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

DECISION

Child's Name: R.H.

Date of Birth: [redacted]

Dates of Hearing:

August 14, 2014
September 15, 2014

CLOSED HEARING

ODR Case # 15186-1314KE

Parties to the Hearing:	Representative:
Parent	Adam Wilson, Esquire 2651 Main Street Lawrenceville, NJ 08648
Parent	Alyssa Lopiano-Reilly, Esquire 1067 Pennsylvania Avenue Pen Argyl, PA 18072
Saucon Valley School District 2097 Polk Valley Road Hellertown, PA 18055	Lucas Repka, Esquire One West Broad Street Suite 700 Bethlehem, PA 18108
Date Record Closed:	September 15, 2014
Date of Decision:	September 25, 2014
Hearing Officer:	Jake McElligott, Esquire

INTRODUCTION

[Student] ("student") is a [teenaged] student who has been identified as a student eligible as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 ("IDEA")[1]. The student resides in the Saucon Valley School District ("District"). The student's parents are divorced.

While not strictly a matter of evidence, as will be explained below, the parties do not dispute the student's eligibility under IDEA as a student with Down Syndrome, behavior needs, speech and language needs, among the other deficits.[2] Instead, the student's mother objects to a proposed change in the student's placement by the District, a change-in-placement supported by the student's father. By allegation, the student has attended District schools and, through the 2013-2014 school year, those District-based placements have been largely inclusive with modifications and supports in the regular education setting where the student would attend if not disabled. For the 2014-2015 school year, again by allegation, the District proposed that the student receive a life-skills curriculum in a more restrictive placement, a life-skills classroom for students with severe/profound disabilities, a classroom operated by the local intermediate unit ("IU") in an out-of-District location.

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[1] It is this hearing officer's preference to cite to the implementing regulation of the IDEA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.163.
[2] *See* mother's complaint at Hearing Officer Exhibit-2; *see generally*, Notes of Testimony at 1-43.

Based on events subsequent to the filing of mother's special education due process complaint, the complaint which led to these proceedings, the ability of student's mother to continue in this hearing as a "parent" under the terms of the IDEA has been limited by a court of competent jurisdiction. Therefore, as set forth below, mother's complaint will be dismissed.

ISSUES

Is the student's mother still a "parent",
as defined under IDEA
and Pennsylvania special education regulations?

If not, can mother continue to pursue remedies
through special education due process proceedings?

PROCEDURAL HISTORY / FINDINGS OF FACT

1. On June 30, 2014, the student's mother filed a special education due process complaint with the Office for Dispute Resolution. The complaint alleged exclusively that she disagreed with the District's proposed change in placement for the 2014-2015 school year. A hearing date of August 15th was scheduled. (Hearing Officer Exhibit ["HO"]-2).
2. On July 11, 2014, the District filed a response to the complaint. (HO-3).
3. On July 11, 2014, the student's father also filed a response to the complaint. (HO-4).

4. At the request of the hearing officer to clarify the educational custody/decision-making authority of the parents, to make sure that the student's mother had standing to bring the complaint and the student's father was included in the proceedings to the extent his educational custody rights should be respected, a copy of a November 2013 court order issued by the Northampton County (PA) Court of Common Pleas ("Court of Common Pleas"), approving a stipulation and agreement entered into by the parents, was provided to the hearing officer. The November 2013 custody arrangements did not assign educational custody/decision-making to either parent; the parents shared joint educational custody of the student. (HO-5).
5. On July 24, 2014, the hearing officer confirmed to all parties that both parents had standing in these proceedings under the terms of IDEA and Pennsylvania special education regulations and that, at that point, counsel for the student's father had entered a formal appearance. Therefore, mother's counsel, father's counsel, and District counsel were instructed to include the attorneys for all parties on any communication with the hearing officer. (HO-6).
6. On July 24th, after the hearing officer had advised counsel as to a determination on the standing of the parents, District counsel emailed regarding various matters, requesting that the August 15th

hearing session be rescheduled and that the issue of the student's pendent placement be decided as a preliminary matter. (HO-7).

7. As to pendency, the hearing officer declined to hold an evidentiary session. The complaint, and therefore the dispute between the parties, centered entirely on the appropriateness of the placement for the student; the hearing officer advised the parties that he did not feel an evidentiary proceeding on pendency was advisable. (HO-7).[3]
8. Relying on the explicit language of the IDEA itself (and as adopted by Pennsylvania special education regulations) in addition to well-established, precedential 3rd Circuit case law, the hearing officer advised the parties that the student's placement should remain the "current educational placement…the operative placement actually functioning at the time the dispute first arises." (HO-7).
9. The District asked for more formal briefing of its position regarding a pendency determination, and the hearing officer established a briefing schedule for an offer of proof. (HO-8).

[3] In declining to hold an evidentiary hearing on pendency, the hearing officer informed the parties: "Ultimately, evidence geared to a pendency ruling would be, largely if not wholly, evidence on the underlying merits of the dispute. In a sense, the issue in the first instance is "what should (the student's) program/placement look like in the immediate future?", and the issue in the second instance is "what should (the student's) program look like going forward into the 2014-2015 school year?". The overlap in evidence between the two issues (i.e., each parties' views on the relative appropriateness/inappropriateness of the program/placement options) is too large. In fact, it is arguable that evidence on pendency would be exactly the same evidence at subsequent hearing sessions. In short, I do not want a rushed evidentiary determination on pendency to swallow a more deliberate evidentiary determination on the question of (the student's) program/placement." HO-7 at page 1.

10. On July 29, 2014, the District filed its offer of proof as to pendency. (HO-9).

11. On July 31, 2014, the student's mother filed its response to the offer of proof. (HO-10).

12. On August 1, 2014, the student's father filed his response to the offer of proof. (HO-11).

13. On August 1, 2014, the District filed a reply to mother's response to its offer of proof. (HO-12).

14. On August 6, 2014, the hearing officer issued a ruling on the District's offer of proof, confirming his earlier pendency ruling. (HO-1, HO-13).

15. On August 15, 2014, the hearing convened. In collaboration with counsel, the August 15th hearing session was dedicated solely to procedural matters, including hearing officer opening remarks to frame the process, instructions to counsel, the parental choice for the proceedings to be "open" or "closed", and to receive the parties' opening statements. By design, the hearing session was brief. (Notes of Testimony at 1-43).

16. Thereafter, the hearing officer, counsel and parents engaged in a collaborative, off-the-record discussion to schedule additional hearing dates. Between the three parties, 17 witnesses were identified, including the parents, other family members, District teachers and other personnel, IU personnel, and outside

educational/service providers. Five hearing dates were selected for the continuation of the proceedings, with the first mutually-available hearing date on the schedules of the hearing officer, counsel, and the parents being September 15, 2014.

17. On August 27, 2014, the Court of Common Pleas issued an opinion and order. The August 27th order indicated that the parents continued "to share legal custody of (the student) in all respects, except that the Father shall have the sole ability and right to make binding educational placement and programming decision [sic] for (the student)…for the 2014-2015 school year….". The same order placed the matter on the non-jury trial list for June 2015. (HO-14).

18. In rejecting mother's arguments before it, the Court of Common Pleas relied not on Pennsylvania's implementing regulations of IDEA but instead on generalized Pennsylvania child-disability regulations.[4] In its characterization of the hearing officer's pendency ruling, the Court of Common Pleas found the hearing officer's reliance on the pendency language of IDEA and the pendency holdings of 3rd Circuit case law to be inapplicable.[5]

[4] 22 PA Code §§15.1-15.11 wherein Pennsylvania adopts the generalized protections of Section 504 of the federal Rehabilitation Act of 1973 ("Section 504"), for all students with disabilities, as opposed to the more intricate and concrete protections of students with disabilities who require special education found in IDEA, as adopted at 22 PA Code §§14.101-14.163. Mother's complaint did not allege any District violations of, or failures under, Section 504. HO-14 at pages 3-4, 23-25.

[5] HO-14 at pages 4-5, 23-25.

19. On August 28, 2014, in light of the August 27th opinion/order issued by the Court of Common Pleas, the District issued a notice of recommended educational placement ("NOREP"), seeking to change the student's placement to the IU placement, and scheduled an individualized education plan ("IEP") meeting for September 2nd. The facts that the District issued the NOREP and sought to schedule an IEP meeting were not shared with the hearing officer. (HO-15; NT at 58-61).

20. On September 1, 2014, counsel for the student's mother emailed the hearing officer, presenting an argument on student's placement as a result of the August 27th opinion/order of the Court of Common Pleas. At that time, it came to light that, due to an email error, the hearing officer had not been advised of, or provided with, the August 27th opinion/order of the Court of Common Pleas. (HO-16, HO-18).

21. Over September 1 and 2, 2014, the parties communicated with the hearing officer about the District's intention to file a motion to dismiss in light of the August 27th order issued by the Court of Common Pleas. The District did not inform the hearing officer that it had begun a NOREP/IEP-meeting process, and the hearing officer established a deadline for the filing of the District's motion to dismiss without that knowledge. (HO-16).

22. On September 2, 2014, the student's IEP team met, although the student's mother was not part of that meeting, and the student's father approved the NOREP. The student's father approved the NOREP, and the District made plans for the student to begin attending the IU placement beginning September 8, 2014. (HO-19; NT at 60-62).

23. In the afternoon of September 3, 2014, via email from the mother's counsel, the hearing officer learned for the first time that a NOREP/IEP-meeting process had been undertaken and that, based on that process, the District intended to facilitate a change-in-placement. The student's mother objected. (HO-17).

24. On September 3, 2014, with knowledge of the NOREP/IEP-meeting process (albeit scant and without any communication or enlightenment from counsel for the District), the hearing officer informed the parties that, with new information in hand but no context, he considered his pendency ruling still to be in effect. (HO-17).

25. On September 4, 2014, the hearing officer shared his view that the Court of Common Pleas had misunderstood the legal standards—including the explicit provisions of IDEA, the relevant Pennsylvania special education regulations, and binding case law—governing the underlying dispute. He reiterated the view that the pendency ruling was still in effect. (HO-18).

26. On September 4, 2014, the District filed its motion to dismiss. It was the first communication or information from District counsel regarding the NOREP/IEP-process, contained in attachments to the motion. The attachments included the NOREP for the IU placement approved by the student's father. (HO-19).

27. Having received the motion to dismiss, the hearing officer modified the briefing schedule for the mother's response to the District's motion to dismiss.[6] Any response to the motion was due by September 11th, giving counsel for the student's mother the same number of working days as District counsel had to prepare its motion. (HO-20).

28. On September 5, 2014, the student's mother petitioned the federal District Court for the Eastern District of Pennsylvania for a temporary restraining order on the District's proposed change in placement, a petition that was denied. (HO-20).

29. On September 8, 2014, the student began to attend the IU placement. (NT at 63-64).

30. On September 10, 2014, the hearing officer informed the parties that, regardless of the response filed by the student's mother, he intended to utilize the already-scheduled September 15th hearing session for an evidentiary hearing on the motion to

[6] Counsel for the student's father indicated that father agreed with the District in the substance of its motion and, therefore, did not intend to file a response to the motion.

dismiss, for fact-finding related to disposition of the motion. (HO-22).

31. On September 11, 2014, the student's mother filed a response to the District's motion to dismiss. (HO-21).

32. On September 15, 2014, the hearing officer convened a brief evidentiary hearing related to the parties' positions vis a vis the District's motion to dismiss. (NT at 44-103).

DISCUSSION & CONCLUSIONS OF LAW

Pennsylvania, through its State Board of Education, has explicitly adopted, at 22 PA Code §§14.101-14.163, provisions for the implementation of IDEA in most of its particulars and, generally, "(t)o specify how the Commonwealth will meet its obligations to suspected and identified children with disabilities who require special education and related services".[7] In Pennsylvania, a parent may file a special education due process complaint related to the "identification, evaluation, or placement of, or the provision of a free appropriate public education (to)" a child who qualifies, or who is thought to qualify, for such services.[8] The filing of such a complaint triggers an impartial administrative review process before an impartial hearing officer who, *inter alia*, "must possess knowledge of, and the ability to understand, the provisions of (IDEA), Federal and State regulations pertaining to (IDEA), and legal

[7] *See generally* 22 PA Code §§14.102(a); 22 PA Code §14.102(a)(3).
[8] 22 PA Code §§14.102(b)(2)(xxix), 14.162(b); 34 C.F.R. §§300.507-300.508.

interpretations of (IDEA) by Federal and State courts."[9] This special education due administrative hearing process culminates in a final decision which may be appealed to a state court of competent jurisdiction or to a federal district court.[10]

A "parent" is specifically defined in IDEA, a definition adopted through Pennsylvania special education regulations.[11] In full, for the purposes of IDEA " 'parent' means:

> (1) A biological or adoptive parent of a child;
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> (2) A foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;
>
> (3) A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);
>
> (4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or
>
> (5) A surrogate parent (appointed by a competent authority when no parent, otherwise defined, is available)."[12]

Importantly for these proceedings, however, "(i)f a judicial decree or order identifies a specific person or persons…to act as the 'parent' of a

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[9] See generally 34 C.F.R. 34 C.F.R. §§300.511-300.513; §300.511(c)(1)(ii); 22 PA Code 102(b)(2)(xxx).
[10] 34 C.F.R. §§300.514-300.516; 22 PA Code §14.102(b)(2)(xxx).
[11] 34 C.F.R. §300.30; 22 PA Code §14.102(b)(2)(vi).
[12] *Id.* at §300.30(a).

child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the 'parent' for purposes of this section."[13]

In this case, on June 30, 2014, the student's mother filed her special education complaint as a statutorily-defined "parent". As of August 27, 2014, however, the Court of Common Pleas ended this role for the student's mother in the educational decision-making for her child. By issuing a judicial order whereby the student's father "shall have the sole ability and right to make binding educational placement and programming decision [sic] for (the student)…for the 2014-2015 school year", the Court of Common Pleas assigned to father alone the role of "parent" under the terms of IDEA and Pennsylvania special education regulations, at least as to the student's placement for the 2014-2015 school year. Because the mother's special education complaint sounded entirely in a dispute over her views of the appropriateness of the District's proposed change in placement for the 2014-2015 school year, and her standing to continue pursuing adjudication of that complaint was removed by judicial order as of the August 27th order, the mother's special education due process complaint must be dismissed. An order will be issued accordingly.

In its August 27th order, the Court of Common Pleas did not account for monitoring the student's transition or acclimation to the out-

[13] *Id.* at §300.30(b)(2).

of-district IU placement. The record in these proceedings contained potentially conflicting observations regarding the student's initial transfer to the new placement.[14] Therefore, the order will contain directives to the IEP team to ensure explicit data-sharing for consideration by the IEP team, including the student's mother, to monitor the student's continuing transition/acclimation to the IU placement, especially as reactive changes in the student's behavior and/or progress may not surface immediately.

Finally, both the Court of Common Pleas and the District recognize the genuine concern of the student's mother regarding her child's education and her good-faith effort to seek adjudication of her dispute with the District. Even though she is no longer a statutorily-defined "parent" under IDEA, to ensure that she is included in communications regarding the student's educational progress, the order will explicitly address her inclusion in communications/meetings related to the student's educational programming in the 2014-2015 school year.

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The hearing officer offers two points by way of dicta. First, the total lack of communication from District counsel with this hearing officer regarding the NOREP/IEP-meeting process initiated/held over the period

[14] The District director of special education testified that information he had received in a hallway conversation, and in a liaison meeting, indicated that the student had transitioned successfully. The student's mother testified that, after transitioning to the IU placement, the student engaged in long-recognized solace-seeking behavior ([redacted]). NT at 63-68, 96-98.

August 28th – September 3rd is disappointing. The District undertook its actions related to the NOREP/IEP-meeting process on the advice of its counsel,[15] knowing those actions would materially alter the student's educational placement, an issue pending in these proceedings, yet District counsel took no steps over the course of those seven days to advise the hearing officer of its intentions. Wishing to act on the basis of a definitive order from a tribunal is understandable; ignoring a second tribunal with concurrent, and active, jurisdiction is not. For a seasoned special education attorney who knows the role that special education due process plays in disputes such as these, the total lack of communication with the hearing officer over such a material procedural development is, as indicated, disappointing.

Second, the Court of Common Pleas has asserted jurisdiction over concerns for the student's educational programming and placement for the 2014-2015 school year, going so far as to place the matter on the non-jury trial list in June 2015. Of course, the Court of Common Pleas may assert its jurisdiction where it feels it can. Whether it should or not, though, is another matter. This hearing officer finds value in the caution offered long ago by the U.S. Supreme Court, adopted by the 3rd Circuit, and reiterated by the 3rd Circuit just two weeks ago: "(T)he policy of requiring exhaustion of administrative remedies is strong….", and "we have cautioned that 'the advantages of awaiting completions of the

[15] NT at 59-60.

administrative hearings are particularly weighty in (IDEA) cases. That process offers an opportunity for state and local agencies to exercise discretion and expertise in fields in which they have substantial experience.…(C)ourts should be wary of foregoing the benefits to be derived from a thorough development of the issues in the administrative proceeding.' ".[16]

CONCLUSION

With the student's mother no longer having a role as a statutorily-defined "parent" under the IDEA, the student's mother no longer has standing to pursue adjudication of her special education due process complaint. Thus, the complaint is dismissed upon the District's motion.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the complaint filed by the student's mother against the School District is dismissed for lack of standing to continue with the adjudication of that complaint through these proceedings. The remaining hearing sessions scheduled in this matter are cancelled.

Additionally, the School District is ordered as follows:

[16] Blunt v. Lower Merion Sch. Dist., F.3d , 2014 U.S. App. LEXIS 17629, 114 LRP 39807 (3d Cir. Sept. 12, 2014) (quoting Komninos by Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 778-780 (3d Cir. 1994)); Smith v. Robinson, 468 U.S. 992, 1011-1013 (1984).

On or about October 15, 2014 and on or about November 14, 2014, the School District shall convene the student's IEP team, including the student's mother, to consider explicitly (1) behavior-monitoring data and (2) anecdotal observations by educators, by the student's father, and the student's mother, and any other IEP team member, to ensure that the student's programming remains appropriate, that the student's needs are being met, and that the student's transition to the IU placement is not prompting behaviors which interfere with the student's learning or the learning of others. To the extent that, as of mid-November 2014, the IEP team is satisfied that the student's transition to the IU placement has been a smooth one, the IEP team is under no further directive under the terms of this order to meet to consider issues of the transition to the IU placement.

Even though the student's mother does not have decision-making authority regarding the student's 2014-2015 educational programming/placement, she must be included in communications regarding that programming/placement in the 2014-2015 school year. Accordingly, the School District is ordered to provide to the student's mother, simultaneously and in the same format and by the same means of communication, any and all written information provided to the student's father, where such information relates to the student's educational programming/placement including, but not limited to, re-evaluation reports and/or re-evaluation data, invitations to multi-

disciplinary team meetings, proposed revisions to the student's IEP, proposed revisions to any positive behavior support plan, any functional behavior assessment, behavior data (whether quantified, observational, or anecdotal), invitations to IEP team meetings, progress monitoring on short-term objectives/annual goals contained in the student's IEP, and home-school communication logs/sheets. Where, by the nature of the information and/or means of communication, the IU is the more likely provider of such information, the School District shall advise the IU of the terms of this paragraph of the order; the school district and the IU shall determine between themselves how best to comply with this paragraph of the order and which entity will assume responsibility to ensure the information under consideration is provided to the student's mother.

Any claim in the complaint at this ODR file number not addressed in this decision is denied.

s/Jake McElligott, Esquire

Jake McElligott, Esquire
Special Education Hearing Officer

September 25, 2014