

*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 Due Process Hearing Officer**

**Final Decision and Order  
ODR No. 20363-1718AS  
OPEN HEARING**

Decision on Remand from the United States District Court for the Eastern District of Pennsylvania  
[citation omitted]

**Child's Name:**

A.P.

**Date of Birth:**

[redacted]

**Date of Hearing:**

06/11/2018

**Parent:**

[redacted]

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**Hearing Officer:**

Brian Jason Ford, JD, CHO

**Date of Decision:**

07/12/2018

## **Introduction and Procedural History**

The procedural history of this matter is well-known to the parties and well-documented elsewhere. For context, this matter originally came before me as a special education due process complaint. The District determined that the Parent and Student reside outside of its geographical boundaries, and refused to provide services on that basis.<sup>1</sup> I determined on jurisdictional grounds that I could not hear an appeal of the District's residency determination, and dismissed this matter. The Parent appealed to the U.S. District Court for the Eastern District of Pennsylvania. The Court found that the residency dispute was a threshold issue to underlying special education claims and, consequently, I had authority to resolve the residency dispute. The Court remanded the matter to me to hear the Parent's residency appeal and, if the District is the Student's LEA, resolve the underlying special education claims.

Following the remand, the parties submitted evidence and briefs. Upon consideration of the submitted evidence, I affirmed the District's residency determination and conditionally dismissed the matter again. In doing so, I noted some ambiguity about where the family resided when the Parent attempted to re-enroll the Student in the District. I invited the Parent to move for reconsideration and file an offer of proof regarding the Parent's residency during that narrow period of time. The Parent then filed a motion for reconsideration with an offer of proof. I then convened a hearing and took testimony and additional evidence. The parties then filed post-hearing briefs.

For reasons discussed below, I affirm the District's non-residency determination, and dismiss this matter on that basis.

## **Findings of Fact**

I carefully reviewed and considered the entire record in this case. However, I make findings of fact only as necessary to resolve the issues presented. Consequently, not every document and not every point made during testimony is referenced herein.

The post-hearing evidentiary record supports the findings of fact in the preliminary residency determination. All of the findings of fact in the preliminary residency determination are incorporated herein by reference. For readability, I copy those findings below:

1. The Student is a "child with a disability" as defined by the IDEA. At all times, the Student was entitled to a FAPE.
2. The Student attended school in the District during the 2014-15 school year. During that school year, the Student received special education under an individualized education plan (IEP).
3. The Parent was not satisfied with the implementation of the Student's IEP.
4. The Parent enrolled the Student in [a private school in another state] (the Private School), for the 2015-16 school year. The Parent signed a tuition contract with the Private School on June 29, 2015.
5. The Parent signed a two-year lease for a single-family rental property in [the other state]. The Parent executed the lease on June 19, 2015 (10 days before the tuition contract) for a term starting on August 1, 2015, and ending on July 1, 2017.

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<sup>1</sup> Except for the cover page, identifying information is omitted to the extent possible.

6. The Parent moved to [the other state] with the Student and the Student's siblings. The Parent enrolled the Student's siblings in [the other state's] public school. The Student attended the Private School, and the siblings attended the [other state] public school during the 2015-16 school year.
7. The District did not immediately remove the Student from its attendance monitoring system. As a result, at the start of the 2015-16 school year, the Parent received automated calls and emails about the Student's absences from school. The Parent sent an email on October 7, 2015, saying that the Student was attending the Private School. The District dis-enrolled the Student the next day.
8. On December 22, 2015, the Parent requested a special education due process hearing against the District. The Parent sought reimbursement for the Student's tuition at the Private School.
9. On May 6, 2016, the parties entered into a settlement agreement, ending the due process hearing. The District agreed to reimburse the cost of tuition at the Private School for the 2015-16 school year.
10. On June 1, 2016, the Parent enrolled the Student in the Private School for the 2016-17 school year, paying a deposit to the Private School.
11. June 10, 2016, was the final day of the 2015-16 school year at the Private School.
12. On June 20, 2016, the Parent applied to re-enroll the Student in one of the District's middle schools for the 2016-17 school year.
13. On the re-enrollment form, the Parent wrote an address within the District as the family's physical address, indicating that the Parent owned property within the District. That property was the same address that the family used when the Student attended school in the District.
14. The Parent also sent a copy of the Parent's Pennsylvania driver's license. The address on the driver's license matched the address on the enrollment form.
15. The Parent also sent a copy of a deed, executed in 2003, showing that the Parent owns the property at the same address as written on the reenrollment form and the driver's license.
16. The Parent also sent utility bills, billed to the Parent at the same address in April and June 2016. Those bills show that electricity usage in June 2016 was roughly half of what it was in June 2015.
17. The Parent did not attempt to re-enroll the Student's siblings. The siblings continued enrollment in the [other state] public school during the 2016-17 school year.
18. On June 30, 2016, the District informed the Parent that it was necessary to reenroll the Student in person.
19. July 5, 2016, was the first day of school for the 2016-17 school year at the Private School.
20. On July 5, 2016, the Parent sent an email to the District requesting both an IEP team meeting and continued placement at the Private School at the District's expense.
21. On July 13, 2016, the District concluded that the Student was not a resident of the District. The District advised the parent that the Student was ineligible to enroll and attend its schools for that reason. The District also told the Parent that enrollment was a prerequisite for tuition reimbursement.

22. On July 20, 2016, the District advised the Parent of the Parent's right to appeal its residency determination, either to the District's School Board, or to a hearing officer (not a special education due process hearing officer, but a hearing officer with jurisdiction over school residency disputes).
23. Also, on July 20, 2016, the Parent requested a due process hearing against the District. ODR assigned that matter to me as ODR No. 18036-1617AS. The Parent demanded, inter alia, reimbursement for tuition at the Private School for the 2016-17 school year.
24. On July 28, 2016, the District sought confirmation that the Parent was not appealing its residency determination to the School Board or a hearing officer. The Parent responded the same day, confirming that they were pursuing the matter only through a special education due process hearing.
25. On August 1, 2016, the District moved to dismiss the due process complaint.
26. On August 30, 2016, upon consideration of the District's motion and the Parent's response, I determined that I had no authority to hear a residency dispute. I dismissed claims related to the 2016-17 school year for that reason. I did not dismiss claims regarding ESY in the summer of 2016 because I could not determine the viability of those claims based on the pleadings at that time.
27. On September 13, 2016, the Parent withdrew claims concerning ESY in the summer of 2016.
28. On September 20, 2016, I dismissed ODR No. 18036-1617AS. The Parent appealed.
29. On March 1, 2018, the court remanded this matter to me.

In addition to the findings in the preliminary residency determination, I find as follows:

- a. The Parent is an emergency room physician who works in a hospital in Philadelphia at night. NT 49.
- b. During the 2015-16 school year, the Parent was able to arrange her work schedule so that she would work in five day, four night blocks. NT 46-49. Despite some ambiguity in the record, I find that the Parent worked between one and three of those blocks per month. *Id.*
- c. The Parent slept in her Pennsylvania home when she was working, and slept in her [other state] home when she was not working. *See, e.g.* NT 49.
- d. The Student and the Student's siblings slept in [the other state] on school nights. NT *passim* (*see, e.g.* NT 50). The Parent arranged for childcare so that the Student and the Student's siblings could remain in [the other state] while the Parent was in Pennsylvania. NT 48.
- e. When the Parent's work block spanned a weekend, the Student and the Student's siblings would sometimes accompany the Parent in Pennsylvania on non-school nights. NT *passim*.
- f. The Student attended the Private School until June 10, 2016. NT 241.
- g. The Private School runs an eleven-month program. The Private School was closed from June 11, 2016 through July 5, 2016.
- h. The Student and the Student's siblings remained in [the other state] while the siblings attended public school in [the other state], at least until June 20, 2016. NT 249-250.

- i. The Parent did not dis-enroll the Student's siblings from the [other state] public school at the end of the 2015-16 school year. NT 27-29.
- j. From June 21 through July 5, 2016, the Student and Parent lived in the Pennsylvania home enjoying summer activities. *See* NT 252.
- k. The Parent participated in an in-person enrollment appointment at the District on July 1, 2016. During the meeting, the Parent presented documents that the District requested to demonstrate residency in the District. *See, e.g.* NT at 100.
- l. The Student was present at the private school when it resumed on July 5, 2016. The Student attended the Private School from Tuesday, July 5, 2016 through Friday, July 15, 2016, with the exception of a medical absence on July 12. The Student was in Pennsylvania with the Parent on July 12, 2016 for a medical appointment. NT 244.
- m. From Monday, July 18 through Friday, July 29, 2016, the Student attended a Pennsylvania sleep-away summer camp for children with social and emotional needs. *See, e.g.* NT 247.
- n. From Monday, August 1 through Friday, August 5, 2016, the Parent and Student lived in the Parent's Pennsylvania home enjoying local summer activities. NT 248.
- o. The Student returned to the Private School's eleven-month program after the summer of 2016. NT *passim*.
- p. The Student's siblings attended the [other state] public school during the 2016-17 school year. The Parent did not re-apply for enrollment in [the other state] at that time. Rather, the Parent simply informed the [other state] public school that the siblings were returning to continue their education. *See* NT 27-29.

### **The Burden of Proof**

The burden of proof was discussed in the preliminary residency determination, and I find no reason to disrupt the assignment of the parties' respective burdens as explained therein.

For clarity, in residency disputes, a parent satisfies an initial burden when presenting documentation to establish residency during the enrollment process. Then, when contesting residency, a school's determination must be supported by substantial evidence. On appeal, courts consider whether the school's determination was supported by substantial evidence. *Whitacker-Reid v. Pottsgrove Sch. Dist.*, 160 A.3d 905 (Pa. Commw. Ct. 2017).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rossa v. Workers' Comp. Appeal Bd. (City of Phila.)*, 576 Pa. 349, 354, 839 A.2d 256, 259 (2003) *citing Consolidated Edison Co. v. National Labor Relations Bd.*, 305 U.S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206 (1938); *Bethenergy Mines v. WCAB (Skirpan)*, 531 Pa. 287, 612 A.2d 434, 436 (Pa. 1992).

This hearing is analogous to the appeal stage in *Whitacker-Reid*. The parent presented documentation during enrollment. Then, the District contested residency. My task is to determine whether the District's non-residency determination was supported by substantial evidence. As discussed below, I find that the District has satisfied this standard.

## Discussion

Given the distinction between residency and domicile articulated in my preliminary residency determination, and the explicit purpose of the evidentiary hearing, it is odd that there is no single, clear, definitive statement anywhere in the evidentiary record about where the Parent was living between June 20 and July 13, 2016. Above, I find [more likely] than not that the Student was not living in the District until June 21, 2016, but this does not reveal the Parent's residency on June 20, 2016.

Outside of the evidentiary record, according to an affidavit that the Parent submitted with her motion for reconsideration, the family was residing exclusively in Pennsylvania from the attempted re-enrollment through July 13, 2016 – except for time spent on vacations. With the exception of June 20, 2016 specifically, the Parent's testimony as a whole was consistent with this averment. Moreover, the Student's residency is controlled by the Parent's residency. *See* 24 Pa. Stat. Ann § 13-1302(a); 22 Pa. Code § 11.11. If the Parent was a resident of the District, so was the Student – even if the Student was not physically present in the District at the time.

Again, the lack of a clear, definitive statement is perplexing. Even so, I find that the Parent was living in her Pennsylvania home at the time of the attempted re-enrollment. This conclusion is drawn from the Parent's testimony as a whole, and the complete lack of evidence rebutting this point. I noted in the preliminary residency decision that the District's evidence does not take the form usually associated with this type of case. No investigator made inquiry as to where the family was living at the time in question. Consequently, the Parent's testimony as a whole is the best evidence of where the Parent was living at the time of the attempted re-enrollment.

I give greater weight to the Parent's testimony as a whole than I do to the District's comparatively circumstantial evidence because the Parent testified credibly. I am charged with the responsibility of judging the credibility of witnesses. I have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.” *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003); *See also, generally, David G. v. Council Rock School District*, 2009 U.S. Dist. LEXIS 96338, 2009 WL 3064732 (E.D. Pa. 2009). Nothing in the Parent's demeanor during the hearing session indicated a lack of credibility, although demeanor is certainly not the only (or best) indication of credibility. More importantly, the Parent was candid about her own memory, made no attempt to embellish the events that she could remember, and was candid about what she could not remember.

In the absence of an adverse credibility determination, when un-rebutted testimony forms the only direct evidence of a critical fact, I must accept that evidence. *See Shane T. v. Carbondale Area Sch. Dist.*, No. 3:16-0964, 2017 U.S. Dist. LEXIS 163683 (M.D. Pa. Sep. 28, 2017). I find that the Parent was living within the District at the time of the attempted re-enrollment. The question, therefore, becomes whether that fact alone is sufficient to establish residency for IDEA purposes. For reasons set forth below, I find that it does not.<sup>2</sup>

[The other state's] law incorporates a “bona fide residency requirement” into its school regulations [citations redacted]. [The other state's] bona fide residency requirement requires children to attend public school in the county in which the “child is domiciled **with the child's parent or guardian...**” [citation redacted]. The same regulation imposes fines for fraudulently claiming residency [citation redacted]. There is no evidence that the Parent committed fraud when enrolling the siblings in the [other state] public school. There is also no evidence that the Parent obtained special permission from the

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<sup>2</sup> I note that this result is unusual, and limited to the unique facts of this case.

superintendent of the [other state] public school to enroll non-resident children, or paid non-resident tuition to the [other state] public school. [Citation redacted.]

[The other state] imposes stricter residency requirements than Pennsylvania, mandating domicile and not simply residency. *C/f* [citation redacted]; 22 Pa. Code § 11.11. Arguably, for IDEA purposes, residency matters more than domicile or even enrollment. *See, e.g. Moorestown Twp. Bd. of Educ. v. S.D.*, 811 F. Supp. 2d 1057 (D.N.J. 2011). But the siblings were not seeking special education from the [other state] public school. Rather, they were simply enrolled. Assuming that the Parent did not defraud the [other state] public school, the Parent met both [the other state's] residency (or domicile) requirement in order to enroll the siblings.

I find, via necessary implication in the absence of fraud or tuition payments to the [other state] public school, that the Parent satisfied [the other state's] residency requirements at all times pertinent to this matter. The siblings were continuously enrolled in the [other state] public school through the 2015-16 and 2016-17 school years. At no point did the Parent dis-enroll the siblings from the [other state] public school or attempt to enroll the siblings in the District. The Parent did not re-apply for enrollment in the [the other state] public school at the start of the 2016-17 school year.

The Parent was physically located in the District at the time of the attempted re-enrollment. As discussed in the preliminary residency determination, a person's residency is their factual place of abode. My finding that the Parent's factual place of abode was in the District at the time of the attempted re-enrollment would be conclusive but for the Parent's simultaneous satisfaction of [the other state's] bona fide residency requirement.

Pennsylvania courts have addressed similar situations in which a parent could potentially claim residency in two school districts. When interpreting Pennsylvania's residency requirement in similar cases, the law must be construed in such a way to avoid absurd results. *Mathias v. Richland Sch. Dist.*, 140 Pa. Commw. 298, 592 A.2d 811 (1991). It is impermissible for parents to establish simultaneous residency in multiple school districts for enrollment purposes. *Id.* Similarly, parents may not "school shop" by claiming residency in two school districts simultaneously, or by choosing their preferred school when owning or renting property in multiple school districts. As stated by our Commonwealth Court:

[P]arents cannot simply rent or buy multiple properties in several school districts and then choose between those properties on a given day just so their children can attend a particular school.

*Paek v. Pen Argyl Area Sch. Dist.*, 923 A.2d 563, 567 (2007).

As applied to this case, the Parent cannot simply rent or buy multiple properties in several school districts and then choose between those properties on a given day just to secure tuition reimbursement. As found in the preliminary residency determination (and incorporated above by reference), the Parent demanded placement in the Private School and tuition reimbursement simultaneously with the attempted re-enrollment. Current case law prohibits this. The Parent cannot claim residency within the District only during the attempted re-enrollment in the summer of 2016 while simultaneously claiming residency in [the other state] continuously through the 2015-16 and 2016-17 school years. A contrary result would indicate that the Parent either committed fraud in [the other state], or paid tuition for the Student's siblings to attend the [the other state] public school – facts that are not supported by the record.

### **Conclusion**

All of the above compels me to find that the District has satisfied its burden, and so I affirm the District's non-residency determination. The District's non-residency determination was supported by substantial evidence. The District has established that the Parent was a [resident of the other state] at the time in question despite the fact that the Parent was physically within the District during the attempted re-enrollment. Any contrary holding would either yield an absurd result precluded by case law, or would have serious implications regarding fraud and unpaid public school tuition in [the other state].

As described by the court remanding this matter to me, the residency appeal is a threshold issue to the underlying special education claims raised in the Parent's due process complaint. [Citation omitted.] The Student's right to special education from the District is contingent upon the Student's residency within the District. Having affirmed the District's non-residency determination, I must dismiss the Parent's underlying special education claims.

### **ORDER**

Now, July 12, 2018, it is hereby **ORDERED** that the District's non-residency determination is **AFFIRMED**. The Parent's complaint is **DISMISSED**.

/s/ Brian Jason Ford  
HEARING OFFICER