Before the
Administrative Hearing Commission
State of Missouri

and,)		
ON BEHALF OF		
,)		
	)	
Petitioners,	)	
	)	
vs.	)	No. 14-0368 ED
	)	
VAN-FAR R-1 SCHOOL DISTRICT,	)	
	)	
Respondent.	)	

DECISION

The parents of a year-old boy, , ("Child") filed a due process complaint against the Van-Far R-1 School District ("the School District"), alleging that the School District failed to appropriately evaluate their son, and challenging the School District's decision that their son did not meet eligibility criteria (Speech Impairment-Voice) under the Individuals with Disabilities Education Act ("IDEA") for special education and related services. We find that the District's evaluation was adequate and the determination was correct.

Procedure

On March 21, 2014, and ("Parents") filed a due process complaint in the interest of their son ("Child"). We scheduled a hearing for April 22-23, 2014. On March 31, 2014, the District responded to the complaint and filed a pre-hearing conference statement. On March 31, 2014, the Parents filed their pre-hearing conference statement. On April 3, 3014, we

held the pre-hearing conference by telephone, and the School District made an oral motion to continue the hearing. By order issued on April 3, 2014, we granted the motion. We reset the hearing to May 5, 2014, and set a decision date of June 6, 2014.

On May 5, 2014, we held a hearing on the complaint. Ernest G. Trakas, with Mickes Goldman O'Toole, LLC, represented the School District. The Parents represented themselves. The matter became ready for our decision on May 22, 2014, the date the last written argument was filed.

Findings of Fact

1. Child is a year-old boy who lives in the School District. At the time of the evaluation in question, Child was years old.

2. During the 2013-2014 school year ("the school year"), Child was not enrolled in the School District, but was in day care.

3. In August 2013, Mother noticed that Child's voice, over a period of time, would become strained, hoarse, and difficult to understand. Child's child-care provider also noticed and commented on this. Parents took Child to a doctor, who did a "scope."[1]

4. Mother contacted the School District requesting an IDEA evaluation of Child with regard to his speech/voice.

5. On September 12, 2013, the School District convened a multidisciplinary team to conduct a review of existing data ("RED meeting"). In an RED meeting, the team considers what information is available and what further assessment might be needed.

6. Parents attended the RED meeting.

[1] Tr. at 14. The School District objected to any further testimony about the doctor's procedures and diagnosis as hearsay, and we sustained the objection.

7. Lisa Wise, the School District's speech pathologist and case manager in the special education department, facilitated the meeting. The team decided to further evaluate Child by administering the Boone Voice Screening ("BVS") to Child.

8. Wise gave Parents a written Notice of Action, and they gave their consent to start the evaluation process.

9. On September 27, 2013, Wise administered the BVS. The evaluation took place in the morning and took approximately 15 minutes.

10. Following the evaluation, Wise prepared an evaluation report. The results of the screening were as follows:

> The first section was a Voice Rating Scale. [Child's] pitch, loudness, quality, nasal resonance and oral resonance were all within normal limits. He exhibited a slight raspiness to his voice, but it was not severe. Had you not known the history of his voice, you would not have even picked up on this slight raspiness to his voice. The second section of the screening consisted of an S/Z ratio. This assesses his respiration by elongating the phonemes /s/ and /z/. [Child] achieved an S/Z ratio of 1.1, which indicates adequate respiration. Based on the results of this screening, [Child's] voice was considered functional and within normal limits for his age and gender.
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> ***
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> According to the State's eligibility criteria for Speech – Voice Disorder, a child must exhibit deviations in one or more of the following parameters of voice: Pitch (e.g., shrill or guttural), Quality (e.g., breathy, hoarse, or gravelly), and/or Volume (e.g., soft, loud, nasal, or denasal). The child's voice must also be discrepant from the expected parameters for children of same age, gender, and/or culture. The child's voice disorder must adversely affect the child's educational performance. In addition, the voice disorder can't be the result of any temporary conditions (e.g., normal voice changes, allergies, colds, or other conditions).
>
> [Child] was administered the Voice Screening from the Boone Voice Program for Children. Based on the results of this screening, [Child's] voice was considered to be functional. His

> pitch was within normal limits for his age and gender. . . . He exhibited a slight raspiness to his voice, but it was not severe. Had you not known the history of his voice, you would not have even picked up on this slight raspiness to his voice. His vocal volume was considered within normal limits for his age and gender. He did not talk too loud, too soft or through his nose. [Child's] voice does not adversely affect his educational performance at this time. His parents stated he knows preacademic skills such as colors, numbers, shapes and the alphabet. The DIAL-3 administered on 03/27/13 revealed a score of 128 on Concepts and 126 Overall. These scores are both within the OK range. Therefore, it was determined that he does not meet eligibility criteria for Speech – Voice Disorder. An evaluation on 08/26/13 by Troy Scheidt, MD at Missouri Ear, Nose, and Throat Center revealed a diagnosis of hoarseness due to vocal nodules. Parents stated that [Child's] raspy or hoarse voice comes and goes. It appears that he exhibits vocally abusive behaviors. The parents were given strategies to follow in order to reduce these vocally abusive behaviors.[[2]]

11. The evaluation report addressed the following potential areas of concern: vision, hearing, health, motor, speech, language, intellectual/cognitive, adaptive, social/emotional, academic achievement, transition, and assistive technology. The only area that was determined to require further assessment information was speech.[3]

12. Wise, and later the team, considered the factors listed in the Missouri Office of Special Education and Compliance Standards & Indicators for Speech/Voice evaluation. These factors include: pitch, quality, volume, voice discrepant from the norm, adverse effect on educational performance, voice disorder not the result of temporary problems.[4]

13. The team also considered: (a) March 27, 2013 DIAL-3 (Developmental Indicators for the Assessment of Learning, 3rd ed.); (b) August 26, 2013 ENT Diagnosis; (c) September 12, 2013 report from Parents; (d) September 27, 2013 BVS; and (e) September 27, 2013 Observation by Wise.[5]

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[2] Respondent's ex. 8 at 3-5.
[3] Respondent's ex. 8 at 2-4.
[4] Respondent's ex. 20.
[5] Respondent's ex. 8 at 2-4.

14. On October 28, 2013, the team met to review the evaluation results. Father was present at this meeting and received a copy of the evaluation report.

15. Parents requested an Independent Education Evaluation ("IEE"). In December of 2013, at the School District's expense, the IEE was performed.[6] The independent evaluator provided the IEE report to the Parents, and Mother provided the IEE report to the School District.

16. On January 10, 2014, Parents met with the team.

17. Parents were given a Notice of Action, dated January 16, 2014, affirming that the team had considered the IEE, and Child was still found ineligible for special education and/or related services.

Conclusions of Law

This Commission has jurisdiction over this case.[7] The burden of proof is on the party seeking relief, in this case the Parents.[8]

I. Failure to Disclose Documents and Witnesses

At the hearing, the School District argued that the Parents failed to comply with 34 CFR § 300.512(b):

> (1) At least five business days prior to a hearing conducted pursuant to § 300.511(a), each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.
>
> (2) A hearing officer may bar any party that fails to comply with paragraph (b)(1) of this section from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

[6] We do not make findings of fact about the IEE because it is not in evidence. See discussion below.
[7] Section 162.961. Statutory references, unless otherwise noted, are to RSMo Cum. Supp. 2013.
[8] ***Schaffer v. Weast***, 546 U.S. 49, 62 (2005).

In addition, 34 CFR § 300.512(a)(3) gives any party the right to "[p]rohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing."

The Parents sought to introduce the following documentary evidence: a transcript from the tape recorded IEP meeting on January 1, 2012; a Triennial IEP dated January 1, 2009; and an IEP dated January 1, 2012. The Parents sought to call the following witnesses: Deanna Terry, the owner of Child's day-care center; Sarah Robertson, a speech and language therapist; and Mother. Based on the failure to disclose as provided in this regulation, the School District asked us to prohibit introduction of all documentary evidence and any witnesses other than the Mother.[9] We granted the request and issued the sanction under 1 CSR 15-3.425(2)(C).

In their reply brief to Respondent's post-hearing reply brief, the Parents argue that they complied with the regulation in that they provided the required information to the School District on March 31, 2014 in the form of their pre-hearing conference statement. The Parents made this argument at the hearing, and we rejected it. The School District's argument, "The rules are clear that to avoid prejudice the parties are to focus and finalize their case five days in advance to give their opponents an opportunity to prepare. . . ."[10] is persuasive. We agree with the School District that providing, at any point in the proceedings, a "laundry list" of people who might testify does not serve the purpose of the law.

While there are strict deadlines in these cases, they may also be waived and the due process hearing may be held long after the due process complaint or prehearing conference statement is filed. One of the purposes of the five-day rule is to prevent a party from "having to defend against undisclosed evidence produced at the last minute in administrative

[9] The School District agreed to allow the Mother to testify because it was expected that she would testify, and thus the School District admitted it suffered no prejudice.

[10] Tr. at 11.

proceedings."[11] Another purpose of the rule is to promote prompt resolution of the case. The rule also "reduces the likelihood that a hearing would have to be delayed or adjourned on account of disputes or confusion over a party's disclosure obligations . . . it is precisely the categorical, unambiguous nature of the rule that serves the IDEA's goal of prompt resolution of disputes[.]"[12] We consider it a reasonable interpretation of the regulation that the parties must comply with the five-day rule, not at any time before the hearing, but within a reasonable time – no later than five days before the hearing. "The hearing officer has discretion with regard to the admission of evidence."[13] A reasonable interpretation is entitled to deference.[14]

We sustain our decision to exclude the witnesses and documentary evidence. Because the IEE was not introduced into evidence, we do not consider it in this decision.

II. Evaluation/Eligibility

The issue in this case is whether Child is eligible for special education services from the School District. This includes a determination of whether the School District's ineligibility determination met the IDEA's procedural and substantive requirements.[15] A child with a disability is defined as:

> *Child with a disability* means a child evaluated in accordance with §§ 300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), **a speech or language impairment**, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, any other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, **and who, by reason thereof, needs special education and related services**.[[16]]

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[11] ***L.J. v. Audubon Bd. of Educ.,*** 2008 WL 4276908 at 4 (D.N.J. Sept. 10, 2008).

[12] *Id.* at 5 (citations omitted).

[13] ***Warton v. New Fairfield Bd. of Educ.,*** 217 F. Supp.2d 261, 279 (D. Conn. 2002); *see also* ***Pachl ex rel. Pachl v. School Bd. of Indep. School Dist. No. 11***, 2005 WL 428587 at 18 (D. Minn. Feb. 23, 2005) (the hearing officer has discretion to admit or reject evidence to avoid prejudice).

[14] *Id*.

[15] ***D.A. v. Meridian Joint School District No. 2***, 2014 WL 43639 (D. Idaho Jan. 6, 2014).

[16] 34 CFR 300.8(a)(1) (bold emphasis added).

A speech or language impairment means: "a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance."[17]

In determining whether a child has a disability, the school district must:

> (i) draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background and adaptive behavior; and
> (ii) Ensure that information obtained from all of these sources is documented and carefully considered.[[18]]

In the determination of eligibility:

> (a) *General*. Upon completion of the administration of assessments and other evaluation measures --
> (1) A group of qualified professionals and the parents of the child determines whether the child is a child with a disability, as defined in § 300.8, in accordance with paragraph (c) of this section and the educational needs of the child; and
> (2) The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parents.[[19]]

The State Plan also sets forth criteria for evaluations:

> The public agency must provide notice to the parents of a child with a disability that describes any evaluation procedures the agency proposes to conduct. Each public agency shall ensure, at a minimum, that the following requirements are met:
>
> A. A variety of assessment tools and strategies are used to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum (or for a preschool child, to participate in appropriate activities), that may assist in determining whether the child is a child with a disability and the content of the child's IEP.

[17] 34 CFR 300.8(c)(11).
[18] 34 CFR 300.306(c).
[19] 34 CFR 300.306.

B. **No single measure or assessment is used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for a child.**

C. The public agency uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

D. Assessments and other evaluation materials used to assess a child under Part B of the Act are selected and administered so as not to be discriminatory on a racial or cultural basis, 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 provide or administer.

E. Assessments and other evaluation materials used to assess a child are used for the purposes for which the assessments or measures are valid and reliable and are administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the tests. If an assessment is not conducted under standard conditions, a description of the extent to which it varied from standard conditions (e.g., the qualifications of the person administering the test or the method of test administration) must be included in the evaluation report.

F. Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

G. Assessments are selected and administered so as best to ensure that if a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

H. The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

> I. Assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent school as necessary and as expeditiously as possible to ensure prompt completion of full evaluations.
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> J. In evaluating each child with a disability, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.
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> K. The public agency uses assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child.[[20]]

A. Evaluation

Wise testified about the process of evaluating Child. She testified that during the evaluation, Child's pitch, volume, quality of voice, and respiration were all within normal limits. She noted the slight raspiness, but testified that it was not severe. Wise concluded that "his voice was considered functional and within normal limits for his age and gender."[21] Wise, and later the team, considered the factors listed in the Missouri Office of Special Education and Compliance Standards & Indicators for Speech/Voice evaluation, and determined that Child was not eligible for services.

Parents attack the evaluation, arguing that Child was only evaluated once, in the morning before Child had the chance to tax his voice, and arguing that the evaluation was brief. But these allegations are not supported by evidence of why these factors might invalidate the evaluation. The only potential problem with the evaluation we see is under B of the State Plan: "No single measure or assessment is used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for a child." Wise appears

[20] State Plan for Special Education at p. 33-34 (emphasis added). *See also* 34 CFR 300.304.
[21] Tr. at 60.

to have used only the BVS to make the determination. But she set forth in her report and testified that she also assessed Child based on his conversation with her and her observations of his behavior, and on discussions with Parents. Because of these other assessments, we do not find the evaluation defective.

Parents cite ***Mary P. v. Illinois State Bd. of Educ***.,[22] a case in which the Court found that a seven year-old boy who was suffering from a speech impairment due to the presence of small nodules on his vocal cords was eligible for services. Both parties in that case admitted that the child's voice was not normal and that he suffered from hoarseness, squeakiness, fluctuations in pitch, strain, and low volume levels. But the school district found he was not eligible for services because the child was equal to or superior to his classmates academically, and his social adjustment was not affected by his speech impairment. In ***Mary P***., the Court found that the school district's determination was too dependent on whether the vocal problems interfered with his academic and social aptitude, and failed to consider other factors.

The School District distinguishes ***Mary P***. It argues that its evaluation did not concentrate on Child's academic performance because Child was not yet enrolled in school. The team's decision makes little reference to Child's performance in day care. As noted above, the team relied on more than the BVS in making its determination.

The School District also cites cases dealing with the adequacy of evaluations. In response to the Parents' complaints about the type of testing, the School District cites ***Concord Public Schools***.[23] In that case, a district was not required to pay for an IEE for a student because the evaluation was appropriate and comprehensive. The hearing officer stated:

> I am persuaded that Ms. Thistle's decision to administer two, rather than three writing tests reflected a credible expert, and

[22] 919 F. Supp. 1173 (N.D. Ill 1996).
[23] 53 IDELR 342 (SEA MA 2010).

> informed opinion as to what was necessary for her evaluation to be comprehensive. In order to be determined comprehensive, Ms. Thistle's evaluation need not be perfect and certainly need not include every possible test. [[24]]

In the case before us, an experienced speech pathologist testified that the BVS was an appropriate test for Child's evaluation, and we have no evidence to the contrary.

B. Eligibility

Parents argue that, even if the School District's evaluation was adequate, it should have determined that Child was eligible for services, as the Court did in ***Mary P***. Another distinction between that case and the one before us, however, lies in the description of the child's voice in ***Mary P***., which both parties admitted was not normal (described as "wholly unintelligible"), and the fact that the child was "reluctant to offer vocal responses to oral questions."[25] In contrast, Child was described by Wise as "very willing to speak with me" and "talkative and attentive and very cooperative."[26] There was no reliance on one factor in the School District's evaluation, but the team considered many different vocal characteristics of Child that Wise found were all within normal ranges. That evaluation led to the determination that Child was not eligible for services.

In ***Cape Girardeau 63 School District***,[27] the hearing panel found that a child with severe medical conditions was not a child with a disability because he was experiencing no adverse educational impact that resulted from his medical conditions. Even with a diagnosed medical condition, a finding that the child is not eligible for special education services may be warranted. It is necessary to show that there is an adverse effect on the student's educational performance.[28]

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[24] *Id*.

[25] ***Mary P***.. at 1175.

[26] Tr. at 59.

[27] 105 LRP 9159 (SEA MO Dec. 30, 2004)

[28] ***Downers Grove (IL) Grade School Dist.58***, 1 ECLPR 271 (OCR 1992) (child with a diagnosis of vocal nodules was not entitled to special education eligibility); Weymouth Public Schools, 21 IDELR 578 (SEA MA 1994) (child with a speech lisp was not eligible for special education services); Fairbanks North Star Borough School Dist., 108 LRP 37272 (SEA Alaska 2007) (speculation as to future academic problems resulting from child's delays related to pragmatic language development, and anxiety did not establish that the child was eligible for special education services).

No evidence was presented to support a different conclusion than that the School District's evaluation of child was sufficient, the procedures were adequate, and the determination that Child was not eligible for services was correct.

Summary

The School District's evaluation of Child was adequate and the determination that he was not eligible for special education services was correct.

Appeal Procedure

Please take notice that this is a final decision of the Administrative Hearing Commission in this matter, and you have a right to request review of this decision. Specifically, you may request review as follows:

1. Proceedings for review may be instituted by filing a petition in the circuit court of the county of proper venue within forty-five days after the mailing or delivery of the notice of the agency's final decision.

2. The venue of such cases shall, at the option of the plaintiff, be in the circuit court of Cole County or in the county of the plaintiff or of one of the plaintiff's residence.

Please take notice that you also have a right to file a civil action in federal or state court pursuant to the IDEA.[29]

SO ORDERED on June 5, 2014.

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SREENIVASA RAO DANDAMUDI
Commissioner

[29] See 34 CFR § 300.512.