

09-064

Received

JUL 16 2009

CASE CLOSURE SUMMARY REPORT

Dispute Resolution & Administrative Services

(This summary sheet must be used as a cover sheet for the hearing officer's decision at the end of the special education hearing and submitted to the Department of Education before billing).

<u>Public Schools</u> School Division	<u>Name of Parents</u>
<u>Name of Child</u>	<u>July 13, 2009</u> Date of Decision or Dismissal
<u>John F. Cafferky, Esquire</u> Counsel Representing LEA	<u>None</u> Counsel Representing Parent/Child
<u>Public Schools</u> Party Initiating Hearing	<u>Public Schools</u> Prevailing Party

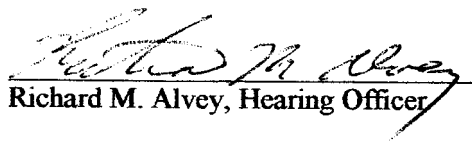
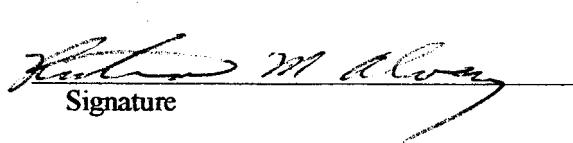
Hearing Officer's Determination of Issue(s):

See attached Decision

Hearing Officer's Orders and Outcome of Hearing:

The hearing officer found that the evaluation for each student was appropriate and that the parents are not entitled to an additional IEE at public expense. The prevailing party on all issues is the LEA.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. The written decision from this hearing is attached in which I have also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer and the SEA within 45 calendar days.

 Richard M. Alvey, Hearing Officer	 Signature
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**VIRGINIA DEPARTMENT OF EDUCATION  
DIVISION OF INSTRUCTIONAL SUPPORT SERVICES  
OFFICE OF DUE PROCESS AND COMPLAINTS**

Public Schools  
School Division

Parents

Division Superintendent

Children

John Cafferky  
Counsel for LEA

Richard M. Alvey  
Hearing Officer

Public Schools  
Party initiating hearing

DECISION OF THE HEARING OFFICER

SUMMARY OF THE PROCEEDINGS

On April 17, 2009, a request for a special education due process hearing was filed by the LEA. A pre-hearing conference was held on April 29, 2009 wherein parents filed a motion to dismiss and or grant summary judgment. At this initial pre-hearing conference, the hearing date was set for May 21 through May 28, 2009 and a decision date was set for June 1, 2009. On May 1, 2009, the LEA filed a response to the motion to dismiss containing a request to file an enclosed amended request for a special education due process hearing. On May 7, 2009, parents filed a request for an extension of time to file an Answer and respond to the LEA's amended request for a due process hearing. On May 8, 2009, the LEA filed an objection to the parents' request to file a late response. On May 11, 2009, parents filed a response to the LEA's request for due process hearing and a reply to the LEA's response to the parents' motion to dismiss. On May 12, 2009, I issued an order granting the LEA's request to file an amended request for a due process

hearing and giving the parents until May 18, 2009 to file a response. Parents filed their response on May 18, 2009.

Another pre-hearing conference date was ordered to be held to set a new hearing date, discuss production of educational records and settle remaining pre-hearing issues. The new decision date was set for June 18, 2009. On May 19, 2009, a second pre-hearing conference was held wherein the hearing date was set for June 9, 2009 through June 12, 2009. On May 19, 2009, parents filed a motion to compel production of documents and a motion to exclude material witness from the due process hearing venue. Parents argued strongly and convincingly for access to test protocols and the LEA acquiesced, subject to the accommodation of those holding proprietary rights to the test protocols. On May 26, 2009, one such holder of those proprietary rights filed a request for protection of its interests. The motion to exclude the material witness from the due process hearing venue was denied after consideration of arguments from both sides.

On June 2, 2009, parents filed an omnibus motion for discovery sanctions, and/or a continuance of the hearing, and/or a motion for summary judgment due to the school division's failure to provide discovery. By letter of the same date, the LEA indicated its agreement to a continuance. On June 9, 2009, a third pre-hearing conference was held wherein the parents orally requested the continuance and argued again for access to the test protocols. The continuance was granted and found to be in the best interest of the children. On June 9, 2009 a confidentiality order was entered granting parents access to the test protocols and manuals. A new hearing date was set for July 6 through July 10, 2009. Parents presented subpoenas for more than twenty witnesses to appear at the hearing. The LEA identified eight witnesses it intended to call. The parties indicated

their intention to file briefs after the hearing. Due to the fact that the parties, all represented by attorneys and all cautioned not to unnecessarily overload the hearing with witnesses, indicated their intention to call more than thirty combined witnesses and also file post hearing briefs, the decision date was reset by agreement of the parties for July 31, 2009.

On July 6, 2009, the hearing commenced. After the LEA called and examined its first witness, the parents cross examined her and then filed a letter stating their intention to rest their case in defense on all of the previously filed pleadings. The parents then left the hearing. The LEA then presented the testimony of its witnesses.

#### THE ISSUES IN THE CASE

The issue raised and argued by the LEA is whether its educational evaluations of the two students are appropriate and therefore, the parents' request for IEE at public expense for each of their two sons is not warranted.

The parents, in their pleadings, raised several issues. The first one is the contention that the LEA cannot initiate a due process hearing because it has not afforded the parents the opportunity to inspect all education records pertaining to their sons. The parents were granted unprecedented access to education records, test protocols and manuals. This hearing was continued to assure their access. No evidence was presented by the parents at the hearing concerning this issue and I now consider it abandoned by the parents.

The second issue raised by the parents in their pleadings pertains to the notice filed by the LEA. Parents objected to the misidentification of the parties due to the misspelling of the parents' and children's last name. This matter was addressed by the LEA

with a request to file an amended complaint which was granted. Again, no evidence was presented by the parents at the hearing concerning this issue or any prejudice caused them and I now consider it abandoned.

The third issue raised by the parents in their April 29, 2009 motion to dismiss or grant summary judgment appears to be a rehash of their first issue objecting to absence of access to educational records. For the reasons stated above, I consider this issue abandoned.

The fourth issue raised by the parents is whether there is an unreasonable delay in the filing of a request for a due process hearing, in violation of 34 CFR §300.502(b)(2). No evidence was presented by the parents at the hearing concerning this issue. The LEA, however, did offer testimony as to the reasonableness of the timing for initiating this due process hearing. There was also evidence presented by the LEA indicating communication between the LEA and then counsel for the parents showing an agreement for a delay in filing the request for a due process hearing. (Exhibit S-127). 34 CFR §300.502(b)(2) only requires the LEA request a due process hearing upon rejecting a request for an IEE “without unnecessary delay”. In this case, the time period in question was between March 11, 2009 and April 17, 2009 was not unreasonable. I consider this issue both unfounded and abandoned by the parents.

The fifth issue raised by the parents is whether simply disagreeing with the results of tests conducted by the LEA entitle the parents to an IEE.

#### LEGAL AUTHORITY

The only real issue remaining to be decided is whether the previous testing of the students is appropriate thereby making an additional IEE at public expense unnecessary.

The correlating issue raised by the parents is whether simply disagreeing with the previous testing creates an automatic right to an IEE. The legal authority for the settlement of this issue can be found in 34 CFR §300.502(b)(1) and (c).

#### FINDINGS OF FACT AND DECISIONS

The easiest portion of this issue to resolve is the parents' argument that simply disagreeing with previous testing creates an automatic right to an IEE. The regulation clearly states that if the previous evaluation is appropriate, the parents are still entitled to an IEE, BUT, not at public expense.

Before resolving the remaining issue, there are several determinations I must disclose. They are as follows: The requirements of notice to the parents were satisfied. The children have a disability. The children need special education and related services. The LEA is providing a free and appropriate public education. These determinations were reached from a review of the submitted documents, testimony and, in the case of having a disability and needing services, with the apparent agreement of the parties.

The remaining issue is whether the previous educational evaluations for the children are appropriate and, if so, then the parents are not entitled to an IEE at public expense.

The parents' evidence consists of documents labeled Exhibits 1- 33. Without any direction from the parents, I assume from a review of these documents that the most significant to the parents are Exhibits 17, 18 and 30.

Exhibits 17 and 18 are reports prepared as the result of IEE for each of the students. These two reports are very similar with identical language appearing in six paragraphs. Of significance to the parents is the identical recommendation appearing in

both reports: “However, as stated earlier in this report, it is possible that he has some underlying auditory information processing deficits (APD), such as phonemic extraction problems that could interfere with any success in correcting his speech production of the /r/ phonemes. As such, one recommendation is that [the student] should have a comprehension APD assessment to rule out phonemic extraction and discrimination problems.” It is due to this recommendation that the parents are requesting an additional IEE for both students at public expense.

The LEA presented the testimony of the coordinator for monitoring and compliance with 23 years teaching experience including being on the adjunct faculty for a local university teaching psychoeducational assessment for graduate students. This witness was accepted as an expert witness in the field of eligibility process. Through this witness it was established that the younger student was eligible for special education services due to speech language impairment and other health impairment. (Exhibit S-2 and 18); IEEs were authorized for the younger student for psychological, educational, speech/language and occupational therapy assessments. (Exhibits S-11); Those IEEs were completed. (Exhibits S-38, 39, 41); School assessments for the younger student were conducted. (Exhibits S-37, 33, 43, 34, 32).

This witness also established that IEEs were authorized and performed for the elder student in speech/language, occupational therapy, psychoeducational, and neuropsychological. (Exhibit S-126); School assessments for the elder student were conducted such as evaluations of auditory processing abilities, occupational therapy, audiological, and psychological. (Exhibit S-126)

As a result of reviewing the results of the various school and independent assessments for both students, this witness determined and testified that the recommendation for a comprehension APD contained in the IEEs from parents' Exhibits 17 and 18 were not supported or recommended by any of the other assessments. This witness characterized this recommendation as an "outlier", one standing by itself and not supported by other evaluations

As a side note, the parents' Exhibits 17 and 18 (IEE reports) recommend "comprehension" APD assessments. The LEA's exhibit S-126 indicates the word "comprehension" was wrong wording. I assume the LEA thinks it should read: "comprehensive." If it is a typographical mistake in the IEE, the fact that it appears in both IEEs is, along with the apparent recycling of other paragraphs and passages, an indication of a lack of individual attention to each specific student.

This first LEA witness also testified that both students are performing extremely well in school and that existing accommodations are working. In short, there is no need for additional testing for either student.

The next witness called by the LEA was a school psychologist, who based on her resume and testimony, was accepted as an expert witness. She introduced Exhibit S-34 wherein she reported the younger student's auditory processing ability to understand speech under noisy conditions was at the upper limits of the average range. Significantly, her report stated: "His cognitive processing abilities, such as auditory processing, long-term retrieval, visual perceptual speed, visual discriminatory and visual-spatial orientation, all ranged from average to well-above average for his age and, although some areas emerged as weaker than [the younger student's] overall intellectual ability would



suggest, all were appropriately developed for his age and not considered areas of deficit but rather areas of personal weakness.”

The third LEA witness is the special education teacher for the elder student. She testified about the accommodations provided and that the elder student is doing well and is making sufficient progress. (Exhibits S-106, 108, 118).

The fourth LEA witness is the second grade teacher for the younger student and testified this student is doing extremely well.

The fifth LEA witness is a school based speech language pathologist who testified the younger student is making sufficient progress. Another LEA speech language pathologist testified.

Then testimony was presented by the LEA audiologist who was qualified as an expert. She testified as to observing and working directly with the younger student and having observed and reviewed the testing for the elder student. She testified the younger student did not need further testing to meet his needs.

She testified in referring to the elder student that “Audiological evaluation demonstrates normal peripheral hearing bilaterally associated with excellent speech discrimination both in quiet and in the presence of competing background noise.” (Exhibit S-99). She testified the elder student was at or above expectations and did not need further testing to meet his needs.

The final LEA witness was a psychologist who testified the elder student was “absolutely thriving from the accommodations he is already getting;” the “r” sound problem given as the reason in the IEE for recommending a comprehensive ADP no

longer exists due to speech therapy; additional testing is not necessary; and the testing already performed was properly conducted.


Each of the numerous evaluations submitted into evidence appears to have been both comprehensive and conducted by qualified professionals. Other than the assertion by the parents that another evaluation should be performed, there is no allegation against the quality or accuracy of all the other evaluations. I have determined that the LEA evaluations were performed by trained, qualified professionals and incorporated information from various sources. The LEA used a variety of assessment tools and strategies to gather information about each student. They based their findings on interviews with the students' parents and teachers, observations of the students in class, review of IEEs and the results of standardized tests. I found no fault in the evaluations.

I heard glowing reports about the progress of both students such as passing the SOL, being A/B student, being considered for gifted program and advanced program. I heard no evidence of failure.

For the above stated reasons, I find the evaluation for each student was appropriate and that the parents are not entitled to an additional IEE at public expense. The prevailing party on all issues is the LEA.

#### APPEAL RIGHTS

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

  
Richard M. Alvey, Hearing Officer