

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF ACCOUNTABILITY
OFFICE OF SPECIAL PROGRAMS



Public Schools
School Division

Ms.
Name of Parents ("Parent")

Asst. Director of Special Education

Name of Student ("Child")

Counsel Representing LEA

Wilfredo Bonilla, Jr.
Counsel Representing Student

James T. Lloyd, Jr.
Hearing Officer

Parent
Party Initiating Hearing

DECISION OF HEARING OFFICER

This matter came on request dated September 27, 2004 by the Parent for an impartial hearing under the Individuals with Disabilities Education Act ("IDEA") challenging an evaluation performed on the Child on February 26, 2003 the result of which was a determination the Child was eligible for special education services due to "Developmental Delay." The Parent seeks and Independent Educational Evaluation ("IEE") at public expense. By letter dated October 5, 2004 from the _____, I was appointed Hearing Officer in this matter.

I. PRE-HEARING MATTERS

A telephonic pre-hearing conference was held on October 2, 2004. I was informed that the Parent had retained Wilfredo Bonilla, Jr., Esquire as 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 November 29, 2004. Witness

Lists and Exhibits were to be exchange by the Parties by November 19, 2004. At a pre-hearing telephonic conference held on November 18, 2004, the LEA filed a Motion to Dismiss these proceedings based on the inability of the LEA to asset the Child's current needs or provide any educational services to the Child.

Because the background of the Motion to Dismiss was based essentially on the factual issues to be addressed at the hearing, the Motion to Dismiss was denied.

The hearing commenced on November 29, 2004 with the testimony of all live witnesses and admission of all documents exchanged, without objection.

II. ISSUES PRESENTED

1. Was the Child properly evaluated and found eligible for special education services, due to Developmental Delay, in February, 2003?
2. Did the LEA give the Parent proper notice of an IEP/Eligibility hearing in September 2004?
3. Was the IEP of June 2003 ever properly implemented?

III. FINDINGS OF FACT

1. The Child was born
2. The Child attended a Head Start Program in for the 2002-03 year and 2003-04 year.
3. In fall 2002, the Child's pediatrician raised a concern about the Child's development, mainly related to speech, and the Child was brought to Public Schools for testing and evaluation. The testing and evaluation occurred on February 26, 2003.

4. The Child was 3 years and 6 months old at the time of the evaluation. The Child was extremely non-compliant and had more difficulty adjusting to the testing/evaluation situation than other children around the same age, at least based on the experience of the testers/evaluators for Public Schools.
5. The Child, generally, took some time to adapt to situations based on the Parent's experience. The Child did not talk to a sitter hired by the Parent for almost three months; the Child did not talk at Head Start for some time. Overall, though, the Parent was pleased with the Child's progress at Head Start and was only concerned about the Child's speech development.
6. Based on the February 26, 2003 evaluation, an Eligibility Committee found the Child eligible for special education services finding the Child to be Developmentally Delayed.
7. An IEP meeting was scheduled on three occasions in the spring of 2003. A meeting was finally conducted on May 28, 2003. The Parent did not attend the meeting.
8. An IEP was signed by the Parent on August 13, 2003.
9. During the 2003-2004 school year, the Child again attended Head Start.
10. Head Start did not implement the IEP.

11. The Child was enrolled at _____ Elementary for the 2004-2005 school year. Early in the year, the Child exhibited some unruly behavior and the Parent was called to discuss the behavior.
12. On September 22, 2004, the Child was moved into an inclusion classroom at _____ Elementary without the consent of the Parent.
13. On September 23, an IEP meeting was held regarding the Child. At that hearing, the Parent requested an IEE and was told she could not request the action at that time.
14. The Parent did not agree with the information that the Child was Developmentally Delayed and requested the IEP meeting be continued so that she could get records from Head Start. The IEP team apparently told the Parent she had to accept the IEP at that time or the Child would not be covered by the rights and safeguards of special education.
15. The Parent did not agree to the IEP.
16. The Child was withdrawn from _____ Elementary on September 27, 2004 and there has been no contact between the Child and _____ Public Schools since that time. That same date, the Parent requested a due process hearing.

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.

Recently, in *Weast v. Schaffer by Schaffer*, 104 LRP 35502, U. S. Court of Appeals, Fourth Circuit 03-1030, July 29, 2004, the Fourth Circuit held that the party bringing the action bears the burden of proof.

The Parent brought this hearing and therefore I place the burden on the Parent, whose counsel acknowledged that burden.

2. Notice

The Parent made some general claims that the LEA violated procedural safeguards by not providing sufficient or appropriate notice of the IEP and Eligibility meetings held in this matter. Notice to the Parents, in writing, with mandated detail, is necessary for eligibility hearing, IEP hearings, etc. 20 U.S.C.A. § 1415(b)-(c); 34 C.F.R. § 300.503(a) and related Virginia Regulations.

I find that proper and sufficient notice was given the Parent concerning all meetings held in this matter, one notice even hand-delivered. Therefore, I find no violation of the notice requirements by the LEA in this matter. The Parent was properly informed of all meetings.

3. Implementation of the August 13, 2002 IEP by Head Start

The Parent raised a concern that the IEP executed on August 13, 2003 was neither sent to nor implemented by Head Start, where the Child was

attending during the 2003-2004 school year. This concern has no merit. Head Start cannot implement an IEP. Only the LEA can do so. Had the Child been enrolled in a program with the LEA, the result would be different. But since the Child was enrolled at Head Start, a federally funded program outside the jurisdiction of the LEA, this objection has no basis.

B. REQUEST FOR IEE

The crux of this due process case is the Parent's request for an IEE based on the disagreement, in September 2004, with the finding the Child was Developmentally Delayed and eligible for special education services. The main facts argued by the Parent in support of this contention is that the Child was seen for no more than 45 minutes to an hour during the February 26, 2003 evaluation and was not comfortable with the examiners as revealed by his non-cooperation. The evaluators were also unable to administer certain concrete "tests" to the Child thereby allowing no formal assessment of the Child. Thus, the evaluation was not completed in order for the Eligibility Committee to determine the Child was Developmentally Delayed.

The School Psychologist and Speech Pathologist who conducted the evaluation in February 2003 each testified about the actions taken to evaluate the Child. There is no dispute factually about what occurred at the evaluation – the Child's non-cooperation, the inability to administer certain tests, etc. But as testified by the two, they used their observations in addition to information obtained from the Parent to arrive at their opinions leading the Eligibility Committee to determine the Child was eligible for special education services.

Using such information is routine and a standard among School Psychologists and Speech Pathologists when faced with a non-compliant Child. They are experts at such evaluations, and nothing in the record diminishes the strength of their expert testimony. As stated by the Parent, the Parent is not the expert here, but the LEA representatives. Nothing presented in this matter alters that assessment.

I do believe that the Parent was somewhat confused about the process. The Parent embarked on the evaluation process with a concern, as noted by the pediatrician, of a speech delay problem. I believe the Parent was confused when the Eligibility Committee found the Child eligible for special education services under the label of Developmentally Delayed. Perhaps more explanation to the Parent would have been helpful. Developmentally Delayed is more or less a generic categorization relating to a list of educational delays in a Child under 9 years old. It seems the Parent is more concerned with the label than anything.

A pivotal fact is that the evaluation in question occurred over 18 months ago, and as noted by the experts that testified in this matter, a Child's development changes drastically during these young years. There is no way any IEE can assess the Child now about the Child's status at 3 years and 6 months old. And, the LEA is ready, willing and able to conduct another evaluation almost immediately to assess the Child's needs, if any.

I have not heard any evidence for the Parent to meet the burden of proof that the evaluation in February 2003 was improper to warrant the ordering of an IEE. It seems a current evaluation is not only necessary but crucial for the Child

to be educated properly within the LEA. Should the Parent have a concern with a new evaluation, she can and should pursue an IEE if and when such a concern arises.

VI. CONCLUSION AND DETERMINATION

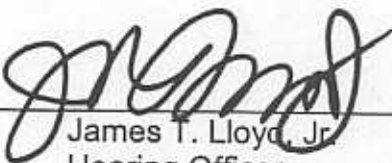
In summary, based on the above and the record of this case, consisting of Exhibits, the transcript and the testimony, I find:

- A. No procedural violations by the LEA;
- B. No violation by the LEA regarding the implementation of the August 2003 IEP in the Head Start Program; and
- C. No basis for ordering an IEE.

V. APPEAL RIGHTS

The Parent has the right to appeal this matter through 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: 12/15/04


James T. Lloyd, Jr.
Hearing Officer