program for four year olds (Tr. Pg 40 In 22-25)

6. Enrolled in 06/07 school year — repeated pre-K (Tr pg 41 In 1-6)
7. The student enrolled in pre-k in for the 07-08 school year but withdrew in January 2008. (Tr pg 41 In 9-11)
8. Enrolled in kindergarten in the district in August 2007 (Tr pg41 In 13-16)
9. Determination was made in November 2008 that the student was not a resident of the district (Tr. pg 41 In 25-Tr. Pg 42 In 1-4)
10. District requires some type of proof of residency before enrollment. (Tr. pg 60 Ln 6-10)
11. [The named person] was the principal of the elementary school when the student enrolled. (Tr. pg 72 In 16-19)
12. Pre-k is a program not required by law; it is initially offered to (Tr. pg 73 In 8-25-Tr pg. 74 In 1-5)
13. Bus driver brought the residency issue to the attention of [the elementary principal]. (Tr. pg 76 In 6-12)
14. [The named person] superintendent of respondent district sent a letter denying emergency transfer in December 2008. (Petitioner Exhibit C2)
15. Based on advice by [named person] of the State Department of Education, [The superintendent] changed his mind and allowed the student to finish the 2008 school year and then apply for an open transferee in 2009 (Tr. pg 88 In 19-25 Tr. pg 89 In 1-18)
16. [The named person] started as superintendent of school in 2006-2007 (Tr. pg 91 In 19-25)
17. [The Superintendent] determines residency by using maps or calling the local postmaster who has a more detailed maps. (Tr pg 93 In 23-29 Tr. pg 94 In 1-5)
18. [The Superintendent] has authority to approve an emergency transfer. (Tr pg 97 Ln)

19. The student's family were not registered voters inside the respondent district (Tr. pg 101 In 12-15).

20. [Superintendent] verified his decision about residency with a map from the County Assessor's office (Tr pg 106 In 15-17 and a real estate developer Tr. 106 In 17-19).

21. Real estate developer was a private citizen and not affiliated with the district (Tr. pg 106 In 20-25 Tr. pg 107 In 1-2).

22. Parent admits the she and the student do not actually physically reside in the district (Tr. pg 116 In 4-6).

23. The student already lived in district when the student was enrolled (Tr pg 122 In 14-17)

24. The parent purchased the home she is in by relying on the assurances of a developer [name omitted] that there home was located in the respondent district. (Tr. pg 123 In 10-25 124 1-4)

25. [The developer] is not an employee of the district (Tr. pg 124 In 5-16)

26. The parent already made her decision to move to her current residence prior to speaking with anyone at the school. (Tr. pg 124 In 17-25; Tr pg 125 In 1-10)

27. Student is currently enrolled at [the neighboring district] and has the process in place to get an IEP for the student Tr. 125 In 11-17; Tr 126 13-18

28. The Respondent School district voted not to allow the student an open transfer to its district in May 2009 (Petitioner Exhibit E1 & E2)

29. At the time the student was enrolled in the district residency was determined by the bus driver who was familiar with the routes and where people lived. (Tr pg 94 in 12-23)

Analysis

The parent brings this action on behalf of the student asserting that the student was denied a Free and appropriate public education (FAPE). Specifically, the complaining party asserts, among other things, that the student was denied instruction during the summer of 2009 as contemplated by his Individual Education Plan (IEP). Instruction during the summer is commonly referred to as Extended School Year (ESY). The parties have resolved this issue and it is no longer the subject of this action.

The remaining issue in focuses on whether the respondent school district is responsible for providing the student FAPE from this point forward. Specifically, the parent argues that they are a resident of the respondent district; thereby obligating the respondent to provide special services for the student. The parent argues that the student is an actual resident of the respondent district or should be considered a *de facto* resident. As a result, the parent is of the opinion that the respondent district is responsible for providing the student FAPE for the 2009 school year and beyond.

For its part, the respondent admits that in March of 2006 it was under the mistaken belief that the student was a resident of its district. The evidence indicates that bus routes for the respondent did run close to the student's home.

Additionally, it was believed that the maps used by the district in the spring of 2006 indicated that the student did in fact live in the respondent district. However, the respondent asserts that in the fall of 2008 the district reassessed the residency status of the student and determined that the student in fact resided in the [neighboring] school district.

The respondent contends that the student and his family do not reside in the district. They further assert that incorrect assessment of the student's residency was a mutual mistake. Moreover, the district contends it would not be equitable for the district to be financially responsible for a student for whom they could not receive the appropriate financial subsidy.

A. The IDEA and residency

The IDEA does not specify the manner in which a state assigns the responsibility of providing services to students requiring special education. The IDEA requires the states to provide special services to all disabled students within its jurisdiction.

The IDEA does not further define residency requirements and leaves that issue to state law. Therefore, to resolve this dispute a careful review of state law on residency as it relates to school districts is required.

B. The Parent is not an physical legal resident of the respondent district

The requirements necessary to establish residency are found in *Okla. Stat*

tit. 70 §1-113. Only one sub-part may apply in the instant matter and it gives little guidance in how to define residency. The law provides,

Okla. stat tit. 70 '1-113:

1. The school district in which the parents, guardian, or person having legal custody holds legal residence.

Unfortunately, the statute does not define the term "resides". Therefore, one is left with the traditional definition of the term. The word Residence is defined as:

"...2. The place where a person resides, a person's home " *Oxford University*

Press.

During the hearing the parent presented no evidence that her actual residence or where she lived was physically located within the district. Indeed, during the course of the proceedings the parent admitted that after reviewing the evidence in the hearings she agreed with the respondent that her place of abode was outside the district bounds. Therefore, the Petitioner cannot satisfy her burden that she lives within the boundary of the respondent district.

C. Okla. Stat. tit. 70 § 13 1-103 does not apply

The parent urges this tribunal to find that as a matter of law the student is a resident of the district. The petitioner relies on Okla. Stat. tit. 70 § 13 1-103 to support her contention. The statute reads in part:

Beginning with the 2008-2009 school year, a transfer student granted for a child with a disability pursuant to paragraph 4 of section 13-101 of this title for three consecutive years to the same school district shall automatically be renewed each year. . .

Setting aside the issue of whether this Tribunal can order a granting of a transfer, this statute is not applicable in the instant matter.

The plain reading of the statute indicates that its provisions did not come into effect until the 2008 school year. The statutory language protects disabled students who have been enrolled via a transfer in a school district for three years. Under this construction, this statute would protect those students who had been enrolled on a transfer for three years from 2008. That would mean the statute would not protect those students until 2011.

Since the statute in question alters the obligations of the respondent district there must be express language that would allow its application to the 2005-2006 school year. The statute does not contain language that would give it retroactive effect. " A substantive change that alters the rights or obligations of a party cannot be viewed as solely a remedial or procedural change and cannot be retrospectively applied." *Burch v. State* 166 P.3d 502 (2007) citing *Sudbury v. Deterding* 19 P3d 856 (Ok 2001). "Statutes are typically not given retroactive effect unless the Legislature **has** made clear its intent to do so. Any doubts must be resolved against a retroactive effect." *CNA Ins. Co. v. Ellis*, 2006 OK 81, 13,148 P3d 874,877.

Without retroactive application the parent's reliance on this statute is misplaced and cannot be used as a foundation for the student's residency.

D. The evidence does not support the contention that the student is a defacto resident of the respondent district.

The petitioner contends that even if she and the student are not a legal residence of the district they should be considered *defacto* residents of the district. Courts had applied equitable estoppel in order to find a person a resident of a school district even in those situations when a individual actually lives in another district. Such a doctrine is based on material misstatements buy one party. However, other elements are necessary to satisfy the legal test. A review of the evidence in this matter shows that the petitioner's case falls short in this regard.

The concept of defacto residency arises from the case of *Burdick v. Independent School Dist.*, 702 P.2d 48 (Okla.1985). In this case, the Burdick family considered buying a new home in Midwest City in 1975. The Bricks desired that their children attend school at the Midwest City -Del City School District. Ms. Burdick telephoned both the Mid-Del and Oklahoma City School District to find out in which district would serve there future home. She was told by both districts that her home would be located in the Mid-Del district. The

Bricks then purchased their home and enrolled their children in the Mid-Del School district where they remained for almost five years. In 1980 they were told actually resided in the Oklahoma City School District and would have to enroll in said district.

The *Burdick* court applied the doctrine of equitable estoppel to determine that the Burdick family were defacto residents of the Mid-Del district. The elements of equitable estoppel are:

- (1) a false representation or concealment of facts,
- (2) made with actual or constructive knowledge of the facts,
- (3) to a person without knowledge of, or the means of knowing, those facts,
- (4) with the intent that it be acted upon, and
- (5) the person to whom it was made acted in reliance upon it to his detriment.

In this case, the petitioner has failed to present evidence to satisfy these requirements.

There is no evidence that the district was aware or should have been aware that the initial enrollment of the student was incorrect.' The only evidence in the case as to how residency was determined was testimony that school officials and the student's parent looked at a map to try to ascertain whether the student lived within the district.

¹The fact that the school district agreed to enroll the student in the '06 school year can be taken as a false statement as to residency.

The evidence suggests that the initial enrollment was as a result of an erroneous reading of a map by school officials and the parent. No evidence was presented demonstrating that district officials knew or should have known of actual residence of the student. It would have been instructive to have the testimony of the transportation director who might have elucidated this issue, but this tribunal cannot assume what evidence that individual may possess. As a result the parent's assertion of defacto status must fail.

There are is some evidence that [the named Oklahoma] County Assessor records indicate that the Petitioner resided in a school district other that the respondent. The evidence submitted by the parties indicate that at least as early as 2007 the school district was [designation]. This designation does not clearly identify a school district by name, but it indicates that the Plaintiff did have access to public records which could have enlightened her as to the proper district in which to enroll her student.

There is no detrimental reliance in this situation that would justify assigning defacto status to the student. In the *Burdick* decision the court noted that the *Burdick's* decided to purchase a home based on the statements by the school district. In this case, the testimony is that the parent had made their decision on where to live before they spoke with school officials. Indeed, the testimony is this case was that the parent relied on the statements concerning school district residency of a property developer

when making a decision where to purchase a home. The property developer is not affiliated with the district and his statements cannot be attributed to the respondent.

There is also no evidence of detriment as it relates to the provision of special services. The evidence at the hearing was that the [neighboring] school district was in the process of implementing an IEP for the student. Vague, subjective notions of dislike for the [neighboring] school district does not constitute detriment. Further, the fact that it is not as convenient to transport the student to the [neighboring] may be regrettable , but it is not of any legal consequence.'

IT IS THEREFORE ORDERED that for all the foregoing, the Petitioner's request be denied.

On this 5th day of October 2009.



1 The parent's concern regarding the motivation of the district in reassessing the student's residency. Is of no legal significance. If the petitioner cannot satisfy the elements of defacto residency why the district denied transfers or reassigned residency simply does not matter.

**IF EITHER PARTY IS DISSATISFIED WITH THIS DECISION THEY MAY
APPEAL THE ORDER WITHIN THIRTY-DAYS OF THE RECEIPT OF THE
DECISION TO:**

**DUE PROCESS HEARING APPEALS
STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION SERVICES
2500 NORTH LINCOLN BLVD
OKLAHOMA CITY, OK. 73105**

For more information call (405) 521-4871

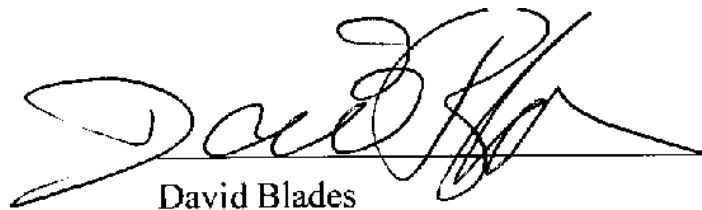
Certificate of Mailing

The undersigned certifies that a copy of the forgoing was mailed certified mail on the 5 day of October 2009 to:

[Parents and address]

[Special Education
Resolution Center and address]

[Attorney for School District and address]



David Blades