

BEFORE THE SPECIAL EDUCATION DUE PROCESS HEARING PANEL
DUE PROCESS HEARING FOR THE COLONIAL SCHOOL DISTRICT

IN RE THE MATTER OF:	:	
	:	DP DE (08-16)
["Student"],	:	
	:	
Petitioner,	:	
	:	
v.	:	
	:	
COLONIAL SCHOOL DISTRICT	:	
	:	
Respondent.	:	

The Due Process Hearing for ["Student"] was heard before a Hearing Panel consisting of Norman E. Levine, Mr. Kenneth Rose and Mrs. Judith Mellen. Hearings were held on October 14, 2008, November 18, 2008, December 3, 2008 and January 29, 2009.

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

For the Colonial School District (hereinafter "CSD"):

James H. McMackin, III, Esquire
Morris, James, LLP
500 Delaware Avenue, Suite 1500
Wilmington, DE 19899

For ["Student"]:

["Mother"]
["Address"]

The following individuals were called to testify on behalf of the "CSD":

1. Ms. ["S.K."]
Director of Special Education "CSD"
2. Ms. ["M.M."]
Speech Language Pathologist – worked for "CSD" 2007-2008 school year
3. Mr. ["T.D."]
School Psychologist "CSD"
4. Ms. ["H.B."]
Occupational Therapist "CSD"
5. Ms. ["K.C."]
Physical Therapist "CSD"

6. Ms. ["K.M."]
Special Education Teacher "CSD"

The following individuals were called to present testimony of behalf of ["Student"]:

1. Mr. ["D. B."]
Principal – ["Middle School"] "CSD"
2. ["Student's grandmother"]
3. ["Student's half-sister"]
4. ["Mother"]
5. ["Student"]
6. ["Father"]

DISTRICT EXHIBITS

1. Hearing Request
2. Curriculum Vitae of ["S.K."]
3. Curriculum Vitae of ["T.D."]
4. Curriculum Vitae of ["P.R."]
5. Curriculum Vitae of ["H.B."]
6. Curriculum Vitae of ["M.M."]
7. Curriculum Vitae of ["K.C."]
8. Curriculum Vitae of ["K.M."]
9. Attendance Records
10. Health Records
11. Proposed 2008-2009 IEP
12. Completed 2007-2008 IEP with Updated Progress on Goals and Objectives
13. 2007-2008 IEP
14. 2005-2006 IEP
15. August 14, 2008 Meeting Minutes
16. June 10, 2008 Meeting Minutes
17. May 30, 2008 Meeting Minutes
18. May 13, 2008 Meeting Minutes
19. June 6, 2007 Meeting Minutes
20. May 15, 2007 and May 22, 2007 Meeting Minutes
21. May 23, 2006 Meeting Minutes
22. June 5, 2008 Letter from ["Mother"]
23. June 5, 2008 Memo from ["Mother"]

24. DSTP and Grade Reports
25. Homebound Procedures
26. Prior Written Notice
27. May 2008 Psycho-Educational Evaluation
28. Addendum to Psycho-Educational Report
29. 2005 Psycho-Educational Report
30. 2002 Psycho-Education Report
31. 1998 Psycho-Education Evaluation and State Evaluation
32. Analyses of ETCH
33. ETCH Manual
34. OT Work Product
35. 5/08 OT Evaluation
36. 5-07 OT Report
37. 5/06 OT Report
38. 3/05 OT Evaluation
39. 3/02 IT Report
40. 5/01 OT Evaluation
41. SLP Records
42. 5/08 SLP Evaluation
43. Fitness Gram
44. S.F.A. Review
45. S.F.A. Records
46. 7/08 PT Evaluation
47. 5/05 PT Evaluation
48. 4/04 PT Evaluation
49. 4/03 Pt Evaluation
50. 3/02 PT Evaluation
51. 5/01 PT Evaluation
52. Partial School Year 07/08 Work Product

["Student's"] EXHIBITS

2008 Exhibits

1. May 25, 2007 Letter ["Mother"] to ["C"]
2. October 7, 2008 Letter ["B"] to ["Mother"]

2009 Exhibits

1. January 22, 2009 Letter ["Mother"] to McMacklin
2. June 16, 2008 Request for Due Process Hearing
3. January 16, 2009 CFR Sections
4. May 24, 1993 A.I. duPont Hospital OT/PT Note
5. May 19, 2005 Evaluation Report
6. 2008 Evaluation Report
7. December 12, 2008 Woodruff District Improvement Memorandum
8. June 23, 2008 Letter McMacklin to Parents
9. October 2, 2008 Letter ["D.B"] to ["Mother"]
10. October 1, 2008 Letter ["Mother"] to ["D.B."]
11. May 29, 2008 IPRD Meeting Minutes
12. May 13, 2008 Letter ["R"] to ["S.K."]
13. August 28, 2008 Letter ["S.K."] to ["R"]
14. May 25, 2005 IPRD Meeting Minutes
15. June 5-6, 2007 E-mails between ["S.K."] & ["H.B"]
16. March 5, 2001 Down Syndrome: Teaching Strategies article
17. 2003 Cursive Writing by Jan Z. Olsen – Article
18. Hooked on Phonics work book

SUMMARY OF ISSUES

I. PROCEDURAL ISSUES

1. Was [“Student”] denied a timely resolution meeting?
2. Was [“Student”] denied a pretrial conference?
3. Was [“Student”] denied the right to present relevant witnesses?
4. Was [“Student”] entitled to have “CSD” pay for a psycho-education evaluation by an evaluator of his choice?
5. Was [“Student”] speech and occupational therapist’s evaluation improperly excluded from the evidence?
6. Did [“Student”] request consecutive hearing dates, and if so, was the request improperly denied?
7. Was the motion to recuse the second appointee as Panel Chair improperly denied?
8. Was the requirement of written closing arguments violative of [“Student”] due process rights?
9. Did “CSD” comply with discovery requirements?

II. SUBSTANTIVE ISSUES

1. Were the 2005/6, 2006/7, and 2007/8 IEPs implemented?
2. Was the draft 2008/9 IEP reasonably calculated to confer meaningful educational benefit to [“Student”]?

PROCEDURAL ISSUES

1. 34 C.F.R. § 300.510 requires that the district must conduct a resolution meeting within fifteen days of receiving parents' due process complaint. The district received the complaint on June 19, 2008. On June 26, 2008 the district wrote the parents asking if she wanted to participate in a resolution meeting. Parents never responded with regard to the resolution meeting. A resolution meeting was held on August 14, 2008 which was not successful. The district is not responsible for the delay, and parents are not entitled to any relief. Further even if parents were entitled to relief, parent's remedy for the district not holding the meeting within fifteen days, is that the parents may request the hearing panel to order the forty-five day time to begin. Special Education Rights of Parents and Children, Del. Dept. of Ed., Sept. 10, 2007 at para. 14, attached as an Exhibit to parents' closing argument.

2. A pretrial conference was held on July 22, 2008. Additionally, pretrial conferences were held at the beginning of each hearing day, October 14, 2008, November 10, 2008, December 3, 2008, and January 29, 2009. There was not a denial of the opportunity to present pretrial issues. The panel provided more than ample opportunity for the presentation of pretrial issues, which opportunity was abused by Petitioner, creating insufficient hearing time on each hearing day.

3. Petitioner was not denied the right to present relevant witnesses. Although Petitioner's presentation of witnesses was limited to one hearing day, Petitioner, as stated above, squandered hearing time on pretrial issues. Additionally Petitioner's cross-examination occupied at least two-thirds of the hearing time on the hearing days, prior to Petitioner's one hearing day. Petitioner occupied approximately ninety per cent of the hearing time on her one hearing day.

In fact, Petitioner did not use the full day of hearing time offered to Petitioner, and it was the only hearing day that adjourned early, because the testimony had been completed.

4. Petitioner was not entitled to have the district pay for a psycho-educational evaluation. The hearing panel was presented with this issue, and in the proper exercise of its discretion ruled that Petitioner was entitled to obtain a psycho-educational evaluation, and the panel would consider assessing the costs of psycho-education evaluation to the district, as part of its final decision.

5. Petitioner objects to the denial of the admittance into evidence of an occupational therapy evaluation dated January 20, 2009 and executed by ["P.H."], OTR/L of ["Hospital"]. The document was attempted to be introduced without either the author or the record custodian present, and a copy of the evaluation was not presented to the district at least five days before the hearing date, as required by

rule and the panel's order. Therefore, the report was not properly admitted into evidence.

6. Petitioner did not request consecutive hearing dates. In fact, Petitioner was adamant about no hearings on Mondays and Fridays because of her work schedule. Further as stated above, Petitioner requested, and was given time between hearing dates to seek out, meet with, hire, and have a report prepared by a psycho-educational expert, and reported at the next hearing date that the expert had been contacted, and additional time was needed to have the expert evaluate and complete his report. Petitioner did not object to the scheduling of hearing days as they occurred. Additionally, the need for four hearing days was directly related to Petitioner's misuse of hearing time with regard to procedural matters, which were continually represented after being denied, and obsessive and non-relevant cross-examination. It was Petitioner who moved to recuse two of the three original panel members, which further exacerbated the delays.

In sum, delays between hearing dates, the number of hearing days, and the productivity of those hearing days were all a direct result of Petitioner's conduct throughout the hearing.

7. The motion to recuse the second appointed Panel Chair was properly denied. Although Petitioner disagreed with many of the Chair's ruling, and sought to reargue those issues multiple times, not ruling in Petitioner's favor is not a grounds for recusal, and Petitioner stated no basis upon which the second Panel Chair should have been recused.

8. In this hearing involving four hearing days, approximately fifteen hundred pages of transcript, numerous issues, some relevant, some not, the completion of the last hearing date at 4:30 p.m., when the hearing was scheduled to conclude at 5:00 p.m., and Petitioner throughout the proceeding was demanding the transcript from the preceding hearing date before the next hearing date, all factors that lead to the conclusion that the requirement of written closing arguments rather than oral arguments, that could not have been concluded without an additional hearing day, was a sound exercise of discretion, and not a violation of Petitioner's procedural rights.

9. There is no evidence that the district did not comply with discovery requests as alleged by Petitioner. In fact it was Petitioner who repeatedly failed to comply with discovery requests.

For the reasons stated above, no procedural rights of the Petitioner were violated.

FINDINGS OF FACT

1. It is “CSD” ‘s obligation to provide a free appropriate public education (“FAPE”) to each student identified with a disability cognizable under the Federal Individuals with Disabilities Education Act (“IDEA”) and 14 Del. C. § 3120.

2. Petitioner challenges the implementation of the 2005-2006, 2006-2007 and 2007-2008 Individualized Education Program (IEP), and the appropriateness of the 2008-2009 draft IEP.

3. As a result of the request for a due process hearing, the stay put provisions required that the 2007-2008 IEP continue in effect.

4. [“Student”] is an outgoing, pleasant, child, whose date of birth is [“Date”]. [“Student”] will soon be celebrating his 14th birthday.

5. [“Student”] has Down Syndrome and a tested IQ in the range of 40-54, which severely limits his abilities.

6. The goal and objectives in the 2007-2008 IEP, which is still in effect as the result of the stay put provisions, have been implemented as indicated by the evidence introduced by the “CSD” through testimony and exhibits.

7. [“Student”] has been absent and tardy on numerous occasions which has hindered the implementation of his IEP, as continuity and consistency are vital to [“Student’s”] progress.

8. The proposed 2008-2009 is addressed toward training [“Student”] to function independently and in the community. These goals are important because of [“Student’s”] age, and the necessity to transition him into independent living.

9. The 2008-2009 IEP was formulated based on current, reliable data available to the IEP team, and was individualized for [“Student”], with reasonable, defined goals and objectives.

10. The parents’ concerns, where appropriate, were included in the proposed IEP.

11. The district based its curriculum for Downs Syndrome children on data from the University of Indiana at Bloomington, which is recognized as reliable, researched, and respected.

12. The proposed IEP builds upon [“Student’s”] existing knowledge, and is calculated to build upon his strengths.

13. The proposed IEP is reasonably calculated to meet [“Student’s”] need, and addresses goals and objectives which are built on [“Student’s”] knowledge, and which are measurable and include short term objectives and long term goals.

14. The parents' demand for increased related services, occupational therapy (OT), physical therapy (PT) and speech and language pathology (SLP) are excessive based on ["Student's"] needs, and would take too much time away from ["Student's"] instructional time.

15. ["Student's"] ability to participate in the educational curriculum negates his need for the OT services requested by his parents.

16. ["Student's"] evaluation supports the conclusion that the current level of SLP services is appropriate.

17. There has been no basis offered to support the request for PT.

18. There has also been no showing that ["Student"] needs or would benefit from homebound instruction.

19. Parents challenge ["Student's"] classification change from educable mentally disabled (EMD) to trainably mentally disabled (TMD) in his 2005/2006 IEP based upon objective assessments. However Father signed the IEP agreeing to this classification change.

20. It makes no difference to the development of the IEP, whether ["Student"] was classified EMD or TMD, because the IEP is based upon his individual needs.

21. ["Student's"] achievements have been consistent with his IQ and cognitive delays.

ARGUMENT

A. Implementation

Parents contend that the prior IEPs were not implemented. The burden to prove the prior IEPs were implemented is upon the District. Carlisle Area Sch. V. Scott, P., 62 F.3d 520(3rd Cir. 1995), Oberti v. Bd. of Ed. of Borough of Clementon Sch. Dist., 995 F.2d1204 (3rd Cir. 1993) and Coale v. State Dept. of Educ., 162 F.Supp 2d 316 (D. Del. 2001).

The District has met its burden based on the uncontradicted testimony of its witnesses and its exhibits. For example, ["S.K."], Director of Student Services for the District testified that the district did not only implement the existing IEP, but went beyond the implementation of the IEP by providing ["Student"] with extra instruction, attention and assistance to build his self-esteem to accomplish tasks presented to him by Ms. ["K.M."], ["Student's"] teacher. Coupled with Mother's request to introduce 90 new words per marking period to ["Student"], ["K.M."] measured ["Student's"] progress everyday, she used embedding techniques in all contacts with ["Student"], and consulted on a frequent basis with ["Student's"] related service providers.

Ms. ["K.M.'s"] testimony continued that she used flash cards, blocks and other techniques to implement the mathematics, goals and objectives. With regard to counting goals and objectives, she worked with ["Student"] on a one-to-one basis with bills, scarves, blocks, puzzle pieces, number lines, counting boards and paper.

Reading objectives were also implemented by Ms. ["K.M."] as well as the related service providers, and the classroom paraprofessionals.

Additionally, Ms. ["K.M."] worked on the other goals and objectives in the classroom including science, social studies, telling time by analog clock, and communication skills. She worked with the SLP in implementing communication skills, which included speech articulation, answering an asked question, etc.

Handwriting was addressed by Ms. ["K.M."] and Ms. ["H.B."], the occupational therapist, using the Handwriting Without Tears system.

Ms. ["K.M.'s"] testimony that the IEP was implemented is corroborated by Ms. ["M.M."], the speech and language pathologist and Ms. ["H.B."].

B. Draft 2008-2009 IEP

Under the IDEA, "[a] free, appropriate public education consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to 'benefit' from the instruction." S.H. v. State-Operated Sch. Dist., 336 F.3d 260, 264 (3d Cir. 2003). Significantly, "[a] free appropriate public education 'need not be the best one possible, or the one calculated to maximize the child's educational potential,'" Lewisville Indep. Sch. Dist. v. Charles W., 81 Fed. Appx. 843, 846 (5th Cir. 2003); Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607, 612 (8th Cir. 1997) (a student's IEP need not maximize their potential nor provide for the best possible education); Doe v. Tullahoma City Sch., 9 F.3d 455, 459-460 (6th Cir. 1993) (IDEA "requires that the [school district] provide the educational equivalent of a serviceable Chevrolet to every handicapped student [T]he [school district] is not required to provide a Cadillac"), and "proof that loving parentss can craft a better program than a state offers does not, alone, entitle them to prevail under the Act." Kerkam v. McKenzie, 862 F.2d 884, 886 (D.C. Cir. 1991), *subsequent opinion*, 931 F.2d 84 (D.C. Cir. 1991).

In Hendricks Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982), the Supreme Court established a two-part test for determining the validity and/or appropriateness of an IEP. The first prong of that test requires compliance with the procedural requirements of the IDEA. Second, an

IEP must also be reasonably calculated to provide the child with a "meaningful educational benefit." Ridgewood v. Bd. of Ed. v. N.E., 172 F.3d 238, 247-48 (3d Cir. 1999); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988). The requisite degree of progress required varies depending on the student's abilities. Alex R. v. Forestville Cmty. Unit Sch. Dist. #221, 375 F.3d 603, 615 (7th Cir. 2004).

Ms. ["S.K."] testified that the IEP team in drafting the IEP included goals for training ["Student"] to be as independent, and function as independently as possible in the community. Some of the goals, which were included at the request of Mother, were too rigorous.

Her testimony continued that the IEP team relied upon observations, evaluation, discussions, and team members' knowledge obtained through working with ["Student"] for a number of years. The goals were defined, measurable, and tailored for ["Student"]. The IEP team included goals and objectives suggested by parents.

The proposed IEP specifically addressed ["Student's"] needs in language arts, functional academics, oral and written communications, within the context of the least restrictive environment. The IEP was built upon ["Student's"] strengths, because of his failure to master certain goals and objectives in the 2007-2008 IEP. Building upon his strengths involved teaching ["Student"] to understand numbers, not simply count by rote. His parents objected to this strategy contending that it was not challenging enough. The parents' approach would not meet ["Student's"] need of understanding numbers in the community.

The proposed IEP includes implementation in the school and community setting, to generalize learning skills from one setting to another, and to address ["Student's"] transition from school life to independent life.

["Student"] was provided the opportunity to perform tasks in the cafeteria and to practice in community settings, which tasks were opposed by his parents.

With regards to reading, again the parents disagreed with the district's approach. The district's position is to teach ["Student"] words that have meaning for him such as danger, poison and exit, and also to teach him common words such as I, the, saw. The parents are seeking to have words such as barber, citizen and situation taught to ["Student"]. Based on his limited success with simple words, the parents' position is untenable.

Similarly, the parents and district disagree about writing goals. The parents want repetitive practice writing over and over. The district approach is that having ["Student"] write repeatedly is not helpful, as he becomes frustrated with this task.

As with the above goal, parents and the district disagree on writing in cursive. ["Student"] can only write in cursive with a model. He cannot even sign his name in cursive without a model. The parents do not seem to understand Down Syndrome and ["Student's"] limited capabilities. The parents must understand a Down Syndrome child's capability, and work with the school in developing an appropriate IEP to meet ["Student's"] needs, and taking into consideration his rapid approaching majority.

There has been no evidence introduced that would indicate that the proposed IEP is not appropriate, and that it is not reasonably calculated to provide ["Student"] with meaningful education benefit, nor has there been any credible evidence presented that the parents' proposals regarding the IEP, additional services or homebound instruction appropriate.

CLASSIFICATION

The parents are requesting that ["Student"] be reclassified from TMD to EMD. The change from EMD to TMD occurred on May 19, 2005, and is time barred by the statute of limitations. It was approved by Father. The Request for Due Process was filed on June 18, 2008, more than three years later.

Further the classification of TMD is appropriate. TMD encompasses on IQ of 35-50, and EMD encompasses on IQ of 50-70. Each has a margin of error of plus or minus 5. The school psychologist, Mr. ["T.D."] was appropriately qualified, and is certified as a Nationally Certified School Psychologist (NCSP) in 1989 and is a Delaware and Maryland Certified School Psychologist. Mr. ["T.D."] testified that the TMD classification is appropriate for ["Student"] because of his past evaluations, present level of performance, and the scoring system of WASI. He indicated that ["Student"] had a valid score of 53 on the Weschler Abbreviated Scale of Intelligence (WASI). However, the lowest score one can obtain on the WASI is 50. ["Student's"] score of 53 reflects one right answer on one subtest, and therefore, TMD is the appropriate classification.

Finally, the classification is not relevant, because the IEP is based upon need, not classification. 14 DE Admin. Code 925.6.5.2 requires that classification is not a relevant factor in determining whether a child is receiving FAPE.

CONCLUSIONS

Based on the reasons stated above the District has proven by competent evidence that the 2007-2008 IEP was implemented, and 2008-2009 IEP was appropriate. There was no credible evidence provided to the contrary.

The panel is aware that the parents have their child's best interest at heart, and encourage the parents to work with the school to reinforce the efforts being made by the school to implement the goal of independent functioning in the community.

The panel is also aware of the bad feelings that exist between the parents and the school, and would suggest, not order, that a change of location for ["Student"] might be advantageous.

DECISION

Based on the facts established at the hearing by testimony and exhibits, and the current law and regulations, it is the decision of the hearing panel that "CSD" provided an appropriate IEP, appropriate implementation of the prior IEPs, and a FAPE to the student.

RIGHT TO APPEAL

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

DATED: April 13, 2009

/s/ Norman E. Levine
NORMAN E. LEVINE,
Hearing Panel Member

/s/ Kenneth Rose
MR. KENNETH ROSE,
Hearing Panel Member

/s/ Judith Mellen
MS. JUDITH MELLEN,
Hearing Panel Member