

# **PENNSYLVANIA**

## **SPECIAL EDUCATION HEARING OFFICER**

This is a redacted version of the original hearing officer decision. Select details may have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

### **DECISION**

#### **DUE PROCESS HEARING**

Name of Child: S.B.  
ODR #5999/05-06 KE

Date of Birth: XX/XX/XX

Date of Hearing: December 7, 2005

#### **CLOSED HEARING**

#### **Parties to the Hearing:**

Parent

#### **Representative:**

Pro Se

School District of Philadelphia  
440 N. Broad Street, 3<sup>rd</sup> Floor  
Philadelphia, Pennsylvania 19130

Mimi Rose, Esquire  
Office of General Counsel  
School District of Philadelphia  
440 N. Broad Street 3<sup>rd</sup> Floor  
Philadelphia, Pennsylvania 19130

Date Transcript Received:

December 13, 2005

Date of Decision:

December 16, 2005

Hearing Officer:

Linda M. Valentini, Psy.D.

## Background

Student is an eligible student enrolled in the School District of Philadelphia (hereinafter District). His mother, Parent (hereinafter Parent) asked for this hearing in order to have Student's instructional location changed to another school in the District. She believes that he is unsafe at his current school due to a previous altercation in the neighborhood in April 2005 and a subsequent verbal threat in the school in September 2005 from one of the participants in the altercation. The District changed Student's school once at the Parent's request but the length of travel time became a factor, and both the District and the Parent agreed that placement was not viable. The District has offered at least one other school in the region<sup>1</sup>, but the Parent has rejected that offer believing that the school is not a suitable place for Student. The Parent seeks Student's placement in one of several high schools in the District outside Student's designated region.

At the prehearing conference the hearing officer learned that the Parent also alleges that Student's IEP is not being implemented. Given the potential urgency of a location change, this hearing officer bifurcated the hearing and received testimony only on the location change; another session will be scheduled for the IEP implementation issue(s) unless the parties come to a resolution between themselves. (NT 14-16, 65)

In order to place this decision in the context of Student as a student, the following historical information is offered<sup>2</sup>. He was first evaluated in August 1998 when his cognitive functioning was found to be variable (VIQ 90, PIQ 69) and he was placed in a full time learning support program. Inpatient and a partial psychiatric hospitalizations in February 1999 led to placement in a small, structured emotional support setting where he did well. He was subsequently mainstreamed into a 4<sup>th</sup> grade class and according to a November 2000 psychological evaluation made "fine progress" with wraparound support, and although he continued to demonstrate symptoms of ADHD, his behavior "improved greatly".

In May 2003 he received an occupational therapy evaluation and although some difficulties were noted particularly in handwriting occupational therapy was not found to be necessary. In June 2003 (end of 6<sup>th</sup> grade) an evaluation found him to be functioning in the average to low average range (VIQ 97, PIQ 83, FSIQ 90), his teacher reported he was instructional at a 6<sup>th</sup> grade level in reading and at the middle of 5<sup>th</sup> grade in math, and

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<sup>1</sup> The District is divided into geographical regions that, while under one governing body, are in some respects autonomous. Apparently, although not prohibited, it is not generally common for students from one region to transfer to another region. There are some schools designated as "magnet schools" however that draw students from the entire District as do the remedial disciplinary schools and some low incidence special education programs.

<sup>2</sup> The information is based upon the current IEP dated May 3, 2005, an occupational therapy evaluation dated May 1, 2003, an ER dated June 17, 2003 and a psychological evaluation report dated December 3, 2003. The hearing officer requested these documents in order to understand whether factors intrinsic to Student would affect her decision on the limited issue presented. These documents were not introduced as evidence into the record for this first part of the bifurcated hearing, as the District's attorney had not had the opportunity to review them beforehand. All but the IEP were faxed to the hearing officer by the Parent and/or the District after the hearing.

his WIAT standard scores were Basic Reading 91, Reading Comprehension 95, Mathematics Reasoning 73, and Spelling 96. He was not disruptive in the classroom. He continued to be found to have a disability (emotional disturbance with other health impaired as a secondary category) but not to be in need of specially designed instruction, and with his mother's approval was exited from special education with a recommendation for monitoring through CSAP and support in reading and math to bolster his self-confidence in these areas.

In December 2003 he received another evaluation<sup>3</sup>. On the Stanford Binet he achieved a Standard Age Score (SAS) of 88 in verbal reasoning, an SAS of 82 in visual abstract reasoning, an SAS of 74 in quantitative reasoning, and an SAS of 78 in short term memory. Achievement testing with the WIAT yielded standard scores as follows: Basic Reading 77, Reading Comprehension 94, Mathematics Reasoning 85, Numerical Operations 83, Spelling 96 and Listening Comprehension 95. The evaluator believed the scores may have been depressed because of lack of motivation and his not having received his medication for ADHD the morning of the testing. The evaluator offered a smorgasbord of options for the IEP team to consider ranging from "mainstream placement" through "resource support for learning and emotional problems" and "learning and/or emotional support class" to "placement in an approved private school". Additional recommendations were "resumption of individual and family therapy" and "resumption of medication therapy for ADHD". Following this evaluation he was again found to be eligible and was offered special education programs up to and including the present. Student is currently classified as emotionally disturbed and other health impaired (ADHD). His IEP calls for learning support<sup>4</sup> in a resource room for 7.67 hours per week and school-based counseling.

Apparently behavioral problems were present from preschool, where Student [was aggressive with] peers, had problems following directions and was unable to focus. High lead levels in early childhood were also noted. Subsequent to inpatient hospitalization in February 1999 for [two incidents of problematic behavior], Student attended a partial hospitalization day treatment program. At that time a psychiatric evaluation noted frequent school absences<sup>5</sup>, difficulty getting along with teachers, peers and adults, and an inability to focus on schoolwork. Following his return in March 2003 from a brief stay in [another state], Student reportedly began fighting almost daily with the other children in the neighborhood. [Redacted.]

### Issue

Must the School District of Philadelphia move Student to one of the high schools preferred by his mother?

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<sup>3</sup> It is not clear if this was done as an IEE or by one of the District's psychologists.

<sup>4</sup> A notation in the records cited above clarifies that the Parent did not want Student in an emotional support program because she believed he was brighter than the other students in those classes.

<sup>5</sup> It is noteworthy that in school years 1996-1997 through 2002-2003 Student was absent a total of 158 days (usually in the 20's, with a high of 30 and a low of 5).

### Findings of Fact

1. Student is a [teenaged] eligible student who currently attends High School. (NT 17)
2. Student has been diagnosed with Attention Deficit Disorder<sup>6</sup> and Oppositional Defiant Disorder. (NT 23)
3. In April 2005 there was [an incident involving Student]. (NT 1-21, 32)
4. After the [incident] the Parent requested and the District provided a transfer to School from the neighborhood school. (NT 21)
5. [Redacted.]
6. As Student was due to enter high school in September, in August the Parent completed paperwork for a transfer from School, his assigned high school. (NT 21-22)
7. On September 6, 2005 the Parent was present when [an incident occurred involving a peer]. (NT 17-18)
8. The District transferred Student from School and from the region to School, but after two weeks the principal and the Parent agreed that the commute was too long for Student given that he was in special education and was getting to school late everyday. (NT 33-34)
9. The Parent signed another transfer form but did not realize that the regional office would send Student back to School. (NT 38, 40)
10. Student then returned to School. (NT 34)
11. Student alleged that [another incident involving a peer occurred on September 14, 2005]. (NT 18-19, 49)
12. Shown individual photographs of the 12<sup>th</sup> grade class, Student was unwilling or unable to identify the [peer involved]. (NT 49-50)
13. The District has offered [Redacted] High School to Student but his mother rejected that placement because [a relative had] a bad experience there. (NT 37, 40-42)
14. The Parent maintains that Student is not safe in School. [Redacted.] (NT 19, 21-22)

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<sup>6</sup> Properly termed Attention Deficit Hyperactivity Disorder, Predominantly Inattentive Type according to the DSM-IV (Diagnostic and Statistical Manual – Fourth Edition)

15. The Parent believes that attending School is detrimental to Student's ability to benefit from his educational program because he is watching his back rather than focusing on his work and he is getting suspended often, she believes on purpose. (NT 24-25)

### Discussion and Conclusions of Law

The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) provides parents with an opportunity for an impartial due process hearing [118 STAT 2720 Section 615 (f)(1)(A)] 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 of such child [118 STAT Section 615 (b)(6)].

Prior to convening the hearing the hearing officer discussed with the parties the question of whether or not the resolution of the Parent's complaint fell under the jurisdiction of the hearing officer. According to the Dispute Resolution Manual (formerly the Hearing Officer Handbook) issued June 2004, Chapter 12, when questions of jurisdiction are raised, the Hearing Officer

*“must hold a hearing to consider the question of jurisdiction<sup>7</sup>. Once the record has been opened, opening statements have been given in order to establish the specific issues that the hearing has been requested for, and any necessary factual evidence has been entered into the record, the Hearing Officer has the authority to determine how to proceed. Further, the Hearing Officer has the authority to accept oral argument or written briefs on the question of jurisdiction. The decision whether or not to allow oral argument and/or written briefs is at the sole discretion of the Hearing Officer. Finally, the Hearing Officer may: 1. Rule on the issue of jurisdiction at the hearing; 2. Postpone the hearing until a specific date to allow time to receive briefs and render a decision on the question of jurisdiction; or 3. Continue with the hearing and rule on the question of jurisdiction as part of his or her decision. When a Hearing Officer dismisses some or all of the issues because of a jurisdictional challenge, the Hearing Officer must send to both parties and their representatives a written order dismissing the issues in question. That order may be appealed following the appeals procedures applicable to the specific type of hearing in question.*

Given that this hearing involved a pro se parent who believed the school to which her son was assigned was unsafe, this hearing officer chose to allow a complete record to be made to form the basis of a decision or a dismissal. The hearing officer also conducted a full hearing so that, in the event the finding was that she lacked jurisdiction to hear the issue, the District would have an opportunity to listen to the Parent's position and decide

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<sup>7</sup>In re Educational Assignment of T.L., Spec. Educ. Op. 1167 (2001); In re Educational Assignment of J.D., Spec. Educ. Op. 1176 (2001); In re Educational Assignment of E.H., Spec. Educ. Op. 1291 (2002).

whether to take prudent action on its own outside the boundaries of special education due process.

In In Re The Educational Assignment of M.V., Special Education Opinion No. 1459, February 2004, the Pennsylvania Appeals Panel noted that the IDEA's provision that "parents or 'public agencies' may initiate a hearing on the identification, evaluation, educational placement or provision of FAPE for a child with a disability", "demarcates the subject matter jurisdiction of hearing officers". The Panel, citing various incidences of case law noted that "a hearing officer cannot be a roving dispute resolution mechanism for any complaint of a student with a disability; when the issue is not tied to the student's disability under the IDEA or other special education legislation or regulation, any such resolution is *ultra vires*". Although the Panel allowed that "there are cases in which hearing officers, and the Appeals Panel, have decided issues that extend beyond special education, such as Pennsylvania law regarding home schooling, instruction in the home, and intermediate unit ancillary services, but only when these issues are intertwined with one or more of the prerequisite issues of identification, evaluation, placement, or FAPE".

This hearing officer was unable to establish that the subject matter of this hearing "intertwined" with a hearable issue, and likewise was unable to find any authority establishing the subject matter of this hearing as being under her jurisdiction. Accordingly, this matter is dismissed. The Parent may appeal this order as outlined in the Appeals Procedures enclosed with this decision.

By way of dicta, however, the District should be mindful that it does have a duty to ensure the safety of students during the hours the students are in the District's care, and that failure to utilize advance knowledge to prevent an aggressive incident would be imprudent indeed. In turn, the Parent should consider whether her objections to [Redacted] High School really should outweigh her concerns for Student's safety.

## ORDER

It is hereby ORDERED that:

This subject matter of this hearing is not within the jurisdiction of a special education due process hearing officer. The matter is therefore dismissed

December 16, 2005  
Date

*Linda M. Valentini, Psy.D.*  
Linda M. Valentini, Psy.D.  
Hearing Officer

## Special Education Hearing Officer

Linda M. Valentini, Psy.D. 2308 Waverly St. Philadelphia PA 19146 ♦ 215-732-5697 (phone) ♦ 215-732-2873 (fax)

December 16, 2005

Parent

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440 N. Broad Street, 3<sup>rd</sup> Floor  
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Office of General Counsel  
School District of Philadelphia  
440 N. Broad Street 3<sup>rd</sup> Floor  
Philadelphia, Pennsylvania 19130

Dear Parties and Counsel:

Enclosed is my decision for Student. You may appeal this decision to the panel of three Appellate Hearing Officers as outlined in the enclosed Appeal Procedures.

The school district is responsible for implementing this decision. Therefore, any questions regarding implementation should be discussed and resolved between the parties. Questions concerning this letter may be directed to Ms. Karen Eberly, case manager, at the Office for Dispute Resolution at 1-800-222-3353.

After the winter break I will contact the parties to see if there is a need for the second part of this bi-furcated matter, and if so will assign a hearing date.

Sincerely,

*Linda M. Valentini, Psy.D.*

Linda M. Valentini, Psy.D.  
Hearing Officer

Encl.: Decision; Appeal Procedure