

DELAWARE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

In the Matter of:

CH)
Student)
)
v.)
)
Cape Henlopen School District)
School District)
And)
State of Delaware Department)
of Education)
Respondents)

HEARING DECISION AND ORDER
DE DP 07-06

Due Process Hearing Held: December 6 and 12, 2006

Date of Last Submission: December 23, 2006

Date of Opinion: January 6, 2007

Before the Hearing Panel: Sandra Battaglia, Esq. Chair
Mr. Stephen Hailey Educator
Mr. John Werner Lay Member

Counsel for School District Michael Stafford, Esquire
Young Conaway Stargatt and Taylor

Counsel for the Dept of Education Jennifer Kline, 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.

Nature and Stage of the Proceedings

On September 7, 2006, Parent on behalf of Student filed a due process hearing request with the Delaware Department of Education (DOE). Parent alleged that the School District violated the Individuals with Disabilities Act (“IDEA”) in the following areas:

- A. The District failed to develop an IEP while Student was still enrolled in a private school.
- B. The District failed to provide an IEP for Student’s 2006-2007 school year in a timely manner and according to IDEA requirements.
- C. The District has failed to provide the required 10 day notice of any proposed IEP meeting for 2006/2007 school year.
- D. The District has failed to provide the Speech and Language Evaluation stipulated by the District to be necessary before the District could begin to develop Student’s 2006/2007 IEP goals and objectives.
- E. The District failed to review and consider Student’s current standardized testing performed at The Gow School, his current teacher comments and his present levels of performance as provided by his end of year report card from The Gow School in its August 2006 Psycho-educational assessment.

Following the appointment of the Panel, the Parent requested that the Secretary of Education find that the Hearing Panel members were biased and unable to understand the IDEA rules using as examples of the Panel members’ lack of understanding excerpts from other hearings and other opinions. The Secretary’s response was that the decision of a Hearing Panel member to recuse himself or herself was to be made by the Panel. At the prehearing conference, Parent was asked about her request to remove the Panel members but she declined to renew her request and her decision was noted in the letter memorandum memorializing the pre-hearing conference. Between the first and second days of the hearing, Parent wrote a letter to the Hearing Panel arguing that the first day of hearing should be nullified and the Hearing Panel should recuse itself because the Parent perceived that the Hearing Panel was biased. The members of the Hearing Panel carefully considered Parent’s request for recusal when it was first made and each member felt that he/she was not biased and could be fair and impartial in rendering a decision in this matter.¹

¹ The Panel feels that the Parent’s attempts to recuse the Panel members is a matter of frustration at the system but Parent’s methods of making personal attacks on the Panel member’s qualifications and competence by using out of context statements made by members of the panel either in the course of the hearing or in an opinion is a tactic that is not very productive to the process.

The District asked that the DOE be joined as a party defendant. In the Due Process Hearing Request, Parent requested as a remedy that the Student should remain at the Gow School for the 2006-2007 school year and that the District should reimburse the Parent for the tuition. In such a case, because the DOE carries a portion of the financial burden, the DOE routinely is joined as a party defendant. The Parent objected to the joinder on the basis that as an unrepresented parent having two defendants would result in the Parent being “ganged up” on by the defendants. The Hearing Panel granted the joinder.

The District then filed a Motion to Dismiss on the basis that the claims brought by the Parent were legal, not factual, issues and could properly be decided by the Hearing Panel. The Hearing Panel requested that the issues be briefed and the District, together with the DOE, and the Parent filed briefs on the issue. After review of the arguments, the Hearing Panel decided not to grant the District’s motion and scheduled the Due Process Hearing. The Hearing Date was postponed once at the request of the District, the DOE and the Parent and then began on December 4 and continued on December 12, 2006. Closing arguments were presented in written form and were filed by all parties on December 22, 2006²

Issues Presented

- A. *The District failed to develop an IEP while Student was still enrolled in a private school.*
- B. *The District failed to provide an IEP for Student’s 2006-2007 school year in a timely manner and according to IDEA requirements.*
- C. *The District has failed to provide the required 10 day notice of any proposed IEP meeting for 2006/2007 school year.*
- D. *The District has failed to provide the Speech and Language Evaluation stipulated by the District to be necessary before the District could begin to develop Student’s 2006/2007 IEP goals and objectives.*
- E. *The District failed to review and consider Student’s current standardized testing performed at The Gow School, his current teacher comments and his present levels of performance as provided by his end of year report card from The Gow School in its August 2006 Psycho-educational assessment*

² The parties agreed to present the closing arguments one week after the receipt of transcripts which were provided electronically on December 15. Parent did not object to this arrangement but did request that she be provided with a hard copy because she did not have the computer capability to print out a large volume of pages. Parent, in her closing argument, for the first time protested the one week agreement and stated that such agreement was prejudicial to her. Parent did not ask for an extension nor did she object to the agreement during the hearing.

Finding of Facts

Student attended the Gow School, a private residential school for students with learning disabilities during the school year 2005-2006. Prior to the 2005-2006 school year, Student had attended the Gow School as well as other private schools. The Student had not attended the District's school since 2001. During these prior years, Parent had filed claims against the District on several occasions concerning the education of Student and had entered into a settlement agreement in connection with the Student's attendance at the Gow School for the 2006-2006 school year.

During the summer of 2005, the District decided that it would be an appropriate time to conduct an evaluation of Student in connection with the requirement of triennial evaluations and to develop an IEP should Student return to the District. While the Student was never reenrolled in the District, the Parent and the Principal SC who was serving in a dual role as director of special service for the District until September 1, 2006, were in contact in regard to other matters but Parent did not state definitively at any time that Student would return to the District nor did Parent re enroll the Student in any formal sense. In fact Parent reenrolled Student at the Gow School for the 2006-2007 school year.

On May 25, 2006 the District sent Parent a form to initiate the evaluation process.³ Parent returned the form within the requested ten days but failed to fill out the required consent (Parent Exhibit 6) thus requiring that the District contact the Parent to try to get the consent. The consent was finally received on July 6. The evaluation was conducted on August 7 and August 14 by District Psychologist. Early in the summer, District Psychologist requested information from the Gow School and sent to the Gow School forms for Teacher Rating Scales. Testing data relating to Student was received by District Psychologist and District Psychologist even requested a more legible copy of certain information which information District Psychologist incorporated into his report. The Teacher Rating Scales were returned to the District on Friday August 24, 2006 and forwarded to District Psychologist on Monday August 28, 2006. District Psychologist then prepared an addendum to his August report to incorporate the information received from the Gow School. The report prepared by the District Psychologist contained numerous references to testing information and other data provided by the Gow School.

An Eligibility/IEP conference was scheduled for August 22 by a notice dated August 18 (Parent Exhibit 10). Parent was given the opportunity to meet earlier than the required 10 day notice period if she would agree to waive the 10 day period or to meet August 28 or 29, which would be after the 10 days notice. Parent chose to attend the meeting of August 22, 2006 and signed a waiver. (District Exhibit B). The Eligibility/IEP meeting was convened on August 22 and the notes from the meeting indicated that the District Psychologist reviewed his findings and determination that the Student remained eligible for special services. Because of the length of that discussion and some obligations of

³ Parental consent is required to begin the evaluation process.

members of the IEP development team, the meeting of August 22 concluded without any discussion of the IEP. At the end of that meeting, the parties discussed when to reconvene to discuss the IEP and the District's wish was to convene as soon as possible but the Parent had travel plans and could not meet until September so the meeting was to be reconvened in September. The District specifically remembers that the date was to be September 11; however, Parent testified that she knew that the date was under consideration but that due to the birthday of one of her children on that date, she was not sure that she would be available that date.

The first day of school was September 6 and on September 7, Parent filed her request for a due process hearing. Student did not attend school on September 6 or on any day in September since Student returned to Gow School for its school year beginning September 5.

On September 11, the IEP Team was prepared to meet but Parent declined to attend citing the filing of the Request for Due Process on September 7. Because of Parent's filing, it is impossible to determine whether Parent intended to pursue the IEP process as of the end of the meeting on August 22 or whether Parent had already decided to file her Request for Due Process.

Also in September the Director of Special Programs attempted to reschedule the September 11 meeting for the continuation of the August 22 Eligibility/IEP meeting and despite offering several dates for the meeting, Parent refused to participate based on her filing of the Request for Due Process. The District also tried to schedule a speech and language evaluation to be conducted at the Gow School and the Parent refused permission again because the evaluation was being scheduled after the Request for Due Process had been filed.

During testimony, the evidence showed that the Parent had enrolled the student for another year (the 2006/2007 school year) in the private placement. This reenrollment occurred at least by March 2006. Regulations call for the parent to notify the district of such private placement with at least 10 days notice should the parent expect the district to fund such placement. No evidence was introduced to show that the district was so notified. (See §300.403)

Findings of Law and Opinion of the Hearing Panel

The Individuals with Disabilities Act (IDEA) contains requirements for IEPs for students who are entering the school district from other placements. While no regulation specifically relates to the reenrollment of a child from a private placement, the regulations do provide for a period of time during which the IEP for the new school year is being developed. Section 300.323 of the IDEA Regulations states when IEPs must be in effect:

(a) **General.** At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in §300.320.....

(c) **Initial IEPs; provision of services.** Each public agency must ensure that--

- (1) A meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services; and
- (2) As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

(d) **IEPs for children who transfer public agencies in the same State.** If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either--

- (1) Adopts the child's IEP from the previous public agency; or
- (2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§300.320 through 300.324.

*

*

(f) **IEPs for children who transfer from another State.** If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency--

- (1) Conducts an evaluation pursuant to §§300.304 through 300.306 (if determined to be necessary by the new public agency); and
- (2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in §§300.320 through 300.324.

(Authority 20 U.S.C. 1414(d) (2) (A)-(C))”

While the regulations state that the IEP is to be in effect at the beginning of the school year, the regulations go on to require that both initial IEPs, IEPs for students who transfer within the State and for students who transfer from another State all must receive a free appropriate public education while a new IEP is developed, adopted and implemented in accordance with the regulations governing IEPs. The Delaware Department of Education in its Administrative Manual for Special Education Services

(AMSES) mirrors the IDEA regulations and provides time frames requiring the development of an IEP within 30 days for students transferring from another district within the State of Delaware and 60 days for students transferring from school districts outside of the State of Delaware.

Neither the law nor common sense requires that an IEP be in place and fully implemented on the first day of any school year. IEP are by definition individualized education plans and with students new to a school district there needs to be a period of time that allows the District to work with the particular student and the student's family to ensure that the student receives the proper placement.

In the case at hand, the District did begin to prepare for an IEP well in advance of the upcoming school year by obtaining permission from the Parent to evaluate, requesting information from the Student's private placement and scheduling an Eligibility/IEP meeting in August. Circumstances, some of which were caused by the District because of vacations and other staffing issues and some of which were caused by the Parent through her failure to properly complete the parental consent form and her inability to continue the August 22 meeting any time before September 11, meant that the IEP was still being developed on the first day of school. Parent filed the Request for Due Process on the second day of school and refused to participate in the IEP development after that filing thus making sure that no IEP could be developed for Student.

Parent also argues that she did not receive the proper 10 day notice of the IEP meeting. Parent did admit that at the beginning of the August 22 meeting she waived her rights to the 10 day notice for that meeting. However, as the Hearing Panel understands Parent's argument, Parent believes that she should have received a 10 day notice for the September 11 meeting since in her reasoning the September 11 meeting was a new meeting and not governed by the original notice. The Hearing Panel does not find that the facts and circumstances support Parent's argument. Parent received a notice for the August 22 Eligibility/IEP meeting and was given the opportunity to meet at a later date or to waive her right to the 10 day notice. Parent chose to waive her rights in writing at the beginning of the August 22, 2006 meeting. The testimony from both the School District and the Parent agree that the August 22 meeting needed to be continued to a later date although there is a dispute as to the date of the continuance. In any event, whatever date the meeting would have reconvened there would be no need for another formal notice although in all likelihood, at the beginning of the meeting the Parent would have been asked and presumably would have agree to waive her rights to the 10 day notice. In addition, once Parent declined to attend the September 11 meeting, the District sought to reschedule the meeting to provide a 10 day notice and the Parent refused to participate citing the filing of the request for Due Process as the reason for not wanting to meet.

During the course of the hearing the Parent expanded on her claim that the 10 day notice was not provided to claim that the notice as given was inadequate because it did not indicate that transition services were to be discussed. The District states that the notice was broad enough to include the indication that transitional services would be discussed

and further, the District argues that the Parent waived any rights to dispute the context of the notice when she waived her rights at the beginning of the August 22 meeting. While the District's arguments are somewhat persuasive, it would seem that the Notice could have included a more definitive statement that transition services were to be discussed as a part of the development of the IEP. However, the District's failure to include such a definitive statement as to transition services, if a procedural error at all, is very minor and easily remedied during the course of the development of the IEP.

The final procedural argument raised by Parent is that the District did not perform the necessary speech and language evaluation before the development of the IEP. While the District did not have the speech and language evaluation completed by the first day of school, there is not a requirement that such an evaluation be done in the time frame stipulated by the Parent. While the Panel would have preferred to see the evaluation done during the summer months, the fact that it wasn't completed as of August 22 is not an egregious violation by the District. District attempted to complete the evaluation in a timely manner by asking permission from the Parent to conduct the evaluation at the Gow School during the month of September but the Parent refused to consent based on her assertion that having filed a Request for Due Process she would not allow the District to continue with any evaluations or meetings that related to the development of an IEP for Student.

The last argument raised by Parent is that the evaluation prepared by District Psychologist failed to consider the Student's current standardized testing performed at The Gow School, his current teacher comments and his present levels of performance as provided by his end of year report card. District Psychologist had available information from the Gow School which he considered appropriate in making his determination of eligibility for special services. When additional information was received, District Psychologist amended his report to include that information. There was no evidence presented that showed that the District Psychologist did not consider the information from the Gow School in making his determination that Student was eligible for special services.

Remedy

Parent seeks as a remedy for the alleged violations the reimbursement of Student's tuition at the Gow School for the 2006-2007 school year as well as payment for additional services such as driver education classes. In order for procedural violations to rise to the level of a denial of FAPE, the courts have consistently stated that the procedural violations must "(i) [have] impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or (iii) caused a deprivation of educational benefit." 34 CFR 300.513(a) (2). The Delaware District Court in its opinion in *Corey v. Cape Henlopen School District* (286 F. Supp. 380, 385 (D. Del 2003)) stated that "minor" procedural violations do not constitute an IDEA violation. In addition, when Congress

considered the reauthorization of IDEA they specifically discussed that minor procedural violations should not, of themselves, show any violation of FAPE.

Summary

Parent presented four procedural and one substantive allegation in her Request for Due Process. Based on the testimony and a review of the applicable statute, regulations and case law, the Hearing Panel finds that the only possible procedural error was the failure of the District to include in its notice of the Eligibility/IEP meeting a definitive statement that transition services would be discussed as a part of development of Student's IEP. This possible procedural error is easily curable and does not rise to the level of impeding the child's right to FAPE or significantly impeding the parent's right to participate in the decision making process regarding the provision of FAPE to the Student or causing a deprivation of educational benefit. In fact, the minor nature of the procedural violation is such that under the standard of *Corey*, there would be no violation of the IDEA. Further, the Hearing Panel finds no substantive violation in the use of the Gow School records in connection with the preparation of the psycho-educational evaluation.

For the reasons stated above, the Hearing Panel finds for the School District.

Appeal Rights

This order may be appealed within 90 days.

So ordered this 6th day of January, 2007

Sandra K. Battaglia
Sandra K. Battaglia, Esquire Chair

John Werner
John Werner, Lay Member

Stephen Hailey
Stephen Hailey, Educator