

DELAWARE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

In the Matter of:

XX)

Student)

v.)

Cape Henlopen School District)
School District)

And)

State of Delaware Department)
of Education)

Respondents)

HEARING DECISION AND ORDER
DE DP 05-26

Due Process Hearing Held: July 22, July 25, July 26,
August 27, October 26 and December 12, 2005

Date of Last Submission: January 16, 2006

Date of Opinion: January 31, 2006

Before the Hearing Panel: Sandra Battaglia, Esq. Chair
Dr. James McLaughlin Educator
Mr. John Werner Lay Member

Counsel for Parent

On July 25, 26, 27 and August 27
On October 26 and December 12

Larry Fifer, Esquire
Bruce Rogers, Esquire

Counsel for School District

Jennifer Brierley, Esquire
Morris, James, Hitchens and Williams

Counsel for the Dept of Education

Craig Fitzgerald, Esquire
Deputy Attorney General

This Decision and Order refers to parties, witnesses and others generically, to protect personally identifiable information. An index of names is attached for the benefit of the parties. This index will permit the parties to identify specific witnesses and other persons and pertinent references. The index is designed to be detached before this Decision and Order is released as a public record.

TO BE DETACHED

INDEX OF NAMES

Parent	XXXXXXXXXXXXXXXXXX
Student	XXXXXXXXXXXX
Elementary School	XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
School District	Cape Henlopen
Director of Special Education	XXXXXXXXXXXXXX
Third Grade Teacher	XXXXXXX
Fourth Grade Resource Room Teacher	XXX
Fifth Grade Teacher	XXX
Fifth Grade Reading Teacher	XXX
School Occupational Therapist	XXX
Paraprofessional	XXX
School Psychologist XX	XXX
KK Psychologist	Marjorie Fessler
Parent’s Psychologist “Dr. F”	Dr. Rona Fields

Nature and Stage of the Proceedings

On June 10, 2005, Parent requested a due process hearing alleging that the School District had violated the Individuals with Disabilities Act (IDEA) with respect to the education of her child ("Student") on several bases including the following:

- (a) Failure to review existing data
- (b) Failure to develop an appropriate IEP for 2005/2006
- (c) Failure to comply with IEP team member requirements
- (d) Failure to provide Behavioral Intervention Plan
- (e) Failure to provide qualified staff relative to Student's disability for school years 2002/2003, 2003/2004, 2004/2005 and 2005/2006
- (f) Failure to provide continuum of placement options for 2004/2005 and 2005/2006

In addition, following the pre-hearing conference, the Parent stated that three additional issues needed to be addressed at the due process hearing:

1. The alleged failure of the School District to implement IEPs for Student for school years 2002-2003, 2003-2004, 2004-2005 and for the next school year of 2005-2006;
2. The alleged failure of the School District to consider parental input for all the IEPs in the years mentioned above; and
3. The alleged failure of the School District to obtain prior informed consent of Parent for testing and evaluation conducted during the 2004-2005 school year.

Parent asserted that the appropriate remedy for these violations was compensatory education and tuition reimbursement for private placement of Student in a private day school in North Carolina for the 2005-2006 school year. Because the remedy requested involved tuition reimbursement, the State of Delaware Department of Education ("DOE") was added as a defendant.

Numerous attempts were made and by the Hearing Panel to clarify the issues being asserted by Parent. While the Parent has a right to assert claims against the School District, it is important to the process that Parent not use the hearing as a way to vent all of the Parent's frustrations at the system but the Parent should clearly state the issues and the possible remedy. It also is important that the hearing be structured in such a way as to not become so unwieldy that the true issue is clouded by other irrelevant issues that may be raised. As a result of discussion between the parties and the Hearing Panel as to the specificity of the allegations, the parties agreed that the Parent's concern was that the School District's allegedly failed to provide Student with a free and appropriate public education ("FAPE"). The testimony as to FAPE was expected to be lengthy and a decision as to the failure to provide FAPE needed to be in Parent's favor before a remedy could be discussed, therefore it was agreed that the due process hearing would be bifurcated and that the only testimony to be heard would deal with the issue of FAPE. It

also was agreed that the Hearing Panel will issue a decision as to the provision of FAPE and then would proceed with a further hearing as to the appropriate remedy, if necessary.

Testimony began the morning of July 22 and continued on July 25 and July 26. Before finishing the day on July 26, the parties and the Hearing Panel agreed to hear two more days of testimony on August 27 and September 20. The lengthy delay between hearing dates was necessitated by schedules of all of the parties including vacations for many persons involved in the due process hearing.

The hearing continued on Saturday August 27 with a full day of testimony and the School District concluded its case in chief. The Parent was called by her attorney to testify on Student's behalf. The Parent's testimony was very short on this day because of a misfiling in the exhibit binders Parent prepared for the Hearing Panel which resulted in an inability to follow the testimony being given by Parent. This inability to identify lead to confusion among the Hearing Panel, the witness and the Parent's attorney and it was decided that the Parent's testimony would be continued to another day and the hearing would be adjourned until September 20, 2005. However, due to scheduling conflicts, the September 20 hearing was rescheduled to October 25, 2005. Prior to the rescheduled date, Parent's attorney withdrew from the case and new counsel was substituted.¹ On October 25, 2005 Parent presented testimony from her psychologist Dr. F. but Dr. F. was unable to complete her testimony on that day due to a scheduling conflict on her part. The next available date convenient to the witness and the participants was December 12, 2005. The hearing continued on that date with presentation of the remainder of Parent's witnesses and with the School District's rebuttal witnesses. At the conclusion of the testimony on December 12, 2005, the parties and the Hearing Panel agreed to the submission of closing arguments by written memorandum and the final closing arguments were received by the Hearing Panel on January 16, 2006.

It is important to note that between the fourth and fifth days of testimony, due to personal reasons, the Parent's attorney withdrew from his representation of Parent and was replaced by another attorney. The transition to the new attorney was agreed to by the parties and the Hearing Panel and was aided by the fact that transcripts of the first four days of testimony had already been provided to all parties. Parent's new attorney was able to review those transcripts which included the testimony of most of the School District's witnesses, some of whom had been cross identified and had been questioned by the Parent's attorney as witnesses for the Parent as well cross examined on the basis of the testimony elicited by the School District. However, some statements made by the new Parent's attorney, particularly in the closing arguments, show a lack of coordination between the two attorneys. In the closing arguments, Parent's attorney asserts as fact statements that are clearly contradicted by the testimony during the first four days. The Hearing Panel has taken into account the fact that Parent was represented by a different attorney during the first four days of testimony and has not relied on the Parent's attorney's recitation of the facts but has reviewed the transcript extensively in order to prepare the findings of fact set forth below.

¹ Throughout this opinion the term Parent's attorney refers to the attorney who represented Parent on the day of testimony or document being discussed.

Findings of Fact

Student attended elementary school (“Elementary School”) in the School District from third grade (2002-2003) through fifth grade (2004-2005). All three school years are the subject of this due process hearing because of Parent’s allegation the District failed to implement the IEPs for the years in question. In addition Parent has alleged that the School District failed to develop an appropriate IEP for the sixth grade school year (2005-2006).

During the Hearing, the School District presented extensive testimony from the teachers and staff at Elementary School. The testimony presented was very thorough and presented a consistent picture of Student and Student’s needs and weaknesses. The testimony included a detailed and exhaustive review of each of Student’s IEPs as well as the meetings that were held between Parent and the School District to discuss, review and, in some cases, modify the IEPs. The School District also reviewed in detail the evaluation reports prepared by Kennedy Krieger in April, 2003 and in July, 2004 (the April 2003 report is referred to herein as the “KK 2003 Report” and the July, 2004 report is referred to as the “KK 2004 Report”).

The School District presented testimony from the School District’s Director of Special Education, the Student’s third grade teacher, fourth grade resource room teacher, fifth grade teacher, fifth grade reading teacher, the School’s Occupational Therapist and the School Psychologist. Many of these witnesses were cross identified as witness for the School District and the Parent, Parent, through Parent’s attorney, had the ability to conduct both cross examination and direct examination of these witnesses. Parent also called as witnesses a psychologist who had treated Student in 2000 (“Dr. F”) and Parent herself. In rebuttal the School District recalled the School Psychologist and the School District’s Director of Special Education. The Delaware Department of Education (“DOE”) participated in the hearing as well but did not call any witnesses as to the issue of FAPE.²

The Hearing Panel thoroughly reviewed the transcript which consisted of over one thousand pages. Many irrelevant facts were presented over the six days of the hearing, the Parent through her attorney insinuated many things that were of little relevance and made allegations that the activities of various persons involved with Student’s education without presenting proof that such activities impacted the education of the Student. Parent was a full and involved participant in the education of her child and Parent’s input in the determination of the Student’s educational experience at the Elementary School resulted in extensive discussions with the teachers and staff at the Elementary School which as a result led to many decisions that were incorporated in

² DOE was made a party to the Due Process Hearing because Parent asked for tuition reimbursement for the placement of Student in a private school and if such reimbursement were to be ordered by this Hearing Panel, the DOE would be financially responsible for much of that reimbursement. Tuition reimbursement is one remedy that might be available if the Hearing Panel found a denial of FAPE. This opinion deals only with the issue of FAPE.

Student's IEPs. Parent's input was considered and accepted in a number of program components including the Behavior Plan, the scheduling of Student's day and the assignment of teachers. Parent was present at all the meetings dealing with the IEPs and indicated by her signature on the IEPs her agreement with the plans for Student's education.

The facts that the Hearing Panel deems relevant in relation to the Parent's allegations that the School District failed to provide Student with a "free and appropriate education" ("FAPE") are set forth in the Statement of Facts and in the discussion of the issues raised by the Parent below.

Student began her education at Elementary School after moving to the School District from Virginia. In Virginia Student has been identified as a child in need of special education services who had an individualized education plan ("IEP"). When Student arrived at Elementary School as a third grader she initially was placed in a "resource classroom" where Student was in a classroom setting with her peers and was placed in, or "pulled out" of that setting, for small group instruction in reading and math.³ Shortly after the school year began the IEP team⁴ (which included the Parent) changed Student to a Third Grade Classroom in the Intensive Learning Center which provided a small group, self contained environment of six learning disabled students with a teacher and paraprofessional.⁵

To provide information for the 2002-2003 (Third Grade) IEP, the teachers had the Student's educational records but because the teachers were not familiar personally with Student, the teachers depended on Parent to provide background information about Student. Parent provided records from Virginia and included some testing that had been undertaken in the summer of 2002 while in Delaware. Parent met with the IEP team and developed jointly the IEP for the remainder of the 2002-2003 year. In responding to the survey of needs portion of the IEP, the IEP team agreed that in reviewing Student's needs that Student was not visually impaired, she did not have a communication delay, she was not hard of hearing but that she did exhibit some behaviors such as impulsiveness, calling out and distractibility that impeded her learning.

³ Parent's attorney in his closing argument makes statements that the School District failed to provide special education services for the first five days of Third Grade and did not develop an IEP for 120 days. This concern was not raised as an issue at the outset of the due process hearing. Parent made allegations of at least seven different procedural violations but did not include this issue as one of them. In fact the testimony and the dates of the IEP specifically contradict Parent's attorney's statements. The IEP for Third Grade is dated September 23, 2002.

⁴ References to the IEP team include all the members of the School District who were present at the time of the IEP meeting and most importantly includes the Parent because unless noted in the text Parent evidenced her agreement with the School District members of the IEP team as to the course of action being taken as a result of the IEP meeting being referenced.

⁵ Parent's attorney states in his closing argument that this placement was not appropriate; however, Parent agreed to the placement as a more appropriate setting for Student because of Student's tendency towards distractibility and the need for more one-on-one attention and the IEP Team (including Parent) felt that this placement was a better placement for Student taking into account her disability and her needs. Whether the placement decision was the "best" place for Student is not a direct issue rather the issue is whether Student received educational benefit from the placement.

An occupational therapy assessment was requested to determine if Student needed assistive technology⁶. In addition, other accommodations were provided from an increased use of visuals to a request from Parent that Student's organizational skills needed to be addressed by sending home writing assignments in advance so that Parent could review with Student the instructions so that Student would better understand the assignment when it was presented in the classroom. Because Student's reading was a concern the IEP team had several accommodations including color overlays to make the words easier for Student to discern and the directing of Student to read books at or below the Student's usual level so that Student could increase her reading fluency.⁷ During the school year other accommodations were added as more information about Student's needs became available. For example, devices to assist Student with "auditory processing" issues were added after such need was identified by an audiologist's evaluation at Bayhealth in the second half of the Third Grade school year. Multisensory approaches were used in all instruction so that the Student could use multiple senses (touching, seeing and hearing) in the learning process.⁸

In the area of accommodating her behavioral issues, in the 2002-2003 school year, the Third Grade teacher used positive reinforcement with a point card providing points for every ten minute interval and a reinforcer (reward) for an accumulation of points. When this system did not work with Student, the IEP team agreed to use a program that Parent was using at home with Student called 1-2-3 Magic which was a more visual program that provided that the Student would be given chances to improve behavior on a three step plan with known consequences for not adhering to the visual cues. The program was not used with other students and when Parent requested the Elementary School use 1-2-3 Magic for Student, the Elementary School agreed and trained the staff in the program. Student also was assigned a one-on-one paraprofessional to assist Student, and only Student, in staying on task and not be distracted and to assist Student with her organization skills. The paraprofessional's sole duties were to assist Student and testimony from all of the teachers indicated that the paraprofessional was a valuable resource for Student.

⁶ While Parent's attorney in his closing arguments alleges that no assessment took place the testimony indicates that an assessment did occur and based on Student's results on that OT assessment it was determined that Student was not in need of occupational therapy services at that time. As noted in the text, the IEP requested another assessment at the end of Third Grade and that assessment showed that there were some issues that Student developed that would benefit from occupational therapy and Student did in fact receive OT services under the direction of the School Occupational Therapist. See testimony of School Occupational Therapist.

⁷ Reading fluency is the speed in which Student recognizes and thus "reads" the words.

⁸ Throughout the hearing Parent and Parent's attorney indicated a misunderstanding of multisensory approaches to learning. In Parent's attorney's reply closing argument the attorney stated that the Middle School had no "multisensory programs". First that statement assumed facts not in evidence and second the multisensory issue is an approach to teaching and not a program per se, multisensory approaches to learning can be used in every day teaching and just means that the student is taught through the use of materials that can be accessed through multiple senses (seeing, hearing, touching) without relying on use of one sense to provide the educational material. Most teachers use multisensory approaches in the classroom.

For reading the IEP team developed goals to increase Student's overall reading abilities from the level of being equivalent to the end of first grade based on testing done outside of the School District during the summer of 2002 to a reading level of the end of second grade or beginning of third grade by the end of the school year, a growth of a year. The Third Grade Teacher monitored progress by using the same testing protocol called the Brigance Inventory throughout the school year. Progress reports were reported to Parent on a quarterly basis as a form of report card. During Third Grade the Brigance Inventory showed that Student progressed from reading words at the level of the first grade with 100% accuracy in September to reading words of difficulty level of the end of second grade with 100% accuracy in November to reading words of a difficulty level of the beginning of third grade with 94% accuracy in June. On another section of Student's IEP, the goal was "Given a story passage at 2.2 [second grade, second half of the year], that [Student] could read the selection with 97 percent accuracy." At the beginning of the year Student read at a 2.2 level with 32% accuracy but by June the IEP progress notes show that Student could read a passage at the 3.1 level (a level higher than the goal) with 95% accuracy. In writing, the Third Grade Teacher and the IEP progress reports show that Student made gains in writing throughout the years while working towards the goals set in the IEP. In math, again, the Third Grade teacher and the IEP progress notes both showed that Student made progress in grasping those math concepts that were outlined in the IEP.

At the end of Third Grade, the Third Grade Teacher, along with the other members of the IEP team, met with the Fourth Grade teachers to develop the Student's IEP for the Fourth Grade. At that time it was determined to put Student in a less restrictive environment, a Resource Classroom, rather than an Inclusive Learning classroom. The placement decision was made because of the progress Student had made in the Intensive Learning Classroom in academic subjects but also in controlling her behavior. In addition, this least restrictive environment would allow Student to take science and social studies classes with her peers and enable her to have a positive school experience. During Third Grade Student had been forced to miss science and social studies courses because of Parent's insistence that Student receive individualized reading tutoring during school hours and the only time available resulted in Student missing those subjects. Science and social studies were subjects that interested Student and were subjects that Student could interact with peers and be successful thus giving her a more positive school experience.

In preparing for the Fourth Grade IEP, the other information presented to the IEP team was a report from the Kennedy Krieger Institute (the "KK 2003 Report") which had conducted an evaluation of Student in April 2003. The IEP team reviewed the report and noted the recommendations in that report and incorporated those recommendations into the IEP. For example the KK 2003 Report suggested that an OT evaluation would be helpful and despite the results from the prior OT evaluation that Student did not exhibit any need for OT service, the IEP team agreed to get another OT evaluation. The KK 2003 Report also noted a new issue that of a "graphomotor problem".⁹ The KK 2003

⁹ Graphomotor problems mean that while a student knows what they want to write, he/she does not have the ability to translate those ideas from thoughts onto the paper without great difficulty.

Report recommended that Student would need small group instruction in reading and math which the IEP implemented by providing a resource room environment for those subjects thus providing a small group instructional setting. The KK 2003 Report also recommended that there be the provision of extended school year services to maintain the skill level that Student had achieved in the past school year and to prevent regression over the summer months. The School District was willing to implement that particular recommendation; however, Parent decided that extended year services were not needed by Student so the services were not provided.

In preparing the goals and objectives for the Fourth Grade IEP, the IEP team used the recommendations from the KK 2003 Report along with the observations of the Student's teachers. Not all of the recommendations from the KK 2003 Report were incorporated into the IEP because some of the recommendations were already a part of the Elementary School's programming and in at least in the case of one recommendation that the Parent disagreed with the KK 2003 Report's recommendation. All of the recommendations were reviewed and considered by the IEP team and the IEP team, including Parent, agreed on the terms of the 2003-2004 IEP and indicated that agreement by signing the IEP.

In Fourth Grade, Student was in a general education classroom for several subjects and in the Resource Room for reading and math. Some testimony was given that hinted at a problem with the general education teacher in fourth grade but no direct testimony was presented on that issue so the Hearing Panel has no evidentiary basis to deal with the issue relating to that teacher and the courses in science and social studies. For the Fourth Grade year the issues presented to the Hearing Panel concerned the subjects of reading and math.

For the Fourth Grade (2003/2004) school year Student was in the Resource Room for the language arts and math components of the curriculum which constituted approximately 2 1/2 hours of each school day. The IEP used in Fourth Grade was developed by the Third Grade IEP team in the spring of the year and then reviewed by the Fourth Grade IEP team during the in service days before the beginning of school and again once or twice in the opening weeks of school. Parent was present for these IEP sessions and indicated her agreement with the IEP. In addition to the services provided in the Third Grade IEP, additional services were included in the Fourth Grade IEP of occupational therapy services two or three times a week from the School District's Occupational Therapist and the use of a one-on-one paraprofessional to help Student in reading, math and in the general classroom

In addition to the paraprofessional, Student had other resources and accommodations including the use of colored overlays, use of visual cues, a multi sensory approach to teaching and a structured environment that provided frequent positive reinforcement and immediate feedback and error correction. In the writing program, the Fourth Grade Resource Room Teacher, along with the paraprofessional, would provide support to Student in her writing and spelling, including posting of commonly used words on a word wall for Student to use as reference, use of an Alpha

Smart and a personal word bank as well as the assistance of the paraprofessional for scribing when needed. In math, manipulatives frequently were used and Student had information at her desk for computation assistance as well as the assistance of the paraprofessional who could repeat directions or re-read word problems if needed. At the request of Parent, the Fourth Grade Resource Room Teacher received training in 1-2-3 Magic and used this approach for maintaining Student's attention to task.

The Fourth Grade Resource Room Teacher testified that the Student made progress in math, reading and in handwriting during the Fourth Grade school year as observed by the Resource Room Teacher and as shown on the quarterly assessments. Based on the progress from Third Grade, when Student entered the Fourth Grade her current level of progress in language arts showed that Student could read a passage at the 3.1 level with 95% accuracy and by the end of Fourth Grade Student's assessment showed that she read an oral passage at the 4.1 level with 91% accuracy and she also scored 100% accuracy in the passage comprehension and in word recognition skills. By the end of the year, Student read a fifth grade list of words with 80% accuracy. In math, Student mastered the many of the concepts but was still having some difficulty with word problems. Handwriting issues were addressed through work with the School's Occupational Therapist in therapy session two to three times a week and by the end of the year the Occupational Therapist reported that the goals set for Student in occupational therapy had been met. The Fourth Grade Resource Room Teacher testified extensively as to the Student's progress in various subject areas which were documented on the progress reports on the Student's IEP.

In areas other than academics, the Fourth Grade Resource Room Teacher testified that Student also made progress. Student's "off task behaviors" decreased and Student's fidgetiness and inattentive behaviors also decreased until the last two to three weeks of the year when these behaviors increased possibly due to the withdrawal of Student from medication that Student had been taking to control her behaviors. Student's organizational skills improved with the assistance of the one-on-one paraprofessional assigned to Student who was able to assist Student in staying on task as well as having assignments, homework papers and other items prepared for each class.

As in the Third Grade year, Parent was an involved participant in the IEP team meetings and whenever Parent felt that the IEP team should meet, the IEP team was called together with Parent present. Parent indicated her acceptance with all of the IEPs by signing her acceptance on the IEP document.

At the end of Fourth Grade, the Fourth Grade Resource Room Teacher participated in the discussions for planning the Fifth Grade. During the first few months of Fifth Grade, Student took reading and math in a resource room from the Fifth Grade Teacher but then at the request of Parent, Student transferred to another resource room classroom for reading and math which was taught by the Fifth Grade Reading Teacher. The Fifth Grade Reading Teacher testified as to Student's progress in her classroom and stated that the Student made progress during the year in reading and in math. During Fifth Grade the Student's reading program consisted of Open Court Interventions (primarily

for decoding and comprehension), Read Naturally (for reading fluency) and Reading Assist (added as the Fifth Grade Reading Teacher received the training in that program). Student had a reevaluation at Kennedy Krieger during the summer between Fourth and Fifth Grade and the IEP team met after the KK 2004 Report was received in order to review that report and to incorporate its recommendations in the Student's Fifth Grade IEP. Testimony and the records of the IEP meetings indicated that the IEP team (including Parent) met for two days to review and incorporate the KK 2004 Report into the IEP.

The KK 2004 Report seems to be the linchpin on which Parent contends that Student failed to receive FAPE. The reevaluation took place in July 2004 and was a follow up to the previous evaluation in April 2003, a period of fifteen months. In the KK 2004 Report, the KK Psychologist said that the "parent report, review of prior evaluations and findings of this assessment suggest the following diagnostic impressions... 2. specific learning disability in reading (dyslexia)...". In recommending school placement/program the KK Psychologist stated that "[Student] continues to meet criteria for categorization as a student with Other Health Impaired due to ADHD, and is also likely eligible for secondary categorization as having specific learning disabilities in reading written language and mathematics." In fact Student was classified as Learning Disabled, not Other Health Impaired, in the Fifth Grade IEP. The word dyslexia also appears on the Fifth Grade IEP at the insistence of the Parent. However, the KK Psychologist noted the facts "suggest" a "diagnostic impression" which by her own words does not state a definitive diagnosis¹⁰. Later under the heading "referrals" the KK Psychologist suggested an "updated psychological evaluation, as the last assessment is six or seven years old (per maternal report)" so even the KK Psychologist indicates that her report is limited to that of a "re-evaluation of academic skills". Again by the KK Psychologist's own admission the testing took place without any medication for Student's ADHD and as a result Student during the testing was:

"restless and fidgety, sometime bouncing in the chair or playing with the loose beads from a bracelet she made in the playroom. When reading independently she drummed her fingers on the desktop, clapped her hands and released air from her cheeks. She was also distractible and inattentive to details. When she returned to the testing room after a lunch break, these behaviors were more pronounced. She bounced more vigorously, kicked her feet, and flapped the sleeves of an overly large sweater that had been given to her so that she would not feel cold in an air conditioned office. She frequently gazed off and needed repeated prompts to return to task." KK 2004 Report at page 3.

The KK Psychologist went on to note that "It is not known how much difference would be accrued, particularly in a structured one-to-one setting, by provision of medication". While the testing showed that on one subtest of the Woodcock-Johnson Psycho

¹⁰ Indeed there is a question whether the KK psychologist who has a doctorate in education and is a nationally certified school psychologist can "diagnose" dyslexia. By definition dyslexia is a disability that is neurological in origin. (See International Dyslexia Organization www.ida.org.)

educational Battery III Tests of Achievement (WJ-II) Student scored a reading fluency of 2.0 grade equivalence, reliance on that one test to argue that Student did not receive FAPE is not an appropriate conclusion. Unfortunately, Parent focused solely on that one figure throughout the course of the six day hearing with repeated questions from her attorney to witnesses that parlayed that one subtest score into a statement that “Student read at a second grade level”. The statement is not accurate but Parent and Parent’s attorney persisted in stating it as a fact. In addition, the score on a subtest of the WJ-III given when Student’s ADHD symptoms were not controlled in any way by medication and which behaviors were commented on by the individual conducting the test in some detail can not lead to the conclusion that Student did not receive FAPE.¹¹

Once the KK 2004 Report was received by the Elementary School, the IEP team met to discuss the implementation of the 18 detailed recommendations from the KK 2004 Report. One of the recommendations involved the reading program and the KK Psychologist suggested the Wilson method. The Wilson method was not used in the School District but other similar types of reading programs were used. The Fifth Grade Reading Teacher contacted the KK Psychologist directly to discuss the reading programs used in the School District and to find out if the KK Psychologist felt that Wilson was the only method. The KK Psychologist responded that she had suggested Wilson because she personally was most familiar with that method however after checking with colleagues, the KK Psychologist responded in writing that the School District’s reading programs were appropriate for the needs of Student.

During the Fifth Grade school year, Student continued to receive the services of a one on one paraprofessional, the other accommodation she had received in prior years, the accommodations recommended by the KK 2004 Report and services in language arts through the Resource Room. The Fifth Grade Reading Teacher reviewed the IEP and the progress reports and noted that Student progressed throughout the year starting the year with work at a third grade level and being successful and continuing throughout the year progressing to work at the fifth grade level with similar scores . The Fifth Grade Reading Teacher pointed out the progress notes for Student’s IEP which reports that in the area of reading fluency at the beginning of the year Student read 58 words per minute on a previously rehearsed text at third grade level and by the end of January Student read 77 words per minute on a previously rehearsed text at the 5th grade level. In decoding of words, Student, at the beginning of the year was at 92% using grade 3 level word but by January, Student was at 96% accuracy at the 5th grade level. The Fifth Grade Reading Teacher recorded similar progress in other areas measured by the IEP.

Several IEP meetings were held during the year and modifications and amendments to the IEP were made to add services such as after school tutoring in Reading Assist.

¹¹ The KKK 2004 Report was the topic of much discussion during the hearing. No direct testimony was given as to the report in that the author of the KK 2004 Report was not called to testify. The Hearing Panel only had the written report and the interpretation of that report by School District employees including the School District psychologist from which to gather information about what was seemingly the key component to Parent’s allegation.

The Fifth Grade Reading Teacher did note that in the last two months of the School Year, beginning after the spring break, Student was not as cooperative in school and often was not completing work in school but insisting on taking work home to finish at night and weekends, although the work was not always completed. The Fifth Grade Reading Teacher felt that this change in attitude and attention was caused somewhat by the issues facing all students following the March DTSP testing but was also fostered by Student's statements that she would be moving and attending a different school in the fall.

The IEP team did formulate the Sixth Grade (2005-2006) IEP. In Sixth Grade, Student would move from the Elementary School to a Middle School. Discussions were held with the IEP Team, Parent and representatives from the Middle School as to the appropriate accommodations and settings for Student for the next school year and prepared a draft IEP. One of the areas mentioned as additional services to be provided was the provision of extra tutoring hours in reading using the Reading Assist program. The Sixth Grade IEP was not finalized in part because of Parent's actions in removing Student from the School District toward the end of May and then giving notice to the School District that Parent was placing Student in a private placement.

The Parent called two witnesses to testify on her behalf, Dr. F and Parent. Dr. F is a psychologist who had worked with Student for approximately a six month period in 2000-2001 and who had not worked with Student in the years when Student was in the School District. Dr. F testified as to her impressions of Student in the years before Student came to the School District and then reviewed the IEPs of Student during the years in the School District to try to point out how those IEPs were so written that they could not be said to provide Student with FAPE.¹²

The Hearing Panel found that Dr. F's testimony was not credible for many reasons¹³ and can not be used as a basis for finding a failure to provide FAPE. For example, Dr. F described the difficulties faced by Student based on many emotional issues which Dr. F identified Student had suffered from beginning in her early childhood through traumatic events that occurred before Student was placed in School District. The Hearing Panel does not make light of any of the difficulties Student has faced, Dr. F's assertion that Student should have been recognized in the IEP under the heading

¹² Much discussion was had as to whether Dr. F could testify as an "expert". The Hearing Panel indicated that it would give Dr. F's testimony the weight that it believed was appropriate given Dr. F's knowledge and experience. Even assuming that Dr. F would meet the qualifications of an expert on IEP development and appropriateness, the unfamiliarity of Dr. F with the IEP used to track Student's progress and the clear misunderstanding of the progress notes on the IEPs that Dr. F exhibited when questioned on direct examination, on cross-examination and again on redirect examination have required that the Hearing Panel disregard her testimony as an expert as to IEP development.

¹³ The Hearing Panel also found credibility issues with the 2000 report that Dr. F presented. For example she diagnosed a "neurological delay of 9 months" yet is not a neurologist and in the same report said that neurological testing was needed. In addition, she admitted under oath that the report presented to the Hearing Panel was not complete and that there was information about Student that she chose to omit about Student's "toxic" condition at birth prior to the adoption of Student by Parent.

“Connecting all Data Sources to Identify Student’s Needs” as “visually impaired”, “hard of hearing” and “having a communication delay/disorder” in addition to the identification of “having behaviors that impede his/her learning or the learning of others” is not credible given the definitions that are used for such identifiers in Delaware. For example, as to hearing, Dr. F testified that Student should be marked as meeting the “hard of hearing” criteria because Student, because of her sensory difficulties, was extremely sensitive to noise and would perceive a loud voice as a threat and it would also be painful to her.¹⁴ Dr. F made similar correlations between Student’s difficulties and the other Needs to conclude that the School District had incorrectly stated Student’s needs. The fallacy in Dr. F’s arguments is that she did not correlate the statements to the actual definitions applied on the IEPs but instead gave her own views as to how the School District should define each of the Needs categories. While Dr. F gave the Hearing Panel a great deal of information about the issues that faced Student in 2001, her interpretation of the IEP document is not consistent with the actual practice in Delaware. Also, because Dr. F had not worked with Student since 2001 there is no way of knowing whether Student’s issues as reported by Dr. F continued or had changed positively or negatively at the time the IEPs were written. Dr. F further testified that she had not discussed Student’s needs with the School District nor had she worked with Student during the years that are the subject of this Due Process Hearing.

Dr. F’s testimony also lacked credibility as to her testimony that the IEPs developed for Student were not adequate. Dr. F testified that she had reviewed all of Student’s IEPs and she then testified that the goals set out by the School District were inappropriate. For example, Dr. F pointed to the IEP for 2003-2004 and stated that it was ridiculous for the School District to have regression as a goal (emphasis supplied) pointing to the comments in the column labeled 11/4/2003 which showed a test score that was lower than the present performance. In reality the 11/4/03 note was a progress note written by the Fourth Grade Teacher to show that while at the end of Third Grade, Student had read a passage at the lower Third Grade level at 95% accuracy, Student did regress to 88% accuracy on an upper Second Grade level in November and then by 1/22/04 was 92% accurate at the Upper Third Grade level and by 3/25/04 was at 91% at the Lower Fourth Grade level, all of which indicated progress by the Student. By misinterpreting the IEP and testifying that the progress notes were goals established for Student by the Elementary School, Dr. F concluded that the School District was not providing an appropriate education for Student. In fact the IEP was reporting on Student’s progress towards meeting the goals established at the beginning of the Fourth Grade year by the IEP team. Given that Dr. F’s testimony is not factually correct; the Hearing Panel can not give any reliability to Dr. F’s conclusions about the School District’s provision of FAPE to the Student. The testimony of Dr. F is not sufficient to

¹⁴ In Dr. F’s testimony she indicated that she had reviewed the IEP prepared for Student in Virginia and found that it was a very good IEP. That IEP, in a section very similar to the Needs section discussed in the text, found that Student’s needs were in behavior and were not in “communication and/or language needs” nor did Student require “assistive devices and services” nor was Student “deaf or hard of hearing or have language or other communication needs”. Despite Dr. F’s assertion that the Virginia IEP was a model that should have been followed by the School District she contradicted herself in the testimony about the School District’s IEPs. Dr. F testified that Student’s needs in all of these areas began before Student moved to the School District yet they were not included in the Virginia IEP.

have the Hearing Panel conclude that the IEPs were inadequate and could not provide FAPE.

Response to Procedural Motions

Both before and during the hearing, the Hearing Panel expressed concern as to the vagueness of the many of these procedural allegations and while the attorney for the Parent argued that he would make the allegations more specific during that hearing, that specificity did not occur. The Hearing Panel was left to guess at what action the Parent is alleging in many of the procedural violations. Based on the assumption that the Hearing Panel has made from the testimony, for the reasons set forth below the procedural violations alleged by the Parent are without merit.

1. *Failure to review existing data*

The Hearing Panel finds that the testimony shows that from the beginning of Student's involvement with the School District, the School District reviewed the extensive volume of data provided by Parent including the reports from outside sources such as Kennedy Krieger. The School District also considered and implemented the recommendations of the audiologist from Bayhealth, the request from the Parent that 1-2-3 Magic be used, that reading tutoring be provided during the school day, that reading tutoring after school be done by the School District and that a second OT evaluation be conducted even though the first evaluation showed no eligibility for services. There is no evidence that states that data available to the School District was not reviewed.

2. *Failure to develop an appropriate IEP for 2005/2006*

The testimony showed that the IEP for the school year 2005/2006 was in the process of being developed with the input of the teachers from the Student's teachers for the 2004/2005 school year as well as input from the teachers in the Middle School where Student would have been placed for the 2005/2006 school year. A draft of the Sixth Grade IEP was developed during these discussions. The Parent was involved in these discussions and then decided to withdraw Student from the School District in favor of a private school placement and filed for due process. The Parent thus never gave the School District the opportunity to develop a final IEP for the School Year 2005/2006. Further, the 2005/2006 IEP in its draft stage appears to have taken into account Student's needs and weaknesses and proposed appropriate accommodations and goals.

3. *Failure to provide Behavioral Intervention Plan*

The testimony showed that Student had a Behavioral Intervention Plan ("BIP") that was in fact developed by IEP team incorporating Parent's insistence that the Elementary School use a 1-2-3 Magic Program for behavioral interventions for Student. That BIP was used for several years as a substitute for having Student adhere to the Elementary School's Code of

Conduct. The testimony showed that Parent drafted many of the points included in the BIP including several items that directed the teaching staff as to how to handle Student's behavioral issues. For example, the BIP instructed the teaching staff that "It is necessary when assigning [Student] any new task or setting that she clearly understands the assignment and the responsible adults (sic) expectations". That BIP was in place until January 2004 when the IEP team and Parent discussed the need to replace the Parent's form of BIP with provisions in the IEP that would address Student's behaviors. Parent disputed the need to remove the BIP and even filed an Administrative Complaint with the Delaware Department of Education ("DOE"). In finding the actions of the School District were not in violation, the DOE made findings of fact that are consistent with the testimony before the Hearing Panel. The School District felt that the BIP formulated in 2003 was no longer appropriate for several reasons and that the Student could adhere to the Elementary School's Code of Conduct. Parent disagreed and was to provide examples of the part of the Code of Conduct which Parent felt that Student could comply. Parent did not provide School District with any information. The School District also requested Parent's consent to do a functional behavioral assessment ("FBA"), to identify those behaviors of Student and the effect those behaviors had on Student's learning so that those behaviors would be addressed in a behavioral intervention plan focusing on the Student's behaviors. Parent refused to provide the necessary parental consent for such evaluation to be performed.

In summary, a BIP was in place and was discussed by the IEP team (including Parent) as needing to be replaced by behavioral interventions that were included in the Student's IEP. An updated form of BIP would need to have a functional behavior assessment ("FBA") in order to determine the behaviors that Student was exhibiting and the appropriate type of responses to control those behaviors. In order to conduct an FBA, the Elementary School would need to have the consent of the Parent. The IEP team did discuss the issue with Parent and asked Parent to consent to an FBA. Parent did not consent insisting if the FBA was to be done that she wanted it to be done by psychologists that she felt were competent and not by the Elementary School's psychologists.¹⁵ Parent, having failed to give consent for the FBA which would lead to a determination of the need for an updated form of BIP and having failed to cooperate with the School District in discussing the revisions to be made to the BIP cannot now allege a failure to have a BIP.

¹⁵ Parent takes a dim view of school psychologists and testified that school psychologists were not real psychologists and only got 60 hours of training. Wherever Parent got that impression, it is not accurate and clearly colored Parent's views when testing was requested by the Elementary School. The psychologist who wrote the KK Reports identified herself as a certified school psychologist, a title also earned by the School District's psychologist. In addition an FBA, by its very nature, must be conducted in the school setting and cannot be adequately conducted in a psychologist's office in Maryland or Virginia.

4. *Failure to provide qualified staff relative to Student's disability for school years 2002/2003, 2003/2004, 2004/2005 and 2005/2006.*

Parent provided no direct testimony that any of the staff were not qualified to provide services to Student. Many allusions were made that the teachers and the one-one paraprofessionals assigned to Student did not act appropriately but the testimony provided no direct factual evidence that the teachers or paraprofessional were not qualified. In fact as to the paraprofessional assigned to the Student, the evidence showed that the paraprofessional was more highly qualified than the usual paraprofessional and that the paraprofessional worked very effectively with Student and was an asset to the Student in terms of optimizing the educational experience at Elementary School.

Parent stated as fact that Student's disability, as defined by Parent, is "dyslexia" and Parent alleged that the School District has very few teachers qualified to handle students with dyslexia. Parent's argument is undercut by the fact that Parent never identified sufficient basis for the learning disability diagnosis of dyslexia other than a parenthetical comment by a psychologist and further fails to recognize that in an educational setting the teaching of children with learning disabilities encompasses the teaching of children with dyslexia. In addition, Parent's witness Dr. F testified that Student had multiple disabilities and did not mention dyslexia as a primary issue for Student. Even if the Hearing Panel assumed that Student's main disability was dyslexia, that diagnosis was part of the "learning disabilities" qualification and the testimony indicated that the Elementary School Teachers were capable of handling many language based disabilities (of which dyslexia is only one type) and that the School District has teaching staff qualified to teach children with learning disabilities in the language arts area.¹⁶

5. *Failure to provide continuum of placement options for 2004/2005 and 2005/2006*

From the testimony presented it is not clear what continuum the Parent is alleging should have been provided. In 2004/2005 Parent agreed to the IEP which included placement at the Elementary School and various services as outlined in the IEP. For 2005/2006 Parent removed Student from the District after determining unilaterally that the School District could not address

¹⁶ While not germane to the issue of whether the Student received FAPE during her three years at the Elementary School, it is important to note that the Parent appears to take a very narrow view of dyslexia for in her testimony to justify her child's placement in a school in North Carolina she stated that she found no school in all of Delaware that were "schools for dyslexics". Because dyslexia is categorized under the heading of "learning disabilities", a school, public or private, can address the needs of a child with dyslexia. Several private schools in Delaware admit and can address the needs of a child with dyslexia such as the Pilot School, Centerville School and the University of Delaware's College School. In addition, all public schools have special education teachers trained to deal with children with learning disabilities. Finally, the private school that Parent chose in North Carolina, the Key School of the Carolina Day School, does not advertise itself as a school for children with dyslexia rather it states it "provides students with learning disabilities the educational opportunity to overcome their disabilities and to achieve their maximum potential in school and life." (See Key School Mission Statement at www.cdschool.org.) At least on its website the Key School does not advertise itself as a specialized school for students with dyslexia.

Student's needs. As mentioned above, if Parent's allegation of a failure of placement options is based on her view that the School District did not have qualified staff to handle a child with dyslexia, the Hearing Panel finds that the dyslexia label that Parent attempts to place on Student is included in the categorization of learning disabilities which the School District was prepared to address using a number of programs, teaching methods and accommodations that were set forth in the IEPs.

6. *The alleged failure of the School District to consider parental input for all the IEPs in the years 2002/2003, 2003/2004, 2004/2005 and 2005/2006.*

Parent testified that in the years in question there were 25 IEP meetings which Parent attended and participated in and at which Parent indicated approval of the IEP. Further, Parent testified many, if not all, of these IEP meetings were scheduled at Parent's request. While the Hearing Panel does not give much weight to the fact that there were 25 IEP meetings, it is hard to understand how a Parent who was constantly in discussions with the School District and the IEP team and who indicated her acceptance of the IEPs as they were modified and amended from time to time can say that her input was not considered. In one particular case, that of providing extended school year services as recommended by the KK 2003 Report, Parent decided that the services were not needed and the IEP team did not include that recommendation in the IEP so it is clear that the Parent's input was heard and considered. If Parent felt that her input was not considered on any particular occasion Parent should have presented testimony as to that instance so that the Hearing Panel could focus on the issue. The Hearing Panel finds that there is no merit to Parent's allegation.

7. *The alleged failure of the School District to obtain prior informed consent of Parent for testing and evaluation conducted during the 2004-2005 school year.*

As to this allegation, the Hearing Panel has surmised that Parent is alleging that the Parent should have given consent for the School Psychologist to "test and evaluate" Student. In fact the testimony shows that there was no testing or evaluation of Student done by the School Psychologist in 2004/2005. The School Psychologist did visit the classroom and did work with Student's teachers in an attempt to assist the teachers in the gathering of data about the disruptive behaviors, if any, that Student was experiencing and to provide guidance to the teachers as to how to handle the situation. This level of involvement by the School Psychologist does not constitute "testing and evaluation" and therefore no informed consent of Parent was required.

Allegation of Denial of FAPE

Legal Standard to be Applied

IDEA and the regulations promulgated thereunder require that public schools provide a free and appropriate public education ("FAPE") to all students. The statute and regulations do not define FAPE with specificity and the courts have had to fashion tests for determining if an education is "appropriate" for a particular student based on the facts

presented in the case. The keystone case on the issue of FAPE is the U.S Supreme Court decision in *Board of Education v. Rowley* (458 U.S.176 (1982)). In *Rowley*, the Supreme Court developed a two-pronged test to determine if a school district provided a student with FAPE: (1) compliance with the procedural requirements of the statute; and (2) development of an IEP reasonably calculated to enable the child to receive some educational benefit (458 U.S .at 206-07).

Using the *Rowley* standard, other courts have made decisions as to FAPE. Those decisions are based on the facts presented to the trier of fact and the determination by that trier of fact as to whether given the facts and circumstances presented by the case, the student has been provided with an “appropriate” education. The cases have been decided for the students and for the school districts depending on the facts presented by the parties. The key factual issue is whether there is a showing that the Student made progress in the educational setting taking into account the disabilities of the student.

Decision on the Issue of FAPE

A decision regarding FAPE requires that the Hearing Panel determine, based on the facts presented, whether the Student received an “appropriate” education during the school years in question. Under Delaware Law the School District carries the burden of proof. The Hearing Panel finds that the School District has met its burden and that the Student did receive an appropriate education during the school years 2002-2003, 2003-2004 and 2004-2005. The IEPs set forth clear and objective goals and the progress reports monitored the Student’s progress on a quarterly basis. Progress was shown throughout the years in question. The Parent’s attorney points to the fact that Student’s IQ “dropped” during the years at issue as an indication that Student did not receive an appropriate education but the Parent’s attorney fails to recognize that IQ scores are not indicators of academic progress rather IQ scores represent the student’s potential and not the student’s achievement.¹⁷

Parent’s attorney questioned several witnesses about the modifications made to the programs to meet Student’s needs. While some of the modifications were put into place to accommodate Student’s disability, such as having the paraprofessional scribe for Student when Student became fatigued because of her graphomotor disability, Parent’s attorney alluded to the fact that these accommodations reduced the meaningful educational benefit provided to Student. The facts presented to the Hearing Panel do not lead to the conclusion that the modification in the program made to meet Student’s needs resulted in the lack of progress on Student’s part. If anything, many of the accommodations enhanced Student’s ability to learn by accepting the child’s disability and accommodating it in areas where such accommodations would enhance the learning experience. In addition to progress shown in the classroom setting, through the appropriate use of accommodations, Student was able to show progress through the testing conducted by the DTSP.

¹⁷ Although not relevant to the determination of FAPE, Student’s IQ was reported as 113 (90% certainty 108-117) in 2001 and as 105 (90% certainty 101-109) in 2005. Different tests were used to determine the score which may explain some of the variation and in addition, the psychologist administering the 2005 test stated that the Full Scale IQ score (105) was not the best estimate of Student’s cognitive ability level.

Based on the presentation at the Hearing it appears that the Parent's main issue as to the denial of FAPE is the KK 2004 Report where, as noted in the Statement of Facts above, the Parent has taken a score on one subtest and used it to say that Student has not progressed in reading during the three years at the Elementary School. Using the results of that subtest, Parent would like this Panel to say that there was a denial of FAPE. However that sentence cannot be viewed in isolation. First, a test such as the evaluation provided by the KK 2004 Report is a "snapshot in time". It represents the findings of an examiner on a particular day at a particular time given the situation of the child on that day and time. The Hearing Panel spent a great deal of time listening to the findings of the KK 2004 Report and learning about the School District's response to the recommendations presented in the KK 2004 Report.¹⁸ The IEP team met on several occasions to review the KK 2004 Report in the fall of 2004 and implemented most of the recommendations. The Parent was a part of those meetings and indicated her agreement with the implementation of the recommendations. Changes in the reading program were made and the IEP progress notes for Student during the 2004-2005 school year show consistent progress on all of the reading goals. Additionally, the KK 2003 Report was conducted while Student was taking medication for her ADHD, and the KK 2004 Report states that Student was not taking that medication at the time of the 2004 testing. As pointed out by the KK Psychologist the reliability of the KK 2004 testing is not certain given the difference in Student's behavior without the medication.

In summary, the School District provided ample evidence of designing programs to find out what might be the most appropriate for Student taking into account Student's needs. The School District used the many resources available to it in designing the programs and relied on the reports teachers, staff, outside consultants including Kennedy Krieger and Parent in preparing accommodations and programs. The IEPs were reviewed, discussed and modified on a regular basis and in fact as often as Parent requested. As the recitation of the facts indicates, the Student showed progress throughout the 3 years in question. Taking all of these factors into account and giving weight to all of the testimony presented by the School District and the Parent, the Hearing Panel finds that the School District provided FAPE to the Student.

Conclusion and Order

After reviewing the testimony and documentary evidence, the Hearing Panel finds that the School District did not err in any of the procedural areas asserted by Parent and further the Hearing Panel finds that the School District provided Student with a "free and appropriate education" during the school years 2002-2003, 2003-2004 and 2004-2005.

¹⁸ As noted above in footnote 11 above, the Hearing Panel is concerned about having to rely on second hand knowledge of the KK Reports given that the Parent relied on those Reports as the linchpin to prove her allegations. The Hearing Panel has attempted to take the words of the KK Reports as written and interpret the KK Reports although the Parent repeatedly suggested the KK Reports carried more weight than the language of the KK Reports suggests. Without the direct testimony of the author of the KK Reports it is difficult for the Hearing Panel to read the reports in the manner suggested by the Parent.

Because this Hearing Panel had not found any violation there is no need for a remedy to be fashioned so the Due Process Hearing 05-26 is concluded.

Right to Appeal

The decision of the Hearing Panel is final. An appeal of this decision may be made by any party by filing a civil action in Family Court of the State of Delaware or United States District Court within ninety (90) days of the receipt of this decision.

Sandra K. Battaglia
Sandra K. Battaglia, Esquire, Chair

James McLaughlin
Dr. James McLaughlin, Educator

John Werner
John Werner, Lay Member

Dated: January 31,2006