OAH 80-1300-35352
MDE 18-019H

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF EDUCATION

L.A.S., Student, and her Parents,
B.S. and M.D.,

v.

St. Paul Public School District,
ISD 625-01, School District.

ORDER EXCLUDING IEP TEAM ATTENDANCE COST FROM IEE AT PUBLIC EXPENSE

The above-entitled matter is pending before Administrative Law Judge LauraSue Schlatter upon the Student and her Parents' Complaint and Hearing Request, filed June 26, 2018.

Jamie Jonassen, Assistant General Counsel, appeared on behalf of the Saint Paul School District (School District). Andrea L. Jepsen, School Law Center, LLC, appeared on behalf of L.S. (the Student) and B.S. and M.D. (her Parents).

In their Complaint, the Student and her Parents alleged, inter alia, that the School District imposed conditions on the Student's Independent Educational Evaluation (IEE) that the School District does not impose on its own evaluations when it refused to pay for the independent evaluators' presence at an individualized education program (IEP) meeting in order to explain the education implications of the results of the IEE to the IEP team. The District admitted in its answer that it refused to pay for the presence of the IEE evaluators at an IEP team meeting, but affirmatively alleged that such payment is not required by the applicable law.

During prehearing conferences, the parties and the Administrative Law Judge agreed that this issue, which is a legal issue, will not be addressed at hearing. Instead, the Administrative Law Judge agreed to issue an Order addressing the question without briefing from the parties, who raised and responded to the question in their initial pleadings.

The parties and the Administrative Law Judge agreed to proceed with this issue in this manner because this Administrative Law Judge has issued an Order in an unrelated case which involved the School District and counsel for L.A.S., who addressed the

identical issue in the earlier proceeding.[1] The parties and the Administrative Law Judge agreed that, in the interest of judicial efficiency and economy, no further arguments are required in this case on this issue.

Pursuant to law, the administrative record, and for the reasons explained in the Memorandum below,

IT IS HEREBY ORDERED:

1. The School District is **NOT REQUIRED** to pay for any of the independent evaluators who participated in the IEE to attend an IEP team meeting for the Student following completion of the IEE.

2. Either the School District or the Parents may request that one or more of the IEE evaluators attend the Student's IEP team meeting. The party requesting attendance of an evaluator at the IEP team meeting is responsible for the cost of the evaluator's time in connection with attending the IEP team meeting.

Dated: August 1, 2018

LAURASUE SCHLATTER
Administrative Law Judge

MEMORANDUM

I. Background

On May 18, 2018, the Student and her Parents requested a multi-component Independent Educational Evaluation (IEE), including evaluations performed by a neuropsychologist, a certified behavior analyst, a communications specialist, and a reading specialist, at public expense. The School District agreed to provide the requested IEE.[2] However, the School District refused the Student and her Parents' request that the IEE at public expense include the cost of attendance by the IEE evaluators at a subsequent IEP team meeting.[3] The Student and her Parents assert that the School District routinely includes its own evaluators at IEP team meetings when reviewing the results of District triennial evaluations.[4] According to the Student and her Parents, the School District's refusal to pay for inclusion of the IEE evaluators in the IEP team meeting violates L.A.S.'s rights under the Individuals with Disabilities in Education Act (IDEA) by

[1] *In the Matter of T.O.F. and his Parents, L.F. and L.O. v. St. Paul Pub. School Dist. No. 625*, OAH Docket No. 80-1300-34041, MDE No. 17-009-H, Order Excluding IEP Team Attendance Cost from IEE at Public Expense (Mar. 6, 2017).
[2] Complaint and Hearing Request (Complaint) at 4 (June 25, 2018).
[3] *Id*.
[4] *Id.*

denying her a free appropriate public education (FAPE), because the School District's refusal effectively imposes conditions on L.A.S.'s IEE that the School District does not impose on its own evaluations.[5]

II. School District's Arguments

The School District has addressed this issue in another, unrelated case.[6] In that case, the School District argued that the scope of an IEE at public expense does not include public payment for an evaluator's attendance at an IEP team meeting. The School District insisted that the definition of the IEE does not encompass an IEP team meeting, and that the required composition of an IEP team does not include the author of an IEE. Furthermore, the School District maintained, the federal regulations do not impose an obligation on it to pay for the evaluators to attend an IEP team meeting.

In addition to citing the definition of "IEE" at 34 C.F.R. § 300.502(a)(3) (2018) and the requirements for IEP team membership at 34 C.F.R. §300.321(a)(5) (2018), the School District relied on an Indiana case in which the federal district court disagreed with a family's argument that the "full cost" of an IEE included public payment for evaluators to attend the IEP team meeting.[7] The court in that case held that neither the IEE regulation (34 C.F.R. §300.502) nor the IEP regulation (34 C.F.R. § 300.321(a)) requires evaluators to be present at IEP meetings.[8] Therefore, the court found that the obligation of the school district to pay for an IEE did not extend to paying for the evaluators to attend IEP team meetings.[9]

While acknowledging that the regulations require it to apply the same criteria to independent evaluators as it does to its own evaluators,[10] the School District argued that routinely including district staff evaluators in IEP team meetings is not a form of applying criteria to those evaluators. According to the School District, the notion of applying criteria for qualifying evaluators is not the same concept as the School District asking its own staff to attend a meeting.

The School District noted that, in addition to its position that there is no legal requirement for it to bear the cost of the attendance of evaluators at the IEP team meeting, to impose such an obligation would impose a financial burden that it cannot easily absorb. The School District contended that it has limited resources and many students to serve, it must spend those limited resources carefully, and it would be imprudent to impose a financial burden on the School District where none is required by the plain language of the law.

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[5] *Id.* at 6.
[6] *In the Matter of T.O.F. and his Parents, L.F. and L.O. v. St. Paul Pub. School Dist. No. 625*, OAH Docket No. 80-1300-34041, MDE No. 17-009-H.
[7] *B.B. Brunes ex rel. Brunes v. Perry Township School Corp.,* 2008 WL 2745094 at *11 (S.D. Ind., Jul. 11, 2008).
[8] *Brunes,* 2008 WL 2745094 at *10.
[9] *Id.*
[10] 34 C.F.R. § 300.502(e) (2018).

III. Parents' Arguments

In the T.O.F. case, the Parents[11] first focused on the language that the IEE requested by parents pursuant to 34 C.F.R. § 300.502(a) (2018) must be provided at public expense and "at no cost to the parent . . . ."[12] The Parents observed that the criteria for public and independent evaluations must be the same, unless that is inconsistent with a parent's right to an IEE.[13] Furthermore, the Parents asserted a parent-initiated IEE must be considered in decisions regarding the provision of a FAPE.[14]

The Parents then turned to the portion of the federal statute requiring that the determination of a disability and related educational needs of a child must be "made by a team of qualified professionals and the parents of the child . . . ." after "completion of the administration of assessments and other evaluation measures . . . ."[15] The Parents emphasized that there must be a person present at the meeting of the IEP team, who may or may not be a member of the team, but who "can interpret the instructional implications of evaluation results . . . ."[16]

The Parents relied on two federal district court cases to support their arguments.[17] These cases in turn rely on the language discussed above at 34 C.F.R. §300.502(a)(iii),[18] and 34 C.F.R. §§ 300.501(c) (2018) (guaranteeing parents the right to participate in any group that makes placement decisions about their child). Both cases also quote the United States' Supreme Court's description of the IEE as an assurance to parents that they will have:

> access to an expert who can evaluate all the materials that the school must make available and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.[19]

T.O.F.'s Parents claimed, as L.A.S.'s do in this matter, that school districts always include their own evaluators in IEP team meetings regarding assessment results. By excluding the independent evaluators from the IEP team meetings, the Parents argue that the School District is applying different criteria to the independent evaluators than it

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[11] The attorney for T.O.F. and his Parents practices law with Ms. Jepsen, who is counsel for the Student and her Parents in this case. Ms. Jepsen agreed that her arguments in this case would mirror those argued by her colleague, who handled T.O.F. Second Prehearing Conference.
[12] 34 C.F.R. § 300.502(a)(3)(ii).
[13] 34 C.F.R. § 300.502(e)(1).
[14] 34 C.F.R. § 300.502(c)(1) (2018).
[15] 20 U.S.C. §1414(b)(4)(A) (2012).
[16] 20 U.S.C. § 1414(d)(1)(B)(v) (2012).
[17] *Meridian Joint School District No. 2 v. D.A. and J.A.*, 62 IDELR 144 (Dist. ID, Nov. 25, 2013), *citing M.M. v. Lafayette Sch. Dist.,* 2012 WL 398773 (N.D. Cal. Feb. 7, 2012).
[18] *M.M.* at 11.
[19] *Schaffer v. Weast*, 546 U.S. 59, 60-61, 126 S.Ct. 528, 536 (2005).

does to its own staff who perform evaluations, in violation of 34 C.F.R. §300.502 (e) (2018).

IV. Analysis

The Administrative Law Judge can find nothing in the language of the law or the regulations that requires that an IEE at public expense be extended to include payment for the evaluators to attend an IEP team meeting once the evaluation itself is complete. In fact, an IEE is merely one piece of information considered as part of an evaluation or re-evaluation.[20] There is no requirement that the review of the assessment results be conducted by the IEP team. Rather, a group of qualified professionals and the parents of a child are to make determinations about the educational needs of a child.[21]

Furthermore, there is evidence the federal agency did not contemplate that the clinical evaluator would necessarily participate in the IEP team meeting. When the federal Department of Education made regulatory changes in 2006, it responded to a public comment it received regarding 34 C.F.R. §300.321(a)(5).[22] That section, which echoes the language of the statute,[23] requires that the IEP team meeting have a person present who may be a member and who can interpret the instructional implications of evaluation results. The same commenter recommended that the IEP team include a person qualified to conduct individual diagnostic assessments. In response to that recommendation, the federal agency replied that:

> [a]n individual who is qualified to conduct a particular assessment does not necessarily have the skills or knowledge to assist the IEP Team in determining the special education, related services, and other supports that are necessary in order for the child to receive FAPE. Therefore, we do not believe that it is necessary to require that the IEP Team also include an individual who can conduct diagnostic assessments.[24]

This understanding of the regulations is supported by the requirement discussed above, that the IEP team meeting include a person who can interpret the instructional implications of evaluation results. Even without the evidence from the commentary in the Federal Register, the language of 34 C.F.R. §300.321(a)(5) clearly does not require the presence of a person who conducted the evaluation. Had congress, or the federal agency interpreting the statutory language, intended the evaluator to be necessary to the IEP team's discussion, it could easily have required the evaluator to participate. No such requirement exists.

While the language at 34 C.F.R. §300.502(a)(3) does insure that an IEE be provided to parents at no cost in certain circumstances, the regulation does not define the

[20] 71 Fed. Reg. 156 at 46641 (Aug. 14, 2006).
[21] 34 C.F.R. § 300.306(a)(1) (2018). Minn. R. 3525.2710, subp.3 D (2017).
[22] 71 Fed. Reg. 156 at 46670 (Aug. 14, 2006).
[23] 20 U.S.C. § 1414(d)(1)(B)(v).
[24] *Id.*

scope of the IEE. By definition, the evaluation itself must be concluded before the results of the evaluation can be used by the a group of qualified professionals and parents to determine what special education, related services, and other supports the child might need. The presumption that the subsequent IEP team meeting, following completion of the IEE, is part of the IEE itself does not logically follow.

The Administrative Law Judge is not convinced by the Parents' argument that the School District has established a requirement that it pay for independent evaluators to participate in IEP team meetings by having the School District's own evaluators participate in such meetings. First, the Parents presented no evidence that the School District has a policy of always having its own evaluators attend IEP team meetings. But even if the Parents had demonstrated that such a policy exists, the plain language of the regulation does not support their argument. 34 C.F.R. § 300.502(e)[25] requires:

> (1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.
>
> (2) Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

The plain language of this regulation addresses criteria for obtaining or initiating an evaluation. It does not address the question of how a school district chooses to utilize its own staff. To interpret 34 C.F.R. § 300.502(e) to require a school district to mirror the procedures it uses for its staff when independent evaluators have performed an IEE would discourage the school district from inviting its own evaluators to IEP team meetings, lest it then be required to pay independent evaluators to do likewise.

The Parents' reliance on *Schaffer* is likewise not persuasive. The Court's discussion in *Schaffer* about the significance of IEEs at public expense is dicta. *Schaffer* is a case about the burden of proof in special education cases. The Court in *Schaffer* discussed the IEE at public expense as an example of one of the procedural guarantees that helps to level the playing field to insure that parents are not left without the means to gather needed information in order to advocate for their children. But even the quoted language from *Schaffer,* stating the purpose of the IEE is to make sure parents "are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition,"[26] does not lead to the conclusion that the government must pay for that expert to attend the IEP team meeting. The IEE process itself will provide parents with school records and an expert

[25] Emphasis added.
[26] *Meridian,* 62 IDELR 144, *citing Schaffer* (citations and quotations omitted in original).

report. Parents have a right to be at the IEP team meeting. They have a right to bring the independent evaluators if they wish. Nothing in the law requires that a school district pay for the attendance of those evaluators.

In *Arlington Central School District v. Murphy*,[27] the Supreme Court discussed the nature of legislation, such as the Individuals with Disabilities in Education Act (IDEA), enacted pursuant to congress' spending power. Comparing such programs to contracts, the Court acknowledged that state recipients of the federal funds attached to such programs must accept those funds "voluntarily and knowingly."[28] If the state cannot know the conditions attached to its receipt of federal funds, then it cannot knowingly enter into the federal-state program which is the nature of a program like IDEA. Therefore, to the extent that the federal IDEA statute and its implementing regulations do not provide unambiguous notice to the School District that it will be required to spend money for independent evaluators to routinely attend IEP team meetings, the Administrative Law Judge will not infer such a financial obligation in this case.

L. S.

[27] *Arlington Central School District v. Murphy*, 548 U.S. 291, 126 S. Ct. 2455 (2006).
[28] *Arlington* at 296. Internal citations omitted.