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

DISMISSAL

OPEN HEARING

ODR File Number: 19300 16 17

Child's Name: I.W. **Date of Birth:** [redacted]

Dates of Hearing:
09/26/2017

Parent:
Parent(s)

Counsel for Parent
Earl Raynor, Esquire
234 North Peach Street
Philadelphia, PA 19139

Local Education Agency:
School District of Philadelphia
440 North Broad Street
Philadelphia, PA 19130

Counsel for the LEA
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Hearing Officer: Brian Jason Ford, JD, CHO

Date of Decision: 11/01/2017

DISMISSAL

Introduction and Procedural History

On May 30, 2017, the Parent filed a complaint, requesting a special education due process hearing on behalf of the Student, against the District.[1] The Student is [beyond teenaged]. The Parent was *pro se* at that time. The Parent alleged that the District failed to provide a free, appropriate public education (FAPE) to the Student, failed to follow a prior due process order, and failed to follow a settlement agreement. The only relief that the Parent demanded was a "fair and reasonable [resolution]." *Complaint* at 5.

The Parent's claims arise under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and its federal and Pennsylvania implementing regulations.

On June 13, 2017, the District filed a motion to dismiss (1st MTD). The District alleged that it did not receive a copy of the hearing request when it was filed with the Office for Dispute Resolution (ODR), challenged my jurisdiction to hear claims related to the implementation of a prior order, and challenged the sufficiency of the Complaint.

On June 15, 2017, after convening a conference call with the Parent and District's attorney to clarify their positions, I issued a pre-hearing order (1st PHO). I determined that I did not have jurisdiction to hear enforcement claims, and so I dismissed claims concerning the prior order and settlement. I also determined that the claims made and relief demanded in the complaint were insufficiently plead. Rather than dismissing this matter, I gave the Parent leave to amend the complaint.

On July 1, 2017, the Parent, still *pro se,* filed an amended complaint. The Parent continued to allege that the District failed to comply with prior orders and agreements. The Parent also continued to allege that the District denied a FAPE to the Student, but now gave examples of how FAPE was denied. Specifically, the Parent listed a number of ways that the District allegedly failed to implement the Student's IEP, and denied the Student access to educational programming. The Parent also alleged that the District refused to let the Student access a previously established compensatory education fund.[2] For remedies, the Parent demanded programming from the District, including specially designed instruction (SDI) to address the Student's current educational and transition needs. The Parent also demanded an order that preemptively penalized the District by awarding additional compensatory education that would be placed in a third-party trust if the District failed to provide whatever SDI I awarded.

On July 13, 2017, the District filed a motion to dismiss the amended complaint (2nd MTD). The District argued that the amended complaint was insufficient, and that I do not have jurisdiction to award the demanded relief. Regarding my jurisdiction, the District argued that I have no

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[1] With the exception of the cover page of this decision, identifying information is omitted to the extent possible.

[2] The amended complaint does not specify whether the existing compensatory education fund was established through a prior order, or through a settlement agreement.

enforcement authority (something that I had already found in the 1st PHO). The District also argued that the Student was not enrolled in the District, and I have no authority to order the District to directly provide special education to any child who is not enrolled in the District.

On July 16, 2017, the Parent, still *pro se*, responded to the 2nd MTD. The Parent generally argued that the amended complaint was sufficient.[3] The Parent clarified that no demand was made for enforcement of a prior due process order. The Parent did not respond to the District's contention that the Student was not enrolled, or that I cannot order the District to directly educate students who are not enrolled.

On July 20, 2017, I issued a second pre-hearing order (2nd PHO). I agreed with the District that I do not have authority to place compensatory education into a third-party trust, or pre-emptively award sanctions to ensure compliance with my orders. I also found that a portion of the 2nd MTD was predicated on facts that may be disputed. Specifically, because the Parent did not respond to the District's claim that the Student was no longer enrolled, I could not make assumptions about the Student's enrollment status. I ordered the parties to "file a joint stipulation regarding the dates that the Student was enrolled in the District… [or alternatively] inform me that they are unable to reach a joint stipulation" by July 28, 2017. I also denied the sufficiency challenge in the 2nd MTD.

In the morning of September 26, 2017, the hearing convened. The parties did not send joint stipulations or say that they were unable to reach stipulations. At that point, my intention (stated explicitly to the parties) was to resolve the dates of the Student's attendance, resolve the remaining portion of the 2nd MTD, and then go on to a hearing on the merits if the amended complaint survived the 2nd MTD.

The Parent arrived at the hearing without an attorney, announced that the family had retained an attorney, and moved for a continuance so that the attorney could represent the family at the hearing. The District objected to a continuance, and was ready to proceed. I granted the Parent's request for a continuance over the District's objection. I also entered orders about how this hearing would proceed if the attorney did not enter an appearance for the Parent, and about how this hearing would proceed if the attorney entered an appearance.[4]

Later in the day on September 26, 2017, the Parent's attorney called me, and then entered an appearance via email. It appears that the Parent retained the attorney for this matter when they

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[3] I declined to review each of the arguments that the Parent sent, as most were cursory, conclusory statements that the Parent had either previously answered the District's questions, that the District somehow failed to object to the amended complaint before it was filed, or that my "acceptance" of the amended complaint precluded the District's objections to it. Understanding that the Parent was *pro se* at the time, I drew no negative inference from any of these statements. However, I cannot give credence to such arguments.

[4] At the hearing, the Parent could not remember the attorney's full name, and could not provide an email address for the attorney. The parent provided a phone number for the attorney, and I left a voicemail at that number. The Parent also stated that she would be with the attorney at an unrelated hearing later in the day.

met at the unrelated hearing in the afternoon of September 26, 2017. From this point forward, all communication to the Parent was via counsel.

Still later in the day on September 26, 2017, I sent an email to the parties. This email outlined my hearing procedures. I attached the original complaint, the 1st MTD, the 1st PHO, the amended complaint, the 2nd MTD, and the 2nd PHO to that email.

On September 27, 2017, the Parent, via counsel, moved for a continuance and an extension of the decision due date. Those motions were granted over the District's objection.

On October 3, 2017, I ordered the parties to either submit joint stipulations regarding the dates of the Student's enrollment in the District, or file a statement that they were unable to reach stipulations. The deadline for stipulations was October 6, 2017. In addition, if the parties failed to reach stipulations, I ordered the District to send all documents establishing the dates of the Student's enrollment, and any arguments or averments about the dates of the Student's enrollment, on or before October 13, 2017. The Parent would then have until October 20, 2017 to respond to the District's documents and arguments.

On October 6, 2017, I sent a reminder to the parties, via email, that stipulations were due.

On October 6, 2017, at the close of business, the District confirmed that the parties had not reached stipulations. In the same correspondence, the District sent documents concerning the Student's enrollment, and renewed prior motions to dismiss. All of this was sent to me, via email, with copy to the Parent's attorney.[5]

On October 9, 2017, I confirmed receipt of the District's documents, and confirmed that the Parent had until October 20 to respond. The Parent did not respond. As of the date of this order, the last contact from the Parent's attorney was the Parent's continuance request of September 27, 2017.

Discussion

As a student with a disability, the Student is entitled to special education until graduation, or the end of the school year in which the Student turns 21 years old. There is no dispute that the Student will turn 21 years old during the current, 2017-18 school year. Assuming, for the sake of argument, that the Student has not graduated on the District's academic standards, the Student is currently entitled to a FAPE.

That conclusion, however, does not necessarily mean that the District is responsible for the Student's education. The District avers that the Student is not enrolled. The District asserts that it has no obligation to provide direct educational services to students who are not enrolled. I agree with this argument.

[5] At this time, the District also made averments about its efforts to contact the Parent's attorney, and the Parent's attorney's lack of response to those efforts.

Undisputed evidence substantiates the District's claim that the Student is not enrolled in the District.[6] Attendance records filed by the District with its October 6, 2017, submission indicate that the Student attended 5th grade in the District during the 2007-08 school year. The Student was not listed as being in a grade during the 2008-09 through 2012-13 school years. During that time, the Student was educated in a private school. The Student attended school in the District during the 2013-14 school year (11th grade) and the 2014-15 school year (12th grade). Then, according to the attendance records, the Student was withdrawn on September 8, 2015.

The Parent had multiple opportunities to refute this evidence both before and after retaining counsel. The purpose of the procedures that I adopted both before the September 26, 2017 hearing, during the hearing, and after the hearing were all designed so that the Parent could have a fair opportunity to present evidence and argument in opposition to the District. The same is true regarding my overruling the District's multiple motions and objections. Despite this, the Parent did not provide any evidence to contradict the District.

While the Parent's attorney has been silent, the Parent herself has been a vocal advocate for the Student, and has opposed the District's position – albeit without evidence. During the September 26, 2017 hearing, the Parent made frequent reference to an email of July 25, 2017. In that email, a response to the 2nd PHO, the Parent claims that she did not un-enroll the Student, and did not accept a diploma for the Student. Even if I could accept the Parent's contentions as fact, the Student's graduation status is not relevant. For purposes of this analysis, I assume that the Student did not graduate on academic standards. Even assuming that the Parent did not un-enroll the Student, the result is the same. The analysis does not hinge on the Parent's actions, but on the Student's enrollment status. There are a multitude of reasons that students withdraw from school. Sometimes, the withdrawal is a function of the student or parent's actions. Sometimes, the withdrawal is a function of a district's action. The particular mechanism of the Student's withdrawal in this case is not an issue.[7] The only issue is whether the Student is, currently, enrolled in the district.[8] The only credible evidence submitted on this point shows that the Student has not been enrolled in the District since September 8, 2015 – over 20 months before the instant matter was initiated.

Based on the foregoing, I accept the District's argument that the Student is not enrolled in the District.

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[6] The District initially claimed that the Student's enrollment ended in June of 2015. Evidence shows that the date is actually September 8, 2015. For purposes of this order, that distinction makes no difference.

[7] The District makes no averment about how or why the Student was withdrawn, arguing only that the Student is not enrolled.

[8] The IDEA includes procedural protections for students with disabilities when schools improperly issue diplomas or otherwise terminate special education services. In this case, the District raises the Student's literal enrollment status in the context of a jurisdictional challenge. The propriety of the Student's withdrawal from special education was not presented as an issue before or after the Parent retained counsel.

In *Ferren C. v. Sch. Dist. of Phila.*, 595 F. Supp. 2d 566 (E.D. Pa. 2009), the court determined that Pennsylvania school districts are obligated to ensure that Students have access to previously-awarded compensatory education, regardless of their eligibility status. Ferren's IDEA eligibility ended at age 21. At that time, Ferren had unused compensatory education, and was unable to access that compensatory education because the District refused to issue an IEP.[9] Ultimately, the court required the District to issue an IEP, despite the fact that Ferren had aged out of eligibility, because that was the only way to accomplish the remedial purposes of the IDEA.

By extension, *Ferren C.* also *might* stand for the proposition that Pennsylvania school districts are obligated to take actions other than issuing documents so that un-enrolled students can access previously-awarded compensatory education. Without analysis, for the sake of argument, I will assume that *Ferren C.* stands for this proposition.

This case is different for two reasons. First, the claims surviving the 2nd MTD do not concern the Student's ability to access previously-awarded compensatory education. Second, the Parent does not demand actions from the District to enable services provided by a third party. Rather, the Parent seeks direct services from the District itself. In *Ferren C.*, the family wanted paperwork from the District to secure services from a third party. In this case, the Parent wants the District to educate the Student directly. This distinction is critical. It is reasonable for the District to demand that families enroll their children before the District provides services.

In reaching this conclusion, another distinction must be made. In *I.H. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762 (M.D. Pa. 2012), the court determined that, in some circumstances, Pennsylvania school districts must meet with families and develop IEPs for children who wish to enroll, but who have not yet enrolled.[10] Such IEPs effectively let families know what services a child will receive if the child enrolls. This case is different because the Parent argues that the Student is enrolled. Had the Parent simply accepted the District's premise, and then enrolled the Student, or even provided notice of intent to enroll, current case law unambiguously would require the District to develop an IEP for the Student. Such case law does not apply in this matter because the Parent is neither seeking enrollment, nor demanding a pre-enrollment placement preview.[11]

It is not simply a practical necessity for students to enroll before receiving services from the District. Pennsylvania's education regulations clearly establish that enrollment is a precondition to receipt of services from a school district. *See* 22 Pa. Code 11.11(b). Pennsylvania children must apply for enrollment and, if enrollment criteria are met, Pennsylvania public schools must

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[9] Ferren received compensatory education services from a third party. The third party required Ferren to have an IEP in order to continue receiving services.

[10] Portions of *I.H.* concerning the IDEA's statute of limitations have been overruled by *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015). The portion of *I.H.* concerning an un-enrolled student's right to an IEP from a school district under special circumstances has not been altered by subsequent cases.

[11] The Parent vigorously rejected the District's premise, on multiple occasions, arguing that the Student is enrolled but taking no action to enroll the Student. The Parent took this position before retaining counsel. The Parent did not alter this position after retaining counsel.

enroll and educate those children. *Id*. In practice, Pennsylvania's regulations strip public schools of their authority to reject enrollment in most circumstances. Once a child applies for enrollment, the public school must quickly accept the child unless particular conditions are met. *Id*. However, nothing in the IDEA, Pennsylvania's special education regulations, or Pennsylvania's regular education regulations requires schools to provide direct services to children who are not enrolled.

In sum, the Student is not enrolled in the District. The only surviving relief that the parent demands is direct educational services from the District. The District has some obligations to take actions for children with disabilities who are not enrolled, but those actions do not extend to the direct provision of special education and related services. Consequently, I cannot order the District to provide the only surviving relief that the Parent demands. These circumstances necessitate dismissal. An appropriate order follows:

ORDER

Now, November 1, 2017, it is hereby **ORDERED** that the Parent's due process complaint, as amended, is **DISMISSED.** This Order constitutes the final administrative disposition of this matter. The administrative file is hereby closed, and I relinquish all jurisdiction.

/s/ Brian Jason Ford
HEARING OFFICER