

XXXX XXXX, Jr.	*	BEFORE DAVID HOFSTETTER,
STUDENT	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE
PRINCE GEORGE’S COUNTY	*	OF ADMINISTRATIVE HEARINGS
PUBLIC SCHOOLS	*	OAH NO.: MSDE-PGEO-OT-17-00767
	*	(Remand of MSDE-PGEO-OT-15-01496)
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DECISION ON REMAND

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STATEMENT OF THE CASE

On January 13, 2015, XXXX XXXX, Sr. (Parent¹), on behalf of his child, XXXX XXXX, Jr. (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by the Prince George’s County Public Schools (PGCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).

I conducted a hearing on June 12, 15-17, July 27, and August 17, 2015. The Parents were represented by Dennis C. McAndrews, Esquire, on behalf of the Student. Jeffrey Krew, Esquire, represented PGCPS.

On September 16, 2016, I issued my Decision and Order (ALJ Decision). The ALJ Decision concluded, *inter alia*, “that the Parents are not entitled to reimbursement for an

¹ The Due Process Complaint was filed in the name of XXXX XXXX, Sr., only. However, at the hearing both Mr. XXXX, Sr., and his wife, XXXX XXXX, were present. Both testified and the parties clearly understood them to be acting as a unit for the purposes of this litigation and commonly referred to them as “the Parents.” I will adopt this convention throughout.

[independent educational evaluation (IEE)] conducted by [XXXX Group Practice, LLC (XXXX)] in May 2014.” ALJ Decision at 46. I also found that the Parents had not established by a preponderance of the evidence that the Student was denied a free appropriate public education (FAPE) during the applicable time periods and, therefore, I dismissed their Due Process Complaint.

The Parents filed a timely appeal in the United States District Court for the District of Maryland (Civil Action No XXXX). Following briefing, on December 13, 2016, the Court, XXXX, J., entered its Memorandum Opinion (Opinion) and its Order (Order) granting in part, and denying in part, the parties’ cross-motions for summary judgment. The Court upheld the ALJ Decision in its entirety with one exception: the Court remanded to me, “for further proceedings or clarification,” that portion of the decision denying reimbursement to the Parents for the cost of the XXXX IEE report. Order at 1-2. The Court did not direct that further evidentiary proceedings be held and neither party requested such a hearing.

On January 10, 2017, the Parents filed an appeal (No. XXXX) to the United States Court of Appeals for the Fourth Circuit. PGCPS moved to dismiss for lack of jurisdiction. After briefing, the Court entered an order (Circuit Court Order) granting the motion to dismiss because “[t]he record indicates that the district court intended to retain jurisdiction while the case was remanded and has not ruled on all issues before it; therefore the case is not yet ripe for appeal.” Circuit Court Order.

On April 6, 2017, I held a pre-hearing telephone conference regarding the remand and the parties were directed to appear for oral argument on April 25, 2017. After oral argument on April 25, 2017, the parties were given the opportunity to submit written memoranda by May 3, 2017 and both parties did so.

ISSUE ON REMAND

The issue is whether, in light of the District Court's remand Opinion and Order, the Parents are entitled to reimbursement from PGCPs for the cost of an IEE conducted by XXXX in May 2014.

DISCUSSION

The ALJ Decision

In May 2014, XXXX conducted an IEE of the Student. At the hearing, the Parents argued that they were entitled to reimbursement for that evaluation. PGCPs argued that the criteria for reimbursement had not been met.

When a local education agency performs an evaluation of a student, the student's parents have the right to seek an IEE as a procedural safeguard. 20 U.S.C.A. § 1415(b)(1) (2010). However, the right to obtain an IEE at public expense is qualified. The federal regulations provide the following, in pertinent part:

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, *unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.*

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the

parent still has the right to an independent educational evaluation, but not at public expense.

34 C.F.R. § 300.502(b). Emphasis supplied.

The italicized portion above, as applied to this case, can be summarized this way: the Parents have a right to have PGCPs pay for the XXXX evaluation *unless* PGCPs was able to demonstrate at the hearing that the evaluation “did not meet agency criteria.” My decision also noted as follows:

The regulations provide guidance in determining whether an assessment is appropriate. The regulations, at 34 C.F.R. §300.304, require that certain standards be met when evaluating a child:

(b) Conduct of evaluation. In conducting the evaluation, the public agency must –

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child . . .

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(c) Other evaluation procedures. Each public agency must ensure that –

(1) Assessments and other evaluation materials used to assess a child under this part—

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child’s native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) *Are administered by trained and knowledgeable personnel*; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

...

ALJ Decision at 26-27. Emphasis supplied.

I reasoned that the criteria set forth in 34 C.F.R. §300.304 were, in this case, the “agency criteria” referred to in 34 C.F.R. § 300.502(b)(2)(ii).² As set forth above in the italicized portion of the criteria, assessments must be “administered by trained and knowledgeable personnel.” 34 C.F.R. §300.304(c)(1)(iv). Regarding whether PGCPS had indeed demonstrated that the IEE did not meet “agency criteria,” I made reference to the testimony of XXXX XXXX, a PGCPS school psychologist who was accepted as an expert in that field. I wrote that Mr. XXXX’s testimony “severely criticized the methodology and conclusions of the XXXX report.” ALJ Decision at 28. The next sentence in the ALJ Decision is at the center of the issues resulting in the remand from the District Court. That sentence states: “With one important exception, however, Mr. XXXX and PGCPS did not clearly establish that the report failed to meet ‘agency criteria.’” *Id.* Despite the double negative in the construction of that sentence, I consider its meaning to be clear. The sentence means that, except as to one criterion, PGCPS did *not* meet its burden to show that the XXXX IEE was out of compliance with “agency criteria.” It notes, though, that as to that one criterion, PGCPS *did* meet its burden. That criterion is the requirement that the IEE be administered by “trained and knowledgeable personnel.” In other words, I found that PGCPS had demonstrated that the XXXX IEE did not meet the requirement that it be administered by trained and knowledgeable personnel. The ALJ decision states:

² The District Court so concluded as well. Opinion at 28.

As set forth above, at hearing, the public agency must “demonstrate” that the IEE did not meet agency criteria. 34 C.F.R. § 300.502(b)(2)(ii). Those criteria are contained in 34 C.F.R. § 300.304(b), as set forth above. In Mr. XXXX’s testimony, he severely criticized the methodology and conclusions of the XXXX report. With one important exception, however, Mr. XXXX and PGCPS did not clearly establish that the report failed to meet “agency criteria.” That exception concerns 34 C.F.R. § 300.304(c)(1)(iv) which provides that any evaluation or assessment must be administered by “trained and knowledgeable personnel.” In this case, the XXXX document itself states that the “examiner” was “XXXX XXXX, M.A., P.A., Doctoral Psychology Intern.” P-32 at 1. It also states that the supervisor for XXXX (no honorific is used because it is not clear if XXXX is male or female), is XXXX XXXX, Ph.D., Licensed Psychologist.” *Id.* The document is signed on the last page by “XXXX XXXX, M.A., P.A., Psychology Associate/Evaluator” and “XXXX XXXX, Ph.D., Licensed Psychologist/Supervisor.” P-32 at 28. The document does not state whether it was actually written by XXXX or by Dr. XXXX, or by both of them in collaboration. No *curriculum vitae* is in evidence for either XXXX or Dr. XXXX. I conclude that XXXX is not a licensed psychologist, given the designation of “intern” and given the fact that Dr. XXXX is identified as licensed but XXXX is not. Neither XXXX nor Dr. XXXX testified. These facts were noted repeatedly by various PGCPS witnesses, including Mr. XXXX.

It is true that 34 C.F.R. § 300.502(b)(2)(ii) provides that the IEE must be at public expense unless the agency “demonstrates . . . that the evaluation obtained by the parent did not meet agency criteria.” I do not take that to mean, however, that in these circumstances, PGCPS must affirmatively prove that XXXX was *not* “trained and knowledgeable” to administer the evaluations performed. Rather, I understand it to mean that establishing that the examiner is “trained and knowledgeable” is part of “agency criteria” and that where the agency itself would be required to make such a showing, and where the very report of the IEE itself leaves that question unanswered and subject to serious doubt, the agency has “demonstrated” a failure to show that the IEE meets “agency criteria.”³ [Footnote 12 in original]. If the school district were required to “prove” that the evaluator was *not* trained and knowledgeable, it would allow virtually anyone to conduct an IEE for a parent and make it exceedingly difficult for the school district to “prove a negative.” I do not believe this is the intent or meaning of the statute. For this reason, I conclude that the Parents are not entitled to reimbursement for the XXXX IEE.

ALJ Decision at 28-29. Emphasis supplied.

In substance, then, I found that the IEE evaluation failed to clearly establish authorship and that the “examiner,” XXXX XXXX, was described as an “intern.” I concluded, therefore,

³ Footnote 12 in the ALJ Decision stated: “While it is true that PGCPS could have subpoenaed XXXX and Dr. XXXX, I conclude that it was not required to do so in order to ‘demonstrate’ a failure to meet ‘agency criteria’ given that the document itself fails to provide any information as to the qualifications and training of XXXX other than the bare facts of degrees granted and ‘intern’ status.”

that, on its face, the IEE did not reveal that it was “administered by trained and knowledgeable personnel.” 34 C.F.R. §300.304(c)(1)(iv). As a result, I concluded that PGCPS had demonstrated that the IEE failed to meet this agency criterion and that, therefore, the Parents were not entitled to reimbursement for the cost of the evaluation.

The District Court Opinion

Regarding my analysis of whether the PGCPS had proved that the IEE failed to meet “agency criteria,” the District Court stated:

[The Parents] argue that, in contravention of [34 C.F.R. §300.502](b)(2)(ii), the ALJ improperly shifted the burden to the parents to demonstrate that the independent evaluation from [XXXX] “met agency criteria.” *Plaintiffs are correct.* In reaching his conclusion, the ALJ noted that [PGCPS] had put forth testimony at the hearing criticizing the conclusions of the report. But the ALJ then stated, “[w]ith one important exception, however, Mr. XXXX and PGCPS did not clearly establish that the report failed to meet ‘agency criteria.’” Specifically the ALJ found that PGCPS did not establish that the XXXX assessment was not “administered by trained and knowledgeable personnel,” which is one of the established criteria.⁴

Opinion at 21. Emphasis supplied. Citations omitted.

The Court continued:

Given that (b)(2)(ii) requires the agency to demonstrate at a hearing that the evaluation did not meet agency criteria, if the ALJ’s conclusion is that the agency did not meet this burden, that should end the matter. Nonetheless, the ALJ determined that “[i]f the school district were required to ‘prove’ that the evaluator was *not* trained and knowledgeable, it would allow virtually anyone to conduct an IEE for a parent and make it exceedingly difficult for the school district to ‘prove a negative.’” But as the ALJ acknowledges, the authors of the report could have been subpoenaed to testify at the hearing, and this Court is aware of no reason why that would have been difficult or burdensome to accomplish. Thus, the absurd outcome the ALJ was apparently seeking to avoid does not exist here, and there is no reason to believe that the drafters of the

⁴ In my view, this sentence (beginning “[s]pecifically the ALJ found . . .”) is incorrectly worded. The sentence states that I found that PGCPS did *not* establish that the assessment was *not* administered by trained and knowledgeable personnel. The literal meaning of this sentence then would be to state that I found that PGCPS had failed to meet its burden to establish a violation of the “trained and knowledgeable personnel” agency criterion. If that were the case, I would have found that the Parents were entitled to reimbursement. In fact, I found (if incorrectly, according to the Court), that PGCPS *had* met its burden to show a failure to comply with the “trained and knowledgeable personnel” requirement and that therefore the Parents were not entitled to reimbursement. I therefore conclude that the Court’s sentence is simply incorrectly drafted; I believe that a full reading of the Court’s opinion supports this view.

regulation did not mean what they said when they crafted language placing the burden on the agency to demonstrate that the IEE did not meet agency criteria. The Court is, however, unclear if the ALJ's qualifying statement, "with one exception," was intended as a conclusion that PGCPS did establish that the additional criteria beyond the knowledge and training of the personnel, had not been met.⁵ [Footnote 15 in the District Court's Opinion.] Thus, the Court will vacate and remand the decision on this issue for a determination or clarification of whether the agency met its burden of establishing that the report failed to meet agency criteria.

Opinion at 22. Italics in original.

The Court's Opinion states unequivocally that I improperly shifted the burden to the Parents to demonstrate that the IEE met agency criteria. It then seeks clarification as to whether I did indeed intend to find that PGCPS met its burden of establishing that as to one or more criterion, the IEE did not meet agency standards. As set forth above, it was indeed my intention to find that PGCPS met its burden to show that the IEE did not meet agency standards regarding the use of trained and knowledgeable personnel. I did not, however, conclude that PGCPS demonstrated that the IEE failed to comply with agency criteria in any other way. Having so clarified my decision, it might be expected that I would therefore again conclude that my original decision to deny reimbursement to the Parents was correct. Having carefully considered the Court's opinion, however, I am of the view that a reversal of my decision on the issue of reimbursement for the IEE is required. I reach this conclusion because, as I have emphasized, I found only one criterion as to which PGCPS met its burden to show that the IEE did not comply with agency criteria, namely the trained and knowledgeable personnel requirement. As to that finding, the Court clearly stated that the basis for my conclusion that PGCPS had met its burden concerning the "trained and knowledgeable" agency criteria was flawed. I had reasoned that the actual authorship of the evaluation was unclear and that, on its face, the document failed to meet

⁵ Footnote 15 in the District Court's Opinion states, "For example, to the extent that there is a list of specific criteria, if the ALJ found that the agency established that some of the criteria had not been met, it would seem that the agency did carry its burden of establishing [that] the report did not meet agency criteria; but it is unclear if that is what the ALJ intended in his ruling."

the standard regarding trained and knowledgeable personnel. I concluded that to do anything further, PGCPs would have essentially been required to “prove a negative.” The Court disagreed with my reasoning, however, pointing out that PGCPs could have subpoenaed the putative authors of the report and adding that “this Court is aware of no reason why that would have been difficult or burdensome to accomplish.” *Id.* As a result, the Court concluded that my analysis constituted an impermissible shifting of the burden from the PGCPs to the parents. I am, of course, bound by the District Court’s decision. I have clarified the basis for my decision on the IEE reimbursement issue, namely that PGCPs was able to prove a failure to adhere to agency criteria only as to the trained and knowledgeable personnel issue. It is clear that the Court found that my analysis on this issue constituted legal error. I will therefore find that the Parents are entitled to reimbursement for the cost of the IEE.

I have found it necessary, for the sake of clarity, to summarize and discuss the ALJ Decision and the Opinion before turning to the position of the parties’ on remand. I will discuss those positions now.

PGCPs’s Position on Remand

PGCPs argues that my original finding should be interpreted to mean that, “in one important respect, the XXXX report failed to meet Agency criteria.” PGCPs Memorandum of Law on Remand (PGCPs Memorandum) at 5. As set forth above, that interpretation of my original finding is correct. I did in fact find, as I have now clarified, that PGCPs met its burden to establish that the XXXX IEE failed to establish the “trained and knowledgeable” criteria. PGCPs then argues that, given this finding, my original determination (denying reimbursement) was correct and that I should re-affirm it. In support of its argument, PGCPs cites two statements from the Opinion. The Court opined, “Given that (b)(2)(ii) requires the agency to demonstrate at a hearing that the evaluation did not meet agency criteria, if the ALJ’s conclusion is that the

agency did not meet this burden, *that should end this matter.*” Opinion at 22. Emphasis supplied. Similarly, PGCPs notes that the Court stated in Footnote 15, “[I]f the ALJ found that the agency established that some of the criteria had not been met, *it would seem that the agency did carry its burden of establishing the report did not meet agency criteria,* but it is unclear if that is what the ALJ intended in his ruling.” *Id.* Emphasis supplied.

As I have noted above, I did indeed conclude that PGCPs met its burden to establish that the IEE was not administered according to agency criteria. I have also suggested that this fact, coupled with the language of the Opinion quoted by PGCPs, above, might lead to an initial expectation that I should re-affirm my decision. However, I conclude that the complexity of the Opinion is such that, reading it as whole, it is necessary for me to reverse my previous decision. While the Court did call for clarification of my conclusion regarding agency criteria, it also made clear that, if the clarification was that PGCPs had met its burden to show that the IEE was not administered by “trained and knowledgeable personnel,” then that conclusion was in error. As I have explained, the Court’s clearly expressed conclusions regarding burden-shifting and what likely would have been required for PGCPs to meet its burden (subpoenaing the putative authors), mandate that I reverse my conclusion.

The Parents’ Position on Remand

The gravamen of the Parents’ argument on remand is simply that the District Court’s Opinion mandates that I reverse my finding as to whether the Parents are entitled to reimbursement for the XXXX IEE. As I have discussed above, I agree. Having clarified that I found that PGCPs met its burden concerning the “trained and knowledgeable” criterion, but not as to any other, the language of the Court’s opinion about burden-shifting and its analysis of the basis of my decision requires such reversal.

The Parents make various additional arguments, notably that 34 C.F.R. § 300.502(a)(2) required that PGCPs provide the Parents with the agency criteria applicable for independent educational evaluations. Submission on Remand on Behalf of XXXX XXXX, Jr., and His Parents (Parents' Memorandum) at 11-12. That regulatory section provides that a public agency "must provide to the parents, *upon request for an independent educational evaluation*, information about . . . the agency criteria applicable for independent educational evaluations" Emphasis supplied. In response, PGCPs makes three points as to why the Parents' argument should be rejected. First, PGCPs points out that 34 C.F.R. § 300.502(a)(2) only applies where parents request an IEE of the agency and argues that that did not happen in this case. PGCPs Memorandum at 3-4. Rather, PGCPs argues, the XXXX report was never even known to PGCPs staff until several months after it was performed. *Id.* Second, PGCPs argues that the Parents did not raise this issue either at the hearing or on appeal and that it should thus be deemed waived. Finally, PGCPs argues that the Parents have failed to show any prejudice from the alleged error in failing to supply them with "agency criteria" and that, therefore, the Parents have "alleged nothing more than a procedural error with no substantive deprivation." *Id.*, citing *DiBuo v. Bd. of Educ. of Worcester County*, 309 F.3d 184, 190-91 (4th Cir. 2002). In my view, it is not necessary for me to reach these issues. The District Court did not itself discuss, much less rely on, the Parents' interpretation of 34 C.F.R. § 300.502(a)(2). My decision is based on the explicit language of the District Court's Opinion finding that I impermissibly shifted the burden on the agency criteria issue to the Parents and that my justification for my decision on that issue was wrong as a matter of law. The proper interpretation of 34 C.F.R. § 300.502(a)(2) regarding

whether PGCPs was required to provide the Parents with “agency criteria” but failed to do so is not before me.⁶

CONCLUSION OF LAW ON REMAND

Upon consideration of the Opinion and Order of the District Court, I conclude as a matter of law, that the Parents are entitled to reimbursement from PGCPs for the cost of an IEE conducted by XXXX in May 2014. 34 C.F.R. § 300.502(b); 34 C.F.R. §300.304.

ORDER ON REMAND

I **ORDER** that PGCPs shall reimburse the Parents for the cost of an IEE conducted by XXXX in May 2014.

June 2, 2017
Date Decision Issued

David Hofstetter
Administrative Law Judge

DH/cj

REVIEW RIGHTS

Within 120 calendar days of the issuance of the hearing decision, any party to the hearing may file an appeal from a final decision of the Office of Administrative Hearings to the federal District Court for Maryland or to the circuit court for the county in which the Student resides. Md. Code Ann., Educ. § 8-413(j) (2014). Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number. The Office of Administrative Hearings is not a party to any review process.

⁶ I also note that the Parents argue that the recent decision of the United States Supreme Court in *Andrew F. v. Douglas County School District RE-1*, 580 U.S. ___, 137 S.Ct. 988 (2017) requires that I reverse my decision. *Andrew F.* made clear that a school system must offer more than “some” education benefit or benefit that is trivial or merely more than *de minimis* in order to provide a disabled student with FAPE. *Andrew F.* was decided after the date of the District Court’s decision in the present case, but in any event, its specific relevance to the issue on remand is not obvious. As explained above, my decision to reverse my conclusion as to the IEE reimbursement issue is based on the clear language of the District Court’s decision. My decision would be the same even if the *Andrew S.* decision had not been issued.