BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

BRYAN COUNTY SCHOOL DISTRICT, Plaintiff, v. [redacted] Defendant.	:	Docket No.: OSAH-DOE-SE-1323602-15-Teate 13-281335

FINAL DECISION
ORDER GRANTING MOTION FOR SUMMARY DETERMINATION

I. INTRODUCTION

On December 20, 2012, the Plaintiff, Bryan County School District ("the District"), filed a Due Process Hearing Request asking this Court to approve the District's request for triennial reevaluations and to deny the Defendant's ("the Family's") request for Independent Educational Evaluations ("IEEs") at public expense. The District filed its Motion for Summary Determination on December 28, 2012. The Family subsequently filed its Answer on January 2, 2013. For the reasons stated below, the District's Motion for Summary Determination is **GRANTED**.

II. FINDINGS OF FACT

District's Evaluations and IEP Meetings prior to September 2012

1. In September 2010, the District conducted psychological, occupational, physical, and speech and language evaluations of [redacted][1] The evaluations were presented in a special education

[1] [redacted] is a [redacted]-year-old boy who attends elementary school in the Bryan County School District. [redacted] was diagnosed with Autistic Spectrum Disorder and Attention Deficit Hyperactivity Disorder. [redacted] is currently placed in a significant developmentally delayed and speech and language impaired programs. [redacted] also receives occupational

eligibility determination and Individualized Education Program ("IEP") meeting on September 30, 2010. (Affidavit of Laura Murphy, ¶ 6; Exhibit 1 & 2).

2. At the September 30, 2010 meeting, the IEP team determined that [redacted] was eligible for special education and related services provided by the District under its Autism and Speech Impairment Program. Both of [redacted]'s parents were present at the meeting and did not express any disagreement with the IEP. (Affidavit of Laura Murphy, ¶ 7; Exhibit 2).

3. On September 21, 2011, the District conducted an annual review IEP meeting. [redacted]'s father attended the meeting. [redacted]'s father did not express any disagreement with the IEP. (Affidavit of Laura Murphy, ¶8; Exhibit 3).

September 2012 IEP Meeting

4. On September 19, 2012, the IEP team, which included both of [redacted]'s parents, met for an annual review and reevaluation determination. The purpose of the meeting was to determine whether additional or updated data may be needed for continuing education. The IEP team determined that no additional data was needed for continued eligibility in the areas of Autism and speech and language impairment. [redacted]'s mother signed the last page of the Reevaluation/Redetermination form and checked a box that stated, "Yes, I do agree with the Recommendation." Just above [redacted]'s mother signature, the IEP team checked a box that stated "Student continues to meet eligibility for the Autism and Speech Impairment programs." The last page also contained a section where all relevant boxes were checked "no" in response to the following questions:

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therapy. As a student with disabilities, [redacted] is covered by the Individuals with Disabilities Education Act of 2004

Is additional data needed to determine:

(a) Present levels of performance and educational needs of the student (e.g. transition and postsecondary planning)?

(b) Whether the student continues to need special education and related services?

(c) Whether any additions or modifications to the special education and related services are needed to meet IEP goals and participate, as appropriate, in the general curriculum?

(Affidavit of Laura Murphy, ¶¶10-11; Exhibit 4).

[redacted] *'s Parents Request for Independent Educational Evaluations ("IEE")*

5. On November 5, 2012, Dr. Laura Murphy, the Director of Special Education, met with [redacted]'s parents at another IEP to add goals and objectives for [redacted] At that time, [redacted]'s parents voiced their desire to have [redacted] privately evaluated.[2] (Affidavit of Laura Murphy, ¶ 13; Exhibit 5).

6. On November 7, 2012, [redacted]'s parents sent the Principal of Richmond Hill Elementary, Crystal Morales, an e-mail asking for the District to make payment arrangements for a psychological evaluation, an occupational therapy evaluation, and a speech and language evaluation. [redacted]'s parents stated in the e-mail that they believed the District's evaluations were improper. (Affidavit of Laura Murphy, ¶ 14; Exhibit 6).

7. On November 15, 2012, Dr. Murphy called [redacted]'s mother to discuss the IEE request and left a voicemail. [redacted]'s mother sent an e-mail in response to Dr. Murphy's voicemail, asking her to

("IDEA"), 20 U.S.C. §1401, et seq. (Exhibit 2).

[2] It is unclear from the record whether [redacted]'s parents requested an IEE at this time. Dr. Murphy states that [redacted]'s parents did not request an IEE at public expense and did not disagree with the September 2012 evaluations. However, [redacted]'s parents sent an e-mail suggesting that IEEs were, in fact, discussed at the November 5, 2012 meeting. (Affidavit of Laura Murphy ¶ 13; Exhibit 6).

respond to the IEE request in writing. On November 20, 2012, Dr. Murphy responded to the IEE request in writing via e-mail. In the e-mail, Dr. Murphy stated the District was considering the IEE request, but asked that [redacted]'s parents provide clarification on exactly which valuations they found improper, since [redacted]s parents never disputed or voiced disagreement with the 2010 evaluations.[3] Dr. Murphy also asked at that time for [redacted]s parents to consent to evaluations performed by the District before they pursued IEEs at public expense. (Affidavit of Laura Murphy, ¶¶ 16, 20-22; Exhibit 6).

8. Rather than responding to Dr. Murphy's request, [redacted] parents wrote to the Chairman of the District's Board of Education, Eddie Warren, demanding that he enforce state and federal law by directing the District to give their son an IEE at public expense. In correspondence dated December 3, 2012, the District's Superintendent, Dr. Paul Brooksher, asked that [redacted]s family contact Dr. Murphy to address their concerns, and explained that it is always the first step to offer and recommend District evaluations. Instead of replying to Dr. Brooksher, [redacted] parents e-mailed Mr. Warren again, alleging that the District was violating federal and state law and ignored their requests. (Affidavit of Laura Murphy, ¶¶ 23-27; Exhibit 6).

9. On December 4, 2012, [redacted]s parents wrote to Mr. Warren a third time, asking whether the District would comply with federal and state law. On the same day, Dr. Brooksher e-mailed [redacted]s parents to address their concerns, and once again asked them to contact Dr. Murphy to

[3] Significantly, Plaintiff fails to produce any affidavit or evidence suggesting that they ever asked for independent testing or disagreed with the 2010 evaluations prior to the November 5, 2012 meeting. To the contrary, all of the exhibits the District presented show that [redacted]s parents never voiced disagreement prior to November, 2012. Specifically, [redacted]s mother signed the September 2012 reevaluation results, showing that she agreed that additional data was not necessary to determine eligibility or to determine present performance letters or modification of the IEP. Plaintiff claims that they only agreed that additional data agreement that additional testing was unnecessary

discuss the next steps to help meet [redacted]s needs. On the evening of December 4, 2012, [redacted]s parents responded to Dr. Brooksher's e-mail, which also addressed Dr. Murphy's e-mail. In this e-mail, [redacted]s parents insisted on their right to an IEE at public expense, said they were not required to provide a reason for this request, and stated that they would agree to additional District evaluations *only if* the District provided IEEs at the public's expense.[4] (Affidavit of Laura Murphy, ¶¶ 28-30; Exhibit 6).

10. On December 6, 2012, [redacted]s parents contacted Ms. Murphy to ask if the District made arrangements to pay for the IEEs. (Affidavit of Laura Murphy, ¶ 31; Exhibit 6).

11. Dr. Murphy sent [redacted]s parents a letter denying the requested IEEs at public expense on December 7, 2012. The letter explained that the IEEs were untimely since they were time-barred by the applicable statute of limitations, and as [redacted]s parents failed to disagree with the evaluations at the September 2012 IEP meeting. Dr. Murphy stated that the District treated their request as a request for reevaluation by the District and called an IEP meeting on December 14, 2012 to discuss those evaluations. Dr. Murphy also informed [redacted]s parents that once the reevaluation is completed, they will be allowed to request an IEE as to those evaluations. (Affidavit of Laura Murphy, ¶¶ 33-36; Exhibit 7).

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only related to evaluations conducted by the District. However, the plain language of the signed document relates to *any* data or testing. (Plaintiff's Answer, ¶ 7; Exhibits 4-6).

[4] While the Plaintiff asserts that the District has not tried to resolve this matter, the undisputed evidence contained in the Exhibits shows the District made many efforts to contact [redacted]s parents to address their concerns, and asked to meet with the parents on multiple occasions. (Exhibits 7-10).

12. [redacted] parents declined to attend the December 14, 2012 meeting, but did not provide a reason why or suggest an alternative date. The District proceeded without them.[5] (Affidavit of Laura Murphy, ¶ 37; Exhibit 8-9).

13. On December 14, 2012, Dr. Murphy asked [redacted]s parents to allow the District to conduct its triennial reevaluations. Dr. Murphy further stated that unless [redacted]'s parents agree to the triennial reevaluations, the District must file a due process hearing asking the Court to deny the IEEs and require the parents to consent to the triennial reevaluation. [redacted] parents have not responded to the letter. (Affidavit of Laura Murphy, ¶41; Exhibit 10).

III. CONCLUSIONS OF LAW

Filing a Due Process Hearing without Unnecessary Delay

1. The Individuals with Disabilities Education Act ("IDEA") provides that either party "may file a due process complaint on any of the matters described in § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of Free Appropriate Public Education ("FAPE") to the child). 34 C.F.R. § 300.507 (a) (1). As to any of the matters so described, when a parent requests an IEE, the public agency must, without unnecessary delay, either file a due process complaint to show that its evaluation is appropriate or provide the IEE at public expense. 34 C.F.R. § 300.502 (b) (2) (i). [redacted]s parents explicitly asked the District to pay for a psychological evaluation, an occupational therapy

[5] Plaintiff asserts in its Answer that the District violated federal regulations by failing to schedule the December 14th meeting at a convenient time. However, the District provided three alternative meeting times and stated, "If you do not respond by December 11, 2012, the meeting will proceed on December 14, 2012." [redacted]s parents responded in an e-mail December 13th stating, "With regard to your request for a meeting, we will advise you if we wish to schedule any meetings with you . . . However, we have not requested that you do this at this time, since a meeting is not required for the district to . . . make payment arrangements for [redacted] IEEs." Based on this response, the District provided [redacted] with adequate notice and an opportunity to reschedule the meeting, but [redacted]s parents were unwilling to comply with the meeting at all. (Plaintiff's Answer, ¶ 9; Exhibit 7-8).

evaluation, and a speech and language evaluation in the November 7, 2012 e-mail. Thus, the District had notice that [redacted]s parents were seeking each of those IEEs at that time. After continued communications or attempted communications with [redacted]s parents, the District filed a due process complaint on December 20, 2012 seeking a new triennial evaluation without specifically seeking to show that its current September 2010 evaluation is appropriate. The statutory language in 34 C.F.R. § 300.502 (b) (2) (i) is not implicated in this case because [redacted]s parents' IEE request fell outside of the two (2) year statute of limitations indicated in 34 C.F.R. § 300.507 (a) (2) and, the District was therefore not required to defend its previous evaluations. According to the United States Office of Special Education (OSEP), the division of the United States Department of Education that administers the IDEA and develops its regulations, a due process hearing is not necessary when an IEE request falls outside the statute of limitations. *Placentia-Yorba Linda Unified School Dist.*, 112 LRP 41903 (August 7, 2012) (citing *Letter to Thorne, supra,* 16 IDELR 606, at p.3). The necessity of a due process hearing in this case is significantly diminished, especially considering the expense imputed on all parties in requesting a due process hearing and the District's right to seek a new evaluation as indicated in 34 C.F.R. § 300.303 (a) (1), to which the parents could subsequently object. The District argues, and the Court agrees, that where the District's evaluation is outside the statute of limitations indicated in 34 C.F.R. § 300.507 (a) (2), the District has not waived its defenses to a parental due process complaint challenges regarding the current evaluation.

Furthermore, under circumstances presented, the District made a good faith effort to reach a resolution and did not *unnecessarily* "delay" filing its due process request on December 20, 2012. When a school district is able to document its good faith effort to resolve an IEE dispute, some delay has been found reasonable. See e.g., *L.S. v. Abington School Dist.*, 48

IDELR 244 (E.D. Pa. 2007) (finding a ten-week delay was not a per se violation of the IDEA because the district attempted to resolve the matter through numerous e-mails and a resolution session and notified the parents within twenty-seven (27) days that the IEE request would be denied); *J.P. v. Ripon Unified School Dist.*, 52 IDELR 125 (E.D.Cal. 2009) (finding a two (2) month delay was not unreasonable because the district attempted to resolve the matter with the parents and filed a due process hearing request three weeks after it reached final impasse).

Here, the District made a good faith effort to resolve the IEE dispute prior to filing a hearing request. One week after [redacted]s parents requested the IEE, Dr. Murphy called [redacted]s mother to discuss their request. When [redacted]s parents declined to speak with Dr. Murphy by phone, Dr. Murphy promptly responded to the request in writing and continued to make a good faith effort to resolve the dispute. Following a series of e-mails from the District, and [redacted]'s parents' insistence upon receiving a private IEE at public expense, the District asked for the parents to participate in a meeting regarding the IEE request on December 14, 2012—this meeting marked the District's final attempt to resolve the IEE dispute outside of Court. When [redacted] parents failed to attend the meeting, the District promptly filed its due process hearing request on December 20, 2012. The Court finds that the District's good faith effort to resolve the issue outside of court constitutes *reasonable* delay.

Statute of Limitations

2. "The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint." 34 C.F.R. 300.507 (a) (2); 20 U.S.C. § 1415 (b) (6) (B). The two-year statute of limitations provision for due process complaints is also reflected in the IDEA's requirement that a parent or agency must request an impartial hearing on

their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint. 34 C.F.R. § 300.511 (e). A claim therefore accrues and the statute of limitations begins to run when a parent is aware of the facts that would support a legal claim. See e.g., *M.D. v. Southington Board of Ed.* (2d Cir. 2003) 334 F.3d 217, 221. According to OSEP's *Letter to Thorne*, "it would not seem unreasonable for the public agency to deny a parent reimbursement for an IEE that was conducted more than two years after the public agency's evaluation." The California Office of Administrative Hearings persuasively argued that OSEP's reasoning strongly supports the conclusion that the statute of limitations applies to IEE requests, as that agency is tasked with interpreting the IDEA.

The paucity of courts that have dealt with the statute of limitations issue concurs with OSEP's interpretation of the IDEA. For example, the California Office of Administrative Hearings states, "The public policy behind application of a statute of limitations is fairly obvious. A statute of limitations serves to assure that claims are not brought up years after they have become stale." *Placentia-Yorba,* 112 LRP at 9.[6] The earliest date that [redacted]'s parents requested an IEE was on November 5, 2012 at the parent conference, a date that is more than two years after the completion and presentation of the District's September 2010 Evaluations to the Eligibility and IEP Team on September 30, 2010. Contrary to argument presented by [redacted]s attorney that an IEE request is not subject to this statute of limitations, the Court agrees with the District that the statute of limitations requires dismissal of a complaint filed after the two year limit.

[6] The Court takes judicial cognizance that two Georgia Office of Administrative Hearings matters concluded that the IDEA's statute of limitations applies to IEE requests. OSAH-DOE-SE-731775-138-Gatto (July 20, 2007); OSAH-DOE-IEE-0828123-80-Barnes (August 13, 2008).

Either the District or the parents may seek a re-evaluation subject to statutory limitations indicated. 34 C.F.R. 300.303 (a) and (b). A triennial evaluation is required unless the District and the parents agree that such an evaluation is unnecessary. 34 C.F.R. 300.303 (b) (2). While there appeared to be agreement that such an evaluation was unnecessary as of September 2012, the District's decision to request the evaluation is reasonable because the parents have voiced concern that [redacted]s past evaluations are no longer current. Additionally, triennial evaluations are already required to occur within this year. Thus, allowing a triennial evaluation at this time would not substantially alter the course [redacted]s evaluations.

IEE at public or private expense

3. The IDEA provides that a student is entitled to obtain an IEE at public expense if the conditions of the statute are met. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(a)(1)(2006). "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." 34 C.F.R. § 300.502(b)(1)(2006). The parents did not object to the September 2010 evaluation within the two-year statutory limit indicated in 34 C.F.R. 300.507 (a) (2). After the new triennial evaluation that the District seeks is completed, the parents are free to seek a new IEE at public expense if they disagree with the evaluation, as well as to present any IEE obtained at private expense. 34 C.F.R. § 502 (c) (1) and (e).

Summary Determination

4. Summary determination in this proceeding is governed by Office of State Administrative Hearings ("OSAH") Rule 15, which provides, in relevant part:

> Any party may move, based on supporting affidavits or other probative evidence, for a summary determination in its favor upon any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination.

GA. COMP. R. & REGS. § 616-1-2-.15(1).

On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact such that the moving party "is entitled to a judgment as a matter of law on the facts established." Porter v. Felker, 261 Ga. 421 (1991)); See generally Piedmont Healthcare, Inc. v. Ga. Dep't of Human Res., 282 Ga. App. 302, 304-305 (2006) (observing that a summary determination is "similar to a summary judgment" and elaborating that an Administrative Law Judge "is not required to hold a hearing" on issues properly resolved by summary adjudication). See Leonaitis v. State Farm Mutual Auto Ins. Co., 186 Ga. App. 854 (1988)).

Further, pursuant to OSAH Rule 15(3):

> When a motion for summary determination is made and supported as provided in this Rule, a party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or other probative evidence, that there is a genuine issue of material fact for determination in the hearing.

GA. COMP. R. & REGS. § 616-1-2-.15(3).

The record indicates no genuine of material fact and the District has demonstrated through established facts that its motion is supported as a matter of law. The Family's arguments otherwise are non-persuasive.

ORDER

For the foregoing reasons, the District's Motion for Summary Determination is **GRANTED.** The Family's Motion for Consolidation and Motion for Partial Stay is **DENIED.**

The Defendant's request for IEE at public expense is untimely under IDEA (34 C.F.R. § 300.507 (a) (2) and 34 C.F.R. § 300.511 (e) ;

The Family is required to consent to the District's request for triennial reevaluations in accordance with 34 C.F.R. § 300.303 (b); and

The District is not required to consider any IEE the Family has obtained at private expense until such time as the triennial reevaluations have been completed and presented to the Family.

SO ORDERED, this 25th day of January 2013.

Steven W. Teate
Administrative Law Judge

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