

Special Education Due Process Hearing Decision
Union 7, Saco School Department v. Parent

CASE NO: 99.157

REPRESENTING THE SCHOOL: Catherine Faust

REPRESENTING THE PARENT: Melinda Duval

HEARING OFFICER: Carol B. Lenna

This hearing was held and the decision written pursuant to Title 20-A, MRSA, 7207-B et. Seq., and 20 USC § 1415 et. seq., and accompanying regulations.

The case involves student, whose date of birth xxx.. He resides with his parents who live in Saco. Student is identified as a student with a disability under the category of "learning disabled".

The school requested the hearing in response to the parent's request for an independent educational evaluation at public expense. In the spring of 1999 the parents obtained an independent education evaluation of their son. They requested the school reimburse them for the cost of this evaluation on May 28, 1999. The school denied the request and filed for a due process hearing on July 1, 1999.

The parties met in a prehearing conference on July 22, 1999, to exchange documents and witness lists. The hearing officer found a number of documents introduced by the parents not relevant to the stated issues of the hearing. Those document were removed without objection by either party. The hearing convened on Friday, July 30, 1999, at the York County Probate Court, Alfred, Maine. Sixty-four documents were entered into the record of the hearing; four witnesses gave testimony. The hearing record remained open until Friday, August 6 to allow the parties time to submit written summaries. Following is the decision in this matter.

I. Preliminary Statement

The student is identified as a student with a disability under the category of "learning disability". In the spring of 1999, the parents obtained an independent educational evaluation of their son. At a PET meeting on May 28, the parents requested the school reimburse them for the cost of the evaluation. The school denied the request and filed for a due process hearing on July 1.

It is the school's contention that the evaluation performed by them was appropriate, met regulatory criteria, and provided sufficient data for the PET to develop an appropriate IEP for the student. They argue that the parents are not entitled to an independent evaluation at public expense and that the school is not required to reimburse them for the evaluation they have obtained.

It is the parent's contention that they are entitled to reimbursement for their evaluation. They argue that the school used a portion of evaluation to determine eligibility. Additionally, they argue that the school did not act in a timely manner to deny their request for an independent evaluation at public expense and initiate a due process hearing. It is their position that this procedural violation justifies a remedy of reimbursement for the cost of the evaluation obtained by them.

II. Issues

- Are the parents entitled to reimbursement for the costs of the independent educational evaluation obtained by them in March 1999

The parent claims the following procedural violation:

- Failure by the school to act in a timely manner to initiate a due process hearing or provide for the independent evaluation at public expense in violation of 34 CFR 300.502 and Maine Special Education Regulations Section 10.5.

III. Stipulations

The parties stipulated to the fact that there is no dispute about the program proposed in the 1999-2000 IEP. The current goals and objectives listed are appropriate to meet the needs of the student.¹

IV. Findings of Fact

1. The school mailed a "Parental Notice, Triennial Evaluation" to the parents on January 6, 1999. The notice included a "Consent to Evaluate" form for the parent to sign

¹ The parties have agreed to further reading assessment before completing the reading goals, but there was no dispute around the goals currently written in the IEP.

and return to the school. The form requested consent to perform academic testing, intellectual testing, classroom observation, psychological/behavioral evaluation, and occupational therapy assessment. (Exhibit: P-3)

2. On February 4, the parents sent a letter to the school giving notice that they intended to obtain an independent academic and intellectual evaluation of their son. The letter gave the school consent to do a classroom observation and to perform an occupational therapy assessment. The letter expressly refused consent for an psychological/behavioral evaluation. The "Consent to Evaluate" form was not signed and returned with this letter. (J-19, J-17)

3. The school responded to the parent's request for an independent evaluation at public expense by letter dated February 17. The letter informed the parent that the school "will not be financially responsible for the independent evaluation you have initiated...If you go forth with the independent evaluation it will be at your expense because you have not allowed us to complete our evaluations first." (Exhibit: J-18)

4. By letter dated February 21, the parents informed the school they would go forward with the scheduled independent evaluation, and would seek reimbursement for the expense of the evaluation. They did, however, agree to provide consent for the school to perform achievement testing. (Exhibit: J-17)

5. On February 23, the school initiated a Due Process Hearing in response to the parent's request for, and their denial to pay for, an independent evaluation. (Exhibits: S-5, S-6, S-7, S-8)

6. In a letter to the parents, dated February 26, the school again requested the parents sign the "Consent to Evaluate" form for academic and intellectual testing, and notified the parents that "[w]hen [we] have received these forms [we] will withdraw the current hearing request. We ask that you defer requesting reimbursement for any independent evaluations you are performing until after you have reviewed ours...We also ask that you consider putting off your testing and avoid those expenses until after you have seen our test results..." In letters to the school, dated February 26 and March

1, the parents requested the school identify the specific test instruments and evaluators to be used in the school's academic and intellectual evaluations. Accompanying this letter was a signed "Consent" form to allow occupational therapy assessment of the student and classroom observation. (J-15, J-16, P-4)

7. On March 5, the school mailed a new "Consent" form to the parent, listing on the form the assessment instruments proposed by the school's evaluation and the evaluators by name. Among other tests listed, the form specified that the school evaluators would administer the Wechsler Intelligence Scale for Children-Revised, the Bender Visual Gestalt Test, and the Wide Range Assessment of Memory and Learning. The parent signed the consent form on March 10. The school withdrew the request for hearing on March 12 assuming the independent evaluation issue moor. (Exhibits: J-15, J-13, J-14; Testimony : Wike)

8. The parent moved forward with their independent educational evaluation. Testing was conducted on March 13, March 18 and April 22 by a licensed provider, certified to administer the tests given. Among other procedures, the independent evaluator administered the Wechsler Intelligence Scale for Children-Third Edition (WISC-III), the Bender Motor Gestalt Test, the Wechsler Individual Achievement Test (WIAT), and the

Wide Range Assessment of Memory and Learning (WRAML). (Exhibit: J-9; Testimony: Parent)

9. The school proceeded with their evaluations on March 23 and 24. The occupational therapy assessments were conducted on March 23. On March 23 and 24 academic achievement was assessed, using the Woodcock Johnson Psycho- Educational Battery-Revised. (Exhibit: J-23; Testimony: Wike)

10. On March 30 the school's psychologist met with the student to conduct the intellectual testing portion of the school's evaluation. This testing session was suspended when the psychologist learned that the tests she proposed to administer had been previously administered by the independent evaluator on March 13 and 18. She notified the school that any conclusions she might draw using these instruments would be invalid given the recent administration of the tests by the independent evaluator. The school identified new evaluators who could administer different tests of intellectual ability. On March 31, the school sent another "Consent" form to the parent identifying the new tests and evaluators. The parents signed the form on April 5 and returned it to the school. The school completed its evaluations on May 4 and May 7. (Exhibits: J-10, J-11, J-12; Testimony: Wike, Hanley)

11. School evaluations were completed on May 4 and May 7. Classroom observations were completed on April 12 and May 5. (Exhibits: J-20, J-21, J-22, J-24)

12. The student's cognitive ability was assessed by the school using the Woodcock Johnson Tests of Cognitive Ability-Revised. The evaluator is a licensed professional certified to administer the test instrument. The student achieved a standard score of 90 in Broad Cognitive Ability, putting him in the 25th percentile, or average range, when compared to his same age peers. A test of "comprehension/knowledge", which involves the ability to communicate verbally, resulted in a score of 88, within the low average range. A test assessing "short-term memory, or immediate recall of simple words, phrases and sentences", resulted in a standard score of 96, within the average range. Tests that measure "processing of information that has been placed in short-term memory" revealed standard scores ranging from 79 to 102. "Visual processing" emerges as an identified weakness, with "fluid reasoning" an identified strength. The test also revealed that the student scored within the low average range when required "to store information and fluently retrieve it later through association." A test of "nonverbal reasoning ability" revealed a solidly average ability to reason, form concepts, and solve problems using unfamiliar information or novel procedures. The evaluator concluded that the student's overall cognitive functioning fell within the average range. She recommended continued modifications in test taking procedures which included prepared guides and alternative test formats, as well as practice and review of new skills, and instructional approaches which make associations between new information and previously learned information. (Exhibit: J-21; Testimony: Hanley, Wilke)

13. The student's memory skills and learning profile were assessed using the California Verbal Learning Test- Children's Version. The evaluator is a licensed professional, certified to administer this test instrument. She concluded that the student "had mild difficulty learning verbal information...[H]e may need more repetition of material to learn it. Care should be taken not to frustrate him by presenting too much information too quickly." "Basic skills should be practiced until they are overlearned[sic]." (Exhibit: J-22; Testimony: Pinkos)

14. The student's current achievement was assessed by the school using the Woodcock-Johnson Psycho-Educational Battery-Revised. The evaluator is a licensed professional certified to administer this test instrument. Results of this assessment showed that the student, when compared to other students his age, scored in the average to low average range in all areas tested. Standard scores achieved were: Basic Reading Skills, 90; Basic Math Skills, 90; Basic Writing Skills, 80; and Broad Knowledge, 93. The Humanities sub-test score of 73 fell in the below average range. The evaluator concluded that the student's "achievement scores reflect personal strengths and weaknesses. Math reasoning, reading comprehension, written expression, and knowledge of Science and Social Studies are commensurate with age mates. Testing indicates more difficulty with math calculation, knowledge of Humanities, and writing mechanics." She recommended assistance in developing and editing written work, modifying classroom expectations for written work, and instruction in word analysis. (Exhibit: J-20)

15. The PET convened on May 28, 1999, to discuss evaluation results and begin program planning for the student's 1999-2000 school year. During the meeting, the parent presented the independent educational evaluation report to the PET along with a letter to the school asking for reimbursement for the cost of the evaluation. This was the first time the PET had been provided a copy of the report. The PET meeting adjourned at that point to allow the members time to review the evaluation. (Exhibits: J-8, J-9, J-7; Testimony: Wike, Parent, Pinkos)

16. In her summary of the independent educational evaluation, the evaluator reported that the student obtained the following scores on the WISC-III: Verbal, 88; Performance, 94 and Full Scale, 90. She concluded that the student's cognitive abilities fell within the average range. Results of the WRAML revealed that the student exhibits "a memory deficit compounded by verbal memory weaknesses that would certainly impact [the student's] capability to learn and memorize information." Results of achievement testing showed that the student scored in the average range in reading and math, but below average in writing skills. Scores obtained on the WIAT were: Reading Composite, 83; Mathematics Composite, 91 and Writing Composite, 77. She concluded that "[a]chievement testing documented [that] weaknesses continued to show in the area of reading decoding, spelling and writing." She recommended continued modifications in the classroom to address memory and writing skill deficits, and direct instruction to address reading decoding and memory deficits. (Exhibit: J-9)

17. The school psychologist and the school psychological examiner reviewed the independent educational evaluation at the school's request. The findings and conclusions of the independent evaluation and the school's evaluation were compared. Each testified that, in her opinion, the independent evaluation did not provide the school with new or conflicting data about the student and his special education needs. (Testimony: Pinkos, Hanley)

18. On June 10, the school responded to the parent's request of May 28 to have the school pay for their independent evaluation. The letter asks the parent to indicate if, and specifically how, they disagree with the school's evaluation. The letter makes clear that the school feels their evaluation is appropriate and that they are prepared to request a due process hearing to defend those evaluations. (Exhibit: J-6; Testimony: Wike)

19. By letter dated June 11, the parent requested the school conduct a Wilson Assessment for Decoding and Encoding to be performed by a certified Wilson teacher.

The school responded by agreeing to provide the evaluation upon receipt of a signed "Consent" form. The parents signed the form on July 1, 1999, and returned it to the school. (Exhibit: P-12, J-1, J-4)

20. By letter, dated June 15, the parent notified the school that their request for payment on May 28 clearly implied disagreement with the school's evaluations. They were continuing to request reimbursement for the independent evaluation. (Exhibit: J-5; Testimony: Parent)

21. The PET met again on June 30.² The minutes reflect a discussion of the school evaluation and the independent evaluation. There was no indication that the members found the results of the two evaluations conflicted in any way. The team determined the student continued to be eligible to receive special education services as a student with a learning disability. The team completed the "Learning Disability Evaluation Report." Major portions of the IEP were adopted and the transition plan developed. The PET determined that the results of the Wilson Assessment would be used to establish a baseline for the student's reading program and guide the development of final reading goals and objectives. (Exhibits: J-1, J-3; Testimony: Wike, Parent)

22. The school filed for a due process hearing on July 1, 1999. (Exhibit: S-2, S-3; Testimony: Wike)

V. Conclusions

Are the Parents Entitled to an Independent Educational Evaluation at Public Expense?

"The parents of a student with a disability have the right to obtain, at public expense, an independent educational evaluation of their child when they disagree with an evaluation obtained by the administrative unit..."[Maine Special Education Regulations, 8.23]
"...[T]he school administrative unit may initiate a hearing to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent evaluation, but not at public expense."

If the school unit refuses to grant a parent's request...or refuses to pay for an independent evaluation obtained by a parent, the unit shall immediately initiate a due process hearing to demonstrate that the evaluation conducted by the unit is appropriate".[Id. 10.5] See also 34 CFR 300.502

Regulations which speak to the parent's right to an independent educational evaluation make clear that parent's have a right to such an evaluation "if the parent disagrees" with the school's evaluation. It is the intent of such regulations to give parents the opportunity to obtain information, to present to the PET that might offer opposing conclusions to the school evaluation. Such evaluations may be at public expense if the school agrees to pay for them, or if, at hearing the parent can successfully argue that the school's evaluation was not appropriate or was not conducted by qualified, licensed professionals

² The PET did in fact meet again on June 14, but action was limited to extending the student's current IEP to the end of the school year. The school scheduled and rescheduled the meeting to complete the IEP several times.

using valid and reliable instruments.

It is not the intent of such regulations to allow parents a publicly funded evaluation by the evaluators of their choice. At no time did the parents present evidence to show that they disagreed with the school evaluation. Rather, the parent sought and completed the independent evaluation prior to the school administering any of its tests. The stated goal for the independent evaluation was to “consolidate assessment data and provide a single picture of [the student’s] skills and abilities...”³ While the parent was clear in her testimony that she had more faith in the independent evaluator and felt the data would be more reliable, no evidence was presented to show that the school’s evaluation lacked validity or reliability. In fact, had the parent’s evaluation not pre-empted the school’s evaluation, the school would have used the same instruments as those used by the independent evaluator. At the time the parent’s evaluation took place, there was no evaluation data gathered by the school. There was no basis upon which the parent could have disagreed. No evidence was presented by the parent to argue that the school’s previous triennial evaluation, completed in 1996, was in any way inappropriate. Evidence shows that the personnel performing the evaluation were qualified and licensed to perform such evaluations. The instruments used in 1996 were valid and reliable, and, in fact, were many of the same instruments used by the independent evaluator in 1999.

When denying the parent’s request for an independent educational evaluation at public expense, the school must inform the parent of their decision to deny payment, and initiate a hearing to “demonstrate that their evaluation is appropriate.” The school has an obligation to defend their evaluation as an appropriate assessment of the student’s current ability and needs. The school has met that test. Evidence shows that the school’s evaluation is appropriate. The school evaluation meets regulatory criteria. Test instruments were performed by appropriately qualified and licensed professionals using valid and reliable evaluative instruments. The results give a good picture of the student’s strengths and weaknesses and describe the student as a learner.

While the independent evaluation also meets this test, there is no obligation in regulation for the school to find the independent evaluation inappropriate in order for them to deny payment. However, it is important to note that the independent evaluation did not provide any significantly different or contradictory data. Standard scores in the two evaluations are consistent with one another, and are consistent with findings from previous evaluations.

The parent argued that the school used some achievement scores for the “learning disability evaluation report” and that this somehow gave preferred status to the independent evaluation. The school is obligated to consider the results of an independent evaluation, whether or not it is at public expense. Because certain portions of such an evaluation are cited by the PET does not, in and of itself, invalidate the school’s evaluation, nor compel them to pay for the evaluation. The student’s standard scores from the two evaluations in the area of writing were not significantly different.

³ The independent evaluation report also states that the evaluation “will serve as the triennial review’ for the student. The school did not view this evaluation as the triennial review or agree to accept it in place of their own evaluation.

That the PET chose to use the lower of the two sub-test scores is not conclusive. Either of the scores obtained by the student in writing achievement meets the criteria in regulations of “approximately 1.5 standard deviations between the student’s achievement and ability as determined by individualized assessment of intelligence and academic achievement...” (MSER, 3.10)

Finally, the parent argued that the school was unable to complete the student’s reading goals because there was insufficient data to develop a baseline in reading. They pointed to the school’s willingness to have a teacher certified in the Wilson Reading Program do additional reading assessment as an admission by the school that their evaluation was inappropriate. This argument is unclear. The parent requested additional reading assessment before the PET completed the reading goals. The school complied with the request. Neither the independent evaluation nor the school evaluation administered the particular assessment requested by the parent. However, both provided sufficient data on the student’s reading ability and weaknesses that were consistent with one another. The decision not to complete the reading goals was made to concur with the parent’s request, not an inability to complete goals because of a lack of information.

Did the School Fail to Respond to the Parent’s Request for an Independent Educational Evaluation in a Timely Manner?

“If the parent submits a written request that the school administrative unit provide a independent educational evaluation, the administrative unit shall provide the parent with a written response within 30 days of the receipt of the request...” (MSER, 10.5(C)) “...If the school unit refuses to grant a parent’s request...or refuses to pay of an independent educational evaluation obtained by a parent, then unit shall immediately initiate a due process hearing to demonstrate that the evaluation conducted by the unit is appropriate.” (Id., (D)) “... [T]he public agency may ask for the parent’ reason why he or she objects to the public evaluation. However, the explanation by the parent may not be required and the public agency may not unreasonably delay...initiating a due process hearing to defend the public evaluation.” [34 CFR 300.502 (b)(4)]

The school denied the parent’s request for an independent evaluation in February. On May 28, the parent again requested, in writing, that the school pay for the cost of the independent evaluation obtained by them. The school responded to the parents’ request, in writing, on June 10 stating that they would not consider the request “unless you disagree with our evaluations...” and “if so what the specific nature of the disagreement is.” The school did not, however, request a hearing until July 1.

Regulations are clear that an independent evaluation at public expense is based on the parent’s disagreement with the public evaluation. Schools may not, however require that parents detail these disagreements before clearly stating their position to deny payment of the evaluation and moving forward with a hearing. The school was under an obligation to make a decision to either respond positively to the parent’s request or to move forward to hearing to defend their evaluation. They should have done so before July 1.

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Requiring the parent to detail their disagreement with the public evaluation is expressly prohibited by regulations. The school's letter of June 10 was not an appropriate response to the parent's request. The school's contention that this letter was by way of an offer to possibly mediate the dispute over the evaluation is not convincing. The controversy over this evaluation had been active since February. There is no reason to believe that the parents were suddenly going to see the errors of their way and withdraw the request. The school had an obligation to move forward "immediately" and request the hearing. The school's argument that it took time to pull together the supportive material necessary to request is equally unconvincing. Requests for hearing do not require supportive documentation as claimed by the school. Persons requesting a due process hearing must provide the name of the student on whose behalf the hearing is held, the parents and public agency involved, a description of the nature of the dispute and the nature of the hearing issue. It is not a procedure that should take five weeks.

However, the parent's argument that this procedural violation by the school resulted in such violation of the student's rights so as to represent a "fatal flaw" in the student's ability to receive a free appropriate public education is not persuasive. The school should have dealt with the parent's request more quickly, but their failure to do so did not result in any discernible harm to the child's program. The IEP, which was developed as a result of the two evaluations does not go into affect until the school year, begins in September. The school and the parent agree that the IEP is appropriate to meet the student's needs. Additional assessments that have been ordered before completing the IEP were not part of the independent evaluation request.

VI. Order

No order is given as a result of this hearing.

Carol B. Lenna
Hearing Officer