

RFD #1, Box 614
South Harpswell, ME 04079
May 28, 1999

TO: Parents
Supt Frederick Bechard
P.O. Box 499
Waterboro, 04087
324-3222

FROM: Toni Rees, Ph.D., Hearing Officer

RE: Due Process Hearing, Case #99.082, Parent v. SAD #57

This is to provide you with my decision in the Special Education Due Process Hearing on behalf of the student.

Either party may appeal this decision by filing a petition for review in Maine Superior Court or Federal District Court within 30 days of receipt of the decision. The petition for review in Superior Court must be filed in the county in which the student resides, or the county in which the Administrative Unit is located.

The Administrative Unit shall submit to the Commissioner, with a copy to the Due Process Consultant, documentation that the Unit has either complied with any order contained in this decision or that an appeal is pending. Such documentation shall be submitted no later than 45 days after the receipt of this decision.

Parents may request the Department to review the Unit's compliance with this decision by filing a written complaint with the Commissioner of the Department of Education.

Any questions regarding this decision or the record of the hearing should be directed to:

Due Process Coordinator
Division of Special Education
Department of Education
State House Station #23
Augusta, Maine 04333

c: Michael Opuda, Ph.D., Due Process Coordinator
Diane Herrle, Advocate for the Parents

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING
Case #99.082, Parent v. SAD #57

May 28, 1999

Advocate for the Parent: Diane Herrle
Counsel for the School: None
Hearing Officer: Toni Rees, Ph.D.

This hearing was held and the decision written pursuant to Title 20-A MRSA, Chapter 303, Section 7207, Maine Special Education Law; and 20 USC Section 1415, the Individuals with Disabilities Education Act.

A special education due process pre-hearing conference was held to consider the matter Parent v. SAD #57, in the Biddeford District Court. The Hearing request was initiated by the Parents on the behalf of their child. The pre-hearing conference was held May 3, 1999. Present were:(Mother),and (sister of the Parent), Denise Smith, Director of Special Education for SAD #57.

At the pre-hearing conference the parties exchanged sets of documentary evidence and the hearing issues were clarified. Exhibits entered jointly for the Parents and School were numbered J-1 through J- 7 (23 pages). Exhibits entered by the Parents alone were numbered P-1 through P- 20 (76 pages). Exhibits entered by the School alone were numbered S-1 through S- 12 (35 pages).

The hearing was held on May 21, 1999. Present for the Parents were: the Parents, Diane Herrle, Parent Advocate; and a friend of the Parent. Present for the School were: Denise Smith, Director of Special Education for SAD #57 and Lorrie Kingsbury, special education teacher and an interning Director of Special Education. Five witnesses were called by the Parents to present testimony and two additional witnesses were called by the School. Complete lists of witnesses are appended to this decision. At the conclusion of the hearing, the hearing officer agreed to accept briefs by Friday, May 28, 1999. The Parents submitted a three page brief on May 25.

The hearing was held at the request of the Parents to resolve the following issues:

1. Failure to identify the Student as eligible for special education and related services under the Individuals with Disabilities Education Act (IDEA).
2. Reimbursement to the Parents for two independent evaluations of the Student: a) a neuropsychological evaluation conducted August 1998, and b) an evaluation of written expression conducted in February 1999.

Documentary Evidence - submitted jointly by Parents and School

J-1	1	WISC-III Report 1/8/97
J-2	3	Educational assessment 1/97
J-3	6	Minutes of P.E.T. meeting 5/14/97
J-4	9	Report of Independent Psychoeducational Evaluation 8/11-8/12/97
J-5	17	Mediation agreement 5/12/98
J-6	18	Speech/Language Assessment 9/10/98
J-7	23	Report Card 4/15/99

Documentary Evidence – submitted by Parents

P-1	1	Issues
P-2	2	Opening Statement
P-3	3	List of Witnesses
P-4	4	Overview
P-5	7	Executive Report
P-6	11	Graph composites
P-7	17	Medical report from Dr. Collins
P-8	24	Minutes of P.E.T. meeting 5/14/97
P-9	27	Letter from Jo-Anne Dee 6/7/98
P-10	28	Letter from Jo-Anne Dee 6/8/98
P-11	29	Transcribed Minutes of P.E.T. meeting 10/98
P-12	49	Letter from Denise Smith 12/8/98
P-13	50	Letter from Dr. Doiron 1/4/98
P-14	51	Neuropsychological Report 8/26/98
P-15	66	Letter from Jo-Anne Dee 1/6/99
P-16	67	Test of Written Language 2/14/99
P-17	71	Report Cards from ninth and tenth grades
P-18	73	Report by student on Manifest Destiny
P-19	75	Summary
P-20	76	Corrections to P.E.T. minutes 10/19/98

Documentary Evidence – submitted by School

S-1	1	Classroom observation
S-2	3	Minutes of P.E.T. meetings 1/27/97 and 2/10/97
S-3	7	Report of Psychological Evaluation 3/17-3/28/97
S-4	15	Memo to Parents setting up independent evaluation 7/1/97
S-5	16	Minutes of P.E.T. meeting 9/11/97
S-6	18	Minutes of P.E.T. meeting 6/8/98
S-7	20	Educational assessment 6/9/98
S-8	21	Minutes of P.E.T. meeting 10/19/98
S-9	23	Student Accommodation Plan

Documentary Evidence – submitted by School (continued)

S-10 24 Summary of issues
S-11 26 Summary
S-12 28 Qualifications of School evaluators

Witness List

Witnesses for the Parent

PW-1 Jo Anne Dee, Special Education Consultant and evaluator
PW-2 Dr. Richard Doiron, Psychologist
PW-3 Amy Cote, Social Studies Teacher
PW-4 Lorrie Kingsbury, Special Education Teacher
PW-5 , sister of Parent

Witnesses for the School

SW-1 Richard Kauffman, Psychological Examiner
SW-2 Deborah Curtis, English Teacher

I. PRELIMINARY STATEMENT:

The Student is a young person aged x years (DOB xxx). The Student failed most of courses in the fall of 1996. In January 1997 the Parents requested testing to identify their child as eligible for special education. In January 1997 the School began a series of evaluations to determine whether the Student qualified for special education under the Individuals with Disabilities Education Act (IDEA). As a result of the evaluations the School concluded that the Student was ineligible for special education under IDEA. The results of an independent educational evaluation (IEE) conducted in August 1998 concluded that the Student had an Attention Deficit Disorder (ADD) and in September 1998 the School identified the student as eligible for services under Section 504. The result of another IEE conducted in February 1999 revealed deficits in written expression. The Parents sought due process to contest the School's special education eligibility determination and obtain reimbursement for two independent evaluations.

II. ISSUES:

1. Is the Student eligible under IDEA for special education and related services?
2. Must SAD #57 reimburse the Parents for an independent neuropsychological evaluation conducted to determine the presence of an Attention Deficit Disorder?
3. Must SAD #57 reimburse the Parents for an independent evaluation of written expression?

III. STIPULATIONS: None

IV. FINDINGS OF FACT

Issue number one: Is the Student eligible for special education and related services under IDEA?

As the Student moved into middle school, the student began to fall behind academically, particularly in the areas of organization and work production (P-14). Beginning the fall of 1996 when the student was in ninth grade, the Student failed most courses. The Parents communicated their concerns to the School and on January 27, 1997 a Pupil Evaluation Team (PET) met to consider the results of evaluations and a classroom observation. Seven teachers were either present at the January 1997 PET or sent progress notes to be reviewed at the meeting. The Student's overall intellectual functioning was reported to be in the average range. Although failing to pass in work and poor organizational skills were consistently reported as problems, the Student was not found to be eligible for special education.

At the January 1997 PET the Parents asked for an independent evaluation. An administrator with the authority to commit resources was not present and so the PET had to be rescheduled two weeks later when the Director of Special Education could be present.

The PET reconvened on February 10, 1997, and determined that the School Psychologist would evaluate the Student. The Parents requested an independent educational evaluation (IEE) at the end of the school year if the Student continued to fail.

In March 1997 the School Psychologist conducted a battery of tests. Additionally, to help assess the educational impact of possible learning difficulties and behavior problems the Student's mother and six of the student's teachers completed Conner's Rating Scales. The Parent indicated highly significant levels of learning difficulties. None of the six teachers described difficulties related to conduct problems at school or the presence of hyperactivity/impulsivity in his functioning at school. Neither did any of the six teachers describe significant levels of inattentiveness or passivity in the classroom. The Student was seen as a student who had elected not to work at school and the student was seen as somewhat passive and uninvolved. Teachers did not see inattentiveness and disorganization as significant problems that limited the Student's acquisition of academic skills over the years. The School Psychologist reported that academic evaluation continued to suggest grade-level academic skills commensurate with the Students overall intellectual ability.

A PET met on May 14, 1997 to consider the results of the psychological evaluation. The Student was reported to be doing somewhat better academically but the PET determined that further evaluations would be conducted. The Parent still wanted an independent educational evaluation so an IEE was conducted in August 1997 and was paid for by the School.

PET minutes and documentation did not specify exactly what the independent evaluator was to evaluate but the independent evaluator noted "CURRENT CONCERNS" (J-4) as including failing all subjects but one in the first semester of grade nine, difficulties persisting throughout the second semester and difficulties with short-term memory, maintaining attention and focus, weak skills in organization, note taking, copying from the blackboard. The IEE noted preferences in learning strategies, generally average skills and the impression that the Student was not performing well in school because the student was not interested rather than because the student had any known disability.

A PET met in September 1997 and after reviewing test results determined that the Student did not have a disability that prevented the student from benefiting from regular education and so determined that the student was not qualified to receive special education and related services under IDEA.

In school year 1998-99 the Parents obtained test results from two additional independent evaluators. An independent evaluator who was a psychologist reported that the Student had an Attention Deficit Disorder (ADD). Although the licensed psychologist interpreted the evaluation results a neuropsychological technician who did not hold certification or a license recognized by the Maine Department of Education administered the tests. Another independent evaluator conducted an evaluation of the Student's written language and found discrepancies between the Student's overall intellectual functioning and the student's written expression.

In October 1998 the School convened a PET and reviewed findings of the first independent evaluator who found that the Student had ADD. (The other independent evaluation of written language had not yet been conducted.) The PET identified the Student as eligible for services under Section 504 of the Rehabilitation Act of 1973 and developed an Accommodation Plan. In February 1999 the Parents obtained another independent evaluation, this time of written expression. On April 13 the Parents initiated a hearing request to determine the issues of eligibility for special education under IDEA and also reimbursement for two independent evaluations.

Issues number two: Must SAD #57 reimburse the Parents for an independent evaluation to determine the presence of an Attention Deficit Disorder (independent neuropsychological evaluation)?

The Parents questioned the validity of evaluations conducted by the School and alleged that evaluators employed by the School were not qualified.

The Student had been evaluated on a number of occasions:

- By the School in January 1997 - Woodcock Johnson Tests of Achievement by a Teacher of Students with Disabilities K-8 and 7-12, currently certified by the Maine Department of Education (282) who had completed training necessary to administer and interpret the Woodcock Johnson Tests.
- By the School in January 1997 - WISC III by a Teacher of Students with Disabilities 7-12 currently certified by the Maine Department of Education (282).
- By the School in January 1997 - Classroom observation by a Teacher of Students with Disabilities K-8 and 7-12 currently certified by the Maine Department of Education (282).
- By the School in March 1997 - Psychological evaluation by a psychological examiner currently licensed by the Maine Department of Professional and Financial Regulation.
- By the School as part of the psychological evaluation conducted in March 1997 - six of the Student's teachers and the Parent completed Conner's Rating Scales to determine the impact of possible learning and behavioral problems on learning.

- IEE in August 1997 - Psychoeducational evaluation by an individual currently certified by the Maine Department of Education as a school psychological services provider (093).
- By the School in June 1998 - Speech and language assessment by an individual certified in the State of New York as a public school teacher with the certification area of Speech and Hearing Handicapped. The School had written permission (S-12, pages 34 and 35) for the individual to serve as a speech and hearing clinician for school years 1997-98 and 1998-99.
- By the School in June 1998 - Wechsler Individual Achievement Test (WIAT) by a Teacher of Students with Disabilities K-8 and 7-12 currently certified by the Maine Department of Education (282).
- An IEE in August 1998 - Neuropsychological assessment administered by a neuropsychological technician not holding a license or certificate recognized by the Maine Department of Education and interpreted by an individual licensed in Clinical Psychology, Clinical Neuropsychology, and School Psychology.
- An IEE in March 1999 - Test of Written Language by an individual certified by the Maine Department of Education as an Educational Consultant (079), an Administrator of Special Education (030), and Teacher of Students with Disabilities (282).

The evaluation conducted by the School Psychologist in March 1997 (S-3) was conducted to assess the Student's current level of social and emotional adjustment as well as learning or behavioral problems that might limit school performance. An Independent Educational Evaluation was conducted in August 1997 and was approved and paid for by the School on the basis that the IEE was requested by the Parents because they disagreed with the psychological evaluation conducted by the School in March.

At a Mediation (J-5) held in May 1998, the School agreed to conduct a "reading/language processing assessment to be specifically determined by a PET and an assessment to determine the presence of an Attention Deficit Disorder (ADD) and to reconvene a PET in September 1998 to review the results.

Following the mediation a PET was held June 8, 1998, and determined that the following tests would be conducted:

- WIAT for reading to be conducted by a special education teacher
 - Language processing – with the two School Speech and Language Clinicians to determine the appropriate tests.
 - School Psychologist to look into ADHD evaluations.
- PET to discuss results in September (1998).

The assessment as to whether the Student had an Attention Deficit Disorder was to have been conducted by the School Psychologist.

The Parents believed that the School Psychologist was biased. One basis for this belief was a previous report in which the School Psychologist had written of the Student “[The student] is seen as a student who has elected not to work at school. Inattentiveness in class is not described by most of the teachers, but [the student] is seen as somewhat passive and uninvolved”. Another basis for the Parents mistrust of the School Psychologist was a telephone conversation overheard by the Parent’s sister in which the School Psychologist had allegedly used a belligerent manner to intimidate the Parent into withdrawing her request for an evaluation for ADD.

The Parents arranged for an independent evaluation with a neuropsychologist and the Parents were concerned that if the Student had to undergo evaluations with the School Psychologist, the student would not be willing to also complete evaluations by the independent evaluator. The School did not have an opportunity to conduct an evaluation specifically to determine the presence of ADD. In August 1998 the independent evaluator determined that the Student did have ADD.

The psychologist, who produced the neuropsychological report dated August 26, 1998, acknowledged that a technician had administered the tests and the psychologist had interpreted the findings. The technician did not possess certification or licensure specified in Maine Special Education Regulations.

A PET convened in October 1998. On the basis of the IEE the School agreed to identify the Student as eligible for services under Section 504 and developed a 504 plan.

Issue number three: Must SAD #57 reimburse the Parent for an independent speech/language evaluation?

At Mediation (J-5) in May 1998, the School agreed to conduct a reading/language processing assessment and to reconvene a PET in September 1998 to review the results.

Following the mediation, a PET meeting was held June 8, 1998, and determined that the following tests would be conducted:
WIAT for reading to be conducted by a special education teacher
Language processing – exactly what to be determined by the two School Speech and Language Clinicians.

On June 9, 1998, The special education teacher conducted a WIAT to reassess reading comprehension. The Students reading comprehension was found to fall within the average range (S-7). A speech and language assessment was

conducted in June 1998. The evaluator concluded that the Student did not require speech and language services.

In February 1999 the Parents obtained an independent evaluation of the Student's written language skills. The findings of the IEE were that the Student performed in the borderline and below average range while the student's intelligence was in the average range.

The Parents did not ask the school to conduct evaluations of the Student's written language skills. School evaluations and consideration of results by PETs had determined that the Student was not eligible for special education under IDEA. At the Hearing the School indicated that they would have conducted an evaluation of written language if the Parents had requested such a test. The Parents independent evaluation was not in response to tests by the School.

V. CONCLUSIONS:

Issue number one: Failure to identify the Student as eligible for special education and related services under IDEA.

Legal standards to consider are: a) whether the School conducted adequate and appropriate evaluations, b) whether the evaluation results were considered by members of appropriately constituted PET teams to determine whether or not the Student was eligible for special education and related services, and c) whether the School complied with special education procedures and informed the Parents of their due process rights.

One technical violation is noted. In January 1997 a PET convened without an administrator authorized to commit resources. At the January PET the Parents requested an IEE. There was a delay of two weeks before the PET reconvened and the Parents withdrew their request for an immediate independent evaluation. The technical violation of not having the administrator present and the consequent two-week delay is not determined to have harmed the Student.

The School conducted a series of evaluations between January 1997 and August 1998. Evaluators employed by the School were qualified according to Maine Special Education Regulations, Chapter 101, Section 6.6: Psychological Services and 6.10: Contracted Special Education Services.

Maine Special Education Regulations, Chapter 101, Section 8.14 require any person who provides an assessment or evaluation recommended by the PET or administrative unit to meet the professional qualifications of the publisher of the evaluation instrument and specifies that qualified evaluators shall have successfully completed appropriate training in each assessment area in which

they conduct evaluations. Evaluators employed by the School to evaluate the Student had completed necessary additional training to administer the Woodcock-Johnson Tests.

A speech and language evaluation conducted to determine the Student's eligibility for special education under IDEA was conducted by an individual employed by the School who was not qualified under Maine Special Education Regulations, Chapter 101, Section 5.13 Speech and Language Services. However Section 6.10C permits the School to obtain prior written approval from the Maine Division of Special Education for individuals who do not possess either certification or licensure in Maine. This permission was granted to the School for the speech and language clinician who administered tests to the Student (S-12, pp. 34-35).

A team of qualified personnel must make the determination as to whether a student suspected of having a Learning Disability is eligible under IDEA as a child with a Learning Disability. The team must include:

- (1) The child's regular teacher; or
- (2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or
- (3) For a child of less than school age, an individual qualified by the State educational agency to teach a child of his or her age; and
- (4) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher (34 CFR Section 300.540).

At least one team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting (34 CFR Section 300.542). Maine Special Education Regulations, Chapter 101, Section 8.18. PETs convened by the School were appropriately constituted to rule out eligibility for special education on the basis of a Learning Disability.

PETs were convened on six occasions between January 1997 and October 1998. Teams considered whether the Student was eligible for special education and related services under IDEA and concluded that the student did not qualify. The PET that met in October 1998 reviewed the independent evaluation that reported that the Student had ADD and concluded that the Student was eligible for a 504 Accommodation Plan.

ADD can be considered a disability under IDEA (special education) under the category Other Health Impaired if the disability adversely impacts a child's educational performance. The 1997 amendments to IDEA provide the Student and family with a number of procedural safeguards. For example: If a school considers a student under IDEA and rejects them as IDEA eligible, then 20 USC 1415(b)(3) requires that the Parents be given written notice of "(1) a description of the action proposed or refused by the agency; (2) an explanation of why the agency proposed or refused to take the action; (3) a description of any other

options that the agency considered and the reasons why these options were rejected; (4) a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposes or refused action; and (5) a description of any other factors that are relevant to the agency's proposal or refusal. [Note: This has been on the statute since 1975.] The School contended that PET minutes provided the Parents with the necessary written notice. The several sets of PET minutes did contain the elements of notice although no single document was provided to the Parents with all the elements described above.

An independent evaluation reported that the Student had an Attention Deficit Disorder. Under both IDEA and Section 504 the Student has the right to receive a Free and Appropriate Education (FAPE). Whether or not the Student was eligible for special education and related services under IDEA, or was eligible for an appropriate education under a Section 504 Plan, was a judgement call made by professional educators who worked with the Student every day in school. Teachers observed that the Student was performing within the average range of the student's regular education classes.

Under Section 504 (29 USC 794) and the ADA (42 USC 12132) students are entitled to a wide range of services (34 CFR 104.333(b)(1)). The Hearing Officer does not have jurisdiction over 504 Accommodation Plans, however it is noted that the numerous recommendations made by evaluators (J-4, p. 15; P-14, pp.63-65; and P-16, p. 69) were not incorporated in the Accommodation Plan currently in effect for the Student.

The School followed overall appropriate procedures in ordering evaluations, considering the results, and making the determination that the Student was not eligible for special education and related services under IDEA.

Issue number two: Reimbursement for the independent neuropsychological evaluation conducted to determine whether the Student had an Attention Deficit Disorder.

Parents have a right to an independent educational evaluation at public expense if they disagree with the results of an evaluation conducted or obtained by a school (Maine Special Education Regulations, Chapter 101, Section 10.5C and 10.11).

Legal standards to consider are: a) whether the independent evaluation was conducted by an appropriately qualified evaluator, b) whether the School had an opportunity to conduct adequate and appropriate evaluations and did conduct those evaluations, c) whether the independent evaluation was conducted because the Parent disagreed with evaluation results obtained by the School,

and d) whether the School complied with special education procedures and informed the Parents of their due process rights.

Documentation submitted by the School (S-12) indicted that evaluations conducted by the School were conducted by appropriately qualified personnel.

The evaluator who produced the neuropsychological report dated August 26, 1998, was himself a qualified psychological examiner. The technician who administered the tests was not qualified under Maine Special Education Regulations, Chapter 101, Section 6.10C. A School is not obligated to pay for evaluations administered by unqualified personnel.

Maine Special Education Regulations, Chapter 101, Section 10.5C note "Parents are under no obligation to request an independent evaluation from an administrative unit prior to exercising their right to an independent evaluation". However Schools must be afforded the opportunity to conduct evaluations. At the mediation held in May 1998, the School agreed to evaluate the Student for ADD. The Parents refused the evaluation that was to have been conducted by the School Psychologist. It is unfortunate that ineffective communication between School personnel and the Parents appears to have contributed to this refusal. Parents must provide the School with an opportunity to conduct an evaluation and may only obtain reimbursement for an independent evaluation if they disagree with an evaluation obtained by the school (Maine Special Education Regulations, Chapter 101, Section 8.23). In the brief submitted to the hearing officer after the conclusion of the hearing the Parent states: "... The only test I believe I did not allow the school to perform was the Attention Deficit (ADD) testing".

The School followed appropriate procedures and provided the Parents information about their due process rights.

For the above reasons the Parents are not entitled to reimbursement for the independent neuropsychological evaluation.

Issue number three: Reimbursement for the independent evaluation to determine whether the Student had a problem with written expression that might qualify the student for special education under IDEA.

The legal standards to consider are: a) whether the independent evaluation was conducted by an appropriately qualified evaluator, b) whether the School had an opportunity to conduct adequate and appropriate evaluations and did conduct those evaluations, c) whether the independent evaluation was conducted because the Parent disagreed with evaluation results obtained by the School, and d) whether the School complied with special education procedures and informed the Parents of their due process rights.

Documentation submitted by the School (S-12) indicated that the speech and language evaluator employed by the School was appropriately credentialed. Testimony indicated that the independent evaluator was also appropriately qualified.

The School had an opportunity to conduct speech and language evaluations to determine whether the Student qualified for special education under IDEA because of a speech-language disorder. The School speech and language assessment report dated September 10, 1998, identified the Student's strengths and weaknesses, recommended strategies to help the student learn, and did not recommend the provision of speech language services. The speech-language report was discussed at the PET that convened in October 1998 (S-8) and because of the independent evaluation indicating that the Student had an Attention Deficit Disorder the Student was identified for services under 504.

The School had not conducted evaluations specifically focussing on problems with written expression and so the Parent's IEE was not conducted because of a disagreement with evaluation results obtained by the School. The School followed appropriate procedures and provided the Parents information about their due process rights.

For the above reasons the Parents are not entitled to reimbursement for the independent evaluation of written language.

VI. ORDER:

1. The Student is not found eligible for special education and related services under IDEA. The School conducted evaluations using appropriately qualified examiners. The School followed appropriate procedures in considering eligibility and making the determination to identify the Student for services under Section 504. The School is directed to review requirements for providing Parents with written notice as described in 20 USC 1415(b)(3).
2. The School is not ordered to reimburse the Parents for an independent neuropsychological evaluation. The evaluation was not administered by a qualified examiner. The School did not conduct an assessment to determine whether the Student had an Attention Deficit Disorder and so the Parents did not conduct the IEE because they disagreed with an evaluation obtained by the School.
3. The School is not ordered to reimburse the Parents for an independent evaluation of written language. The evaluation was administered by a qualified examiner, but the School had not conducted an assessment of written language and so the Parents did not conduct the IEE because they disagreed with an evaluation obtained by the School.

