

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

FINAL DECISION AND ORDER

Student's Name: K.C.

Date of Birth: [redacted]

ODR No. 16658-1516AS

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Representative:

Pro Se

School District of Philadelphia
440 N. Broad Street
Philadelphia, PA 19130

Judy Baskin, Esq.
School District of Philadelphia
Office of General Counsel
440 N. Broad Street, Suite 300
Philadelphia, PA 19130

Dates of Hearing: N/A

Record Closed: 09/04/2015

Date of Decision: 09/04/2015

Hearing Officer: Brian Jason Ford

Introduction and Procedural History

This is a final order, dismissing the captioned special education due process hearing.

This special education due process hearing was requested by (Grandparent). The Grandparent is the grandparent and guardian of Student. The Grandparent represents herself and the Student without an attorney. The Grandparent requested this hearing against the School District of Philadelphia (District) for the sole purpose of having a special education evaluation report destroyed. Both the Grandparent and District agree that the Student is not eligible for special education. There is no dispute concerning the provision of a free appropriate public education (FAPE).

The procedural history of this case is set forth in my Order Granting Respondent's Motion to Dismiss (Order), which is attached as Appendix A. The Order was sent to the parties on August 28, 2015. In the Order, I explained that I do not have authority to hear the claims raised in the Grandparent's complaint, and dismissed this matter on that basis. However, I also recognized the Grandparent's *pro se* status, and feared that the Grandparent did not receive all of the correspondence in this case – especially email. To mitigate this, the Order was set to automatically stay itself if the Grandparent responded to the District's Motion to Dismiss on or before September 4, 2015. The Order was sent by email and certified mail.

On September 1, 2015, the Grandparent contacted the District, indicating that the Grandparent did not want this hearing to be dismissed. The District, via counsel, reported that contact to me. Then, with the District's consent, I contacted the Grandparent *ex parte* to explain that the response must be sent to me, with a copy to the District's attorney.

After the call, on September 1, 2015, the Grandparent sent two emails to me. Together, in substance, they say that (1) the Grandparent does not want this hearing to be dismissed, (2) the Grandparent did not receive an email from me sent on August 18, 2015 because the family was out of town, (3) that the evaluation report is inaccurate and misleading and, (4) the report was not kept confidential.

Per my Order of August 28, I accept these emails as a motion to reconsider the dismissal of this due process hearing.

Discussion

As explained in my prior order, I have authority to hear cases about the provision of a FAPE to students with disabilities. Also explained in my prior order, special education laws mirror broader laws about student records. Those laws give parents and guardians the right to inspect, challenge, correct, and amend educational records. They also give parents and guardians the right to supplement disputed records with their own documents. Further, under some circumstances, parents and guardians have the right to request a hearing to challenge educational records. But, as explained in my previous order, a hearing to challenge an educational record is not a special education due process hearing.¹

¹ See Order of August 28, 2015 at pages 4-5 in the original or 8-9 in the appendix below, discussing the framework for hearings under the IDEA and FERPA when (1) parents or guardians wish to amend an educational records and (2) the provision of FAPE is not in dispute.

The Grandparent's emails to me explain why the Grandparent wants the District to destroy the evaluation. However, those emails do not allege any substantive violation of the Student's right to a FAPE. Looking at those emails in the light most favorable to the Grandparent, one could argue that the Grandparent alleges a procedural violation: disclosure of a special education record without consent. Even if I were to take that leap, the only remedy that the Grandparent demands is destruction of a student record – relief that I cannot order under the circumstances of this case.²

Conclusion

The Grandparent has asked for a records hearing, either under FERPA or IDEA regulations at 34 C.F.R. § 300.618. Neither of those are a special education due process hearing. The Grandparent has a right to a records hearing, but I cannot convene that type of hearing. I can only convene a special education due process hearing. Therefore, I must dismiss this case.

ORDER

Now, September 4, 2015, it is hereby **ORDERED** that the Grandparent's Motion for Reconsideration is **DENIED** and this case is **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER

² If modification, or even destruction, of a student record is required for the provision of FAPE, I can issue such an order. In this case, both parties agree that the Student is not eligible for special education, and so there is no FAPE issue connected to the record.

Appendix A

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

August 28, 2015

Pennsylvania
Special Education Hearing Officer

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

Student's Name: K.C.

Date of Birth: [redacted]

ODR No. 16658-1516AS

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Representative:

Pro Se

School District of Philadelphia
440 N. Broad Street
Philadelphia, PA 19130

Judy Baskin, Esq.
School District of Philadelphia
Office of General Counsel
440 N. Broad Street, Suite 300
Philadelphia, PA 19130

Dates of Hearing: N/A
Record Closed: 08/28/2015
Date of Decision: 08/28/2015
Hearing Officer: Brian Jason Ford

Introduction and Procedural History

This special education due process hearing was requested by Grandparent. The Grandparent is the grandparent and guardian of Student. The Grandparent represents herself and the Student without an attorney. I have done my best to avoid legal terms when possible, and explain them when unavoidable.

The Student is a student in the School District of Philadelphia (District). The District moves to dismiss this special education due process hearing, arguing that the Grandparent has not alleged a violation of special education laws. The District sent a copy of its motion to the Grandparent by email on August 10, 2015. The District states that it mailed a copy of its motion to the Grandparent on August 11, 2015.

On August 18, I notified the parties via email that I would accept a response from the Grandparent to the District's motion on or before August 26, 2015. I also asked the Grandparent to respond to my email to confirm receipt. The Grandparent neither replied to confirm receipt, nor filed a response. I received no error indicating that my email was not delivered.

For reasons explained below, I will grant the District's motion, but will delay the dismissal until September 4, 2015. A copy of this order will be sent to both parties by email and certified mail. If the Grandparent replies in any form prior to September 4, 2015, I will stay this motion and consider the reply. This is to ensure that the Grandparent's non-response to my email of August 18 is not the result of a technical error.

It is important for the Grandparent to know that this document dismisses the complaint and terminates the hearing, unless I receive a response before September 4, 2015. The Grandparent should carefully read the Order below, which gives information about what the response must contain. It is equally important for the Grandparent to know that sending a response does not guarantee that the hearing will go forward. Rather, this is a final opportunity for the Grandparent to explain why I should hear the case, and mitigation of a possible miscommunication.

The Grandparent's Complaint

The Grandparent drafted the complaint using a form that is available through the Office for Dispute Resolution. In one box, the form asks, "What is the dispute about? Please include facts in your description." In that box, the Grandparent wrote:

I am requesting that the evaluation report on [Student] be destroyed. [Student] is not eligible for an I.E.P. Also I made a mistake in requesting one. There is no sense in keeping the record if [Student] is not eligible.

In another box, the form asks, "How would you like to see this resolved? What are you seeking?" In that box, the Grandparent wrote:

To destroy the record of [Student's] evaluation report. Student is not eligible for an I.E.P.

The Grandparent wrote nothing else about the dispute or the desired resolution on the form.

The District's Motion

The District included additional facts in its motion to dismiss. While I cannot assume that those facts are true, I accept them as a statement of the District's position. Notably, the District's facts do not contradict the Grandparent's complaint.

Specifically, the District alleges that the Grandparent signed a Permission to Evaluate form on April 8, 2015. This is a common form by which school districts seek parental consent to evaluate students. The District alleges that a report was issued on June 4, 2015. Importantly, the District agrees that the Student was found ineligible for special education and, therefore, the Student will not receive an IEP.

Beyond the foregoing, the District says that it obtained background information from the Grandparent for the report, but removed that information from the report at the Grandparent's request. However, the District also says that it obtained behavior rating scales (part of standardized testing) from the Student's parent, and that those scales are still contained in the report.³ Regardless, the report ultimately concludes that the Student is not eligible.

Consistent with its finding of ineligibility, the District alleges that it issued a Notice of Recommended Educational Placement (NOREP) on June 17, 2015. The NOREP [is] a form that says that the Student is ineligible and asks the Grandparent to agree or disagree with that determination. The District does not say whether the Grandparent agreed or disagreed, but the Grandparent's complaint indicates agreement.

Although not strictly pertinent, the District also claims that a Section 504 plan is in development for the Student, and that a Functional Behavioral Analysis and Positive Behavior Support Plan are both pending.⁴

Discussion

The District argues that I do not have jurisdiction to hear the Grandparent's claim. In other words, the District says that I do not have the authority to resolve the dispute presented in the Grandparent's Complaint.

My authority is limited. I can resolve cases about violations of special education laws. The federal special education law is the Individuals with Disabilities Education Act (IDEA).⁵ If the Grandparent has not alleged a violation of special education laws, I must dismiss the case.

³ It is not clear if the District obtained the rating scales from the Grandparent or the Student's parent. Further, in the District's motion, reference is made to a report of April 10, 2015. It is not clear if this is a separate report or an early version of the June 4, 2015 report.

⁴ A Section 504 plan, sometimes called a service agreement, is a document that explains what accommodations a school will provide to students with disabilities who (1) are not eligible for special education but (2) require accommodations to access the regular education curriculum.

⁵ 20 U.S.C. § 1400 *et seq.* I can hear claims arising under the IDEA and its Pennsylvania and federal implementing regulations. I can also hear claims arising under Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104.4. and its Pennsylvania and federal implementing regulations. There is some dispute as to whether I can hear a claim arising under

First, I must decide if any dispute is presented at all. The Grandparent is asking the District to destroy the report. The District does not say that it complied with that request, and since the Grandparent has not withdrawn the Complaint, I infer that there is a dispute.

The dispute is limited to the question of whether the District must destroy the report. Both the Grandparent and District agree with the report's conclusion. To be clear, the question is not whether the report *should* be destroyed. Rather, to resolve the District's motion, I must determine whether any special education law gives the Grandparent the right to have the report destroyed, and whether that law falls within my jurisdiction.

There is a separate law about student records. That law is called FERPA, or the Family Educational Rights and Privacy Act.⁶ FERPA gives parents and guardians the right to inspect student records, and the right to request that a school correct records which they believe to be inaccurate or misleading. If the school decides not to amend the record, the parent or guardian then has the right to a formal hearing. But that hearing is not a special education due process hearing. That is a hearing conducted by the school district, not by the Office for Dispute Resolution.

FERPA includes a definition of educational records, and special education laws adopt that definition. Special education laws ensure that parents and guardians have access to student records.⁷ Special education regulations also include provisions about amending records at a parent or guardian's request. The regulations require as follows:⁸

- (a) A parent who believes that information in the education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child may request the participating agency that maintains the information to amend the information.
- (b) The agency must decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.
- (c) If the agency decides to refuse to amend the information in accordance with the request, it must inform the parent of the refusal and advise the parent of the right to a hearing...

The hearing referenced in the regulation is not a special education due process hearing.⁹ Rather, the hearing is conducted by the school district, and provides a forum for parents and guardians to challenge information in education records to ensure that they are not inaccurate,

the Americans with Disabilities Act (ADA), 20 U.S.C. § 1415(l), when those claims are entirely derived from IDEA or Section 504 claims and no additional relief is demanded.

⁶ 20 U.S.C. § 1232g; 34 CFR Part 99.

⁷ 34 C.F.R. § 300.613.

⁸ 34 C.F.R. § 300.618.

⁹ Special education due process hearings convene pursuant to 34 C.F.R. § 300.511. The IDEA regulations about amending educational records provide for a hearing pursuant to 34 C.F.R. § 300.619, which is an entirely different and separate hearing process. The IDEA adopts FERPA's hearing procedures when the dispute is about amending records and not about the provision of a free appropriate public education (FAPE). 34 C.F.R. § 300.621; 34 C.F.R. § 99.22.

misleading, or otherwise in violation of the privacy or other rights of the child.¹⁰ After the hearing, if the school district decides that the records must be amended, the school district must amend the records. If the school district decides that the records should not be amended, it must allow the parent or guardian to place a statement in the student's records about the disputed document. The school district must then maintain that statement, and must send that statement with the disputed record wherever that record goes.¹¹

Under this legal framework, I cannot hear the Grandparent's case. The Grandparent is neither challenging the special education eligibility determination nor the way in which the District is using (or not using) the report to educate the Student. The Grandparent does not allege that the District denied the Student a free appropriate public education (FAPE).¹² At most, the Grandparent is asking the District to "amend" the report by destroying it. When the dispute is about amending an educational record, parents and guardians have a right to a hearing, but not a special education due process hearing.¹³

Conclusion

The Grandparent agrees with the District's evaluation report's conclusion, and does not allege a denial of FAPE. Rather, the Grandparent wants the District to destroy the report and the District refuses to do so. Nothing in the law explicitly gives the Grandparent the right to have an educational record destroyed, but I interpret the laws about amending educational records to include destruction. Two laws, FERPA and the IDEA, give the Grandparent the right to request a hearing to have the records destroyed. Those same laws give the Grandparent the right to attach a statement about the disagreement to the report even if the District will not destroy it after a hearing. However, the type of hearing is not a special education due process hearing. Consequently, this matter must be dismissed.

ORDER

Now, August 28, 2015, it is hereby **ORDERED** as follows:

1. The special education due process hearing scheduled for September 4, 2015 is canceled.
2. This matter is dismissed, effective September 4, 2015.
3. In accordance with the foregoing memorandum, if the Grandparent responds to this Order before September 4, 2015 stating (1) that my email of August 18, 2015 was

¹⁰ 34 C.F.R. § 300.619.

¹¹ 34 U.S.C. § 300.620.

¹² See 20 U.S.C. § 1415 regarding my authority to hear a broad spectrum of claims concerning alleged denials of FAPE.

¹³ I note that when parents and guardians allege that a student's right to a FAPE is denied, and demand changes in documents so that the student can receive a FAPE, the case is squarely in my jurisdiction. This case is different because there is no dispute concerning the provision of FAPE. Both parties agree that the Student is not eligible. The issue solely concerns a request to destroy an educational record.

not received and (2) responding in substance to the District's Motion to Dismiss, this order shall be automatically stayed.

4. I will accept the Grandparent's response, if any, as a motion for reconsideration and, after review, determine whether the matter should be dismissed,
5. If the Grandparent responds, and the motion for reconsideration is granted, a new hearing session will be scheduled sometime prior to the decision due date, currently October 17, 2015.
6. If the Grandparent does not respond to this Order before September 4, 2015, this Order is final, dispositive and subject to appeal. Information about appeals is enclosed with or attached to the mailing and transmission of this Order.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER