BEFORE THE SPECIAL EDUCATION DUE PROCESS HEARING PANEL

DUE PROCESS HEARING FOR THE INDIAN RIVER SCHOOL DISTRICT

IN RE THE MATTER OF:	)	
	)	DE DP 05-2 & 07-20
[STUDENT]	)	

DECISION

The Due Process hearing for [STUDENT] was heard by the Hearing Panel consisting of the following individuals: (a) Janell S. Ostroski, Esquire, Chair; (b) Janice Hoffman-Willis, Ph.D.; and (c) John Werner. The original complaint was filed with the Department of Education on or about August 31, 2004. A decision on that complaint was issued in 2005 in favor of the Indian River School District. Parents appealed that decision to the Family Court of Sussex County. The Family Court of Sussex County issued its decision on that appeal on or about January 19, 2007, reversing the decision of the Due Process Panel and remanding the matter for further findings and a decision not inconsistent with its holding. The same panel was appointed on remand as was appointed on the original complaint.

A teleconference took place on May 2, 2007, with the parties and all panel members present. There was argument presented with respect to what evidence the panel needed to hear, if any. As the panel never heard evidence on the issue of whether the District failed to identify the child for special education services in a timely fashion at the first hearing, it was appropriate for

the panel to review all evidence and hear all testimony on that issue. A hearing was scheduled to hear this new testimony and review this new evidence.

However, as the panel had heard evidence on the issue of the appropriateness of the IEP at the first hearing in 2005 for five (5) days, the panel determined that it was not necessary to hear evidence on this issue as the panel could review the record to make this decision. Nonetheless, the parties were permitted to argue this issue in their closing argument. The Family Court's decision specifically gave the panel discretion in this area. (J. Millman's decision dated January 19, 2007, emphasis added.)

Finally, the panel specifically permitted the parties to provide evidence, testimony, and/or argument on any proposed remedy and the appropriateness of the remedy in light of the fact that two years had passed since the close of the evidence and almost three years had passed since the child was removed from the school district.

The hearing was scheduled for May 24, 2007, from 9:00 a.m. until 3:00 p.m.; May 30, 2007, from 9:00 a.m. until 1:00 p.m.; June 19, 2007, from noon until 5:00 p.m.[1]; and June 20, 2007, from 9:00 a.m. until 5:00 p.m. The District presented its case and rested at the conclusion of the hearing of May 30, 2007. Parents cross-examined the District's witnesses and did direct examination of some of the District's witnesses. Parents were expected to present their case on June 20, 2007. On June 15, 2007, the chair person received an e-mail from mother indicating that the parents were choosing not to present any additional witnesses and rested their case. The parties had elected to submit their closing arguments in writing after the final transcripts were sent out by the DOE. Closing arguments were due July 17, 2007.

1 This date was later changed to June 21, 2007 from 9:00 a.m. until 3:00 p.m. to accommodate a conflict in the chair person's schedule.

The following individuals were designated as representatives of the respective parties:

For Indian River School District:

James H. McMackin, III, Esquire
Morris, James LLP
500 Delaware Ave.
Wilmington, DE 19801

For [STUDENT]:

[MR. & MRS. XX]

REFERENCES AND DEFINITIONS

Throughout this decision the following references and definitions will be used:

1. At the beginning of these proceedings in 2007, the parents refused the chair person's offer to change the student's name in the record for confidentiality reasons. T-4-6 (5/24/07). Nonetheless, [Mr. and Mrs. XX] may be referred to collectively and individually as the "parents". In some instances, for example, only one parent may have attended a meeting but this decision may still refer to the parents in the plural. Actions and decisions of either parent were considered to represent the position of both parents. Therefore, the singular and plural use of this word is not critical. References to "the mother" refer to [Mrs. X]. References to "the father" refer to [Mr. X].

2. [STUDENT] may be referred to as "the student".

3. Indian River School District will be referred to as the "District".

4. Exhibits will be referred to as 05PE-1, (2005 Parent Exhibit 1, 2, etc.) 07DE-1, (2007 District Exhibit 1, 2, etc.)

5. References to the hearing transcript will be cited as "T-____ (date of hearing)", e.g., T-1 (1/20/05).

6. After identifying the witnesses, they may be thereafter referred to by last name.

7. Due Process will be referred to as "DP".

8. Free Appropriate Public Education will be referred to as "FAPE".

9. Individual Education Plan will be referred to as "IEP".

10. Occupational Therapy will be referred to as "OT".

11. The State of Delaware Department of Education will be referred to as "DOE".

12. [Elementary School] will be referred to as [Elementary School].

13. [Private School] will be referred to as [Private School].

SUMMARY OF ISSUES

The issues to be decided on remand were as follows:

1. Did the Indian River School District timely identify the student as a student eligible for special education, and thus timely provide her with an IEP?

2. Was the IEP for the 2004-2005 school year reasonably calculated to provide the student with a free, appropriate public education?

3. If the Indian River School district failed to satisfy either obligation, what is the appropriate remedy?

EXHIBITS

The Exhibits from the 2005 hearing for both the District and the Parents were re-submitted during the 2007 hearing.

The 2007 Exhibits of the Indian River School District were admitted with the following objections:

1. Parents objected to District's Exhibit Number 1 based on the fact that it is one page from District's Exhibit Number 5 in 2005. The objection was denied as there was no harm in admitting one page again.
2. Parents objected to District's Exhibit Number 2 in 2007 based on the fact that is the same as District's Exhibit Number 14 in 2005. The objection was denied as there was no harm in admitting the document again.
3. Parents objected to District's Exhibit Number 4 based on the fact that it was the same as District's Exhibit Number 15 in 2005 except that it was missing page 1.

The objection was denied and noted for the record.

4. Parents objected to District's Exhibit Number 5 based on relevance. Upon further questioning, Mother admitted the information with respect to this document was already in evidence. The objection was denied but noted for the record.

5. Parents objected to District's Exhibit Number 6 based on the fact that no witness was identified who was listed on the document and that some of the pages were duplicates of evidence submitted in 2005. The District argued it was a business record. The objection was denied.

6. Parents objected to District's Exhibit Number 7 based on the fact that it is the same as District's Exhibit Number 31 and Parents' Exhibit 47 in 2005. The objection was denied as there was no harm in admitting the document again. There was also an objection on the grounds of relevance. The District argued it was offered for impeachment purposes. The objection was denied.

7. Parents objected to District's Exhibit Number 8 based on relevance. The objection was denied.

8. Parents objected to District's Exhibit Number 9 based on relevance. The objection was denied.

9. Parents objected to District's Exhibit Number 10, 11, and 12 because they were incomplete documents. The District agreed to remove them as they were already in evidence in the 2005 binder. As they were removed from the record, the issue of admissibility was moot.

10. Parents objected to District's Exhibit Number 13 based on the fact that it is the

same as District's Exhibit Number 24 in 2005. The objection was denied as there was no harm in admitting the document again.

The Exhibits for the student were admitted noting the following:

Every document submitted by the parents was dated subsequent to the events which lead to the parents filing their due process complaint in 2004. The panel explained to the parents that documents from 2006 and 2007 would not be relevant to a case which was based on facts that occurred in 2003 and 2004. The parents asserted that Exhibit Numbers P-6, P-7, and P-8 were submitted to support their proposed remedy. The panel allowed these documents to be entered into evidence believing that the author would be testifying about her recommendations. This witness was never presented. The panel allowed the remaining documents only to protect the parents' right to appeal but made it clear that the panel believed they were not relevant. No witnesses were presented to authenticate these documents. The panel raised this issue sua sponte after receiving the Parents' documentary evidence in an attempt to alert the parents about this problem as soon as possible.[2] However, the panel made the aforementioned decision after oral argument on this issue at the beginning of the hearing.

STATEMENT OF THE POSITIONS OF THE PARTIES

Indian River School District

The District asserts that it timely identified the student as a child with a disability in need of an IEP and that the proposed IEP was appropriate. It further asserts that as there was no violation of

2 See chair person's letter dated May 18, 2007, which is part of the record being submitted to the DOE.

the IDEA under either issue, there is no need for a remedy. In the event the panel were to find that the District had violated the IDEA, the District proposes that the appropriate remedy should be limited to compensatory services calculated based on specific findings as to when the deprivation of educational benefit began; when the District knew or should have known of the deprivation; and how long the District reasonably had to correct the problem.

Parents

The parents assert that the District failed to identify the student as a child with a disability in need of an IEP in a timely fashion and that the proposed IEP was not appropriate to address the student's unique needs. The parents assert that the appropriate remedy is for the District to reimburse the parents for the tuition and related expenses of the [Private School] for the 2004-2005 school year and for the District to provide as compensatory education for the 2003-2004 school year all related costs for enrollment in an intensive remedial language based program designed to address all of the student's unique needs in a small group setting and continuing until such time as the student's achievement is commensurate with her age appropriate peers.

FINDINGS OF FACT

1. Prior to her enrollment in the IRSD, the student had attended public school in White Plains, New York where she had received accommodations under a 504 Plan. (05DE-4; 05PE-17).
2. On 12/20/03, six months before the child was enrolled in the IRSD, the school district in White Plains, New York, after considering a social history, classroom observations,

teacher reports, a psychological evaluation, a speech/language evaluation, an audiological evaluation, an OT evaluation, and a physical examination, determined that the student was not eligible for special education services. (05PE-11).

3. On 6/13/03, the student was enrolled in third grade at [Elementary School] in the IRSD. 05DE-2.

4. In 9/03, the student began attending third grade at [Elementary School] and Connie Warner was her assigned regular education teacher. T-8 (2/24/05).

5. On 9/22/03, an initial conference was held to review the NY 504 Plan and it was determined that the student would remain on a 504 Plan. The team established classroom accommodations at this conference. The parents were part of this team and agreed to the accommodations. 05DE-5; 05PE-18.

6. Following the conference, the parents requested and gave permission for an OT evaluation. 05DE-5.

7. On 9/25/03, Eleanor Gregory performed an OT evaluation and concluded that direct OT was not needed but that the OT would consult with the teacher if the teacher felt it was indicated. (05DE-7). Gregory believed that the 504 Plan adequately addressed the weaknesses in visual perception and visual motor skills indicated by the OT evaluation she performed. T-80-94 (2/15/05).

8. Results of the OT evaluation were discussed at a conference on 10/15/03 and it was decided that Gregory would consult with Warner on an as needed basis up to two times per month. The mother was present for said meeting. 05DE-10; T-112 (1/20/05); T-17-18 (1/24/05).

9. The parents argued in the hearing that Gregory was instructed to perform a "sensory awareness" (tactile and vestibular) evaluation and that she did not perform a sensory motor evaluation as requested. 05DE-5; T-100 (2/15/05); T-9 (2/15/05). There is no evidence to support this position.

10. Warner gave the mother her home phone number and encouraged her to call if there was a problem. She talked to the mother by phone and met with her when the mother asked to meet with her. She testified that they had at least two phone conferences and five meetings. T-19-20 (1/24/05).

11. As of 10/2/03, the student's mid-marking period progress report for the first quarter indicated her grades were 65 in Math, 70 in Reading, 76 in English and 74 in Spelling on a scale where 70 or above is a passing score. Her handwriting was marked satisfactory (S). 05DE-8; PE-20.

12. The student's first marking period report card indicated that she scored 70 or above on all of her core subjects except for a 63 in Math. 05DE-11; T-39 (1/24/05).

13. Mother admitted that the curriculum at [Elementary School] was harder than the curriculum at the student's school in New York. 05DE-14.

14. The services recommended by district officials to improve the student's educational performance during the later half of the first marking period were provided at the parents' expense. The student received instruction from Sylvan Learning Center two times per week and private tutoring by Jessica Norwacki one time per week. 05DE-14; T-39 and 52-54 (2/24/05).

15. On 12/8/03, mid-marking period progress report for the second quarter revealed the

student's grades improved slightly and were 80 in Reading, 70 in Math, 76 in English, and 85 in Spelling. However, she received unsatisfactory remarks from her teacher in areas such as Expected Behaviors and Works Independently. 05DE-10; 05PE-22. This was the same time period when the student was receiving services outside of school as arranged by the parents.

16. The student's grades for the second quarter showed that she scored 70 or above in all subjects except math which was a 68. 05DE-28.

17. Warner had prior experience working with children with auditory processing issues as her own daughter had the same disability and she had also been a regular education team teacher with Jan Drake, a special education teacher at [Elementary School], for 4 years. In that setting, they had worked with children with auditory processing issues. T-11 (2/24/05).

18. Warner used a multi-sensory approach in the classroom. T-11 (1/24/05).

19. The parents never expressed dissatisfaction with Ms. Warner's teaching efforts nor did they ask her to modify the classroom accommodations. T-13-14, 34 (1/24/05).

20. Warner referred the student to the Host Mentoring Program and to a small group reading program which were both pull out programs done during the school day to address her reading problems. The parents removed the student from these interventions without teacher advisement because they believed the student should be in the classroom with Warner. T-41-42 (1/24/05).

21. In January, 2004, an independent OT evaluation was performed by J. B. Haughey of Easter Seals, at the expense of the parents, recommended therapy two times per week

05DE-12.

22. Haughey never contacted the classroom teacher and was unable to give an opinion as to whether the Easter Seals OT objectives had any relationship to the work the student was doing in school because she had never observed her in the school setting. T-291 (2/15/05).

23. On 2/3/04, before a 504 meeting, parents received a letter from the district notifying them that the student was in danger of retention because she had not met the criteria for Math. 05DE-13.

24. At the 2/3/04 meeting, the mother requested further evaluations in the areas of achievement and personality. 05DE-14. A Conner's Rating Scale was completed by the teacher and parent. A Conner's Rating Scale is a behavior rating scale and not a personality test. There was no evidence presented to prove that an achievement or a personality test was performed as a result of mother's request at this time.

25. The student's 2/25/04 mid-marking period progress report for the third quarter indicated she scored above 70% on all of her core subjects, that her handwriting was satisfactory, and that she was complying with all expected behaviors. 05DE-16; 05PE-26.

26. The student's grades for the third quarter showed that she scored greater than 70 in all subjects except math where her grade was a 67. 05DE-28.

27. On 3/3/04, a 504 conference was held to discuss the student's grades and recent testing by the District's speech pathologist, Paula Howard. (05DE-18; 05PE-27). It was agreed that she would take the State test in a small group with additional time and

emphasis on re-reading and re-focusing. The minutes show the student was using the Earobics program at that date. T-48 (1/24/05).

28. On 3/11/04, the student took the State test (DSTP) and scored below the standard required for promotion to fourth grade. 05DE-19.

29. On 4/28/04, the parents sent an e-mail memo to Darlene St. Peter, the District's Special Education Director, which acknowledged that the student would be retained in third grade, but asked for a team room setting and a "full educational, psychological, speech and language (please include auditory processing); neurological and physical/occupational assessments". 05PE-31.

30. The 5/4/04 mid-marking period progress report for the fourth quarter showed that the student scored 61 in Reading, 61 in Math, 68 in English, and 78 in Spelling, satisfactory in all but one expected behavior, and satisfactory in her ungraded subjects, including handwriting. 05DE-21; 05PE-33.

31. On 5/18/04, Charles Rechsteiner performed a psycho-educational assessment. The test revealed that the student is of average intelligence, with average cognitive skills except in the area of visual-spatial reasoning with abstract concepts and pattern recognition. She scored in the average range on word identification. However, in reading comprehension she scored on a grade equivalent (GE) level of 1.8 years representing a severe discrepancy from her ability as indicated on the intelligence and achievement tests. 05DE-36. Rechsteiner recommended that an IEP team meet and determine whether the student qualified for special education services as a child with a learning disability. 05DE-36.

32. On 5/26/04, the District notified the parents that the student did not meet the State standards in Reading and Math and offered her a two week remedial course called "Immersion in Learning" that was tailored to address the Reading and Math deficits indicated on the DSTP. 05DE-37.

33. On 5/28/04, the parents notified the District that they did not want the student removed from her regular classroom to participate in the Immersion in Learning Program because they wanted her in the classroom with Warner as much as possible. 05DE-38.

34. Warner and Rhonda Lynch (school guidance counselor) testified that in late May 2004, the student told them she would be attending [Private School] in September, 2004. T-263, 267 (1/20/05); T-56 (1/24/05).

35. On 6/2/04, an IEP team meeting was scheduled for 6/11/04 to meet and discuss the student's special education needs. On 6/3/04, the parents completed an IEP input form on which they listed the student's areas of weakness as reading comprehension and math. They noted she was failing although "she has been tremendously supported throughout the school." 05PE-39.

36. The parents took the student to Dr. Blackburn, OD, for visual testing. He issued a report to the local referring optometrist dated 6/4/04 indicating problems with eye coordination, eye convergence and eye tracking. He prescribed glasses and 18-24 hours of vision therapy in his office with supplemental home therapy. A separate 6/6/04 report to the parents addressed a bottom line deficit in site word decoding and suggested a multi-sensory structured reading program using phonetic principles.

(05PE-40).

37. The meeting scheduled for 6/11/04 was rescheduled to 6/14/04. At that meeting, Rechsteiner reviewed the results of his assessment and his recommendation that the student had a mild learning disability in reading comprehension based on the guidelines contained in AMSES. T-214, 220 (1/20/05).

38. On 6/14/05, the parents accepted the recommendation of the District's psychologist (Rechsteiner) that the student was learning disabled in reading comprehension based on a severe discrepancy between ability and achievement. 05DE-27; 05PE-43. The IRSD team classified the student "Learning Disabled" as a student with a disability in reading comprehension. 05DE-27. There was no evidence presented at either hearing indicating that the parents disputed the fact that the student was learning disabled in reading comprehension only and not learning disabled in math as well.

39. At this point, the team, including the parents, agreed that the student would be retained in third grade in a team room setting with a certified special education teacher. 05DE-27; 05PE-43. This decision was consistent with Mother's letter of 4/28/04 where she requested a team room setting. 05PE-31.

40. After the 6/14/04 meeting, Drake, who was then the special education coordinator, prepared a proposed IEP. The proposed IEP was considered at the team meeting on 7/9/04. 05DE-29; T-223 (1/20/05).

41. At the 7/9/04 IEP meeting, the IEP team discussed classroom accommodations which included a soundfield system to address the student's disability in reading comprehension but also discussed accommodations to address math reasoning,

listening comprehension and processing, anxiety, graphomotor (handwriting) skills, and a plan for a follow up consult with the OT. The plan included goals and objectives for reading comprehension which was the student's only area of diagnosed learning disability. 05DE-29, page 3-4; 05DE-30; 05PE-44; T-132-137 (2/15/05).

42. Mother signed the 7/9/04 IEP meeting notes indicating she agreed with the plan. The notes from the 7/9/04 meeting indicate that Mother was going to discuss the IEP with father and make a decision on the student's academic career for the 04-05 year as Mother had said at the beginning of the meeting that the family had not made a decision as to whether the student would be attending [Elementary School] in the upcoming school year. 05DE-29.

43. Twelve days later, on 7/21/04, the mother went to [Elementary School] and met with Janet Hickman. She signed the IEP indicating that she did not agree with the proposed plan or the proposed placement. 05DE-30; T-172 (1/24/05).

44. The parents enrolled the student in [Private School] on or about 8/3/04 when they paid her annual tuition for the 2004-05 school year. 05DE-46.

45. On 8/20/04, prior to the start of the 2004-2005 school year, the parents sent Hickman a certified letter informing her that the student would be attending [Private School] because [Elementary School] had failed to provide a concise plan on how to address the student's learning disability and gave four reasons to support their conclusion. (05DE-31; 05PE-47). The four reasons stated in the letter are identical to paragraphs (5) through (8) of the parents' letter requesting a due process hearing. 05DE-1; 05PE-47.

46. October 1, 2004, the student's grades from the [Private School] were: Math 92; Reading 84; History 97; Spelling 98; Science 96; Handwriting 92; Bible 95; Language 89. (05PE-49). There was no evidence presented that the programs at [Private School] and [Elementary School] were comparable. Therefore, the panel could not compare the student's progress in the two schools. 05PE-49

47. There was evidence presented that the student was receiving none of the services at [Private School] that the parents were requesting be provided by [Elementary School]. T-13-21, 72-75 (3/15/05). However, she was receiving excellent grades.

48. There was also evidence presented that the parents did not fill the student's eye glass prescription until September, 2004, and that she was not wearing the eye glasses at school in [Private School]. T-15-16 (3/15/05); T-47 (3/15/05);

49. Parents presented no non-hearsay evidence as to the amount of money they are requesting to be reimbursed for private school placement or related costs for enrollment in an intensive remedial language based program designed to address all of the student's unique needs in a small group setting and continuing until such time as the student's achievement is commensurate with her age appropriate peers.

DISCUSSION

1. Did the Indian River School District identify [STUDENT] as a student eligible for special education, and thus timely provide her with an IEP?

The District has the responsibility of identifying children who are in need of special education services. 14 Del. C. Sec. 3122. The IDEA requires a local public school district to

develop an Individualized Education Program ("IEP"") that is designed to ensure FAPE for every child identified as eligible for special education due to a disability,. *S.H. v. State-Operated Sch. Dist. of Newark*, 336 F.3d 260, 264 (3d Cir. 2003). The District has the burden of proving the IEP is appropriate but does not have to prove the inappropriateness of any alternative placement. *Carlisle,* 62 F.3d at 533. But first, in order to be eligible for an IEP, a child must qualify for services as a child with a disability as defined by state law. 20 *U.S.C.A.* § 1414(d)(1)(A).

The Delaware Department of Education has issued the *Administrative Manual for Special Education Services* (*"AMSES"*), as a means to satisfy the state's responsibilities under the IDEA. *AMSES* at Preface. Pursuant to *AMSES*, a "child with a disability" means:

> [A] child evaluated in accordance with [the provisions of *AMSES*] as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment, including blindness, serious emotional disturbance…, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, *a specific learning disability*, deaf-blindness, or multiple disabilities, *and who, by reason thereof, needs special education and related services*. (emphasis added.)

AMSES, at 25; *see also,* 20 U.S.C. § 1401(3)(A). *AMSES* further provides that, a school district must refer a child to its Instructional Support Team before testing for special education services

> [The] referral to the school's instructional support team is a process where teachers enlist the help of the team to assist in the identification of potential instructional strategies or solutions for learning and behavior problems. The instructional support team process may or may not lead to referral for initial evaluation to determine eligibility and possible need for special education services. Documentation of the process should be comprehensive (including baseline and outcome data) and include strategies such as: curriculum based assessment, systematic observation, functional assessment, current health information and analyses of instructional variable. Id at 11.

In this case, the IRSD identified this student as a student with a learning disability in reading comprehension after conducting a full psycho-educational evaluation on May 24, 2005. The parents assert that the IRSD did not timely identify the student. It is unclear to the panel whether the parents assert that the child is learning disabled in other areas in addition to reading comprehension or if they assert that the IRSD simply failed to identify the student in a timely fashion.

We will first review whether the child should have been identified as learning disabled in math as well as reading comprehension. The psycho-educational testing done by the school district in May, 2004, showed a severed discrepancy in reading comprehension only. The parents presented no non-hearsay testimony to show that the child also had a severe discrepancy in math as well. Therefore, the panel has no evidence to find in favor of parents on this issue.

Second, we will review whether the IRSD timely identified the student as a learning disabled in reading comprehension. The student was enrolled in the IRSD in June, 2003, and began school in September, 2003, with a 504 Plan. It is significant to note that the student came to the IRSD with a file from her previous school in White Plains, New York. In that file, it was noted that, as of December 20, 2002, six months before being enrolled in IRSD, the student was determined to <u>not</u> be eligible for special educational services based on, among other things, a psycho-educational exam completed in September, 2002. Finally, it is important to note that the student had recently moved to the area and was adjusting to a new home, new friends, and a new school and that the IRSD's curriculum was harder than her previous school, according to her mother.

A 504 team was convened and met within the first few weeks of school and wrote a new 504 Plan for the student. An OT evaluation was conducted on September 25, 2003. The evaluation showed that the student scored low on the visual-perception evaluation but that OT intervention on a pull out basis was not indicated at that time. The difficulties were addressed in the 504 Plan. The evidence was that, within the first two semesters of school, the student was offered and used the Earobics program, that the student was offered the Host mentoring program but the parents withdrew her from the program, that the student was offered a small reading group but the parents withdrew her from the program, that the parents procured services from Sylvan Learning Center at their own expense, that the parents hired a tutor at their own expense, and that the parents obtained OT services through Easter Seals at their own expense[3]. By the second marking period, the student was showing improvement. However, in the third marking period, the student's grades began to decline. This time coincided with a time period when her brother may have been ill[4], there was a death in the family, and father was out of the home on business much of the time. All of these factors, could affect a child's learning. If this was the only evidence presented, the panel could have found that it was reasonable for the IRSD to have not performed a psycho-educational evaluation of the child until May, 2004, after mother requested the evaluation on April 28, 2004, as a team had been offering instructional strategies to assist the student.

However, in reviewing the record, it was evident that there was a meeting on February 3,

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3 After the district learned that the student failed the DSTP test in March, 2004, the student was offered the Immersion in Learning Program and the parents refused that service. The student was also offered summer school and the parents refused that service as well. Either of these programs could have helped the student pass the third grade and the DSTP.

4 We say "may have been ill" because the evidence was that the student was telling teachers and her

2004, at which time the mother requested further evaluations to rule out other problems. She signed a consent for personality testing and achievement testing. The panel finds that there were no red flags prior to this point that the IRSD should have seen that would have required them to conduct an evaluation at this time. However, since mother requested the testing, the testing should have been done within forty-five (45) school days or ninety (90) calendar days. See**,** *Section 3.1 of Delaware Department of Education Regulations*, AMSES. The panel could find no evidence that the personality or achievement testing was done as a result of mother's request in February, 2004. It appears the testing was only done after mother's second request in April, 2004. If the IRSD had done the testing in a timely manner after mother's first request, the panel can assume that the IRSD would have found the same learning disability that it found when the psychologist completed his testing in May, 2004. Therefore, the panel finds that the IRSD did not timely identify the student because it failed to honor mother's request for testing in February, 2004.

2. Was the IEP for the 2004-2005 school year reasonably calculated to provide Gabby with a free, appropriate public education?

The District bears the burden of proving the appropriateness of the program and placement proposed. *Oberti v. Bd. of the Borough of Clementon Sch. Dist.,* 995 F.2d 1204 (3d Cir. 1993); *Fuhrman v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1035 (3d Cir. 1993). Both federal law, through the IDEA, and state law at 14 Del. C. § 3120 obligate the District to provide the student with a free, appropriate public education ("FAPE"). The Supreme Court has interpreted IDEA's mandate to provide a FAPE to require the District to provide an education

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counselor that her brother was ill and had been in the hospital but mother told the panel that this was not true.

"tailored to the unique needs of a handicapped child by means of an 'individual education program' ("IEP"). *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The child's program should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade; the education provided must be "sufficient to confer some educational benefit." *Id.* at 176. Although there has been no specific definition of what is meant by "meaningful", the Third Circuit Court of Appeals requires an "educational benefit" to be "more than a trivial benefit or *de minimis* educational benefit." An IEP must confer "significant learning" and "meaningful educational benefit." *Ridgewood v. Bd. of Educ.*, 172 F. 3d at 247; *Carlisle Area Sch. Dist.*, 62 F.3d at 533-534; *Oberti*, 995 F.2d 1204, *Polk v. Central Susquehanna Intermediate Unit,* 853 F.2d 171, 180 (3d Cir. 1988);

At the same time, there is no requirement the school district maximize the potential of a child. *Rowley*, 458 U.S. at 198. School districts are not obligated to provide a child with the best education, public or private, that money can buy. *Steinberg v. Weast*, 34 IDELR 113 (D. Md. 2001). Nor does the IDEA require a school district to maximize each child's potential commensurate with the opportunities provided to other children. *Rowley,* 458 U.S. at 198. Rather,

> The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal education; it requires an adequate, rather than an optimal IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential.

Rowley, 458 U.S. at 198. *Rowley* does not require the District to provide an optimal level of services, or even a level of services, which would confer additional benefits, because the IEP required by the IDEA represents only a "basic floor of opportunity." *Id.* at 176; *Carlisle*, 62 F.3d at 533. The Sixth Circuit analogized that the IDEA does not require the educational equivalent of a "Cadillac," but only requires the equivalent of a "serviceable Chevrolet." *Doe v. Bd. of Educ. of Tullahoma City Schools,* 9 F.3d 455, 459-460. The District has the burden of proving the IEP is appropriate but does not have to prove the inappropriateness of any alternative placement. *Carlisle,* 62 F.3d at 533.

In May, 2004, after the student was identified as a student with a disability entitled to educational services, the staff at [Elementary School] quickly assembled a team which included the parents. They convened meetings on June 14, 2004, and July 9, 2005. After initially agreeing with the team at the first two meetings, the parents changed their mind and chose to enroll the student in the [Private School]. The parents notified the school of their decision when mother met with Hickman one-on-one on July 21, 2004. The team was not present and, therefore, could not address mother's concerns about the proposed IEP. Unfortunately, it does not appear that the IRSD attempted to contact mother to resolve the matter or to ascertain why mother was not in agreement with the proposed IEP. Almost a month later, Mother wrote a letter to the district listing her concerns about the proposed IEP. But by that time the parents had already withdrawn the child from IRSD and paid the tuition for the student to be enrolled in the [Private School]. Eleven days later, the parents filed their due process complaint.

This is a very difficult and unfortunate case. It was clear to the panel that the staff of the [Elementary School] was dedicated to helping the student succeed and honestly believed they

were doing what they thought was the best plan for this student. The parents just wanted more for their daughter, as any good parent would. It is very possible that if the parents had just requested another team meeting to address their concerns rather than just abruptly signing the IEP indicating that they disagreed with the proposed IEP, the IRSD would have changed the IEP to satisfy the parents. However it is important to note that the parents had already refused the Host Mentoring Program, the small group reading class the Immersion in Learning Program and summer school, all of which may have helped this student succeed. Instead, they chose to use services outside of the school such as Sylvan Learning Center and a private tutor. And, they chose to use Easter Seals for OT when it was not specifically designed to have an educational benefit. A proposed IEP is a work in progress. If the parents had made suggestions before rejecting the plan, there could have been a completely different outcome to this case.

Nonetheless, this panel is required to make a decision as to whether the proposed IEP was reasonably calculated to provide the student with a free, appropriate public education. And, in this case, the panel agrees that the IEP, while it could have used some modifications to be better, it is reasonable to believe that the student would have received meaningful educational benefit from the plan. The accommodations from the 504 plan were listed in the plan but there were additions as well. The student was going to be in a team classroom with a special education teacher in that room for 12.5 hours per week. There was discussion and plans to help the student with areas outside of her reading comprehension disability. The plan addressed math reasoning, staying on task, anxiety, visual processing, grapho-motor inefficiencies, and her need for movement in the classroom. There were notes reflecting that Mother would meet with the OT to develop a plan to meet the student's needs. This plan was a work in progress. The working

draft was a very good start and the student could have received meaningful educational benefit from this plan as written. If the parents wanted more from the district, they needed to make their suggestions in a team meeting where the team could consider their suggestions. The school district's plan does not have to be a "Cadillac". They needed to provide a working Chevrolet. And they did that in this case.

3. If the Indian River School district failed to satisfy either obligation, what is the appropriate remedy?

With respect to the first issue, the panel has found that the IRSD failed to identify the student in a timely manner when it failed to conduct the evaluations that mother requested in February 3, 2004**.** If the school district had acted on this request, according to the DOE's regulations, it would have had forty-five (45) school days or ninety (90) calendar days to complete the evaluation or until approximately April 7, 2004. After the testing, an IEP team would have met to determine that the student was learning disabled and eligible for services. Given that spring break fell during this time, it is reasonable to expect that the school would have met within three weeks of the testing or by April 20, 2004. After the team had met to determine eligibility, a second meeting would have been scheduled to review a proposed IEP. Pursuant to the DOE's regulations, the District would have had to meet within thirty (30) calendar days of determining eligibility or by May 20, 2004. Therefore, assuming the testing had been completed following mother's first request, the panel finds that the student could have been receiving services as early as May 20, 2004.

The panel finds that the district would have been the appropriate placement for this child.

Therefore, reimbursement of private school placement is denied. The panel further finds that the OT the student was receiving from Easter Seals was not necessarily designed to provide an educational benefit. Therefore, it would not be appropriate to reimburse the parents for this expense. However, the parents were paying for Sylvan Learning Center and a private tutor for the student. The IRSD shall reimburse the parents the out of pocket expenses they incurred with Sylvan Learning Center and the private tutor for the period of time from May 20, 2004, through the end of the 2003-2004 school year. Parents shall provide verification of these out of pocket expenses in the form of bills or canceled checks to the district's counsel within thirty (30) days of the date of this decision. The district then has thirty (30) days to reimburse the parents the amount of the expenses. If the parents do not provide verification of the expenses in a timely manner, the district has no obligation to reimburse them.

As the panel found that the IEP was reasonably calculated to provide meaningful educational benefit to the student, no remedy is required with respect to the second issue.

DECISION AND RELIEF

The District failed to identify the student as a student in need of special education services in a timely manner for the reasons more specifically stated above.

The proposed IEP was reasonably calculated to provide the student with meaningful educational benefit for the reasons more specifically stated above.

The request for private placement is denied as the appropriate placement for this child was in the IRSD. The IRSD school shall reimburse the parents for out of pocket expenses as more specifically stated above.

RIGHT TO APPEAL

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

20 U.S.C. 1415 (i) (2) (A).
14 *Del. C.*, Sec. 3142 (a).

Dated: _____ _____
Janell S. Ostroski, Esquire,
Chairperson

Dated: _____ _____
Janice Hoffman-Willis, Ph.D.

Dated: _____ _____
John Werner