

DELAWARE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

In the Matter of:

XXXXXXXXXXXXXXXXXX

Student

v.

Christina School District

School District

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HEARING DECISION AND ORDER
DE DP 05-01

Due Process Hearing Held: April 19 and 20, 2005
Before the Hearing Panel: Sandra Battaglia, Esquire Chair
Dr. Harold Tarriff, Educator
Ms Patricia Toland, Lay Member

Parents

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Counsel for School District

Jennifer Brierley, Esquire
Morris, James, Hitchens and Williams

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.

INDEX OF NAMES

Parent	XXXXXXXXXXXXXXXXXXXX
Student	XXXXXXXXXXXXXXXXXXXX
Student's Aunt	XXXXXXXXXXXXXXXXXXXX
Elementary School	Brader Elementary School
School District	Christina School District
Principal	XXXXXXXXXXXXXXXXXXXX
First Grade Teacher	XXXXXXXXXXXXXXXXXXXX
Second Grade Teacher	XXXXXXXXXXXXXXXXXXXX
Third Grade Teacher	XXXXXXXXXXXXXXXXXXXX
Reading Resource Teacher	XXXXXXXXXXXXXXXXXXXX
Reading Resource Teacher	XXXXXXXXXXXXXXXXXXXX
School Psychologist Brader	XXXXXXXXXXXXXXXXXXXX.
School Psychologist Keene	XXXXXXXXXXXXXXXXXXXX

Nature and Stage of the Proceedings

Parent filed a due process hearing request on behalf of Student on August 27, 2004. At that time Student was entering Fifth Grade and Parent's request for a due process hearing was based on the failure of the School District to identify Student as being in need of special services, that Student should qualify for special services and that the School District should put into place an individualized education plan ("IEP") in light of Parent's statement that Student was in need of such services. An initial pre hearing telephone conference was held with the parties on September 13, 2004 during which the Parent stated that there was a need to have Student identified as needing Special Services and presented with an IEP for the present school year 2004-2005. A due process hearing was scheduled for September 29, 2004 to continue on October 1 and 4, 2004.

Subsequent to telephone conference the Parent and School District reached agreement on an evaluation to determine if Student qualified for special services. On September 27, 2004 the Hearing Panel granted the School District's request for a continuance to continue the evaluation process and the development of an IEP. The Parent agreed to the continuance and the hearing was rescheduled for November 3, 4 and 9, 2004.

On October 26, 2004 Student was identified as eligible for special services and an IEP was established. The November 2004 Hearing was postponed so that the parties and the Hearing Panel could determine the legal issues that remained in connection with Parent's August Due Process request. While the Parent's primary objective in the August request was to have the Student identified, and that objective had been met, the Parent asserted that the identification should have occurred in 2001 and that the School District was responsible for the Student's lack of success over the next four school years because of that failure to identify the Student.

Following the Parent's assertion of this additional issue, the School District argued that the Parent's complaint was barred by the statute of limitations and presented a motion and brief setting forth its position on that issue. By letter dated November 15, 2005 the Hearing Panel, through its Chair, found that while the applicable IDEA law does not have specific statute of limitations, the case law has recognized that claims can be time barred based on specific factual situations. The case law generally allowed the statute of limitation defense when Parents unilaterally acted and also failed to put the school districts on notice of the alleged failures. Because the case law's determination of the applicability of the statute of limitations is factually based, the Panel determined that it would reserve decision on the statute of limitation defense until more of the factual record was established.

On December 10, 2005 another pre hearing conference was held and the parties narrowed the legal issues and determined to go forward with the hearing on January 10, 11 and 25, 2005. The legal issue for which the hearing was requested was determined to be whether the School District should have identified Student as in need of special

services in March, 2001. On January 9, 2005, the parties mutually requested a postponement of the hearing and the Hearing Panel agreed to that request.

Over the next two months, the parties attempted to narrow the legal issue and the remedy sought. Ultimately, the School District agreed to accept liability for the 2003-2004 school year on the basis that if Student had been evaluated at that time, Student likely might have been identified as in need of special services. The School District offered hours of compensatory education as the remedy for that school year¹. The parties failed to agree on the exact nature of the remedy and requested that the Hearing Panel make that decision. In addition, Parent renewed the assertion that Student should have been identified as in need of special services in March 2001 and asked the Hearing Panel to make a determination on that issue.

The hearing commenced on April 19 and continued April 20, 2005. The School District presented 10 witnesses which witnesses were cross examined by Parent. Parent also called some of the School District's witnesses on Parent's behalf and was able to conduct direct examination of those witnesses.

Issue Presented

1. Whether in March 2001 Student should have been identified as needing special services in accordance with the Individuals with Disabilities Act, 20 U.S.C. §1400 et.seq. ("IDEA") and Ch. 31 of Title 14 of the Delaware Code?
 2. What is an appropriate remedy for the lack of services received by Student in the 2003-2004 school year.
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1. WHETHER IN MARCH 2001 STUDENT SHOULD HAVE BEEN IDENTIFIED AS NEEDING SPECIAL SERVICES?

Findings of Fact

Student attended elementary school in the School District from kindergarten (1999-2000) through third grade (2002-2003).("Elementary School") In 2003-2004 Student attended another elementary school in the School District and in 2004-2005 Student attended a third elementary school still in the School District. The years in question in this hearing are the years from 2001 through 2003 while Student was at Elementary School.

During the Hearing, the School District presented extensive testimony from the administrators and teachers at Elementary School. The testimony presented was very

¹ The remedy of compensatory education is addressed later in this Opinion under "Compensatory Education".

thorough and presented a consistent picture of Student and Student's needs and weaknesses. Extensive testimony was presented as to how the process of identifying students for special services was handled as was an exhaustive picture of the classroom and outside of the classroom interventions² provided to the Student to help Student learn.

The School District presented testimony from the Principal of the Elementary School, the Student's first, second and third grade teachers, the Reading Resource teachers for all three years and the School Psychologist. All of the witnesses presented a very similar picture of Student. Student was an average student who had difficulty reading but who was able to progress through the various reading levels and ultimately was on grade level, although at the lower end of the range, when Student ended Third Grade.

Student's progression can be measured in a very summary fashion by his success at the end of each school year. In 2001, at the end of First Grade Student was not promoted to Second Grade but rather was assigned to Second Grade at the insistence of Parent. By letter dated June 11, 2001, the Principal noted that "many of the skills and work habits necessary for success had not been attained". The letter indicated that Student's progress would be monitored in Second Grade and if improvement was not noted that Student may need to be retained at that time. However Student did progress and at the end of Second Grade was promoted to Third Grade and subsequently in 2003 was promoted to Fourth Grade.

Student's progress was a result of the attention paid to Student's needs and weaknesses by the School District working in conjunction with Parent. In 2000-2001, Student's First Grade teacher noted that Student was having difficulty and referred Student to the START team. The START team is an "instructional support team" and is comprised of school administrators, classroom teachers, special education teachers, guidance counselors, reading specialists, the school psychologist and the educational diagnostician. Referral to the START team is a process whereby teachers enlist the help of the team to identify possible instructional strategies or "interventions" for learning or behavior problems. This referral is a part of the process for evaluating and identifying students who are having difficulties and may or may not lead to a referral for an initial evaluation to determine a student's eligibility for special education. In 2001 the START team listed several interventions to aid Student including giving Student additional small group reading instruction through the Reading Resource Room. These resources were put into place during the latter portion of the school year and Student was not promoted to Second Grade but was assigned to Second Grade at the insistence of Parent.

During 2001-2002 Student was in Second Grade at Elementary School. The interventions begun at the end of the First Grade year were continued and Student did

² Interventions in the educational setting include services in addition to or to supplement the typical classroom instruction which is provided to help the student to learn in subjects such as reading. One example of an intervention is the use of the Reading Resource Room where students receive small group instruction in reading.

progress in reading although Student was still below the age and grade equivalents in reading. In March 2002 Student was again referred to the START committee and almost simultaneously, Parent requested that Student be evaluated for eligibility for special education.³ The START committee also developed an intervention plan which included, among other things, referral to the school guidance counselor, small group instruction and continued participation in the Reading Resource program. On April 18, 2002 a meeting was held with Parent and the Elementary School teachers and administrators to review Parent's request for an evaluation. At that meeting it was determined that Elementary School through its psychologist would conduct the evaluation. Parent requested a speech and language evaluation be conducted and even though the Elementary School did not feel that speech and language issues were at issue, the Elementary School acquiesced to the request and a speech/language evaluation also was conducted.

On May 20, 2002, after finishing the evaluation process, the Elementary School teachers and administrators held a conference with the Parent and other interested parties, including Student's aunt, to discuss the findings of the evaluation. The school psychologist who conducted the evaluation testified at the Due Process hearing about that meeting and as to the results of the testing. The psychologist noted that Student was found to be within the norm for all of the indicators. In addition the speech /language evaluation showed no difficulties in that area. The group concluded that Student did not meet the eligibility requirements for special education but did indicate that interventions, including the Reading Resource Room instruction were still needed for Student to continue to progress. The Parent and Student's aunt concurred with the decision and indicated their agreement by signing the meeting summary.

In Third Grade Student continued to receive interventions including the Reading Resource Room. Student's Third Grade teacher testified that although Student often challenged the teacher's authority that Teacher and the Student were able to resolve the power struggle and Student was able to progress in all subject areas including reading. The Third Grade teacher testified how proud he was of Student's achievement during Third Grade noting that by the end of the year Student was within the benchmark levels for Third Grade proficiency for reading.⁴ As a result of Student's achievements, Student was promoted to Fourth Grade.

Student's time in Fourth and Fifth Grades was not a part of this Due Process Hearing so that no testimony was presented on any issues that arose during those years.

Legal Standard to Be Applied

IDEA and the regulations promulgated thereunder require that public schools provide a free and appropriate public education ("FAPE") to all students. To provide

³ When a parent requests an evaluation, the evaluation cannot take place immediately. Certain requirements must be met including signing of a parental consent form. The letter request cannot serve as the consent.

⁴ The Third Grade reading benchmark is between levels 22 and 24 and Student was at a level 23 so Student's achievement met the benchmark and Student was promoted to Fourth Grade.

FAPE the school districts must locate and identify children with disabilities who may be in need of specialized education in order to get FAPE. To receive the specialized education the child must be a “child with a disability”. While some disabilities are easily apparent such as blindness or deafness, other disabilities are more subtle such as learning disabilities. Parent alleged that Student qualifies as a child with a disability because of Student’s low achievement in reading. Under Delaware law, in order for Student to be eligible for special services as a child with a learning disability there must be: (1) written documentation of formal interventions used with Student; (2) a comprehensive psychological evaluation and (3) evidence of a severe discrepancy between achievement and intellectual ability based on correlation table approved by the Delaware Department of Education. (See Section 4.8 of the Delaware Department of Education Regulations as outlined in the Administrative Manual for Special Education Services of the Delaware Department of Education, Section 925) All three of these elements must be present to identify a child as being in need of special services.

Decision

By May 2002, School District had completed all of the steps necessary for it to make a determination as to whether Student would qualify as a “child with a disability”. At that time the School District officials met with Parents and Student’s aunt and discussed the results of the testing and evaluations. At the end of that meeting it was agreed by the group that Student did not qualify as a child with a disability but that interventions that had been used with Student were helpful and should continue. Parents and Student’s aunt did not dispute the decision and signed the memorandum of the meeting as being in concurrence with the decision.

Parent seeks to have this Hearing Panel revisit this May 2002 conclusion and to go further back in time and find that in March 2001 the Student should have been identified. Parent argues that the fact that Student was reading “below grade level” is in and of itself the sole marker that should be used to determine that Student had a disability. Parent points to Student’s inability to read at grade level as a clear indicator of a “severe discrepancy between the Student’s ability and achievement.”

However the evidence presented to the Hearing Panel by all of the witnesses pointed out that all children develop reading skills in various ways and that grade level is in fact a range of levels. At any given time a student may be reading at a point along the reading continuum and that point may or may not be equivalent to the child’s grade level. Thus grade level is a fluid concept and that fluidity is recognized by the School District’s own grading methods which place emphasis on two factors: progression along a reading continuum and an acceptable range of levels.⁵ Parent persists in making the argument that Student should have been identified even though the Parent did not address any of the specifics of the decision in May 2002. The School District witnesses testified in detail as to the steps it took to perform the needed elements to determine if Student was in need of special services. All of the indicators were reviewed and the conclusion in

⁵ The reading level benchmarks for the end of Second Grade are 20 to 22. Student fell below the Second Grade benchmark but as noted in Footnote 4 met the Third Grade benchmark.

May 2002 was that Student did not exhibit a “severe discrepancy between achievement and intellectual ability” and therefore did not meet the eligibility criteria to be “a child with a disability”.

Throughout the years in question, Student’s reading was not on “grade level” but the facts and evidence show that Student was making consistent progress, was not regressing even during periods when some regression would be expected such as over the summer break and in fact by the end of Third Grade Student met the minimum standard for reading for Third Grade. Given this fact pattern the Hearing Panel also finds that Student did not meet the eligibility criteria to be a “child with a disability”. The Hearing Panel finds that School District acted appropriately and there was no evidence to show that Student should have been identified as being eligible for special education at any time in the years in dispute in this Due Process Hearing.

Statute of limitations

The School District has asserted that Parent’s claims concerning the lack of identification for eligibility for special services of Student as far back as 2001 should be barred by the statute of limitations. The School District recognized that IDEA does not have a statutory limitation on claims but noted that court decisions have limited claims to a one and sometimes two year period. The Hearing Panel noted in its November 19, 2004 letter ruling that the one or two year limitation periods were often based on the factual circumstances of any particular claim and that the Panel did not have enough undisputed facts to determine if the Parent’s claims should be time barred. The Panel ruled that the due process hearing should proceed and that it would hear the Parent’s allegations before proceeding.

Recent amendments to IDEA, which are effective July 1, 2005, resolve this dilemma for future cases by establishing a two year statute of limitations. Under the amended IDEA, a due process hearing request must be filed within two years after the date the parent knew or should have known about the alleged action that forms the basis of the complaint. The statute of limitations would not apply in instances where there were specific misrepresentations by the school district that it had resolved the problems that were the subject of the complaint or if the school district withheld information from the person that was required to be disclosed.

In this case the Parent was well aware of the findings of the School District when in May 2002 the School District found that the Student was not eligible for special services. Despite Parent’s written acknowledgment agreeing with the decision, Parent has continued to advocate for Student to the point of arguing in this Due Process Hearing that the School District should have made a determination of eligibility in 2001. This approach forced the School District to expend its resources to present to a Hearing Panel and to the Parent a restating of the many, many steps that the School District followed to help the Student and a detailed explanation of information that had been disclosed to Parent on several occasions and to which Parent had concurred. This continual restating

and re justification of a decision made more than two years previous to the present Hearing is an example of why a statute of limitations should be included in IDEA.

Although this case serves to show the need for a statute of limitation, the Hearing Panel is reluctant to use that theory to make its finding. The factual record was ably presented by the School District and served to reinforce the appropriateness of the decisions made by the School District.

2. WHAT IS AN APPROPRIATE REMEDY FOR THE LACK OF SERVICES RECEIVED BY STUDENT IN THE 2003-2004 SCHOOL YEAR.

Prior to the Hearing, School District conceded that it would accept responsibility for a failure to evaluate Student at the beginning of the 2003-2004 school year. The School District indicated that had it tested Student it might have found that Student was eligible and, if eligible, Student would have received special education services during that year. The School District proposed that compensatory education in the amount of 450 hours be ordered for use by Student as the remedy for the School District's failure to evaluate.

At the request of the Hearing Panel, Parent responded in writing to the School District's proposed remedy and proposed a different remedy of 1000 hours based on Parent's evaluation of time that Parent deemed Student's education was disrupted in the school year in question and Parent further proposed that the services be delivered by individuals personally known to Parent whose resumes Parent included in the written submission. Parent's submission contained a number of factual allegations to which the School District was not given an opportunity to respond.

In its response School District rightfully noted that it should have an opportunity to respond to Parent's allegations. The Panel agrees with the School District that an evidentiary hearing might prove or disprove the allegations asserted by Parent; however the Panel feels that such a hearing would not serve any useful purpose in arriving at a decision as to the compensatory education remedy.

The courts note that "compensatory education is a legal term used to describe future educational services which courts award to a disabled student under the IDEA for the school district's failure to provide a FAPE in the past". Kevin T. v. Elmhurst Community School District No. 205 (U.S. D.Ct. N. D. Ill. 3/20/2002 J. Manning)

Even if the Hearing Panel assumes that all of the factual statements presented by Parent as to the events that took place during the 2003-2004 school year are true, the Hearing Panel finds that the remedy of 450 hours is appropriate. The determination that 2 ½ hours per day for each of the 180 days of school is designed to provide future educational services to remedy the School District's failure to provide an appropriate education for Student during 2003-2004.

Because of the disparity between the Parent's beliefs in how the compensatory education should be handled and the School District's offer, it is necessary for the Panel to make a decision as to the type of services that will constitute "compensatory education" in this instance.

As noted above, the purpose of a compensatory education is to remedy the School District's failures to provide FAPE. Because the remedy is to compensate Student for the failure to receive special education services in Fourth Grade, the focus for the Parent and Student should be on helping the Student to learn those skills, primarily in this case reading skills, which will serve to enhance Student's learning. To that end the services should be provided by agencies or individuals approved by the School District and who are certified to teach Delaware students those reading and other skills that Student needs to succeed. If Student needs an alternative reading method to succeed in reading, reading methods such as Wilson, Orton-Gillingham, Lindamood Bell or Reading ASSIST are nationally recognized as methods to help the struggling reader by providing a multi sensory approach to reading. Instruction should be provided by an agency such as Back to Basics or other tutoring services that have instructors that are certified and can provide the Student with appropriate instruction in the reading method that would be most successful. The Hearing Panel finds that a programmatic approach is needed to ensure that the instruction provided to Student meets the standards for compensating for the admitted failure of the school to provide services during the 2003-2004 school year.

The Hearing Panel would suggest that the compensatory education provided as the remedy in this case mimic as closely as possible the types of instruction that Student would receive had he received the 2 ½ hours per day of instruction during the school year. Thus, if small group instruction, private tutors approved by the School District, tutoring at Back to Basics or other approved agencies, instruction in a different reading method or after school tutoring would have been suggested by the School District as ways to handle the special instruction needs of a Student, then those approaches should also be used to provide the 450 hours of compensatory education. In addition, if services such as counseling and behavioral therapy are found to be needed to make Student successful, those services can be included as a part of the 450 hours of compensatory education time and such services also must be provided by a qualified provider approved by the District. The Hearing Panel would suggest that the School District, through the IEP team, meet with Parent to develop the programmatic approach to be used to deliver compensatory education to Student. If Parent and School District can not develop a plan by August 10, 2005, the parties may apply to this Panel to have this part of the decision vacated and the compensatory education plan mandated by this Hearing Panel.

The compensatory education plan needs to provide education resources that correlate with the instruction that Student receives in the School District. Parent cannot unilaterally determine how to provide the compensatory education through Parent's own resources. The Parent has exhibited a tendency to work through resources other than the School District and the Panel finds that a remedy of compensatory education by its very definition requires that the Parent and the School District work together to coordinate the needed educational program..

Given the guidelines set out above, the Hearing Panel also notes that the compensatory time of necessity must be used over a period of years and cannot be used to interfere with or replace Students' existing educational instruction. This compensatory education is in addition to and not in lieu of the existing academic program. For example the compensatory education program might consist of 3 hours of reading instruction per week during the school year and a more intensive program of 10 to 15 hours of educational instruction per week during the summer over the course of the next two years along with one hour of behavioral therapy each week.

Conclusion and Order

On the first issue: whether in March 2001 Student should have been identified as needing special services, the Hearing Panel finds that the Student did not qualify for special services in March of 2001 or at any future time during the years in question (2001-2003).

On the second issue: what is an appropriate remedy for the lack of services received by student in the 2003-2004 school year, the Hearing Panel grants compensatory education in the amount of 450 hours to be used in a programmatic approach so as to be in addition to Student's present academic learning situation. Using the guidelines set out in this Opinion, by August 10, 2005, the School District and Parent must have a comprehensive plan for the use of these 450 hours which shall include the School District's approval of all of the agencies or individuals who will perform the compensatory education.

Right to Appeal

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

/s/ Sandra K. Battaglia
Sandra K. Battaglia, Esquire, Chair

/s/ Harold Tarriff
Dr. Harold Tarriff, Educator

/s/ Patricia Toland
Patricia Toland, Lay Member

Dated: June 16, 2005