

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: E.S.

Date of Birth: [redacted]

ODR No. 14486-1314KE

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Representative:

Pro se

Oxford Area School District
125 Bell Tower Lane
Oxford, PA 19363-1208

Thomas C. Warner, Esq.
331 Butler Avenue
New Britain, PA 18901

Dates of Hearing: 01/06/2014

Record Closed: 01/06/2014

Date of Decision: 02/05/2014

Hearing Officer: Brian Jason Ford

Introduction / Procedural History / Process for Stipulations

The Parent requested this special education due process hearing on November 19, 2013. The Parent is not represented by an attorney, and is not comfortable with legal jargon. I will avoid jargon as much as possible, and explain unavoidable jargon.

The Parent used a form called a Due Process Complaint Notice to request this hearing. I will call that form the Complaint. The Complaint includes blank spaces for the Parent to write in the "Nature of the problem" and the "Proposed Resolution." For the nature of the problem, the Parent wrote:

[The Student] is is not permitted to attend [redacted] High School. Tried numerous accounts to meet [student registration] requirements by showing bills, notarized letters from landlord, PennDOT registration, bank statements and rent receipt. [These were sent to the District] via fax, mail and personally handing in documents. [NAME REDACTED] called [NAME REDACTED] and I followed orders to send in another notarized letter from [the] landlord.

For the proposed resolution, the Parent wrote:

[The] best solution is for [the Student] to attend another school, of our choice, at [the] expense of [the District]. Where [the Student] feels welcomed and catches up to level, assignments and skills that were taught. Some may be [too] important or vital information ... that should not be lost due to [redacted] High School not permitting [the Student] to attend. Please help us. [The Student] has an IEP [and the Student] really can't lose any more schooling.

After the Parent sent in the Complaint, the District asked me to dismiss it. On December 4, 2013, the District filed a motion giving several reasons why I should dismiss the Complaint. The District argued that 1) I do not have the power to decide whether the Student is a resident of the District, and 2) the Parent is not entitled to a private school placement even if I could decide if the Student is a resident.

In a document called a Pre-Hearing Order dated December 12, 2013, sent after a conference call with the Parent and the District's attorney, I refused to dismiss the hearing.¹ In the Complaint, the Parent said that the Student has an IEP and was being kept out of school. I have the authority to determine whether a school is providing an appropriate special education to a student with an IEP, and I also have the authority to

¹ The District's letter of December 4, 2013 was a motion to dismiss and, in the alternative, a sufficiency challenge. I denied the sufficiency challenge on December 9. I then convened a conference call on December 11, 2013 and resolved the motion to dismiss on December 12, 2013.

determine if a school is excluding a student on the basis of disability. The “problem” written in the Complaint is something that I have the power to resolve.

At the same time, I cautioned the Parent that I can only award a private school placement or tuition reimbursement in limited circumstances. I explained that to obtain tuition reimbursement, the Parent would have to prove that 1) the District is not providing an appropriate education to the Student, 2) the private school is appropriate for the Student, and 3) it is fair for me to award tuition reimbursement. I also explained that I could award a private school placement if the Parent could prove that the District cannot educate the Student in the public schools.

In sum, I explained that I have authority to hear about the “problem,” but that the problem does not automatically lead to the “proposed resolution.” More importantly, I explained to the Parent that the circumstances alleged in the Complaint, even if proven, would not likely result in a private school placement. Even so, I would not deny the Parent an opportunity to be heard.²

After the December 12, 2013 Pre-Hearing Order, the District asked me again to dismiss the Complaint because the Parent had not participated in a resolution session. Ultimately, the Parent and District met at a resolution session immediately before the hearing convened.

In addition to the foregoing, the District also moved to dismiss this matter as moot, and maintained that position consistently leading up to the hearing. In sum, the District argued that the only issue raised in the Complaint was the District’s alleged failure to enroll the Student. The District claimed that the residency dispute was resolved and that the Student had been enrolled. Consequently, the District argued that the sole issue raised in the Complaint was moot. I held the District’s motion in abeyance until the start of the hearing.

The hearing convened on January 6, 2014. The Parent was accompanied and assisted by a lay advocate during the hearing. At the outset of the hearing, I addressed the District’s arguments regarding mootness, and I explained the concept of mootness to the Parent. (NT at 11-13). A lengthy, on the record dialogue then followed, and the Parent limited the scope of her claim. (NT at 13-29). For practical purposes, the Parent argued that the District improperly denied the Student’s residency from the start of the 2013-14 school year through December 11, 2013. (See NT at 15). The Parent continued to argue that the Student was improperly denied a special education during

² More technically, I concluded that the Parent filed a sufficient Complaint which included alleged violations of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* As such, I decided that I would allow the Parent to present evidence and testimony in support of those violations, even if it was highly unlikely that the alleged violations could be remedied by the demanded relief. I noted, on several occasions, that I may only award the relief demanded in the Complaint. The Parent never amended the Complaint to include other demands.

that period of time, and continued to demand placement at a private school as a remedy for that denial.³

Upon hearing the Parent's revised claims, I reiterated my concerns that the claims, even if proven, could not yield the demanded remedy: a private school placement. I reiterated what the Parent would have to prove in order to obtain tuition reimbursement or a private school placement. Then, I asked the Parent for an offer of proof, explaining what that meant, as to what facts she would establish in support of her demand. (See NT at 15-28). A recess was taken so that the Parent could formulate the offer of proof, and then the Parent made her offer on the record.

Upon hearing the Parent's offer of proof, I asked the District if it agreed with the facts that the Parent intended to prove. The District could not agree or disagree with certain facts without some research, and so another recess was taken. After the recess, the District was able to stipulate to some of the facts offered by the Parent.⁴

Stipulated Facts

1. The Parent had a meeting with one of the District's administrators and another individual prior to the start of the 2013-14 school year. (NT at 40-41).
2. The Parent and the District were in frequent communication prior to and at the start of the 2013-14 school year. During this time, the Parent sent at least one letter to the District. (NT at 41, H-1).
3. The Student is IDEA-eligible (meaning that the Student has a disability and, by reason thereof, requires special education).⁵

Findings of Fact

The Parent testified and was cross-examined. In addition to the stipulations, based on the Parent's testimony, I find as follows:

4. The Student had an IEP from a different district prior to the 2013-14 school year.
5. The Student attended a private, parochial school during the 2012-13 school year.
6. The Student received free lunches at the private school during the 2012-13 school year.

³ In this process, the Parent also raised concerns about the District's failure to provide extended school year services in the summer of 2013. As explained below, those claims are not raised in the Complaint and will not be addressed in this decision.

⁴ I explained the term "stipulation" to the Parent, and explained that the District was essentially conceding many of the facts that the Parent offered. As a result, the Parent would only have to prove the non-stipulated facts. Even so, I again reiterated that proving those facts may not yield an award of a private school placement.

⁵ Although the Parent testified that the Student has ADHD and learning disabilities, the District stipulated only that the Student is eligible as a student with a specific learning disability (SLD). For purposes of this decision, the pertinent fact is that the Student is eligible.

7. In order for the Student and the Student's siblings to participate in free lunch programs, the Parent completed two forms. One form was for the Student's [sibling], who was attending the District at the time. The other form was for the Student and another of the Student's siblings, who were attending a private school. (See, e.g. NT at 66-67).
8. In late August of 2013, the Parent attempted to contact the District to set up an IEP team meeting and develop an IEP for the 2013-14 school year.
9. Prior to the start of the 2013-14 school year, one or more District representatives told the Parent that the District would not offer an IEP to the Student until the Student enrolled in the District.⁶ (NT at 55, 64).
10. The Parent has investigated several private schools in the area, some with religious affiliations. The Student has visited some of these schools, and the Parent believes that some of these schools are a good fit for the Student. (NT at 56).
11. The Parent has not enrolled the Student in a private school, has not signed any tuition agreements, has not received any written placement offers, and has not incurred debt to any private school for the 2013-14 school year. (See, e.g. NT at 35).
12. The Parent's first attempt to enroll the Student took place in mid-to-late August of 2013. (NT *passim*)
13. The Student's [sibling] was enrolled in the District during the 2012-13 school year.

Discussion

The record does not yield a finding of fact as to when the District accepted the Student's residency and enrolled the Student. The District argues that the Student enrolled in late October of 2013. The Parent argues that the District stopped disputing residency and enrolled the Student on December 11, 2013. The difference between the two dates does not matter in light of the relief that the Parent is demanding.

The record also does not yield a finding as to when the Student started the District's free lunch program.⁷ The Student was enrolled in a free lunch program during the 2012-13 school year. Testimony suggests that the District's free lunch program and the free lunch program serving students enrolled in private schools are different programs. The Parent used one form to enroll the children attending the private school and another form for the child attending the public school. Those forms may have been similar, and may have asked for the same information, but the Parent did not prove that the Student was enrolled in the *District's* free lunch program before the start of the 2013-14 school year.

⁶ The Parent alleges that this information was said during the meeting with an administrator prior to the start of the 2013-14 school year. The District denies this information was said at all. I am persuaded that the District told the Parent that it would not offer an IEP prior to enrollment, but it is not clear that was said during the meeting in question. I make no finding as to the specific date or meeting in which that information was conveyed.

⁷ An on-the-record averment from the District's attorney suggests that the Student entered the District's free lunch program in October of 2013. There was no evidence or testimony on this point, and I do not rely upon averments from counsel for fact-finding.

Although not presented as an issue in the Complaint, the Parent raised the District's failure to provide extended school year (ESY) services in the summer of 2013 as a grievance. The record, as a whole, leads me to conclude that the Parent did not ask the District for ESY services before enrolling the Student in the District. I decline to make particular findings of fact about this issue, because it is outside of the Complaint. Regardless, no evidence was presented that the Parent sought ESY services from the District at any time prior to the Parent's first enrollment efforts in late August of 2013.

In the Complaint, and during the hearing, the Parent averred that the District's residency denial was the result of race-based discrimination. The Parent provided examples that were detailed, specific and concerning. As I explained during the hearing and several times prior, I have no authority to hear claims of racial discrimination. My authority to hear this case is based on the allegation that the Student is IDEA-eligible, but was being kept out of school.

Both the Parent and the District agree that the Student is IDEA-eligible. Both the Parent and the District agree that the Student did not start school on the first day of the 2013-14 school year because the District was disputing residency. For purposes of this decision, I will assume that the District's residency denial was improper, and that the resulting exclusion was in violation of the IDEA. That exclusion lasted from the first day of the 2013-14 school year through either late October of 2013 or December 11, 2013. With this violation presupposed, the questions are whether the Parent is entitled to tuition reimbursement or whether the Student is entitled to a private school placement.

Avoiding legal jargon, if a public school district cannot provide an appropriate public education to an IDEA-eligible student, the public school district must look outside of itself for the services that the student needs. Often, school districts will work with their supporting intermediate units to put services in place. Sometimes, school districts will contract with private providers. Whenever a public school cannot provide an appropriate education by bringing other educators in, the public school must consider outside placements. These considerations usually start with private schools that are approved by the Pennsylvania Department of Education for educating students with disabilities, but other private schools must also be considered if necessary, even if they are affiliated with religious organizations.

In this case, no evidence or testimony was presented that the District cannot meet the Student's educational needs. The Parent testified that both the Parent and the Student were deeply upset by what they perceived as racial discrimination, but such testimony gives no insight as to the Student's educational needs. As such, the Parent has not proven that the Student requires placement in a private school.

As noted above, and throughout these proceedings, parents are sometimes entitled to tuition reimbursement if a three-part test is satisfied.⁸ The first part considers whether the public school provided an appropriate education to the student. The second part considers whether the school selected by the parent is appropriate for the student. The third part considers whether it is fair to award tuition reimbursement. Case law suggests that I must look at each part of the test in order, and must stop if any part of the test is not satisfied.

The first part of the test calls for an examination of the appropriateness of the program currently in place. Some cases suggest that I look at the appropriateness of whatever program was in place when the hearing was requested. Other cases suggest that I consider the program that was in place when the hearing convened. Currently, both the District and the Parent agree that the Student is enrolled in the District, and the District agrees that the Student should receive special education pursuant to an IEP. No evidence or testimony was presented regarding the appropriateness of the special education that the Student is currently receiving. As such, the Parent did not prove that the Student's current placement is inappropriate. In this case, I find that it is appropriate to examine the services that are currently in place. As a result, the Parent's burden of proof has not been satisfied, and the test ends here. The Parent is not entitled to tuition reimbursement.

In an abundance of caution, I will also consider the services that were in place at the time the hearing was requested. I will further assume that the Parent is correct, and the Student was excluded from school through December 11, 2013. As such, the Student was receiving no services from the District at the time that the hearing was requested, in violation of the IDEA. Under this analysis, I would have moved on to the second part of the test, and would have considered the appropriateness of the parental placement. In this case, the Parent has not selected a placement. Rather, the Parent has toured several schools and believes that some of them are a good fit for the Student. The test requires more. In addition to concrete evidence as to why the (singular) school is appropriate for the Student, the Parent must also establish that some tuition cost has been incurred or debt has been accrued. This is a key difference between tuition *reimbursement* and private school *placement*. Reimbursement is predicated upon the notion that there is something for which to reimburse a parent. Those are not the facts of this case.

Based on the Parent's demeanor, candor, and recollection of particular details, I have no doubt that the Parent was deeply offended and emotionally tested by the events surrounding the Student's enrollment. It is beyond my authority to determine whether the Parent's version of those events are true, or whether the District committed racial discrimination. The IDEA will require a great deal of interaction, coordination and cooperation going forward. Regardless of what actually happened, the Parent's feelings are real, and the District should take heed of those feelings as the parties move on.

⁸ Three-part *Burlington-Carter* test was explained in pre-hearing orders and correspondence with the Parent, including citation. The test was explained again during the hearing.

That suggestion notwithstanding, the Parent has not proven that the Student requires placement in a private school or that the Parent is entitled to tuition reimbursement. As such, the Parent's demands are denied.

ORDER

Now, February 4, 2014, it is hereby **ORDERED** as follows:

1. The Parent is not entitled to tuition reimbursement.
2. The Student is not entitled to placement at a private school of the Parent's choice.

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

/s/ Brian Jason Ford
HEARING OFFICER