

**DELAWARE DEPARTMENT OF EDUCATION
EXCEPTIONAL CHILDREN'S RESOURCES**

**FINAL REPORT
STATE COMPLAINT RESOLUTION**

DE AC 10-7 (March 15, 2010)

On January 5, 2010, Parents filed a complaint with the Delaware Department of Education on behalf of Student.¹ The complaint alleges the Christina School District (“the District”) violated state and federal regulations by failing to grant Parents’ request for an Independent Educational Evaluation (“IEE”) at public expense.

The complaint has been investigated as required by federal regulations at 34 C.F.R. §§ 300.151 to 300.153 and according to the Department of Education’s regulations at 14 DE Admin Code §§ 923.51.0 to 53.0. The investigation included an interview on January 20, 2010 with the District’s Director of Special Services, and with Parents on January 13 and February 12, 2010. The investigation also included a review of correspondence and electronic mail (E-mail) between Parents and District personnel regarding the allegations in the Complaint. Parents and the District’s Director of Special Services provided all documents relative to the investigation.

COMPLAINT TIMELINE

State and Federal regulations require the Department to conduct an investigation and issue a letter of findings within 60 calendar days of the receipt of a complaint. The Department may, however, permit an extension of time if exceptional circumstances exist with respect to a particular complaint. *See*, 14 DE Admin Code § 923.52.1. In this case, the Department received Parents’ Complaint on January 5, 2010, and the original due date for the Department’s letter of findings was March 6, 2010. The Department, however, granted a brief extension of time (by one week) to address an allegation raising a regulatory issue that was not part of the original Complaint (i.e, specifically, whether the District is imposing conditions on the IEE it authorized after the Complaint was filed, as more fully described below).

FINDINGS OF FACT

1. Student is currently in 2nd grade and attends a District school. Student is identified as a student with a disability and eligible to receive special education and related services under the Individuals With Disabilities Education Act (“IDEA”) and 14 *Del. C.* § 3101 *et seq.*

¹ The Final Report identifies some people and places generally to protect personally identifiable information about the student from unauthorized disclosure. An index of names is attached for the benefit of the complainant and public agency involved in the investigation. The index shall be removed before the Final Report is released as a public record.

2. On or about October 23, 2009, Parents requested the District to provide an Independent Educational Evaluation on behalf of their daughter at public expense. Parents explained their belief that prior evaluations completed by the District were inconsistent, and “not accurate portrayals of [Student’s] behaviors and abilities”. Parents felt the educational program developed by the District was not addressing Student’s needs, and an IEE was warranted.
3. State and federal regulations afford parents the right to obtain an IEE at public expense if the parents disagree with an evaluation obtained by the school district. *See*, 14 DE Admin Code § 926.2.4. Parents are entitled to only one IEE at public expense each time the school district conducts an evaluation with which the parents disagree. *See*, 14 DE Admin Code § 926.2.6. An “IEE” is an evaluation conducted at public expense by a qualified examiner who is not employed by the school district. *See*, 14 DE Admin Code § 926.2.3.²
4. When an IEE is sought at public expense, the criteria under which the IEE is obtained must be the same as the criteria used by the school district when it initiates an evaluation, including such criteria as the location of the evaluation and the qualifications of the examiner. *See*, 14 DE Admin Code § 926.2.9. When an IEE is requested, the school district must also provide parents with information about where an IEE may be obtained, and the specific agency criteria applicable to IEEs. *See*, 14 DE Admin Code § 926.2.2. Except for a description of such criteria, the District may not impose conditions or timelines related to obtaining an IEE at public expense. *See*, 14 DE Admin Code § 926.2.10. This rule preserves the independent nature of an IEE.
5. On or about November 16, 2009, the District acknowledged Parents’ request for an IEE. In response, the District authorized Parents to obtain at public expense: (a) an independent speech evaluation; and (b) an independent occupational therapy evaluation. The District also informed Parents they were limited to the cost of \$280.00 per independent evaluation. Other than the cost limitation, the District did not provide Parents with information about the District’s criteria applicable for independent educational evaluations.
6. On or about December 7, 2009, Parents wrote to the District advising they would attempt to stay within the \$280.00 limit for the speech evaluation and occupational therapy evaluations. Parents also explained their belief state and federal regulations do not permit the District to limit the cost of an independent evaluation. Parents further stated it is the District’s responsibility to provide them with the agency criteria applicable for IEEs.

²² Delaware has adopted as its state regulations most of the federal regulations implementing the IDEA, including the federal regulations applicable to IEEs found at 34 C.F.R. § 300. 502. For ease of reference, the Department has cited to the state regulations throughout its findings, but notes the federal law provisions are equally applicable.

7. On or about December 10, 2009, the District responded to Parents and denied their specific request for an Independent Educational Evaluation. The District explained it had not completed its own psychoeducational evaluation of Student, and therefore Parents were not entitled to an IEE. The District stated its willingness to conduct a psychoeducational evaluation if Parents placed their request in writing and forwarded it to Student's school. In response to Parents' request for specific agency criteria related to IEEs, the District advised Parents a list could not be provided "because the District contracts with many agencies".
8. On or about January 5, 2010, Parents filed their Complaint with the Department of Education alleging the denial of the IEE was a violation of state and federal special education regulations.
9. On January 20, 2010, however, the District contacted Parents and advised the District reconsidered its position and agreed to provide an Independent Educational Evaluation of Student at public expense. The District provided Parents with a short list of available providers of IEEs, but did not include a description of the District's criteria applicable for IEEs.
10. Parents contacted a private, out-of-state provider ("the Institute") to conduct the IEE, and Parents promptly informed the District of the provider they selected. According to the District, the cost of the IEE by the Institute was excessive and beyond the customary and reasonable cost of an evaluation obtained by the District. Regardless, the District forwarded to the Institute an "Independent Contractor Agreement" for the Institute to sign and return. The Agreement is approximately 7 pages in length, and attempts to establish the business relationship between the District and the Institute. Among its provisions, the Agreement clarifies the Institute shall function as an "independent contractor", and not an employee of the District. The Agreement also states the District shall not be responsible for withholding taxes with respect to the Institute's compensation. The Agreement further contains a hold harmless and indemnification clause outlining the liabilities of the parties in case of negligence or other misfeasance. Other than these types of business related provisions, the Agreement does not impose limits or timelines on the Institute's actual completion of the IEE.
11. According to the District, it routinely enters in to the "Independent Contractor Agreement" when contracting for educational services from independent providers, and it is a requirement of the District's business office the Agreement be signed.
12. In this case, the Institute refused to sign the District's "Independent Contractor Agreement". The District informed Parents it could not provide the IEE through the Institute because the Agreement was not signed, and Parents would have to select another provider.

COMPLAINT ALLEGATIONS

In the original Complaint, Parents alleged the District violated state and federal regulations by failing to grant their request for an Independent Educational Evaluation of their daughter at public expense. As described above, the District has since granted Parents' request for an IEE, and this issue is moot.

Parents now allege the District is imposing unlawful conditions on the IEE by requiring the Institute to enter into the "Independent Contractor Agreement" in violation of 14 DE Admin Code § 926.2.10.

CONCLUSIONS

The District Failed to Provide Parents With the Specific Agency Criteria the District Uses When Conducting Evaluations

When an IEE is sought at public expense, the criteria under which the IEE is obtained must be the same as the criteria used by the school district when it initiates an evaluation, including such criteria as the location of the evaluation and the qualifications of the examiner. *See*, 14 DE Admin Code § 926.2.9. When an IEE is requested, the school district must provide parents with information about where an IEE may be obtained, and the specific agency criteria applicable to IEEs. *See*, 14 DE Admin Code § 926.2.2.

It is important to note that for an IEE obtained by a parent (either at public or private expense) to be considered by a school district, the IEE must meet the school district's criteria. *See*, 14 DE Admin Code § 926.2.7. Therefore, parents must be able to have access to the relevant school district criteria. *See, Comments of Office of Special Education Programs*, 64 Fed. Reg., p. 12608 (March 12, 1999).

In this case, the District did not provide Parents with the specific agency criteria used by the District when the District initiates or conducts evaluations. The information was not provided to Parents when they initially requested the IEE in October 2009, nor was it provided in December 2009 when Parents contacted the District pointing out their right to receive it. Parents were asking for the agency criteria they were entitled to receive. ***For the reasons stated, I find a violation of 14 DE Admin Code §§ 926.2.2 and 926.2.9.***

No Unlawful Conditions Placed on the IEE

State and federal regulations describe the independent nature of an IEE, and the procedural rights of parents to receive an IEE under certain circumstances. Except for a description of specific public agency criteria, a school district may not impose conditions or timelines related to obtaining an IEE at public expense. *See*, 14 DE Admin Code § 926.2.10.

In this case, the District required the Institute to enter into an "Independent Contractor Agreement" before the District would commit to providing the IEE through the Institute. In order to determine whether the Agreement constitutes a "condition" on the IEE within the meaning of 14 DE Admin Code § 926.2.10, it is necessary to review the content of the

Agreement. As described above, the Agreement primarily outlines the business relationship to be established between the Institute and the District. For example, it clarifies the Institute's role as an "independent contractor", rather than an employee of the District. Most importantly, the Agreement does not place specific conditions or limits on how and when the Institute must conduct the IEE. In this case, it is not clear why the Institute refused to sign the Agreement, and the District should have explored the reasons for the rejection with the Institute. ***For the reasons stated, I find no violation of state or federal regulations related to the placing of conditions on the IEE as defined in 14 DE Admin Code § 926.21.0.***

CORRECTIVE ACTION

Development of Policies and Written Procedures Related to IEEs and District Criteria for IEEs

I. ***On or before April 16, 2010***, the District shall develop written procedures related to IEEs. The procedures shall include, but not be limited to:

(a) a description of how requests for IEEs will be handled by the District office and relevant school staff, including a timeline and process for responding to parental requests for IEEs in writing;

(b) a process by which parents will receive in writing the District's criteria for IEEs, whether the IEE is at parent or public expense, and information about where IEEs may be obtained; and

(c) a description of the state and federal regulatory requirements related to IEEs at 14 DE Admin Code § 926.2.0 and 34 C.F.R. § 300.502.

Once developed, the District shall distribute the written procedures to relevant special education staff, and others, as appropriate. ***On or before April 16, 2010***, the District shall provide the Department with a copy of the written procedures it developed, and confirmation it was distributed to relevant special education staff.

II. ***On or before April 16, 2010***, the District shall also develop a written memorandum outlining the District's criteria for IEEs. The District is reminded the criteria under which an IEE is obtained by a parent (either at parent or public expense) must be the same as the criteria used by the school district when it initiates an evaluation, including such criteria as the location of the evaluation and the qualifications of the examiner. *See*, 14 DE Admin Code § 926.2.9. Once developed, the District shall distribute the memorandum to relevant special education staff, and others, as appropriate. ***On or before April 16, 2010***, the District shall also provide the Department with a copy of the written memorandum outlining the District's criteria for IEEs, and confirmation it was distributed to relevant special education staff.

Provision of the IEE as Requested By Parents

On March 12, 2010, the Department received a communication from Parents and the District suggesting the parties may have mutually agreed on a provider of the IEE for Student, and the provider is on the list supplied by the District. The District must ensure the provider of Student's IEE meets the District's criteria. ***On or before March 26, 2010***, the District shall provide to Parents, in writing, a description of the District's criteria for IEEs. If Parents and the District have not agreed to the provider of Student's IEE by ***April 10, 2010***, Parents shall contact the Exceptional Children Resources branch of the Department of Education.

By: /s/ Edward Wulkan

Ed Wulkan
Assigned Investigator

Date Issued: March 15, 2010