

INDIVIDUALS WITH DISABILITIES EDUCATION ACT
BEFORE THE STATE REVIEW OFFICER
FOR THE SOUTH CAROLINA DEPARTMENT OF EDUCATION

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 In the Matter of:)
)
 M.G.on behalf of C.B.,)
 Petitioner and Respondent,)
)
 V.)
)
 Florence County School District One,)
 Respondent and Petitioner.)
 _____)

**DECISION OF THE
STATE REVIEW OFFICER**

This matter is before me pursuant to an appeal by M.G. (“Parent”), on behalf of C.B. (“Student”), of a decision by Bruce J. Smith, the Local Hearing Officer (“LHO”), finding that Florence County School District One (“District”) provided the Student a Free and Appropriate Public Education (“FAPE”) and properly conducted an evaluation that determined that the Student was not eligible for special education services in accordance with the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400, *et seq.* This matter is also before me pursuant to a cross-appeal by the District of the same decision’s finding that the District violated the IDEA by failing to respond to the Parent’s request for a private independent educational evaluation (“IEE”) in a timely fashion and without unnecessary delay.

1. Procedural Background

I incorporate the procedural history laid out by the LHO in his decision dated June 2, 2022. The Due Process hearing was held in person on May 18 and 19, 2022. The Parent appealed the case on June 8, 2022. The District submitted a cross-appeal on June 12, 2022. On June 17, 2022, I combined both appeals and set a briefing schedule that would allow for a decision by July 8, 2022. The transcript and exhibits were made available on June 17, 2022. The Parent and the District submitted briefs on June 23, 2022. The District submitted a response on June 30, 2022.

2. Factual Background

The Student enrolled in the District during the 2020-2021 school year as a kindergartner and attended the school year virtually because of COVID-19. At the end of kindergarten, the school asked the Parent if she wanted the Student to repeat kindergarten and she said no. At the end of the first quarter of first grade, the Parent asked to place the Student in kindergarten and the school said no. As a first grader the Student struggled from the beginning of the year. His first-grade teacher immediately put in a request for him to receive services through the multi-tiered system of supports (“MTSS”) process. He worked hard and had a good attitude through the year. His teacher tried early interventions like one-on-one testing or repeating questions. On September 24, 2021, the Parent asked the District to evaluate the Student. On September 25, 2021, the principal told the Parent that they would begin the MTSS intervention process first.

On September 27, 2021, the Parent emailed the principal again asking for the evaluation to begin. The team met on October 18, 2021, to plan the evaluation,

The evaluation was completed in the next two months and the team met on December 13, 2021, to discuss the evaluation and determine eligibility. During this meeting, the speech language pathologist, school psychologist, and occupational therapist presented data that suggested that while the Student had weaknesses, these weaknesses were in line with the Student's ability and therefore the Student was not eligible for special education services.

During this meeting, the Parent expressed disagreement and asked for an IEE. The Parent then also emailed the District with a request for an IEE later that same day (December 13), and, having received no response from the District, emailed the District again on January 8, 2022. The District does not recall responding to either of these emails.

During this time, the school provided extra supports to the Student through their MTSS process. He was with a small group intervention teacher and is now in 1:1 Reading Recovery. Since January 2022, he has been receiving services on a daily basis. The Reading Recovery process has been effective and the teacher predicted he would be close to on-grade level by the end of the year. He also received occupational therapy support once a week and has made progress.

At the same time, the Student received grades of Cs, Ds, and Fs on report cards throughout the year. The teacher wrote comments on the report card like “If [Student’s] progress does not improve, he may not meet academic requirements for promotion. [Student] is working extremely hard. He wants to do well.”

On February 22, 2022, the Parent filed a state complaint and a request for due process. On March 1, 2022, the state department dismissed the Parent’s complaint. On March 21, 2022, the Parent filed a request for a due process hearing. On March 31, 2022, the District responded to this request and filed a counterclaim against the Parent that its own evaluation as appropriate. This counterclaim, filed 97 days after the Parent first requested an IEE, was the District’s first direct response to that request.

In discussions during the resolution period, the District offered to pay for an IEE with the evaluator of the Parent’s choice. Despite not coming to a resolution agreement, the District has provided the IEE.

3. Standard of Review

Federal and state regulations provide that a party aggrieved by a LHO decision may appeal to a State Hearing Officer (“SHO”) who must “[e]xamine the entire hearing record” and “[m]ake an independent decision on completion of the review.” 34 C.F.R. § 300.514(b)(2)(i) and (v) (2014). The SHO must also consider the hearing officer’s advantage of examining the demeanor of the witnesses when credibility determinations are at issue. *Id.*; *Shore Reg’l High Sch. Bd. Of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In doing so, the findings of fact of the LHO are entitled to deference and are considered prima facie correct. *M.S. ex rel.*

Simchick v. Fairfax Cnty. Sch. Bd., 553 F.3d 315, 326 (4th Cir. 2009); *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991). However, the SHO must still determine the weight of the evidence and questions of law independently. *Springer v. Fairfax Cnty. Sch. Bd.*, 134 F.3d 659, 663 (4th Cir. 1998) (differentiating itself from *Doyle*).

The burden of proof in this case lies with the Parents for their claim, and the District for theirs, as the respective party seeking relief. See *Schaffer ex. Rel. Schaffer v. Weast*, 546 U.S. 49 (2005) (holding that the burden of proof in an administrative hearing challenging an IEP under the IDEA is properly placed upon the party seeking relief, whether that is the disabled child or the school district).

Consistent with these principles, a SHO reviews the record created through an administrative trial before the LHO, and does not rehear evidence and generally does not admit or hear evidence not considered by the LHO. A SHO does have discretion to admit evidence not considered below. 34 CFR § 300.514(b)(2)(iii).

4. Hearing Officer's Findings

The LHO found that the District's evaluation was appropriately conducted and that the team's determination that the Student was not eligible for services was appropriate and did not violate the IDEA's child find requirements. He found the Parent presented no evidence that the evaluation results were not valid or reliable and there was no evidence that the District violated any procedural requirements of the IDEA in regards to the evaluation.

However, he found that the District's lack of response to the IEE request of December 13, 2021, until after the Parent's due process request on February 22, 2022 was a period of time "that is not compatible with the term 'without unnecessary delay.'" He found that this delay led

the Parent to file a complaint and a due process hearing request. The LHO did not explicitly make a finding on the District's counterclaim that it was not required to provide an IEE at District expense because the initial evaluation was sufficient.

During resolution meetings, the District agreed to provide an IEE by a provider of the Parent's choice. Therefore, the LHO did not order an additional remedy but advised the District to review its current policies to ensure such violations do not occur in the future.

5. Discussion

In her appeal, the Parent raised several questions about facts considered in the LHO's decision. She also argued that the fact that the Student's grades remained low indicated that the school did not in fact serve the Student's needs appropriately and that he should have received services. The District appeals the LHO's finding that the District caused an unnecessary delay in its lack of response to the Parent's request for an IEE.

The Parent and the District each challenged specific factual statements.

The Parent objected to the LHO's reference to a state complaint on pages 3 and 4. While this complaint was not part of the hearing in this case, it is part of the case record and therefore may be referenced. The LHO further did not use the state complaint to argue that the District had no obligation to respond to the request for an IEE, and therefore the reference to the state complaint is immaterial to this case.

The Parent challenged the LHO's mention of the District paying for the IEE without more fully discussing the circumstances leading up to this payment or the Parent's efforts. These efforts are well-documented in other parts of the order. Further, given that the LHO still found

that the District was delayed in providing the IEE, this mention – even if incomplete – does not materially change the outcome of the LHO’s decision.

The District challenges paragraph 4 of the facts statement, saying “No evidence was presented that the District refused to provide a psychoeducational evaluation upon the parent’s request due to his participation in MTSS, or that a prior written notice was issued saying the same, contrary to paragraph 4.” Instead, the District says that the principal sent an email indicating that the request would be sent to the school psychologist and to the MTSS coordinator and they would likely begin with the MTSS intervention first. The only substantive difference in the District’s statement and the LHO’s is that this information was in an email rather than in a PWN.

The District noted that the IEE was discussed on December 13, 2021, and was noted as an item for follow up in the PWN. The District also noted that the IEE the District offered during the resolution period allowed the Parent to use the evaluator of their choice, even without a formal resolution agreement.

The District did not violate the IDEA in its initial evaluation of the Student.

In the appeal, the Parent did not challenge any of the LHO’s findings regarding the timeline for and process for conducting the evaluation. The Parent’s challenge to the evaluation was that the Student’s classroom teacher said that she was not qualified to determine eligibility but was considered a member of the team that determined eligibility.

General education teachers are part of a student’s multi-disciplinary and/or IEP team. The team as a whole makes eligibility determinations based on input from all members of the team. It would be ideal for all members of the team to feel empowered to participate fully in this

conversation to maximize the team decision-making envisioned by the IDEA. But the record reflects no evidence that the general education teacher failed to participate or that the District would have reached a different eligibility determination had the teacher participated more actively.

The District's response to the IEE request was unnecessarily delayed and violated the IDEA.

The District's cross-appeal makes two arguments. First, the District argued that they were not unnecessarily delayed in responding to the IEE request because they needed time to determine whether to file a due process hearing in response to the IEE. Second, the District argued that in the current due process hearing, they have demonstrated that the initial evaluation was appropriate and therefore the Parent is not entitled to an IEE. They have agreed to an IEE despite this, and therefore, wish to be found not in violation of the IDEA.

The Parent requested an IEE on December 13, 2021, during the eligibility determination meeting. This request was documented in the Prior Written Notice. The Parent followed up with an email. The Parent then sent an email again on January 8, 2022. After that, the Parent heard absolutely nothing from the District, and then filed a state complaint on February 22, 2022. This complaint was dismissed, and the Parent filed a due process hearing request on March 21, 2022. The District did not file a due process hearing request related to this IEE request until March 31, 2022 – over 3 months after the initial request.

The District gives several reasons for its lack of response: 1) the initial emails were close¹ to the holidays, 2) they needed time to consider whether to file a due process hearing, and 3) there was no mandatory time frame by which they needed to respond as their evaluation was sufficient and the Student was being served.

The proximity of the holidays to the requests bears absolutely no weight in this situation. The IDEA makes no exceptions for holidays and all IDEA timelines are based on calendar days. Taking time to consider whether to file a due process hearing request does not necessitate not responding at all to the Parent. Finally, while “unnecessary delay” is not defined by the IDEA, other IDEA timelines encourage timely responses to ensure that students’ needs are met quickly.

While case law is unclear on this topic, several cases are instructive. First, in *Pajaro Valley Unified School Dist. v. J.S.*, 47 IDELR 12,50 (N.D. Cal. 2006), a district waited three weeks to respond to an IEE request and then asked the student to reiterate his request or it would be seen to be waived. After the student immediately reiterated the request, the district then waited another 8 weeks to file a due process hearing. The court in this case found that the procedural safeguards embedded in the IDEA warranted relief for this undue delay and that this delay “waived its right to contest the Student’s request for an IEE at public expense.” *Id.* On the other hand, courts have sided with a district when its delay in filing a due process request was due to ongoing discussions about the IEE and not filing the due process request until the parties had reached an impasse. *J.P. ex rel., E.P. v. Ripon Unified School Dist.*, 2009 WL 1034993 (E.D. Cal, 2009); *L.S. ex rel. K.S. v. Abington School Dist.*, 2007 WL 2851268 (E.D. PA, 2007).

¹ Whether the emails were indeed close to the holidays is in the eye of the beholder. The Parent’s initial email was on Monday, December 13, with nearly a full week of school remaining before the holiday break. The Parent’s second email was on Saturday, January 8, 2022, after school was in session after the holiday break for a full week. It would be quite reasonable for the Parent to expect a reply from the District in this timeline.

The right to an IEE is to ensure that parents, in challenging a district's assessment, "are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition." *Schaffer v. Weast*, 546 US 49, 60 (2005). When a parent asks for an IEE, the Parent is entitled to a response – whether that response is acceptance of the request or a due process hearing – within a reasonable time. In this case, the Parent heard nothing for over 2 months from the District, and then proceeded to file a due process hearing, only after which did the District decide to file a complaint on its own. The District presented no compelling reason as to why this delay was necessary or what information it was seeking to gather before making a decision about a due process hearing.

I agree with the LHO that the District's delay in response to the IEE request constituted an unnecessary delay in violation of 34 C.F.R. § 300.502(b)(2) and that the District, therefore, waived its right to a due process hearing to challenge the IEE request.

Further, at this point, the District should independently be considering what more the Student needs. Despite lengthy testimony and writing from the District about the Student's significant progress through the MTSS process, and despite significant testimony about the Student's work ethic and willingness to put in real effort to learning, the Student's grades are very low. The District argues that the grades were low because the standards for 1st grade are high and the grades do not indicate the significant progress the Student made through the year. This argument is illogical. If the MTSS process was not getting the Student to the 1st grade level, as the District claims, then a deeper study of the Student's needs may be important. If the process is helping the Student, but the grades just do not demonstrate that, then the District's grading policy leaves students unclear about where they stand. The classroom teacher remained

concerned about the Student's progress throughout the year. An IEE, or another evaluation of some sort, feels critical at this early point in the Student's educational career. A student or parent who regularly receives grades of Cs and Ds despite hard work and significant progress would obviously be concerned.

The District also argues that the Student is behind because he attended Kindergarten virtually and the school had asked for him to repeat Kindergarten; because of this, they say, the Student does not have a disability but is just behind because of a problem with their previous instruction. I find this argument to be problematic. The District had an obligation to appropriately instruct even the students who attended Kindergarten virtually – and if the Student was not making progress virtually, then the District should have provided more interventions then, rather than waiting for the Student to repeat the grade. The Parent also asked if the Student could be moved back to Kindergarten after a few months of school, concerned about progress, and the school denied that request for reasons that remain opaque on the record.² The fact that this Student has continued to work so hard despite very low grades is encouraging, and the District and Parent must work together to ensure that this Student gets every service necessary. The District has instead invested significant resources in fighting the Parent's IEE request.

6. Conclusion

I uphold the LHO's finding that the District did unduly delay the provision of an IEE. I order no remedy at the time; however, if the eligibility team reviews the IEE and determines that the Student requires special education services, then this team should also determine whether the

² The District implies that the Student was so far behind that there is no way he would have earned better grades in first grade, suggesting the Student may not have belonged in first grade and would have benefited from repeating kindergarten. That argument renders the District's refusal to grant the Parent's request early in the school year for the Student to repeat kindergarten particularly befuddling.

District owes the Student compensatory services (and, if necessary, what services) to make up for the District's undue delay in responding to the Parent's IEE request, and any resulting delay in the provision of special education services.

7. Notice of Appeal Rights

Any party aggrieved by this decision may commence a civil action with respect to the complaint presented in any state court of competent jurisdiction or in a district court of the United States within ninety (90) days of the date of this decision. 20 U.S.C. § 1415(i)(2)(A)-(B) and 34 C.F.R. § 300.516.

A handwritten signature in cursive script, reading "Avni Gupta-Kagan", is positioned above a horizontal line.

Avni Gupta-Kagan

State Hearing Officer

July 8, 2022