BEFORE THE SPECIAL EDUCATION DUE PROCESS HEARING PANEL

DUE PROCESS HEARING FOR THE CHRISTINA SCHOOL DISTRICT

IN RE THE MATTER OF:	:	
	:	DP DE (08-04)
["Parent" for "Student"]	:	
	:	
Petitioner,	:	
	:	
v.	:	
	:	
CHRISTINA SCHOOL DISTRICT and DELAWARE DEPARTMENT OF EDUCATION,	:	
	:	
Respondents.	:	

The Due Process Hearing for ["Student"] was heard before a Hearing Panel consisting of Norman E. Levine, Dr. Merrilyn Faison and Ms. Judith Mellen. Hearings were held on November 12, 2007, November 13, 2007, December 11, 2007, December 12, 2007 and December 13, 2007.

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

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

Michael P. Stafford, Esquire
Young, Conaway, Stargatt &Taylor, LLP
The Brandywine Building
1000 West Street, 17th Floor
Wilmington, DE 19801

For the Department of Education:

Jennifer Kline, Esquire
Department of Justice
102 W. Water Street
Dover, DE 19909-6750

Mary L. Cooke, Esquire
Department of Justice
102 W. Water Street
Dover, DE 19909-6750

SUMMARY OF ISSUES

Was ["Student's"] IEP reasonably calculated to confer meaningful educational benefit to him, and was the IEP implemented by the "CSD"?

FINDINGS OF FACTS

1. ["Student"], born in 1997, is a child with severe hearing loss. He qualifies for special educational services under the classification "Hard of Hearing or Partially Deaf".

2. The student moved to Delaware in January 2005, and was enrolled at the Delaware School for the Deaf, hereinafter "DSD" having previously attended the Maryland School for the Deaf.

3. The student's original IEP, developed in a meeting on January 4, 2005, provided for his attendance at the DSD, and for him to be mainstreamed at ["Elementary School"] for academic classes, which is adjacent to the DSD. The IEP provided for a one-on-one interpreter for the student.

4. The student made appropriate educational progress and was socially successful in his one and one-half years at ["Elementary School"] from January 2005 to June 2006.

5. For the school year 2006-2007 the student was enrolled at ["School"] by his ["Parent"].

6. Because of the statutory and regulatory scheme, a student attending private school pursuant to parental placement is only entitled to a proportionate share of what is known as "Part B Funding", which is a very limited funding source, especially when compared with funding for special education students in the public schools. The funding for public school special education students may not be spent to provide services to special education students in private school. Funds for special education students in private schools may only come from "Part B Funding".

7. On August 27, 2007 the student was enrolled in the ["Elementary School"] in "CSD", his "home" school.

8. Upon the student's enrollment at ["Elementary School"], he was entitled to a free and appropriate public education as a special education student and to an updated IEP.

9. An IEP team meeting was held on September 5, 2007, where the student was found to be eligible for special education services. An IEP was attempted to be developed, but the IEP meeting had to be continued because the interpreter had to leave the meeting before development of the IEP. On September 13, 2007, the IEP team meeting was continued, and an IEP was developed. The student was mainstreamed and provided a one-on-one interpreter. ["Parent"] did not agree with the IEP, objecting

to the class size.

10. The CSD hired an interpreter for the student to begin on September 5, 2007, through the Deaf Connection Agency. ["Interpreter"] had over 12 years of service with DSD, and had additional experiences as an educational interpreter in various educational settings.

11. ["Parent"] expressed concerns about ["interpreter's"] qualifications, that she was not "remaining in role" and was "dumbing down" the classroom instructions. A program was requested by ["Elementary School"] to provide technical assistance regarding the student's educational program. A search was begun to find another interpreter for the student and technical assistance was provided to ["Elementary School"].

12. ["R.K."], an educational audiologist, was selected to provide technical assistance to ["Elementary School"]. Ms. ["R.K."] observed the student's classroom and the student on September 7, 2007 and September 10, 2007. She observed the student refuse to "engage with any of the kids" at recess and to refuse to look at the interpreter and put his head down on the desk for significant amounts of time. This behavior of the student putting his head down and disengaging from the interpreter, fellow students and teacher was observed by Ms. ["S. J."], an Educational Diagnostician for CSD, and Mr. ["T. R."], the ["Elementary School"] principal.

13. The last day the student attended ["Elementary School"] was September 12, 2007. The student was reenrolled and began attending ["School"] on September 13, 2007.

CONCLUSIONS

The panel after thoroughly considering and discussing the memoranda of the parties concludes that the Argument cited as I and II of CSD and Delaware Department of Education are adopted as the conclusions of the panel, and are attached hereto as Exhibit A.

Further, the panel finds that ["Parent"] was given the opportunity to work with the CSD in formulating the IEP, and finding an interpreter and failed to do so. After enrolling the student at ["Elementary School"], ["Parent"] failed to encourage ["Student"] to make an effort to have the ["Elementary School"] experience successful for him academically, socially and emotionally.

Finally the panel wishes to express it gratitude to the interpreters, ["A.B."] and ["A.W."], who were present for all five hearings of the panel and worked diligently, effectively and congenially in causing the hearing to proceed expeditiously, professionally and with cordiality that distinguished their performance.

DECISION

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

RIGHT TO APPEAL

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

DATED: _____

/S/_____
NORMAN E. LEVINE,
Hearing Panel Member

/S/_____
DR. MERRILYN FAISON,
Hearing Panel Member

/S/_____
MS. JUDITH MELLEN,
Hearing Panel Member

I. STUDENT'S IEP IS REASONABLY CALCULATED TO CONFER MEANINGFUL EDUCATIONAL BENEFITS

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

In *Hendricks Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), the Supreme Court established a two-part test for determining the validity and/or appropriateness of an IEP. The first prong of that test requires compliance with the procedural requirements of the IDEA. Second, an IEP must also be reasonably calculated to provide the child with a "meaningful educational benefit." *Ridgewood v. Bd. of Ed. v. N.E.*, 172 F.3d 238, 247-48 (3d Cir. 1999); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988). The requisite degree of progress required varies depending on the student's abilities. *Alex R. v. Forestville Cmty. Unit Sch. Dist. #221*, 375 F.3d 603, 615 (7th Cir. 2004).

Finally, "procedural flaws in an IEP do not automatically signify a deprivation of a student's FAPE. It is only when the mistake 'compromise[s] the pupil's right to an appropriate education, seriously hamper[s] the parents' opportunity to participate in the formation process, or cause[s] a deprivation of educational benefits' that an IDEA violation occurs. However, 'minor' procedural violations do not constitute an IDEA violation." *Corey v. Cape Henlopen Sch. Dist.*, 286 F. Supp. 2d 380, 385 (D. Del. 2003) (internal citations omitted).

In the instant matter, ["Parent"] claims that Student's IEP and placement at ["Elementary School"] are inappropriate because of the class size, the accommodations in the IEP, and the interpreters lack of qualifications. From these, ["Parent"] alleges that Student has been, and will continue to be, denied access to education at ["Elementary School"].

Taking each allegation in turn, first, ["Parent's"] claim that Student requires a small class size ignores both the long history of successful mainstream placements for deaf students in regular education classes in Delaware and Student's own success during his time in a comparable placement at ["Elementary School"].

As noted *supra*, ["R.L."]'s fourth grade class at ["Elementary School"] contained approximately 27 or 28 students. (["T.R."] 67). The testimony shows that deaf students in Delaware are routinely successfully placed in large mainstream classrooms in public schools. For example, ["S.M."] testified that she has served as an educational interpreter for deaf students placed in regular education classrooms of 25, or more, students in public schools throughout the District. Indeed, this has "been her entire career." (["S.M."] 91-92; ["R."] 122). Similarly, ["R.K."] indicated that the majority of the mainstreamed deaf students in the public schools that she has observed over the course of her career have been in class sizes of 25 or more students. (["R.K."] 14-15; ["R."] 122 (DSD mainstreams students full-time to other public schools within the District and class sizes often range from 28-30 students); ["T.R."] 66-67 (discussing prior experience with deaf students placed in mainstream classes of between 38 to 42 students)). Moreover, deaf students placed in larger, mainstream classes in the public schools have in many instances met with great academic success. (["S.M."] 95-96 (providing examples)). Simply put, deaf students do not require small class sizes in order to be successful in mainstream placements. (["R."] 131). In ["S.M."]'s opinion, a class size of 27 or more students definitely *does not* make it impossible for an educational interpreter to work effectively. (["S.M."] 93). Working as an educational interpreter presents "challenges *regardless of the class size.*" (["S.M."] 92). Access to instruction is impacted more by how a particular teacher structures his/her classroom than by the sheer number of students in it. (["R.K."] 15; ["R."] 130 (what matters is teacher style, the accommodations, and the interpreter), 132-133 (classroom management is the key to addressing "lag time" in larger classrooms)). Moreover, any issues created by class size can be addressed

through accommodations and staff training. (["R.K."] 15-16; ["R."] 130). "[I]f all of these things are taken care of, then the classroom size doesn't have an impact." (["R."] 130).

Recognizing the potential state-wide import of ["Parent's"] argument that deaf students require small class sizes in order to receive FAPE in regular education classes, ["T.R."] specifically asked ["Parent"] whether her belief that a class size of 27/28 students was inappropriate for ["Student"] also meant that it would be inappropriate for all other mainstreamed deaf students as well. ["T.R."] asked ["Parent"] this question because "she was saying how inappropriate the public school education was for her child, so I said, you know, you are responsible for placing similar students on the state level. I said do you feel then public education or public classrooms are inappropriate for all other students also and ["Parent"] says, 'No, just for my child.'" However, according to ["T.R."], ["Parent"] provided no explanation that would distinguish ["Student"] from other deaf students in this regard. ("T.R." 67-68).

["Parent's"] claim that ["Student"] requires a small class size in order to receive FAPE also ignores his own prior social and academic success at ["Elementary" School]. ["Student's"] third grade teachers and his educational interpreter all testified to his academic success at ["Elementary School"]. (See also, District Exhibits 11; 16; 17). In addition, an Evaluation Summary Report completed on April 11, 2005, when ["Student"] was in second grade, indicate that he received scores in the third grade range, or higher, on various subtests on a Woodcock-Johnson exam given to him in February, 2005. The Evaluation Summary Report also notes that ["Student's"] current classroom based assessments and observations indicate that he is "on or above grade level." (District Exhibit 29; 22). Moreover, ["Student's"] DSTP1 results demonstrate that he made satisfactory progress while attending ["Elementary"]. (J.K.226; District Exhibit 18). In addition, in ["J.K.'s"] opinion, Student's MAP2 test scores indicate that he "made significant progress" in third grade. (J.K.229-30; District Exhibit 31). Finally, the

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1 The Delaware State Testing Program ("DSTP") is a standards-based test that is given once per year to all students in public schools in Delaware. It's based on the Delaware state curricular content standards. (J.K. 223-224).

2 The Measures of Academic Progress ("MAP") test is a computer-based assessment used by the District. It is given three times per year and is designed to measure growth over time. The District began using the MAP test in the 2005-2006 school year when Student was in third grade. (J.K. 226-228).

results of the initial admissions testing given by ["School"] also support the District's position that ["Student"] was academically successful at ["Elementary School"]. ["School"] administers an academic achievement test, the Educational Records Bureau Examination ("ERB"), to all applicants. (W. 116-117; H. 136). Here, Student's ERB scores were in a "strong range" and "typical of an applicant that" ["School"] would admit. (H. 137).

Setting aside the results of the various tests and assessments he has taken, ["Student's"] consistent achievement of passing grades in the general education curriculum and advancement from grade to grade at ["Elementary School"] constitutes powerful evidence that he would receive a FAPE if he were to remain at ["school"]. *See e.g.*, *Rowley*, 458 U.S. at 207 n.28 ("When the [disabled] child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit."); *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) ("[T]he attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress.").

In reaching the conclusion that ["Student"] would be successful at ["Elementary School"], ["F.S."] considered his prior experience in a comparable placement at ["Elementary School"]. In ["F.S."]'s opinion, ["Student"] "was extremely successful at ["Elementary School"] for his two years of placement there." (["F.S."] 88). ["J.K."] also reviewed Student's educational records, including his performance on the DSTP and MAP tests, and concluded that he had been very successful at ["Elementary School"]. (J.K. 212-13; 223). The evidence demonstrates that both ["F.S."] and ["J.K"]. were correct in their assessment of Student's prior success at ["Elementary School"].

Second, the accommodations listed in Student's IEP are appropriate. (District Exhibit 65). The purpose of accommodations in an IEP is to "level the playing field for students with disabilities by putting them on an equal footing with their nondisabled peers." (["F.S."] 77-78). Here, the IEP team developed ["Student's"] accommodations from suggestions provided by ["R.K."] Many of the proposed accommodations suggested by ["R.K."] were designed to improve the acoustics in the classroom so that the interpreter could hear better. For example, ["R.K."] suggested that tennis balls be placed on chairs so that they did not loudly scrape across

the floor. (["R.K."] 38-40; 47). She suggested the use of an Elmo so that ["Student"] (and other students) could follow along visually with any materials that his teacher was referencing. She also suggested the use of an electronic messaging device so that ["Student"] had a means of communicating directly with classmates without having to go through the interpreter. Another accommodation deals with note taking, which is always problematic for deaf students. She also suggested preferential seating because she did not believe that ["Student"] was seated properly in the class, indeed, she wanted to work with ["R.K."] on rearranging the classroom seating arrangements so that ["Student"] could have better visual access to the other students in the room. (["R.K."] 44-47). While ["Parent"] may disagree with some, or all, of the accommodations, their presence in Student's IEP in no way indicates that the IEP is inappropriate because students are not required to utilize all the accommodations they are provided in their IEP. (R.K. 152; S. 36; ["F.S."] 88).

Third, ["Parent's"] argument that the District failed to provide a qualified interpreter is incorrect. First, and most importantly, ["Parent's"] allegation about interpreter qualifications are all directed at a single person- ["interpreter"]. ["Interpreter"] however, would not have continued serving as ["Student's"] interpreter at ["Elementary School"] had ["Parent"] elected not to return him to ["School"] because she resigned her position on September 13, 2007. (["F.S."] 71-72). Moreover, if ["Student'] returned to ["Elementary School"] and ["Parent"], once again, had concerns over the quality of his educational interpreter, ["F.S."] would attempt to hire another interpreter. (["F.S."] 75-76).

Setting this aside, ["Parent"] provided no evidentiary basis whatsoever for her assertion that ["interpreter"] lacked the requisite ability to serve as ["Student's"] educational interpreter. First, ["Parent"] had only about three "brief interactions" with ["interpreter"]. (D.A. 173). Second, Delaware, unlike some other states, does not have a formal assessment tool for educational interpreters or any State requirements relating to the qualifications that educational interpreters must possess. (["R.K."] 61; Schick 82-83). Third, "DSD" continues to employ educational interpreters who do not have either certification by the National Registry of Interpreters for the Deaf or degrees in deaf education. ["S.M."] is one such interpreter who remains employed by DSD based on her length of service. (["S.M."] 78-79). Indeed, the

testimony at the hearing showed that ["Parent"] specifically requested that ["S.M."] work with ["Student"] as his educational interpreter during third grade despite the fact that she did not meet the criteria for qualified educational interpreters set forth in Parent's Exhibit 9, (["S.M."] 85-87, 89; Parent's Exhibit 9), and that she hired an interpreter, ["B.H."], to work with Student at ["School"] who does not possess any national certification. ("B.H." 130, 156-58). Finally, as even ["Parent's"] own expert witness admitted, nothing in the IDEA requires an IEP to spell out the specific qualifications and/or credentials that an educational interpreter must possess. (K 158).

For these reasons, the ["Elementary School"] IEP is appropriate and provides the necessary supports and services for ["Student"] to be successful at ["Elementary School"]. (["F.S."] 86-87; District Exhibit 65).[3]

However, should the Panel determine that the proposed IEP is not reasonably calculated to confer meaningful educational benefits, amending the proposed IEP to address any perceived deficiencies is a more appropriate remedy than an unlimited, continuing public funding obligation for ["Student's"] ["School"] placement. A panel's authority to amend an IEP is a well-recognized part of its general equitable powers. *See e.g., Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 2004 U.S. Dist. LEXIS 22213, *6-7 (D. Minn. Nov. 1, 2004). Here, many of the concerns and alleged deficiencies raised with respect to the IEP, such as, for example, with ["Student's"] accommodations, are amenable to this type of discretionary equitable relief.

II. ["ELEMENTARY SCHOOL"] IS THE LEAST RESTRICTIVE ENVIRONMENT FOR STUDENT

Under the IDEA, disabled children must be educated "in the least restrictive environment that will provide [them] with a meaningful educational benefit." *T.R. v. Kingwood Township Bd. Educ.*, 205 F.3d 572, 578 (3d Cir. 2000). "The least restrictive environment is the one that, to the maximum extent possible, satisfactorily educates disabled children together with children who

3 Student's IEP does not contain any specific annual goals or objectives because the IEP team did not believe he required any. Instead, Student only required an interpreter as a related service and

are not disabled, in the same school the child would attend if the child were not disabled." *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 535 (3d Cir. 1995) (emphasis added).

As ["J.K."] explained, private schools are the most restrictive placements. (J.K. 201-202). Students are only placed in private schools when a district cannot provide an appropriate education in any of the full range of public placement options that are available. (J.K. 202-203). Here, placement in a regular education classroom at ["Elementary School"], with the support of an educational interpreter, constitutes ["Student's"] least restrictive environment.

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various accommodations. (S. 108); *see also Pomona Unified Sch. Dist.*, 30 IDELR 158 (SEA CA 1998) (district's failure to include annual goals was not considered a denial of FAPE).