

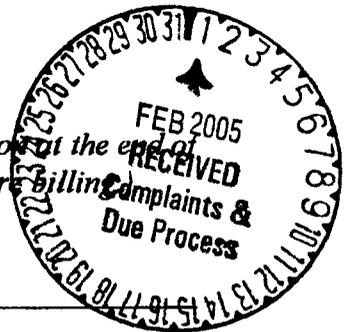
Local Hearing

05-040

State Level Appeal

**CASE CLOSURE SUMMARY REPORT**

*(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.)*



\_\_\_\_\_  
School Division

\_\_\_\_\_  
Name of Parents

\_\_\_\_\_  
January 26, 2005

\_\_\_\_\_  
Name of Child

\_\_\_\_\_  
Date of Decision

\_\_\_\_\_  
Louise M. DiMatteo  
Counsel Representing LEA

\_\_\_\_\_  
Howard Deiner  
Counsel Representing Parent/Child

\_\_\_\_\_  
Parent on issue of IEE  
LEA on issue of tutoring and Earobics

\_\_\_\_\_  
Party Initiating Hearing

\_\_\_\_\_  
Prevailing Party

**Hearing Officer's Determination of Issue(s):** Whether the parent is entitled to reimbursement for individual education evaluations, tutoring expenses and the cost of the "Earobics" program. The parent has withdrawn, without prejudice, the issue of whether the LEA failed to implement a portion of the student's IEP.

**Hearing Officer's Orders and Outcome of Hearing:** The LEA must reimburse the parent for the cost of the IEE. The parent is not entitled to reimbursement for the Earobics program and tutoring cost.

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, Esquire  
Printed Name of Hearing Officer

\_\_\_\_\_  
*Richard M. Alvey*  
Signature

VIRGINIA DEPARTMENT OF EDUCATION  
DUE PROCESS HEARING DECISION



SCHOOL DIVISION:  
LEA COUNSEL: LOUISE M. DIMATTEO  
  
NAME OF PARENT:  
NAME OF CHILD:  
PARENTS' COUNSEL: HOWARD DEINER  
  
INITIATING PARTY: PARENT  
  
HEARING OFFICER: RICHARD M. ALVEY

INTRODUCTION

This matter came for hearing on December 17, 2004, in Virginia, before a duly appointed Hearing Officer. Present in person in addition to this Hearing Officer and the Court Reporter was the parent and her counsel, counsel for the LEA and the School Division's representative.

The due process hearing was requested in writing and received by the LEA on November 16, 2004 and this Hearing Officer was assigned to hear the case on November 17, 2004. The parent raised the issues of whether she is entitled to reimbursement for individual education evaluations, tutoring expenses that were incurred after her daughter was found ineligible for special education services and for the cost of the "Earobics" program. The parent has withdrawn, without prejudice, the issue of whether the LEA has failed to implement a portion of the student's IEP.

In the course of one day, both parties presented testimony and exhibits.

FINDING OF FACTS

This Hearing officer makes the following finding of facts:

1. The student is a ten-year-old fifth grade student attending an elementary school operated by the LEA.
2. The student was adopted from an orphanage in China, where she received no formal education.
3. Until her arrival in the United States, the student spoke only Mandarin Chinese.
4. Upon enrollment in elementary school in September 2001, the student was placed in the second grade.

5. The student was provided ESOL and HILT services by the LEA to build her English language skills towards proficiency.
6. The student's progress in the second grade was described by her teacher as "excellent" and "considerable."
7. By the third grade, the student's teacher noticed her distractibility but her overall grades were average and "satisfactory." The student's ESOL/HILT teacher commented on her need for self-confidence to propel her toward greater achievement.
8. In the fourth grade, the student's teachers noted lowered levels of effort on her report cards. While all of the student's teachers in the later reports from this grade note that the student was reading below grade level, that she has had difficulty with attentiveness and was "moody," all teachers reported that she was continuing to make progress, was employing "reading strategies," and was a hard worker.
9. On October 21, 2003, the parent requested the student be evaluated for special education services.
10. By October 28, 2003, a Student Study Committee Referral was made and on November 6, 2003 the Student Study Committee made a referral for an IDEA Evaluation.
11. An eligibility meeting was set for December 16, 2003 at which time the Committee reviewed the following documents constituting Eligibility Components:
  - Teacher narrative
  - Educational checklist and suggested adaptations: An intervention Guide for Elementary Second Language Learners Experiencing Academic Difficulty
  - Classroom observation
  - Report of Educational Evaluation
  - Report of Speech Evaluation
  - Report of Social Worker
  - Summary of Health Information and attendant reports
  - Psychological Evaluation
12. On December 16, 2003, the eligibility committee voted unanimously, with the exception of the parent, finding the student was not eligible for special education services at that time. The majority opinion was that the student's acquisition of English as a second language as well as the major transitions within her life likely impacted her academic development.
13. The parent noted her disagreement with this finding.

14. The parent, in a statement dated December 18, 2003 made a detailed objection to the finding of ineligibility. The parent believed the LEA evaluation demonstrated the student was eligible for special education services.
15. At the request of parent, a new eligibility meeting was scheduled in May, 2004.
16. The eligibility committee considered the following in May, 2004:
  - Letter dated May 14, 2004
  - Letter dated May 5, 2004
  - Teacher narrative
  - Classroom observation
  - Summary of health information
  - Occupational Therapy report
  - Speech pathologist report
  - Psychological evaluation
  - Special education teacher report
  - Letter dated April 22, 2004
  - Auditory and language processing evaluation report (IEE)
  - Neuropsychological evaluation (IEE)
17. The committee considered all the information provided to them as well as commentary and opinions.
18. The eligibility committee determined the student should be found eligible for special education services.
19. On July 7, 2004, parent requested reimbursement for the cost of the IEE.
20. On July 8, 2004, the LEA assistant principal informed the parent the request for public funds should be made before the IEE is performed and instructed the parent to send the request to the Director of Special Education.
21. On July 16, 2004 parent made a second request for reimbursement.
22. On August 6, 2004 the Director of Special Education denied the request.
23. On September 14, 2004, parent made a third request for reimbursement.
24. On October 27, 2004, a new LEA Director of Special Education denied the request.

#### ARGUMENTS RAISED

Parent argues she is entitled to reimbursement for the cost of an IEE because she disagreed with the LEA's evaluation. Specifically, parent says she objected to the statement in the LEA evaluation dated December 5, 2003, that the student's "acquisition of English as a second language as well as the major transitions within her life likely

impacted her academic development.” Parent argues that caselaw does not require that the request for reimbursement must be made before the preparation of an IEE.

Parent further argues the LEA evaluation was inappropriate because it failed to diagnose the student’s learning disability, dyslexia, and, in the alternative, even if it were found that the LEA evaluation was appropriate, parent would still be entitled to reimbursement because the IEE served as the lynchpin for, and was necessary and useful in eventually finding the student eligible.

Parent is seeking reimbursement for the costs of Earobics and a private tutor, arguing these costs were incurred to make up for the instruction the Student would have received had the eligibility team found her eligible for special education services in December, 2003

The LEA argues the parent did not comply with the applicable regulation in order to secure an IEE at public expense. Specifically, the parent did not object to the LEA evaluation but did object to the eligibility committee decision. The LEA argues that a parent must request an IEE at public expense prior to the preparation of the IEE. In any case, the LEA argues the IEE was appropriate, thereby making the parent not entitled to an IEE at public expense. The LEA disagrees with the parent’s characterization that the IEE served as the lynchpin for eventually finding the student eligible.

#### DISCUSSION AND CONCLUSION OF LAW

Based on all of the evidence presented, the applicable statutes, regulations and case law, and the arguments presented by the parties, this Hearing Officer makes the following conclusions of law:

The applicable regulation, 34 CFR 300.502(b)(1) states that a parent has a right to an independent educational evaluation at public expense if the parent disagrees with the evaluation obtained by the public agency. Both parties have argued the parent must disagree with the evaluation in order to be entitled to an IEE at public expense. Therefore, it must be determined whether the parent disagreed with the LEA evaluation.

The LEA has noted that in her letters requesting reimbursement for the IEE, the parent wrote: “I informed the Eligibility Committee in December, 2003, that I did not agree with their determination...” The LEA considers this proof the parent disagreed with the decision and not with the evaluation. As further proof, the LEA directs me to the parent’s Brief where the parent speaks favorably of the LEA evaluations.

Upon reviewing the parent’s “Statement Reflecting Conclusions of Dissenting Parent,” it appears to be clear the parent did not disagree with the existence of certain factors, i.e., that the student’s acquisition of English as a second language and that major transitions in her life likely impacted her academic development. The parent disagreed that these factors “should be used to deny her an appropriate education.” I find that the parent did not disagree with the evaluation prior to the preparation of an IEE.

However, the applicable regulation does not require disagreement with an LEA evaluation prior to the preparation of an IEE. The regulation only requires that the parent disagree with the LEA evaluation before entitlement to payment for an IEE. It is easy to envision a situation where a parent of little education wouldn't understand the LEA evaluations and therefore, could not agree or disagree with them. Likewise, such a parent could have doubts and questions that would cause him to seek out another opinion. It is possible that only after seeking an IEE, the parent finds himself in a proper position to decide whether he agrees or disagrees with the LEA evaluation. If after obtaining this new input, the parent sincerely disagrees with the LEA evaluation, why shouldn't he seek to have the IEE paid for at public expense?

In this present case, the parent does disagree with the LEA evaluation in that it failed to identify the students' learning disability, dyslexia.

The LEA argues that the parents must request an IEE at public expense prior to the preparation of the IEE. This is so the LEA can either initiate a hearing to show that its evaluation is appropriate or ensure that an independent education evaluation is provided at public expense, unless the LEA shows the evaluation obtained by the parent did not meet agency criteria, all pursuant to 34 CFR 300.502(b)(2). This language seems to support the position that a request for payment can be made after the preparation of an IEE because how else can the LEA show the evaluation obtained by the parent is not kosher. Likewise, the request for public payment of an IEE after its preparation doesn't hinder the LEA's initiation of a hearing.

Parent argues the case of Hudson v. Wilson, 828 F.2d 1059 (4<sup>th</sup> Cir.1987) is controlling on this issue and I agree. In response to an LEA's position that this regulation requires a parent who obtains private testing to notify the school that it disagrees with its evaluation and give the school an opportunity to show that its evaluation is appropriate before the parent obtains the private testing, the Court stated: "This strained reading of the regulation obviously would leave the parent with no way to challenge a school's evaluation with a reimbursed private evaluation. The plain thrust of the regulation is that the school can *later* challenge the private testing, and, if it then convinces the administrative reviewers and the district court that the initial evaluation was correct, the parent will not be reimbursed." Nothing in the recent changes to the regulation indicates an abandonment of allowing the parent a way to challenge a school's evaluation with a reimbursed private evaluation.

For the foregoing reasons, I read Hudson to say that a parent doesn't have to disagree with an LEA's evaluation before having an IEE and the parent doesn't have to go through a hearing on appropriateness before having an IEE. The parent, when the issue is raised by the LEA without unnecessary delay, does have to confront the appropriateness of the LEA evaluation before entitlement to reimbursement.

It is necessary, therefore, to determine whether the LEA initiated a hearing on the appropriateness of its evaluation without unnecessary delay. The evidence reveals that

the parent requested reimbursement for the IEE on July 7, 2004 and got a response from the assistant principal on July 8, 2004. The LEA did not initiate a hearing on appropriateness at this time. The parent made a second request for reimbursement on July 16, 2004 and got a response from the LEA Director of Special Education on August 6, 2004. Again, the LEA did not initiate a hearing on appropriateness. On September 14, 2004 the parent made a final request for reimbursement. The new LEA Director of Special Education responded on October 27, 2004. The evidence clearly establishes the existence of unnecessary delay, foreclosing the LEA of the opportunity to have a hearing on the appropriateness of its evaluation as a reason to withhold reimbursement. Therefore, the LEA should reimburse the parent \$4,300.00 for the cost of the IEE.

The parent is also requesting reimbursement for private tutoring and the cost of the Earobics program. As justification for this request, parent argues the LEA failure to find the student eligible for special education services in December, 2003 was ultimately found to be incorrect. This argument has a potential to revive the issue of the appropriateness of the LEA evaluation. If I did address this issue, I believe I would find the December eligibility decision to be appropriate. I believe the LEA 's eligibility committee properly followed the federal law as it pertains to determining eligibility for special education services in that it drew upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background, adaptive behavior; and ensured that information from all sources was documented and carefully considered. I also believe the decision to find ineligibility for special education services because the student's acquisition of English as a second language as well as the major transitions in her life likely have impacted her academic development was correct when made.

The fact is, when the eligibility decision was made in December, 2003, the parent did not request a review of a Hearing Officer in a due process hearing. That eligibility decision to continue the current programs became the statement of what the student was entitled to until changed by a properly constituted new eligibility committee. Therefore, the parent is not entitled to reimbursement for tutoring costs and the Earobics.

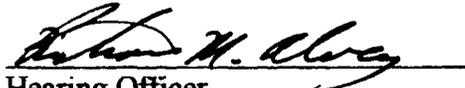
1. Parental notice requirements were satisfied by the LEA.
2. The child has a disability.
3. The child needs special education and related services.
4. The LEA is providing FAPE.

#### IDENTIFICATION OF PREVAILING PARTIES

This Hearing Officer identifies the parent as the prevailing party on the issue of reimbursement for the cost of an IEE and the LEA as the prevailing party on the issue of reimbursement for the cost of tutoring and Earobics.

APPEAL INFORMATION

A decision by the hearing officer in any hearing shall be final and binding unless the decision is appealed by a party in a state circuit court within one year of the issuance of the decision or in a federal court. The appeal may be filed in either a state circuit court or a federal district court without regard to the amount in controversy.

  
Hearing Officer

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.