

Colorado Department of Education
Decision of the State Complaints Officer
Under the Individuals with Disabilities Education Act (IDEA)

State-Level Complaint 2016-528
Arapahoe County School District 5

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on November 7, 2016, by the father ("Father") of a child ("Student") identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹

Based on the written Complaint, the State Complaints Officer (SCO) determined that the Complaint identified one allegation subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§300.151 through 300.153.²

COMPLAINT ALLEGATION

Whether the School District ("District") violated the Student's rights under the Individuals with Disabilities Education Act by improperly denying Student's request for an independent educational evaluation ("IEE") on the grounds that both of Student's parents did not consent to the IEE.

SUMMARY OF FATHER'S PROPOSED REMEDIES

To resolve this complaint, Father proposes that 1) District be required to pay for an IEE for Student by a competent evaluator of Father's choosing; 2) The issuance of corrective actions against the District to ensure compliance, including necessary training for District and School administration/staff in the general areas of IDEA and the specific area of IEEs.

SUMMARY OF DISTRICT'S RESPONSE

District denies that it has improperly denied Father's request for an IEE for the following reasons: 1) the request for an IEE violated the IDEA's two-year statute of limitations; 2) the proposed IEE seeks to disagree with an outdated 2014 evaluation that no longer reflects Student's 2016 fourth-grade current level of functioning; 3) District offered its IEE guidelines to both parents but cannot proceed because of conflicting directives from each parent, 4) federalizing domestic relations law unnecessarily creates competing and duplicative evaluation procedures and exacerbates family conflicts, 5) ignoring a state court

¹ The IDEA is codified at 20 U.S.C. § 1400, et seq. The corresponding IDEA regulations are found at 34 CFR § 300.1, et seq.

² Hereafter, only the IDEA regulation and any corresponding Exceptional Children's Education Act (ECEA) rule will be cited (e.g., §300.000, Section 300.000 or Rule 1.00).

Memorandum of Understanding (MOU) and granting each parent unilateral, parallel authority over IDEA-based educational decisions would magnify parental and school conflicts.

FINDINGS OF FACT

The nature of this complaint does not require a detailed account of Student's educational history, disability and the nature of services being provided as the dispute revolves around a legal analysis of defined and undisputed facts.

1. At all times relevant to the Complaint, Student resided within District's boundaries. Student has been identified as eligible for special education and related services.
2. The parents of Student are divorced. The allocation of their parental responsibilities and decision-making are memorialized in a Memorandum of Understanding dated August 1, 2011. The agreement provides that the parties exercise shared allocation of parental responsibilities and decision-making authority as it pertains to all major decisions regarding Student's education (school, classes and special programs). The agreement also provides that if the parties are unable to agree, they will seek resolution through mediation.³
3. Student was identified as a child with a disability eligible for special education and related services in the beginning of the 2014-2015 school year.
4. Subsequent annual IEP meetings were held on September 16, 2015 and September 23, 2016.⁴
5. At this year's meeting, Father was present with counsel, Mother was present via telephone and District's counsel was present. At the end of this meeting, Father requested an IEE. At that time, Mother did not have a position with respect to the IEE, but requested additional information.⁵ Ultimately, Mother expressed her disagreement with an IEE.⁶ District proposed two things: 1) proceed immediately with the reevaluation due August 2017⁷ or, 2) the parties could resolve their disagreement regarding the IEE via the mediation clause referred to in their MOU.⁸ Mother agreed with the evaluation being "pushed up" and signed the necessary consent form.⁹ Father continued his request for an IEE and objected to the reevaluation.¹⁰
6. Upon review of the e-mails and District's response and exhibits, the SCO and District believed the evaluation in question i.e. the evaluation with which Father disagreed for purposes of the IEE request, was the initial evaluation completed in August of 2014.¹¹

³ Exhibit 2

⁴ Exhibits E and F

⁵ Exhibit H

⁶ Exhibit I

⁷ Student's next eligibility meeting needs to occur on or before September 9, 2016.

⁸ Exhibit A; Response

⁹ Exhibit J

¹⁰ Exhibit A

¹¹ Exhibit A; Response

7. Father clarified the evaluation(s) he disagreed with as the “the numerous evaluations of [Student]” pertaining to his academic and social/emotional progress done in anticipation of the 2016 IEP. He indicates that his request for an IEE is with respect to “all of those evaluations done in conjunction with the 2016 IEP.” As best as the SCO can determine, the “evaluations” with which Father disagrees, and which form the basis for his IEE request, are the progress monitoring data and information periodically collected by the District in order to measure Student’s progress in meeting Student’s IEP goals.¹²
8. In follow-up communications, the SCO requested that Father, through counsel, specify which evaluations he disagreed with, and requested that the District produce any and all evaluations done in conjunction with the 2016 IEP.¹³
9. The District responded that there “are not any evaluation documents/reports from that meeting other than what is reflected in the already-provided IEP.”¹⁴
10. While Father did respond to the SCO’s request, the response was not timely nor did it provide the specific information SCO requested, namely the evaluations he disagreed with in the 2016 IEP. Rather, he simply responded that District did have evaluations (but still did not say which or for what) and District should have provided them. In addition, Father introduced evaluations conducted in conjunction with the 2015 IEP as the ones he disagreed with. Accordingly, for purposes of this Complaint, the SCO is only considering the data used in developing the 2016 IEP; any other “evaluation that was disagreed with” was introduced outside the scope of the complaint and reply (and falls outside the one-year limitations period governing state complaints), and was not responsive to the SCO’s request.¹⁵
11. The September 23, 2016 IEP document does not contain or reference anything that could be construed as an evaluation with the exception of the August 2014 evaluation.¹⁶

CONCLUSIONS OF LAW

Based on the Findings of Fact above, the SCO enters the following CONCLUSIONS OF LAW:

Allegation One: Whether the School District violated the Student’s rights under the Individuals with Disabilities Education Act by improperly denying Student’s request for an independent educational evaluation (“IEE”) on the grounds that both of Student’s parents did not consent to the IEE.

¹² Reply

¹³ Email Communications with the SCO

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Exhibit H

1. Before proceeding to an analysis of the above question, the SCO must first consider if Father's request for an IEE meets the criteria that triggered the District's responsibility to either 1) pay for an IEE, or 2) request a due process hearing. In this case, the SCO finds that it does not.
2. A parent has a right to an IEE at public expense if "the parent disagrees with an evaluation obtained by the public agency." 34 C.F.R. §300.502. Thus, the first step in the analysis of a parent's right to an IEE is to determine if there is an "evaluation" as contemplated by IDEA.¹⁷
3. While the term evaluation can be broadly interpreted in many arenas, with respect to IDEA and IEEs, an evaluation is a defined term of art and has two specific purposes. These are 1) to determine whether the child has a disability, and 2) to determine the child's specific needs. See 34 C.F.R. §§300.15 and 300.304(b)(1)(i)-(ii). Additionally, when a District conducts an evaluation, the District must comply with the procedures set out in 34 C.F.R. §§300.304(b) through 300.311. These procedures include the use of a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, not using any single measure or assessment as the sole criterion for determining eligibility and the use of technically sound instruments that may assess the relative contribution of cognitive and behavioral factors. 34 C.F.R. §300.304. Lastly, the District must comply with procedural safeguards when it intends to conduct an evaluation, namely obtain parental consent and provide the parent with prior written notice ("PWN"). 34 C.F.R. §§300.304 (a), 300.309, and 300.301.
4. In this case, the progress monitoring information that the September 2016 IEP team used to inform the IEP team's review and revision of Student's IEP does not meet the IDEA's definition of evaluation and thus does not entitle Father to request an IEE. At a basic level, the information was not obtained to gather functional, developmental, or academic information to determine whether Student continues to be an eligible child with a disability, or to determine Student's special education needs. Rather, the information was to perform the function of tracking Student's progress on IEP goals. Further, the progress data was obtained without any of the procedural requirements for evaluations - in measuring how Student was progressing, the District did not obtain parental consent or provide the parents with prior written notice, nor does Father argue that such procedural steps should have been followed.
5. Case law is limited in this area, but the scant authority that exists supports the interpretation that, for purposes of determining a parent's right to request an IEE, an evaluation means those assessments and reviews of existing data that are being used to determine whether a child is a child with a disability or to determine the child's special education needs. See, e.g., *Haddon Township School District v. New Jersey Department of Education*, 67 IDELR 44 (N.J. Super., App. Div. 2016) (parents were entitled to IEE because school district's review of existing data was part of reevaluation to determine the extent of special education services that were

¹⁷ Though Parent is not obligated to explain what he objects to about an evaluation, the Parent is required to identify which evaluation(s) he disagrees with in order to give the District notice so they can either 1) decide to pay for an IEE or 2) defend their own. §300.501(b)(4)

necessary and appropriate); *F.C. v. Montgomery County Public Schools, Montgomery County Board of Education and Starr*, 68 IDELR 6 (D. Md. 2016) (parents not entitled to IEE because school district's determination that additional data was unnecessary to determine eligibility did not constitute an evaluation). In both *Haddon* and *F.C. v. Montgomery County*, the courts relied on the definition of evaluation as those "procedures used in accordance with §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." 34 C.F.R. §300.15. (*emphasis added*).

6. By contrast, the meeting held on September 23, 2016 was an annual IEP meeting, not an eligibility meeting. The discussions that occurred during the meeting involved Student's current classroom functioning, present levels and progress monitoring reports. While annual IEP meetings may include discussions of evaluations, in this case there does not appear to have been any. The District reports that there were none and Father did not specify or present any. Additionally, none of the progress monitoring or data gathering triggered the procedural safeguards that would be expected when evaluations are conducted. Parents were neither asked to sign consent for the District to conduct an evaluation nor were they given notice that an evaluation(s) was being conducted.
7. Guidance by the federal Office of Special Education Programs ("OSEP") supports this conclusion that progress monitoring does not constitute an evaluation that triggers a publicly funded IEE. In *Letter to Zirkel*, OSEP explained that "a district that uses an RTI process prior to a formal evaluation for identifying children with SLD is not obligated to pay for an IEE if the district has not yet evaluated the student." Many of the same procedures and tools used to implement an RTI approach are some of the same progress monitoring tools used to implement and prepare for an annual IEP. *Letter to Zirkel*, 52 IDELR 77 (OSEP 2008).
8. In this case, the SCO concludes that the 2016 IEP and the progress monitoring that took place in anticipation of that meeting does not constitute an evaluation that would trigger the District's obligations pursuant to 300 CFR 300.502 and therefore there is no violation. The IEP in question was an annual IEP that addressed present levels of academic and functional performance and discussions regarding the Student's goals.
9. The District is poised to conduct a reevaluation. Upon completion of that evaluation, a request for an IEE would be appropriate if parent disagrees.
10. The issue of consent will continue to be a factor with these parents and the District and as such, the SCO makes the following findings and conclusions.
11. Under IDEA, a parent is a biological or adoptive parent and has the right to make educational decisions on behalf of the child unless there is some legal authority restricting that right. 34 C.F.R. §300.30. The commentary to the IDEA regulations reiterates this position: "in situations where the parents of a child are divorced, the parental rights established by the Act apply to both." 71 Fed. Reg. 46568 (August 14, 2006).

12. Parents who are divorced have those same rights subject to the terms of “a custody agreement that spells out the educational rights of the parents, [in which case] courts will look at that agreement to determine the extent of the parent’s rights.” *Rockaway Twp. Bd. Of Educ. 43 IDELR 80 (SEA NJ 2005)*. If there is a joint custody order that does not otherwise delegate or limit one parent’s educational decision-making rights, an IDEA action requiring parental consent may proceed with the consent of only one parent - it is not necessary to obtain consent from both. See *Pueblo School District 70, Colo. State Complaint 2002:502 (April 1, 2002)*, reported at 102 LRP 12929. “Generally, either parent may grant consent. In the case of divorced parents with joint custody, either parent may grant consent. However, in the event that one parent grants consent and the other parent refuses, then the school is obligated to initiate the action for which consent has been granted.” *Biddeford Sch. Dep’t., 44 IDELR 87 (SEA ME 2005)*; see also *Letter to Ward, 56 IDELR 237 (OSEP 2010)* (there is no requirement in Part B that the public agency obtain consent for the initial provision of special education and related services, or accept revocation of consent for the child’s continued receipt of special education and related services, from both parents with legal authority to make educational decisions on behalf of that child). In other words, either parent with legal authority to make educational decisions may consent or revoke their consent barring a court order that says otherwise.
13. In this case, the Memorandum of Understanding provides that the parents will continue to “exercise shared allocation of parental responsibilities and decision-making authority.” The Memorandum also provides that if the parties disagree, they shall seek mediation. While the Memorandum endeavors to be detailed and clear, there are numerous ambiguities such as who determines if there is a disagreement to such a degree that triggers the mediation provision, who initiates the process, what happens if no one initiates the process, the time frames, etc. These are matters for the parents to resolve. While the District’s position to make the parties adhere to their agreement is understandable, it is not the District’s responsibility to interpret and enforce the agreement. It is the parties’ obligation to enforce the provisions of their agreement when and if they feel it is necessary. In the meantime, the District cannot fail to act if it has a properly executed consent or request by a parent with decision-making authority. Therefore, in this case, the District was obligated to proceed with the reevaluation based upon Mother’s consent alone.

REMEDIES

The SCO has found no violation of the IDEA. Accordingly, no remedy is ordered.

CONCLUSION

The Decision of the SCO is final and not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint, provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. See, 34 CFR §300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 156, 46607 (August 14, 2006).

This Decision shall become final as dated by the signature of the undersigned State Complaints Officer.

Signed this 6th day of January, 2017.

Jacqueline Esquibel, Esq.
State Complaints Officer

APPENDIX

Complaint

Dated October 17, 2016

- Ex. 1 E-mail correspondence requesting an IEE
- Ex. 2 Parents' Memorandum of Understanding
- Ex. 3 E-mail correspondence
- Ex. 4 E-mail correspondence
- Ex. 5 E-mail correspondence

Response

Dated November 29, 2016

- Ex. A Response to SCO request for documentation, including notes, correspondence, memoranda, or other documentation relating to the School District's consideration of Parent's request for an IEE.
- Ex. B All School District policies and procedures relating to or governing the manner in which the School District handles or responds to requests for IEEs.
- Ex. C Special Education Referral Form
- Ex. D Prior Notice and Consent for Evaluation
- Ex. E Individualized Education Program (IEP) (2014)
- Ex. F IEP parental Agreement for Initial Placement (2014)
- Ex. G IEP (2015)
- Ex. H IEP (2016)
- Ex. I Student's Third Grade Report
- Ex. J Prior Notice and Consent for Reevaluation
- Ex. K Email Correspondence

Reply

Dated December 8, 2016

- Ex. AA Email Correspondence (12/6/2016 - 12/20/2016)