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

CLOSED HEARING

ODR File Number:
19663 17 18

Child's Name:
D.L.

Date of Birth:
[redacted]

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Parent(s)

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Date of Decision
11/20/2017
Hearing Officer
Brian Jason Ford, JD, CHO

Introduction and Procedural History

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and Pennsylvania law concerning the obligations of school districts to children with disabilities placed in residential programs. 24 Pa. Cons. Stat. § 13-1306.

Much of this procedural history is also captured in a pre-hearing order of November 15, 2017, which resolved the Parents' standing to bring claims on behalf of the Student.[1] A redacted copy of that pre-hearing order is attached to this decision as Appendix A.

On September 6, 2017, the Parents filed three due process complaints, alleging IDEA claims against the Cheltenham Township School District (Cheltenham), the Neshaminy School District (Neshaminy), and [a private program]. Shortly after filing, all three cases were consolidated. However, each case retained its own ODR file number, and I am issuing two identical decisions under the file numbers for Neshaminy and Cheltenham.

The Student was 20 years old at the time of filing [redacted].

On September 20, 2017, Cheltenham filed a motion to dismiss, alleging, *inter alia*, that the Parents lack standing to request a due process hearing on the Student's behalf. Neshaminy and [the private program] also filed motions to dismiss, but neither challenged the Parents' standing. Subsequently, Cheltenham opposed Neshaminy's motion to dismiss, and vice versa.

On October 2, 2017, the Parents moved for appointment under 20 U.S.C. § 1415(m), an IDEA provision that allows parents of adult students to "represent the educational interests of the child throughout the period of eligibility." *Id*.

On October 6, 2017, I dismissed the complaint against [the private program]. In the same order, I clarified that the scope of this hearing is limited to the question of which school district, Neshaminy or Cheltenham, is the Student's local educational agency (LEA) for IDEA purposes. A redacted copy of that pre-hearing order is attached to this decision as Appendix B.

On November 15, 2017, I appointed the Parents to represent the Student's educational interests pursuant to 20 U.S.C. § 1415(m). *See* Appendix A. At that time, I also determined that the sole remaining issue was a pure question of law, and that an evidentiary hearing was unnecessary to resolve the dispute. *See id.* I informed the parties that I would resolve the dispute without an evidentiary hearing, unless they requested an evidentiary hearing. All parties confirmed that an evidentiary hearing was not necessary.

Issue

The single issue presented in this case is: which school district, Neshaminy or Cheltenham, is the Student's LEA for IDEA purposes?

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[1] Except for the cover page of this decision, identifying information is omitted as much as possible.

Discussion

Facts Not in Dispute

There is no dispute that the Student has been identified as a child with an Intellectual Disability, Autism, and a Speech or Language Impairment. There is no dispute that the Student's [parent] lives in Cheltenham, but the Student attends a residential program at [the private program], which is located in Neshaminy.[2] There is no dispute that the Student is IDEA-eligible, meaning that the Student has a qualifying disability and is in need of specially designed instruction.[3] Finally, there is no dispute that the Student was placed at [the private program] by an agency that is not a party to these proceedings.

Authority to Award Declaratory Relief

Cheltenham argues that I do not have authority to award declaratory relief. The Parents and Neshaminy dispute this, and argue that I have authority to award declaratory relief. I agree with the Parents and Neshaminy.

There are few cases precisely on point, and the most direct analysis comes from Hearing Officer Culleton in *T.W., School District of Philadelphia,* ODR No. 14391-1314 at 18 (Culleton 02/26/17). I completely agree with Hearing Officer Culleton's assessment that

> the IDEA vests jurisdiction in the administrative hearing officer to provide such a declaratory order. The IDEA requires each state to provide "[a]n opportunity for any party 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). This broad language ("any matter relating to [FAPE]") encompasses [declaratory relief]. Given the hearing officer's broad equitable remedial authority, I conclude that it is within the hearing officer's authority to issue a declaratory order…

Id at 17-18. *See also Swope v. Central York School District,* 796 F. Supp. 2d 592 (W.D. Pa. 2011)(declaratory relief is within the equitable remedies available under the IDEA through the administrative process); *accord, D.F. v. Red Lion Area School District,* 2011 U.S. Dist. LEXIS 151970 (M.D. Pa. 2011); *Hesling v. Avon Grove School District,* 428 F. Supp. 2d 262, 273 (E.D. Pa. 2006).

The precise issue before Hearing Officer Culleton was whether he could declare that a school district had offered an appropriate program to a student. The fact that the specific declaration that I am asked to make in this case concerns a different issue is a distinction without a difference.

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[2] The complaint identifies the Student's [parent] as the parent residing with the Student, and the [other parent] as the parent not living with the Student. All parties agree that, up until the Student's 21st birthday, Cheltenham was the "resident" district, as described below.

[3] To the extent there was any legal dispute over the Student's eligibility status, that issue was addressed in the November 15, 2017 pre-hearing order. *See* Appendix A.

Even so, as Neshaminy notes, Hearing Officers routinely grant or deny educational agencies' motions to dismiss as improper parties. Such decisions inherently include a declaration as to the educational agencies' responsibility to the student. *See, e.g., M.B., New Media Technology Charter School*, ODR File No. 18046-1617 (Jelley, Sept. 9, 2016)(granting motion to dismiss PDE as the responsible educational agency); *B.B., Elwyn, Inc.*, ODR No. 18909-1617KE at 2 (Culleton, Jul. 17, 2017)(refusing to dismiss PDE as responsible educational agency). *See also Z.R.—Chester County Intermediate Unit*, ODR No. 2866-11-12-AS (PDE Feb. 6, 2012).

Cheltenham relies upon *Y.K., Haverford Twp. Sch. Dist.*, 7662-0607 (Myers, Sept. 10, 2007).[4] In the *Y.K.* hearing, the parents lived in Haverford, but the Student lived outside of Haverford with other family members, and attended school outside of Haverford. Haverford sought the parents' permission to evaluate the student, and requested a hearing when the parents refused. Under those circumstances, Hearing Officer Myers determined that the dispute was moot and, consequently, any opinion would be advisory. Hearing Officer Myers concluded that Hearing Officers lack authority to issue advisory opinions. I agree that Hearing Officers may not issue advisory opinions, and that moot cases should be dismissed. However, there is a difference between awarding declaratory relief and issuing an advisory opinion. Moreover, this case is not moot. There is a genuine, active controversy regarding which school district is responsible for the Student's education. Consequently, this hearing is distinguishable from *Y.K.*, and I may resolve the issue presented.[5]

Regulatory Framework

Children are sometimes placed into residential programs by non-educational agencies for non-educational reasons. Those residential programs often have an educational component that compliments, or is a part of, the residential placement. When that happens, a child's family may reside in one school district, but the residential program is located in another school district. Pennsylvania regulations delineate both school districts' responsibilities to the child in these circumstances.

The school district that the family lives in is called the "resident district" and the school district in which the residential program is located is called the "host district." Responsibilities are divided between the districts pursuant to 24 P.S. § 13-1306 (Section 1306). Section 1306 has been interpreted by the Pennsylvania Department of Education, Bureau of Special Education via a Basic Educational Circular titled "Nonresident Students in Institutions" (BEC). In this case, Cheltenham is the resident district and Neshaminy is the host district.

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[4] Citation to other Hearing Officers' decisions, by both the parties and me, indicates the dearth of court decisions about the subjects raised in this hearing. Further, regardless of the extent to which *stare decisis* applies between due process decisions, I am compelled by the logic of the other decisions referenced herein.

[5] The distinction is further highlighted in this case, in the pre-hearing order dismissing [the private program]. A key factor was that the Parents confirmed that there is no justiciable issue against [the private program]. *See* Appendix B.

Responsibilities to students with disabilities are explicitly outlined in Section 1306 and discussed in detail in the BEC. For IDEA-eligible students, "the host school district is responsible for providing the student with an appropriate program of special education and training consistent with Chapters 14 and 342 of the Pennsylvania regulations and standards." *BEC*. More specifically, the BEC explains:

> This means the host school district is responsible for making decisions regarding the goals, programming, and educational placement for each student. The host school district is also responsible for seeking advice from the resident school district with respect to the student, and keeping the resident school district informed of its plans to educate the student.

As such, when an IDEA-eligible student is placed in a residential program for non-educational purposes, the host district is responsible for the substance of the student's education.

Analysis

In this case, Neshaminy is the host district, and is responsible for the Student's receipt of an appropriate public education. However, Neshaminy may not be responsible for the cost of the Student's education. Section 1306 "allows the host school district to charge the full cost of providing special education programs and services for all institutionalized students." *BEC*. Therefore, Neshaminy is responsible for the Student's education, but Cheltenham may be responsible for funding that education.

I note that a substantial portion of the parties' motions and responses concerned the Student's residency. Under Section 1306, there is no need to determine the Student's residency. Section 1306 is triggered when a third party paces a child with a disability outside of the *family's* resident district. The [parent's] residency in Cheltenham is not disputed, nor is the Student's placement by a third-party agency at [the private program] in Neshaminy. The fact that the Student is 21 years old is also irrelevant because the Student is still, by definition, a child with a disability. *See* Appendix A.

Section 1306 comes up rarely in special education litigation. When it does, the cases typically involve a school district or entity other than the host district seeking dismissal as an improper party. *See Z.R., Cheltenham S.D.*, ODR No. 2285-1112AS (McElligott, Dec. 8, 2011); *Z.R., Chester County Intermediate Unit*, ODR No. 2866-1112AS (Ford, Feb. 6, 2012). Those cases hold that resident districts and other third-party agencies are not proper parties when parents request a hearing concerning the educational services a student receives in a Section 1306 placement. This matter is distinguishable because the Parents raise no complaint about the services that the Student is receiving, but rather present an issue about what entity is responsible for the Student's education. *See* Appendix B.

Pennsylvania regulations provide a clear answer to the question presented in this hearing: both school districts are partly responsible to ensure the Student's receipt of a free, appropriate public

education (FAPE). Assuming that Neshaminy takes advantage of Section 1306's payment provisions, Cheltenham is responsible for the "F" of FAPE, and Neshaminy is responsible for the "APE" of FAPE. Despite the small number of cases on point, in Pennsylvania this is very well-settled law.

An appropriate order follows.

ORDER

Now, November 20, 2017, it is hereby ORDERED as follows:

1. The Student is a "child with a disability" until the end of the current, 2017-18 school year, or the end of any extended school year services that the Student may be entitled to in the summer of 2018. *See* Appendix A.

2. The Neshaminy School District is responsible for the provision of an appropriate educational program for the Student. The Neshaminy School District is also responsible for seeking advice from the Cheltenham School District regarding the Student's education.

3. The Cheltenham School District is responsible for funding the Student's educational program, if billed in accordance with 24 P.S. § 13-1306.

/s/ Brian Jason Ford
HEARING OFFICER

Appendix A

Pre-Hearing Order Regarding the Parents' Standing

November 15, 2017

Pre-Hearing Order
Regarding the Parents' Standing

Introduction and Procedural History

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and Pennsylvania law concerning the obligations of school districts to children with disabilities placed in residential programs. 24 Pa. Cons. Stat. § 13-1306.

On September 6, 2017, the Parents filed three due process complaints, alleging IDEA claims against the Cheltenham School District, the Neshaminy School District, and [the private program].[6] The Student was 20 years old at the time of filing [redacted].

On September 20, 2017, Cheltenham filed a motion to dismiss, alleging, *inter alia*, that the Parents lack standing to request a due process hearing on the Student's behalf. Neshaminy and [the private program] also filed motions to dismiss, but neither challenged the Parents' standing. Subsequently, Cheltenham opposed Neshaminy's motion to dismiss, and vice versa.

On October 2, 2017, the Parents moved for appointment under 20 U.S.C. § 1415(m), an IDEA provision that allows parents of adult students to "represent the educational interests of the child throughout the period of eligibility." *Id.*

On October 6, 2017, I dismissed the complaint against Woods Services. In the same order, I clarified that the scope of this hearing is limited to the question of which school district, Neshaminy or Cheltenham, is the Student's LEA for IDEA purposes.

For context, the Student has been identified as a child with an Intellectual Disability, Autism, and a Speech or Language Impairment. The Parents live in Cheltenham, but the Student attends a residential program at [the private program], which is located in Neshaminy. The student was placed at [the private program] by an agency that is not a party to these proceedings. Under Pennsylvania law, the district in which the residential placement is located (the "host" district – Neshaminy in this case) is responsible for the provision of FAPE, while the district in which the family resides (the "resident" district – Cheltenham in this case) has funding obligations. *See* 24 Pa. Cons. Stat. § 13-1306. Neshaminy and Cheltenham disagree about how the Student's age impacts upon their obligations.

This pre-hearing order *only* addresses the issue of the Parents' standing. Other issues will be addressed separately.

Discussion

[6] Other than the caption of this document, identifying information has been omitted to the extent possible.

The Student reached the age of majority [redacted] when the Student turned 21 years old. Cheltenham argues that the Parents lack standing to bring a claim on the Student's behalf because the Student is 21 years old.

The complaint was filed before the Student turned 21. Cheltenham acknowledges that there are circumstances in which parents may bring IDEA claims on behalf of adult children, but argues that those circumstances have not been substantiated in this case.

Under the IDEA, children with disabilities are entitled to a FAPE through graduation from secondary school or age 21, whichever comes first. *See, e.g.* 20 U.S.C. §§ 1401(9), 1414(c)(5)(B). Pennsylvania law, through interconnected regulations, extends the right to a FAPE through the end of the school year in which the child with a disability turns 21. Pennsylvania special education regulations define a "student with a disability" as any child "of school age" who meets the IDEA's eligibility criteria. 22 Pa. Code § 14.101. In turn, a child is "of school age" either until graduation or until the end of the school year (or "term") in which the child turns 21 years old. 24 P.S. 13-1301. *See also* Pennsylvania Basic Educational Circular (BEC), Graduation Requirements for Students with Disabilities, March 6, 2017 (Graduation BEC).

The first day of the 2017-18 school year was August 31, 2017 in Neshaminy and September 5, 2017 in Cheltenham. Starting with either date, the Student turned 21 during the 2017-18 school year. Therefore, the Student is a child with a disability, entitled to a FAPE, until either the end of the 2017-18 school year, or until the end of whatever Extended School Year (ESY) services the Student may entitled to during the summer of 2018. *See* Graduation BEC.

Establishing the Student's current right to a FAPE does not, however, resolve the question of the Parents' standing. Although the Student has a current right to a FAPE, the Student is also an adult. The Parents allege that the Student has significant disabilities, including cognitive disabilities, which necessitate residential placement at [the private program]. Accepting those allegations as true does not expand my jurisdiction into guardianship proceedings. I have no authority to adjudicate the Student's general legal competency, and I have no authority to appoint the Parents as the Student's guardians. In Pennsylvania, that authority typically rests in the Orphan's Court Divisions of the county Courts of Common Pleas.

Perhaps in anticipation of this type of situation, the IDEA creates a "special rule" under which parents may continue to "represent" their adult children. 20 U.S.C. § 1415(m)(2). The special rule is explicitly for students "who [have] not been determined to be incompetent," taking general guardianship of the person out of the equation. *Id.* Rather, the special rule applies when a student "is determined not to have the ability to provide informed consent with respect to the educational program…" *Id*. Under those circumstances "the State shall establish procedures for appointing the parent … to represent the educational interests of the child throughout the period of eligibility." *Id.*

Pennsylvania has not established procedures particular to 20 U.S.C. § 1415(m)(2). In the absence of such procedures, the decision falls to me to. As noted, I recognize that the Orphan's Courts have jurisdiction in most guardianship-like proceedings. However, the IDEA provision in

question only applies in cases where the student "has not been determined to be incompetent." *Id*. When a student has been determined to be incompetent, parental rights remain with the parents, and do not transfer to the student. 20 U.S.C. § 1415(m)(1). This structure implies that the IDEA provision in question operates outside of traditional guardianship proceedings. I interpret this provision, therefore, to permit me to make appointments under 20 U.S.C. § 1415(m)(2). I must, therefore, determine if the Student has "the ability to provide informed consent with respect to the educational program."[7] *Id.*

The Parents have filed a Re-Evaluation Report from [the private program], dated July 11, 2017 (2017 RR). According to the 2017 RR, the Student's difficulties with the production and processing of language were so significant that only non-verbal intelligence tests were administered. The Student's full-scale, non-verbal IQ score was 41, below the 1st percentile compared to same-age peers, and in the "significantly below average" range. The Student's adaptive skills, which include measures such as the Student's ability to communicate, safety awareness, self-care, and social skills, were all significantly depressed. This resulted in a "General Adaptive Composite" score of 55 (as measured by teachers) and 54 (as measured by caregivers) – both below the 1st percentile. These scores are consistent with prior assessments, which are also reported in the 2017 RR.

The 2017 RR concludes that the Student, "exhibits significant deficits in cognitive and adaptive functioning… requires structure, assistance, supervision, and prompting in activities of daily living… [and] struggles with independence and functional skills compared to other [same-age] students." The evaluator found that the Student remained eligible as a student with an Intellectual Disability, Autism, and a Speech or Language Impairment.

Under these circumstances, I find it unlikely that the Student can provide informed consent with respect to the Student's own educational programming. This is not to say that the Student has no part in the IEP development process. Rather, accepting the 2017 RR as an accurate depiction of the Student's abilities, it is more likely than not that the Student cannot read, understand, and respond to an offer of educational programming to the extent that is contemplated by the IDEA's consent provisions. *See, e.g.* 20 U.S.C. §§ 1414, 1415 *et seq*. Consequently, I am satisfied that the special rule at 20 U.S.C. § 1415(m) applies to this case, and I appoint the Parents to represent the educational interests of the Student throughout these proceedings.

ORDER

Now, November 15, 2017, it is hereby **ORDERED** as follows:

1. Pursuant to 20 U.S.C. § 1415(m), the Parents are hereby appointed to represent the educational interests of the Student for the duration of these proceedings.

[7] Pennsylvania Orphan's Courts may also have jurisdiction to make a Section 1415(m)(2) appointment. Nothing herein should be construed as my interpretation of the jurisdiction of any other tribunal. Rather, it seems that the potentially concurrent jurisdiction is not a factor in this case.

2. The portions of the District's September 20, 2017, Motion to Dismiss that challenge the Parents' standing are **DISMISSED.**

/s/ Brian Jason Ford
HEARING OFFICER

Appendix B

Pre-Hearing Order Dismissing Claims Against [the Private Program] and Resolving the Scope of These Hearings

October 6, 2017

Pre-Hearing Order

Dismissing Claims Against [the Private Program]
and
Resolving the Scope of These Hearings

On October 6, 2017, all captioned parties, via counsel and the undersigned Hearing Officer participated in a pre-hearing conference call. During the conference call, the parties confirmed that there is no dispute about the appropriateness of the Student's current program and placement. The parties further confirmed that dismissing [the private program] from these proceedings will have no impact upon the Student's current program and placement. I note that the Parents did not withdraw their complaint against [the private program]. Rather, the Parents confirmed that there is no justiciable issue against [the private program], and that they do not object to [the private program's] dismissal.

Further, during the conference call, the Parents confirmed that the only relief that they seek is declaratory judgement, finding that either the Neshaminy School District or the Cheltenham School District is the Student's local educational agency (LEA).

ORDER

Now, October 6, 2017, it is hereby **ORDERED** that:

1. The complaint against [the private program], ODR No. 19466-1718AS, is **DISMISSED.**

2. The scope of this hearing is limited to the question of which school district, Neshaminy or Cheltenham, is the Student's LEA for IDEA purposes.

/s/ Brian Jason Ford
HEARING OFFICER