

DELAWARE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING PANEL

In the Matter of:)	
)	
)	HEARING DECISION AND ORDER
Complainant,)	
)	DE DP # 16-26
v.)	
)	Hearing Dates: May 23, 24, 25, 2016
<i>APPOQUINIMINK SCHOOL DISTRICT</i>)	
Respondent.)	Decision Date: July 8, 2016

Parent:

Counsel for Parent: Pro Se

Counsel for School District or Charter School: Michael P. Stafford
Young, Conaway, Stargatt & Taylor, LLP
1000 N. King Street
Wilmington, DE 19801

The Decision and Order refers to the parties, witnesses, and others generally, 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.

INDEX OF NAMES

**DELAWARE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING PANEL**

DE DP# 16-26

DECISION AND ORDER

CASE BACKGROUND / PROCEDURAL HISTORY

The Due Process Complaint was filed April 4, 2016.

ISSUES

1. Did the District provide an appropriate IEP for Student in its June 1, 2015 IEP and its subsequent revisions?
2. Did the District fail to implement accommodations in the Student's IEP and if not, did the failures to follow the IEP result in denial of a Free and Appropriate Public Education? (FAPE).
3. Did the District fail to give proper notice of an October 19, 2015 IEP meeting and if so, did the procedural violation result in denial of FAPE?
4. Did the District provide the IEP to school bus personnel? Did bus personnel follow the IEP?
5. Did the presence of school personnel that Parents did not want at an IEP meeting create any flaw in the IEP?
6. Did District not allow for proper communication with parents in the drafting of the IEP and its implementation and if so, did it result in denial of FAPE?

7. Did the District fail to include Student's needs as a result of Student's Dysgraphia in the IEP and if so, did the failure result in denial of FAPE?
8. Did the change from an inclusion classroom to a regular classroom during the academic year 2015-2016 with a one on one aide constitute an improper change of placement?
9. Did administration of state based standardized testing to student result in any failure to implement Student's IEP or provide Student with a free and appropriate public education?
10. Does Parents' provision of Brain Integration Therapy to Student outside of school mean that the IEP was inadequate?

FINDINGS OF FACT

1. Student was evaluated at age x and found eligible for special education services under the category of autism. (ED, 16)
2. Student received related services; speech and language until Spring of 2014, when Student was dismissed from it as it was determined Student no longer needed it. (ED 17, 19)
3. Student has trouble with handwriting. (ED 76). Since Student had such trouble with writing, even with writing Student's first name, Student did not like to work on it and therefore did not make much progress. (COTA 541). School began to look to assistive technology to overcome this problem (ED 76, 77) (COTA 540). Student was getting older and Student's assignments were more voluminous and had to be completed (COTA 541). Student used an ipad for Student's assignments (COTA 541). On the ipad, there is an app which lets Student scan worksheets in and fill them out by

speaking the answers (COTA 542) In addition, in April or May of xth grade, student started to use pencils to write things out. (PPL 316). Student refused the ipad because Student wanted to write (COTA 558). Student agreed to use the ipad when needed (COTA 558). OT still thought Student needed to do more writing to get work completed than Student could do, so Student still needed the ipad (COTA 560). Parents believe Student's writing improved due to Brain Integration Therapy (Parent 692). Parent felt that the Brain Integration Therapy, along with a medication change, and the GET's understanding of Student's sensory needs, contributed to Student being able to write more (Mother 717-718).

4. It has also helped Student greatly that Student can eat lunch in the classroom with GET and others rather than remain in the noisy cafeteria. This makes Student a much happier child as Student's stomach is filled whereas without that accommodation, Student would refuse to eat even if Student was hungry (Parent 719).
5. Student received related services; Occupational Therapy (OT) (ED 17) (COTA 540). Student had accommodations for sensory needs: earplugs, headphones, wiggle seat, widgets, and being allowed to wear Student's coat everyday (COTA 545). It was determined that Student no longer required OT as Student was independent with the use of the ipad to be able to do assignments without handwriting (COTA 547). Student agreed, and told OT that there was no point in Student coming for OT as Student could do it in the classroom, and Student knew what Student was doing (COTA 549-550). The OT told Student Student would have to show OT this (COTA 550). Student was able to show OT that Student could meet OT's standard (COTA 550). OT continues to monitor Student on a consultative basis (COTA 553).

6. Student met with the school psychologist for social skills groups, anxiety, and counseling. (ED 17)
7. In x and x grade, there was a Special Education Teacher (SET) in the Student's regular education classroom. A one on one aide was added for Student in the x grade on March 17, 2015 (SET 4 570-571).
8. In x grade, academic year (2013-2014), Student made progress with dealing with overstimulation and frustration, beginning to be able to talk about it rather than run away (SET 3 354). Big improvements in Student were noted (SD-76, 0483).
9. Student was in a co-taught classroom for x grade, academic year 2014-2015 (a general education teacher and a special education teacher) (ED 35).
10. May 2014 Student IEP for upcoming x grade included goals for work habits, written expression, handwriting legibility and endurance, word processing and dictation and calming strategies. These include a "de-escalation area" for Student to retreat to when over-stimulated. (SD-59). The classrooms at School have a break-out room – the room contained a beanbag chair for student to use – and Student could close the door and thus be separated from the rest of the classroom when Student felt self escalating. (SET 3 65). (GET 191). There was a discussion about removing the de-escalation area at the IEP meeting May 2014, because Student was no longer using it, (ED 24) but the de-escalation area was retained at parents' request. (ED 25).
11. On June 15, 2015, Student's IEP was revised for x grade (SD-54). It was modified to provide for an aide on the school bus and to add a 12-month program (SD-54). The IEP was revised again on September 14, 2015 (SD-52). This revision made changes to Student's Behavior Support Plan as far as recess options, cues of overstimulation,

non-verbal signals in class, teaching through role-playing and sharing (SD-52). The IEP was revised on February 22, 2016 (SD-50). This also made changes to the Behavior Support Plan, and changed OT to a consultative basis (SD-50).

12. Student had a Functional Behavioral Assessment (SD-40), and a Behavior Support Plan, (SD-58) dated May 11, 2015 and modified June 1, 2015 (SD-57) and again on September 14, 2015 (SD-53), and again in February 2016 (SD-51)(SP 424). The goals of Student's plan were staying in student's seat, talking on topic, not calling out and not making inappropriate noises (SD-58) (SET 5 325). Special Education Teacher 5 observed and collected data regarding Student's behavior. Student made progress on the behavior goals during the x grade. (SET 5 331) (SD-98). Student made progress regarding calling out in class. (SP 403).
13. Student experiences anxiety when Student is not sure what is happening – Student has a need to know Student's schedule and what will be happening next (Student 672). This extended to Parent giving student a monthly calendar of dinners the family planned, because he/she needed to know during the day what was for dinner (Parent 690).
14. Student's x grade class had x students. (GET 181). It contained a General Education Teacher and a Paraprofessional. (GET 181). Student would sit in each subject class for a time, and then the paraprofessional would break Student out and work with student one on one. (SET 182).
15. Student was placed in Setting "A" – the general education setting, meaning Student was in the general classroom at least 80% of the school day. (ED 85) "The team rejected a more restrictive setting as [Student's] needs can be met in a regular setting with additional adult support." (ED 88) (SD-25). This setting can be a co-teaching

classroom with both General Education and Special Education teachers, or it can be a General Education Teacher with an adult aide (ED 148-149) (PRN 505).

16. At the beginning of x grade, Student used the de-escalation room, but as the year went on, Student learned to handle stress and used it less and less and eventually no longer needed it. (GET 193) (PPL 308). At the beginning of the year, Student separated self from the class, sitting on a windowsill while still listening to the General Education Teacher (GET), but as the year went on, Student spent more and more time with the class, and was always with the class by the time of the hearing. (GET 196).
17. Student improved in x grade regarding escalation, beginning to see for self when Student needed a sensory break or de-escalation and asking for breaks. (SP 370).
18. In the x grade General Education Classroom, the Paraprofessional's main priority is Student. (PPL 319). Paraprofessional was with Student in some capacity for the entire school day except for a 30-minute lunch break for Paraprofessional. (PPL 319).
19. In x grade, Student made social progress, making friends with three Students in particular and with others. (GET 197). Student is happier and gets to be Student's self. (SP 441). At the beginning of the year, Student felt no one liked Student and Student was not normal. (GET 201-202). Student progressed so as to have friends who invited student to birthday parties and sleepovers and chose to work with Student or do recess activities with Student. (GET 202-203) (PPL 283). At recess, at the beginning of the year, it was Student and Paraprofessional at Recess searching for object (Student's interest at the time) (PPL 298). In one incident in September, Student became upset that other students were out doing the same thing and had to de-escalate. (PPL 298). In another, Student became upset because Student could not search for object because

it was muddy out (Parent 687). Parent took pictures an hour later to show that it was not muddy (Parent 688)(P-Recess Accommodation 1-4). By the end of the year, Student spent recess playing with Student's friends. (PPL 296). Student went from running to the school psychologist to being busy with Student's work so that student does not see school psychologist come in to the classroom. (SP 370).

20. Student made progress with work completion, being able to finish an entire test without the Paraprofessional having to re-focus Student as Para did at the beginning of the x grade. (GET 199-200). Student improved so that Student was completing assignments without prompting. (GET 201).
21. Paraprofessional worked with Student in related arts classes, collaborating with Student in Art, a class Student is able to attend for the full time period. (GET 285-286). In Library, Student completes the lesson and then breaks out with Paraprofessional and Paraprofessional read to him/her, in lieu of checking out books. (GET 287). In Spanish, Student sits through the lesson and then breaks to work with Paraprofessional outside the Spanish classroom, which is noisy. (GET 288). In technology, Student did the lesson and likewise goes with Paraprofessional back to the GET's classroom to complete the activities there, because it is quieter there. (PPL 290). However, by the end of the year, Student was staying in the class and doing the classwork. (PPL 292). In music, Student was likewise at first staying only for part of the class, but starting to stay longer. (PPL 292).
22. Student's physical education teacher (PET) noted that, in x grade, there were many times when Student had to be removed from class because of Student's behavior and had to be sent to Student's de-escalation area. (PET 245). Student had an incident in gym

class in December (ED 43). Following that, the IEP team wanted to have another IEP meeting, but parents declined. (ED 42, 43) Student was suspended for a half day but that suspension was retracted voluntarily and deleted from Student's discipline record when it was determined that Student had not been sent straight to Student's escalation area, which was what the IEP required. (PRN 509).

23. Student is physically active in gym class, and in x grade, used the fitness lab if Student did not participate in the gym class activities. (PET 253) (PPL 293). With this means of participation, Student in x grade did not, to PET's recollection, lose control and require de-escalation. (PET 257). PET tells Student what the activity will be, and Student decides whether Student wants to participate in that or use the fitness lab. (PET 264) (PPL 293). Student joins the class about 15% of the time. (PET 264). In the physical education class generally, "everyone is yelling and I don't know what to do most of the time" (Student 675-676). The fitness lab contains a variety of activities. (PET 268-269). The PET is satisfied with Student's x grade progress; Student is learning the five-element program of curriculum. (PET 275-276). Student does choose what Student is doing; while Paraprofessional is with Student in the lab, Paraprofessional allows Student to choose what to do. (PPL 315).
24. Student went from, early in the school year, dealing with transitions by running ahead to the cafeteria or related arts classes to walking in the line with and talking to Student's friends and when Paraprofessional looks for student, Paraprofessional notices that Student is behaving as a typical peer. (PPL 303). When it came to getting off the bus, Student went from Paraprofessional chasing student as student ran from the bus to getting from the bus to the classroom on student's own, or with a friend. (PPL 305).

25. Student regresses somewhat after breaks like summer and winter holiday breaks. (SET 5 323, 334-5) (SP 363). Student is anxious about change and the unknown. (SP 362). School Psychologist (SP) worked with student on coping strategies. (SP 364-5).
26. Student's grades:
- In x grade, three xs, a x- and an x- (SD-70)
 - In x grade, a x+, three x-, and an x. (SD-70)
 - In x grade, xs and xs (GET 206). Student's curriculum is the same as for the students in the General Education class. (GET 206-207).
Student was mastering the content of the general education program (PRN 523).
27. Parent requested Student be opted out of the Smarter Balance tests (PRN 526). Student pulled student's hair enough to cause a bald spot, during the period of the testing (Parent 702). The accommodations separated Student from student's peers and made student feel different (Parent 720). Student's parents have refused DCAS testing due to Student's stress. (ED 63). Paraprofessional witnessed Student fiddling with student's hair. (PPL 311-312). Special Education Teacher 3 administered the DCAS to Student in x grade pursuant to accommodations (taken in increments and Student could take Student's time) and SET 3 did not see Student pull Student's hair. (SET 3 346). Student met the State Standards pursuant to this test for the x grade (SP 380-382) (PRN 518-519) (SD-45-0157). Student took the MAP tests in the x grade with accommodations (SET 4 577). SET 4 administered the test and did not see Student pull Student's hair (SET 4 578). SET 4 never saw Student pull Student's hair during the x grade (SET 4s 579). SET 4 did notice a bald spot on Student one day in early spring, on a Monday morning (SET 4 578).

28. When GET first told Student Student could take the MAP standardized test, Student became upset (GET 228). After that, when GET would tell Student about the test, Student says, "I'm not taking that" (GET 228).
29. Student has gained independence in the x grade. (SP 371, 442). There have been times when Student told Student's one-on-one paraprofessional that Student's "got this and Student will work on it by Student's self." (PPL 280). The Paraprofessional still monitors to make sure Student is on task, but at the beginning of the x grade year, Student could do a few math problems, and by the time of the hearing, Student could do an entire math activity. (PPL 280). Student has progressed to do a geometry test, vocabulary and social studies quizzed by Student's self. (PPL 281). When working on a science activity, Student patted Paraprofessional on the arm and said Student was fine and PPL could take a break. (PPL 281). Student made "amazing" progress in Student's x grade year, going from much assistance to almost total independence. (PPL 282). Student made "great gains" during x grade. (SET 5 324)
30. Transitions are difficult for Student, who will be transferring to another school next year. (ED 136) (GET 187). This is a challenge for all x grade students. Student has a good foundation for the upcoming transition (SP 441). Student wants to gain even more independence in the x grade (Student 677) (Parent 720).
31. Parent obtained an Independent Educational Evaluation in October 2015, early in the School year. Student has improved since then; Student is like a different Student. (GET 210-211) (PPL 309-310).
32. Parents acknowledged Student's progress in the x grade. (PPL 215-216) (SD- 123, Page 3919).

33. Parents obtained an Independent Educational Evaluation. This was completed on November 21, 2015 (IEE 782) (SD-41). The Independent Evaluator spent two days with Student at home, once in July 2015 and once in August 2015. The Independent Evaluator observed Student in the classroom on October 5, 2015 (IEE 783). The Independent Evaluator agreed that where a special education student who is placed in a regular general education class of normal size (number of students in the high 20's or low 30's), who receives passing grades in the general education curriculum of the district, who is achieving IEP goals, who is not a significant disruption to learning in the classroom, forming age-appropriate peer relationships with their classmates, the placement was appropriate (IEE 788-789). The Independent Evaluator is a school psychologist licensed in Pennsylvania, supervising the service department at Pennsylvania school district, and also conducts a private practice conducting independent educational evaluations and consultations (IEE 791).
34. In October 2015, Student had an incident at the bus stop. (ED 105). The Student's bus stop is the end of the driveway of Student's home, and Student waits there with Student's sibling. On October 13, 2015, it was reported to the School Psychologist that there had been a "hands on" behavioral incident. (SP 420). The Behavioral Support Plan provided that in the event of such an incident, there should be a meeting. (SP 420). The School Psychologist and the Educational Diagnostician believed Parents agreed to a meeting with less than 10 days notice, knowing that Mondays were best for Parents, they set the meeting for Monday October 19; however, after appearing to agree, Parents declined. (ED 113) (SP 421). The other meeting attendees came to the meeting. (ED 114-115). Since they were there, they discussed

some ideas about what might help Student on the bus. (ED 116). (SP 422). It was not an IEP meeting, because Parent had declined, (ED 119), and no changes were made to the IEP or the Behavioral Support Plan (ED 159).

35. The IEP team met Feb. 22, 2016 to discuss any impact from the Individual Educational Evaluation. (ED 123). The team revised the Behavioral Support Plan as a result. (ED 124) (SD-50).
36. Parents obtained Brain Integration therapy for Student and felt that was the reason Student did better. This might have been a factor, but Student had made progress before the therapy (SES 642). Special Education supervisor, a former school psychologist, researched Brain Integration therapy and found that there was little research done about it yet and that by one individual, but that if it was helping someone, it could be considered (SES, 615, 638). Student noticed that Student was able to write more, and be more efficient after the Brain Integration Therapy began (Student 677). Parents did the Brain Integration Therapy 5 nights per week at home. It involves some physical exercises, math problems, spelling words, work on working memory and work on handwriting (Parent 746-747).
37. Parents did not want administrators present at meetings (ED 38 – An administrator to observe ED for Delaware Performance Appraisal System)(ED – the principal at a May, 2015 meeting).(ED 70-71- the SES at June 1, 2015 meeting) (ED 130 – names crossed off). Parents’ reason was that the administrative personnel spend little time with Student (Parent 683-684). Administrative personnel are at IEP meetings to serve functions such as having personnel knowledgeable about the general education curriculum, someone aware of the resources available to special education students,

and able to secure those resources and the authority to commit resources (SES 629, 631). When there is a lawsuit or attorney involvement in a student's case, the administrator is called upon to make sure the IEP is meeting the student's needs, to determine if there might be other resources available (SES 630). Sometimes, staff request administrator involvement in cases where there are attorneys and it makes the staff uncomfortable in communications with parents (SES 630).

38. Parent has to take off work for meetings the School calls for what Parent believes are minor things that could be taken care of over the phone Parent 681). Parent knows it would not be good to have IEP meetings over the phone (Parent 683). Parent is a teacher, though not qualified in Special Education (Parent 679).
39. Both parents need to be present for the meetings, as they bring different perspectives and they need to work as a team (Parent 683).
40. Student's transportation to school was on the regular bus (SD-55). Student rode bus x to school (SOT 472). It was determined that a bus aide was needed, to help Student. (ED 91). Student's Behavior Support Plan was provided to the bus personnel and provided again when there were revisions. (ED 92, 94) (SOT 482) (SD-55) (SP 427). Student did not have problems on the bus that spilled over into the classroom, except one time Student was upset about an incident with Student and Student's sibling at the bus stop. (PPL 307) Student came upstairs and the problem was dealt with. (PPL 307) Generally, Student was smiling and in good spirits when Paraprofessional greeted student at the bus. (SD-123, 3913-3014). No bus incidents prevented Student was access to his/her education (SP 470).

41. Statute and regulations provide for the methods by which teachers are evaluated (SED 600). The methods include evaluations of how teachers communicate with parents (SED 601). The Special Education Director observed Student over a 3 day period, reviewed Student's records, and recommended another adult support person in x grade, and that support person began March 17 and was continued into the x grade (SED 608). Special Education Director did this in response to the ED and the Principal requesting additional support (SED 605).
42. Student sometimes was upset in the evenings at home and needed hours to decompress regarding things happening at school (Parent 689-690). Parent lost sleep because Parent had to console Parent's child (Parent 690).
43. Parents want a smaller class size, believing that Student's sensory needs would be better met in smaller classes (Parent 725).

CONCLUSIONS OF LAW

The School District must prove, by a preponderance of the evidence, that it has provided the student with a free and appropriate public education (FAPE). If the Due Process Hearing Panel cannot determine that it was more likely than not that the School District provided the student with a free and appropriate public education, it must decide in favor of the Petitioner. *Kruelle v. New Castle County Board of Education*, 642 F.2d 687, 692 (3rd Cir. 1981); 20 USC § 1415(e)(2).

The Third Circuit Court of Appeals held that the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq., requires that states provide a free, appropriate public education to students with disabilities, one that is tailored to each student's needs through an

individualized educational program (IEP). IEPs must provide students significant learning and confer meaningful benefit. *Ridgewood Bd. of Educ. v. N.E.*, 172 F. 3d 238 (3d Cir. 1999).

Violations of procedural requirements of IDEA may be adequate grounds for finding that school failed to provide a FAPE. However, technical violations of IDEA, if they result in no harm to the student's education, have been found by Courts not to deny a FAPE or render an IEP invalid. See *Coale v. State Department of Education*, 162 F.Supp. 2d 316 (D. Del. 2001).

The IEP must consist of "Specially designed instruction- adapting, as appropriate to the needs of the child, the content, methodology or delivery of instruction:

- i. to address the unique needs of the child that result from the child's disability, and;
- ii. to ensure access of the child to the general curriculum so that the child can meet educational standards of the jurisdiction." 34 *CFR* § 300.26

Parent consent must be obtained prior to:

- a. Conducting initial evaluation or reevaluation
- b. Initial provision of special education and related services. 34 *CFR* § 300.20

The members of the IEP team are:

- a. Parent;
- b. At least one regular education teacher if child is or may be in regular education environment;
- c. At least one special education teacher of the child, or special education provider of the child;
- d. Representative of public agency;
 - (1) Qualified to provide or supervise the provision of specially designed instruction;
 - (2) Is knowledgeable about the general curriculum;
 - (3) Is knowledgeable about availability of resources of the agency;
 - (4) Delaware law requires that the agency representative must have the authority to commit resources and be able to ensure that whatever services are set forth in the IEP will actually be provided. *AMSES* 5.3.1

- e. Individual who can interpret instructional implications of evaluation results, if student has been evaluated;
- f. Other people with knowledge or special expertise, at discretion of parent of agency;
- g. The child, if appropriate. 34 *CFR* § 300.344

Under *AMSES* 5.3.2, the district must notify parent of IEP meetings no less than 10 business days in advance, unless a shorter time is agreed to by parents. The meeting notice must state the purpose, time, place and participants.

The education must take place in the Least Restrictive Environment. “The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled. *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 535 (3d Cir. 1995).

First, the Court must determine “whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily.” *Oberti v. Bd. of Educ. of the Borough of Clementon School District*, 995 F.2d 1204, 1215 (3rd Cir. 1993).

If parent disagrees with public agency’s evaluation, parent may request an independent evaluation at public expense. 34 *CFR* § 300.502

The Supreme Court established the following two-part test that courts should use to decide the appropriateness of a student's education:

1. Has the state complied with the procedures set forth in the IDEA?
2. Is the IEP, developed through the IDEA's procedures, reasonably calculated to enable the child to receive educational benefits?

Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, [553 IDELR 656](#) (U.S. 1982).

The Supreme Court held that when this two-part test is satisfied, the state has complied with the obligation imposed by Congress, and the courts can require no more.

The IDEA provides only a basic “floor of opportunity,” and districts are not required to maximize a student's educational performance. *Klein Indep. Sch. Dist. v. Hovem*, 690 F. 3d 390, 396 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1600 (2013). IDEA does not require that a school provide the best possible education at public expense. *Bradley v. Arkansas Dep't of Educ.*, 443 F.3d 965, 975 (8th Cir. 2006). The IDEA does not require that parental preferences be implemented, so long as the IEP is reasonably calculated to provide some educational benefit. *Ibid.*

In *Rowley*, the Supreme Court held that the IDEA does not require districts to provide students with disabilities with the best possible education. The minimal level of benefits that an appropriate educational program must confer is the provision of a "basic floor of opportunity." *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200 (1982).

"The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use. We suspect that the Chevrolet offered to appellant is in fact a much nicer model than that offered to the average Tullahoma student. Be that as it may, we hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to appellant, and is therefore in compliance with the requirements of the IDEA." *Doe v. Board of Educ. of Tullahoma City Schs.*, 9 F.3d 455, 459-460 (6th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994).

The child's educational benefit must be more than *de minimus* - there must be some tangible gain in abilities. In *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), the 3d Circuit held that the IDEA "calls for more than a trivial educational benefit" and requires an IEP to provide "significant learning" and confer "meaningful educational benefit.").

Achievement of passing grades and advancement from grade to grade in a regular classroom environment is not necessarily an indication that the student is receiving FAPE under the IDEA. An evaluation of the student's circumstances as a whole is still required. *See Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985). "Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade." 34 *CFR* 300.101 (c).

To be found to have affected provision of FAPE, procedural defects must cause substantive harm to the child or his parents, a loss of educational opportunity, or serious infringement on the parents' right to participate in creating the IEP. *W.G. v. Board of Trustees*, 960 F. 2d 1479, 1484 (9th Cir. 1992).

Panel authority regarding remedies is not defined clearly in the IDEA.

20 U.S.C. § 1415 (f)(3)(E) Decision of hearing officer

(i) In general

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies-

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

14 Del. C. Chapter 31 is silent also.

“The IDEA and its regulations, however, are largely silent about the remedial authority of the impartial HR/Os.” Zirkel, Perry A., Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update, *Journal of the National Association of Administrative Law Judiciary*, Vol. 31, Issue 1, Page 3. “In the expance of litigation under the IDEA, courts have exercised various traditional forms of relief, primarily in the form of the injunction-based, specialized equitable remedies of tuition reimbursement and compensatory education. *Ibid*, Page 4. The courts are divided as to whether the IDEA allows for the legal remedy of money damages. *Ibid*, Page 5. There is a minority view that money relief is available, but the majority view is that HO/Rs (such as the panel) do not have authority to order monetary damages. *Ibid*, Page 42.

Though some unusual orders have been made, for example, a hearing officer's order that a school principal have no further contact with a student; an order that parents reimburse a district for the cost of an inexcusably cancelled evaluation appointment; an order that parents obtain a family court ruling as to which parent had final educational decisionmaking authority, none of these have been subjected to subsequent judicial review. *Ibid*, Page 38. However, these orders concerned specific parties to the case. There is no authority to the effect that a hearing officer/review officer/due process panel may order a District to alter any factor affecting a school in general, such as class size.

1. Did the District provide an appropriate IEP for Student in its June 1, 2015 IEP and its subsequent revisions?

Student's IEP was appropriate and all revisions were appropriate. The evidence shows that Student has passing grades and has earned student's promotion to the next grade each year. Student has improved in student's ability to calm Student's self down, recognize when Student needs to calm Student's self down, work independently, refrain from calling out in class, refrain from pacing in class and has increased Student's number of friends and social contacts. Student has improved in Student's ability to transition from class to class independently and to and from the bus. Student has mastered the general education curriculum. Student was able to be released from OT and from Speech and Language services, because Student had improved to a point where Student no longer needed them.

School has provided a Behavior Intervention Plan that meets Student's needs. Student's behavior has improved on many fronts, and Student has had fewer and fewer incidents and no longer needs Student's de-escalation area. Student is fitting in with the class. The School called for a meeting when an incident required one: not to harass parents but to address whether changes needed to be made to benefit Student regarding Student's behavior plan.

The School District has met its burden of proof by a preponderance of the evidence that the IEP is appropriate, the placement is appropriate, and the Student is receiving more than *de minimus* educational benefit.

Parents suggest a remedy of smaller class size. They do not request tuition reimbursement, but can be said to be requesting same for a private school that would have a smaller class size. The panel has no authority to make orders regarding class size. And since school is providing FAPE in the least restrictive environment, any such request would fail. Student has progressed well in the regular size classroom, and thus taking Student to a smaller

one would result in a more restrictive environment. A more restrictive environment would take away the progress Student has made.

Parents suggest training for District Staff, in particular the ED, Transportation and Administrative Staff. All Staff involved were qualified and had licenses in good standing. There is no authority in state or federal law for the panel to order particular training – the qualifications of personnel are left to state law. Parents suggest that parent evaluations of staff should be part of staff evaluation. The panel has no authority to make such an order. These matters are subject to State law, which the panel does not have authority to administer. The panel has jurisdiction only over Student's particular case.

2. Did the District fail to implement accommodations in the Student's IEP and if not, did the failures to follow the IEP result in denial of a Free and Appropriate Public Education? (FAPE).

On one occasion, the discipline in gym class, the District failed to implement the IEP by not sending Student directly to Student's de-escalation area. The District rectified this by taking the disciplinary incident off of Student's record. This incident did not impact Student's education. Issues regarding the gym class do not rise to the level of failure to implement the IEP. The School retracted the disciplinary incident where the IEP was not followed and student was not sent straight to his/her de-escalation area. Student can have peers who want to be in the fitness room with student. If the peers want to be in the regular gym class, they have that right and the panel cannot order that they be required to be there. Student prefers to be there because gym class is obviously a triggering environment for Student, as there is a lot of noise and yelling. Student receives the concomitant educational benefit, physical activity, in an environment

student finds comfortable. The activities for the rest of the class cannot be tailor made to Student's needs, as the other students have their own needs, therefore Parents' suggestion that these activities need to be modified to more small group activities is not something that the panel can order the School to do. The Panel cannot order the School to alter the curriculum. FAPE is provided when a Student who cannot access the curriculum due to a disability is given accommodation to allow Student to access it another way.

The recess incident regarding the object was not a failure to implement the IEP or the BSP. It was an incident that gave Student difficulty and the difficulty was handled at the School without interfering with Student's access to Student's education. Part of Student's challenges are to handle changes in situations and Student has been progressing with that.

3. Did the District fail to give proper notice of an October 19, 2015 IEP meeting and if so, did the procedural violation result in denial of FAPE?

The District did not fail to give proper notice of the meeting of October 19, 2015. There were no procedural violations. At most, there was a misunderstanding about whether parents waived their right to 10-day notice of an IEP meeting. When they did not, no IEP meeting took place. Those present did no more than discuss some ideas to help Student.

4. Did the District provide the current IEP to school bus personnel at all times? Did bus personnel follow the IEP?

Bus personnel were provided with Behavior Support Plans, which was what they needed in order to help Student on the bus. The restrictions placed on communication between parents and bus personnel are not unreasonable and do not interfere with implementation of Student's IEP.

Parent may communicate with the bus personnel if there is someone from the transportation company or district present. None of Students teachers or other support staff found that anything that happened on the bus interfered with Student's participation in class.

5. Did the presence of school personnel that Parents did not want at an IEP meeting create any flaw in the IEP?

34 *CFR* § 300.20 describes the IEP team and who can be on it. That regulation includes "Representative of public agency;" who are "(1) Qualified to provide or supervise the provision of specially designed instruction; (2) knowledgeable about the general curriculum; (3) knowledgeable about availability of resources of the agency; In addition, Delaware law requires that the agency representative must have the authority to commit resources and be able to ensure that whatever services are set forth in the IEP will actually be provided. *AMSES* 5.3.1 The regulations provide that these personnel may be at the meetings. There is no provision in law or regulation that Parents may disallow meeting participants. The regulations do not provide any base line for the actual amount of time the administrator spends with Student. The administrator is there due to knowledge of resources which may help Student, which does not entail knowing Student personally in any way. The other IEP team members, parents and teachers, etc. provide personal knowledge of the Student to the IEP team.

6. Did District not allow for proper communication with parents in the drafting of the IEP and its implementation and if so, did it result in denial of FAPE?

There was communication at all times with parents. Though there were a few bumps in some of the relationships, Parents clearly could communicate with GET, PPL, SP and others

easily. Parents asserted that there were too many meetings, that things could be handled over the telephone, and that they were harassed with many meetings. The evidence is however, that the meetings District staff called were necessary or required in order to be sure Student's IEP and BSP were still appropriate. There is no evidence that these meetings were called to harass parents.

7. Did the District fail to include Student's needs as a result of Student's Dysgraphia in the IEP and if so, did the failure result in denial of FAPE?

District provided accommodations for Student's Dysgraphia consistent with the amount of work Student had to do. The District did not find that continuing with writing was an option for Student. Parents wanted Student to continue writing and provided him/her with Brain Integration Therapy. Student continued to try to improve Student's writing.

8. Did the change from an inclusion classroom to a regular classroom during the academic year 2015-2016 with a one on one aide constitute an improper change of placement?

Changing Student from a co-teaching classroom to a regular teacher's classroom with a full time aide, whose priority is Student, is not a change of placement according to law and regulations. Student remained in the A setting as it is defined, with no change. The change that did take place, though it was not a placement change under the IDEA, was one that benefitted Student in that Student was in a classroom with an aide who devoted aide's day to him/her.

9. Did administration of state based standardized testing to student result in any failure to implement Student's IEP or provide Student with a free and appropriate public education?

Student has opted out of the testing. This has no relevance to the appropriateness of the IEP. Student's progress has been measured in other ways. Student experienced stress from taking the tests. The Parents opted out and the tests were discontinued. None of the teachers who administered the test noticed the Student pulling Student's hair during the tests. Student passed the tests, meeting state standards.

10. Does Parents' provision of Brain Integration Therapy to Student outside of school mean that the IEP was inadequate?

The Brain Integration Therapy may have helped Student, however, it alone is not the cause of Student's progress, as Student had made progress before. Student's exit from OT occurred before the February 2016 implementation of Brain Integration Therapy. Student's grades improved after x grade. Improvements were observed in x grade as to work completion. Student had met state standards in x and x grade. As an additional resource, it may be helping Student. Parents did not request specifically that it be made part of the IEP or that they be reimbursed for it. However, such a request could not be granted, because the IEP is reasonably calculated to provide educational benefit to Student and the evidence shows that it has.

ORDERS

Based upon the findings and conclusions of law, IT IS ORDERED THAT: No relief is ordered.

NOTICE OF RIGHT TO APPEAL

The decision of the hearing panel is a final order unless a party seeks judicial review. Any party aggrieved by the hearing officer's decision has the right to seek judicial review in the U.S. District Court or the Delaware Family Court within ninety (90) days of the date of this written decision, as provided in 20 *U.S.C.* § 1415(i)(2) and 14 *Del. C.* § 3142.

Laraine A. Ryan, PANEL CHAIRPERSON

Dr. Vicki McGinley EDUCATOR PANELIST

Jon Fletcher, LAYPERSON PANELIST

cc: [Parent]
[School District's Attorney]
[Director, Exceptional Children Resources, Department of Education]