DELAWARE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING PANEL

In the Matter of	:	
[STUDENT]	:	
Petitioner,	:	HEARING DECISION AND ORDER
		HEARING DATES
	:	
		November 29, 2006
v.	:	November 30, 2006
		December 19, 2006
Woodbridge School District		
And	:	
The Department of	:	
Education for the State of Delaware,	:	
Respondents.	:	

Parents:	XXXXXXXXXX.
Counsel for Parent:	*Pro se*
Counsel for District:	James D. Griffin, Esquire
Counsel for DOE:	Jennifer Kline, Esquire,

The Decision and Order refers to the parties, witnesses and others generically, to protect personally identifiable information. An index of names is attached for the benefit of the parties. The 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.

In the Matter of
[STUDENT] HEARING DECISION AND ORDER

Petitioner, :

v :
:
Woodbridge School District,
and :
The Department of :
Education for the State of:
Delaware, :
Respondent :

DECISION

This is the decision by the Independent Hearing Panel in the Matter of “STUDENT”, Woodbridge School District, and the Department of Education of the State of Delaware.

A Request for Due Process was filed by the Parents on behalf of their son on October 11, 2006. A Request for Dismissal was timely filed by the District, and the Petitioners were ordered to submit an amended complaint. The District requested that the Department of Education (DOE) be added as a party on October 20, 2006, and the DOE voluntarily entered the case. The District responded to the Due Process Complaint Notice in a timely fashion and the Petitioners provided additional information two times.

The issues for the hearing were placed on the record at the beginning of the hearing with agreement of the Parties.

Having heard testimony for three days, reviewed the relevant documents and exhibits, together with written closing arguments, and current law, the Independent Hearing Panel makes the following findings:

FINDINGS OF FACTS

1. Mr. & Mrs. xx, (hereinafter referred to as "Parents") are the parents of "Student", (hereinafter referred to as "Student") and are citizens and residents of Woodbridge, Delaware.

2. "Student" is a thirteen year old student currently in the 7th grade, who is considered eligible for special services by virtue of having a learning disability as defined by the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. Section 1400 *et.seq.,* as well as eligible pursuant to 14 Del C. Sec.3103 *et.seq.* (State Act).

3. Woodbridge School District (hereinafter referred to as "District") is the Local Educational Agency (LEA) receiving monies pursuant to IDEIA and is the agency responsible for providing special education to the student pursuant to the State Act.

4. The Department of Education (hereinafter referred to as "DOE") is the State Educational Agency (SEA) responsible for overseeing special education services within the State of Delaware.

5. The Student's past educational history is significant for attending public school in the Cape Henlopen and Woodbridge School Districts and periods of home-schooling. (District Exhibit 6 p.11).

6. Past medical history is significant for Attention Deficient Disorder and Tourette 's syndrome. (District Exhibit 6 p.11).

7. Psychological evaluations were conducted in 2001 (1st grade) and in 2004 (4th grade). (District Exhibit 6 p.10 & 28).

8. Cognitive skills testing revealed deficient scores in 2001 and borderline scores in 2004, both suggesting that the student has significant learning problems. (District Exhibit 6 p. &14). The Student was identified as eligible under IDEA and has received an Individualized Education Program (IEP) every year from 2001.

9. The 2001 evaluation recommended, among others, intensive learning support services and behavior and a social skills intervention plan. (District Exhibit 6 p.32) The 2004 evaluation reported clinically elevated

scores due to oppositional behaviors and learning problems largely related to inattention, distractibility, and poor attention span, and very significant concerns regarding low self-esteem, limited self-confidence, and apparent detachment from peers. (District Exhibits p. 12).

10. The Student transferred into the District for 3rd grade, and a student evaluation report and summary conducted on November 14, 2002 resulted in continued placement as a Learning Disabled student. (District Exhibit 6 p.18).

11. The Student was removed from the District's special education program and began Home School on February 10, 2003 due to parental objection to placement in the District's Intensive Learning Center (ILC). (District Exhibit 7 p.91).

12. The Student returned to the District for school year 2003-2004 (4th grade). On September 23, 2003, his Physician, Dr. xxx, wrote to the District stating that the Student has Tourette's Syndrome and that cursing is part of the syndrome. (District Exhibits p. 21; Parents' Exhibit 1 p. 2). Additionally, Parents provided literature regarding the syndrome to the District. (Parents Exhibit 2 p. 15).

13. The District performed a Functional Behavioral Assessment (FBA) on October 27, 2003 to address behaviors such as cursing, aggression, and throwing objects. (District Exhibit 28 p.1-4).

14. Following the FBA, the IEP team approved a Behavior Intervention Plan (BIP), which was to take effect on October 23, 2003. (District Exhibit 28 p. 5). Minutes from a meeting held on March 27, 2004 reflect that the BIP was extended to the bus. (Parents Exhibit 2 p. 9).

15. The IEP developed on March 9, 2005 for 5th grade does not reflect any behavioral needs; to the contrary, minutes state that his behavior was improving in that he no longer used profanity, admitted when he was wrong, and took responsibility for actions. (District Exhibit 7 p. 36). Further, the IEP reflects that his impeding behaviors were attention related. (District Exhibit 7 p. 23).

16. The IEP developed on November 7, 2005 for 6th grade reflected that the Student had behaviors that impeded his learning. An IEP goal was

added that the Student would improve his behaviors per the ILC Student Contract. (District Exhibit 7 p. 9).

17. Sixty-five (65) of the Student's ILC contracts were submitted by the District into evidence. On 18 of the 65 days reported, the Student's contract was positive and reflected a good day. The remaining 47 contained notes regarding his negative behaviors, disrespectfulness, inappropriate words and actions, or inattentiveness. (District Exhibit 9 p.1-71).

18. On March 17, 2006, Mr. B. informed the Assistant Principal, Ms. xxx, that the Student's teacher, xxx, had intentionally pushed a desk into the Student's chest and stated that she would do it again. (Parents' Exhibit 5 p.7). Further, it was alleged that 2 days later, the teacher sprayed air freshener all over him and in the room because someone was passing gas. (District Exhibit 13 p. 1- 12).

19. The matters were investigated by the Principal, and the teacher was placed on administrative leave due to concerns for the safety of the students. (District Exhibit 13 p.8-1 0). The teacher tendered her resignation after the incidents. (Tr. p. 189).

20. On April 4, 2006, the student was suspended for use of a racial slur against another student. (District Exhibit 10 p.2).

21. The Parents gave written notice on April 13, 2006 of the intent to enroll the Student in a private school and requested the District pay tuition. (District Exhibit 13 p.11).

22. Mr. xxx, the individual responsible for discipline in the school as an administration representative and one of the individuals who meted out discipline to the student, testified that he was unaware that the student had a BIP. (Tr. p. 267).

23. The 2004 Psychological Evaluation (4th grade) measured the Student's capability in the borderline range with a full scale IQ at 71. The Student's achievement test results placed his total reading score at the 1.4 grade equivalent level. His math achievement score placed him at the 1.8 grade equivalent; spelling was at grade equivalent 1.8. (District Exhibit 6 p. 10).

24. The Student's 6th grade IEP stated that his Present Level of Education Performance in reading comprehension was at the 2.0 level; his math current level was at level 3. (District Exhibit 7 p. 6 & 7).

25. The Student's Delaware Student Testing Program (DSTP) results for 5th grade reflects that the Student was below the standard in reading, well below the standard in writing, and below the standard in math. (District Exhibit 11 p. 8).

26. The test results of the Gates-MacGinitie reading test results reflect that the Student, in grade 5, had a reading grade equivalent of 1.9 in both reading vocabulary and comprehension. (District Exhibit 11 p. 2).

27. DSTP test results from the Student's 6th grade reflect below the standard scores in reading; well below the standard in math with regression; and again, well below the standard in writing.

28. An IEP team meeting was conducted on August 25, 2006 for the purposes of reviewing placement for school year 2005-2006 and for determining placement for the 2006-2007 school year. The District and Parents were unable to agree regarding placement for school year 2006-2007 (7th grade). (District Exhibit 8 p.1- 4).

29. Parents unilaterally placed the Student at the Destiny Christian School for his 7th grade. The District was informed of this at the last IEP team meeting and in writing.

30. The administrator of Destiny Christian School, Ms. B., testified that the school is for children with special needs from K through 12. (Tr. 12/19/06 at 126-127).

31. Ms. B testified that the Student has met every IEP goal except for reading comprehension, which has not been tested yet. He has come up at least a grade level in each of his IEP goals, math, spelling, word reading. His behavior is basically acceptable, he is following the rules, smiles a lot, and has a friend. (Tr. 12/1 9106 at 126).

32. Ms. B. tests her students every few months using the Wide Range Achievement Test (WRAT) to determine progress.

33. The Student has an IEP at Destiny Christian School but no BIP. The Student has made some progress on his IEP goals. (Parents' Exhibit 9. p.6-7) He does not have a BIP because he has not displayed negative behaviors. (Tr.12/19/06 at 152).

34. There were no administrators or regular education teachers at the Student's IEP meeting. (Parents' Exhibit 9 p. 4-8).

35. Ms. B. testified that she was not aware that Tourette's Syndrome and Attention Deficit Hyperactivity Disorder are not disability categories under the Delaware Special Education law.

36. Destiny Christian School has no employees other than Ms. B. Ms. B. applies for substitute teacher positions at other schools and gets a substitute teacher for her class if she gets an offer. Ms. B. is attempting to get a full time lob at other schools and will replace herself if she is successful.

37. Destiny Christian School is not accredited as a special education program by the State of Delaware. The school has a business license but not a license to run a school. The school has not been inspected by the fire or health department. The DOE has never monitored the school.

38. At Destiny Christian School, all of the students read from the same text book regardless of their reading level or grade.

39. The students at Destiny Christian School do not take state standardized tests.

40. Students at Destiny Christian School cannot get a state certified diploma.

ISSUES

The issues agreed upon by the parties are WHETHER:

1. The District failed to provide the Student with an appropriate special education program for school year 2005-2006

because he was physically and emotionally abused;
2. The District failed to fully implement the Student's IEP for school year 2005-2006;
3. The proposed IEP for school year 2006-2007 is appropriate for the Student;
4. The proposed special education placement for school year 2006-2007 is appropriate; and
5. The parents are entitled to tuition reimbursement for placement of the Student at a private school.

LEGAL STANDARDS

1. Free Appropriate Public Education

The Individual with Disabilities Education Act (IDEA) requires public school to provide a Free Appropriate Public Education (FAPE) to students with disabilities. Exactly what FAPE means or requires is an elusive topic.

FAPE is defined by the IDEA as special education and related services that:

a. have been provided at public expense. . . without charge (to parents);
b. meet the standards of the State educational agency;
c. include an appropriate preschool, elementary or secondary school education in the State involved; and
d. are provided in conformity with the Student's individualized education program required under section 614(d).

Twenty years (20) ago, in *Hendrick Hudson Central School District Board of Education v. Rowley,* the United States Supreme Court held that FAPE requires services that provide students with "some educational benefit." *Rowley* is undoubtedly the most important and influential case in special education law. The "some educational benefit" standard permeates nearly every aspect of special education because it is the standard against which services are measured. Subsequent courts have expanded on this "some educational benefit" requirement, but it remains essentially intact today.

While the statute defines FAPE, it does not describe the substantive requirements of FAPE, nor does it set any requisite standards or levels of learning achievement for Students with disabilities. (See Ladonna L.

Boeckman, Bestowing the Key *to Public Education: The Effects of Judicial Determination on the IDEA on Disabled and Nondisabled Students, 46 Drake I. Rev. 855, 866-868 (1998)).*

In *Rowley,* the Supreme Court attempted to determine the substantive standards of FAPE. The plaintiff argued that FAPE required that the school maximize the potential of handicapped children commensurate with the opportunities to other children. The trial court agreed with the proportional maximization standard. The Court of Appeals affirmed the trial court's decision without much comment.

The Supreme Court overturned the Court of Appeals' decision, finding that the IDEA (then known as the EHA- Education Handicapped Act) did not require schools to proportionally maximize the potential of handicapped children. Rather, the Supreme Court said, Congress had more modest goals in mind. The Court relied upon the text and legislative history of the statute to find that the Congressional intent was only to provide a "basic floor of opportunity" to Students with a disability by providing access to public education, as opposed to addressing the quality of education received once in school. *Rowley*. 458 U.s. at 192, 200. The Court stated:

> By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose any greater substantive educational standards that would be necessary to make such access meaningful
>
> Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside. *Id*. at 192.

Subsequent court decisions interpreted *Rowley* to mean that the IDEA does not require schools to provide students with the best or optimal education, not to ensure that Students receive services to enable them to maximize their potential. Instead, schools are obligated only to offer services that provide Students with "some educational benefit." Courts sometimes refer to this as the Cadillac verses the Chevrolet argument, with the student entitled to a serviceable Chevrolet, not a Cadillac.

Some courts further refined the “some educational benefit” standard to require students achieve “meaningful benefit” or to make “meaningful progress” in the areas where the Student’s disability affects his or her education. *Ridgewood Bd. of Educ.* v. *N E.* 172 F.3d 238, 247 (3rd Cir. 1999) (IDEA requires significant learning and meaningful benefit).

Moreover, when a Student displays considerable intellectual potential, the IDEA requires “a great deal more than a negligible benefit.” *Ridgewood,* 172 F. 3d, at 247 (Benefit must be gauged in relation to the child’s potential.)

Despite a myriad of court decisions on the topic, school districts, parents, and courts still have little guidance on how to assess FAPE or educational benefit. In *Rowley,* the Supreme Court mentioned that grades and advancement from grade to grade were a factor in assessing benefits for mainstreamed students.

Post-*Rowley* courts have viewed passing grades and grade advancement as important factors in determining if students receive educational benefit. However, schools often modify grades for students with disabilities, so grades lose their validity as a measure of benefit or progress.

Further, in an effort to avoid putting meaningful data in IEPs, many school districts include no objective measure of a child’s progress. Instead of including educational goals where the progress is measured using objective tests and measurements, many schools propose IEPs that rely exclusively on subjective teacher observations of the child’s progress. This so-called objective measure of progress becomes the teacher’s subjective observation as to whether the child has improved in reading, writing, and math. When parents object and ask for a more intense program, they are often rebuffed or criticized.

Some courts have looked at academic achievement testing, in addition to grades and grade advancement, to measure educational benefit. These courts have relied upon “objective” standardized academic tests, such as performance in successive test scores to measure educational benefit. Courts using this approach, however, produce varying results with similar information.

The lack of substantive standards for FAPE, combined with the current Cadillac verses Chevrolet mentality, facilitates a minimalist view of the substantive education that students with disabilities are entitled to receive and lowers expectations for students with disabilities. When Congress reauthorized the IDEA, it expressly noted that low expectations for students with disabilities had impeded implementation of the IDEA. (20 U.S.C.A. Sec. 1400 (c) (4)). Congress stated that educating students with disabilities could be more effective by "having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible." *Id*. (c) (4)-(5). The 2004 reauthorized IDEA states:

Almost 30 years (language added in IDEA 2004) of research and experience have demonstrated that the education of children with disabilities can be made more effective by—

> (A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to —
>
> > (i) meet developmental goals and to the maximum extent possible, the challenging expectations that have been established for all children; and
> >
> > (ii) be prepared to lead productive and independent lives, to the maximum extent possible. *Id*.

Despite this mandate, the question remains: how is meaningful educational benefit measured?

In *Polk v. Central Susquehanna Intermediate Unit 1616, 441 IDLER 130 (3rd Cir. 1988),* the Third Circuit defines the *Rowley's* requirement that educational programs must be designed to provide "some educational benefit" to mean that they must offer more than a *de minimus* benefit. The Court in *Polk* found that "the question of how much benefit is sufficient to be meaningful" is inescapable. Reaching the territory that the Supreme Court in *Rowley* did not have to enter, the Third Circuit held that the IDEA "calls for more than trivial educational benefit" and requires an IEP to provide "significant learning" and "significant benefit."

Explaining why a child must receive something more than a trivial

benefit from a district's program, the Third Circuit cited legislative intent and policy reasons behind the IDEA:

> Implicit in the legislative history's emphasis on self-sufficiency is the notion that states must provide some sort of meaningful education-- more than mere access to the school house door. We acknowledge that self-sufficiency cannot serve as a substantive standard to measure the appropriateness of a child's education under the act. Indeed, the [student] is not likely ever to attain this coveted status, no matter how excellent his educational program. Instead, we infer that the emphasis on self-sufficiency indicates in some respect some quantum of benefits the legislators anticipated: they must have envisioned that significant learning would transpire in the special education classroom-enough so that the citizen who would otherwise become a burden on the state would be transformed into a productive member of society. Therefore, the heavy emphasis in the legislative history on self-sufficiency as one goal of education, where possible, suggest that the benefit conferred by the EHA and interpreted in Rowley must be more than *de minimus.*

Further, high expectations for all Students, including students with disabilities, were established through content and proficiency standards. These standards define academic performance levels and provide specific substantive benchmarks that students should meet at specific points of their academic career.

Also, the reauthorization of the IDEA 1997 changed the focus from access to high expectations and real education results for children with disabilities. The 1997 changes emphasized that schools must provide students with disabilities with the same quality educational services already provided to students without disabilities, including access to a curriculum that incorporates state educational standards. In short, mainstream the children.

In 2001, Congress reauthorized the Elementary and Secondary Education Act and gave ESEA a new name, The No Child Left Behind Act (NCLB). NCLB greatly expanded the scope of Title I requirements and reaffirmed the government's position that <u>all students</u> (emphasis added) should meet high academic standards. Congress went further in the reauthorization of IDEA 2004 and included language from NCLB in the

IDEA 2004. Congress added to the statute that the purpose of IDEA includes a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education (language added to IDEA 2004). 20 U.S.C. Sec. 601(d) (1)(A). The states had to develop plans to demonstrate that the state has adopted challenging academic and content standards for all students in the areas of reading or language arts, math and science.

Incorporating state educational standards and proficiency standards into the statutory definition of FAPE means high expectations must now be included in disabled students' IEP. Educational standards define performance criteria that school districts must use when developing goals and objectives in a student's IEP. School districts, parents, and courts may also use these standards in assessing whether a school district successfully provided a student FAPE.

At a due process hearing, the District has the burden of proving whether or not the IEP in dispute is reasonably calculated to provide educational benefit. 13 Del.C. Sec. 3140 and *Coale v. State Dept of Educ. and Brandywine School Dist,* 162 F. Supp. 2d 316, 324 (D.Del. 2001). An IEP is reasonably calculated to provide educational benefit if it contains measurable IEP goals and provides appropriate related services to the student. *Id.at* 326.

The Delaware Supreme Court held in *Fishery. Christina Sch. Dist.,* 41 IDELR 238 (Del. Sup. Ct. 2004) that FAPE was denied to a student when test scores revealed the student was not making progress and that the District's failure to remedy the lack of progress through changes in his IEP or remediation obligated the District to provide for private school compensatory education.

2. Tuition Reimbursement

The IDEA permits payment for education of children enrolled in a private school without the consent of the public agency under the following conditions:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public education, enroll the child in a private. . . school without the

> consent of or a referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the costs of that enrollment if the court or hearing officer finds that the agency has not made a free appropriate education available to the child in a timely manner prior to that enrollment.

In *School Comm. Of Burlington v. Dept of ED. of Mass.,* 471 U.S. 359, 369 (1985), the Court held that the IDEA's grant of equitable authority empowers a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the act." This yields a two-part test: (1) Is the IEP inappropriate? and (2) Is the private school an appropriate placement for the student?

Further, the Court stated that Congress intended that IDEA's promise of a Free Appropriate Public Education for disabled children would normally be met by an IEP's provision for education in the regular school or in private school jointly chosen by school officials and parents. In cases where cooperation fails, however, "parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of the child or pay for what they consider to be the appropriate placement." *Id. a*t 370.

The United States Supreme Court in *Florence County v. Carter,* 510 U.S. 7 (1993) established that parents could receive reimbursement even thought the private school was not on a state approved list and did not meet all of the IDEA requirements for educating disabled children.

ANALYSIS

The District's position on the issues before the Panel is that although the Student may not have made optimal educational progress, the District remains the Least Restrictive Environment; that allegations of abuse were limited and either unfounded or dealt with appropriately; the IEP was followed; the Student's diagnosis of Tourette's Syndrome was considered before punishment was imposed; and DSTP test results and goals show progress.

The Parents' position is that the District failed to provide meaningful educational benefit to the Student and that the District does not have an appropriate placement for him.

The District has the burden of proof to show that FAPE was provided to the Student and that the IEP in effect when the Student was removed from the public school was reasonably calculated to provide FAPE when it was written.

In this case, based on the evidence presented as it relates to the legal standards above, the District did not meet its burden.

1. Academic Progress

The District's position is that it provided FAPE to the Student during 5th and 6th grades. The District relied on the fact that the Parent approved the discontinuation of Occupational Therapy Services, approved the IEP for 7th grade, agreed to a promotion to 7th grade based on "demonstrated progress toward IEP goals," agreed to the ILC placement, improvement in math goals by one level in 3 out of 4 goals, and improvement in reading comprehension skills by 20 percent on 7 out of 10 goals and by 10 percent on 3 out of 10 goals.

Further, the District asserted that the Student's IEP was updated to show that he had achieved 75 percent compliance on 4 out of 7 behavior goals and 80 percent compliance on 3 out of 7 behavioral goals.

In support thereof, the District elicited testimony from the school psychologist, among others, Ms. xxx, to show academic progress:

> I mean having evaluated [Student] on one occasion, when I looked at the state test scores and other academic information that was presented, I was impressed that…it demonstrated that he had progressed, and I was pleased to see that. (Tr. 11/30/2006 at 33-34).

The testimony failed to provide what objective measures of progress were used to come to this conclusion. Rather, it appears to be a convenient conclusion to support her opinion regarding progress.

Using goals to prove meaningful progress is a subjective measurement unless documented by reliable objective data on how the percentages are obtained. In this case, no collection of data was provided to substantiate the Student's progress. Further, the Building Special Education Coordinator, Ms. xxx, testified that she could see no progress in the goals in reading and math on the Student's IEP for school year 2005-2006:

A. This looks like it is "Student's" math goals and objectives.

Q. Can you tell us if it reflects any progress "student" has made?

A. According to just these goals here, the numbers are pretty much the same all the way across. It doesn't show much.

Q. So does it show progress in this goal?

A. For this particular set of problems and goals, no.

Q. If we could go to page 7/25, if you could tell us what this document is?

A. That's his right angles, "Student's" right angles.

Q. Can you tell us if it shows progress made by "Student"?

A. As the goals written by the teacher, it looks like he stayed the same.

Q. So he didn't make progress, according to this document?

A. According to this, it has stayed the same.

Q. If we could go to 7/26. And could you tell us what this document is?

A. This says it's for spelling skills.

Q. And does this page show progress?

A. No.

Q. Do you see where "Student" regressed on this page?

A. I see where it's marked, according to those goals, yes, in one specific area, that would be long vowels.

Q. And so you don't believe it shows that he made progress in spelling?

A. Just by going by this goal, it shows that--the progress towards those goals.

Q. Okay. If we could go to 7/27. And could you explain what this document is?

A. It says that they are his reading scores -- goals. I'm sorry, not scores.

Q. And on this document does it show that he's made progress?

A. It looks like for these goals and objectives, his progress has remained the same. (Tr. 11/30/06 p. 240-246).

This testimony belies the District's position that, based on goals, the Student made progress. The progress required must be meaningful. The above testimony is not persuasive that the Student made academic progress in his IEP goals.

DSTP testing showed that he was below the standards in reading and math and well below the standards in 5th grade, and that writing was well below the standards. In 6th grade, the scores remained the same except for math, in which he fell to well below the standard. Reliance on the DSTP test results also does not persuade the Panel that meaningful benefit was provided.

The Gates-MacGinitie Reading Test taken in 5th grade (although

dated 9/11/02) reported his reading grade equivalent to be at 1.9. The revised IEP for 6th grade reported his Present Level of Educational Performance to be at the 2nd grade level and his math level at the 3rd grade level. Writing on both the 5th and 6th grade IEPs was well below the DSTP standard.

To determine whether FAPE was provided, the Student's capability must be taken into consideration. The last testing for ability (District Exhibit 6 p. 14) found the Student functioning in the borderline range of ability.

Using both the questionable subjective measures, as well as objective measures, such as the DSTP scores, and factoring in the Student's limitations, it is reasonable to conclude that this Student received no meaningful educational benefits from the District's IEPs in 5th and 6th grades. Accordingly, the IEPs were not reasonably calculated to meet his academic needs, and FAPE was not provided.

2. Behavior

The District's position is that the Student's behavior no longer affected his academic progress because there were fewer disciplinary referrals. The Parents' position is that, based on "abusive" incidents in the school, the Student was not safe.

In support of the District's position, the school psychologist testified that the Student's behaviors were not interfering with his academic progress:

> Based on the reduction over time of disciplinary referrals, it would certainly appear that…with the improved behavior, it certainly should not have significantly impacted his ability. (Tr. 11/30/2006 at 36).

However, using disciplinary referrals may be one way to determine improvement in behavior and, in this case before the Panel, an ineffective way. An analysis of the Student's daily student contracts showed that, on 47 out of 65 daily contracts, he had many negative comments. The daily contracts reflect behaviors for which, in prior years, the Student had been given a disciplinary referral. In school year 2003-2004, the Student used profanity 16 times; in school year 2004-2005 and in 2005-2006 (3/4 of the

school year), the Student used profanity 3 times.

Yet, on 3/13/06, the daily contract stated that the Student used profanity. No disciplinary referral was made. Again on 3/1/06, the daily contract reflected that he used profanity to a teacher. No disciplinary referral was made. On 2/2/06, the daily contract reflected that he used profanity at other students. No disciplinary referral was made. On 1/10/06, he again used profanity, and no referral was made. Other daily contracts reflect that he called other students names. It is not clear if these are profane words or not. However, a review of the daily contracts shows daily disruption of the day for both this Student, as well as others in his class. No changes were ever made in his BIP (developed on 3/26/04) based upon his daily behaviors. No evidence was offered showing that the BIP was consistently implemented after its development, that all those responsible for behavioral interventions were aware of it, or that data was routinely collected and analyzed. It is reasonable to conclude that the District was not paying attention to his daily conduct. It is apparent that the day-to-day negative behaviors were creating a tense situation to the point where his teacher acted unprofessionally toward the child. She resigned after a District evaluation, and the Student was removed from the unsafe environment.

The District contends that it had a BIP in place for the Student that met his needs and considered his disability. Yet, there was only one BIP completed. It was updated one time for bus behavior. The BIP called for counseling as well as did his IEP for 6th grade. However, testimony from the guidance counselor indicated that counseling was sporadic and unplanned. No notes were taken by the counselor either to document her sessions with the Student or to show what, if any, behavioral improvement he may have made.

Based on a review of the daily student contracts, it is unreasonable that the BIP was not reviewed more thoroughly or changed in three years. The needs of a student may change from 3rd grade to 6th grade, yet no data other than a decrease in behavioral referrals was presented. As outlined above, reliance on the number of disciplinary referrals is misplaced. A more significant record of his behavior was seen by a review of the Student’s daily contracts.

Mr. xxx, the individual who is the administration's representative in disciplinary matters, had no formal training in discipline and did not know that this Student had a BIP.

Accordingly, the Student's IEP did not appropriately address his behavioral needs. The BIP was not used in a meaningful way; it was not updated, not attached to the IEP, and not shared it with people responsible for discipline. It is hard to discern how anyone could progress in the kind atmosphere to which this Student was subjected on a daily basis.

Both academically and non-academically, the Student's IEPs for 5th and 6th grades did not provide FAPE.

3. Tuition Reimbursement

When there is a determination that the IEP failed to provide FAPE and was inappropriate, the next inquiry is whether the Parents are entitled to tuition for placement at a private school.

It is Parent's position that the proposed IEP and placement were inappropriate and that the District should pay for the Student's tuition to the Destiny Christian School. It is the District's position that the DCS is not a proper placement under the law and that the LRE is at the District.

The private school administrator, Ms. B., testified in support of the Student's placement at her school. She appears to be very well-intentioned, of high energy, and a dedicated person. She holds a Masters Degree in Special Education from Wilmington College and an undergraduate degree from Eastern College in Elementary Education and Youth Ministries.

She does everything in the school. She teaches, assesses the students, prepares the curriculum, acts as the nurse, takes the children on outings, and takes them swimming. The children in the school vary in ages and abilities.

Ms. B. testified that the Student was making progress in the school. He appears to be shy but friendly, interacting with peers without problems; has no behavioral problems in the school; and the assistance he received has helped him succeed academically.

The District argued that DSC does not specialize in educating disabled children. Ms. B. testified that the school is for disabled children. The District argued that DSC does not use state curriculum and content standards, does not perform quarterly evaluations of Student's progress, and has not developed a specific plan for progression of the Student from grade to grade. Ms. B. testified that she does perform evaluations of progress; she may not use the state curriculum; however, the curriculum she does use is known and well regarded.

The District argued that an independent expert to testify about the DSC program was needed. This adds an additional legal requirement for proof for appropriateness of the private placement. This hearing panel could find no such requirement or authority in the law. Indeed, the District or the DOE could have arranged to observe the Student at the private school if they had so chosen. Neither did.

The District argued that because the Parents requested the Student's file be sent to the private school prior to withdrawal that this somehow precluded then from receiving tuition reimbursement. This argument has no merit. A parent is entitled to know if the student will be accepted at the private school before taking the life-changing steps of removal to another school. That is just common sense.

The Panel is troubled about the placement, nonetheless. Ms. B. testified that she is actively seeking temporary and permanent employment in a local school district as a teacher. If a position is received, then she would hire a substitute for herself and work outside of DCS. The program has no State accreditation, and has had no inspections by the fire and health departments. All of the students, regardless of age, grade and ability, use the same texts. Much of the assessment of progress is reliant upon reapplication of standardized tests that far exceeds recommendations for validity. Other measures of progress, such as word-counting, provide very limited types of analysis. These issues do little to provide confidence in the placement or her measurements of progress.

CONCLUSIONS OF LAW

1. The District failed to meet its burden of proof that it provided a free appropriate public education during the Student's 5th and 6th grades

since the IEP was not fully implemented, the Student showed no progress, and the environment posed danger to him;

2. The Parents failed to meet the burden of proof that the private school is proper; however, the District is obligated to reimburse tuition until such time as an appropriate IEP and placement are provided for the reasons stated above.

ORDER

The decision of the Panel is as follows:

1. The Parents shall be reimbursed for the Student's placement at the Destiny Christian School only until such time as the District develops a new IEP, BIP, and placement for him.

2. The BIP shall include targeted behaviors, methods of measuring behavioral changes, schedules for measuring behaviors, and dates for review and analysis of data obtained.

3. The District shall provide training to District staff on functional behavioral assessments, behavior plans, IEP development, and IEP implementation, as well as staff training on Tourette's Syndrome and how to address the effects of Tourette's Syndrome in the educational environment.

IT IS SO ORDERED BY THE PANEL:

Patricia M. O'Neill

Judith Mellon

Dr. Corinne Vinopol

NOTICE OF APPEAL RIGHTS

Any party aggrieved by the decision of the hearing panel may file a civil action in the Delaware Family Court or the United States District Court for the Delaware District. Such proceeding shall be initiated by the filing of a complaint within 90 days of the date of the decision.

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

Attachment A

(Certification of Record)

DELAWARE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING PANEL

In the Matter of:
Student,
Petitioner,

v.
Woodbridge School District,
and
The Department of Education for the State of Delaware
Respondent.

CERTIFICATION OF RECORD

I, Patricia M. O'Neill, Chairperson of the Due Process Hearing Panel appointed in this matter, DO HEREBY CERTIFY that the attached Record of Proceedings is the entire record in the above entitled matter as of this date, consisting of all letters, pleadings, orders, exhibits, transcripts and depositions.

I FURTHER CERTIFY that the documents and things forwarded herewith are either the original or a true copy of the original documents submitted in this matter.

EXECUTED this 5th day of April, 2007.

CHAIRPERSON