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: C.K.

Date of Birth: [redacted]

ODR No. 16204-1415KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	*Pro Se*
Perkiomen Valley School District	Christina Stephanos Sweet Stevens Katz & Williams LLP 331 Butler Ave. New Britain, PA 18601

Dates of Hearing: N/A

Record Closed: June 3, 2015

Date of Decision: June 3, 2015

Hearing Officer: Brian Jason Ford

Pendency and Jurisdiction Determination

Introduction

This memorandum and order resolves the question of whether I have jurisdiction to preside over this special education due process hearing. I conclude that I do not have authority to hear this matter and dismiss the hearing for that reason. I also address the parties' concerns about the Student's "stay-put" or pendent placement, but only as *dicta*. This memorandum and order is dispositive, and so it is formatted in the style of a final decision and order.

Issue

Does the Office for Dispute Resolution (ODR) have subject matter jurisdiction over the claims raised in the Parents' Complaint of April 28, 2015?

Background

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. The Parents are *pro se*.

On April 23, 2015, the Parents and the District participated in mediation facilitated by ODR. The parties signed a written Mediation Agreement (the Agreement), dated April 23, 2015.

The Parents, still *pro se*, then filed a Complaint with ODR, initiating these proceedings. The Complaint is dated April 28, 2015 and was received by ODR on April 29, 2015.

During a conference call with the parties on May 29, 2015, I determined that the Agreement may compromise my jurisdiction and remove my authority to hear this case. I requested a copy of the Agreement, and received a copy the same day.[1] I explained to the parties that I would consider the Agreement and resolve the question of my jurisdiction in writing.

On June 2, 2015, the Parent sent an *ex parte* email to me, moving to enforce the Student's rights under the IDEA's pendency or "stay-put" rule. I forwarded a copy of that email to the District's counsel upon receipt.

The Agreement

The Agreement includes six substantive terms, set forth in a numbered list. Of those, #6 is pertinent here. It reads as follows:

> [The District] and [the Parents] agree that effective April 29, 2015 nursing services will be discontinued on the bus and nursing services will be reduced to 5 hours in school as stated in the IEP.

Mediation Agreement, ODR No. 16018-1415JS.

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[1] "Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding." 20 U.S.C. § 1415(e)(2)(G). I did not inquire, and do not know, what was said during the mediation. Only the final, written, signed agreement was sent.

The Complaint

The Complaint was written on a Due Process Complaint notice form. The form includes a space for the Parents to write out the nature of the dispute and facts related to the dispute. In that space, the Parents objected to the removal of a nurse on the Student's bus and a reduction of 2.5 hours of nursing services in school. The form also includes a space for the Parents to demand relief. In that space, the Parents demanded continuation of the Student's current level of nursing services in school and on the bus.

In sum, the Parents object to the reduction of nursing services contemplated in the Agreement, and have requested this hearing to prevent that reduction from happening.

Jurisdiction

The IDEA enables parents "to present a complaint … with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6)(A). The subject matter of the Complaint, therefore, is appropriate for an IDEA due process hearing.

The IDEA also makes mediation agreements enforceable in court:

> In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that—
> (i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;
> (ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and
> (iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

20 U.S.C. § 1415(e)(2)(F).

In this case, no complaint was pending when the parties signed the Agreement. The applicable federal regulations, however, clarify that this rule applies when parties resolve a "dispute" via mediation. *See* 34 C.F.R. § 300.506(b)(6).

Based on the Agreement, the parties came to an agreement about the quantity of the Student's nursing services via mediation, put that agreement in writing, and signed it. Six days later, the Parents requested this hearing to stop the District from doing what is written in the Agreement.

The Agreement is legally binding and enforceable in court. It is no different than a contract between the parties. Through their Complaint, the Parents seek to either breach or void the Agreement. I have no clear authority to hear this sort of contract dispute.

Relatively recent case law establishes that hearing officers have authority to determine whether an enforceable contract exists between parties to a special education dispute. *See, I.K. v. Sch. Dist. of Haverford Twp.*, 961 F. Supp. 2d 674 (E.D. Pa. 2013); *A.S. v. Office for Dispute Resolution Quakertown Cmty.*, 88 A.3d 256 (Pa. Commw. Ct. 2014). Those same cases confirm the long-standing concept that hearing officers have no authority to enforce a contract. The

question of whether a hearing officer has authority to nullify an otherwise enforceable contract is novel based on my research.

Just as current case law permits hearing officers to determine that a contract *is* enforceable, the same cases permit hearing officers to determine that a contract is *not* enforceable. Hearing officers apply all of the tenets of contract law when deciding whether a contract is binding upon the parties. Even in such cases, hearing officers still have no enforcement authority. Rather, hearing officers may determine if a contract exists and, if it does, litigants can go to court for enforcement (or, depending on the circumstances, to the Pennsylvania Department of Education).

In this case, there is no question that an agreement exists. The Agreement is legally binding and enforceable in court as a matter of law. Despite this, the Parents ask me to prohibit the District from taking the agreed upon action. This is beyond my authority. Just as I have no power to force litigants to comply with agreements, I have no power to void agreements. There is no case law on this precise point, my only authority vis-a-vis contracts is derived from case law, and those cases do contemplate the action that the Parents have requested.

Despite the foregoing, I recognize that any student's needs will change over time. This is why the document that typically articulates a student's educational program (an IEP) is reviewed and revised whenever necessary, but not less than annually. When non-IEP documents control a student's program and placement, parties should be careful to explain in writing how long the agreement should last, and how it can be altered in response to the student's needs. Although the Agreement in this case includes no such provisions, only six days passed between the Agreement and the Complaint. The Complaint does not suggest that the Student's needs changed during those six days. Rather, the Complaint can be read only as a demand to maintain nursing services in response to the Student's long-standing conditions, despite what is written in the Agreement.

In short, I find that the Agreement constitutes a valid, legally binding contract between the parties. That contract is enforceable in court, but not through these proceedings. Moreover, any dispute that goes beyond the questions of the Agreement's existence or enforceability are beyond my jurisdictional authority. As such, I am compelled to dismiss this matter for lack of subject matter jurisdiction.

Pendency

The IDEA requires the maintenance of a child's current educational placement during the pendency of due process proceedings. 20 U.S.C. § 1415(j) provides as follows:

> Except as provided in subsection (k)(4) [regarding disciplinary placements], during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

This pendency rule, also referred to as the stay-put provision, creates an "automatic preliminary injunction" designed to "protect handicapped children and their parents during the review process," by "block[ing] school districts from effecting unilateral change in a child's educational

program." *Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 82, 83 (3d Cir. 1996) citing *Drinker by Drinker v. Colonial Sch. Dist.*,78 F.3d 859 (3d Cir. 1996). Pendency determinations are highly fact-specific. *See id*.

My lack of jurisdiction to hear the underlying dispute compels me to dismiss this matter. That dismissal renders any pendency issue moot. With no hearing pending, the pendency rule simply does not apply. I note, however, that the question of what services the Student should currently receive is understandably important to both parties. I further note that this decision is subject to appeal, and so this memorandum and order may not be the end of the litigation, particularly in light of *M.R. v. Ridley Sch. Dist.,* 744 F.3d 112, 118 (3d Cir. 2014), *cert. denied Ridley Sch. Dist. v. M.R.,* 2015 U.S. LEXIS 3299 (U.S. May 18, 2015)(holding that pendency continues through the exhaustion of all appeals, through the United States Supreme Court). I choose, therefore, to address the issue here, even if only as *dicta*.

A student's last approved IEP often, but not always, is the student's pendent placement because it typically represents the last agreed-to services. It is also critical to determine what services the student was actually receiving at the time of the dispute, regardless of what is written in the IEP. *M.R., supra at* 118.

The Agreement itself is problematic from a pendency perspective. There is no doubt that the Agreement constitutes the last agreed-to placement before the hearing was requested. Yet if I were to require compliance with the Agreement, I would be enforcing it. As discussed above, I have no authority to enforce the Agreement. If I were to permit the Parents to escape from the Agreement by not requiring the reduction in services contemplated therein, I would effectively assert the jurisdiction I just determined I lack.

To overcome this obstacle, I would simply ignore the Agreement. I would determine what services the Student was receiving when the hearing was requested, regardless of the Agreement, and require continuation of those services during the pendency of these proceedings. While I would permit the parties to present evidence to establish what those services are, there does not appear to be a dispute about what was being provided prior to the Complaint. Specifically, it appears that the District was providing the level of nursing support that the Parents demand. That was indicated during the May 29, 2015 conference call and suggested by the June 2, 2015 email.

Conclusion

The parties entered into a written mediation agreement on April 23, 2015. The Agreement is valid, legally binding, and enforceable in court. On April 28, 2015 the Parents submitted the instant due process complaint, initiating this due process hearing. The Complaint was received by ODR on April 29, 2015. Through the Complaint, the Parents effectively ask me to void the Agreement. Just as I have no power to enforce a contract, I have no power to break one either. Since I have no authority to resolve the issue presented in the compliant, or to grant the only relief demanded, I must dismiss this matter for lack of subject matter jurisdiction.

ORDER

Now, June 3, 2015, it is hereby **ORDERED** as follows:

1. This special education due process hearing is **DISMISSED** for lack of subject matter jurisdiction.

2. The parties have exhausted administrative remedies in regard to the issue presented in the Parents' Complaint.

3. This Order is final and dispositive. It may be appealed within applicable timelines to any court of competent jurisdiction.

/s/ Brian Jason Ford
HEARING OFFICER