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BEFORE THE IDAHO STATE DEPARTMENT OF EDUCATION
(Administrative Hearing)

IN THE MATTER OF THE)
DUE PROCESS HEARING) SDE CASE H-15-05-14
)
)
██████ by and through his parents.) MEMORANDUM DECISION
██████ and ██████████)
)
Petitioners,)
v.)
West Bonner County School)
District No. 83)
)
Respondent.)

INTRODUCTION

On May 14, 2015 the Idaho State Department of Education received an Expedited Due Process Hearing Request and a State Administrative Complaint filed by the student's mother. After reviewing both the Request and Complaint, this hearing officer determined there was no basis for scheduling the hearing on an expedited basis for two reasons: (1) the student is not currently receiving special education services pursuant to the Individuals With Disabilities Education Improvement Act of 2004 (IDEA) and, (2), the district was not proposing any disciplinary action against the student that would have required an expedited hearing as that term is used in the IDEA. The parties were informed of that decision by letter dated May 21, 2015. (EX.1)

At the same time, all issues raised in the State Complaint were set aside for reasons

set forth in EX. 1.

On May 27th the District filed its Answer generally denying allegations raised in the Request For Hearing.

On June 29, 2015 the parties participated in an informal telephone conference to discuss the status of the case, a schedule for the hearing, and other matters. The Petitioners appeared *pro se* and the Respondent appeared through [REDACTED], Attorney at Law. Having recently undergone surgery that led to complications, [REDACTED] expressed a need to delay the hearing to allow some time for his recovery.

On August 7th the District filed a Motion to Dismiss and Motion to Exclude Claims. A supporting affidavit by the District's special education director was filed on August 10th. A telephone conference with the parties was scheduled for, and held on August 12th to consider the District's pre-hearing Motions.

Applicable Law

The Individuals With Disabilities Education Improvement Act of 2004 (IDEA 2004) 20 USCS Sec. 1400 et seq. requires that school districts, like Respondent, provide a free appropriate public education (FAPE) in the least restrictive environment to students with various covered disabilities.

Federal regulations contained in 34 CFR 300 et seq. have been promulgated to implement key provisions of the IDEA 2004.

States, like Idaho, retain some authority under IDEA 2004 and 34CFR 300 et seq. to manage the delivery of FAPE to covered student populations. Pursuant to that authority, Idaho has adopted rules and policies governing a whole range of topics related to the delivery of FAPE including the establishment of a "child find" system, the development of IEPs, the conduct of due process hearings, the provision of "related services", as well as rules related to the qualifications of personnel working within school districts with special ed students. See IDAPA 08.02.03.109 and The Idaho Special Education Manual.

Hearing procedures in this case were governed by the Idaho Rules of Administrative Procedure of the Attorney General (See IDAPA 04.11.01), IDEA requirements, and the Idaho Special Education Manual (2009 Revised Ed.- the “Manual”). In case of any conflicts between Idaho rules and the IDEA or rules contained in 34 CFR 300 et seq., the latter supersede and govern.

A key allegation of the parents in this case is that the District failed to properly identify their at- risk child who has a learning and social disability that would have qualified him for special education and an individualized education plan – in other words, failed its “child find” responsibilities- thereby denying their child FAPE. (See 20 USCS Sec. 1412(a)(3), 34 CFR Sec. 300.111, and the Idaho Special Education Manual, CH. 3).

In this case the parents had the burden of persuasion by a preponderance of evidence since it initiated the request for a due process hearing.. Weast v. Schaffer, 126 S. Ct. 528, 44 IDELR 150 (United States Supreme Court (2005)); however, the District had the burden of persuasion with respect to the pre-hearing Motions it filed.

Discussion, Findings of Fact, and Conclusions of Law

The District’s Motion to Dismiss Due to Failure to Allow Eligibility Evaluation contends that the parents refused consent when the District offered to conduct an initial eligibility evaluation of the student¹ and that that refusal necessitates dismissal of this matter. On the other hand, during oral arguments, the parents seemed to argue that - in spite of their refusal to give consent - the District’s alleged past failures to provide their child FAPE (particularly the District’s “child find” failures), should not be somehow wiped clean by a dismissal and that this due process hearing was a proper forum for addressing evidence of the District’s failures in the context of the IDEA.

During oral arguments on the District’s Motions August 12th it was undisputed that the parents did refuse consent to the offered evaluations. (See also Affidavit of [REDACTED])

¹ The District’s offer to conduct the evaluation came after the parent had filed her Request For Due process Hearing. The offer was presented in a letter to the parents, a copy of which is attached to [REDACTED]’s Affidavit.(See EX. 2). The parents’ response to the offer is also part of [REDACTED]’s Affidavit.

For the sake of argument, assuming that all of the parents' claims are true, without an evaluation initiated by the District there is no way of knowing whether or not the student qualifies for special education as the parents claim. The District is required to conduct an initial evaluation to determine eligibility for special education. The IDEA provides as follows: "... A State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation in accordance with this paragraph and subsection (b), before the initial provision of special education and related services to a child with a disability under this part [20 USCS Sec. 1411 et seq.]." 20 USCS Sec. 1411 (a)(1)(A); 34 CFR Sec. 300.301; Idaho Special Education Manual, Ch. 4.

A parent's refusal to consent to the evaluation relieves a District from the requirement of IDEA to provide FAPE. 20 USCS Sec. 1414 (a)(1)(D)(ii)(III)(aa) provides as follows: "Effect on agency obligations. Absence of consent. If the parent of such child refuses to consent to the receipt of special education and related services, or the parent fails to respond to a request to provide such consent- (aa) the local education agency shall not be considered in violation of the requirement to make available a free appropriate public education for failure to provide such child with the special education and related services for which the local education agency requests such consent." "Special education", as the term is used above, includes initial evaluations to determine eligibility for special education.

In the **Andress v. Cleveland Independent School District** case, 64 F.3d 176 (5th Cir. 1995) the court held that "there is no exception to the rule that a school district has the right to reevaluate a student using its own personnel" in a case where the parents refused to allow a school district to re-evaluate a special ed student to determine continuing eligibility for special education where the student's parents were concerned that such re-evaluation might harm him. The same reasoning should apply to initial evaluations.

The opinion in **Andress** cited similar holdings: "If a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation. **Gregory K. v. Longview School Dist.**, 811 F.2d 1307, 1315 (9th Cir.1987) ("If the parents want [the student] to receive special education under the Act, they are obliged to permit such testing."); **Dubois v. Conn. State Bd. of Ed.**, 727 F.2d 44, 48 (2d Cir.1984)

("[T]he school system may insist on evaluation by qualified professionals who are satisfactory to the school officials."); Vander Malle v. Ambach, 673 F.2d 49, 53 (2d Cir.1983) (School officials are "entitled to have [the student] examined by a qualified psychiatrist of their choosing."). A parent who disagrees with the school's evaluation has the right to have the child evaluated by an independent evaluator, possibly at public expense, and the evaluation must be considered by the school district. 34 C.F.R. Sec. 300.503." No case law contrary to the **Andress** holding was discovered.

There are rigorous protocols governing how the evaluation is conducted. The student's parents, like any other student's parents, would have every right to challenge an adverse eligibility determination through a due process hearing, by, perhaps, putting on credible expert testimony supporting their claims. But convening a due process hearing before the District has had a chance to do its initial evaluation would be pointless, however valid the parents' expressed reasons for denying the evaluation were.

Motion to Exclude Claims Barred By the Statute of Limitations

Idaho special education law generally provides for a two year statute of limitations on claims under the IDEA. However, because of the ruling in favor of the District on its Motion to Dismiss, there is no need to address the specifics of this second Motion.

* * * * *

For the reasons stated above, the District's Motion to Dismiss is GRANTED and the parents' Request For Due Process Hearing is dismissed without prejudice.

IT IS SO ORDERED this 25th day of August, 2015.



Richard A. Carlson
Hearing Officer

CERTIFICATE OF SERVICE

The undersigned Hearing Officer certifies that on the 25th day of August, 2015 he served a true and correct copy of the foregoing on the persons named below at the addresses below by depositing the same into the U.S. mail, postage pre-paid:



Chris Hansen
Attorney at Law
P.O. Box 7426
Boise, ID 83707-7426

A handwritten signature in cursive script, appearing to read "Richard A. Carlson".

Richard A. Carlson

NOTICE

Any party aggrieved by the findings and decision herein has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under 20 U.S.C. Sec 1415 (i)(1). The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. (See 20 U.S.C. Sec. 1415 (i)(2)). Time limitation: The party bringing the action shall have 90 days from the date of this decision to file a civil action, **or, if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law.** (See 34 CFR 516 (b). **Emphasis added.**) IDAPA 08.02.03.109.05(g) provides that "An appeal to civil court must be filed within forty-two (42) caneldar days from the date of issuance of a hearing officer's decision".