**VIRGINIA DEPARTMENT OF EDUCATION**

**DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES**

**OFFICE DISPUTE RESOLUTION AND ADMINISTRATION SERVICES**

**VDOE CASE NUMBERS:**

**XXXXXXX v. XXXXXXXXXXXXX Public Schools 22-020**

**XXXXXXX v. VDOE 22-021**

**DECISION**

XXXXXXXXXXXXX Public Schools Mr. & Mrs. XXXXXXXXXXXXXXXXXXXXX

**School Division Name of Parents**

Dr. XXXXXXXXXX XXXXXX XXXXXXX

**Division Superintendent Name of Child**

Anne E. Mickey, Esquire Kandise Lucas

**Counsel Representing LEA Advocates for the Parent/Child**

Melissa A. Charnes, EsquireSamantha M. Hollins,

**VDOE Representative Assistant Superintendent, VDOE**

Robert J. Hartsoe, Esquire Parents/Child

**Hearing Officer Party Initiating Hearing**

## **INTRODUCTION**

This matter adjudicated a discrete issue regarding the availability of an Independent Educational Evaluation (IEE) to the Child. This issue is, for the most part, a legal question. The Hearing was required regarding the introduction of necessary facts on this specific issue as well as past LEA evaluations and the current school year circumstance. The evidence is undisputed. All involved demonstrated a commitment to the Child. The applicable law is clear. For the reasons stated herein, the LEA is the prevailing party. A court reporter was present at all times.[[1]](#footnote-1)1

**PROCEDURAL BACKGROUND**:

Pursuant to the Individuals with Disabilities Education Improvement Act of 2004 as amended (“IDEA”), this matter came upon the Parent/Child’s Requests for Due Process Hearing, filed herein. The Child is not subject to an IEP but receives Section 504 services. By prior Report, the Parties agreed that the Section 504 claims would not be adjudicated, but that evidence on this subject may be heard as relevant to the issue raised. (Prior Reports filed herein are incorporated by reference as if set forth in full.) The Child has been the subject of previous, recent, IDEA decisions.[[2]](#footnote-2)2 By Prior Report in the instant matter, the VDOE was dismissed with prejudice. (XXXXXXX v. VDOE, VDOE Case No. 22-021). The instant matter’s focus is on a very discreet issue regarding the remedy of an IEE.

**ISSUES DEFINED**:

**I. Whether the Parent/Child are entitled to an Independent Educational Evaluation (IEE) by circumstances referenced by the Due Process Request and confirmed with the evidence considered at the Hearing?**

**PERTINENT/RELEVANT TESTIMONY REVIEW**:

The Parent/Child called three witnesses: the Lawyer, Consultant and Father.

The Lawyer was a fact witness.[[3]](#footnote-3)3 The Lawyer still provides services to the Parent/Child. (Hearing Transcript (HT) at 94-97.) Overall, his testimony appeared to be an attempt to provide legal conclusions, prior matters, prior judicial findings, prior judicial decisions, *etc*., and not provide actual, factual, evidence on issue raised. Overall, his testimony was found to be irrelevant. As a fact witness, the Lawyer’s (legal or otherwise) opinions were not considered–as an expert or otherwise. In addition, his factual testimony was not given any weight insofar as his previous, recent, appearance as the Advocate for the Parent/Child and his ongoing relationship/efforts with them, potential or otherwise. (HT at 95.)

The Consultant was a fact witness and designated as an expert witness in special education, eligibility determination, as well as procedural safeguards and compliance with the IDEA. (HT at 117-118.) The LEA denied the Parent/Child’s request for an IEE. (Parent’s Exhibit 1; HT at 121-122.) The LEA conducted evaluations of the Child in 2018. (HT at 180.) The balance for her testimony was irrelevant as to the issue raised and legal conclusions were not considered. Given the limited scope of her effort, her credibility is not adjudicated except, she was found credible insofar as such testimony was inconsistent with the position of the Parent/Child in the instant matter.

The Father testified as a fact witness. He desired an IEE for the Child; *i.e*., an update from the Expert’s independent, previous report as found in prior decisions. (HT at 204-206.) The Father refused to allow LEA professionals to evaluate the Child insisting, by implication, his apparent desire/design to “micro-manage” information to potential LEA evaluators. (HT at 219-220.) By strong implication, his design was to allow the Expert to conduct an IEE because of the professional’s past contact with the Child. (HT at 219-222 and 236.) (By prior IDEA decisions, the Expert’s credibility and opinions were found, in general, limited for reasons stated therein.) The Father disagrees with the prior educational assessments, *etc*. (HT at 222-223.) The Father strongly believes he is the subject of bias by the LEA. (HT at 227.) The LEA has not conducted evaluations since March 2018. (HT at 234.) The Child has not undergone private evaluations in the last eighteen months from the Hearing. (*Id.*) Since 2018, the Parent/Child has not consented to LEA evaluations. (HT at 246-247.) The Parent/Child’s disagreement with the LEA evaluations should be the basis for an IEE. (HT at 253-254.) The LEA provided the Parent/Child the Procedural Safeguards. (HT at 258.) While his love for the Child was pronounced, his bias against the LEA was demonstrated. His testimony regarding issues inconsistent with the position of the Parent/Child was given weight, the balance was thereof was given little, if any, weight.

The LEA called one witness: the Director. He was a fact witness and qualified as an expert in the following areas: diagnostic and prevention services; evaluations of students under the IDEA and Section 504. (HT at 279.) Because the Child was not subject to an IEP, reviews were not required. (HT at 289-291.) He explained to the Parent/Child why they are not entitled to an IEE as public expense. (HT at 301-305.) The basis was that the Parent/Child had not allowed the LEA to conduct evaluations and, as a result, such could not be addressed by an IEE. (HT at 311-317; and 332.) The LEA last conducted comprehensive, IDEA evaluations of the Child in 2018. (HT at 337-340.) Overall, his testimony supported that the LEA complied with the requirements of IDEA. While the Director was found extremely credible regarding facts and IDEA opinions, his expert testimony regarding purely legal opinions were not considered.

**EXHIBITS**

From the Parent/Child’s Exhibit Binder, the following Exhibits were introduced into evidence by page number: 20, 21, 23 and 35. From the LEA Exhibit Binder, the following

Exhibits were introduced into evidence: 3, 4, 6, 14, 15 and 20. The proceeding was recorded by a court reporter.

## **FACTUAL FINDINGS (By a Preponderance of the Evidence)**

1. The factual findings contained in the past Hearing Officer decisions are incorporated herein by reference.
2. The Child is ineligible for IDEA services based on prior IDEA decisions.
3. The LEA provides Section 504 services to the Child.
4. By agreement, no Section 504 services (as written or implementation) was adjudicated.
5. The LEA has not conducted IDEA evaluations on the Child since 2018.
6. The Father demonstrated actual bias against the LEA undermining his credibility.
7. The Lawyer’s testimony evidenced actual bias insofar as he continues, in some manner as an Advocate or agent, to be involved in the prior matters, *inter alia*, seeking at attorney for an appeal of a prior matter.
8. Since 2018, the Parent/Child refused to allow the LEA to conduct appropriate and potentially necessary IDEA evaluations on the Child.
9. In all matters, the actions of the Advocate are attributed to the Parent/Child, her clients.
10. No persuasive evidence was introduced by the Parent/Child regarding previous (implied timely) requests to the LEA for "educational observations and a comprehensive review of existing data" as referenced in the pleadings.
11. No persuasive evidence was introduced to allow a finding that any IDEA evaluation was conducted by the LEA after 2018 to a basis for an IEE.
12. The LEA's responses to the Parent/Child's request for an IEE (including an update to the Expert's report/testimony filed in previous matters and the Child's academic record) were in accordance with IDEA.

## **LEGAL ANALYSIS**

**Introduction**

The law is clear. The Parent/Child possessed the burden of proof. Weast v. Schaffer, 77 F.3d 449, 456 (4th Cir. 2004). All pleadings, documents, emails, *etc.*, were considered.[[4]](#footnote-4)4 Under applicable law, no IEE requested by a Parent/Child is required of the LEA, given the evidence and applicable law. In addition, to the extent the Parent/Child challenged LEA evaluations conducted, such are barred by the two-year statute of limitations by established law.

**Specific Issues**

**I. The Regulations Mandate that a Parent Allow a LEA to Conduct IDEA Evaluations to Invoke the Regulations’ Opportunity for an IEE.**

For reasons stated in the LEA pleadings, the Letter to Carroll (OSEP 2016), Letter to Baus (2015) (and all other similar such legal pleadings, governmental documents, *etc*.) found in the record are found unpersuasive. Similarly, for reasons stated in the LEA pleadings, the Parent/Child is not entitled to an IEE. With that stated, 8VAC20-81-170B was found binding: “The parent(s) has the right to an independent educational evaluation at public expense **if the parent(s) disagrees with an evaluation component obtained by the local educational agency**. (*Emphasis added*.)” Outside of this mandate and limitation, no other opportunity exists for any parent/child to request and IEE. *See*, as found extremely persuasive (and binding) on the instant matter and despite all Parent/Child’s legal arguments and/or governmental documents, pleadings, *etc.*, submitted, T.P. *ex rel*. T.P. v. Bryan County School District, 792 F.3d 1284 (2015):

The parental right to an IEE is not an end in itself; rather, it serves the purpose of furnishing parents with the independent expertise and information they need to confirm or disagree with an extant, school-district-conducted evaluation. *See* Phillip C., 701 F.3d at 698; Schaffer v. Weast, 546 U.S. 49, 60-61, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005). The evaluation in connection with which Parents sought an IEE at- public expense — the 2010 initial evaluation of T.P. — is no longer current because more than three years have passed since September 2010. See 20 U.S.C. § 1414(a)(2)(B)(ii). Regardless of the merits of Parents' case, ordering an IEE at public expense in these circumstances would be futile because the District "cannot be forced to rely solely on an independent evaluation conducted at the parents' behest." M.T.V. v. DeKalb Cnty. Sch. Dist., 446 F.3d 1153, 1160 (11th Cir.2006) (*quotation omitted*); *see also* [G.J. *ex rel*. G.J. v. Muscogee County School District, 668 F.3d 1258, 1266 (2012)] ("The right to a publicly funded independent educational evaluation does not obtain until there is a reevaluation with which the parents disagree.").

As a fiduciary of tax dollars, any LEA is prevented from expending public funds on such efforts without legal justification, as requested by the Due Process Request--without limitations as required by applicable laws. Otherwise, all students (*i.e.*, students who are ineligible for IDEA services as in the instant matter) could require an IEE(s) without limitation in violation of such LEA fiduciary duty. For legal reasons stated in the referenced Hearing Officer decisions, the LEA cannot provide services in “the best interests of the child,” but such services reasonably calculated to provide material benefits to such child given the circumstances. As a result, the argument that the Parent/Child is entitled (without restriction) to an IEE is unfounded given the applicable law and, quite frankly, a legal reality. Similarly, the Parent/Child’s request that the LEA pay for an updated report from the Expert is equally unfounded. While any student would benefit from an IEE (or such private update), these efforts are not required by the IDEA as to children found, at least, for reasons stated herein and especially insofar as the Child has been judicially found ineligible for IDEA services as in the instant matter. As a result, the Parent/Child is not entitled to an IEE absent their allowing the LEA to perform IDEA evaluations.[[5]](#footnote-5)5

**II. To the Extent that the Parent/Child Challenges prior IDEA Evaluations by the LEA from 2018, this Effort is Barred by the Two-Year Statue of Limitations.**

The overwhelming evidence is that the LEA conducted IDEA evaluations in 2018 and none thereafter. Although not expressly stated, the Parent/Child argued that such evaluations should be, under the Regulations, the basis for an IEE. As stated herein, the Parent/Child has requested two prior Due Process Requests without such challenge to LEA evaluations under IDEA. The law is clear for reasons stated in the LEA pleadings and prior Hearing Officer decisions referenced herein. Specifically, the federal regulations implementing the IDEA (and as interpreted by caselaw) impose a two year statute of limitations on parties who wish to file due process complaints. 34 C.F.R. 300.507(a)(2); 8 VAC 20 81 150(E); *see also* Torda v. Fairfax Cnty., Sch. Bd., No. 1:11cv193 (GBL/TRJ), 2012 BL 153450 E.D. Va. 2012) ("administrative complaints brought under IDEA are subject to a two-year statute of limitations"), *aff'd* Torda v. Fairfax Cnty. Sch.. Bd., 517 Fed. Appx. 162 (4th Cir. 2012). The two-year statute of limitations bar such remedy based on established law.

**RELIEF GRANTED:**

None.

## **CONCLUSION**

The Parent/Child failed to introduce sufficient evidence to carry the burden of proof to grant the relief requested by the Due Process Request.[[6]](#footnote-6)6

**APPEAL, IMPLEMENTATION AND PREVAILING PARTY NOTIFICATIONS**

1. **Appeal**. Pursuant to 8 VAC 21-81-T and §22.214 D of the Virginia Code, this decision is final and binding unless either party appeals in a federal district court within 90 days of the date of this decision, or in a state court within 180 days of the date of this decision.

2. **Implementation**. The LEA shall develop and submit an implementation plan within 45 calendar days of the rendering of a decision.

3. **Prevailing Party**. The LEA is deemed the prevailing party.

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Hearing Officer Date

**CERTIFICATE OF SERVICE**

I certify that on this 25th day of October 2021, a true and accurate copy of this pleading was delivered *via* email and First-Class mail, to:

Mr. & Mrs. XXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXX

XXXXXXX, Virginia XXXXX

Parents/Child

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Robert J. Hartsoe

**CONFIDENTIAL APPENDIX A: LEGEND**

Parents XXXXXXXXXXXXXXXXXXXXX

Mother XXXXXXX XXXXXXX

Father XXXXX XXXXXXX

Child XXXXXX XXXXXXX

LEA XXXXXXXXXXXXX Public Schools

Advocate Kandise Lucas/Strategic and Litigation Consultants

Lawyer Sa'ad El-Amin/Strategic and Litigation Consultants

Consultant XXXXXXXXX

Director XXXXXXXXX

Expert Dr. XXXXXX (Did Not Testify)

1. 1The individuals referenced herein are identified in the Confidential Appendix A: Legend. Pronouns (he, she, *etc*.) as stated herein are generic and not an attempt to designate gender of any party or witness. [↑](#footnote-ref-1)
2. 2In re: Student with a Disability, 119 LRP 18512 (VA SEA Apr. 1, 2019), the Hearing Officer determined that the LEA correctly concluded that: (1) the Child did not qualify as a student with a disability under the IDEA; (2) the Child "made consistent and meaningful educational progress during the 2017-2018 and 2018 to 2019 school years"; and, (3) the LEA "provided [the Child] with [FAPE]" during this time period. In July of 2019, the Parent/Child appeal was denied by federal court; see XXXXXXXX *ex rel*. X.X. v. XXXXXXXXXXXXX Sch. Bd., 76 IDELR 44, 1:19-cv-868 (E.D.Va. Feb. 20, 2020). Similarly, In re: Student with a Disability, 121 LRP 22535 (VA SEA April 23, 2021), the Child was correctly found ineligible for IDEA services. Further, the Child's access to the curriculum for 2019-2020 school year was consistent with FAPE. (These referenced VDOE cases are incorporated herein by reference as if set forth in full.) [↑](#footnote-ref-2)
3. 3As the “last-minute” accommodation to the Parent/Child, certain witnesses were allowed to appear remotely. Hours were wasted because the Parent/Child failed to provide this remote witness with the Parent/Child exhibits as previously ordered by prior Report, without excuse or justification. (With that stated, both the Advocate and the Lawyer are part of the same business entity). With such stated, this unexplained delay and the obvious business relationship were unexplained but not a basis to discount credibility without further evidence. The Lawyer surrendered his license to practice law in 1999 in the shadow of disciplinary proceedings. (HT at 52.) His decision was based on his belief that the Virginia State Bar was a racist organization, and his attention was, by implication, required elsewhere to address, needy, recipients. (*Id.*) As a result, his license status and views of the Virginia State Bar were considered but because the circumstances were over twenty years ago, given little, if any, any weight. In addition, the Lawyer was not designated as an expert based on §8.01-401.3B regarding its prohibition against witnesses providing conclusions of law. (HT at 57-68.) Although the Lawyer, *via* past VDOE matters referenced herein, demonstrated a wealth of knowledge and despite judicial attempts to redirect, the Parent/Child refrained from designating this professional in a potentially acceptable area of expertise such as “special education.” No source suggested that the Lawyer was sanctioned as an advocate, as described in Henrico Cnty. Sch. Bd. v. XXXXXXXX, Civil Action No. 3:18-cv-110 (E.D. Va. Oct. 2, 2019). Finally, criminal matters were discussed, such matters were not considered insofar as the LEA inquires did not address the basic legitimate areas as allowed, *i.e*., is the witness a felon or convicted of a crime involving moral turpitude. [↑](#footnote-ref-3)
4. 4On October 16, 2021, the Parent/Child filed an amended pleading which attempted to replace their original pleading. The attempt to amend was without leave of this tribunal. As a result, the amended response could not be considered. In addition, on October 21, 2021, the Parent/Child filed, *via* email, a communication, but cannot be considered insofar as it appears to be evidence and no motion to re-open evidence was filed. In short, all attempts to provide evidence after the close of the hearing requires a motion to re-open evidence and cannot be considered! Any unrepresented party (or perhaps witness) should seek counsel to address such as to their fundamental legal rights, IDEA regulations, laws of evidence, *etc.* [↑](#footnote-ref-4)
5. 5IDEA allows a parent to conduct an educational evaluation (and otherwise) to be considered by the IEP team, Due Process Requests, the instant mater, *etc.*, at such parent/child’s own expense. (Moreover, without any explanation, no evidence from any source suggests the Parent/Child arranged for the Expert to participate in any IEP meeting, perhaps a great resource to all involved.) [↑](#footnote-ref-5)
6. 6Although such cannot be ordered, all involved may wish to review the LEA's opportunity to conduct IDEA evaluations *etc*. The evidence supports that all involved are motivated to allow the Child to benefit from any and all IDEA collaborations which may be available. Overall, IDEA (and Section 504) contemplates, implies (or indeed perhaps directs) collaboration especially with persons who have unique knowledge of the Child's specific IDEA needs as well as physical health and mental health, *etc*., such as his Parents, teachers, counselors, and other professionals involved. Reviewing the instant matter and prior IDEA decisions, IDEA or Section 504 opportunities, these legal resources appear to be potentially ignored without assigning blame and with all due respect. All involved are respectfully requested, but cannot be ordered to, re-evaluate their respective positions and take such actions as are necessary to ensure this Child obtains all opportunities as allowed under IDEA or Section 504 as soon as practical. As referenced in IDEA and Section 504, the Child must be the focus: collaboration and cooperation. Otherwise, IDEA and Section 504 opportunities may be wasted to the potential detriment of the Child. All involve want this Child to succeed! [↑](#footnote-ref-6)