February 12, 2020

TO: ALL K-12 SUPERINTENDENTS

FROM: JAMES D. SIMSON

RE: INDEPENDENT EDUCATIONAL EVALUATION: TO FUND OR FILE FOLLOWING PARENT'S REQUEST

L.C. v. Alta Loma Sch. District[1] ("*Alta Loma*") is the latest in a series of cases that address the circumstances under which a district will be found to have unnecessarily delayed its obligation to fund or file following a parent's request for an independent educational evaluation ("IEE"). Although the term "unnecessary delay" remains undefined by statute, decisional law and advisory comments to the Federal Regulations make it clear that the term is fact-specific and does not adhere to a specific timeline. How the term is applied often depends on the nature of the district's dealings with a parent and the extent to which the delay was the product of reasonable, good faith efforts by the district to resolve the matter in a timely fashion.

Although cases addressing this issue will, from time to time, turn on factors such as the brevity of the delay[2] or the conduct of the parent[3], such cases are the exception. By and large, the deciding factors involve the behavior, good or bad, of the district during the pendency of a parent's request.

Cases in which the court has found no violation nearly always involve judicial findings of extensive and consistent good faith efforts on the part of the district to openly communicate, promote dialog, and engage with parent (or parent's attorney) to reach a timely resolution.[4] Cases on the other side generally involve delays of more than two months[5], coupled with a judicial finding that the district behaved in a way that suggested bad faith, dilatory tactics, neglect, or intransigence.[6] *Alta Loma* is such a case and it is one that district administrators should pay attention to because of the extent to which it expands the scope of what is expected of district when faced with an IEE request.

---

[1] *L.C. v. Alta Loma Sch. Dist.* 389 F. Supp. 3d 845 (2019).
[2] See for example, *Ms. H. v. Montgomery County Bd. of Educ*., 2011 WL 666033 (2011) [delay of less than 60 days].
[3] See for example, *K.C. ex rel. Her Parents v. Nazareth Area School Dist*., 806 F. Supp. 2d 806 (2011); *D.A. ex rel. Adams v. Fairfield-Suisun Unified School Dist*., 2013 WL 5278952 (2013).
[4] See for example, *L.S. ex rel. K.S. v. Abington School Dist.,* 2007 WL 2851268 (2007) [10 week delay]; *J.P. ex rel., E.P. v. Ripon Unified School Dist.*, 2009 WL 1034993 (2009) [2 month delay].
[5] See *C.W. v. Capistrano Unified School Dist*., 2012 WL 3217696, [noting that the briefest period of time determined to be an "unnecessary delay" in a California case at any level appeared to be 74 days].
[6] See for example, *Pajaro Valley Unified Sch. Dist. v. J.S.* 2006 U.S. Dist. LEXIS 90840; *J.P. v. Anchorage School Dist*., 260 P.3d 285 (2011); *Harris v. District of Columbia*, 561 F. Supp. 2d 63 (2008).

Title 34 of the Code of Federal Regulations Section 300.502(b)(2) generally dictates that when a parent requests an IEE, the district must, *without unnecessary delay*, ensure that one is provided at public expense or file for a due process hearing ("fund or file"). The opinion in *Alta Loma* analyzes the term "unnecessary delay." It examines how the lack of assistance provided by the district during the IEE selection process affects whether a delay in the district's filing for a due process hearing will be deemed to be "unnecessary."

FACTUAL BACKGROUND

On September 12, 2017, L.C. ("L.C." or "Parents") filed a request with the Alta Loma School District ("District") for a "visual processing" IEE of L.C., together with the name and contact information of their chosen evaluator, Dr. Stephey. Two weeks later, the District replied with a request that Parents provide Dr. Stephey's resume and rate sheet. Within a week, Parents forwarded the request to Dr. Stephey, who sent both items to the District.

The rate sheet provided by Dr. Stephey did not include a flat fee for visual processing but instead indicated that his fees would not exceed $2,400. Ten days later, the District responded by informing the Parents that Dr. Stephey "does not meet the cost maximum" under the Special Education Local Plan Area's ("SELPA") IEE policy (the "Policy") and Parents would, therefore, need to provide written justification for the additional expense.

The Policy, which had been provided to the Parents, indicated that when a requested IEE exceeds the maximum allowable cost for that evaluation, the parents must demonstrate, "unique circumstances" justifying the additional expense. Although the Policy set forth the maximum allowable costs for three visual-based assessments, including visual-motor integration ($300), visual acuity ($350), and visual perception ($250), it did not include a single maximum cost for "visual processing." This prompted the Parents to seek clarification from the District regarding the cost cap for visual processing as well as the rates set forth by Dr. Stephey – neither of which had been given to them.[7] Rather than providing the requested information, the District directed Parents to contact the SELPA's program manager for the information.

What followed was a series of exchanges between the District and Parents in which the Parents continued to request clarification about the cost discrepancy and the District continued to demand justification for the extra expense until, eventually, on December 5, 2017 (84 days after Parents' initial request for an IEE), the District filed for a due process hearing. Although the District later dropped its request, Parents filed their own due process complaint on December 26, 2017, alleging unnecessary delay on the part of the District.

[7] It should be noted that although the court maintains in its opinion that Parents were not in possession of the rate sheet provided by Dr. Stephey, this appears to be in error, as noted by the ALJ who later heard testimony from Parent that it was them who delivered the rate sheet to District.

HOLDINGS

In finding for the Parents on the procedural components of their complaint, the district court made it clear that the term "unnecessary delay" contemplates both the length of the delay as well as the extent of district's efforts, cooperation, and assistance in resolving the conflict.

The court faulted the District, first, for its two-week delay in replying to Parents' request for an IEE, and then for its decision to task the Parents with providing Dr. Stephey's resume and rate sheet rather than obtaining the information from Dr. Stephey directly.

The court took exception with the District's failure to personally provide Parents with the specific cost criteria as Parents had requested. As the court explained, the district alone bears responsibility for ensuring compliance with the procedural safeguards set forth by the Individuals with Disabilities Education Act ("IDEA"), including those aimed at ensuring meaningful parent participation. The court found that the District's failure to provide Parents with the "agency criteria applicable for independent educational evaluations" as required by 34 CFR Section 300.502(a)(2), "by definition… [denied them] the opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the district's criteria."

The fact that the District directed Parents to a resource where the necessary information could be found did not relieve the District of its obligation under the IDEA.

> "By directing Plaintiff's advocate to collect that information from a third party, rather than fully explaining the basis for its rejection of Dr. Stephey as required under § 300.503(b)(2), the District impermissibly attempted to foist its own responsibility to ensure compliance with the procedures under the IDEA onto Plaintiff's parents and expected Plaintiff's parents to expend needless energy tracking down the necessary information already in the District's possession."

The fact that neither Dr. Stephey's rate sheet nor the Policy specifically addressed "visual processing" – arguably making it impossible for the District to identify a specific cost discrepancy – was of little consequence to the court in light of the fact that the District could have sought clarification from Dr. Stephey, but chose not to do so. In addition, the ease with which the District was able to discern that Dr. Stephey's rates exceeded Policy guidelines left the court unreceptive to arguments that they were unable to say why or by how much those costs differed.

LESSONS

Several important takeaways come out of the court's decision:

1. Districts have an affirmative duty to ensure that parent receive all the necessary information. The fact that this information may be available through other sources will not relieve the district of its obligations should parent decide not to avail themselves of those resources.

2. To the extent such information is not known to the district or in the district's possession, the obligation rests with the district to uncover it, if possible.

3. Although open communication with parent in an effort to cooperate and work together, including appropriate requests by the district for clarity or assistance are generally looked upon favorably, district should be extremely cautious about any communication that could be interpreted as an effort on the part of the district to pass off responsibilities that are rightfully the district's onto the parent.

4. Notifications to parent concerning defects in, or the district's rejection of, a request for an IEE is insufficient where the notification speaks only in general terms about the nature of the problem. Instead, district must identify with specificity the precise nature of the flaws such that parent may adequately address the claim or remedy the issue if possible.

FINALLY

Although the court in this case and much of the summary so far has discussed the facts in terms of specific procedural violations or technical encroachments, it is important to recognize that the court's opinion as a whole did not come about as the result of a district's inadvertent failure to mind procedural technicalities, but rather was the result of what the court felt were pervasive dilatory tactics on the part of the District to harden the road for Parents and discourage them from pursuing their claim. Without question, there were some bad faith dealings by both sides. Parents, from beginning to end, appeared utterly unwilling to cooperate or participate in any way that would further their cause. Their communications with the District were not only unhelpful, but antagonistic. Unfortunately, when both sides engage in such dealings, it will nearly always be the district that loses out because of the obligations placed on it by the law.

We hope this information is useful to you. If you have questions concerning special education, do not hesitate to contact the members of the Special Education Group, Darren Bogié, Stephanie Gutcher, and James Simson.

JDS/aag