

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.

IN THE PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION
Final Decision and Order
ODR File No. 2866-1112AS

CLOSED HEARING¹

Child's Name: Z.R.²
Date of Birth: [redacted]

Hearing Dates: N/A

Parties to the Hearing:

Representative:

Parent

Thomas Bowman, Esquire
1156 Easton Road
Abington, PA 19001

Chester County Intermediate Unit
455 Boot Road
Downingtown, PA 19335

Andrew E. Faust, Esquire
Sweet, Stevens, Katz and Williams, LLP
331 East Butler Avenue
New Britain, PA 19901

Record Closed: February 6, 2012
Date of Decision: February 6, 2012

Hearing Officer: Brian Jason Ford

¹ Parents typically decide to have an "open" or "closed" hearing on the day of the first hearing session. As no hearing session convened in this matter, in an abundance of caution this Hearing Officer has determined that this will be a closed hearing.

² Other than this cover page, the child and parents' names are not used to protect their privacy. "Parents" and "Student" are used instead. Other identifying information, such as the Student's gender, is omitted to the extent possible.

Introduction

The instant matter is a special education administrative due process hearing requested by the Parents against Chester County Intermediate Unit (CCIU) pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

Before me is CCIU's Motion to Dismiss and Sufficiency Challenge. In its Motion to Dismiss, CCIU argues that it is an improper party in an IDEA hearing and that the Parents seek relief that the Hearing Officer does not have authority to grant. In its Sufficiency Challenge, CCIU argues that the Parents' Complaint fails to meet the IDEA's pleading requirements.

For reasons discussed below, this Hearing Officer determines that CCIU is an improper party to this hearing and dismisses this case without prejudice on that basis. Nothing in this decision is intended to prevent the Parents from requesting a due process hearing against a proper party.

It is somewhat unusual for a hearing officer to dismiss a hearing outright on a pre-hearing motion (as opposed to giving the complainant leave to cure any procedural defect by way of an amended complaint). Such dismissals are even more unusual when the complainants are *pro se* parents. In recognition of this, this Hearing Officer believes it is appropriate to provide a comprehensive history of this matter and a full explanation of this decision.

Prior Decisions

The instant matter is not the Parents' first hearing request. Less than three months ago, the Parents requested a due process hearing against Cheltenham Township School District (Cheltenham). That hearing was *T.R. and E.R. o/b/o Z.R. v. Cheltenham Twp. School Dist.*, ODR No. 2285-1112AS (McElligott, 12/8/2011) ("*Z.R. 1*"). In *Z.R. 1*, Hearing Officer McElligott found that: 1) the Parents live within Cheltenham; 2) the Student attends a residential program geographically located in the West Chester Area School District (West Chester); 3) West Chester contracts with the Chester County Intermediate Unit (CCIU) to provide the Student's special education programming at the residential facility and; 4) pursuant to 24 PA. STAT. § 13-1306, West Chester was the local educational agency (LEA) responsible for the provision of a free appropriate public education (FAPE) to the Student. See *Z.R. 1* at 3-7.

Ultimately, Hearing Officer McElligott dismissed the Parents' complaint against Cheltenham because West Chester was the Student's LEA for IDEA purposes. See *Z.R. 1* at 7.

ODR and BSE

Understanding the procedural context of this matter requires some knowledge of the different responsibilities of the Office for Dispute Resolution (ODR) and the Pennsylvania Department of Education, Bureau of Special Education (BSE). ODR administers the special education due process system, as described at 20 U.S.C. § 1415(f).³ ODR has no jurisdictional authority to enforce due process decisions. Enforcement authority lies with BSE.⁴

Procedural History / The Complaint / Parties

Statements of procedural history in special education due process hearings are typically brief. The procedural history of this case is quite unusual, as is the Complaint itself. This section describes the Complaint, how the Complaint came to ODR, how ODR determined that the Complaint is against CCIU, various *ex parte* communications, and the recent discovery that the Parents are represented by counsel. Consequently, this statement of procedural history will be comparatively lengthy.

The Parents' Complaint consists of two documents: a handwritten letter to BSE⁵ and a Due Process Complaint Notice form.⁶ Both documents are dated February 2, 2012. The Parents sent the Complaint to BSE, not ODR. On the form, the Parents checked a box indicating that the Complaint relates to a prior special education due process decision that has not been implemented. Immediately below that checkbox, the form states: "If yes, the Bureau of Special Education will be notified, and will investigate the matter. Due Process is not available when the issue pertains to non-implementation of a Hearing Officer Decision."

The form provides contact information for the Parents, indicates that the Student is still attending the same residential program as in *Z.R. 1*, and lists "West Chester Intermediate Unit" as the Student's LEA.⁷

On the form, the Parents listed "Thomas Boman" [sic] as "Parent Attorney." Spaces on the form to include the attorney's address, email, phone number and fax number were all left blank. The form was completed by the Student's mother, not by an attorney.

³ ODR also provides a number of critical non-litigation special education dispute resolution services including mediation, facilitated resolution sessions and IEP facilitation.

⁴ A concise description of BSE's functions can be found at http://www.education.state.pa.us/portal/server.pt/community/pre_k-12_bureaus/7210 (last visited March 1, 2012).

⁵ The letter is addressed to "Chief, Division of Compliance, Monitoring & Planning, Bureau of Special Education, Pennsylvania Department of Education, 333 Market Street, 7th Floor, Harrisburg, PA 17126-0333".

⁶ More specifically, the Parents used an outdated version of a form promulgated by ODR and the Pennsylvania Training and Technical Assistance Network (PaTTAN) that was developed pursuant to 20 U.S.C. § 1415(b)(8). A current copy of the form can be obtained at <http://odr-pa.org/due-process/request-forms/> (last visited March 6, 2012).

⁷ As discussed below, there is no such thing as the "West Chester Intermediate Unit."

The form does not contain a description of the problem, facts related to the problem, or a proposed resolution. To the extent that the Complaint says what issues are presented for adjudication, that statement is found in the letter to BSE. The letter also refers to a "Reassessment IEP Report," which is a 5 page, typed document that was enclosed with the Complaint. It is not at all clear what the "Reassessment IEP Report" is. Although the document is signed by the Parents, parts of it are purportedly written by a "Dr. Theresa Counihan for a court hearing involving [the Student]." On its face, the "Reassessment IEP Report" is dated January 28, 2012, was signed by the Parents on January 29, 2012 and was "Provided to LEA" on February 3, 2012 (a day *after* the the Complaint form and letter were drafted). It is noteworthy that, according to the Reassessment IEP Report, "West Chester Area School District" is the Student's LEA.

None of the foregoing documents make any reference to *Z.R. 1*, save for the checkbox indicating non-implementation of a prior decision. With a very generous interpretation, the letter to BSE could be construed to indicate that the Parents raised issues with West Chester and CCIU during a resolution meeting connected to the prior due process hearing, and those issues were not resolved to the Parents' satisfaction. See *Letter to BSE* at 1-2. Yet even this would not suggest an issue concerning compliance with a prior order. Moreover, the prior decision is nothing more than a determination of which entity is the Student's LEA and a dismissal. See *Z.R. 1*.

After carefully reviewing the Complaint, this Hearing Officer determines that the Complaint does not pertain to a Hearing Officer Decision which has not been implemented.

BSE received the Complaint on February 6, 2012. It is reasonable to conclude that, upon reading the Complaint, BSE correctly determined that the Parents were not seeking to enforce a prior decision. Regardless of its reasoning, BSE transmitted the Complaint to ODR. ODR received the Complaint on February 15, 2012.

Upon receipt, the Complaint was assigned to an ODR Case Manager. Also, as part of standard procedures, ODR's Customer Service Representative made an effort to determine who represents the LEA and, in that process, realized that there is no such thing as the "West Chester Intermediate Unit." Upon this realization, ODR's Customer Service Representative contacted the Parents (specifically, the Student's mother) by phone on February 17, 2012. During that telephone call, the Parents confirmed that they made an error, that the Complaint should have listed CCIU as the LEA, and that it was their intent to request a due process hearing against CCIU.

Based on the Parents' statements during the telephone call, ODR accepted the Complaint as against CCIU. This Hearing Officer was assigned to the matter shortly thereafter. The Case Manager also made sure that CCIU was notified of the Complaint and attempted – initially without success – to determine who represents CCIU in this matter.

With no information provided for “Thomas Boman,” no communications from any attorney on the Parents’ behalf, and a Complaint written by the Student’s mother, in an abundance of caution this Hearing Officer treated the Parents as though they were *pro se*. On February 28, 2012, this Hearing Officer sent a letter to the parties explaining the timelines for this hearing, urging CCIU to notify ODR who its attorney is, and providing standard procedural guidance to *pro se* parents.

Counsel for CCIU entered an appearance on March 1, 2012 and submitted a Motion to Dismiss and Sufficiency Challenge the same day.

The Student’s mother attempted to call this Hearing Officer several times after the case was assigned. In general, the Student’s mother left voice messages expressing concern about the scheduled hearing time, date and location. After obtaining permission from CCIU’s counsel, this Hearing Officer returned the Parent’s calls *ex parte* to discuss scheduling. During this call, on March 5, 2012, the Student’s mother explained that the Parents were represented by counsel and provided a phone number for their attorney, Thomas *Bowman*.⁸

With this new information, this Hearing Officer then contacted the Parents’ attorney by phone, confirmed that he represents the Parents in this matter and obtained his email address. The Hearing Officer then sent an email to counsel for *both* parties that 1) disclosed the *ex parte* contact with the Parents’ attorney, 2) included a copy of CCIU’s motion and 3) explained that the deadline to render a decision on the motion was the next day, March 6, 2012.⁹ Both attorneys replied to confirm receipt.

CCIU’s Motion

CCIU’s Motion is a combined Motion to Dismiss and Sufficiency Challenge. In its motion to dismiss, CCIU argues that 1) it is not a proper party to this matter because West Chester is the Student’s LEA and 2) this Hearing Officer lacks the authority to award the

⁸ The Student’s mother also had several conversations with the ODR Case Manager. During one of those calls, the Student’s mother referred to Mr. Bowman in passing, said that Mr. Bowman was her attorney in a criminal case, and that Mr. Bowman would advise her, but not represent her for this hearing. This directly contradicts what the Student’s mother told this Hearing Officer on March 5, 2012. Regardless, as discussed, Mr. Bowman did confirm representation during another phone call on March 5, 2012. This Hearing Officer also explained to the Student’s mother that, because she is a represented party, this Hearing Officer would communicate with counsel, not with her directly. The Student’s mother expressed some disappointment about that and, in essence, asked if she could both represent herself and work with counsel. That request was ultimately not resolved but, as a courtesy, this Hearing Officer is sending a copy of this Decision both to the Student’s mother and to the Parents’ attorney.

⁹ As explained below, sufficiency determinations must be made on the face of the Complaint, and so responses to sufficiency challenges are not required. However, this Hearing Officer explained that he would consider any response filed before the March 6, 2012 deadline. The email of March 5, 2012 also included a copy of ODR’s Generally Applicable Pre-Hearing Directions, instructing counsel to submit all motions via email. This Hearing Officer then purposefully waited until 10:00 p.m. on March 6, 2012 before sending this Decision to counsel for the parties via email. Courtesy hard copies will be sent to counsel and the Student’s mother on March 7, 2012.

relief that the Parents demand. In its sufficiency challenge, CCIU argues that the Complaint does not satisfy pleading requirements established by the IDEA at 20 U.S.C. § 1415(b)(7)(A).

The inclusion of the sufficiency challenge triggers a five-day deadline for this Hearing Officer to “make a determination on the face of the notice of whether the notification meets the requirements of subsection (b)(7)(A).” 20 U.S.C. § 1415(c)(2)(B).¹⁰

CCIU does not refer to *Z.R. 1* in its argument that West Chester is the Student’s LEA. Even so, CCIU’s argument is absolutely consistent with Hearing Officer McElligott’s analysis in *Z.R. 1*. Specifically, CCIU argues that 1) the Student was placed in the residential facility; 2) the residential facility is located within West Chester’s geographical boundaries; 3) West Chester, pursuant to 24 PA. STAT. § 13-1306, is responsible for the provision of FAPE to the Student and; 4) West Chester contracts with CCIU to satisfy that FAPE obligation. CCIU further argues that, under Pennsylvania law, its contract with West Chester does not transfer the FAPE obligation from West Chester to CCIU.

The IDEA and Pennsylvania Regulations Regarding LEA Responsibilities to Student in Residential Placements

Under the IDEA, qualifying students are entitled to FAPE. In this jurisdiction, LEAs are responsible for the provision of FAPE to their IDEA-qualifying students. Parents may request a due process hearing against their child’s LEA to address any matter concerning the provision of FAPE. As such, only the family and the child’s LEA are proper parties to an IDEA due process hearing. See 20 U.S.C. § 1415(b)(6); 22 Pa Code § 14.162.

The Pennsylvania’s Public School Code of 1949, 24 PA. STAT. §§ 1-101—27-2702, contains provisions about how responsibilities must be divided when a student is institutionalized outside of his or her home district. Specifically, 24 PA. STAT. § 13-1306 addresses students residing in “orphan asylum, home for the friendless, children’s home, or other institution for the care or training of orphans or other children...” *Id.*

When a student’s family lives in one LEA (the “home district” or “resident district”) and the student is placed in a residential program in another LEA (the “host district”), the host district is responsible for the provision of an appropriate program while the home district is responsible for funding those services. See *id.*, see also, BEC: Nonresident Students in Institutions, effective July 1, 1999.¹¹

¹⁰ Technically, the sufficiency challenge could have been decided within the 5-day period and the remainder of the motion could have been decided later. However, given the straightforward analysis of CCIU’s LEA status, there was no need to wait.

¹¹ The Pennsylvania Department of Education, the Commonwealth’s SEA, publishes Basic Education Circulars (BECs) to provide guidance on the implementation of laws, regulations and policy. BECs are distributed to LEAs and are available online. The BEC referenced here is available at http://www.portal.state.pa.us/portal/server.pt/community/purdon's_statutes/7503/nonresident_students_in_institutions/507335 (last accessed February 14, 2012).

Discussion

I. West Chester is the Student's LEA

Nothing in the Parents' current Complaint suggests that any of the factual circumstances of the Parents' residency or the Student's placement have changed in the three months since Z.R. 1. In fact, the Complaint indicates that the Parents have not moved and that the Student still attends the same residential placement located within West Chester. This alone weighs very heavily in favor of not disrupting Hearing Officer McElligott's well-reasoned decision in Z.R. 1.

Although a special education due process complaint need not say each and every fact that the complainant intends to prove, the IDEA requires more than bare notice pleading.¹² See 20 U.S.C. § 1415(b)(7)(A). The instant Complaint says absolutely nothing that would suggest that West Chester is no longer the Student's LEA. In fact, the Complaint itself indicates that the circumstances have not changed. The Parents' address is the same and the Student still attends the same residential program in West Chester.

The Parents' statements in the Complaint, read in light of Z.R. 1, compel this Hearing Officer to conclude that, as a matter of law, West Chester is the LEA responsible for the provision of FAPE to the Student.

II. CCIU is not the Student's LEA

In a different case, this Hearing Officer recently had the opportunity to consider whether a school district and an intermediate unit could be a student's LEA contemporaneously. In *J.A. o/b/o J.B. v. Schuylkill Intermediate Unit 29*, ODR No. 2816-1112AS (Ford, 02/14/2012), the parents lived in one district, the student attended a residential placement in a second district, and received services from an intermediate unit serving both districts. The Parents requested hearings against both the district of residence and the intermediate unit. This Hearing Officer decided that, under those circumstances, the intermediate unit could not be the student's LEA.¹³ Either the district of residence or the "host" district was the student's LEA, but the intermediate unit could not be the student's LEA at the same time.¹⁴

¹² Compare *Escambia County Bd. of Educ. v. Benton*, 406 F.Supp.2d 1248 (S.D. Ala. 2005) with *M.S.-G v. Lenape Regional High School Dist. Bd. of Educ.*, 306 Fed.Appx. 772, 775 (3d. Cir. 2009)(unpublished). Although neither of these decisions are binding (*Escambia* because it is foreign and *M.S.-G.* because it is unpublished), both are persuasive authority and much can be gleaned about the IDEA's pleading requirements by comparing these two cases.

¹³ The companion case to ODR No. 2816-1112AS, proceeding against the district of residence, is currently pending and has been bifurcated for fact finding concerning the applicability of 24 PA. STAT. § 13-1306. In this case, no such fact finding is needed because the applicability of 24 PA. STAT. § 13-1306 was previously determined in Z.R. 1.

¹⁴ See footnote 11.

The legal reasoning in *J.A. v. Schuylkill IU* also applies to this case – the facts are obviously similar. Under Pennsylvania law, intermediate units are LEAs. See 22 Pa Code § 14.103. The IDEA contemplates only one situation in which multiple LEAs share the obligation to provide FAPE to any student:

A State educational agency may require a local educational agency to establish its eligibility jointly with another local educational agency if the State educational agency determines that the local educational agency will be ineligible under this section because the local educational agency will not be able to establish and maintain programs of sufficient size and scope to effectively meet the needs of children with disabilities.

20 U.S.C. § 1413(e)(1)(A). The foregoing is not applicable to this case. It was established in *Z.R. 1*, and is averred in CCIU's motion, that CCIU provides services to the Student pursuant to a contract with West Chester, not pursuant to any state-level determination that West Chester and CCIU cannot provide FAPE to the Student without combining their resources.

In sum, the determination that West Chester *is* the Student's LEA does not require a finding that CCIU *is not* the Student's LEA. However, the circumstances under which both CCIU and West Chester could be the Student's LEA at the same time are exceptionally rare, and not applicable in this case. Consequently, as a matter of law, this Hearing Officer must conclude that CCIU is not the Student's LEA.

Conclusion

West Chester Area School District is the Student's LEA. Chester County Intermediate Unit 24 is not the Student's LEA. The District's Motion to Dismiss and Sufficiency Challenge is granted on that basis. The remainder of said motion is dismissed as moot.

An order consistent with the foregoing follows:

ORDER

And now, March 6, 2012, this due process hearing is **DISMISSED** without prejudice. Nothing in this decision is intended to preclude the Parents from requesting a due process hearing against the Student's LEA, as described in the accompanying Decision.

/s/ Brian Jason Ford
HEARING OFFICER