

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.

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

ODR File No.: 7662/06-07 AS
Student: YW
School District: Haverford Township
Type of Hearing: Closed

For the Student:

Parents

For the School District:

Natalie M. Habert, Esq.
BeattyLincke
2 West Market Street
6th Floor
West Chester, PA 19383

Director of Special Programs
Havertown Township School District
1801 Darby Road

Due Process Hearing Request Date:	May 10, 2007
Hearing Date:	Not Conducted
Date record was closed:	September 6, 2007
Decision Date:	September 10, 2007
Hearing Officer:	Daniel J. Myers

BACKGROUND

Student is an xx year old former School District elementary school student who is currently living and attending school in [country redacted] while his parents reside full time within the School District's boundaries. Last school year, the Student attended the School District's elementary school, during which time the School District requested parental permission to conduct a psychiatric evaluation of Student. The School District requested this due process hearing when Student's parents refused to grant the requested permission.

Since the due process hearing was requested, Student's parents have adamantly objected to being required to appear for hearing. In fact, they have even sent Student to live in [country redacted] with relatives, and Student now attends school in [country redacted]. The School District, however, refuses to withdraw its request for due process hearing. The School District argues first that, because Student's parents continue to reside within the School District's boundaries, Student is, by law, a School District resident for whom the School District remains educationally responsible. The School District further contends that this matter is not moot because Student may someday return to the School District, at which time the School District needs a Hearing Officer's order overriding parental refusal to permit a psychiatric evaluation.

For the reasons described below, I dismiss this case without conducting a due process hearing.

ISSUE

If a school age child lives and attends school in [country redacted], but his parents reside within the School District's geographical boundaries, is the School District entitled to a due process hearing for the purpose of obtaining a hearing officer's order to override parental refusal to permit psychiatric evaluation of the Student?

FINDINGS OF FACT

The following facts are not disputed.

1. Student is an xx year old child whose date of birth is xx/xx/xx. (HO 1)¹
2. Student's parents reside together within the geographical boundaries of the School District. (HO 1)

¹ Because no due process hearing was conducted, there are only two exhibits in the record. Those exhibits are the School District's May 10, 2007 Due Process Complaint Notice, and my prehearing correspondence to the parties, which I have identified and admitted into the record as Hearing Officer Exhibits 1 and 2, respectively.

3. For at least the 2006-2007 school year, Student lived within the School District's geographical boundaries and he attended the School District's public schools.
4. On March 19, 2007 and on April 13, 2007, the School District requested permission from Student's parents to conduct a psychiatric evaluation of Student. Because Student's parents speak both English and [foreign language redacted] languages, the School District's requests for permission were in both the English and [redacted foreign] languages. (HO 1)
5. Student's parents refuse to give to the School District permission to conduct a psychiatric evaluation of Student. (HO 1)
6. On May 10, 2007, the School District requested a due process hearing for the purpose of obtaining a Hearing Officer's order overriding parental refusal to grant permission to conduct a psychiatric evaluation of Student. (HO 1)
7. Some time after May 10, 2007, Student moved to [country redacted] to live with relatives.
8. Some time after May 10, 2007, Student's parents filed with the School District its disenrollment form for Student. The School District has forwarded Student's educational records to an address in [country redacted] that was provided by Student's parents.
9. Student's parents have consistently and adamantly resisted any due process hearing in this case. At least one of the reasons alleged, more than once, by Student's parents for their resistance to the due process hearing is that it will be quite stressful to Student's parents.
10. On June 26, 2007, I issued correspondence to the parties indicating my suspicion that the underlying issue in this case was whether, in fact, Student might return from [country redacted] to the School District at the end of the summer. Thus, on June 26, 2007, I postponed the due process hearing until September 10, 2007, which would be after the start of the 2007-2008 school year. (HO 2)
11. To date, Student has not returned to the United States, and he is neither living, nor attending school, within the School District.
12. The School District refuses to withdraw its request for due process hearing, contending that it cannot risk a later claim by either Student's parents or others that the School District failed to pursue a necessary psychiatric evaluation of a School District resident.
13. Meanwhile, the School District's lawyer attempted to work out with Student's parents a solution to the lawyer's scheduling conflict with the 10:00 a.m. start time of the September 10, 2007 hearing. More specifically, the School District's

lawyer suggested that the parties agree either to a later start time on September 10, 2007, or to submit the initial issue of “jurisdiction/residency” on stipulated facts and conduct a due process hearing, if necessary, on a later date. Student’s parents, while respectful, refused to agree to anything proposed by the School District’s lawyer, contending that this case must be dismissed.

14. On Thursday, September 6, 2007, after reviewing the parties’ emails containing the undisputed facts listed above, I informed the parties that I intended to cancel the Monday, September 10 hearing, dismiss the case, and issue a written decision.

DISCUSSION

Under the Individuals with Disabilities Education Improvement Act (IDEIA), the School District is required to provide a free appropriate public education (FAPE) to all Students who qualify for special education services. 20 U.S.C. § 1412 The School District program will meet its FAPE obligation if it provides special education and related services at public expense, that meet the standards of the state educational agency, and that are provided in conformity with an individualized education program (IEP.) Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998)

The IDEIA contains “child find” provisions requiring that all children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving special education and related services. 20 U.S.C. § 1412(a)(3); 34 CFR §300.111 These child find responsibilities apply even in the cases of “highly mobile” children. 34 CFR §300.111(c)(2) A school district cannot be compelled to assume any responsibility for evaluating a child, however, while he remains outside Pennsylvania in a unilateral placement. Great Valley School District v. Douglas and Barbara M., ___ Pa. Cmwlth.Ct. ___, 807 A.2d 315 (2002)

In Pennsylvania, the Federal child find responsibilities have been delegated to school districts. 22 Pa. Code §14.121 A child shall be considered a resident of the school district in which his parents or the guardian of his person resides. 24 Pa.C.S. §13-1302 Sometimes hearing officers must determine residency issues where residency under state law is intertwined with the IDEIA’s FAPE obligation. In Re the Educational Assignment of a Student in the Ridgeway Area School District, Special Education Opinion No. 1803 (2007); In Re the Educational Assignment of a Student in the Upper Merion School District, Special Education Opinion No. 1198

On the other hand, hearing officers are not empowered to issue advisory opinions, even where the school district may want to have a determination of FAPE and an IEP in place should a student return during the school year. In Re the Educational Assignment of a Student in the Colonial School District, Special Education Opinion No. 1008 (2000) Where an issue is considered moot, and a case or controversy no longer exists between

parties, a judicial decision is considered to be an inappropriate “advisory opinion.” An actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. Preiser v. Newkirk, 422 U.S. 395, 45 L. Ed. 2d 272, 95 S. Ct. 2330 (1978) An exception to this mootness doctrine exists where the controversy is capable of repetition yet evading review. Winston v CYS of Delaware County, 948 F.2d 1380 (3rd Cir. 1991)

Mootness and case-or-controversy are jurisdictional issues precluding an adjudicator from adjudicating a case. The School District argues, however, that jurisdiction is not at issue, but rather that the real question in this case is whether Student is a resident of the School District. The School District contends that, if I decide that Student is a resident of the School District, then a hearing is necessary on the issue of whether or not the School District can obtain a psychiatric evaluation of Student when he returns to the School District. The School District argues that, if I determine that Student is not a resident of the School District, then the School District would have no FAPE obligation to Student and, consequently, no standing to request either a psychiatric evaluation of Student or a due process hearing to override parental refusal to grant permission for a psychiatric evaluation.

One of the critical, undisputed facts in this case, however, is that Student’s parents have unilaterally moved Student to [country redacted]. Another critical, undisputed fact is that the School District seeks, not to evaluate Student over the next 60-90 days, while he is in [country redacted], but sometime in the future – if and when Student ever returns to the School District.

It is true that the question of whether the School District had sufficient reason to seek a psychiatric evaluation of Student in the Spring of 2007 is within my jurisdiction. That issue was rendered moot, however, when Student’s parents moved him to [country redacted]. While it might have become relevant again if Student had returned to the School District from [country redacted] for this 2007-2008 school year, that has not happened. As it stands no one knows precisely when, or even if, Student ever will return to the School District from [country redacted].

Apparently, the School District fears that, if and when Student does return from [country redacted], the School District will have to go through the parental permission process and due process hearing system before it can evaluate Student, all the while exposed to compensatory education liability. Clearly, then, the School District’s intention is not to take a hearing officer’s decision and immediately start evaluating Student, perhaps by contracting with a [foreign country resident] evaluator or by flying Student to the United States for evaluation. Rather, the School District’s intention is to avoid liability for not having evaluated Student while he was living in [country redacted]. In fact, however, the School District may not be required to evaluate Student unless or until he returns for public education in the School District. See Great Valley School District v. Douglas and Barbara M., ___ Pa. Cmwltth.Ct. ___, 807 A.2d 315 (2002)

Thus, even if I conducted a due process hearing in this case, what would be the purpose of my decision? And what if Student does return to the School District, but not until 2010? What would be the shelf-life of my decision regarding the School District's Spring 2007 request for permission to conduct a psychiatric evaluation? These questions demonstrate three things clearly: 1) the lack of any present case or controversy; 2) the mootness of any Spring 2007 dispute between the parties; and 3) the advisory nature of any hearing officer decision in this case.

I further note that no exception to the mootness doctrine applies here. A moot issue can be decided where the controversy is capable of repetition yet evading review. Winston v CYS of Delaware County, 948 F.2d 1380 (3rd Cir. 1991) In this case, the controversy is definitely capable of repetition. Just as the School District and Student's parent disagreed in Spring 2007 over whether or not the School District may conduct a psychiatric evaluation of Student, the same controversy might arise if and when Student ever returns from [country redacted] to attend the School District's public schools. This controversy, however, would not evade review because, if that controversy arose, the parties would be entitled to a due process hearing at that time to resolve their dispute. Thus, there is no reason to find in this case that an exception to the mootness doctrine exists to permit jurisdiction.

The Appeals Panels have made it quite clear that it is not only proper, but also critical, for hearing officers to dismiss cases via a hearing. In Re the Educational Assignment of a Student in the Spring-Ford Area District, Special Education Opinion No. 1712 (2006) Frankly, I was looking forward to conducting a due process hearing in this case in order to probe whether or not this School District, in an effort to reduce its risks, genuinely evaluates every school-age child of every School District resident, regardless of where that child lives and/or attends school. I was looking forward to hearing how the School District distinguishes, if at all, this Student from: residents' school age children attending charter schools; residents' school age children attending out-of-district court-adjudicated educational placements; and any (probably wealthy) residents' school age children attending private boarding schools that are located in other states and, possibly, in other countries – all of whom could, possibly, enroll in the School District's public schools some day.

One of the undisputed facts in this case, however, is that Student's parents have consistently and adamantly resisted any hearing at least in part because they believe it will be quite stressful to them. Admittedly, I might be completely fooled by their consistent and adamant assertions of stressful fears. In addition, I am certain that School District's experienced officials, as well as I, could have ensured that the hearing would not have been as stressful as Student's parents feared. Nevertheless, I have before me a case where: 1) it is undisputed that Student does not live in the School District; 2) Student has not returned to the School District for new school year; 3) no one knows precisely when, or even if, Student ever will return to the School District; 4) Student's parents consistently and adamantly resist the due process hearing due in part, at least, to the perceived stress of such a hearing; and 5) the School District's intention is not to take a

hearing officer's Order to [country redacted] in order to evaluate Student, but rather to keep such an Order in its back pocket, just in case Student ever returns.

Under those circumstances, I believe that there is no case or controversy in this matter, that any disputed issue is moot, that any Hearing Officer opinion would be advisory, and that I have the discretion to dismiss this case without conducting a due process hearing. Accordingly, I dismiss this case.

CONCLUSION

The School District requested a Hearing Officer's order to override parental refusal to grant permission to conduct a psychiatric evaluation of Student. In response, Student's parents moved Student to [country redacted], where he now lives and attends school. Although no one knows when, or even if, Student ever will return from [country redacted], the School District insists that I have jurisdiction over this matter. The School District contends that I must determine whether Student is a resident of the School District in light of his parents' residency and, if so, whether or not parental refusal to permit psychiatric evaluation of Student should be overridden. Because I find that no case or controversy exists, that any disputed issue is moot, and that any Hearing Officer opinion would be advisory, I dismiss the case. Further, in light of consistent and adamant concerns of Student's parents regarding the perceived stress of a due process hearing, I dismiss this case without conducting a due process hearing.

ORDER

- I lack jurisdiction over this matter.
- No case or controversy exists in this matter.
- Any disputed issue in this matter is moot.
- Any Hearing Officer opinion in this matter would be advisory.
- This matter is DISMISSED and considered CLOSED.

Daniel J. Myers

Hearing Officer

September 10, 2007

ODR File No.: 7662/06-07 AS
Student: Student
School District: Haverford Township