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One Hundred Ten-Day Delay In Evaluating Twins For Autism Was Reasonable Under The Circumstances Presented

In *JG v. Douglas County School District*, (--- F.3d ---, C.A.9 (Nev.), Dec. 24, 2008), the United States Court of Appeals for the Ninth Circuit considered whether twins and their parents stated claims under the Individuals with Disabilities Education Act ("IDEA") where a school district took 110 days to evaluate the twins for autism. The Court of Appeals held that the delay was reasonable under the circumstances because the district was not initially notified of suspected autism, it began evaluating the twins one month after the suspicions of autism were disclosed, and testimony revealed that the delay was necessary to produce valid test results.

Facts

Twin brothers JG and NG exhibited speech and developmental delays. On May 3, 2003, their mother took them to the Brain Power Community Learning Center ("Center") for a free screening. Center, which offers private services to children with disabilities, referred JG and NG to the Douglas County School District ("District"). The twins' mother went to District on May 5, 2003, and obtained a two-page questionnaire, which she filled out and returned on May 7, 2003. The IDEA required that District provide the family with a notice of a proposal to evaluate and a copy of the IDEA's procedural requirements when they returned the questionnaire. However, District failed to provide the information to the family at that time.

On May 14, 2003, the Center evaluated the twins and they began receiving special education services the next week. District, however, referred the twins to start evaluations on June 20, 2003. The twins' mother asked if they could be tested earlier, but after evaluating the information submitted by the mother, District's special education teacher decided not to advance the test date. At the June 20th testing, the twins' mother listed speech development as her primary concern, but also

listed her concerns about behavioral problems. The speech pathologist tested each boy but the twins failed to respond. The speech pathologist concluded that she could not conduct further testing at that time.

In mid-June, a Center professional trained to work with autistic children began to observe the twins. By late July, some of Center's staff believed that the twins' were autistic. Center's director contacted District on July, 28, 2003, and relayed that some of the staff suspected that the twins' had autism. The director cautioned that Center's speech pathologist did not share in this diagnosis.

District conducted an assessment of each twin on August 15, 2003, but the assessments did not include any tests for autism. District held an Individualized Education Program ("IEP") meeting with the twins' mother on August 25, 2003, and presented her with draft copies of the twins' IEPs, but these IEPs did not mention autism. Mother told the school psychologist that some staff members at Center thought the twins were autistic. The twins started to attend one of District's programs that same day, but they also continued to receive services from Center.

District's school psychologist began assessing the twins for autism on September 25, 2003, and asked the mother to sign a consent form for District to obtain information from Center. The twins' mother refused to sign the consent form but agreed to allow Center staff to meet with District. A meeting was held at which Center staff shared data with District. Tests administered in October by District indicated that the twins were mildly to moderately autistic. District began to work on new IEPs, but soon thereafter the twins' parents removed them from District's program and asked District to pay for the twins to attend Center. District refused the family's request.

The family requested a due process hearing.

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The hearing officer found that District had committed a procedural violation when it failed to evaluate the twins in a timely manner and awarded the family \$800 to pay for services rendered between August 13 and August 25, 2003. On appeal, the State Review Officer ("SRO") adopted the hearing officer's findings of fact but reversed the \$800 award. The SRO concluded that District denied the twins a Free Appropriate Public Education ("FAPE") when it failed to provide the family with notice of procedural safeguards and notice of proposal to evaluate on May 7, 2003, and ordered District to pay fifty percent of the cost of obtaining the evaluation from Center. The family appealed the SRO's decision to the federal district court, but the district court affirmed the SRO's decision.

Decision

District and the family agreed that District committed a procedural violation when it waited until August 15, 2003, to give the family notice of the impending evaluations and IDEA procedural requirements and also agreed that such notice should have been given on June 23, 2003. The family argued that they should receive a full reimbursement of the funds expended at Center for evaluations and services between June and August.

The family argued that District had an independent duty to evaluate the twins and that the family was not legally obligated to share Center's evaluations. They asserted that the reduction in their monetary award punished them for failure to share the evaluations. The court found that the family's refusal to share information did not harm District and that it would be improper to reduce their monetary award when their conduct did not harm District. Accordingly, the family is entitled to full reimbursement for Center's evaluations of the twins.

However, the family was not entitled to reimbursement for the services provided by Center. The procedural violation at issue only involved the failure to provide notice of a pending evaluation. District had not yet determined that the twins were eligible for services and the family cannot be compensated

for services that were provided before District determined that the twins were eligible for services. The twins' need for services "have no bearing on the procedural violation that occurred on May 7, 2003," and, had the family received notice of the IDEA procedural requirements, "they would have learned that the District had no obligation to provide services until after the twins' evaluations."

The family asserted that the delay in conducting the evaluations was unreasonable. The court disagreed. The IDEA provides that an evaluation must be conducted within a reasonable amount of time but there is no exact time frame given. The IDEA gives states the primary responsibility to develop and execute educational programs. Here, a Nevada administrative rule provided for a 45-day timeline for evaluating children. The court found that the 45-day timeline "is not an inconsistent interpretation of IDEA's reasonable timeliness requirement." However, the court refused to hold that the timeline "provides school districts with a safe-harbor under the applicable statute." Failure to comply with the state's timeline is good evidence that there has been an unreasonable delay, but a district's "compliance with the regulation will not necessarily mean that in each case the school district completed its investigation in a reasonable period."

Here, the court found that the 110-day delay was reasonable. There was no indication on June 23, 2003, that the evaluations should be expedited. District had no notice that autism was suspected until July 28, 2003. District began its evaluations in August and began administering tests for autism the next month. Testimony before the hearing officer indicated that the one-month delay was necessary to produce valid test results.

Small administrative delays should not render the District's actions unreasonable. School districts must be given "a degree of leeway during summer vacation." The court cautioned that its holding "does not encompass a situation where a school district simply delays in the face of a referral for a potentially autistic child solely because summer vacation makes a timely evaluation difficult."

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The court concluded that the lower court abused its discretion when it reduced the reimbursement amount for evaluation costs, but did not abuse its discretion in declining to award the costs incurred by the family for services provided by Center between June 23 and August 24, 2003.

Questions

If you have any questions concerning the content of this Legal Alert, please contact the following from our office, or the attorney with whom you normally consult.

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