

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

**DECISION GRANTING MOTION FOR
DISMISSAL**

OAL DKT. NO. EDS 08095-18

AGENCY DKT. NO. 2018 28043

**EDISON TOWNSHIP BOARD OF
EDUCATION,**

Petitioner,

v.

E.L. ON BEHALF OF E.L.,

Respondents.

Lisa M. Quartarolo, Esq., for petitioner

Caitlin Lunquist, Esq., for respondents (Busch Law Group LLC, attorneys)

BEFORE **PATRICIA M. KERINS, ALJ:**

STATEMENT OF THE CASE

In this matter arising under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1485, petitioner Edison Township Board of Education (Edison) has requested a ruling that its evaluation of E.L. during the 2017-2018 school year was appropriate and that respondent Er.L., E.L.'s mother, is not entitled to an independent evaluation at public expense. In response, Er.L. has filed a motion requesting dismissal of this matter on the grounds that Edison failed to timely file a due process petition challenging Er.L.'s request for an independent evaluation in accordance with N.J.A.C. 6A:14-2.5(c)(1)(ii) and that, as a result, Edison's petition should be dismissed, entitling

petitioners to a publicly funded independent evaluation. Er.L. also contends that Edison's due process petition should be dismissed because it was improperly filed by an assistant superintendent instead of the school district's attorney.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

E.L., is eight years old and lives with her mother, Er.L., in Edison. She has been eligible for special education and related services since December 2012, when she was two years old. Over the years, she has been classified as "preschool child with a disability," "autistic," and "multiply disabled." In 2013, E.L. was diagnosed with Rett syndrome, a neurological disorder that affects a child's ability to speak, walk, eat, and perform other daily activities

In November, December, and January of the 2017-2018 school year, Edison conducted a multi-disciplinary reevaluation of E.L. with Er.L.'s consent. The reevaluation was composed of educational, psychological, speech/language, occupational therapy, and physical therapy assessments. E.L. received a copy of the educational, psychological, and speech/language assessment reports in December 2017, and a copy of the other two assessment reports in January 2018.

On April 24, 2018, Er.L. scanned and emailed to Lanie Midlin, E.L.'s case manager, and Christopher Conklin (Conklin), Edison's Assistant Superintendent for Pupil-Special Services, a letter requesting an independent educational evaluation (IEE) at Edison's expense.¹ She stated that the reevaluation assessments conducted by Edison "were not appropriate given her Rett Syndrome diagnosis." Instead, Er.L. wrote that E.L. "needs to be assessed by a neurodevelopmental specialist who can evaluate her cognitive and behavior needs" and a "speech language specialist familiar with the augmentative communication device [E.L.] has recently acquired." She also requested physical therapy and occupational therapy assessments.

¹ The IDEA's regulations define an "independent educational evaluation" as "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question," and "[p]ublic expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent[.]" 34 C.F.R. § 300.502(a)(3).

On April 25, 2018, Conklin responded to Er.L.'s email request for an IEE by stating that "[t]he District does not except [sic] electronic request for independent educational valuation [sic]. Please mail it to the address listed below." The address listed was 312 Pierson Avenue, Edison, NJ, which is where Conklin's office is located. In response to Conklin's email, Er.L. asked if she could "just drop it off," to which Conklin replied, "[y]es that would be fine." Two days later, Er.L. responded to Conklin's email by stating, "[m]y apologies, right before I saw your email I'd already mailed the request."

On May 2, 2018, Conklin received the mailed copy of Er.L.'s letter requesting an IEE. On May 16, 2018, Conklin filed a due process petition with the Office of Special Education Programs (OSEP) "for a determination, pursuant to N.J.A.C. 6A:14-2.5(c)(2), that [Edison's] educational evaluations of E.L. were and are appropriate, that [Er.L. is] not legally authorized to request independent evaluations at taxpayer expense, and that [Er.L.'s] request should be denied." According to Conklin, "there were no recent evaluations" that entitled Er.L. to an IEE and she "cannot explain or defend [her] delay in requesting an [IEE] in response to [Edison's] evaluations conducted in December 2017 and January 2018." On June 7, 2018, OSEP transmitted the matter to the Office of Administrative Law (OAL) for a due process hearing.²

On June 28, 2018, Er.L. filed a motion for summary decision finding that she is entitled to an IEE at public expense because Edison failed to timely file a due process petition challenging Er.L.'s request. Er.L. argues that, although on April 25, 2018, Edison received notice of her disagreement with its evaluation and her request for an IEE, Edison failed to file a due process petition to dispute the need for an IEE until May 16, 2018, or twenty-one days later, in violation of N.J.A.C. 6A:14-2.5(c)(1)(ii), which provides in relevant part that an IEE "shall be provided at no cost to the parent unless the school district initiates a due process hearing to show that its evaluation is appropriate . . . [n]ot later than 20 calendar days after receipt of the parental request for the independent evaluation" Er.L. also argues that Edison's petition should be dismissed because

² On May 1, 2018, Er.L. also filed a due process petition seeking an IEE and challenging the April 2018 individualized education program (IEP) offered by Edison. That matter, which was also transmitted by OSEP to the OAL on June 7, 2018, has been assigned docket number EDS 08094-2018.

Conklin, as assistant superintendent, did not have the legal authority to file the petition on behalf of Edison and that, instead, the petition should have been filed by Edison's attorney.

In opposition, Edison contends that Er.L.'s motion should be denied because Edison timely filed its due process request and because Conklin was not prohibited by law from submitting the complaint on behalf of Edison. First, Edison asserts that Conklin properly rejected Er.L.'s initial IEE request by email because special education law, the procedural safeguards statement issued by the Department of Education, and Edison's written policies and procedures for IEE requests support Conklin's insistence on a non-electronic submission of Er.L.'s IEE request, and that Conklin timely requested a due process hearing once he received Er.L.'s IEE request by regular mail. According to Conklin, Edison "maintains and implements written policy guidelines and procedures relating to parental requests for [IEEs]," including one that provides that "parents/guardians must submit a written request (electronic [e.g. emails, faxes, pdf files, etc.] or verbal requests are not acceptable) for an IEE to the Assistant Superintendents' office directly . . ." Conklin Cert., ¶ 7 and Ex. B.

Second, Edison asserts that Conklin properly filed Edison's due process request because state law does not require a school district's attorney to file for due process on the district's behalf. Thus, because Edison properly followed the procedures for contesting Er.L.'s IEE request, Edison submits that Er.L.'s motion must be denied and that a hearing is necessary to determine whether the evaluation conducted by Edison during the 2017-2018 school year was appropriate such that Er.L. is not entitled to an IEE at public expense. In this regard, Conklin has certified that "[i]n my professional opinion, all of the evaluations and assessments of E.L. completed by [Edison] during November and December 2017 are comprehensive, reliable, and more than sufficient to properly assess E.L.'s educational needs in all relevant areas."³ Conklin Cert., ¶ 11.

A decision on this matter was issued to the parties on the record on August 8, 2018, and the within Decision memorializes that ruling.

³ According to Edison's due process petition, two of the assessments were conducted in January 2018.

LEGAL DISCUSSION

The IDEA is designed to assure that disabled children may access a free appropriate public education (FAPE) that is tailored to their specific needs. 20 U.S.C. § 1400(c). Under the state regulations implementing the IDEA, N.J.A.C. 6A:14-1.1 to – 10.2, a school district of residence is responsible for “the location, identification, evaluation, determination of eligibility, development of an individualized education program and the provision of a [FAPE] to students with disabilities.” N.J.A.C. 6A:14-1.3. In determining whether a student is eligible for special education services, a school district must conduct an initial evaluation, which “shall consist of a multi-disciplinary assessment in all areas of suspected disability,” and if the child is deemed eligible, a school district must conduct “a multi-disciplinary reevaluation . . . to determine whether the student continues to be a student with a disability” at least every three years. N.J.A.C. 6A:14-3.4(f); N.J.A.C. 6A:14-3.8(a).

Under N.J.A.C. 6A:14-2.5(c):

Upon completion of an initial evaluation or reevaluation, a parent may request an independent evaluation if there is disagreement with the initial evaluation or a reevaluation provided by a district board of education. A parent shall be entitled to only one independent evaluation at public expense each time the district board of education conducts an initial evaluation or reevaluation with which the parent disagrees. The request for an independent evaluation shall specify the assessment(s) the parent is seeking as part of the independent evaluation request.

The school district shall pay for the IEE “unless the school district initiates a due process hearing to show that its evaluation is appropriate and a final determination to that effect is made following the hearing.”⁴ N.J.A.C. 6A:14-2.5(c) and (c)(1). N.J.A.C. 6A:14-2.5(c)(1)(ii) specifies that “[n]ot later than 20 calendar days after receipt of the parental request for the independent evaluation, the school district shall request the due process hearing.” Thus, “[t]he school district shall not delay either providing the independent

⁴ Under special education law, “[a] due process hearing is an administrative hearing conducted by an administrative law judge.” N.J.A.C. 6A:14-2.7(a).

evaluation or initiating a due process hearing to defend the school district's evaluation.”
N.J.A.C. 6A:14-2.5(c)(5).

While N.J.A.C. 6A:14-2.5(c) does not specify the method by which a parent may request an IEE, guidance on this issue may be found elsewhere. First, N.J.A.C. 6A:14-1.2(b)(18) requires a school board to adopt policies and procedures to ensure that “[w]hen the school district utilizes electronic mail, parents are informed as to whether they may use electronic mail to submit requests to school officials regarding . . . evaluation . . .” Second, the procedural safeguards statement issued by the Department of Education in accordance with N.J.A.C. 6A:14-2.3(g)(7) provides that:

You may request a change in the evaluation, eligibility, IEP or placement of your child. Whenever you make such a request of the school, you should make the request in writing and keep a copy for your records. The school has 20 calendar days to answer you in writing . . . If your school district adopts a policy permitting parents to submit written requests by electronic mail, you may submit your requests by following the school's email policy. Otherwise, such requests must be written or typed and provided to the school district.”

[Department of Education, *Parental Rights in Special Education* (PRISE), p. 6, available at <https://www.state.nj.us/education/specialed.>]

In their motion for dismissal, respondents raise two issues. Firstly, they argue that Conklin, as the assistant superintendent, did not have the legal authority to file the due process petition on behalf of Edison. Yet, neither state nor federal law explicitly state that only a school district's attorney has the legal authority to file a due process petition objecting to a parent's request for an IEE.

First, 34 C.F.R. § 300.502(a)(1)(i) simply states that “[i]f a parent requests an independent educational evaluation at public expense, *the public agency* must, without unnecessary delay . . . [f]ile a due process complaint to request a hearing to show that its evaluation is appropriate.”⁵ (Emphasis added). N.J.A.C. 6A:14-2.7(b) similarly provides

⁵ “Public agency” is defined in relevant part as “the . . . [local educational agency] . . . that [is] responsible for providing education to children with disabilities.” 34 C.F.R. § 300.33.

that “[t]he district board of education shall request a due process hearing when it denies a written parental request for an independent evaluation in accordance with N.J.A.C. 6A:14-2.5(c).”⁶ (Emphasis added). Neither regulation specifies who may file for due process on behalf of the school district. However, 34 C.F.R. § 300.508(c) suggests that a school district is not required to use its attorney as the conduit for filing a due process complaint, such that “[a] party may not have a hearing on a due process complaint until *the party, or the attorney representing the party*, files a [sufficient] due process complaint . . .” (Emphasis added).

That school district attorneys may not be essential during every step of a due process matter is also supported by the resolution meeting requirements, which provide that such meetings must include “a representative of the public agency who has decision-making authority on behalf of that agency,” but “[m]ay not include an attorney of the LEA unless the parent is accompanied by an attorney.” 34 C.F.R. § 300.510(a); N.J.A.C. 6A:14-2.7(h). However, it is clear that there does come a point at which a school district may no longer proceed without an attorney.

In particular, federal law provides that “whether parties have the right to be represented by non-attorneys at due process hearings is determined under State law,” 34 C.F.R. § 300.512(a), and New Jersey law prohibits non-attorneys from appearing on behalf of school districts in due process hearings. Under R. 1:21-1, “[e]xcept as provided below, no person shall practice law in this State unless that person is an attorney holding a plenary license to practice in this State . . .” R. 1:21-1(a). One such exception is found under R. 1:21-1(f), Appearances Before Office of Administrative Law and Administrative Agencies:

An appearance by a non-attorney in a contested case before the Office of Administrative Law or an administrative agency may be permitted, on application, in any of the following circumstances: . . . to represent parents or children in special education proceedings, provided the non-attorney has

⁶ "District board of education" is “the school district of residence, the board of trustees of a charter school, the State agency or other public education agency which acts as the district of residence for the location, identification, evaluation, determination of eligibility, development of an individualized education program and the provision of a free appropriate, public education to students with disabilities except as defined otherwise.” N.J.A.C. 6A:14-1.3.

knowledge or training with respect to handicapped pupils and their educational needs so as to enable the non-attorney to facilitate the presentation of the claims or defenses of the parent or child.

While a parent may be represented by a non-attorney, the exception for non-attorney appearances before the OAL does not include local government employees or officials and, thus, in due process hearings, a school district must be represented by an attorney. Ibid; see also N.J.A.C. 1:6A-5.1; N.J.A.C. 1:1-5.4. However, there is no exception prohibiting a non-attorney school district official from conducting certain pre-hearing activities without an attorney, such as filing a due process complaint with OSEP. Indeed, in the analogous context of controversies and disputes before the Commissioner of Education, N.J.A.C. 6A:3-1.9(b) states that, “[o]nce a matter has been deemed contested, a district board of education shall be represented by an attorney in accordance with applicable rules of the OAL.” N.J.A.C. 6A:3-1.9. This provision suggests that a school district may proceed without an attorney until a matter is sent to the OAL for a hearing. The same should apply in special education matters. As such, respondents’ motion fails with respect to the issue of Conklin’s legal authority to file a due process request on Edison’s behalf.

However, respondents’ motion also raised the issue of whether Edison timely filed a due process request in response to their IEE request. They contend that Edison violated N.J.A.C. 6A:14-2.5(c) by filing its due process request on May 16, 2018, or twenty-one days after Edison received the IEE request by email on April 25, 2018. Edison contends that the twenty-day period for Edison’s due process request did not begin to run until Edison received the IEE request by regular mail on May 2, 2018. Edison asserts that as it filed its due process request on May 16, 2018, or fourteen days after receipt of petitioners’ mailed version of its earlier emailed request, it complied with the twenty-day time limit under N.J.A.C. 6A:14-2.5(c).

Whether Conklin’s rejection of the email request and insistence on a request by regular mail or hand delivery was appropriate is the remaining issue in the within motion. As noted above, N.J.A.C. 6A:14-2.5(c) does not specify the method by which a parent

may request an IEE.⁷ However, N.J.A.C. 6A:14-1.2(b)(18) and the PRISE appear to allow a school district the discretion to accept email requests and that, if a school district has not adopted a policy allowing for email requests, a parent must submit a written IEE request to the school district by regular mail or by personal delivery. Edison contends it has adopted a policy requiring written, non-electronic IEE requests, and, that Conklin properly declined Er.L.'s email request and instead directed her to submit her request by mail or hand delivery.⁸

While New Jersey regulations do not require that an IEE request be in written rather than email format, both N.J.A.C. 6A:14-1.2(b)(18) and the PRISE guidance issued by OSEP appear to allow a district to issue a policy setting forth that requirement. As noted earlier, Edison contends that it has adopted just such a policy with regard to IEE requests. In this matter however, it is crucial to note that the above regulation and PRISE guidance assume that parents will be informed as to such a policy. Although Edison communicated via email for years with Er.L. regarding her daughter, it chose not to specifically provide her with a copy of the policy requiring a written, not emailed request for an IEE. Instead once Conklin received the request via email, he refused to accept it, requiring Er.L. to resubmit the same letter request that he had just reviewed via a mailed or hand delivered written format. While the policy he cited was present on the district's website, as noted by respondents' counsel it was difficult to locate.⁹

⁷ N.J.A.C. 6A:14-2.7(b) states that "[t]he districts board of education shall request a due process hearing when it denies a written parental request for an independent evaluation in accordance with N.J.A.C. 6A:14-2.5(c)," but this also begs the question whether a "written parental request" may be emailed or must be sent by regular mail.

⁸ Although a moot issue, Edison's suggestion that Er.L.'s April 2017 IEE request was untimely because her request was based on her disagreement with the December 2017 and January 2018 evaluation is misguided. While N.J.A.C. 6A:14-2.5(c) and the federal regulation on which it is based, 34 C.F.R. § 300.502, do not include a deadline by which a parent must request an IEE upon completion of an initial evaluation or reevaluation, administrative tribunals have applied IDEA's two-year limitations period for due process requests under 20 U.S.C. § 1415(f)(3)(c) to IEE requests. See, e.g., Fullerton Sch. Dist., 58 IDELR 177 (January 30, 2012) (finding that parents timely requested an IEE fifteen months after the school district completed an evaluation with which the parents disagreed and ordering the school district to pay for an IEE); Bryan Cnty. Sch. Dist., 113 LRP 4536 (January 25, 2013) and Atlanta Pub. Schs., 51 IDELR 29 (August 13, 2008) (finding that parents who made requests more than two years after the school district's last evaluation were not entitled to IEEs at public expense); Letter to Thorne, OSEP, 16 IDELR 606 (February 5, 1990) (stating that "[i]t would not seem unreasonable for [a] public agency to deny a parent reimbursement for an IEE that was conducted more than two years after the public agency's evaluation").

⁹ An initial review of the website by the undersigned's research staff also did not locate the policy.

While in this day and age a prohibition on email request may seem unreasonable, such a policy may be permissible under special education law. In the case of IEEs the PRISE statement, rather than a specific regulation, appears to grant significant discretion to a school district. However, such discretion must be exercised in conformance with existing law and public policy regarding IEEs. As discussed in respondents' legal argument, a district should not place barriers to the prompt handling of such requests. Implicit in the law and policy on IEEs is a responsibility by the school district to clearly communicate and make easily available any procedural requirements that could stand in the way of such requests.

In this matter, the policy cited by Edison disallowing an email request for an IEE was not previously provided to respondents and was not readily accessible on its website. In respondent's dealings with the district over the years communication via email was an accepted method of dealing between the parties. Further a review of respondents' emailed request shows that, but for the disputed method of delivery, it conformed with the substantive requirements for such a request. In effect, respondents showed substantive compliance with the requirements for requesting an IEE. Significantly, the district acknowledged receipt of the request, but chose not to act upon it. Instead it pointed petitioner to a policy that she had been unaware of, which was difficult to find in on its website, and which required her to resubmit the exact same letter via a different method of delivery. Under those facts, Edison's actions acted as another barrier to a speedy resolution of petitioners' IEE request.

Under the facts of this matter Edison has not shown that its requirement that petitioners' request for an IEE be transmitted only in a specific manner and not by email was appropriate. Edison therefore did not comply with N.J.A.C. 6A:14-2.5(c)'s twenty-day requirement by filing its due process request on May 16, 2018, or twenty-one days after Edison received the request by e-mail. Respondents' motion for dismissal is **GRANTED** with respect to this issue.

As Edison's petition is Dismissed, respondents' request for a publicly funded IEE is appropriate and Edison must provide the requested evaluations

ORDER

Respondents' motion is **GRANTED**, and this matter is **DISMISSED**. Further, petitioner is responsible for the IEE requested by respondents.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2018) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2018). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.

November 2, 2018
DATE

PATRICIA M. KERINS, ALJ

Date Received at Agency

November 2, 2018 (emailed)

Date Mailed to Parties:

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