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VIRGINIA

SPECIAL EDUCATION DUE PROCESS HEARING

and

Complainants

v.

IN RE: STUDENT

PUBLIC SCHOOLS,

Respondent

**THRESHOLD DECISION CONCERNING RESIDENCY**

ISSUES AND PURPOSE OF HEARING: Complainants initiated this Due Process Hearing alleging that PS failed to provide the student with FAPE. PS responded and requested a preliminary decision on the threshold issue of the student's residency. Nineteen Stipulations of Facts were submitted along with fifteen agreed exhibits. The issue of residency was argued by briefs, reply briefs and oral telephonic argument submitted by respective counsel.

ANALYSIS: The parents ( ) are both on active duty with the United States Military. The student was enrolled in PS because the parents were stationed in . The parents have recently received orders for a permanent change of station requiring them to move to . At the time of the initiation of this Due Process Hearing, the student was under the age of eighteen. The student reached eighteenth birthday on . Prior to that time, the parents executed Durable Power of Attorney documents granting guardianship of the student to a non relative resident of

Complainant argues that, in accordance with an interpretation from the Attorney General of Virginia of Virginia Code §22.1-3, as it relates to military personnel, this Power of Attorney is sufficient to allow the enrollment of the student with [redacted] S. I believe this Attorney General Opinion covers only the situation when military parents are temporarily transferred and the parents wish to leave their child with a caretaker. Reference is made in the opinion to emergency circumstances. The implication is clear that when military parents are transferred by permanent change of station, the parents are not expected to return. In such a case, the parents establish a new residence in their new station. Virginia case law defines residence as "the place where one actually lives or has his home." See: Schwarzschild v. Welborne, 186 Va. 1052, 45 S.E.2d. 152 (1947).

Besides having a new residence in [redacted], the parents also maintain a domicile in the United States. Virginia case law defines domicile as "the technically preeminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined." See: Com. V. Rutherford, 160 Va. 524, 169 S.E. 909 (1933). The parents' expressed State of domicile is [redacted]. They say so in the executed Power of Attorney documents, Exhibits 2 & 3 and in the arguments of counsel. It seems clear that if the student in this case were a minor, the permanent transfer of [redacted] parents would end [redacted] right to FAPE in [redacted] and activate that right to FAPE in the parents' domicile.

The issue becomes a little more complicated now that the student is over the age of eighteen. For one thing, the Power of Attorney granting guardianship is no longer applicable. See: Virginia Code §31-9. The document speaks of guardianship of a "child". Virginia Code §1-13.42 states that the word child "shall be construed to mean a

person under eighteen years of age. If the student were not capable of handling affairs, resort to the Court for the appointment of a guardian would be necessary. This has not occurred.

The question now is where is the student's residence? Residence is defined as the place where one actually lives or has home. The term "domicile" encompasses the term "residence". One can have two residences but only one domicile. See: Long v. Ryan, 71 Va (30 Gratt.) 718 (1878).

Under the doctrine of domicile of origin, the domicile of the parents at the time of birth constitutes the domicile of the infant, and continues until abandoned, or until the acquisition of a new domicile in a different state. See: Struble v. Struble, Tex. Civ. App., 177 S.W. 2d 279.

These principles should be applied in determining the residence of the student. The first question is where does the student actually live. Since , has been actually living in the , attending school. During this time, residence in evaporated when parents relinquished their residence in

Complainants argue that the student can still maintain a residence in because intends to return to and stay with previously appointed guardian. The student has never before resided with this guardian. (Stip. #13) Therefore, cannot return to this residence. affiliation with the guardian's home is no more than that of a prospective home. A prospective home cannot be a domicile or residence. See: Ruby v. Pierce, 74 Neb. 754, 104 N.W. 1142 (1905). Many other factors exist to make it unlikely the student will, in fact, return to reside in . First of all, has no relatives living in . has "disenfranchised" self from friends in .

gets "verbally aggressive with adult authorities".        has a history of violent behavior.  
(See: Ex. 9) There is no evidence that        guardian would remain committed to  
providing        with a residence if the relationship deteriorated.

Virginia Code §22.1-3 states that a person shall be deemed to reside in a school  
division under any one of six specific situations. The student meets none of those  
situations. (1)        is not living with        natural parents. (2)        parents are not dead.  
(3)        has no court appointed guardian. (4) and (5) and (6)        is not living in the school  
division.

CONCLUSION: The parties agreed that the child has a disability. The requirements of  
notice to the parents were satisfied.

ORDER:        It is ORDERED that the Complainants' claim be dismissed because the  
student is no longer a resident of        and therefore is not eligible for special  
education from this school division.

APPEAL INFORMATION: This decision is final and binding unless appealed by a  
party in a state circuit court within one year of this decision's issuance date, or in a  
federal court.

\_\_\_\_\_  
Hearing Officer

CERTIFICATE

By signature above, I certify that a true copy of the foregoing was mailed this \_\_\_\_ day  
of \_\_\_\_\_ to: