04-099

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF ACCOUNTABILITY
OFFICE OF SPECIAL PROGRAMS

CASE CLOSURE SUMMARY REPORT

Public Schools **School Division ("LEA")**	Mr. **Name of Parent Requesting Hearing**
Director, Special Education and Assessment Services	**Name of Student**
Counsel Representing LEA	Mary Kathryn Hart **Counsel Representing Requesting Party**
James T. Lloyd, Jr. **Hearing Officer**	Mr. **Party Initiating Hearing**

HEARING OFFICER'S DETERMINATION OF ISSUES:

As detailed in the Decision and Recommendation of the Hearing Officer filed in the matter, I hold as follows:

A. No procedural violations were committed by the LEA:

B. The determination of the Child's eligibility for special education services was proper;

C. The Child's placement and continued placement determined in subsequent IEP meetings was proper; and

D. The Child remains eligible for special education services.

HEARING OFFICER'S ORDER AND OUTCOME OF HEARING:

I order that the current IEP of the Child remains in effect. The Child was eligible and remains eligible for special education services.

Signature, Hearing Officer

8/19/04
Date

cc: Mr. ; and Mary Kathryn Hart, Esquire
, Esquire
, Director, Special Education & Assessment Services
Patrick Andriano, Esquire, State Education Agency

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DECISION AND RECOMMENDATION OF THE HEARING OFFICER

This matter came on request dated April 29, 2004 by Mr. (hereafter referred to as the "Father"), for an impartial hearing under the Individuals with Disabilities Education Act ("IDEA") challenging the determination of eligibility of (hereafter referred to as the "Child") in a preschool special education program in Public Schools (hereafter referred to as the "LEA"); and further challenging, in the alternative, the placement of the Child as not being the least restrictive environment. By letter dated May 6, 2004 from , Director, Special Education and Assessment Services, Public Schools, was appointed Hearing Officer in this matter. Mrs (hereafter referred to as the "Mother") did not join in the request for due process, instead supporting and

favoring the determination of the Child's eligibility and placement throughout the 2003-2004 year, and supporting the continued recommendations of the LEA. The Father and Mother are jointly referred to as the "Parents

PRE-HEARING MATTERS

On May 11, 2004, the hearing in this matter was set for June 11, 2004 By telephonic pre-hearing conference on June 3, 2003, was informed by the Father he had retained Mary Kathryn Hart, Esquire as his counsel in this matter, and that a continuance was requested for preparation and availability. The continuance was granted, without objection, as being in the best interests of the Child and the matter was set for July 15 and 16, 2004. Witness Lists and Exhibits were exchange by the Parties by July 8, 2004, as ordered. At a pre-hearing telephonic conference held on July 6, 2004, the Father, through counsel (which action should be presumed throughout this Opinion unless otherwise noted), requested that the testimony of two of his experts be permitted telephonically, one witness residing in and the other in Virginia The LEA had no objection to the request and authority to conduct the testimony of the two witnesses telephonically was granted

The hearing commenced on July 15, 2004 with the testimony of all live witnesses and with the testimony of one telephonic expert witness The hearing then adjourned until July 16, 2004 for the telephonic testimony of the Father's remaining expert witness Based on the unusual nature of the hearing and the complex testimony of a number of experts, the Parties, at my suggestion, were to submit written closing arguments The Parties desired to have the transcript of

the proceedings to formulate their arguments and were given until August 2, 2004 to submit their written closing arguments. Due to a death in the family of counsel for the Father, a continuance until August 6, 2004 was requested for submission of the closing arguments, without objection from the LEA. That continuance was granted and the Parties submitted their closing argument by close of business Friday, August 6, 2004 closing the record in this case.

II ISSUES PRESENTED

Was the Child properly found eligible for special education services in August, 2003?

2. If eligible, was the determination in February 2004 to continue services appropriate?

3. Did the LEA commit procedural violations by not giving the Father individual notice of the eligibility hearing on August, 13, 2003; and IEP meeting on August 25, 2003; and an IEP review meeting on November 4, 2003?

4. Were the various IEP meetings improper since there was no regular education teacher that was part of the IEP Committee

III FINDINGS OF FACT

1 The Child was born and was four years old during the period covered by the issues in this matter.

2 The Child is the middle child with two siblings, the youngest of which has a medical problem requiring significant care.

3. The Father and Mother separated in April, 2003. The Father resides in and has scheduled visitations with the Child The Child and siblings reside with the Mother and maternal grandparents in

4. In July 2003, the maternal grandmother of the Child contacted the Program Administrator of the Program for Educating Exceptional Preschoolers ("PEEP") noting a concern about the Child's development, both academically and socially.

5. The LEA scheduled an evaluation for the Child by the PEEP Assessment Team on July 31, 2003.

6. The PEEP Assessment Team noted, among other things, the following:

   a. Mild delay in Receptive and Expressive Language with no recommendation for speech therapy under the Pre-School Language Scale - 4;

   b. Early Learning Composite Score in the Very Low range based on the Child's performance on the Mullen Scales of Early Learning, which the PEEP Assessment Team considered a significant delay;

   c. Under the Vineland Adaptive Behavior Scales, a moderately low score in Socialization noted by the PEEP Assessment Team as significant, but adequate motor skills;

d. Under the Lower Preschool Level of the Differential Ability Scales, general conceptual ability below average.

7. Throughout the evaluation by the PEEP Assessment Team, it was noted that the Child was not always cooperative, was restless, occasionally oppositional and prone to spontaneous verbal comments The various tests perform each note that the results should be viewed with some caution because of the Child's behavior, and that the scores may be an underestimation of her ability level

8. The PEEP Assessment Team was aware that the Child had a sibling requiring special medical needs, but did not know of the separation of the Child's parents

9. The Father was never present nor consulted during any part of the evaluation by the PEEP Assessment Team.

10. An Eligibility Committee convened on August 13, 2003 and determined the Child was eligible for preschool special education based on a developmental delay.

11 The Father was not present nor was he individually notified of the August 13, 2004 meeting The Mother was notified as was present.

12. An Individualized Education Plan ("IEP") meeting for the Child was conducted on August 25, 2003 and placed the Child in a "self-contained class with full time academic and non academic instruction in a public school facility."

13. The Father was not present nor was he individually notified of the IEP meeting. The Mother was notified and present and consented to the determination of the IEP team.

No regular education teacher was part of the IEP team.

An IEP review meeting was held on November 4, 2004 which determined the Child should continue receiving special education services in a self contained setting.

The Father was not present nor was he individually notified of the IEP review meeting. The Mother was notified and present and consented to the determination of the IEP team.

No regular education teacher was part of the IEP team at the IEP review meeting, but the Child's special education teacher was present.

In December 2003, the Father visited the Child's educational setting and first learned of his Child's special education placement in a self-contained setting. It was not until this time that the LEA became aware of the separation of the Parents.

19. The LEA personnel involved noted that knowledge of the separation of the Parents is a factor that should be taken into account in evaluating a child for certain special education services.

20. The Father had an independent evaluation conducted on the Child by , a licensed school psychologist working in West Virginia, but licensed in Virginia as well, whose evaluation

concluded that no component was indicative of developmental delay or significant behavior problems Dr. Pasquale Accardo, a Developmental Pediatrician, agreed with the report of that the Child was functioning normally and did not need to be placed in a special education setting.

21 The Father requested a meeting, held on February 23, 2004, to address his concerns about the Child. The LEA set up an IEP meeting, but stated to the Father at the meeting a further meeting was necessary to discuss eligibility Nonetheless, all available information was presented to the IEP Committee, both addressing the initial eligibility and the placement. The IEP Committee concluded the Child should remain as placed

22. The Father and Mother both received notice of the February 23, 2004 meeting and both attended.

23. A regular education teacher was not part of the IEP team that met on February 23, 2004.

24 The Mother consented to the continued placement of the Child; the Father filed this due process request.

IV. OPINION

A. Procedural Issues

1 Burden of Proof

Until recently, the issue of the burden of proof in administrative hearings was not clearly decided in the Fourth Circuit. In *Spielberg v. Henrico County*

Public Schools , 853 F.2d 256 (4th Cir. 1988), the court, in dicta, stated that the party bringing the action has the burden of proof. Cases, decisions and academic literature on the issue run the gamut. In issues regarding a plan proposed by an LEA, the burden has been place on the LEA. *See Board of Education v. Michael M.*, 95 F. Supp. 2d 600, 32 IDELR 170 (S.D. W. Va. 2000). One district court held that the party seeking the change bears the burden of proof at an administrative hearing. *Brian v. Vance*, 86 F. Supp. 2d 538, 32 IDELR 69 (D. Md. 2000), *vacated and remanded in an unpublished opinion* 34 IDELR 257 (4th Cir. 2000) (directing that any issue with regard to the burden of proof be consolidated with consideration of the merits). In reviewing legal publications and various other Circuit Court opinions, the better and prevailing rule appears to be that the party who seeks a change in the status quo bears the burden *Doe v. Brookline School Commission*, 722 f. 2d 910 (1st Cir. 1983); *Walczak v. Florida Union Free School District* 142 F. 3d 119 (2nd Cir. 1998); *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 19 IDELR 1065 (3rd Cir. 1993); *S-1 v. Turlington*, 635 F. 2d 342 (5th Cir. 1981); *E.S. v. Independent School Dist. No. 196*, 135 F. 3d 566, 27 IDELR 503 (8th Cir. 1998)I *Seattle School District No. 1 v. B.S.*, 82 F. 3d 1493, 24 IDELR 68 (9th Cir. 1996). *See also,* Thomas Guernsey, *When the Teachers and Parents Can't Agree, Who Really Decides? Burdens of Proof and Standards of Review Under the Education for All Handicapped Children Act*, 36 Clev. St. L. Rev. 67, 74 (1988)("Placing the burden of proof on the party seeking to change the status

qu is consistent with the nderlying theory of allocations of burdens of proof")

Recently in *Weast v. Schaffer y Schaffer*, 104 LRP 5502 U. Court of Appeals, ourth C rcuit 03-' 030 J ly 2004 the ourth Circuit held that the party esiring change shoulde the burden of roof basically affirming the revailing view mong the courts as oted above

The Father seeks change in the statu in this case namely that the Child is ot eligible the lternative the placement ot in the least restrictive environment. therefore lace the burden on the ather whose counsel acknowledged that burden

Notice

The Father claims the LEA violated proced ra safeguards regard ng the eligibility determination the itia IEP meeting nd the November 00 P review by not providing individual notice to the ather of these hearings. The hearings were held at the request of the Mother with her proper notificatio pport and consent The LEA was unaware of the rents were separated until after these meetings occurred

Notice to the Parents, writing with mandated detail, is necessary for eligibility hearing EP hearings etc. U C.A. 1415(b)-(c 34 C R 503(a and related Virg nia Reg lations The best ractice is to that th on-custodia parent has notice *See Doe v. Anrig*, 65 Supp 424 D Mass 1987' ing with the non-custodial parent of known divorced couple When the parents isagree as the case ere the LEA has reat

difficulty in determining how it should proceed. However, the LEA can be justified in following the wishes of the custodial parent, but an LEA may not be able to rely on that wish if the non-custodial parent had no notice of the action. *Id.*

In this case, while there is no argument the Father did not receive notice of the eligibility meetings and early IEP meetings, the LEA was unaware of the status of the Parents' marital relationship The Child came to the attention of the LEA and its PEEP program through the Mother (actually, through initial contact by the maternal grandmother, but then sanctioned and further pursued by the Mother). While acknowledged by LEA personnel that knowing the marital status of the Parents is information they would like to have known, the fact is that the Mother did not reveal this, nor did the Mother, apparently, tell the Father the evaluations, eligibility hearings and subsequent IEP meetings were taking place. The LEA provided proper, written notice where necessary based on the information at its disposal No action occurred without notice to the Father once the LEA knew of the marital status of the Parents. Finally, the Father availed himself to the necessary available remedies, namely an IEP meeting in February 2004 and this due process hearing, when he discovered and disagreed with the actions taken by the LEA. therefore hold that the LEA committed no procedural notice violation in this case.

3. Involvement of a Regular Education Teacher on the IEP Committee

The LEA is required to have the necessary participants at a meeting that develops, reviews or revises the IEP. The IEP team is to include "at least one

regular education teacher of the child (if the child is or may be participating in the regular education environment)." 8 VAC 20-80-62 C.1.b. No regular education teacher was part of the Child's IEP team.

When Congress passed the Public Law that funded Early Childhood and Preschool Programs, it created financial incentives for states to make children eligible for free *special education services* at age three. The LEA does not, *per se*, have a regular preschool education program. The LEA participates in the Title I federally funded "First Step" program, a program to which parents can apply for their preschool child with participation done on a needs-determined basis. The LEA cannot place students in this First Step program. The only other preschool involvement of the LEA is a contract with a private preschool to provided *special education services* at that private preschool.

The Father, in testimony and closing argument, asserted that the LEA committed a procedural violation of IDEA by not providing a continuum of placement for preschoolers. I find no merit with that argument. Nothing requires the LEA to have any such alternatives. Since the LEA has no regular education preschool (other than First Start, to which the LEA cannot place a child), the LEA has no regular education preschool teacher. The Child was neither in a regular preschool environment when the IEP team initially met, nor was there the possibility, within the control of the LEA, that the Child *may* be participating in a

regular education preschool Therefore, the LEA committed no procedural violation in the make-up of the IEP team.[1]

B ELIGIBILITY

The most difficult aspect of this matter is examining whether the eligibility determination for special education services for the Child was appropriate. This is especially complicated by the opposite opinions of the Child's parents Obvious is the fact that both Mother and Father want nothing but the best for the Child

Analysis of the evidence presented, however, reveals that the information relied on by both sides is not that different. The record is replete with test scores on a battery of well known developmental assessments – Preschool Language Scale Test, Mullen Scales of Early Leaning, Brigance Diagnostic, Vineland Adaptive Behavior Scales, Differential Ability Scales, Kaufman Assessment Battery for Children, among others. While there may be some slight difference throughout the tests, the basic determination is that the Child is functioning within the average range, though several aspects as noted in my Findings of Fact were low average What is uncontested throughout all the tests, and all the experts' interpretation of the test, is that the Child did exhibit certain behavioral and socialization problems The Child was not always cooperative, was restless, was occasionally oppositional and was prone to spontaneous verbal comments The Child often went off task and needed redirection The question is whether this activity is simply part of being an active four year old, or if it is indicative of

[1] The Child's special education teacher in the self contained classroom was certified as a nursery school, kindergarten through third grade and fourth grade through seventh grade. Her knowledge of the general education curriculum complies with any necessity for a regular education teacher's view in this matter.

developmental delay. Developmental delay, under Virginia Regulations, must be "measured by appropriate diagnostic instruments and procedures " 8 VAC 20-80-10. Such delays must be in one or more areas, including "physical development, cognitive development, social and economic development, or adaptive development." *Id.*

While there can be alternative interpretations of the various tests administered to the Child, find that the subjective testing did show developmental delay. In addition to the several notations of "low average," an important part of the testing is the cooperation of the Child and the reaction of the Child to the testing. The Child exhibited developmental delays in behavior, social and emotional development and adaptive development during the testing. The incidents during testing did not appear to be isolated. The Child, both as stated by the Mother and the Father as well as the PEEP Assessment Team, showed deficiencies in these areas regularly. Certainly, many of the behaviors are part of the age, but the testing revealed how the Child would react in a setting where attention, quiet, concentration and calm behavior are essential – namely in regular education

therefore find the Child was properly found eligible for preschool special education services.

C INITIAL PLACEMENT AND CONTINUED PLACEMENT

As detailed above, the LEA had no regular preschool program. That does not mean that the finding of eligibility automatically meant the Child should be place in a self-contained setting without proper justification. find the IEP team

had justification The experience of the professionals and educators on the IEP team determined that the small setting was appropriate for the Child based on the evaluation by the PEEP Assessment Committee. The determination was not based on any medical diagnosis (of which there was no clear evidence at the time of the IEP meeting, nor is there any clear evidence now), but on the result of the testing done as reviewed and interpreted by the LEA professionals involved While the testimony of the Father's two expert witnesses may have reached a different conclusion, this decision is not contrary to their view. As stated above, the interpretations of the test scores were not that different, and any differences were only slight. Neither Ms. nor Dr. Accardo, the Father's experts, witnessed the Child in any educational setting nor did they talk to the Child's teachers. Dr. Accardo rendered a medical opinion that the Child did not have autism or attention deficit disorder, but a medical diagnosis of autism and/or attention deficit disorder was not the basis for eligibility or placement. Each did note certain behavior concerns, .e. impatience, impulsiveness, tantrums, lack of cooperation, etc. These references in their reports support the eligibility determination and placement in a small setting.

Continued placement at the IEP meeting in November 2003 is also appropriate That meeting had the benefit of the observations of the special education teacher, who, quite candidly, testified to behavior actions by the Child warranting the continuation – the Child striking her face and head in anger and frustration, to the point the special education teacher feared serious injury; crying outbursts for no apparent reason; imaginary friends, but to an extreme These

behaviors remained through the February 2004 IEP meeting, attended by, and whose outcome was objected to, by the Father.

The February 2004 IEP meeting also properly continued placement. A concern at that meeting, however, was the Father's belief that eligibility would be revisited. The IEP team does have the ability to determine the end of special education services. The LEA officials, however, spent much time at the February 2004 IEP meeting telling the Father eligibility was not in issue, and that another meeting was necessary to address that issue. While I have concern with procedural information given the Father at the February 2004 IEP meeting, find such misinformation was not prejudicial to the Child. The evidence at hand shows that the continued placement of the Child in a self-contained special education class was proper.[2]

D. CONTINUED PLACEMENT AT THIS TIME

Finally, the Father argues that even if eligibility and placement were proper, the Child should now be ineligible. The record shows that the Child, according to her Mother and the special education teacher, has made great strides. Other than Dr. Accardo's report that, from his medical determination, the Child is not in need of special education, there is insufficient evidence to change the eligibility determination. The LEA, through its teachers and staff who have worked with the Child, continue to feel the Child can continue to benefit from

[2] The Father argues that an error in the February 2003 IEP was also the lack of discussion/options for the Child to attend First Step or a private preschool. I find no merit in that argument and no error as discussed above in this Decision.

special education services.[3] The Father has not shown by a preponderance of the evidence that the view of the educators who have serviced the Child throughout the last school year should be changed.

VI CONCLUSION AND DETERMINATION

In summary, based on the above and the record of this case, consisting of Exhibits, the transcript and the Parties' written arguments, I find:

A No procedural violations by the LEA;

B. That the determination of the Child's eligibility for special education services was proper;

C. That the Child's placement and continued placement determined in subsequent IEP meetings was proper; and

D. That the Child remains eligible for special education services.

V. APPEAL RIGHTS

The Father has the right to appeal this matter though the filing of a state or federal civil action. This decision is final and binding unless appealed in a state circuit court within one (1) year of the issuance date, or in a federal court. The Father should discuss any questions he may have regarding appeal rights with counsel.

Date: August 18, 2004

James T. Lloyd, Jr.
Hearing Officer

[3] Testimony was that the LEA believes the best placement for the next school year is in a regular education classroom with accommodations. Based on this pending hearing, the IEP team has yet to meet to discuss this.