STATE OF MAINE

SPECIAL EDUCATION DUE PROCESS HEARING

March 17, 2002

Case #02.014, Parents v. Jay School Department

REPRESENTING THE FAMILY: The family appeared *pro se.*

REPRESENTING THE SCHOOL: Eric R. Herlan, Esq.

HEARING OFFICER: Peter H. Stewart, Esq.

This hearing was held and the decision written pursuant to 20-A MRSA 7202 *et seq.,* 20 USC 1415 *et seq.,* and accompanying regulations.

FACTS

The hearing was requested by the family on behalf of their child, hereinafter referred to as the "student". The Department of Education received the request on 1/15/02, the pre-hearing conference was held in Augusta on 2/12/02. The parties tried unsuccessfully to agree upon a specific issue to be resolved at the hearing. The school then informed the hearing officer that the family had challenged the appropriateness of the educational evaluation obtained by the school and asked for an independent individual evaluation, at public expense, of the student's educational needs. The school had refused that request and, at the pre-hearing, asked that the hearing be enlarged to include the issue of the appropriateness of its educational evaluation, pursuant to MSER 9.19. The family first objected to the school's motion, then withdrew its objection and finally asked for an opportunity to consider the motion further. The hearing officer treated the school's request as a pre-hearing motion and took the matter under advisement.

The parties then attempted to schedule a date and time or[sic] the hearing. The parties and the hearing officer agreed upon 2/28 and 3/1 as "good" days for all. Choosing the time of day to begin the hearing was more difficult. The family wanted the hearing to begin after 3:00 PM and maintained that position throughout the discussion. The school did not agree to such a late starting time. Relying upon an earlier decision on the identical issue, the hearing officer scheduled the hearing to begin at 9:00 AM on 2/28 or 3/1, depending upon the availability[sic] an appropriate location.[1] The Department of Education secured the Livermore Falls District Court on 2/28, beginning at 9:00 AM., and so notified the parties.

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[1] See, Attachment 1, a decision dated 11/26/01 in *Parents v. Jay, #01.283*.

In the time between the pre-hearing conference and the hearing date, the family contacted the hearing officer, both telephonically and by fax, to press their request to move the start time until 3:00 PM, saying that the 9:00 AM start presented a "hardship" for the family, and was unfair and unreasonable. The school, by letter, maintained its objection to the late start. The hearing officer treated the family's requests as a single additional pre- hearing motion and issued a written denial of the motion.[2] In that response, which was received by the family on 2/25/02[3], the hearing was scheduled for 9:00 AM on 2/28/02 at the Livermore Falls District Court building.

On 2/28, the family neither appeared for the hearing at 9:00 AM, nor contacted the hearing officer to offer any explanation for their failure to attend. After waiting until approximately 9:35 AM, the hearing officer opened the hearing and granted the school's motion to hear the issue of the appropriateness of the educational evaluation it had obtained for the student. The school presented two witnesses on that issue. The first, L. F., had earned a bachelor's degree in elementary education and a master's degree in speech and language, was licensed in Maine as a speech and language pathologist, had seventeen years experience doing evaluations similar to the one at issue and had been working with the student since his second grade year. She was not an employee of the school. She met with the family prior to administering the battery of tests to the student. She tested the student in several areas, including vocabulary and articulation. She administered a standard test, the CELF-3, to compare current results with earlier results, and included another test, the Boehm, at the request of the parents. She was satisfied that the tests were both appropriately selected for, and properly administered to, the student. The school's second witness, C.C., had bachelor' degrees in both elementary education and physical therapy, has been licensed as a physical therapist in Maine since 1985 and has a 12 year history of working with the student both as a provider of physical therapy services and as an evaluator. She also met with the student's mother, to discuss the testing process, for about 45 minutes prior to doing the evaluation at issue. At the end of that meeting, C.C. believed that she and the student's mother had reached agreement as to what tests were appropriate for the student. She gave the student a Beruininks-Oeretsky test to evaluate motor proficiency, went through a functional activities checklist and, at the request of the student's mother, did a range of motion study. During testing, the student was co-operative and appeared to participate fully in the process.

The family had still not appeared when the hearing was closed later that morning. The hearing officer has heard nothing from the family since.

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[2] *See*, Attachment 2, a memorandum dated 2/22/02 containing the denial of the family's request for a 3:00 PM start in this case.

[3] *See,* a United States Postal Service receipt, signed by the father on 2/25/02, acknowledging receipt of the memorandum denying his request for a 3:00 PM start.

DISCUSSION

There are two issues presented here. The first is what consequence should flow from the failure of the family to appear at the hearing. The second is whether the school's individual educational evaluation of the student was appropriate.

A.

After reviewing the facts of this matter, I conclude that the family's failure to appear at the hearing compels me to enter a default judgment in favor of the school in this case. The family knew, beyond question, that this case was to be heard[sic] Livermore Falls District Court at 9:00 AM on 2/28/02. They objected to the 9:00 AM time both at the pre-hearing and afterwards in their several attempts to challenge the reasonableness of that time. They were informed about the hearing officer's denial of their requests and received a copy of the memorandum denying those requests three days before the hearing date. There are two parents involved in this case, yet neither chose to attend the hearing which they had initiated and at which they could have advanced the very serious claim that their child was not receiving the education promised by federal and Maine special education law. The school was present and was ready to go ahead with its case. The school had prepared hundreds of pages of documents for this matter. All of the somewhat elaborate due process machinery arising out of state and federal special education law was poised to do the job for which it was designed. The family's choice not to appear, for it was a choice, prevented this very important inquiry from proceeding. It is not, or at least should not be, a frivolous matter to invoke this process. It is not only a serious and elaborate process. It is also expensive. And it takes people - special education teachers, administrators, and service providers – who have important jobs to do each day away from those jobs. The family's choice not to appear at the hearing they requested thwarts all of this. Consequently, default judgment is entered in favor of the Jay School Department in all aspects of *case #02.014* not specifically resolved below.

B.

At the hearing, the school presented sufficient evidence to carry the burden imposed by the MSER to show that the individual evaluation of the educational needs of the student had[sic] obtained by the school was, indeed, an appropriate evaluation. Both evaluators were highly qualified both in terms of education and experience, and each had appropriate certification. Both evaluators had prior experience working with this student, one since the second grade, and the other over a period of 12 years. Neither evaluator was an employee of the school. Both evaluators met with the student's mother prior to the testing process and both added tests at her suggestion. Both the process used to produce the evaluations at issue and the product of that process, the evaluations themselves, are appropriate. Consequently, the school is not obligated to provide the family with an independent educational evaluation at public expense.

CONCLUSION

For the reasons discussed above, this hearing officer concludes that the school has conducted a full and individual evaluation of the student's educational needs and, therefore, is not obligated to obtain an independent educational evaluation of the student at public expense. As to all other aspects of this case, #02.014, *Parents v. Jay School Department,* default judgment is entered in favor of the Jay School Department.

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Peter H. Stewart, Esq. Date
Due Process Hearing Officer