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
XXXXXXXXXXXXXXXX	)	

DECISION

The Due Process hearing for XXXXXXXXXXXXXXXX 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, 2004.1

For reasons this panel was unable to fully understand, as of December, 2004, a hearing in this matter had not been scheduled. (This chairperson was appointed in early January, 2005.) The hearing on this matter was subsequently scheduled and held over several days: January 20, 2005; January 24, 2005; February 15, 2005; March 15, 2005; and March 17, 2005**.** At the conclusion of the testimony, the parties agreed to submit their closing arguments in writing two weeks after the transcript was mailed from the Department of Education to the parties. The parties agreed to submit closing arguments by May 31, 2005. The parents later requested an extension until June 15, 2005, to file closing arguments because they had contracted a computer virus and lost their closing argument. The District did not object. Closing arguments by both parties were mailed on June 15, 2005.

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

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1 It should be noted that two of the three panel members were not originally assigned to the case but were substituted for different reasons several months after the complaint was filed**.**

For Indian River School District:

James Griffin, Esquire
Griffin & Hackett
P.O. Box 612
Georgetown, DE 19947

For [STUDENT]

XXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXX DE XXXXX

REFERENCES AND DEFINITIONS

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

1. For confidentiality reasons, XXXXXXXXXXXXXXXXXXXXXXXXX will 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 XXXXXXXXXXXXX. References to "the father" refer to XXXXXXXXXXXXX.

2. For confidentiality reasons, XXXXXXXXXXXXXXX will be referred to as "the student".

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

4. Exhibits will be referred to as PE-1, (Parent Exhibit 1, 2, etc.)
DE-1, (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. Witnesses – after identifying the witnesses they will 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. XXXXXXXXXXXXX Elementary School will be referred to as "XXES".

13. Lighthouse Christian School will be referred to as "LCS".

SUMMARY OF ISSUES

After a teleconference with the first Panel Chair on December 16, 2005, the parties stipulated that the only issue to be decided by the panel was whether the IRSD failed to provide FAPE to the student.2 The Panel Chair set forth the single issue in her letter of December 29, 2005, memorializing the teleconference. During a second teleconference, during which the second Panel Chair presided, the narrowing of issues was discussed again.3 The parents agreed that the one issue to be decided by the panel was whether the IRSD failed to provide FAPE the student in that it failed to provide an appropriate IEP. This narrow issue was indicated in the Panel Chair's letter of January 19, 2005, wherein she memorialized the teleconference. The parents did not object to the issue as stated.

However, it was during this second teleconference, that the issue of whether the IRSD failed to "Child Find" was raised for the first time, to this panel's knowledge. The panel originally thought that the parents were referring to a program called Child Find which related to

2 It should be noted that the first Panel Chair withdrew before the start of the hearing. Dr. Hoffman-Willis, educator on the panel, participated in the first teleconference. The parents, or at least one of them, participated as well. John Werner, who was then recently appointed as the lay person on the panel, did not participate in the teleconference because he did not receive prior notice of the teleconference. James Griffin, Esquire, attorney for the district, did not participate because he apparently did not receive timely notice of the teleconference either.

3 All panel members and both parties participate in this teleconference.

children of preschool age. We now understand that the parents were referring to section 300.125 of the IDEA which requires a district to locate, identify and evaluate children with special needs.

At the conclusion of the teleconference on January 19, 2005, the panel discussed the issue of "Child "Find", as the parents called it, as well as the issue of whether the district failed to identify the student as the panel suspected this was the real issue the parents were trying to raise.

As was stated in the Panel Chair's letter of January 19, 2005, the panel could find no indication in the original complaint that the parents were raising the issue of whether the district failed to identify the student as a child entitled to special education services. The original complaint had been filed more than four (4) months before the submission of the exhibits for the hearing. Furthermore, the parents had never amended their complaint to include this issue nor did they raise the issue in the first teleconference. As far as this panel can tell, the matter was not raised until the matter was discussed at the teleconference on January 19, 2005, the day before the first day of the hearing. Therefore, after giving every benefit of the doubt to the parents and in fairness to the district which had no notice to prepare for the failure to identify issue, the panel had no choice but to find that the issue of whether the district failed to identify the student as a child entitled to special education services was not timely brought and would not be heard by the panel during this due process hearing. Therefore, the sole issue to be decided by this panel was whether the IRSD failed to provide FAPE to the student in that it failed to provide an appropriate IEP.4

4 However, the issue of failure to identify was not dismissed *with prejudice* as the matter was never heard. As such, it is theoretically possible that the issue of failure to identify could still be litigated.

EXHIBITS

The Exhibits of the Indian River School District were admitted without objection.

The Exhibits for the student were admitted without objection.

FINDINGS OF FACT

1. Prior to her enrollment in the IRSD, the student had attended public school in XXXXX XXXXXX, New York where she had received accommodations under a 504 Plan. (DE-4; PE-17).
2. On 6/13/03, the student was enrolled in third grade at XXES in the IRSD. DE-2.
3. In September, 2003, the student began attending third grade at XXES and CXXXXX WXXXXX was her assigned regular education teacher. DE-5.
4. 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. DE-5; PE-18.
5. Following the conference, the parents requested and consented to an OT evaluation. DE-5.
6. The OT evaluation was performed by EXXXXXX GXXXXXX. On 9/25/03, Ms. GXXXXXX concluded that direct OT was not needed but that the OT would consult with the teacher if the teacher felt it was indicated. (DE-7). Ms. GXXXXXX believed that the 504 Plan adequately addressed the weaknesses and visual perception and visual motor skills indicated by the OT evaluation she performed. T-80-94 (2/15/05).
7. The parents argued that EXXXXXX GXXXXXX was instructed to perform a

"sensory awareness" (tactile and vestibular) evaluation and that she did not perform a sensory motor evaluation as requested. DE-5; T-100 (2/15/05); T-9 (2/15/05).

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

9. Ms. WXXXXX 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 to at least two phone conferences and five meetings. T-19-20 (1/24/05).

10. 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). DE-8; PE-20.

11. 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. DE-11; T-39 (1/24/05).

12. 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 parent's expense. The student received instruction from Sylvan Learning Center two times per week and private tutoring by JXXXXXX NXXXXXXX one time per week. D-14; T-125 (1/20/05); T-107 (3/15/05).

13. 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. DE-10; PE-22. This was the same time period when the student was receiving services outside of school as arranged by the parents.

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

15. Ms. WXXXXX 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 JXX XXXXX, a special education teacher at XXES, for 4 years. In that setting, they had worked with children with auditory processing issues. T-10 (1/24/05).

16. Ms. WXXXXX used a multi-sensory approach in the classroom. T-11 (1/24/05).

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

18. Ms. WXXXXX 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 Ms. WXXXXX. (T-41-42 (1/24/05)).

19. An independent OT evaluation performed in January, 2004, by X. X HXXXXXX of Easter Seals, at the expense of the parents, recommended therapy two times per week D-12.

20. Ms. HXXXXXX 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).

21. 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. D-13.

22. At the 2/3/04 meeting, the mother requested further evaluations in the areas of achievement and personality. DE-14.

23. Subsequently, behavior rating assessments known as Conner's Raters were completed by the teacher and parent. PXXXX HXXXXX, the speech pathologist, performed achievement testing. T-116-117 (1/20/05).

24. 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. DE-16; PE-26.

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

26. On 3/3/04, a 504 conference was held to discuss the student's grades and recent testing by the District's speech pathologist, PXXXX HXXXXX. (DE-18; PE-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).

27. The student took the State test (DSTP) on 3/11/04 and scored below the standard

required for promotion to fourth grade. DE-19.

28. 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 assessment. PE-31.

29. 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. DE-21;PE-33.

30. On 5/18/04, Mr. RXXXXXXXXXX performed the testing for the 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. DE-36.

31. Mr. RXXXXXXXXXX recommended that an IEP team meet and determine whether she qualified for special education services as a child with a learning disability. DE-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. DE-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 Ms. WXXXXX as much as possible. DE-38.

34. Ms. WXXXXX and RXXXXX LXXXX (school guidance counselor) testified that in late May 2004, the student told them she would be attending LCS 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 her areas of weakness as reading comprehension and math. They noted she was failing although "she has been tremendously supported throughout the school." PE-39.

36. The parents took the student to Dr. BXXXXXXXX, 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. (PE-40).

37. The meeting scheduled for 6/11/04 was rescheduled to 6/14/04. At that meeting, Mr. RXXXXXXXXX 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

(Mr. RXXXXXXXXXX) that the student was learning disabled in reading comprehension based on a severe discrepancy between ability and achievement. DE-27; PE-43. The IRSD team classified the student "Learning Disabled" as a student with a disability in reading comprehension. D-27.

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. DE-27; PE-43.

40. After the 6/14/04 meeting, JXX DXXXX, a special education teacher and special education coordinator prepared a proposed IEP. The proposed IEP was considered at the team meeting on 7/9/04. DE-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, including a plan to 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. DE-29, page 3-4; DE-30; PE-44. T-132-137 (2/15/05).

42. The mother left the 7/9/04 meeting with the IEP indicating that she wanted to discuss it with the father. DE-29.

43. On 7/21/04, the mother went to LBES and met with Ms. HXXXXXX. She signed the IEP as being in disagreement with the proposed plan. T-172 (1/24/05).

44. The minutes of the 7/9/04 IEP meeting do not reflect the reason why the parents were rejecting the IEP. DE-29.

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

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

47. October 1, 2004, the student's grades from the LCS were: Math 92; Reading 84; History 97; Spelling 98; Science 96; Handwriting 92; Bible 95; Language 89. (P-49). However, there was no evidence presented that the programs at LCS and XXES were comparable. Therefore, the panel could not compare the student's progress in the two schools. PE-49

48. There was evidence presented that the student was not receiving any of the services at LCS that the parents were requesting be provided by XXES. T-13-21, 72-75 (3/15/05). 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 LCS. T-15-16 (3/15/05); T-47 (3/15/05);

DISCUSSION

1. Was the issue of failure to identify timely raised?

Despite the fact that the panel ruled prior to the start of the hearing that the issue of whether IRSD failed to identify the student as a child entitled to special education services, the parents spent the majority of their forty-eight (48) page closing argument arguing that the issue

should have been allowed and that the IRSD did in fact fail to identify the student. The record is full of examples of the leeway and assistance given to the parents as pro se litigants during the course of the five (5) day hearing. The parents were continuously told that the panel could not give them special privileges simply because they were pro se litigants. Nonetheless, the parents continued to argue in their closing argument that they should have been afforded more leeway and should have been given more assistance because they were pro se litigants. They even went so far as to insinuate that counsel for the district should have recognized what issue they were trying to identify and argued it. (Parent Closing Argument, p. 29) Clearly, it would have been an ethical violation for the district's counsel to do so.

Long before this five (5) day hearing began, the parents clearly were searching for an attorney to assist them as this matter appears to have been delayed while the parents searched for free or inexpensive legal assistance. Presumably, they consulted with several attorneys. Clearly, they consulted with at least one attorney as they, at one time, requested a continuance to allow their attorney to prepare for the case. They later withdrew the request for the extension indicating that the attorney would not be representing them but that they had retained him on a consultative basis only. Therefore, it is clear from the record that the parents did have the assistance of counsel even if it was not during the course of the entire hearing. Furthermore, the parents had the excellent assistance of one *or more* seasoned parent advocates each day of the hearing. The parents wrote a forty-eight page closing argument citing case law to support their position. The parents are not the average pro se litigant. They are educated, intelligent people who more than adequately represented themselves in this due process hearing. To continuously argue that they were afforded less than a fair chance during this process is disingenuous.

The parents had more than enough opportunity to bring the proper issues before this

panel. The panel has already found that the issue of identifying the student as a child entitled to special education services was not raised in a timely manner so that the district could properly prepare to present evidence on the issue. The panel's decision has not changed despite the fact that the parents seem to believe that they get another chance to argue this issue in their closing argument. Therefore, this written decision will not address whether the IRSD failed to identify the student as a child entitled to special education services.

2. Did IRSD fail to provide FAPE to the student by failing to provide an appropriate IEP?

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 "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 the case at bar, the student came to the district with a 504 Plan which entitled her to accommodations in the classroom. There was no indication at that time that the student would be eligible for services under IDEA. Section 504 differs from the IDEA in several important ways, most important for this case is “Under Section 504 regulations, a free appropriate public education is defined as "the provision of regular or special education and related aids and services that . . . are designed to meet individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met and . . . are based upon adherence to specified procedures." 34 C.F.R.§ 104.33(b)(1). Under the IDEA, if a child has a disability that adversely affects educational performance, the child is entitled to an education that is designed to meet the child's unique needs and from which the child receives educational benefit. Section 504 includes no guarantee that the child will receive an education from which the child receives educational benefit.

It was not until late May, 2004, when the psycho educational testing revealed that the student was entitled to special education services that the district was required to provide the student with an IEP. Once the student was identified, the staff at XXES 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 LCS.5 Therefore, the IEP proposed by the district was never implemented. Quite simply, since the IEP was never given a chance, this panel can not find that it was inappropriate.

5 The record is not clear when the parents enrolled the student in LCS and gave the IRSD notice that they would be requesting reimbursement. However, the panel does not have to decide this issue even if the panel was to decide that tuition reimbursement was appropriate because the latest date when notice could have been given was August 20, 2004, which was ten (10) days before the child began at LCS.

DECISION

Based on the facts presented at the hearing, and the current law and regulations, the panel finds that it can not find that the District failed to provide the student with FAPE or that it did not provide the student with an appropriate IEP because the parents never allowed the IRSD to implement an IEP but instead unilaterally withdrew the student from the IRSD and placed her in a private school.

RELIEF

The request for private school tuition reimbursement and reimbursement for additional expenses is denied.

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 thirty days of the receipt of this decision.

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

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

Dated: _____ _____
John Werner