# VIRGINIA DEPARTMENT OF EDUCATION FINDINGS OF FACT AND DECISION

# CASE NO. 24-053

**XXXXXXXXXXXXXXXX PUBLIC SCHOOLS XXXXXXXXXXXXXXXXXXXXXXX**

School Division (LEA) Parents

**ANNE E. MICKEY MELISSA K. WAUGH**

Counsel for LEA Counsel for Parents

**XXXXXXXXXXXXXXX RICHARD M. ALVEY**

Student Hearing Officer

## INTRODUCTION

This matter comes before the undersigned Hearing Officer on Parents’ Request for Due Process filed on or about February 1, 2024. I was appointed shortly thereafter. The LEA filed a response. A resolution meeting was held on February 15, 2024. The parties, however, were not able to reach an agreement. The LEA filed a Motion to Dismiss citing the applicability of the Statute of Limitations (SOL), including legal argument and citations. The Parents filed a response, also including legal argument and citations. A pre-hearing conference in the matter was scheduled and held. The Motion to Dismiss was denied.

Afterwards, the parties agreed to a stipulation of the evidence, all proffered exhibits were deemed admitted, and this decision follows.

## BACKGROUND

The LEA has identified the Student as eligible for special education services under the Individuals with Disabilities Education Act (IDEA) in the disability categories of Autism and Other Health Impairment. On or about December 14, 2021, the Parents requested an Independent Educational Evaluation (IEE) at public expense over concerns related to speech-language services. Prior to this request, the Student had been evaluated by the LEA on December 4, 2019. In December, 2021 but more than two years after this LEA evaluation, the Student

received an IEE financed by the Parents. The Parents made several requests for reimbursement for the cost of the IEE, totaling $1,216.00. The LEA denied each request. At no time after receiving a request for an IEE did the LEA request a due process hearing to determine the propriety of the request. The issue of the propriety of the request was eventually submitted to the Virginia Department of Education, Division of Special Education and Student Services, Office of Dispute Resolution and Administrative Services wherein by a Letter of Findings, it was determined that the Parents’ request for an IEE was untimely and that the LEA was justified in refusing the request for an IEE.

### ISSUE

1. Whether the IDEA’s 2 year SOL for filing a request for due process hearing prohibits reimbursement for the cost of the Parents’ December, 2021 IEE.

## FINDINGS OF FACTS AND CONCLUSIONS OF LAW

On December 14, 2021, Parents requested an IEE at public expense. When an LEA receives a request for an IEE at public expense, the LEA has two mandatory options. (34 C.F.R. §300.503)

Option number one is the LEA, without unnecessary delay, can ensure an IEE is provided at public expense. If the LEA had taken Option One the IEE would have been performed and either the LEA’s IEP would have been validated or the LEA would have received new insight beneficial to the student. In either case the Parents’ concerns would have been addressed and laid to rest.

Option number two is the LEA, again without unnecessary delay, can initiate a due process hearing to show the Hearing Officer that its evaluation is appropriate and/or that the Parents’ request is untimely. If the LEA had taken Option Two, the Hearing Officer would have given due consideration to the LEA’s submission. The Hearing Officer would also have listened to the Parents’ submission concerning any flaws in the current IEP. It is possible that either party would have prevailed. The LEA’s request to have the IEE refused could have been granted and the Parents’ concerns would have been addressed and laid to rest.

On the other hand, the Hearing Officer might have discerned the flaw in the LEA’s provision of FAPE and ordered an IEE. In either case the Parents’ concerns would have been addressed.

In this case, the LEA ignored its duty to choose one of these options and unilaterally made a decision that was solely within the purview of the Hearing Officer. This action by the LEA can, of course, physically be taken. However, it does not negate the right of the Parents to contract for an IEE and charge the cost to the LEA. On December 16, 23 and 30, 2021 an IEE was conducted.

The reasonable cost to the Parents for an IEE became a vested debt owed by the LEA to the Parents on December 16, 2021 by operation of law. The vested rights doctrine is based on the notion that a state has the power to prescribe the rules of conduct for transactions or occurrences. “Vested” means having an absolute right or title to something to be enjoyed either now or in the future. A vested right is unconditional, it is no longer dependent on any event even if it was in the past. There is no controversy here, the regulation is clear and unambiguous. All that is necessary to be done is for the Hearing Officer to issue a procedural order of payment for the cost of the IEE. I am not aware of a statute of limitation for the enforcement of a vested right, other than possibly Virginia Code §8.01-246.4 which provides for three years.

The LEA has relied upon the Letter of Findings from the Department of Education, Division of Special Education and Student Services Office of Dispute Resolution and Administrative Services dated June 30, 2022 wherein it was found that the LEA’s decision to deny an IEE was proper, a decision that most likely would have been reached by a Hearing Officer had the LEA, following the rules and regulations, requested a due process hearing. The Letter of Finding does not, however, address the legal concept of vested rights.

## ORDER

For the reasons stated above, the LEA is ordered to reimburse the Parents for the cost of the IEE, $1,216.00. The Parents are the prevailing party.

## NOTICE OF RIGHT TO APPEAL

This decision is final and binding unless either party appeals in a federal district court within 90 calendar days of this decision, or in a state circuit court within 180 calendar days of this decision.

Entered on the 24th Day of March, 2024.

Richard M. Alvey

Digitally signed by Richard M. Alvey

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Richard M. Alvey, Hearing Officer