

STATE OF SOUTH CAROLINA	)	
	)	
FLORENCE COUNTY	)	LOCAL DUE PROCESS HEARING
	)	HEARING OFFICER BRUCE J. SMITH
In the Matter of:	)	
	)	
M.G., on behalf of C.B.,	)	
	)	
Petitioner,	)	
v.	)	FINAL ORDER
	)	
Florence County School District One,	)	
Respondent.	)	

PROCEDURAL HISTORY

This matter is before me pursuant to a request, initially received via email on March 31, 2022, that I serve as the Local Due Process Hearing Officer. As a result of the parties' failure to fully resolve this dispute during the resolution period, a pre-hearing conference call was conducted on May 3, 2022. Both parties agreed to exchange relative information prior to the hearing. The time and date was set for May 18 and 19, 2022, at 9:00 a.m. at Florence County School District One's (Respondent's/District's) Office at 319 S. Dargan Street in Florence, SC.

SUMMARY

The Petitioner/Parent filed this action on the basis of:

1. The District's failure to comply with the Individuals with Disabilities Education Act (IDEA) child find requirement by failing to identify the Student's specific learning disabilities, identify the Student's need for special education services, and provide the Student a free appropriate public education (FAPE).
2. The District's failure to provide the Parent's request for an independent educational evaluation (IEE) at the District expense. (Hearing Officer Exhibit 1)

PROCESS

This hearing was conducted according to a preset format that was presented to both parties and reviewed at the outset of the hearing. The hearing began at approximately 9:00 a.m.

and proceeded until approximately 3:00 p.m. on May 18, 2022. The hearing reconvened on May 19, 2022, at 9:00 a.m. and concluded at approximately 10:30 a.m.

Both parties were offered the opportunity to begin the hearing with an opening statement. This was followed by the presentation of the Petitioner's case and the calling of witnesses. Both parties had an opportunity to cross-examine the witnesses and offer rebuttal witnesses. Afterwards, each party offered an oral closing statement.

ISSUES

1. Did the District fail to identify the Student's specific learning disabilities, identify the Student's need for special education services, and provide the Student a FAPE? The Petitioner alleges that the District did not timely and properly evaluate the Student, and therefore, the Student was erroneously determined not to be eligible as a child with a disability under the IDEA and did not receive special education and related services.
2. Did the District fail to provide an IEE at District expense in that; upon the Parent's disagreement with the District's evaluation results and request for the District to pay for a private IEE did the District, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation was appropriate; or ensure that an IEE was provided at public expense?

FINDINGS

Testimony, supporting evidence, and arguments presented at the hearing were all considered in my findings as they related to the issues set forth above.

1. The Student is a 6 year, 9 month old male student and has been enrolled in the Respondent District since kindergarten in the 2020-21 school year. Because of COVID-19, the Student attended most of the school year virtually. Testimony (Josie Little, page 216 lines 14-22) reflected on the fact that virtual learning for the very young, limited their educational experience). This resulted in a less than ideal setting for the Student and the Respondent District recommended retention so he could be exposed to a more face-to-face kindergarten experience. That opportunity was declined by the Parent/Petitioner and the Student was advanced to the first grade.

Throughout the testimony there were references to the Student's willingness to work (try) hard and all of the witnesses, who knew him, commented that he was a delight to be around. District staff also testified that while the Student's Intelligence Quotient (IQ) of 81 inhibits his ability to learn, he made significant, meaningful growth this school year as a general education student.

2. On August 31, 2021, at the very start of first grade, the District began monitoring and providing support for the Student through Multi-Tiered System of Support (MTSS) as a general education student.
3. On September 24, 2021, the Petitioner emailed the District with for an evaluation request, and again on September 27, 2021 (via email) the Petitioner requested an initial evaluation and a complete psycho-educational evaluation of the Student, including speech-language and occupational therapy evaluations, which were conducted that fall.
4. On September 25, 2021, the District informed the Petitioner, with a Prior Written Notice, that in response to the September 24, 2021, request, a team would start with the MTSS Intervention Process first.
5. On October 11, 2021, the District replied to an email from the Petitioner, "We cannot proceed with an evaluation based on your e-mail. We can proceed, however, in scheduling an evaluation planning meeting to discuss your request for an evaluation."
6. On October 18, 2021, the team met to discuss the Student's academic performance, MTSS service results, and the Parent's input to determine whether an evaluation would be appropriate.
7. The Student was evaluated in multiple areas by a certified, qualified school psychologist and the report from that evaluation was reviewed with the Parent and the entire eligibility team on December 13, 2021. With the exception of the Parent, the team determined that the Student failed the eligibility criteria as a child with a disability under the IDEA.
8. On that same day, December 13, 2021 (just prior to the holiday break), and again on January 8, 2022, with an email (immediately following the holiday break) the Petitioner/Parent requested an IEE.
9. On February 22, 2022, the Petitioner/Parent filed a State Complaint and request for

due process. (The State Department advised that she could not bring both so she decided to pursue the State Complaint.)

10. On March 1, 2022, the State Department dismissed the Parent's complaint.
11. On March 21, 2022, the Parent filed the current request for a due process hearing.
12. On March 31, 2022, the District responded to the Due Process hearing request and filed a counterclaim against the Parent for a declaration that its own evaluation was appropriate.
13. During discussions during the resolution period the District offered to pay for and is presently (as of May 26) providing the Student an IEE with the evaluator of the Petitioner's choice.
14. The Student continues to receive MTSS supports and interventions, continues to make progress, and is going to be promoted to the second grade.
15. The Petitioner did not challenge any of the facts stated in the Respondent's brief nor was there any conflict in stated facts disclosed in supporting documentation/exhibits and hearing testimony.

DISCUSSION

During the day and a half due process hearing, the Local-Level Hearing Officer (LHO) heard testimony from nine witnesses. Throughout the testimony there were references to the Student's willingness to work (try) hard and all of the witnesses, who knew him, commented that he was a delight to be around. They also testified to significant, meaningful growth this school year as a general education student.

The Petitioner led off the hearing by direct examination of District staff and educators for the purpose of establishing the District failed to identify the child's specific learning disabilities, need for special education services, and provide the Student a FAPE.

Testimony revealed that on August 31, 2021, at the very start of first grade, the District began monitoring and providing support for the student through Multi-Tiered System of Support (MTSS) as a general education student. After he started first grade, the school faculty began to review the Student's performance in weekly MTSS meetings. It was determined that he should

receive Tier 2 interventions, and he ultimately received interventions for Reading, Math, Speech, and Motor Skills. (Testimony the MTSS facilitator, Sherry Sawyer; Josie Little; Karen Munn; Dist. Exhs. 4, 5, 8, Parent Exh. 7)

The Student was evaluated by a certified, qualified, experienced school psychologist, speech language pathologist (SLP), and occupational therapist (OT). The evaluation explored multiple areas and contained multiple components. Parent Exh. 3, evaluation report. The evaluation report was reviewed with the Parent by the school psychologist, the SLP, and the OT. In testimony, the school psychologist was asked why the Student failed. The school psychologist testified "One of the categories that we considered for eligibility was whether or not he qualified under a specific learning disability. According to the state criteria, part of the criteria is to look at their cognitive ability and compare that with their achievement skill, and we're looking for a pattern of strengths and weaknesses, and on his performance on this testing, he did not exhibit that." (Testimony p. 91, lines 6-14)

The school psychologist; Ashley Hylton, the SLP; and Doren Crolley, the OT, testified that the District's evaluation was carefully planned at an evaluation planning meeting with input from the Parent, who was accompanied by an advocate, and the teacher. The assessments were thoughtfully selected. They testified that the evaluation was appropriate, and the school psychologist testified that the evaluation included all the required components and included information that was collected from a variety of sources and the results were valid and reliable. (Testimony Griffin page 125 -126, lines 2-6)

In testimony the Student's general education teacher, acknowledged struggles the Student was demonstrating in the classroom. She acknowledged that as a teacher, she was not qualified to interpret the results of the standardized assessments administered by the evaluators, and that she believed that the school psychologist was qualified, and she trusted her interpretations. The Student's teacher also described significant growth. "I know without a doubt that he has grown from the beginning of the year to now." (Testimony p.85, lines 24-25)

All three MTSS evaluators (Griffin, Hylton, Crolley), in testimony, explained the

decisions they made in the initial evaluation planning meeting. The entire team examined the concerns with the Student's performance, and the entire team agreed upon what components the evaluation should have. The evaluation plan included an assessment of behavior based on the Parent's concerns, even though there were not similar concerns on the part of the school team. The assessments used were technically-sound and measured performance in various areas based on the actual concerns discussed in the evaluation planning team meeting.

The Petitioner made inquiries relative to timelines for conducting evaluations, Brian Denny, the Assistant Superintendent for Special Education (District LEA representative), replied "We have 60 calendar days to complete initial evaluation; once the evaluation is completed, then there's 15 calendar days to determine eligibility; and after eligibility there's 30 calendar days to write or implement the IEP if the student meets qualifications." (Testimony p. 20, lines 12-17) *In terms of timelines, under the State's regulations, SBE Reg. 43.243 and the SEED document, the timeframe for conducting an initial evaluation is 60 days from receipt of informed consent.*

Relative to timeliness, the Petitioner/Parent pointed to the sixty-day timeline for an evaluation in an effort to establish the District did not complete the evaluation within sixty days of her first request. The Parent's consent form is backdated, one month, to pre-date even her first request. (Testimony p. 106-107, lines 18 - 16) The form was signed and returned on October 19, 2021, (not September, 19, 2021) and a meeting to review the evaluation report and determine eligibility was conducted by December 13, 2021.

From the findings above:

1. On September 24, 2021, via email, the Petitioner requested an evaluation and a complete psychoeducational evaluation.
2. On September 25, 2021, the District informed the Petitioner that a team would start with the MTSS Intervention Process first.
3. On October 11, 2021, the District replied to an email from the Petitioner, "We cannot proceed with an evaluation based on your e-mail. We can proceed, however, in scheduling an evaluation planning meeting to discuss your request for an evaluation."
4. The Student was evaluated in multiple areas by a certified, qualified school

psychologist and the report from that evaluation was reviewed with the Parent and the entire eligibility team on December 13, 2021.

The evaluation, therefore, was timely and appropriate.

Relative to evaluation integrity, the Parent provided no evidence through testimony or otherwise to show the District's evaluation of the Student was inappropriate and/or failed to meet federal and state requirements.

The Petitioner, through direct examination, attempted to establish that the Student is eligible for special education as student with a disability under the IDEA.

Eligibility is determined by a team of knowledgeable professionals who review relevant information. Specifically, a group of qualified professionals and the parent of the child determine whether the child has a disability under the IDEA. The District must then provide a copy of the evaluation report and documentation of determination of eligibility. 34 CFR § 300.306(a). The determination of eligibility involves an analysis of the evaluation and other information to determine if the student meets the eligibility criteria for any of the thirteen eligibility categories under State and federal regulations. See SBE R 24.243.1.

The eligibility team for the Student spent a great deal of time reviewing the information collected during the evaluation planning meeting and the evaluation, such as assessments administered to the Student, classroom performance data, MTSS information, social/developmental history information completed by the Parent, and scales completed by the Parent and teacher. The school psychologist provided testimony regarding the eligibility criteria under State regulation, and explained the identification of "patterns of strengths and weaknesses," and the relationship between cognitive skills and achievement.

The school psychologist was asked by the Respondent, relative to Parent Exhibit 3; "Can you explain why you proposed the student, [the Student], does not meet the criteria for special education services?" She replied, "One of the categories that we considered for eligibility was

whether or not he qualified under a specific learning disability. According to the state criteria, part of the criteria is to look at their cognitive ability and compare that with their achievement skill, and we're looking for a pattern of strengths and weaknesses, and on his performance on this testing, he did not exhibit that". (Testimony P.91, lines. 3-14) .

Respondent asked; "Can you tell me about the results of the cognitive assessment? What was the result?" Griffin: "So this test scores between 90 and 109 are considered average scores. Most of CB's scores are in the 80s to 90s range. He did have one score that fell at a 73, so the summary of that is that his cognitive ability is in the below average to average range".

Respondent asked; "Okay. Below average to average range in cognitive?" Griffin, "Yes."

Respondent, "And his full scale IQ, what does that mean?" Griffin, "His full scale IQ is 81, which is in the below average range. What that means is that he is -- if we consider 90 to 109 as being average, it's a little bit below average range, but he has the ability to learn new information. He might just need a little bit more practice and repetition, but he certainly has the ability to learn". (Testimony Pages 111 -112.)

Respondent; "So in looking at these achievement scores, how did they relate to the cognitive scores?" Griffin; "His achievement scores are in line with where his cognitive ability is. He's achieving at the rate you would expect him to, based on his cognitive ability". (Testimony p. 114 lines 14 -20)

The SLP provided testimony regarding scores that in large part were within normal limits. None of these things amounted to eligibility under the State's criteria. The Petitioner did not provide any proof that the team interpreted the evaluation incorrectly or that the eligibility determination was not sound. The Parent spent a lot of time during the hearing attempting to demonstrate that the Student has not made gains, as if a lack of progress would show that the eligibility determination was wrong. A lack of progress does not amount to a disability, and slow progress can be the result of other things. In this case, testimony from the school psychologist; the Student's teacher; Josie Little, principal; and the MTSS facilitator all showed that the

Petitioner's option for the Student to attend kindergarten virtually was not ideal for the Student. The Petitioner agreed, based on her social/developmental history form responses. (Dist. Exh. 2, p. 216, attachment to email; Parent Exh. 3, p. 1, evaluation report.) However, in spite of this, the Student made significant gains this year.

Numerous witnesses testified that although the Student's grades were not strong, he made good progress. For example, his general education teacher gave the following indicators of progress, stating that he "made a lot of gains" "even as of yesterday [May 17]": improved writing (recently wrote a 3 sentence work); 100% on the Accelerated Reader (AR) test -100% (which is precisely addressed in interventions under MTSS); earned certificate in math for passing math facts assessment; up to 42/43 of 53 words on first grade sight words list; improvements socially/initial aggression at the start of the year; increased confidence; improved performance on CBM; 7 month gain on ELL; a gain of approximately a year and a half on STAR assessment after beginning the year at 0.0; and improvement on Running Records from Level A to Level F, which is middle of first grade range.

The teacher was asked by the Petitioner whether a lower grade at the end of the school year as compared to the start of the school year is "regression." The teacher seemed to accept the Petitioner's premise that a lower grade would be regression. However, her testimony on this appears to be a misunderstanding of what regression means given the rest of her testimony. The dictionary definition of regression is the loss of skills. None of the teacher's testimony described any loss of skills. To the contrary, as described above, she testified to significant growth. Later in her testimony she again used the word regression as it related to his grades in a new reading curriculum they are using, but then acknowledged that the new curriculum's assessments test at above grade level. She also testified that she found MTSS to be successful for the Student, and stated, "I know without a doubt he has grown." (p.85, lines 24-25)

The MTSS facilitator, the Reading Recovery teacher, the SLP, and the OT all testified to the Student's progress in MTSS, and the records show this progress, as well. (District Exhs. 4, 5, 8; Parent Exh. 7) In fact, the Student exceeded the target for one of his two goals in speech interventions, with the other goal showing progress, too, despite having been relatively new. (District Exh. 4, MTSS Progress - Speech)

The OT also testified about the Student's progress on motor skills goals in response to her interventions, and this is supported in the MTSS progress reports. (District. Exh. 8, MTSS Progress – Motor)

The Reading Recovery teacher described the one-on-one interventions she provided to the Student during the second half of the school year through Reading Recovery, and testified to great progress. She testified that the Student reached a Text Level of 14, which was his target and demonstrated great gains in self-corrections and problem solving, fluency and phrasing for better comprehension. (Testimony Swaringer; Dist. Exh. 5, MTSS Progress – Reading; Math.)

The MTSS facilitator, testified to his growth, again with monitoring reflecting approximately a year and a half of growth. Although his grades are not strong, the Student has met criteria to be promoted to second grade, which is particularly significant in light of the testimony that at the end of last school year it was recommended that he be retained. Clearly, the Student is capable of progressing and learning in a general education setting, and he is benefitting from the supports that are available to all general education students to work on closing any skill gaps.

On the other hand, relative to establishing that the Student is eligible for special education as student with a disability under the IDEA, the parent provided no evidence through testimony or otherwise.

The Petitioner, through direct examination, attempted to establish that the school district failed to provide an IEE at district expense.

Under 34 C.F.R. § 300.502(b), if a parent requests an IEE at public expense, the public agency must, without unnecessary delay, either -

- (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless...

In other words, a parent of a child with a disability has the right to an IEE if the parent disagrees with an evaluation obtained by the school district except under two conditions: the District demonstrates in a due process hearing that its own evaluation of the child was appropriate; or the district demonstrates in a due process hearing that the evaluation obtained by the parents did not meet district criteria. In this case the District conducted an evaluation and determined that the Student is not a child with a disability as defined by the IDEA and the State's evaluation criteria.

There is no specific timeline during which the District must respond to a request for an IEE, and instead the expectation is that the District respond "without unnecessary delay", i.e. within a reasonable timeframe. 34 CFR 300.502(b)(2). Whether a delay is unreasonable turns on the facts of the case. The District originally acknowledged Petitioners request for an IEE on December 13, 2021, the very day of the eligibility determination meeting. (Parent Exh. 3, pp. 17-18, Dec. 13, 2021, PWN)

The District's original response to the due process hearing request (DPR) and its opening statement further show the procedural history of this matter that is relevant to the timeliness of the IEE response: that the Parent originally filed a State Department of Education complaint and DPR at the same time in February 2022, after asking for an IEE directly before the holiday break and then directly after in January 2022. The Parent then chose to maintain the State Department complaint rather than pursuing the due process hearing, but the State Department complaint was dismissed by letter dated March 1, 2022. (Due Process Response Exh. C.)

The Petitioner then filed a DPR again on March 21, 2022, and the District responded to the DPR within the ten-day timeframe on March 31, 2022, with the ten-day required response and a counterclaim for declaration that the District's response was appropriate. This filing was responsive to the IEE request. It is reasonable for the District to have taken some time to determine whether the District was prepared to file a claim against the Parent to show its evaluation was appropriate rather than provide an IEE. In this case, the District has done two

things responsive to the IEE request: filed a claim against the Parent for a declaration that its own evaluation is appropriate (counterclaim), and provided the Student an IEE. See Due Process Response. In fact, the Student is in the midst of a private evaluation provided by the District with the evaluator of the Parent's choosing. (Testimony Denny.)

However, as explained above, the District presented evidence that its own evaluation was appropriate, and accordingly, and the District felt that the Parent was not entitled to an IEE at the District's expense. During the resolution period agreed to provide an IEE in a good faith effort to address the Petitioner's concerns. Mr. Denny testified "As part of our resolution agreement we agreed that -- or we had in our discussions talked about that we would provide an IEE, so before the resolution agreement was signed off on, we had already contacted Dr. Boone to schedule the IEE." (Testimony p. 50, lines 5-9)

Then there is the question, "Does a parent who suspects their child might be a child with a disability and who disagrees with the initial evaluation obtained by the public agency have the right to a private IEE at public expense?" For an answer to this the United States Department of Education, Office of Special Education Programs (OSEP) gives the following guidance; "Under 34 C.F.R. § 300.502(a), the parents of a child with a disability have the right under Part B of IDEA to obtain an IEE, subject to 34 C.F.R. § 300.502(b) through (e). Under 34 C.F.R. § 300.15, the term "evaluation" means the procedures used in accordance with 34 C.F.R. §§ 300.304 through 300.311 to determine whether a child has a disability (emphasis added), and the nature and extent of the special education and related services that the child needs. Because the definition of evaluation includes eligibility determinations under the IDEA, an IEE can be obtained after an initial evaluation regardless of whether the child was found eligible as a child with a disability, if the parent disagrees with the initial evaluation obtained by the public agency, subject to certain conditions. 34 C.F.R. § 300.502(b)(1). The right to an IEE at public expense, therefore, would extend to parents who suspect their child might be a child with a disability and who disagree with the initial evaluation obtained by the public agency. (May 2, 2019 OSEP Letter to Perry A. Zirkel, Ph.D., J.D).

CONCLUSION

From the testimony and other evidence, it is clear that the Student has benefited this school year due to the MTSS supports and interventions being administered, is progressing, and is going to be promoted to the second grade. Clearly, the Student is capable of progressing and learning in a general education setting, and he is benefitting from the supports that are available to all general education students to work on closing skill gaps.

The Petitioner did not present evidence that the District's evaluation was denied, untimely, or that it was inappropriate or lacking in any way. She did not provide any evidence that the scores were not valid or reliable, or that the conclusions of the eligibility team were wrong. Petitioner did not show that the period of time the District took to determine next steps was unreasonable under the circumstances, nor did she show that the District's evaluation was inappropriate. In fact, the District was able to demonstrate that its own evaluation was appropriate. Therefore, the District did not violate the IDEA's child find requirements.

In the matter of the time between the first Respondent's request for an IEE on December 13, 2021, and her due process request on February 22, 2022, is a period of time that is not compatible with the term "without unnecessary delay". That delay caused the Petitioner to enter a complaint to the State Department of Education and file a Due Process Hearing request. The District's lack of acknowledging the Parent's right to request a private IEE at their expense, in a timely fashion, is a violation of IDEA.

THEREFORE, IT IS ORDERED, that the Petitioner's challenges of the District's failures to identify child's specific learning disabilities, identify the Student's need for special education services, and provide the Student a FAPE, are unwarranted.

As to the issue of providing an IEE by a private agency of the Parent's choice the Petitioner's claim were warranted.

Accordingly, it is my decision to rule that Florence County School District One's evaluation was appropriate, that their process and procedures for developing and administering

the Student's education were appropriate and not in violation of IDEA.

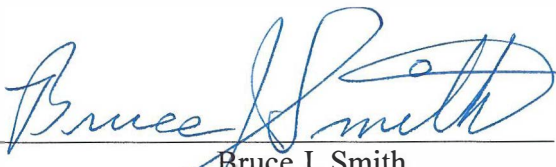
It is also my decision that with regard to the District's lack of a response to the Petitioner's request for a private IEE at public expense, "in a timely fashion" and "without unnecessary delay", the District is in violation of the IDEA. However, as the District has authorized, initiated, and are paying for a private IEE, by a provider of the Parent's choice, I am not ordering any additional remedy. The District is however advised to review and revise its current policies, procedures, and practices, as may be necessary, to ensure that such a violation does not recur in the future.

APPEAL PROCEDURE

Any party may appeal this ruling. A party seeking to appeal this ruling must do so in writing and within ten (10) days of receipt of this Order. The written appeal must be addressed to:

The South Carolina Department of Education Office of General Counsel
1429 Senate Street
Rutledge Building
Columbia, SC 29201

Florence, South Carolina
June 2, 2022



Bruce J. Smith,
Local Due Process Hearing Officer