

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF ACCOUNTABILITY
OFFICE OF SPECIAL PROGRAMS

CASE CLOSURE SUMMARY REPORT



School Division	Public Schools	Name of Parents
Division Superintendent		Name of Child
Counsel Representing LEA	Esquire	Advocate on Behalf of the Parent/Child
Hearing Officer	Esquire	Party Initiating Hearing

HEARING OFFICER'S DETERMINATION OF ISSUES:

Issue: Whether the Parents were entitled to reimbursement of certain private evaluations?

Determination: No. The Parents obtained such evaluations while the LEA was, at the same time, conducting a similar evaluation. As a result, the Parents could not "disagree" with the results of the LEA's evaluation because its results were nonexistent at the time the Parents obtain their private evaluations. See 20 U.S.C. §1415(b)(1) which requires this disagreement wherein it provides that "[a] parent has a right to an independent evaluation at public expense if the parent disagrees with an evaluation obtain by the public agency. [Emphasis added]."

HEARING OFFICER'S ORDERS AND OUTCOME OF HEARING:

ORDERED: For the reasons contained in the Post-Hearing Decision, it is hereby found that the appeal should be, and hereby is, dismissed.

The LEA was declared the prevailing party.

This certifies that I have completed the hearing in accordance with regulations and have advised the parties of their rights in writing. The written decision from this hearing is attached.

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF ACCOUNTABILITY
OFFICE OF SPECIAL PROGRAMS

POST-HEARING DECISION

Public Schools
School Division Name of Parents

Division Superintendent Name of Child

, Esquire
Counsel Representing LEA Advocate on Behalf of the Parent/Child

, Esquire
Hearing Officer Party Initiating Hearing

INTRODUCTION:

This matter came upon the Parents' and 's (collectively "Parents") appeal from the decision contained in the Individual Education Program ("IEP"), filed Exhibit 23 introduced by the Public Schools ("PS").

ISSUE:

Via Pre-Hearing Reports, the Parties established that the sole issue to be addressed by the Due Process Hearing was reimbursement of certain private evaluations, as described by PS' Exhibit 29.

BURDEN OF PROOF/PRODUCTION:

Before the Hearing, the Parties stipulated that the Parents had the burden of proof. Further, by agreement, the Parents would introduce evidence first.

EVIDENCE INTRODUCED/ADMITTED:

By stipulation at the Hearing, the Parties agreed that PS' Exhibit Nos. 1 through 23 and 25 through 34 were admitted. During the Hearing, Exhibit 24 was introduced and admitted. Further, Parents' Exhibit Nos. 1 through 12, 14 and 17 were admitted by stipulation. Parents' Exhibit Nos. 15 and 16 were withdrawn. Parents' Exhibit 13 was not admitted as moot; this Exhibit was identical to PS' Exhibit No. 29, admitted by stipulation.

The Parents called the following witnesses
3, (‘Father’); and, 1, 2,
appeared briefly on the first day, but did not testify. PS called the following witnesses:
4, 5, ; and,

PROCEDURAL BACKGROUND:

On , the IEP team met and referred the matter to the Special Education Referral Team (‘SERT’) for determining the necessity of further evaluations, at the request of the Parents as described by PS’ Exhibit No.16, timely provided to PS. On the SERT recommended that undergo a speech and language evaluation. In response, the Parents contended that additional evaluations were necessary. While in dispute, the evidence revealed that the Parents’ requested evaluations, while not approved, were never denied.⁶ The Parents duly appealed on . Several Pre-Hearing Conferences were held and were unremarkable with exception that the Parties established issues and deadlines, by agreement. (*See* prior Pre-Hearing Reports.) PS, *via* Motion, had requested issues involving ’s eligibility be heard; however, this Motion was withdrawn. (*See* Third Pre-Hearing Report.) Before the start of the Hearing, PS’ Motion to Dismiss was argued and taken under advisement. The Hearing on the merits was held on , at which time the Parties presented evidence and argument.

At the end of the Hearing, the Parties requested the opportunity to file *memorandum* in support of their position. As a result, the Parties filed their *memoranda* on . The date for the decision was continued to . These dates were in the best interests of as described in prior Pre-Hearing Reports.

¹ was qualified as an expert in the following areas: audiology, speech language pathology and auditory and language processing disorders. (Page 45 of the transcript of .)

² was qualified as an expert in the field of applied behavior analysis. (Page 106 of the transcript of .)

³ was qualified as an expert in the field of pediatric neuropsychology. (Page 123 of the transcript of .)

⁴ was qualified as an expert in the following fields: educational testing – educational psychology and the eligibility and evaluation process in special education. (Page 6 of the transcript of .)

⁵ was qualified as an expert in the field of speech language pathology. (Page 61 of the transcript of .)

⁶Page 26 of the transcript of

FACTUAL FINDINGS:

- A. On _____, PS held a SERT meeting for _____. At that meeting, SERT decided to re-evaluate _____ ahead of _____ scheduled triennial evaluation. At that meeting, the Mother stated that "_____ has ruled out ADHD and [that _____] no longer has seizure disorders." (PS' Exhibit 3.)
- B. On _____, PS completed an Educational Evaluation of _____. The Wechsler Individual Achievement Test-II (WIAT-II) was administered. (PS' Exhibit 4.)
- C. Between _____ and _____, PS completed a series of student observations of _____. (PS' Exhibit 5.)
- D. On _____, PS completed a Socio-cultural Report using the Vineland Adaptive Behavior Scales Classroom Edition and Interview Survey Form as well as a general parent interview. (PS' Exhibit 6.)
- E. On _____, PS completed a Psychological Evaluation. _____ utilized: the Wechsler Adult Intelligence Scale-Third Edition (WAIS III); the Integrated Visual and Auditory Continuous Performance Test (IVA); the Behavior Assessment System for Children-Teacher Monitor Ratings (BASC TMR); and, Clinical Interview and Behavioral Observations. (PS' Exhibit 7.)
- F. On _____, the Parents filed a dissent to the consensus of the eligibility committee that met on _____, stating, *inter alia*, "_____ is seizure free and medication free." The Parents also stated that "for your records, _____ will be attending an appointment scheduled with _____ on _____ for a consultation assessment at _____ Hospital." The Parents did not indicate any disagreement with any evaluation done by PS. (PS' Exhibit 11.)
- G. During the IEP meeting of _____, _____ completed a referral form to SERT. On that form, _____ stated the referral problem: "During the IEP meeting [with] advocate, concerns were expressed that the school division did not have enough information on _____ learning style and how _____ processes information. The paper attached describes testing the parent desires." There was no record that the Parents had disagreed with prior evaluation done by PS. The Parents simply indicated that they desired additional evaluations.
- H. _____ PS received the Parents' list of evaluations they wanted the SERT to consider during the IEP of _____. They requested a neuropsychological evaluation; a comprehensive audiological evaluation; and a comprehensive speech-language evaluation. The Parents stated that "additional data through additional evaluations is needed to identify the most appropriate placement for _____." While requesting additional evaluations including specific testing, they did not indicate any disagreement with prior evaluations done by PS. (PS' Exhibit 17.)

- I. The SERT meeting convened on _____ at 3:00 PM. While the SERT felt that PS had sufficient information to establish IDEA's free appropriate public education ("FAPE") for _____, they decided that a speech language evaluation, which had not been a part of the early summer _____ reevaluation, may yield more details about _____'s learning style. (PS' Exhibit 20). The Parents did not communicate any disagreement with the evaluations done by PS.
- J. On _____, _____ followed up with the Parents to clarify that the SERT team had not recommended denying the Parents requested evaluations. (PS' Exhibit 21.)
- K. On _____ and _____, PS completed a Speech and Language Assessment for _____. PS administered: Peabody Picture Vocabulary Tests-3; Test of Adolescent/Adult Word Finding; and the Clinical Evaluation of Language Fundamentals-3.
- L. On _____, the Parents sent correspondence to PS stating that they were requesting specific evaluations. (Parents' Exhibit 13.) In that correspondence, the Parents referred to the section of the *Virginia Regulations* entitled "*Parental Right to Evaluation at Public Expense.*" They did not indicate disagreement with any prior evaluation completed by PS nor did they indicated that PS' evaluations were inappropriate.
- M. In response to correspondence from the Mother, dated _____ and received by _____ on _____, _____ delivered _____ letter, dated _____, (PS Exhibit No. 24.) In that correspondence, _____ further clarified the position of the SERT team, stating that "... members of the SERT ... reviewed the results of _____'s recent evaluations, as well as current progress reports, and felt that there was sufficient data for educational planning purposes." _____ indicated that _____ assumed the Parents were asking for an Individual Educational Evaluation ("IEE") at public expense and would forward the matter to PS Compliance Coordinator, _____. During the Hearing, the _____ provided conflicting evidence regarding receipt of this letter. At first, _____ stated _____ received it, but a month later. (Page 210 of the transcript of _____.) Thereafter, _____ denied receiving this letter. (Page 219 of the transcript of _____.) Credible evidence was to the contrary, as revealed by _____'s attempts to effectuate the IEE which were thwarted by the Parents. (Pages 92-103 of the transcript of _____.) Further, the overwhelming evidence is that the Parents knew of their right to request an IEE. (See PS' Exhibit Nos. 10, 21 and 25 which reference "Procedural Safeguards Requirements (PS' Exhibit No. 34) as an enclosure; see Parents' Exhibit 13 which references this document; see page 101 of the transcript of _____, where

attempted to communicate with the Parents regarding and IEE.) Accordingly, credible evidence supports the finding that the Parents did not want an IEE, with PS evaluators and/or oversight, but instead, sought private evaluators. The by testimony, established that the Parents had lost faith in the IEP process and with the PS' evaluators. (See page 166-167 of the transcript of .)

- N. On , PS received a request for a Due Process Hearing from the Parents. (PS' Exhibit 23.)
- O. tried to communicate with the Parents on and to discuss the evaluations that requested. On spoke with in an effort to clarify the nature of the evaluations the parents were requesting and to discuss the process for obtaining them through PS. (See pages 96-103 of the transcript of .)
- P. On had an Auditory Processing Evaluation. The evaluator utilized: a hearing sensitivity test; a SCAN-A Test; an experimental test designed by the evaluator, Lucker Auditory Discrimination Test; SSW Test; Phonemic Synthesis Test; Pitch Pattern Sequencing Test; and a Time Compressed Sentence Test. The same evaluator conducted a Language Processing Evaluation using the Comprehensive Assessment of Spoken Language. (Parents' Exhibit Nos. 9 and 10.)
- Q. On had a Neuropsychological Evaluation. The evaluation procedures included: Wechsler Abbreviated Scale of Intelligence (WASI); Boston Naming Test; Berry Visual Motor Integration; Rey Oeterrieth Complex Figure [Test]; Wide Range Assessment of Memory and Learning Test; Wisconsin Card Sorting Test; Verbal Fluency [Test]; Wide Range Achievement Test; Behavior Assessment System (BASC); Behavior Rating Inventory of Executive Function; ADHD Rating Scale IV; Adaptive Behavior Assessment; Clinical Interviews; Behavioral Observations; and Medical record review. (Parents' Exhibit 10.)
- R. On had an Educational Evaluation. The evaluator utilized the following sources in evaluation: Record Review; ADHD Clinical Parent Interview; Clinical Diagnostic Interview; Social Skills Rating System; Wechsler Individual Achievement Test- Second Edition (WIAT-2); Test of Nonverbal Intelligence-Third Edition; Stroop Color and Word Test; Matching Familiar Figures Test; Integrated Visual and Auditory Continuous Performance Test (IVA CPT); and Draw A Person Test. (Parents' Exhibit 11.)

- S. On _____ observed _____ in the classroom setting.
(Parents' Exhibit 12)
- T. The testimony of the persons qualified as experts was considered, given weight and incorporated herein by reference as if set forth in full.

ANALYSIS:

Several arguments were presented by the parties; however, the evidence and law is clear on one issue which is dispositive. The Parents' obtaining additional private evaluations was premature, given the SET's recommendation for a speech and language evaluation. This conclusion is supported by the Parents response to PS' Exhibit No. 21, a letter from _____ to the _____, dated _____, wherein _____ stated:

In reviewing the Prior Notice and Consent Evaluation for which you [the Parents] signed for _____ on _____, to have a speech/language evaluation [PS' Exhibit No. 20], it is noted that you amended the document to include the following statement: "[d]enied auditory and language processing evaluation and neuropsychological." This was not the recommendation of ... [the SERT]. Although not previously an area of concern when the re-evaluation process began, the team agreed to a speech/language evaluation to determine if further services are needed for _____ to benefit from special education program and participate in the general curriculum. Results of the speech/language assessment will be considered by the team when the evaluation is completed, along with other pertinent information. **If there is a consensus that the results of the speech/language evaluation, or need, indicates further evaluations, we can address them at that time.** [Emphasis added.]

In response to this letter, the Parents ignored PS' efforts and proceeded with their own private evaluations. Without first obtaining the results of the speech and language evaluation, the Parents lacked the necessary prerequisite upon which to disagree. In other words, the Parents could not disagree with that which did not exist. The law is clear. 20 U.S.C. §1415(b)(1) requires this disagreement wherein it provides that "[a] parent has a right to an independent evaluation at public expense **if the parent disagrees with an evaluation obtain by the public agency.** [Emphasis added]." As a result, the Parents are not entitled to reimbursement for the private evaluations. See 20 U.S.C §1415(b)(1); See also, Rescue Union Elementary Sch. Dist., 33 IDELR 261 (SEA Cal. 2000).⁷ The remaining issues will not be addressed, as moot. As a result, PS' Motion to Dismiss is denied as moot.

⁷Pages 96-103 of the transcript of _____. From implication from the evidence introduced, the Parents obtained such evaluations, without the input of PS, to ensure that _____ received evaluations from professionals perceived to be the best, as opposed to professionals referred by PS who meet IDEA criteria and with IDEA focus. For example, the Parents' ignoring _____'s attempts to effectuate an IEE is found to be their attempt to ignore the government in order to give their child such private evaluations.

No evidence was introduced that the Parents disagreed with any prior evaluations. Instead, the Parents requested additional evaluations, based on their investigation *via* internet and research provided by professionals.⁸ No evidence was introduced to suggest that the prior evaluations were statutorily deficient. When this effort to obtain additional evaluations apparently stalled *via* SERT's recommendation for an additional speech and language evaluation, the Parents obtained the private evaluations referenced by PS' Exhibit 23. Although the Parents' devotion to the child was apparent throughout the Hearing, the law required their allowing the recommended evaluation be completed and reviewed. If, at that time, they disagreed it, than they could have taken action to work with the SERT to effectuate such private evaluations, if necessary to provide FAPE.⁹ By way of observation, the evaluations obtained by the Parents were duplicative (in all or in part) of prior PS evaluations.¹⁰

An IEP team consists of professionals and parents who focus on what resources are necessary to ensure that a child receives FAPE. This is revealed by courts placing the burden of proof on the party seeking to change the IEP.¹¹

By referral, dated _____, the IEP team referred the matter to SERT, as described in PS' Exhibit Nos. 15 and 16. On _____, the SERT, with the written and oral input of the Parents, decided an additional evaluation was required. Unfortunately, before the results of the evaluation were received, the Parents implemented additional private evaluations.¹² While the Parents' desire to address _____'s problems immediately is sincere,

⁸Page 200 of the transcript of _____

⁹In the Request for a Due Process Hearing, the Parents contend that PS should have filed for a Due Process Hearing on the basis of the implied disagreement contained in the Parents' requests for specific evaluations. The flaw in this argument is that PS could not take this action until such time as the Parents had reviewed the recommended speech and language evaluation and disagreed with its contents.

¹⁰To the extent such evaluations are duplicative, PS cannot be held responsible for the cost thereof. See Hudson v. Wilson, 828 F.2d 1059, 1065 (4th Cir. 1987). Only _____'s evaluations were found to be nonduplicative.

¹¹See Bales v. Clarke, 523 F.Supp. 1366, 1370 (E.D.Va. 1981); Hartmann v. Loudoun County School Board, 118 F.3d 996, 1000-01 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 888 (1998); Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd*, 486 U.S. 883 (1984); Johnson v. Independent School District No. 4, 921 F.2d 1022, 1026 (10th Cir. 1990), *cert denied* 500 U.S. 905 (1991) *relying on* Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153 (5th Cir. 1986), and Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd* 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984) where the Court found that the burden of proof was placed on the party "challenging the student's IEP," based on the statutory "presumption" in favor of the education placement; thus, the party "attacking the IEP" has the burden of showing why the IEP was deficient.

¹²The Parents filed their Due Process Complaint on or about _____. They contacted _____ to arrange _____ evaluations before _____. According to _____'s Invoice, a part of PS' Exhibit 29, _____ consulted with the Parents on _____ regarding an evaluation of _____. (Page 123 of the transcript of _____.) The factual implication is that the Parents intended

unfortunately, its implementation denied PS of its opportunity to participate in the process, after consideration of the additional evaluation. Such implementation violated the language, if not intent, of 20 U.S.C. §1415(b)(1). No evidence was introduced that PS' request for a speech and language evaluation was an attempt to stall.¹³ No credible evidence was introduced that

PS lacked the resources to effectuate the necessary evaluations. In contrast, PS effectuated several relevant evaluations in the eighteen months before the IEP. The overwhelming evidence is that PS was attempting to address 's issues as soon as practical.¹⁴ Further, PS evidenced that it was, indeed, committed to providing FAPE to . With the insight from the speech and language evaluations, PS may have effectuated the very evaluations which the Parents completed on their own. PS never had this opportunity.

CONCLUSION

On the date of the SERT meeting, the overwhelming evidence is that PS possessed sufficient evaluations to ascertain the educational needs of .¹⁵ The Parents requested additional evaluations, based on their suspicion that 's tumor was causing problems not revealed by the previous evaluations. SERT directed that additional speech and language evaluations be completed. As a result, completion of this evaluation was necessary in order for the IEP team to recommend what resources were necessary. Accordingly, the Parents, by their actions, disagreed with an evaluation not yet in existence. Without such disagreement, the Parents' obtaining private evaluations was premature and cut PS out of the process. While the Parents wanted, in essence, an IEE, they wanted to pick the evaluations and evaluators. PS had no input in determining the qualifications of the evaluators, the need and location for the evaluations and other statutory criteria. As a result, PS is not responsible for the cost thereof; the Parents are not entitled to reimbursement.

RELIEF GRANTED:

For the foregoing reasons, it is hereby found that the appeal should be, and hereby is, dismissed.

to effectuate such evaluations, regardless of the results of the SERT's evaluation.

¹³In fact, experts for the Parents opined that such an evaluation was appropriate. See, for example, 's testimony on pages 149 and 150 of the transcript from . For the Parents, effectuated such an evaluation.

¹⁴By implication, the Parents contend that PS "dragged its feet." Further, there was argument that PS did not pursue certain evaluations on the basis that the necessary professionals were too expensive or not available. Unfortunately, no credible evidence was introduced to substantiate such allegations. Moreover, if such professionals were unavailable, the remedy would have been to pursue an IEE, upon completion of the speech and language evaluation or after the IEP had rendered a decision with the results of this evaluation.

¹⁵See 's testimony of

PREVAILING PARTY:

For the foregoing reasons, it is hereby found that PS is the prevailing party.

APPEAL RIGHTS

Any appeal of this decision by either party must be instituted in a court of competent jurisdiction within two years of the date of its issuance.

Hearing Officer _____

Date _____

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of this pleading was mailed, *via* first-class, postage prepaid mail, this _____ day of _____, to:

Esquire
Public Schools

, Virginia

Public Schools

Virginia

, Virginia

, Virginia

Virginia Department of Education
Coordinator Due Process and Compliance
PO Box 2120
Richmond, Virginia 23218-2120

VIRGINIA DEPARTMENT OF EDUCATION, DIVISION
OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DUE PROCESS AND COMPLAINTS



ADDENDUM TO POST-HEARING DECISION

Public Schools
School Division
Name of Parents

Division Superintendent
Name of Child

, Esquire
Counsel Representing LEA
Advocate on Behalf of the Parent/Child

, Esquire
Hearing Officer
Party Initiating Hearing

The Post-Hearing Decision is modified as follows:

1. References to 20 U.S.C. §1415(b)(1) shall add the following references: 34 CFR §300.502(b)(1) and 8 VAC 20-80-70.B.2.a.
2. The Section of the Decision entitled "APPEAL RIGHTS" shall be replaced with the following:

APPEAL RIGHTS

This decision is final and binding unless appealed by a party in a state circuit court within one year of this decision's issuance date, or in a federal court. The appeal may be filed in either a state circuit or federal district court without regard to the amount in controversy.

Hearing Officer

Date