

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN, SHEILA, and CURTIS HAWKINS,
Plaintiffs

v.

Civil No. 99-207-P-C

MAINE SCHOOL ADMINISTRATIVE
DISTRICT NO. 57,
Defendant

Gene Carter, District Judge

**MEMORANDUM OF DECISION AND ORDER DENYING PLAINTIFFS' MOTION
FOR THE ADMISSION OF ADDITIONAL EVIDENCE**

Now before the Court is Plaintiffs' Motion for the Admission of Additional Evidence (Docket No. 9) which requests that Dr. Richard G. Doiron be permitted to testify on the issue of reimbursement by Defendant for the independent neuropsychological evaluation performed on John Hawkins. Dr. Doiron previously testified with respect to this issue at the administrative hearing. The Court will deny Plaintiffs' motion.

FACTS

One of the issues to be determined at the special education due process hearing was Plaintiffs' entitlement to reimbursement for an independent neuropsychological evaluation.¹ The

¹Both parties were aware that reimbursement for the neuropsychological evaluation was one of the issues to be determined by the special education due process hearing. Defendant's Objection to Plaintiffs' Motion for Admission of Additional Evidence (Docket No. 11) Ex. 1 at 2 ("At the pre-hearing conference the parties exchanged documentary evidence and the hearing

evidence presented at the hearing on this issue included the testimony of Dr. Doiron.

Specifically, Dr. Doiron testified with respect to the neuropsychological technician who administered the tests and that individual's qualifications as follows:

- Q: Can you tell me which of those tests you administered personally?
A: Those tests were administered by the neuropsych technician that works with me.
Q: By whom?
A: A neuropsychology technician.
Q: And I would be interested in what the qualifications/certifications are for a neuropsych?
A: The neuropsych technician is somebody who has specialty training from a neuropsychologist to administer these particular techniques.
Q: So they do not have the certification that's required by Maine State Regulators for evaluators of students with disabilities?
A: Because they're not an evaluator. The evaluator is somebody who administers and interprets. They do not interpret. They simply are trained to do very specific types of testing.
Q: So all of these tests were not administered by you?
A: No.
Q: And they were administered by a technician who does not hold any certification recognized in the Maine State Special Education Regulations?
A: That's correct.

Transcript of May 21, 1999, at 51-52. The hearing officer ultimately determined that Plaintiffs were not entitled to reimbursement. One of the reasons for the denial was as follows:

The evaluator who produced the neuropsychological report dated August 26, 1998, was himself a qualified psychological examiner. The technician who administered the tests was not qualified under Maine Special Education Regulations, Chapter 101, Section 6.10C. A School is not obligated to pay for evaluations administered by unqualified personnel.

Defendant's Objection to Plaintiff's Motion for Admission of Additional Evidence (Docket No.

issues were clarified"). Plaintiffs suggest that they were not put on notice that one issue to be resolved at the hearing was the qualification of the neuropsychological technician. The Court disagrees with this contention. Questions concerning the administration of neuropsychological tests are simply one aspect of the larger issue of reimbursement for the independent evaluation.

11) Ex. 1 at 13.

DISCUSSION

Plaintiffs proffer that Dr. Doiron's additional testimony, of which they now seek admission, concerns "which of the fifteen (15) assessments that comprise his evaluation were actually administered by Dr. Doiron himself," Plaintiffs' Motion for the Admission of Additional Evidence at ¶ 7; "the thoroughness and length of training that is required before a technician is allowed to actually administer a test," *Id.* ¶ 11; "the degree of supervision under which technicians work," *Id.* ¶ 13; the fact that "neuro-psychological technicians do in fact meet the standards of both the IDEA § 1414(b) and MSER § 9.7 in that they are covered by the doctor's credentials and licensure," *Id.*; and "the extensive training given to the technicians who work under his supervision," *Id.* ¶ 15. The Defendant responds that the testimony regarding the qualifications and supervision of neuropsychological technicians is irrelevant and, to the extent it is relevant, that it should have been presented by Plaintiffs to the hearing officer. Defendant's Objection to Plaintiffs' Motion for Admission of Additional Evidence at 5.

Section 1415 of Title 20 provides that "[i]n any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court deems is appropriate." 20 U.S.C. § 1415(i)(2)(B). Thus, while it is true that section 1415(i)(2)(B) permits the court to hear "additional evidence," the trial court must be mindful not to allow such evidence to change the character of the hearing from one of review to a trial *de novo*. See *Town of Burlington v. Department of Educ., Commonwealth of Mass.*, 736 F.2d 773, 791 (1st Cir. 1984). Despite the seemingly generous statutory language, the Court of

Appeals for the First Circuit has curtailed the type of additional evidence permitted by a witness who has already testified at the administrative hearing, stating that such witness “is rebuttably presumed to be foreclosed from testifying at trial.” *Id.* at 791. According to the *Burlington* court, the term “additional” in the statute means supplemental and thus “does not authorize witnesses at trial to repeat or embellish their prior administrative hearing testimony.” *Id.* at 790. “The reasons for supplementation will vary; they might include gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing.” *Id.* at 790.

Although the Court does not find that the testimony concerning whether Dr. Dorion administered any of the tests is altogether clear, this issue was raised and explored at the administrative hearing. Likewise, the issues of the qualifications and supervision of neuropsychological technicians were raised. Plaintiffs acknowledge that “they [now] wish to *clarify* the issue.” Plaintiffs’ Motion for the Admission of Additional Evidence at ¶ 10.

Whether described as clarification or embellishment further testimony on this issue would only elaborate Dr. Dorion’s previously given hearing testimony. Moreover, the proffered testimony is not of the type anticipated by the *Burlington* court as permissible. Because admitting this type of testimony would amount to a trial *de novo* on this issue, the Court will deny Plaintiffs’ motion.

CONCLUSION

Accordingly, the Court **ORDERS** that Plaintiffs' Motion for the Admission of Additional Evidence be, and it is hereby, **DENIED**.

GENE CARTER
District Judge

Dated at Portland, Maine this 17th day of April, 2000.

CIVIL DOCKET FOR CASE #: 99-CV-207

HAWKINS, et al v. MSAD 57
Assigned to: JUDGE GENE CARTER
Demand: \$0,000
Lead Docket: None
Dkt# in other court: None

Filed: 07/01/99
Nature of Suit: 890
Jurisdiction: Federal Question

Cause: 20:1400 Civil Rights of Handicapped Child

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