

**ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit**

IN RE:

XXXXXXXXXX

Parent on behalf of
XXXXXXXX, Student

PETITIONER

VS.

CASE: ADE H-22-13

El Dorado School District

RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

ISSUES PRESENTED:

Whether, as alleged in ADE H-22-13, the El Dorado School District (hereinafter "District" or "Respondent") denied XXXXXXXXX (hereinafter "Student") a free, appropriate, public education (hereinafter "FAPE") between June 15, 2021 and October 22, 2021, in violation of certain procedural and substantive requirements of the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter referred to as "IDEA"), by: (1) failing to conduct a timely evaluation of Student; (2) failing to consider an independent educational evaluation provided by Parent; (3) failing to conduct a timely referral conference; and (4) failing to create and implement an IEP for Student prior to the start of the 2021-2022 school year.

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PROCEDURAL HISTORY:

On October 22, 2021, the Arkansas Department of Education (hereinafter referred to as “Department”) received a request to initiate due process hearing procedures from XXXXXXXX (hereinafter referred to as “Parent” or “Petitioner”), the parent and legal guardian of Student. Parent asserted in her complaint that District failed to comply with the IDEA and the regulations set forth by the Department by failing to conduct a timely evaluation of Student, failing to consider an independent educational evaluation provided by Parent, failing to conduct a timely referral conference, and failing to create and implement an IEP for Student prior to the start of the 2021-2022 school year. ADE H-22-13 is the fourth due process hearing between Parent and District. The first three due process hearings between Parent and District, specifically ADE H-20-29, ADE H-21-08, and ADE H-21-24 were consolidated, and this Hearing Officer issued a single decision addressing all three cases on June 14, 2021.¹

In response to Parent’s request for hearing in the present case, the Department assigned the case to an impartial hearing officer. All in all, after one continuance, testimony was heard in ADE H-22-13 on December 13, 2021, and December 17, 2021. Due to the threat of COVID-19, this Hearing Officer presided via ZOOM on all hearing dates. Parent and District stipulated and agreed that all witness testimony and admitted exhibits in ADE H-20-29, ADE H-21-08, and ADE H-21-24 would be incorporated into the record for ADE H-22-13. The

¹ During the course of this proceeding, this Hearing Officer discovered a scrivener’s error with regard to the June 14, 2021 decision. Specifically, the date on the decision addressing ADE H-20-29, ADE H-21-08, and ADE H-21-24 was stated as June 14, 2020. The decision was in fact issued, however, on June 14, 2021.

following witnesses testified in this matter: Tyler Crittenden, Joseph Pate Bauldree, Joseph Clark, Parent, Susan Jeter, and Shawn Lampkin.²

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended, and Arkansas Code Annotated §§ 6-41-202 through 6-41-223, Danna J. Young, J.D., Hearing Officer for the Arkansas Department of Education, conducted a closed, impartial, due process hearing. Parent had the burden of proof in this case. Parent was represented by Theresa Caldwell (Little Rock, Arkansas) and District was represented by Khayyam Eddings (Little Rock, Arkansas). Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements, and both timely submitted briefs in accordance with the deadline set by this Hearing Officer.³

FINDINGS OF FACT:

Student currently attends school at El Dorado High School and is in the eleventh grade. There is much history regarding Student, his prior eligibility for special education services, and his discharge from special education services on March 10, 2020. This history is covered in detail in the June 14, 2021 consolidated decision covering ADE H-20-29, ADE H-21-08, and ADE H-21-24 and will not be repeated in this decision. This decision, instead, focuses on the actions of the parties between this Hearing Officer's June 14, 2021 decision and Parent's filing of this due process complaint on October 22, 2021.

On June 14, 2021, this Hearing Officer issued a decision which provided, in part, that by July 15, 2021, District was required to have Student comprehensively evaluated for the

² See generally ADE H-22-13 Transcript, Vols. I-II.

³ See Post-Hearing Briefs.

purpose of determining whether Student is eligible for special education services.⁴ This Hearing Officer further ordered that this evaluation be conducted by an independent third party upon which the Parent and District agreed.⁵

On June 16, 2021, the LEA for District emailed the Arkansas Psych Board and requested clarification regarding the procedures for using an out-of-state evaluator to conduct Student's evaluation.⁶ On this same date, the Arkansas Psych Board replied and provided instructions for how to proceed.⁷

On June 22, 2021, the LEA sent a list of three potential evaluators to District's counsel and indicated that it preferred to utilize an evaluator that was outside of the State of Arkansas. There are several emails between the LEA and District's counsel, referencing the availability of various evaluators and the fact that the evaluators on the list would come to Arkansas to conduct Student's evaluation.⁸ The evaluators referenced by District were available to conduct the ordered evaluation within the timeframe set by this Hearing Officer. Also on this same date, specifically June 22, 2021, Parent's counsel submitted a letter to District's counsel stating that Parent did not agree to the examiners proposed by District, but was agreeable to use Susan Jeter (hereinafter "Jeter"), who is located and licensed in

⁴ See Hearing Officer's Final Decision and Order dated June 14, 2021, which addressed ADE H-20-29, ADE H-21-08, and ADE H-21-24. It is noted that this Hearing Officer does not have jurisdiction to enforce this Final Decision and Order, and in no way is attempting to do so in this decision. The contents of this Final Decision and Order, however, provide context for the actions of the parties in this matter.

⁵ *Id.*

⁶ Exhibit Vol. III, p. 65.

⁷ *Id.* at p. 66.

⁸ *Id.* at pp. 66-71.

Arkansas.⁹ Parent’s counsel did not provide any reasons for refusing District’s proposed evaluators.¹⁰

The following day, on June 23, 2021, District’s counsel emailed Parent’s counsel and reiterated that the evaluators suggested by District were all able to complete Student’s evaluation prior to the deadline, with the exception of classroom observations.¹¹ Parent’s counsel responded via email and stated that she could not “sell” the out-of-state evaluators to Parent because Parent was afraid of traveling.¹² Parent’s counsel then stated in this same email that she had scheduled Student to be evaluated by Jeter on July 9, 2021.¹³

The following day, on June 24, 2021, District’s counsel responded to the prior email sent by Parent’s counsel and stated as follows:

We’ve been ordered to conduct a comprehensive evaluation. The District won’t agree to determine eligibility on anything less. We plan to follow all IDEA requirements for determining eligibility. The District wants to have a truly “independent” evaluator with no connections to Arkansas. What else do you need to know about the three evaluators we suggested in order to give them due consideration? They can begin before July 15 if we let them know something right away.¹⁴

On July 6, 2021, District’s counsel again emailed Parent’s counsel and reiterated that it did not agree to use Jeter to perform the required evaluation of Student. District’s counsel stated as follows:

The District does not agree to use Susan Jeter to perform the required evaluation in this case and will not pay for an evaluation by her. Have you even looked at the qualifications of the people we have suggested? Any suggestions

⁹ *Id.* at p. 72.

¹⁰ *Id.*

¹¹ *Id.* at p. 74.

¹² *Id.* at p. 73.

¹³ *Id.*

¹⁴ *Id.*

for how to resolve this impasse? We will be asking the Court this afternoon or tomorrow for a stay of the Hearing Officer's order.¹⁵

On July 7, 2021, Parent's counsel responded to District counsel's and proposed that (1) Jeter conduct an evaluation of Student on July 9 and, thereafter, give a list of her testing to the District's evaluator; (2) District's evaluators, thereafter, conduct a second evaluation; and (3) District pay for both evaluations.¹⁶ The following day, on July 8, 2021, Parent's counsel sent another email which included an attached letter from Jeter, as well as forms that she needed Student's teachers to complete in order to conduct an evaluation.¹⁷ On this same date, District's counsel again sent an email to Parent's counsel reiterating that District did not agree with Jeter conducting Student's evaluation.¹⁸ Despite this correspondence, Parent's counsel again referenced having Jeter evaluate Student. District's counsel, yet again, stated that it did not agree with this course of action.¹⁹

On July 12, 2021, District filed a Motion for Preliminary Injunction seeking to stay enforcement of this Hearing Officer's June 14, 2021 decision pending its appeal of same, which it filed on July 1, 2021. Parent filed a separate Motion for Preliminary Injunction, seeking to enforce this Hearing Officer's decision, on July 27, 2021. The United States District Court, Western Division, El Dorado Division, conducted a hearing regarding the parties' motions for preliminary injunction on August 9, 2021.

¹⁵ *Id.* at p. 76.

¹⁶ *Id.* at pp. 75-76.

¹⁷ *Id.* at p. 78.

¹⁸ *Id.* at p. 85.

¹⁹ *Id.* at p. 86.

On September 17, 2021, Parent sent an email to the LEA, with a carbon copy to Parent's counsel, which stated that Parent had procured an evaluation by Jeter and requested that an IEP meeting be scheduled within the following week to discuss Student's need for special education services.²⁰ On September 23, 2021, District sent a notice of conference to Parent, scheduling a referral conference on October 7, 2021, sent Parent an email referencing the notice, and filed a motion in the United States District Court, Western District, El Dorado Division, requesting that the Court hold the referral conference in abeyance.²¹ In its motion, District argued that requiring it to hold a referral conference and consider the evaluation of Jeter would result in District being required to consider an evaluation that was procured over District's objection and not in conformity with this Hearing Officer's June 14, 2021, Final Decision and Order.²²

On October 5, 2021, the LEA sent an email to Parent canceling the referral conference on account of ongoing litigation between the parties.²³ On October 26, 2021, four days after Parent filed this due process complaint, the United States District Court denied District's Motion for Preliminary Injunction.²⁴ The Court ordered the parties to meet prior to November 3, 2021, for the purpose of agreeing upon an independent evaluator or, in the alternative, to submit to the Court the names of two independent evaluators licensed in Arkansas so that the Court could choose an evaluator from the four listed options.²⁵ The

²⁰ *Id.* at p. 1.

²¹ *Id.* at p. 2.

²² *Id.* at pp. 45-50.

²³ *Id.*

²⁴ *Id.* at pp. 52-63.

²⁵ *Id.*

Court further ordered that an evaluation of Student be completed by December 10, 2021, and an IEP meeting for Student to discuss this evaluation occur on or before December 15, 2021.²⁶ On November 8, 2021, the Court entered an Order which stated that both parties had submitted names, and that the Court had chosen Tyler Crittenden to perform Student's evaluation.²⁷

Tyler Crittenden conducted a comprehensive evaluation of Student and issued a final report on December 8, 2021.²⁸ He determined that evaluation data, based on a pattern of strengths and weaknesses, appeared to "substantiate a learning disability consistent with Special Education Eligibility and Program Guidelines, as set forth by the Arkansas Department of Education."²⁹ He testified to this as well. The evaluation of Jeter, which was procured by Parent over District's objections, is also included in the record for this matter. Jeter also determined that Student was eligible for special education services pursuant to the IDEA and noted in testimony that her findings were consistent with those of Tyler Crittenden.³⁰

CONCLUSIONS OF LAW AND DISCUSSION:

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children with disabilities between the ages of three and twenty-one. 20 U.S.C. § 1412(a); 34 C.F.R. §

²⁶ *Id.*

²⁷ *Id.* at p. 64.

²⁸ *Id.* at Ex. 24. It is noted that this evaluation occurred after October 22, 2021, which was the date that Parent's due process complaint was filed. The evaluation, and the testimony of this evaluator, were admitted as evidence in this hearing, however, because it could have been instructive to this Hearing Officer in the event that Parent prevailed in this matter and compensatory education was required.

²⁹ *Id.* at Ex. 24, p. 50.

³⁰ Exhibit Vol. II, pp. 113-130.

300.300(a). In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the U.S. Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by courts and hearing officers in determining whether a school district has failed to provide FAPE as required by federal law. 458 U.S. 176, 206-07 (1982). Pursuant to *Rowley*, the first inquiry that a court or hearing officer must make is that of whether the State, *i.e.* local educational agency or district, has complied with the procedures set forth in the IDEA. Thereafter, it must be determined whether the IEP(s) developed pursuant to IDEA procedures was reasonably calculated to enable the student to make appropriate progress in light of his or her specific circumstances. *Id.*

Alleged Procedural Violations

Regarding the first inquiry, that of whether District complied with the procedures set forth in the IDEA, this Hearing Officer notes that the alleged violations cited by Parent in ADE H-22-13 included failing to conduct a timely evaluation of Student, failing to consider an independent educational evaluation provided by Parent, and failing to conduct a timely referral conference. All three of these procedural violations are based on the same set of facts and, therefore, are addressed thoroughly below.

Untimely Evaluation. Regarding Parent's allegation that District failed to conduct a timely evaluation, this Hearing Officer finds no procedural violation. The June 14, 2021 Final Decision and Order issued by this Hearing Officer, which provided that District comprehensively evaluate Student, set forth parameters for District. Specifically, the comprehensive evaluation of Student was to be conducted by July 15, 2021, and such evaluation was to be conducted by a third-party evaluator upon which Parent and District

agreed. Two days after receiving this Final Decision and Order, District contacted the Arkansas Psych Board and inquired about procedures for utilizing an out-of-state evaluator, which was a preference of District to ensure neutrality. Within a week of receiving the Final Decision and Order, and approximately three weeks prior to the July 15, 2021 deadline, District had located three potential evaluators, determined that they could conduct the evaluation in the timeframe provided and within the State of Arkansas, and sought feedback from Parent's counsel regarding evaluator options. Parent's counsel immediately declined to consider any of the evaluators proffered by District and stated that she preferred Jeter. District made attempts to ascertain concerns of Parent's counsel regarding the proffered evaluators, but to no avail. Parent's counsel repeatedly asserted that she wanted Jeter to conduct the evaluation. Despite District's repeated and vehement objections to Jeter, Parent's counsel pushed forward, scheduled the evaluation, procured the evaluation, and ultimately provided it to District on September 17, 2021.

The evidence in this case clearly establishes that District initially made attempts to schedule the evaluation in a timely manner, but that Parent would not consider any evaluator other than Jeter and would not provide feedback to District regarding her reasons for failing to consider any other options. Every communication provided by Parent's counsel in this regard ignored the proffer by District and pushed forward her preference that Jeter evaluate Student. In one email, Parent's counsel suggested that Student could be evaluated by one of District's evaluators after Jeter completed her evaluation and suggested that District pay for both evaluations. This email, in particular, was informative to this Hearing Officer. Clearly, Parent did not truly object to using of one of District's evaluators, as she indicated that Parent

would consent to an evaluation. However, she would only consent to one of District's proffered evaluators if she first procured an evaluation from Jeter. This indicates that Parent's insistence on Jeter was not because she disagreed with the options offered by District, but instead, because she wanted Jeter, specifically, to conduct the evaluation.

In her post-hearing brief, Parent argues through her counsel that she pushed forward with the evaluation of Jeter because of the delay of District and because she was trying to adhere to the July 15, 2021 deadline for completion of the evaluation. This Hearing Officer finds this argument disingenuous, however, in light of the facts in this case. Parent's refusal to consider any options that were timely offered by District, without offering reasons for same, was unreasonable and resulted in an impasse which delayed Student's evaluation. Perhaps, had District offered only one choice or failed to seek feedback from Parent, the outcome would have been different in this case. Here, however, District took actions to secure a timely evaluation, communicate with Parent's counsel, and resolve the impasse, all to no avail. Parent cannot refuse cooperation and delay an evaluation and then, subsequently, file a due process hearing and benefit from that case.

Failure to Consider Independent Educational Evaluation. Regarding Parent's allegation that District failed to consider an independent educational evaluation provided by Parent, this Hearing Officer finds no procedural violation of the IDEA. Title 34 of the Code of Federal Regulations, Section 300.502(c), addresses independent educational evaluations that are initiated by parent. The regulation states as follows:

If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation . . . must be considered by the public agency, if it

meets agency criteria, in any decision made with respect to the provision of FAPE to the child.

34 C.F.R. 300.502(c)(1).

However, where a parent fails to consent so as to allow a school district to conduct testing, but instead demands that district adopt findings from an independent educational evaluation which parent privately obtained, courts have found no procedural violation of the IDEA. *D.P. ex. rel. Pierce v. Sch. Dist. of Poynette*, 2004 WL 602651 (W.D. Wis. 2004); *G.J. v. Muscogee County Sch. Dist.*, 668 F.3d 1258 (11th Cir. 2021). In *D.P.*, parent repeatedly refused to consent to district testing and, instead, proffered an independent educational evaluation. The court, in finding that the district's refusal to consider the independent evaluation did not constitute a denial of FAPE, explained that notwithstanding the duty of a district to consider a parent-initiated evaluation pursuant to 34 C.F.R. 300.502(c), parents are not entitled under the IDEA to require that privately obtained evaluations preempt the opportunity for school districts to conduct their own evaluations in the process of arriving at eligibility determinations. *D.P. ex. rel. Pierce*, 2004 WL at 602651. Additionally, the court in *D.P.* upheld the finding of the administrative hearing officer that parents failed to provide a legal basis for their claim that their refusal to cooperate with school district on its proposed evaluation had been reasonable. *Id.*

In the present case, this Hearing Officer finds no procedural violation pursuant to 34 C.F.R. 502(c)(1). Although this is not a case of *per se* consent refusal, this Hearing Officer finds that the actions of Parent, through her counsel, had the same effect as refusing consent to an evaluation. Because District and Parent had to agree on an evaluator, Parent essentially withheld agreement, without an apparent legal basis for doing so. Parent's counsel did not

provide feedback to District regarding the proffered evaluators and why Parent was not amenable to them, nor did she offer any other solutions other than to have Jeter evaluate Student. Parent then procured the evaluation that she had wanted from the start and attempted to utilize 34 C.F.R. 300.502(c)(1) to force District to consider the Jeter evaluation. Essentially, Parent's actions preempted the efforts of District to comply with the June 14, 2021 Final Decision and Order. For these reasons, it is the conclusion of this Hearing Officer that District did not procedurally violate the IDEA by refusing to consider Jeter's evaluation when it was presented to District on September 17, 2021. Certainly, Parent had the right to have Jeter evaluate Student. She cannot, however, thwart the efforts of District to conduct an ordered evaluation and then insist that District be required to consider only Jeter's evaluation. This action on the part of Parent essentially circumvented District's efforts to comprehensively evaluate Student, as required. As such, this hearing officer finds that District's refusal to consider the evaluation by Jeter did not constitute a procedural violation of the IDEA.

Failure to Conduct Referral Conference. Regarding Parent's allegation that District failed to timely conduct a referral conference following Parent's September 17, 2021 written request, this Hearing Officer finds no procedural violation of the IDEA. In situations where a parent makes a referral for a student to be considered for special education eligibility, Arkansas Department of Education, Special Education and Related Services Rule 4.03 provides that a referral conference must be scheduled within seven (7) days of receipt of the written request and must occur within twenty-one (21) days of same. Certainly, in this case, it is undisputed that Parent sent an email on September 17, 2021, providing Jeter's

evaluation and requesting that Student be referred for special education services. It is further undisputed that District did not hold a referral conference with twenty-one (21) days of September 17, 2021. On its face, this is a *per se* violation of the ADE Rule 4.03. However, the facts and circumstances surrounding this referral conference cannot be ignored. Here, Parent refused to cooperate with District to select an evaluator, and then sought an independent educational evaluation from Jeter, the evaluator that Parent preferred from the start. Parent then requested a referral conference for the purpose of forcing District to review the very evaluation to which District had vehemently objected. Because of this chain of events, District filed a motion to hold the referral conference in abeyance prior to the deadline for holding a conference. In light of these events, it is the opinion of this Hearing Officer that District's failure to hold a referral conference did not, in this particular case, constitute a procedural violation of the IDEA.

It is noted that this Hearing Officer is not signaling that a district can simply file a motion in federal court to avoid its obligation to hold referral conferences. This case is complicated though, and the issue of the referral conference cannot be viewed in a vacuum. Parent refused cooperation regarding the evaluation and then used two other procedural bases, specifically that pertaining to independent education evaluations and referral to push the evaluation of her choosing. For that reason, the actions of District in this case cannot be deemed to constitute a violation of the IDEA.

Conclusion. For the reasons stated above, this Hearing Officer hereby finds that District did not procedurally violate the IDEA.

Alleged Substantive Violations

Having analyzed the first prong of the FAPE analysis, specifically that of procedural violations, and finding no violations on the part of District, it is unnecessary to consider the issue of whether Student was substantively denied FAPE in this case on the basis of District's failure to timely evaluate Student, failure to consider Jeter's evaluation, or failure to hold a timely referral conference. It is noted, however, that to the extent that a reviewing court disagrees with this Hearing Officer and, instead, finds that District's failure to consider Jeter's evaluation or hold a referral conference within twenty-one (21) days constituted procedural violations, there was still no substantive violation of FAPE. Barely more than a month passed between Parent's referral request on September 17, 2021 and her filing a due process complaint on October 22, 2021. Even if District had held a referral conference and considered Jeter's evaluation, it is unlikely that the process would have resulted in the creation and implementation of an IEP within such a short time period.

Finally, Parent alleges a purely substantive IDEA violation in this case, specifically that District failed to create and implement an IEP for Student prior to the 2021-2022 school year. Given that District made attempts to schedule an evaluation for Student by the July 15, 2021 deadline imposed by this Hearing Officer, and given the chain of events that therefore followed and are addressed fully above, this Hearing Officer finds that there was no substantive violation of FAPE on the part of District. Had Parent cooperated with District and allowed District to evaluate Student in the summer of 2021, and had the findings of that evaluation shown that Student was eligible for special education services, certainly, District's failure to create and implement an IEP prior to the start of the 2021-2022 school year could

have resulted in a finding that District substantively denied FAPE to Student. That is not what happened here. As it stands, as of the beginning of the 2021-2022 school year, there was no evaluation showing that Student was eligible for special education services. As such, it makes sense that no IEP was created or implement for Student by that time.

ORDER:

The results of the testimony and evidence in ADE H-22-13 warrant a finding for the District. Parent failed to establish that District procedurally or substantively violated the IDEA.

FINALITY OF ORDER AND RIGHT TO APPEAL:

The decision of this Hearing Officer is final. A party aggrieved by this decision has the right to file a civil action in either Federal District Court or a State Court of competent jurisdiction, pursuant to the Individuals with Disabilities Education Act, within ninety (90) days after the date on which the Hearing Officer’s Decision is filed with the Arkansas Department of Education.

Pursuant to Section 10.01.36.5, *Special Education and Related Services: Procedural Requirements and Program Standards*, Arkansas Department of Education 2008, the Hearing Officer has no further jurisdiction over the parties to the hearing.

IT IS SO ORDERED.

/s/ Danna J. Young

HEARING OFFICER

01/15/2022

DATE

