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.

IN THE PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION

Sufficiency Determination and Dismissal
ODR File No. 2816-1112AS

Child's Name: J.B.[1]
Date of Birth: [redacted]

Parties	Representative
Parent	Koert Wehberg, Esquire Gabe Labella, Esquire Disability Rights Network of Pennsylvania 1315 Walnut Street, Suite 500 Philadelphia, PA 19107
Schuylkill Intermediate Unit 29 17 Maple Avenue PO Box 130 Mar Lin, PA 17951-0130	Karl Romberger, Esquire Sweet Stevens Katz and Williams, LLP 331 East Butler Avenue New Britain, PA 18901

Date of Decision: February 14, 2012

Hearing Officer: Brian Jason Ford

[1] Other than this cover page, the child and parents names are not used to protect their privacy. "Parent" and "Student" is used instead. Other identifying information, such as the Student's gender, is omitted to the extent possible.

Introduction

Before me is the [redacted] (IU's) Sufficiency Challenge. The Sufficiency Challenge is somewhat unusual in that the IU argues that it is not the Student's local educational agency (LEA). For reasons set forth herein, I find that the IU is not the Student's LEA and dismiss the instant matter for that reason.

Procedural History

The Parent filed a single complaint against both the IU and [School District A] on January 26, 2012. When a complaint names two respondents, the Office for Dispute Resolution (ODR) treats the situation as if two identical complaints have been filed. The instant matter, ODR No. 2816-1112AS, the IU is the only respondent. [School District A] is the only respondent in ODR No. 2782-1112AS.

The IU filed its sufficiency challenge on February 9, 2012.

Applicable Legal Principles

I. Pleading Requirements

The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.,* as amended, (IDEA) affords an "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). Such complaints must contain, *inter alia*, "a description of the nature of the problem...including facts relating to such problem; and a proposed resolution of the problem to the extent known and available to the party at the time." 20 U.S.C. § 1415(b)(7)(A)(ii)(III), (IV); *see also* 34 C.F.R. §300.508(b)(5). A "party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets [these] requirements." 20 U.S.C. § 1415(b)(7)(B).

II. Sufficiency Challenges

If the responding party believes that the pleading requirements are not met, they may challenge the sufficiency of the complaint. *See* 20 U.S.C. § 1415(c)(2)(A). Such challenges must be filed within 15 days of the responding party's receipt of the complaint. *See* 20 U.S.C. § 1415(c)(2)(C). Then, "[w]ithin 5 days of receipt of [a sufficiency challenge] ... the hearing officer shall make a determination on the face of the [complaint] notice of whether the notification meets the requirements of subsection (b)(7)(A), and shall immediately notify the parties in writing of such determination." 20 U.S.C. § 1415(c)(2)(D).

III. Types of Agencies

The IDEA's general definition of an LEA is as follows:

> The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.

20 U.S.C. § 1401(19)(A). The IDEA also includes educational service agencies (ESAs) in the definition of LEAs. 20 U.S.C. § 1401(19)(B)(i). The IDEA defines ESAs as:

> (A) ... A regional public multiservice agency—
> (i) authorized by State law to develop, manage, and provide services or programs to local educational agencies; and
> (ii) recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and secondary schools of the State; and
> (B) includes any other public institution or agency having administrative control and direction over a public elementary school or secondary school.

20 U.S.C. § 1401(5).

Under the Pennsylvania Code, both school districts and intermediate units are LEAs. *See* 22 Pa Code § 14.103.

IV. Joint LEA Responsibility

LEAs must both provide a free appropriate public education (FAPE) to IDEA-eligible students and comply with the IDEA's procedural requirements. Neither party argues to the contrary. In fact, LEAs receive federal assistance to satisfy these obligations.[2] *See* 20 U.S.C. § 1413(a).

Important to this case, each LEA must *individually* comply with IDEA obligations. *See* 20 U.S.C. § 1413(a)(1). The IDEA contemplates only one scenario in which multiple LEAs are "jointly responsible for implementing [IDEA funded] programs." 20 U.S.C. § 1413(e)(3)(B). That scenario is spelled out in the IDEA:

[2] It may be more correct to say that it is the receipt of federal funding that triggers IDEA obligations.

> A State educational agency may require a local educational agency to establish its eligibility jointly with another local educational agency if the State educational agency determines that the local educational agency will be ineligible under this section because the local educational agency will not be able to establish and maintain programs of sufficient size and scope to effectively meet the needs of children with disabilities.

20 U.S.C. § 1413(e)(1)(A). However, even under that scenario, joint responsibility does not apply if an ESA "is required by State law to carry out [IDEA funded] programs..." 20 U.S.C. § 1413(e)(4)(A). If that is the case, the ESA alone is responsible. *See id*.

V. Pennsylvania Laws and Regulations

As noted above, Pennsylvania defines its IUs as LEAs, even though they may actually more closely resemble ESAs.[3] *See* 22 Pa Code § 14.103.

In most cases, students live with their parents and the LEA in which they reside is responsible for the provision of FAPE. The Pennsylvania Public School Code of 1949, 24 P.S. §§ 1-101—27-2702, contains provisions about how responsibilities must be divided when students are institutionalized outside of the district in which their parents reside. *See, e.g.* 24 P.S. § 13-1306. This regulation is more directly applicable in the case against [School District A], ODR No. 2872-1112AS, but has some applicability here as well. Generally, when a student's family lives in one LEA (the "home district" or "resident district") and the student attends a residential program[4] in another LEA (the "host district"), the host district is responsible for the provision of an appropriate program while the home district is responsible for funding those services. *See id, see also,* BEC: Nonresident Students in Institutions, effective July 1, 1999.[5] However, when a student is placed in a residential setting operated by an IU, the SEA pays up to a certain amount and the resident district covers any excess. *See id*. The BEC does not say whether the IU assumes any liability for the provision of an appropriate program under those circumstances.

Enrollment in a residential program notwithstanding, the SEA has provided a BEC describing LEAs' obligations and options when choosing a placement for IDEA-eligible students. *See* BEC: Placement Options for Special Education, effective September 1,

[3] It appears that under federal law, ESAs are properly thought of as a sub-set of LEAs under 20 U.S.C. § 1401(19)(B)(i). Pennsylvania makes no such distinction.
[4] More precisely, the statute addresses, "orphan asylum, home for the friendless, children's home, or other institution for the care or training of orphans or other children..." 24 P.S. § 13-1306(a).
[5] The Pennsylvania Department of Education, the Commonwealth's SEA, publishes Basic Education Circulars (BECs) to provide guidance on the implementation of laws, regulations and policy. BECs are distributed to LEAs and are available online. The BEC referenced here is available at http://www.portal.state.pa.us/portal/server.pt/community/purdon's_statutes/7503/nonresident_students_in_institutions/507335 (last accessed February 14, 2012).

1997, reviewed October, 2009.[6] This document, containing the SEA's instructions to LEAs for complying with 22 Pa Code § 14.102, in no uncertain terms explains that when an IEP team places a student in a program not operated by the student's LEA, the LEA "remains responsible for ensuring the implementation of the special education service or program that are provided by the private or public agency, organization or school meets the requirements of Chapter 14 ... and [the] IDEA." *Id*.

The Student's Placement History

For purposes of this Sufficiency Determination, facts contained in the Complaint regarding the Student's placement history will be taken as true. Further, it should be noted that the time period for which the Parents seek a remedy is the start of the 2010-11 school year through the present. The Student's family at all times lived and lives within [School District A's] boundaries.

The Student attended a residential treatment facility (RTF) from some time in 2007 until the Student was discharged in August of 2010. At that time, the Student's IEP team convened and the Student was placed in an emotional support (ES) program operated by the IU within one of the IU's buildings. The Complaint does not specify whether that building is located within [School District A]. Based on subsequent correspondence, the Haring Officer takes judicial notice that the IU's ES Program is located within the geographical boundaries of [School District B].[7]

In February of 2011, the Student was placed in an adolescent mental health group home (MH Group Home), also located within [School District B]. During this time, the Student continued to attend school in the IU's ES program.

On March 1, 2011, the Student was admitted to an inpatient psychiatric hospital (Hospital). The Complaint does not specify where the Hospital is located. The Student did not attend the IU's ES program while receiving inpatient treatment.

Both [School District A] and [School District B] participated in an IEP team meeting on March 14, 2011.[8] The Complaint is vague as to how long the Student remained in the Hospital, but it appears that the Student was discharged sometime around the March 14, 2011 IEP team meeting. The Complaint is also somewhat vague as to where the

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[6] The BEC concerning placement options is available at http://www.portal.state.pa.us/portal/server.pt/community/pa_codes/7501/placement_options_for_special_education/507357 (last accessed February 14, 2012).

[7] Although sufficiency determinations must be made on the face of a complaint, the Hearing Officer asked the parties for some clarification about the Student's placement history. Specifically, the Hearing Officer sought information about the period of time that the Student attended a school run by the IU, and about which school district that school is located. The Parents provided information about the period of time, and that information is consistent with the Complaint. The Parents also provided the address of the IU's school, but did not say what school district the IU's school is located within. Using that address, the Hearing Officer was able to determine that the IU's school is located within [School District B], [near School District A's] boundaries.

[8] It is reasonable to assume that the IU was also represented at this meeting, but the Complaint does not actually say so.

Student was placed after leaving the Hospital, but it appears that the Student returned to the MH Group Home. The Student also continued to attend the IU's ES program during the school day after discharge.

The Student was then readmitted to the Hospital on March 30, 2011. An interagency team then convened, including [School District A], [School District B] and the IU. A representative from the MH Group Home also attended this interagency meeting. During the meeting, it was agreed both that the Student should undergo psychological testing and that the Student required (or continued to require) residential treatment. However, in mid-April of 2011, the MH Group Home decided to discharge the Student due to behavioral issues. It appears that the Student actually remained in the Group Home for some time after that decision was made.

Another interagency meeting then convened on April 21, 2011, but this time [School District A] and the IU did not attend. As a result of the second interagency meeting, the Student was placed by [redacted] Children and Youth Services (C&Y) into a residential group home for dependent youth (Dependent Group Home). The Dependent Group Home is located within [School District B's] boundaries. The Student continued to attend the IU's ES Program while living in the Dependent Group Home.

The Student was readmitted to the Hospital on May 2, 2011 and remained there until discharge on May 10, 2011. Upon discharge, C&Y placed the Student in the [redacted] Youth Center (Youth Center).[9] The Hearing Officer takes judicial notice that the Youth Center is located in [School District C]. Although the Complaint is somewhat vague on this point, the Hearing Officer will assume that the Student continued to attend the IU's ES program while the Student was placed in the Youth Center.

The Complaint does not specify how long the Student remained in the Youth Center but, during that time, psychological testing revealed that the Student's I.Q. satisfies diagnostic criteria for Intellectual Disability. After leaving the juvenile facility, the Student returned to the Dependent Group Home and continued to attend the IU's ES program.

On June 10, 2011, [School District A] issued a notice of recommended educational placement (NOREP) that proposed exiting the Student from special education upon graduation. The District's graduation ceremony had occurred three days prior. The Parent signed the NOREP.[10] The Student was then exited from special education and the District issued a diploma. The Student stopped attending the IU's ES program at that time.

[9] The Youth Center provides temporary custody of juveniles accused of conduct subject to the jurisdiction of the Juvenile Court.

[10] About a month before the District issued the exiting NOREP, the Parent signed a voluntary placement agreement with C&Y, and the Student was adjudicated dependent and placed in the temporary custody of C&Y. Neither the IU in this proceeding nor [School District A] in ODR No. 2782-1112AS challenge the Parent's standing to bring claims on behalf of the Student during the period of C&Y's custody.

Discussion

Although sufficiency determinations must be made on the face of the Complaint, the Hearing Officer permitted the Parent to file a response to the IU's Sufficiency Challenge. In that response, the Parent argues that the IU is both an LEA and an ESA; that IDEA's FAPE obligations apply to LEAs and ESAs; and that parents may bring due process hearings against LEAs and ESAs. All of these arguments are correct, but they do not address the question of whether the IU is or was the *Student's* LEA or ESA – individually or jointly with [School District A].

Regarding joint responsibility, the Parent argues that 20 U.S.C. § 1413 is inapposite because that provision addresses "the criteria for two LEAs to establish joint eligibility for funding under the IDEA." *Response* at 5. The Haring Officer disagrees with that analysis. The provisions at 20 U.S.C. § 1413(e)(3)(B) explain how funds should be divided when two or more LEAs share joint responsibility. That sharing of joint responsibility is predicated on an SEA determination that the LEAs cannot satisfy IDEA mandates without partnering with each other. The Parent does not allege that the SEA made any such determination in this case.

If the IU was an ESA, examining 20 U.S.C. § 1413(e)(4)(A) in isolation could lead one to conclude that the IU alone was responsible for the provision of FAPE to the Student because Pennsylvania intermediate units closely resemble ESAs. But that single sub-part of the IDEA does not exist in a vacuum. Under Pennsylvania regulations, the IU is an LEA, not an ESA.[11]

The Parent does not claim that the SEA has established the joint responsibility contemplated at 20 U.S.C. § 1413(e)(3)(B), and the IU does not bare the sole responsibility that 20 U.S.C. § 1413(e)(4)(A) might create for ESAs. There is no other statute or regulation that explicitly establishes joint responsibility (or liability) for multiple LEAs in special education claims.

The Parent also cites a number of regulations establishing the procedural and substantive requirements of the IDEA. *See* Response at 4. LEAs unquestionably must satisfy these obligations. However, the Parent's argument that these regulations make it "clear that the IDEA contemplates entities beyond a student's home school district may be responsible for ensuring FAPE for students and complying with the requirements of the Act" is conclusory. None of the regulations cited by the Parent address joint responsibility. The only part of the IDEA that addresses joint responsibility is 20 U.S.C. § 1413(e).

[11] The Hearing Officer understands the supremacy of federal law, but does not find 20 U.S.C. § 1413(e)(4)(A) to be inconsistent with 22 Pa Code § 14.103. By defining intermediate units to be LEAs, and by drafting regulations and guidance to address placement options, Pennsylvania has specified which institutions are responsible for implementing the IDEA's mandates under various scenarios all while ensuring that students receive FAPE.

The Student's initial enrollment in the IU's ES program appears to have been an IEP team decision. As such [School District A] placed the Student into the IU's ES program via the Student's IEP. Consequently, this placement neither terminates [School District A's] FAPE obligation nor establishes a FAPE obligation for the IU. *See* BEC: Placement Options for Special Education.

Further, there is no allegation that the Student attended a residential placement run by the IU. Rather, the Student attended the MH Group Home, the Dependent Group Home and the Youth Center at various times. If any of these entities constitute "institution for the care or training of orphans or other children," the responsibility to provide FAPE shifts to the school districts in which those entitles are located ([School District B] for the MH Group Home and the Dependent Group Home, and [School District C] for the Youth Center). *See* 24 P.S. § 13-1306. In no event would the Student's admission to a residential facility shift the FAPE obligation to the IU.

Conclusion

In sum, the IU is an LEA, but not the Student's LEA. The circumstances contemplated in the IDEA under which joint LEA responsibility could be established are not present in this case. Consequently, [School District A] and the IU cannot both be the Student's LEA simultaneously, as alleged in the Complaint. Under Pennsylvania law, neither Student's placement into the IU's ES program nor the Student's enrollment in various residential programs make the IU the Student's LEA.

An order consistent with the foregoing follows.

ORDER

And now, February 14, 2012, it is hereby **ORDERED** that the Parent's Complaint against the [IU], ODR No. 2816-1112AS, is dismissed without prejudice.

/s/ Brian Jason Ford
HEARING OFFICER