THIS JUST IN...

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DEVELOPMENTS IN SPECIAL EDUCATION LAW

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WHEN THE IEE COSTS TOO MUCH

A Texas Hearing Officer has ruled in favor of a district that refused to pay the full cost of an IEE (Independent Educational Evaluation). The district had developed criteria pertaining to IEEs, including limitations on cost. Finding the district's criteria to be properly developed and reasonable, the hearing officer supported the district's refusal to pay more than the criteria called for. The case is well worth review by special education directors.

Background. As usual with hearing officer decisions posted on the T.E.A. website, there is much information redacted. However, we can determine that the Lewisville ISD conducted a FIE (Full Individual Evaluation) and concluded that the student had autism and a speech impairment. The ARD Committee met and developed an IEP. At that ARD meeting, the parents did not disagree with the district's evaluation. Later, however, they did request an IEE and asked the district to pay for it. Parents are authorized to do this whenever they disagree with the district's evaluation. This was in May, 2014.

The district approved the request. Thus the district agreed to pay for "a full psychological evaluation--including autism--as well as cognitive, achievement, adaptive behavior, speech and language, occupational therapy, and FBA and an evaluation for assistive technology." LISD provided the parents with its policies concerning IEEs and a list of possible evaluators.

So far so good. But then some dollar figures came into play. The parents wanted the autism evaluation to be done by a particular provider that is not named in the hearing officer's decision. However, we are told that the provider's fee would be $7,200 plus the cost of an FBA. The FBA would be done at $125 per hour and could go as high as $9,700. The district balked at these figures. Citing its operating guidelines, the district offered to pay $3,241.

The parties were also at odds over the cost of the speech evaluation. The parents' preferred provider quoted a fee of $1,500—approximately four times higher than the district's maximum rate for an IEE for speech.

The parents ended up paying out-of-pocket for some of the costs of the IEEs they had requested. Thus the district did not pay the full cost of the IEEs, and the parents took this matter to a due process hearing. There were also a number of other issues in the case involving FAPE and the provision of an Extended School Year program. The hearing officer ruled in favor of the district on all counts. But the most interesting part of the decision involves the IEE and the propriety of cost criteria.

Legal Authority. The hearing officer held that LISD "properly complied with" a federal regulation, and satisfied legal standards established by an OSERS letter and a previous court case. Let's take a look at those three

IF PARENTS HAD A FEDERALLY PROTECTED RIGHT TO OBTAIN AN EVALUATION BY ANYONE OF THEIR CHOOSING, WITHOUT REGARD TO COST, DISTRICTS WOULD LOSE CONTROL OF THEIR BUDGETS.

authorities—the regulation, the OSERS letter and the court case.

The federal regulation requires public schools to respond to a request for an IEE by either 1) requesting a due process hearing to show that its evaluation is appropriate; or 2) pay for the IEE "unless the agency demonstrates in a hearing…that the evaluation obtained by the parent did not meet agency criteria." See 34 CFR 300.502(b)(2). Here, the district showed that the IEEs exceeded cost criteria. As to the appropriateness of the cost criteria, read on.

The OSERS letter tells us four important things. First, that it is acceptable for districts to provide a list of evaluators that it already knows will satisfy the district's criteria. Second, that the parent ultimately gets to choose who will conduct the IEE. Thus the district cannot limit the parent to the names on the pre-approved list. Third, this means the parent can choose someone not on the pre-approved list, so long as the person chosen meets district criteria. And fourth, that the district must allow for "unique circumstances" that would justify the use of an evaluator who does not meet district criteria. The hearing officer held that Lewisville ISD's criteria satisfied those tests. See *Letter to Parker*, 41 IDELR 155 (OSERS 2004).

The court case held that a New York district's cap of $1,800 for an IEE was reasonable, given the fact that there were several qualified professionals in the area willing to do the IEE for that sum or less. The parent in that case never attempted to contact any of those qualified professionals. See *M.V. v. Shenendehowa Central School District*, 60 IDELR 213 (N.D.N.Y. 2013).

How Lewisville Did It. The law is clear that districts can have "caps" on what it will pay, but there are two important caveats to add. First, as noted above, "unique circumstances" must always be recognized. Second, the district has to base its cap on realistic and accurate information. You can't just pick a number out of the air. Here, the hearing officer concluded that the "district's evidence on appropriate costs of IEEs was based on substantial objective data relevant to the issues presented by the parties." The paragraph citing how the district did this is worth quoting in full:

> The district has adopted operating guidelines for independent educational evaluations and their costs. The guidelines are based upon research in typical costs for evaluations within the geographic area, consideration of the evaluator's credentials and the unique needs of the student, and approximations of costs up to 35% higher than Medicaid rates for the service. Data to establish the guidelines is gathered from two regional education service center regions and includes objective data from school districts, various professionals and private providers.

The Practical Effect. We often refer to evaluations as the foundation of all decision making in special education. Evaluations are to ARD Committees what evidence is to a jury. Thus the right of a parent to obtain an evaluation by a qualified professional who is independent of the school district is one of the most important procedural safeguards that parents enjoy. But that right is not unlimited. As this case illustrates, districts can develop appropriate criteria to address qualifications, cost and other matters.

It has to be that way. If parents had a federally protected right to obtain an evaluation by anyone of their choosing, without regard to cost, districts would lose control of their budgets. There is limited funding available in our special education programs. Directors are expected to spend those funds wisely and fairly. To do that, directors must maintain control over costs. Our special education laws do not allow cost to stand in the way of FAPE. If a student needs a particular service in order to receive a free and appropriate public education, the district must provide that service, regardless of cost. But cost is a legitimate factor in the provision of an evaluation. This case provides an excellent, Texas-based example of a district that did the hard work of developing cost criteria that are reasonable and accurate. And legal.

The case is *Student v. Lewisville ISD*, decided by hearing officer Lucius Bunton on June 5, 2015. The docket number of the case is 107-SE-1214, and you can find it on the T.E.A. website: http://tea.texas.gov/About_TEA/Legal_Services/

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